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The Trifecta of Reform: Women's Reservation, Census, and Delimitation in India's Constitutional Future

Yashasvi Mishra¹

Abstract:

The 106th Constitutional Amendment provides for one-third reservation for women in the Lok Sabha and State Assemblies, but makes its implementation contingent on the completion of the next national census and a fresh delimitation exercise. This conditionality raises serious constitutional and normative concerns, particularly in light of the decade-long delay in census operations and the impending end of the delimitation freeze in 2026. This article critically examines the triadic nexus between women's reservation, census, and delimitation, and evaluates its implications for democratic equality and federal equity in India. The core research question asks: To what extent does the interdependence of these three reforms, namely demographic, territorial, and representational, undermine the immediacy and substance of gender justice in India's constitutional democracy? Employing doctrinal, empirical, and comparative methods, the paper engages with the frameworks of transformative constitutionalism by Upendra Baxi, intersectionality as theorised by Kimberlé Crenshaw and Nancy Fraser, and deliberative democracy through the works of John Rawls and Iris Marion Young to analyse the systemic consequences of this delay. It draws on parliamentary debates, Law Commission reports, Delimitation Commission data, and landmark Supreme Court cases, including Kuldip Nayar and Ashok Kumar Jain. The paper also evaluates regional disparities using census-based simulations and situates India's model against global examples such as Rwanda's binding quotas, the United States' census apportionment framework, and the United Kingdom's boundary commission system. Conclusively, the paper proposes constitutional and administrative reforms to decouple these processes and enable the timely implementation of women's political representation.

Keywords: Women's Reservation, Delimitation, Census, Gender Justice, Indian Constitution

Introduction:

India is passing through a rare constitutional moment. The enactment of the One Hundred and Sixth Constitutional Amendment Act, 2023, which provides one-third reservation for women in the Lok Sabha and in State Legislative Assemblies, was hailed as a milestone in the quest for gender equality. Yet the Amendment carries a condition that turns a moment of triumph into a paradox. Its implementation depends on the completion of the next census and the subsequent delimitation of constituencies.

This entanglement of women's reservation with the census and delimitation is not an accident of drafting. It is the outcome of a political bargain that reflects both the ambition to widen participation and the anxiety of altering the federal balance. Reservation has been on the national agenda since the mid-1990s, yet each attempt was stalled until the current amendment. The final consensus came at a cost: the empowerment of women would take effect only after demographic recalculation and redrawing of electoral boundaries. Since the

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last census was held in 2011 and delimitation has been frozen until 2026, the practical effect is that women may have to wait until at least 2029 to see this reform translated into seats.²

The reasons are embedded in federal politics. Constituency allocation in Parliament is tied to population. States in the north, such as Uttar Pradesh and Bihar, with higher fertility rates, stand to gain once delimitation resumes. States in the south, such as Kerala and Tamil Nadu, which achieved demographic discipline, may lose political weight.³ This trade-off has haunted Indian federalism for decades. By tying women's representation to this bargain, the Amendment risks making gender justice hostage to a contest between regions.

The census itself, while often presented as neutral counting, is a political technology. It is the instrument through which power, resources, and representation are distributed.⁴ Delays in its operation weaken governance and simultaneously postpone reforms that depend on accurate population data. The controversy around caste enumeration and the overlap with the National Population Register has made the exercise more contested than before. In this context, attaching women's reservation to the census converts a technical exercise into a gatekeeper of constitutional reform.

The theoretical implications are equally significant. Upendra Baxi's account of transformative constitutionalism describes the Constitution as a living project committed to deepening democracy and social justice.⁵ The postponement of women's reservation challenges this transformative promise, replacing substantive change with procedural preconditions. John Rawls emphasised the fair value of political liberties as central to democratic equality.⁶ Iris Marion Young's account of group differentiated representation highlights that historically excluded groups require immediate political inclusion.⁷ Kimberlé Crenshaw and Nancy Fraser have shown that delays reinforce structural injustices by compounding exclusions over time.⁸ These frameworks converge on a warning: when reforms are tied to slow processes, justice is not only delayed but potentially denied.

Comparative practice shows how unusual India's model is. Rwanda reserves thirty per cent of seats for women by constitutional mandate, which has led to women holding more than sixty per cent of parliamentary seats, the highest proportion in the world.⁹ Nordic states employ party mechanisms such as zipper systems, where men and women alternate on candidate lists,

² Constitution of India, Art 82; The Constitution (One Hundred and Sixth Amendment) Act, 2023.

³ PRS Legislative Research, *Women in Parliament: Representation and Reservations* (2023).

⁴ Census Act, 1948.

⁵ Upendra Baxi, *The Indian Supreme Court and Politics* (Eastern Book Company 1980).

⁶ John Rawls, *Political Liberalism* (Columbia University Press 1993).

⁷ Iris Marion Young, *Inclusion and Democracy* (Oxford University Press 2000).

⁸ Kimberlé Crenshaw, 'Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color' (1991) 43 *Stanford Law Review* 1241; Nancy Fraser, *Justice Interruptus: Critical Reflections on the "Postsocialist" Condition* (Routledge 1997).

⁹ Inter-Parliamentary Union, *Women in National Parliaments: World Classification* (2023).

guaranteeing balance without waiting for census or boundary redrawing.¹⁰ France enforces parity in candidacy through constitutional mandate, imposing financial penalties for non-compliance.¹¹ The United States relies on the census for apportionment but does not tie gender reforms to that process.¹² The United Kingdom redraws boundaries every decade through independent commissions, yet reforms on inclusion are not postponed until after these exercises.¹³ The global trend is clear: representation reforms are implemented directly, rather than being tethered to contested processes.

The question therefore, arises: to what extent does the interdependence of women's reservation, census, and delimitation undermine the meaning of gender justice and federal equity in India's constitutional democracy? This paper answers by combining doctrinal analysis of constitutional provisions, parliamentary debates, and Supreme Court jurisprudence with empirical reasoning drawn from census simulations and comparative study. The central claim advanced is that the linkage is not inevitable but a political compromise, and that it blunts the transformative spirit of the Constitution. If women's representation continues to be postponed by procedural dependencies, India risks turning a promise of empowerment into a prolonged deferral.

Theoretical Framework:

Constitutional reform cannot be understood only as a matter of legal text or institutional mechanics. It must also be examined through the frameworks of constitutional theory, political philosophy, and feminist critique. The entanglement of women's reservation with census and delimitation illustrates how formal provisions can conceal deep normative struggles. To capture these dimensions, this chapter uses three overlapping lenses: transformative constitutionalism, democratic equality, and intersectional justice. Together, they provide the conceptual tools to analyse how procedural dependencies may erode the substantive promise of gender inclusion.

Transformative constitutionalism, articulated in the Indian context by Upendra Baxi, emphasises that a constitution is not merely a document of restraint but a project of radical change.¹⁴ It demands an ongoing commitment to dismantling entrenched hierarchies and deepening democracy. Instead of accelerating change, the amendment locks it behind procedural gates. This is a distortion of the transformative spirit, where institutions privilege administrative sequence over substantive justice.

Theories of democratic equality help illuminate this distortion. John Rawls argued that the fair value of political liberties is central to justice.¹⁵ Political rights are not meaningful if some

¹⁰ Drude Dahlerup, 'The Story of the Zip: Designing Gender Quotas in Denmark and Beyond' (2018) 24 Representation 1.

¹¹ French Constitution, Art 1 (as amended in 2008).

¹² *Rucho v Common Cause* 588 US 1 (2019).

¹³ UK Boundary Commissions, *Guide to the 2023 Review of Parliamentary Constituencies* (2022).

¹⁴ Upendra Baxi, *The Indian Supreme Court and Politics* (Eastern Book Company 1980).

¹⁵ John Rawls, *Political Liberalism* (Columbia University Press 1993).

groups cannot exercise them on equal terms. In India, women remain severely underrepresented in legislatures, holding only about 14 per cent of Lok Sabha seats in 2024.¹⁶ By tying their enhanced representation to future exercises, the state risks perpetuating this inequality for another electoral cycle. Rawls' framework highlights how delay itself constitutes injustice, since equal liberties are denied in practice even if promised in principle. Iris Marion Young deepens this critique by insisting that democracy must go beyond formal equality of rights to ensure group-differentiated representation.¹⁷ Historically excluded groups, she argues, require active mechanisms of inclusion because systemic barriers prevent them from participating on equal terms.

The 106th Amendment accepts this logic in theory but undermines it in practice. Intersectional perspectives reinforce this argument. Kimberlé Crenshaw famously described how women of colour in the United States faced overlapping forms of discrimination that were not captured by single-axis frameworks of race or gender.¹⁸ Applied to India, intersectionality shows how delays in representation affect not all women equally but disproportionately harm those at the margins. Women from the Scheduled Castes, Scheduled Tribes, and minority communities are doubly disadvantaged when reforms are postponed. Nancy Fraser has similarly argued that justice has two dimensions: redistribution of resources and recognition of identity.¹⁹ In the Indian case, census and delimitation are tied to the redistribution of parliamentary seats among states, while women's reservation is about recognition and participation. By fusing the two, the amendment risks subordinating recognition to redistribution, leaving women's inclusion hostage to federal bargaining.

Theories of justice suggest that reforms of inclusion should be insulated from such bottlenecks, since any delay magnifies exclusion. Comparative theory strengthens this claim. In Rwanda, gender quotas were introduced as part of a post-conflict constitutional settlement.²⁰ The reform was immediate, not contingent on the census or delimitation. In Nordic countries, party-based zipper systems operationalise parity within electoral lists directly, without waiting for structural reforms.²¹ These models embody the principle that inclusion is urgent, not secondary.

This paper, therefore, situates the 106th Amendment within a broader landscape of constitutional theory. It argues that the linkage of women's reservation with the census and delimitation is not merely a legal arrangement but a constitutional paradox. By entangling inclusion with redistribution, the amendment risks creating a democracy deferred. The theoretical frameworks presented here will guide the analysis of subsequent chapters, which

¹⁶ PRS Legislative Research, *Women in Parliament: Representation and Reservations* (2023).

¹⁷ Iris Marion Young, *Inclusion and Democracy* (Oxford University Press 2000).

¹⁸ Kimberlé Crenshaw, 'Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color' (1991) 43 *Stanford Law Review* 1241.

¹⁹ Nancy Fraser, *Justice Interruptus: Critical Reflections on the "Postsocialist" Condition* (Routledge 1997).

²⁰ Inter-Parliamentary Union, *Women in National Parliaments: World Classification* (2023).

²¹ Drude Dahlerup, 'The Story of the Zip: Designing Gender Quotas in Denmark and Beyond' (2018) 24 *Representation* 1.

examine the historical background of census and delimitation, the constitutional debates surrounding the amendment, the federal imbalances that underpin its design, and the comparative models that offer lessons for India's constitutional future.

Legal and Historical Background:

The entanglement of women's reservation with the census and delimitation cannot be understood in isolation. It is the culmination of a long constitutional history in which these three elements evolved in parallel yet distinct trajectories. Women's reservation has its roots in the expansion of representation through the 73rd and 74th Amendments. Census taking has been a foundational administrative exercise since colonial times. Delimitation has been the arena in which demographic realities are converted into political representation. To understand the triadic linkage created in 2023, it is necessary to trace each of these elements and the constitutional compromises that shaped them.

Women's demand for political representation has a long history. The Government of India Act, 1935, introduced reserved seats for women in provincial legislatures.²² After independence, the framers of the Constitution debated but did not provide for legislative reservation, assuming that universal franchise would suffice to create equal opportunity.²³ The first breakthrough came with the 73rd and 74th Amendments in 1992, which introduced one-third reservation for women in Panchayats and Municipalities.²⁴ This reform was transformative at the local level, producing a generation of women leaders and significantly raising female participation in governance. The idea of extending reservations to legislatures was repeatedly debated in Parliament from the mid-1990s onwards. The Women's Reservation Bill was introduced in 1996, 1998, 1999, and 2008, each time provoking heated discussion but never crossing the final hurdle.²⁵ Critics argued that such a reservation would entrench identity politics, while supporters emphasised that without structural intervention, women would remain marginalised in legislatures.

The eventual passage of the One Hundred and Sixth Amendment in 2023 resolved this long debate, but did so by postponing implementation. The constitutional text provides that the reservation will come into effect after the next census and subsequent delimitation.²⁶ To see why this condition was inserted, it is necessary to turn to the history of census and delimitation.

The census in India is both an administrative and constitutional institution. The Census Act of 1948 provides the legal framework.²⁷ Since independence, a census has been conducted every ten years, providing the demographic basis for policy, welfare distribution, and representation.

²² Government of India Act, 1935, s 19.

²³ B Shankaranand, *Constituent Assembly Debates*, Vol VII (Lok Sabha Secretariat 1948) 983.

²⁴ Constitution (Seventy-third Amendment) Act, 1992; Constitution (Seventy-fourth Amendment) Act, 1992.

²⁵ Lok Sabha Debates, *Women's Reservation Bill* (1996, 1998, 1999, 2008).

²⁶ Constitution (One Hundred and Sixth Amendment) Act, 2023.

²⁷ Census Act, 1948.

The census of 1971 was especially significant, because the Delimitation Commission used it as the basis for redrawing constituency boundaries. Following this, the Forty-second Constitutional Amendment of 1976 froze delimitation until the first census after 2001.²⁸ The rationale was to ensure that states pursuing family planning were not disadvantaged in representation. This freeze was extended further by the Eighty-fourth Amendment in 2001, which postponed delimitation until after the first census post 2026.²⁹ Thus, for nearly half a century, India has operated with outdated population figures in constituency allocation, maintaining political stability at the cost of demographic accuracy.

Delimitation itself is carried out by independent commissions appointed under Article 82 of the Constitution. Four such commissions have been constituted since 1950.³⁰ The first three, set up in 1952, 1963, and 1973, redrew boundaries based on the latest census. The fourth, constituted in 2002, had its mandate restricted by the constitutional freeze, meaning that it could only adjust boundaries without changing the total number of seats per state.³¹ The Supreme Court has upheld the authority of delimitation commissions, noting in *Kuldip Nayar v Union of India* that representation is a matter of constitutional design not easily open to judicial interference.³² The result of these freezes and adjustments has been an increasingly pronounced imbalance in representation, with populous northern states underrepresented in proportion to their numbers and southern states overrepresented relative to their demographic weight.

The 106th Amendment inserts women's reservation precisely into this fraught context. The requirement that reservation shall follow census and delimitation reflects the fear that immediate implementation could disrupt the fragile federal bargain. States likely to lose seats after delimitation resisted any reform that would lock the existing distribution, while states poised to gain wanted reservation implemented only after redistribution. By tying women's reservation to this sequencing, Parliament chose compromise over immediacy.

This choice has consequences. The census due in 2021 was indefinitely postponed, officially on account of the COVID 19 pandemic.³³ As a result, India is still relying on 2011 data for planning and representation. The next delimitation cannot occur until after 2026, as mandated by constitutional amendment. This means that women's reservation, although enacted in 2023, may not materialise until 2029 or later. In effect, a reform celebrated as historic has been suspended by inherited compromises in census and delimitation policy.

The parliamentary debates on the 106th Amendment reveal both the enthusiasm for women's representation and the anxiety about its sequencing. Members from across party lines praised the Bill as historic, yet many raised concerns about the delay in implementation. The

²⁸ Constitution (Forty-second Amendment) Act, 1976.

²⁹ Constitution (Eighty-fourth Amendment) Act, 2001.

³⁰ Delimitation Commission of India, *Orders and Reports* (1952, 1963, 1973, 2002).

³¹ *ibid.*

³² *Kuldip Nayar v Union of India* (2006) 7 SCC 1.

³³ Office of the Registrar General, Ministry of Home Affairs, *Status of Census 2021* (2022).

government defended the linkage on grounds of administrative necessity, arguing that new boundaries must be drawn before seats are reserved.³⁴ Critics, however, argued that this was a deliberate attempt to defer reform while claiming credit for passing it. The debates illustrate the tension between constitutional ambition and political calculation, a theme that has characterised the history of all three processes.

The 106th Constitutional Amendment: Critical Analysis

The One Hundred and Sixth Constitutional Amendment Act, 2023, popularly known as the Women's Reservation Amendment, marks one of the most significant developments in the history of Indian parliamentary reform. It amends Articles 239AA, 330, and 332 of the Constitution to provide for the reservation of one-third of seats in the Lok Sabha, in the State Legislative Assemblies, and in the Legislative Assembly of the National Capital Territory of Delhi for women.³⁵ On the surface, this appears to be an unqualified triumph of democratic equality. Yet the details of the text and the conditions attached to its implementation reveal a more complex picture.

The most controversial provision is the clause stipulating that the reservation will come into force only after the publication of census figures following the commencement of the amendment and the subsequent exercise of delimitation.³⁶ This clause transforms an immediate commitment into a conditional one. It means that although the amendment has formally entered into the Constitution, its operational effect is suspended until two other exercises, both delayed and politically sensitive, are completed. The question arises: why was such a condition inserted, and what are its implications for constitutional justice?

To answer this, one must return to the parliamentary debates on the amendment. In the Lok Sabha, members across parties hailed the Bill as historic.³⁷ Yet concerns were raised about the timeline of implementation. Opposition leaders argued that by linking reservation to census and delimitation, the government had effectively postponed the reform to 2029 or beyond. The government defended the clause on grounds of administrative necessity, arguing that seats cannot be reserved until boundaries are redrawn.³⁸ Critics, however, saw this as a political compromise designed to deflect immediate demands while claiming credit for passage. The debates reveal a paradox: overwhelming consensus on principle combined with deep disagreement on practice.

From a constitutional perspective, the conditional clause raises questions of both principle and precedent. The Indian Constitution does not normally postpone the operation of fundamental reforms once enacted. For instance, the 73rd and 74th Amendments introducing reservations

³⁴ Lok Sabha Debates, *One Hundred and Sixth Constitutional Amendment Bill* (2023).

³⁵ Constitution of India, Arts 239AA, 330, 332.

³⁶ Constitution (One Hundred and Sixth Amendment) Act, 2023.

³⁷ Lok Sabha Debates, *One Hundred and Sixth Constitutional Amendment Bill* (2023).

³⁸ *ibid.*

in local bodies were implemented immediately after their enactment in 1992.³⁹ By contrast, the 106th Amendment creates a situation where a constitutional guarantee exists in text but not in practice for several years. This undermines the transformative force of constitutional reform, turning what ought to be immediate empowerment into a deferred entitlement.

The conditionality also intersects with the politics of federalism. Delimitation has been frozen since 1976 and extended until 2026 precisely to prevent penalising states that successfully reduced population growth.⁴⁰ The prospect of resuming delimitation has already created anxiety, since northern states such as Uttar Pradesh and Bihar expect to gain seats, while southern states like Kerala and Tamil Nadu anticipate losing influence.⁴¹ By tying women's reservation to this exercise, the amendment risks transforming a question of gender justice into a collateral issue of federal bargaining. It means that the representation of women will vary depending on the outcome of a contentious redistribution of seats among states.

Judicial perspectives also complicate the picture. In *Ashok Kumar Jain v Union of India*, the Supreme Court upheld reservations in educational institutions, emphasising that affirmative action is a legitimate means to achieve substantive equality.⁴² In *Kuldip Nayar v Union of India*, the Court held that matters of representation are primarily within the domain of Parliament, with limited scope for judicial review.⁴³ These cases indicate that while the Court may uphold the principle of reservation, it is unlikely to interfere with the sequencing chosen by Parliament. The result is that women who challenge the delay in courts may find little relief, since the judiciary defers to legislative design in matters of representation.

The design of the amendment also raises questions about the principle of rotation. The constitutional text provides that one-third of seats shall be reserved for women and that these reserved seats will rotate among constituencies.⁴⁴ While this ensures broad distribution of benefits, it also creates uncertainty for women candidates, who may find their constituencies derecognised as reserved after one election cycle. Scholars of electoral politics have argued that rotation undermines the possibility of women building sustained political careers, since their ability to contest from a constituency is subject to periodic change.⁴⁵ By combining rotation with delay, the amendment may inadvertently weaken the long-term impact of women's political empowerment.

Comparative experiences further illuminate the problem. In France, the constitutional amendment requiring parity in candidacy was implemented immediately after passage, with

³⁹ Constitution (Seventy-third Amendment) Act, 1992; Constitution (Seventy-fourth Amendment) Act, 1992.

⁴⁰ Constitution (Forty-second Amendment) Act, 1976.

⁴¹ Constitution (Eighty-fourth Amendment) Act, 2001.

⁴² *Ashok Kumar Jain v Union of India* (1993) 2 SCC 507.

⁴³ *Kuldip Nayar v Union of India* (2006) 7 SCC 1.

⁴⁴ Constitution (One Hundred and Sixth Amendment) Act, 2023.

⁴⁵ Niraja Gopal Jayal, *Representing India: Ethnic Diversity and the Governance of Public Institutions* (Palgrave Macmillan 2006).

non-compliant parties facing financial penalties.⁴⁶ In Rwanda, the adoption of gender quotas in the post-conflict constitution resulted in immediate and dramatic increases in representation, unmediated by census or boundary reforms.⁴⁷ These examples highlight that reforms of inclusion are often designed to operate without procedural deferrals. By contrast, India has created a model in which inclusion is subordinated to contested demographic processes.

In sum, the 106th Amendment represents both a breakthrough and a compromise. It inscribes women's reservation in the Constitution, achieving what decades of debate could not. Yet it does so by placing the reform behind two gates, census and delimitation, both of which are vulnerable to delay and political manipulation. The result is a constitutional paradox: empowerment promised but not delivered. Whether this paradox will be resolved in the next decade or whether it will deepen India's democratic deficit remains an open question.

Implications of Linking Reservation, Census, and Delimitation

The One Hundred and Sixth Constitutional Amendment created an unprecedented situation in Indian constitutional history. For the first time, a reform that directly affects the composition of legislatures has been made contingent on two other exercises. The most direct implication is the delay in women's political empowerment. Despite the Amendment's passage in 2023, its benefits will not be felt until the next delimitation, which cannot occur before 2026. Given the time required for census data to be processed and for the Delimitation Commission to complete its work, the earliest operationalisation is likely in the 2029 general elections.⁴⁸ This means that women will remain underrepresented for at least one more full electoral cycle. In the Lok Sabha elected in 2019, women comprised only 14.4 per cent of members.⁴⁹ The 2024 elections saw modest improvements but still left India far behind the global average of 26.5 per cent.⁵⁰ A reform designed to correct this democratic deficit is therefore postponed, and the underrepresentation of women is reproduced in the name of procedural sequencing.

Delay does not operate neutrally. It produces unequal effects depending on social location. Women from Scheduled Castes, Scheduled Tribes, and minority groups are doubly disadvantaged when reforms are deferred, since they face both structural barriers to entry and systemic underrepresentation. Kimberlé Crenshaw's account of intersectionality demonstrates how overlapping exclusions intensify marginalisation.⁵¹ In the Indian context, postponing reservation means that women from historically disadvantaged groups continue to be invisible in political institutions. This undermines both the redistributive and recognitional dimensions of justice, to borrow Nancy Fraser's terminology.⁵²

⁴⁶ French Constitution, Art 1 (as amended in 2008).

⁴⁷ Inter-Parliamentary Union, *Women in National Parliaments: World Classification* (2023).

⁴⁸ Constitution (One Hundred and Sixth Amendment) Act, 2023.

⁴⁹ PRS Legislative Research, *Women in Parliament: Representation and Reservations* (2023).

⁵⁰ Inter-Parliamentary Union, *Women in National Parliaments: World Classification* (2024).

⁵¹ Kimberlé Crenshaw, 'Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color' (1991) 43 *Stanford Law Review* 1241.

⁵² Nancy Fraser, *Justice Interruptus: Critical Reflections on the "Postsocialist" Condition* (Routledge 1997).

The second implication concerns federal equity. Delimitation has always been one of the most contested processes in India because it redistributes political power among states. The freeze on delimitation since 1976 was intended to avoid penalising states that succeeded in reducing fertility rates.⁵³ When delimitation resumes after 2026, northern states such as Uttar Pradesh and Bihar are likely to gain seats, while southern states such as Kerala and Tamil Nadu may lose. This redistribution has the potential to alter the balance of federal politics. By tying women's reservation to delimitation, the Amendment makes gender justice contingent on this contentious bargain. In practice, this means that women's representation will increase in absolute terms, but its distribution will be shaped by demographic advantage. Women in the northern states will occupy a larger share of reserved seats simply because those states will gain more constituencies. Southern states, despite having made progress in education, health, and governance, may see their share of women's seats reduced. The result is that federal equity and gender justice are fused, with one reform held hostage to the anxieties of the other.

A third implication is the risk of political manipulation. Census operations in India are vulnerable to delay and controversy. The 2021 census has already been postponed indefinitely, officially due to the pandemic.⁵⁴ Yet scholars and commentators have pointed out that political reluctance to confront questions of caste enumeration and the National Population Register also played a role. Delimitation exercises are equally vulnerable. The Delimitation Commission, constituted in 2002, faced criticism for arbitrary boundary drawing and lack of transparency.⁵⁵ By making women's reservation depend on these processes, the Amendment exposes gender justice to the risk of delay, controversy, and litigation. If census figures are challenged, or if delimitation orders are contested, women's reservation will be caught in the crossfire.

A fourth implication is the weakening of constitutional immediacy. Transformative reforms are most effective when they are implemented directly. The 73rd and 74th Amendments introducing reservations for women in local bodies were implemented immediately after enactment in 1992.⁵⁶ They led to a dramatic increase in women's participation at the grassroots, creating new political cultures and leadership pipelines. By contrast, the 106th Amendment denies women the immediacy of reform. As Upendra Baxi has argued, transformative constitutionalism depends on making justice "present in the present," not endlessly postponed into the future.⁵⁷ Delay risks creating cynicism about constitutional reform itself, reducing trust in the ability of institutions to deliver equality.

There are also implications for democratic equality. John Rawls' principle of fair value of political liberties requires that citizens not only formally possess the right to participate but also have an equal chance of exercising it effectively.⁵⁸ In India, women formally enjoy equal

⁵³ Constitution (Forty-second Amendment) Act, 1976; Constitution (Eighty-fourth Amendment) Act, 2001.

⁵⁴ Office of the Registrar General, Ministry of Home Affairs, *Status of Census 2021* (2022).

⁵⁵ Delimitation Commission of India, *Orders and Reports* (2002).

⁵⁶ Constitution (Seventy-third Amendment) Act, 1992; Constitution (Seventy-fourth Amendment) Act, 1992.

⁵⁷ Upendra Baxi, *The Indian Supreme Court and Politics* (Eastern Book Company 1980).

⁵⁸ John Rawls, *Political Liberalism* (Columbia University Press 1993).

political rights but remain grossly underrepresented in legislatures. By tying reservations to delayed processes, the state undermines the fair value of women's political liberties, since equality on paper does not translate into equality in practice. Iris Marion Young's argument that historically excluded groups require proactive mechanisms of representation is also undercut when such mechanisms are deferred.⁵⁹ The logic of justice demands immediacy, but the logic of political compromise has produced postponement.

Finally, the entanglement risks producing unintended distortions in political careers. The provision that reserved seats will rotate adds another layer of instability.⁶⁰ Women candidates who contest and win from reserved constituencies may lose the opportunity to recontest from the same constituency once rotation changes the status. Combined with the delay in initial implementation, this creates a situation where women must not only wait to enter legislatures but also face uncertainty about sustaining their careers. Political representation requires continuity and consolidation, but rotation and delay together undermine both.

The implications of the triadic linkage are therefore profound. It delays women's empowerment, exacerbates intersectional exclusions, entangles gender justice with federal bargaining, exposes reform to political manipulation, weakens constitutional immediacy, and undermines democratic equality. These consequences reveal that the conditionality of the 106th Amendment is not a neutral administrative choice but a political design with far-reaching effects. Whether India can overcome these consequences will depend on whether the reform is decoupled from census and delimitation in practice, or whether it remains trapped in the paradox of democracy deferred.

International Comparisons and Lessons

India's model of linking women's reservation to census and delimitation is unusual in a global perspective. Other constitutional democracies have designed gender quotas and electoral reforms in ways that avoid procedural entanglements. By studying Rwanda, the Nordic countries, France, the United States, the United Kingdom, and South Africa, one can see how different systems address the balance between inclusion, apportionment, and fairness. Each example provides insights that highlight both the strengths and the weaknesses of India's chosen path.

Rwanda is often presented as the most striking example of rapid transformation in women's representation. The Constitution of 2003 guarantees at least thirty per cent of seats for women in Parliament.⁶¹ This provision was implemented immediately after adoption, with the support of political parties and civil society organisations. Today, women hold more than sixty per cent of seats in the Rwandan Chamber of Deputies, the highest proportion globally.⁶² The Rwandan case shows that immediacy matters. When reforms are introduced without delay,

⁵⁹ Iris Marion Young, *Inclusion and Democracy* (Oxford University Press 2000).

⁶⁰ Constitution (One Hundred and Sixth Amendment) Act, 2023.

⁶¹ Constitution of Rwanda, 2003, Art 9.

⁶² Inter-Parliamentary Union, *Women in National Parliaments: World Classification* (2023).

they can reshape political culture within a single electoral cycle. India, by contrast, risks losing momentum by postponing the reform for several years.

The Nordic countries have taken a different route. Sweden, Norway, Denmark, and Finland rely on voluntary party-based quotas rather than constitutional mandates. Political parties use the “zipper system” in which men and women alternate on electoral lists.⁶³ Because these countries use proportional representation systems, the zipper model ensures balanced representation in legislatures. The Nordic model demonstrates that gender inclusion can become part of political culture when parties internalise it. India can learn from this approach, since political parties could adopt voluntary quotas even before the constitutional reservation takes effect.

France amended its Constitution in 2000 to enshrine the principle of equal access for women and men to electoral mandates.⁶⁴ The law implementing this amendment requires parties to nominate equal numbers of male and female candidates, with financial penalties for non-compliance.⁶⁵ Although some parties have absorbed the penalties rather than comply fully, the reform has increased the number of women in the National Assembly. The French experience highlights how constitutional principles, when coupled with practical incentives and sanctions, can change behaviour without procedural delay.

The United States provides a contrast. The census plays a central role in apportioning seats in the House of Representatives every ten years.⁶⁶ Yet gender inclusion has never been tied to this process. Women’s representation in the U.S. Congress has grown through social movements, party recruitment, and campaign finance reforms rather than constitutional quotas. The Supreme Court has limited judicial oversight of gerrymandering, as in *Rucho v Common Cause*, where it held that partisan gerrymandering was a political question.⁶⁷ Even so, inclusion has been pursued through other mechanisms rather than being tied to census or apportionment. This separation of processes underscores the avoidable nature of India’s entanglement.

The United Kingdom addresses demographic change through independent boundary commissions that redraw constituencies at regular intervals.⁶⁸ These commissions operate with transparency and public consultation, which reduces the scope for manipulation. Gender inclusion in the UK has been driven by party-level reforms, particularly the Labour Party’s use of all-women shortlists in candidate selection.⁶⁹ The result has been significant increases

⁶³ Drude Dahlerup, ‘The Story of the Zip: Designing Gender Quotas in Denmark and Beyond’ (2018) 24 Representation 1.

⁶⁴ French Constitution, Art 1 (as amended in 2008).

⁶⁵ Loi n° 2000-493 du 6 juin 2000 relative à l’égal accès des femmes et des hommes aux mandats électoraux et fonctions électives (France).

⁶⁶ United States Constitution, Art 1, s 2.

⁶⁷ *Rucho v Common Cause* 588 US 1 (2019).

⁶⁸ UK Boundary Commissions, *Guide to the 2023 Review of Parliamentary Constituencies* (2022).

⁶⁹ Sarah Childs, *New Labour’s Women MPs: Women Representing Women* (Routledge 2004).

in women MPs over time. The UK experience shows that independence in boundary drawing can coexist with proactive measures for gender inclusion, each operating in its own sphere.

South Africa offers yet another instructive contrast. It employs a national list system of proportional representation, which eliminates the need for delimitation of single-member constituencies.⁷⁰ Gender inclusion has been advanced through voluntary party quotas, especially by the African National Congress, which adopted a fifty per cent target for women on its lists.⁷¹ This model demonstrates how electoral system design itself can reduce the tension between demographic apportionment and inclusion. For India, the lesson is that the structure of the electoral system shapes the possibilities of reform.

Taken together, these examples reveal several lessons. First, reforms of inclusion are most effective when implemented without delay, as seen in Rwanda and France. Second, political parties can act as crucial vehicles of inclusion, as demonstrated in the Nordic countries, the UK, and South Africa. Third, independent and transparent institutions for census and delimitation, as in the UK, reduce political manipulation. Fourth, electoral system design can either entrench or alleviate tensions between demographic distribution and gender justice.

Jurisprudential and Scholarly Critiques

The conditional design of the One Hundred and Sixth Constitutional Amendment raises questions not only of politics but also of constitutional law. While Parliament has the authority to structure reforms of representation, the judiciary has historically been called upon to interpret the scope of such authority, and scholars have debated whether the courts should play a more active role in ensuring that transformative commitments are not indefinitely deferred. This chapter examines the relevant case law and scholarly commentary to show how jurisprudence and theory illuminate the paradox of women's reservation being postponed by the census and delimitation.

The Supreme Court has consistently upheld the legitimacy of reservation as an instrument of substantive equality. In *Indira Sawhney v Union of India*, the Court affirmed that reservation is not an exception to equality but a means of realising it.⁷² While that case dealt with caste based reservation, the principle applies equally to gender based measures. The Court recognised that equality of opportunity is hollow without mechanisms to correct entrenched disadvantage. Similarly, in *Ashok Kumar Jain v Union of India*, the Court upheld reservations in educational institutions, reinforcing the idea that affirmative action is consistent with constitutional morality.⁷³ These cases create a strong jurisprudential foundation for women's reservation in legislatures.

⁷⁰ Constitution of South Africa, 1996, s 46.

⁷¹ African National Congress, *ANC Policy Document on Gender Equality* (2017).

⁷² *Indira Sawhney v Union of India* 1992 Supp (3) SCC 217.

⁷³ *Ashok Kumar Jain v Union of India* (1993) 2 SCC 507.

Yet the Court has also drawn limits around its role in matters of political representation. In *Kuldip Nayar v Union of India*, the Court upheld amendments to the Representation of the People Act altering the mode of election to the Rajya Sabha, holding that representation is primarily within the domain of Parliament.⁷⁴ The judgment stressed judicial restraint in areas where constitutional design grants wide discretion to the legislature. This implies that challenges to the delay in implementing women's reservation are unlikely to succeed in courts, since the judiciary is reluctant to interfere with the sequencing of representation.

Another relevant strand of jurisprudence concerns delimitation. In *Meghraj Kothari v Delimitation Commission*, the Supreme Court held that orders of the Delimitation Commission are final and cannot be questioned in court.⁷⁵ This insulates delimitation from judicial scrutiny, reinforcing the view that Parliament and commissions, not courts, hold the key to representation. Taken together, these cases suggest that while the principle of reservation is secure, the timing and mechanics of its implementation are shielded from judicial intervention. This judicial posture contributes to the paradox of democracy deferred, since courts are unlikely to act as accelerators of reform.

Scholarly critiques, however, have been less restrained. Upendra Baxi has argued that transformative constitutionalism requires the Constitution to function as a charter of social revolution rather than a static document.⁷⁶ From this perspective, the 106th Amendment's conditionality represents a betrayal of transformative aspirations. Baxi has warned that constitutionalism becomes hollow when process is used to postpone substance. The politics of deferral, in his view, risks undermining faith in the transformative project itself.

Gautam Bhatia has advanced a similar argument in his work on the transformative Constitution. He emphasises that constitutional rights and guarantees must be interpreted in light of their purpose of restructuring social hierarchies.⁷⁷ A reform like women's reservation, which directly addresses structural exclusion, ought to be implemented immediately if the Constitution's transformative spirit is to be honoured. For Bhatia, delay not only weakens the reform but also distorts the meaning of constitutional equality.

Feminist scholars and activists have voiced sharper critiques. Namita Bhandare has argued that tying women's reservation to the census and delimitation is a way of giving with one hand and taking away with the other.⁷⁸ She observes that women have already waited nearly three decades for legislative representation, and the additional postponement is unjustifiable. Karuna Nundy has similarly warned that the amendment risks creating a symbolic rather than

⁷⁴ *Kuldip Nayar v Union of India* (2006) 7 SCC 1.

⁷⁵ *Meghraj Kothari v Delimitation Commission* AIR 1967 SC 669.

⁷⁶ Upendra Baxi, *The Indian Supreme Court and Politics* (Eastern Book Company 1980).

⁷⁷ Gautam Bhatia, *The Transformative Constitution: A Radical Biography in Nine Acts* (HarperCollins 2019).

⁷⁸ Namita Bhandare, 'The Women's Reservation Bill is a Promise Deferred' *The Hindustan Times* (21 September 2023).

substantive reform.⁷⁹ By enacting reservation in text but deferring its practice, the state seeks political credit without delivering actual empowerment. These critiques highlight how procedural design can mask the reality of exclusion.

International feminist scholarship also reinforces these critiques. Iris Marion Young's insistence that inclusive democracy requires group-differentiated representation underscores the urgency of immediate implementation.⁸⁰ Kimberlé Crenshaw's framework of intersectionality reveals how delays disproportionately harm women who are already marginalised by caste, class, or religion.⁸¹ Nancy Fraser's distinction between recognition and redistribution shows how the amendment subordinates recognition of women's political agency to the redistribution of seats among states through delimitation.⁸² These theoretical frameworks expose the deeper injustice of postponement.

Together, the jurisprudence and scholarship paint a complex picture. Courts have validated the principle of reservation, but are unlikely to intervene in questions of timing. Parliament has enacted reform, but hedged it with conditions. Scholars and activists have exposed the injustice of delay and warned that constitutional promises risk becoming symbolic without timely delivery. This dynamic illustrates the limits of jurisprudence in delivering transformation and the importance of sustained scholarly critique in keeping democratic aspirations alive.

Suggestions and Reforms:

The conditional design of the One Hundred and Sixth Constitutional Amendment has produced a paradox in which the promise of inclusion is suspended until after the census and delimitation. If the transformative spirit of the Constitution is to be preserved, it is essential to rethink this linkage. Comparative experience shows that delay is not an inevitable feature of gender quotas but a political choice. This chapter proposes reforms at the constitutional, institutional, and administrative levels that could help India deliver gender justice without making it hostage to demographic exercises.

The first and most important reform is to decouple women's reservation from census and delimitation. The Constitution already provides for reservation of seats for Scheduled Castes and Scheduled Tribes in Parliament and state legislatures without tying them to future censuses.⁸³ Articles 330 and 332 allocate seats for these groups on the basis of population but do not postpone their implementation until delimitation. A similar approach could be adopted for women's reservation. Parliament could enact an enabling law under the 106th Amendment that operationalises the quota using existing constituency boundaries until delimitation occurs.

⁷⁹ Karuna Nundy, 'Women's Reservation Bill: A Reform Stuck in Procedural Quicksand' *The Indian Express* (22 September 2023).

⁸⁰ Iris Marion Young, *Inclusion and Democracy* (Oxford University Press 2000).

⁸¹ Kimberlé Crenshaw, 'Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color' (1991) 43 *Stanford Law Review* 1241.

⁸² Nancy Fraser, *Justice Interruptus: Critical Reflections on the "Postsocialist" Condition* (Routledge 1997).

⁸³ Constitution of India, Arts 330, 332.

Once new boundaries are drawn, the reservation could be recalibrated. This would allow immediate implementation while preserving consistency with future adjustments.

A second reform is the creation of an independent constitutional body to oversee gender inclusion. Just as the Election Commission supervises elections, a Gender Representation Commission could be tasked with ensuring compliance with women's reservation. Such a body could monitor the allocation of reserved seats, recommend adjustments during delimitation, and advise on measures to strengthen women's participation within political parties. Its presence would insulate gender justice from day-to-day political bargaining and provide an institutional safeguard against delay.

A third reform concerns political parties. Even before the constitutional reservation is implemented, parties could adopt voluntary quotas for candidate selection. This has been the path followed by the Nordic states, where party-level zipper systems have created balanced representation.⁸⁴ In India, parties often claim to support women's empowerment yet nominate very few women candidates. Voluntary quotas within parties would not only increase women's representation immediately but also prepare political structures for the transition once the constitutional reservation comes into effect. Financial incentives, such as linking state funding of parties to the proportion of women candidates, could also be considered.⁸⁵

A fourth reform involves rotation and continuity. The system of rotating reserved constituencies, while designed to distribute benefits widely, risks undermining women's political careers. Scholars have argued that continuity is essential for representatives to build local legitimacy and policy influence.⁸⁶ One solution is to lengthen the cycle of rotation, reserving constituencies for women for at least two or three terms before rotation occurs. Another is to allow incumbents to recontest from the same constituency even after rotation, a system used in some local body elections. These adjustments would strengthen the long-term impact of the reservation.

A fifth reform concerns delimitation itself. The history of delimitation in India has been marked by delay and opacity. The Delimitation Commission, constituted in 2002, faced widespread criticism for a lack of transparency.⁸⁷ To prevent future delays, delimitation must be insulated from political bargaining. Independent commissions should operate with clear timelines, public consultation, and transparent criteria. Lessons can be drawn from the United Kingdom, where boundary commissions publish their methods and invite public objections before finalising boundaries.⁸⁸ By making delimitation more reliable and transparent, India

⁸⁴ Drude Dahlerup, 'The Story of the Zip: Designing Gender Quotas in Denmark and Beyond' (2018) 24 Representation 1.

⁸⁵ Loi n° 2000-493 du 6 juin 2000 relative à l'égal accès des femmes et des hommes aux mandats électoraux et fonctions électives (France).

⁸⁶ Niraja Gopal Jayal, *Representing India: Ethnic Diversity and the Governance of Public Institutions* (Palgrave Macmillan 2006).

⁸⁷ Delimitation Commission of India, *Orders and Reports* (2002).

⁸⁸ UK Boundary Commissions, *Guide to the 2023 Review of Parliamentary Constituencies* (2022).

can reduce the risk that women's reservation will again be postponed by demographic controversies.

A sixth reform is census modernisation. The census has been repeatedly delayed, most recently in 2021.⁸⁹ Digital technology offers opportunities to make data collection more timely and less vulnerable to political controversy. A shift to rolling surveys or digital enumeration could provide updated population figures without the long gaps that now occur between censuses. Faster and more reliable demographic data would reduce the scope for deferring reforms dependent on census figures.

A seventh reform is comparative adaptation. France's model of linking quotas to financial incentives for parties could be adapted to India by conditioning party recognition or funding on compliance with women's representation targets.⁹⁰ South Africa's use of proportional representation shows that electoral system design can reduce tensions between apportionment and inclusion.⁹¹ While India is unlikely to abandon its first-past-the-post system, innovations such as multi-member constituencies in selected regions could be explored. Such adaptations could strengthen the impact of women's reservations while addressing federal concerns.

The lessons from comparative practice and the logic of constitutional justice both point to the same conclusion: women's reservation should be implemented without delay, and the institutions of census and delimitation should be reformed so that they support rather than obstruct the realisation of equality.

Conclusion:

The One Hundred and Sixteenth Constitutional Amendment stands as both a moment of triumph and a symbol of delay. On paper, it is one of the most significant constitutional reforms of the last three decades, guaranteeing one-third of seats for women in the Lok Sabha and State Assemblies. In practice, its promise has been postponed, tethered to the next census and delimitation. This linkage creates what may be called a democracy deferred, where inclusion is celebrated but not realised.

The history of women's representation in India shows a pattern of promises followed by postponement. Since the first Women's Reservation Bill in 1996, political consensus has always carried within it a compromise.

The reforms proposed in this paper offer a way forward. Decoupling women's reservation from the census and delimitation is both legally possible and normatively desirable. An independent body to oversee gender inclusion could insulate the process from political bargaining. Political parties can adopt voluntary quotas even before constitutional reservation comes into force, signalling commitment beyond rhetoric. Reforms in rotation, delimitation,

⁸⁹ Office of the Registrar General, Ministry of Home Affairs, *Status of Census 2021* (2022).

⁹⁰ French Constitution, Art 1 (as amended in 2008).

⁹¹ Constitution of South Africa, 1996, s 46.

and census modernisation can prevent the recurrence of delay. Comparative adaptation of models such as France's financial incentives or South Africa's list system could also help address federal anxieties while strengthening inclusion.

The central message is simple: gender justice should not be contingent on demographic exercises. If empowerment is always postponed, it risks becoming symbolic rather than substantive. The 73rd and 74th Amendments proved that immediate reservation at the local level can transform governance and political culture. The same can be achieved at the national level if the barriers of census and delimitation are removed.

The conclusion is therefore not one of despair but of choice. India's constitutional future need not be one of democracy deferred. By reimagining the design of reforms, by learning from comparative experience, and by insisting on the immediacy of justice, India can redeem the promise of the 106th Amendment. The decision lies with Parliament, political parties, and civil society: either to let empowerment wait until the next decade or to act now in the spirit of the transformative Constitution.



The Evolution of Data Protection and the Right to be Forgotten: A Comparative Study of Constitutional and Jurisprudential Approaches in Germany and India

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&
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Abstract:

The digital era has transformed the personal data of individuals into a permanent and easily searchable collection, thus raising significant constitutional questions of privacy, dignity, rehabilitation, and democratic memory. The Right to Be Forgotten (RTBF) is at the core of this discussion, being a controversial idea that aims to give back the person control over the digital traces of the past. Through a comparative constitutional and jurisprudential analysis, this research tries to find out how Germany and India differ in their understanding, justification, and implementation of the RTBF as a fundamental right. In Germany, the right to be forgotten (RTBF) is "essentially derived from the fundamental right to informational self-determination" as it was initially established by the Volkszählungsurteil and later on clarified in the Federal Constitutional Court's Right to Be Forgotten I and II decisions, which employ proportionality, temporal relevance, and practical concordance to balance personality rights and press freedom. In India, the Right to be Forgotten (RTBF) is a derivative of the universal fundamental right to privacy as per the landmark case of K.S. Puttaswamy v. Union of India. It has also been recognised on a few occasions by various High Court rulings, such as Zulfiqar Ahmad Khan and X vs Registrar General. Nevertheless, the absence of a clearly defined statutory provision under the Digital Personal Data Protection Act, 2023, results in Indian courts having to decide on the matter of the right in a disjointed manner. The present paper uses doctrinal comparison as a tool for identifying common constitutional issues that the two countries face and also shows how German jurisprudence, through providing a systematic structure, especially by way of proportionality analysis, temporal sensitivity, and delisting mechanisms, can support India in the establishment of a comprehensive Right to Be Forgotten (RTBF) regime. According to this research, India is supposed to introduce RTBF, which is not only situationally appropriate but also stems from dignity and rehabilitation; at the same time, it needs to take care of openness, open justice, and democratic accountability.

Keywords: Right to Be Forgotten, Informational Self-Determination, Proportionality, Digital Privacy, Comparative Constitutional Law.

Introduction:

It has grown more challenging for people to get above the shadows of their past at a time when the internet stores memories with unwavering persistence. Digital archives today include information that has faded over time and frequently resurfaces in ways that contradict the

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concepts of privacy, dignity, and individual freedom. The Right to be Forgotten (RTBF), one of the most contested rights of the twenty-first century, was born out of this conflict.

Fundamentally, RTBF is a call for equilibrium between society's interest in free and open access to information and each person's right to informational self-determination. Germany has created a unique constitutional path, even though the European Union has codified this right under Article 17 of the General Data Protection Regulation (GDPR). Because RTBF is based on the Grundgesetz's basic right of personality (Article 2) and human dignity (Article 1), German jurisprudence provides a complex framework where press freedom and individual liberty coexist proportionately.

RTBF is still a developing idea in India, where the right to privacy was deemed a basic right in *K.S. Puttaswamy v. Union of India* (2017). Cases like *Ashutosh Kaushik v. Union of India* have shown judicial and legislative ambiguities. Therefore, the purpose of this essay is to investigate how the Indian debate on RTBF might be shaped by comparative ideas from German constitutional law. Through introspection, it makes the case that RTBF should be viewed as a dignitarian mechanism that promotes rehabilitation, digital identity, and democratic responsibility rather than as a weapon for erasure.

As humans become more and more digital, every single action results in an electronic footprint i.e., pictures, news articles, court documents, or social media updates that can be stored forever. Due to the way the internet is structured, it is almost impossible to make information disappear once it has been published. This longevity has confused the boundary between history and memory tremendously, and therefore, the term "digital haunting" that specialists use in such cases has become very common. Academics have consistently cautioned that the idea of digital permanence, in many ways, hampers the individual's capacity to change and evolve. In this regard, Mayer-Schönberger calls it "digital memory inflation", which confuses freedom of choice in the digital age.³

Not being able to move beyond one's past infringes on both the individual's right to privacy and their right to rehabilitation and reintegration into society.⁴ With this being said, the Right to Be Forgotten (RTBF) has become a vital legal weapon aimed at resuscitating human sovereignty. The concept gives people the liberty to have their personal data that is obsolete, unimportant, or disproportionate to the public removed or excluded. The European Union codified the RTBF in Article 17 of the General Data Protection Regulation (GDPR), which gives individuals a chance to apply for deletion if certain requirements are met.⁵

Germany was the one to start the ball rolling, though by constitutional interpretation of its Grundgesetz (Basic Law), much earlier, which sees privacy and data control as part of human

³ Mayer-Schönberger, *Delete: The Virtue of Forgetting in the Digital Age* (Princeton UP 2009).

⁴ Daniel J. Solove, *The Digital Person: Technology and Privacy in the Information Age* 8 (2004).

⁵ Regulation 2016/679, art. 17, 2016 O.J. (L 119) 1 (GDPR).

dignity.⁶ Through the 2017 Puttaswamy judgment in India, privacy was recognised as a fundamental right secured by Article 21 of the Constitution, thus marking a turning point for personal freedom.⁷ In spite of that, India does not have a legislated framework and uniform legal precedent on the matter, as evidenced by the court's acknowledgement of RTBF in several instances.⁸ This research puts forth the argument that RTBF should not be perceived as an appeal to historical forgetting but rather as a dignitarian right based on human agency.

This view is in line with the wider research, which RTBF is essentially an issue of visibility management, i.e. it does not involve the erasure of the past but rather making sure that the prominence of the search does not infringe on one's freedom.⁹ The paper compares how the German constitutional court decisions, i.e., *Volkszählungsurteil*¹⁰ (Census Act Case) and the Right to Be Forgotten I & II decisions that can be helpful to India in building a constitutionally compliant framework for the Right to Be Forgotten that takes into account constitutional morality, proportionality, and democratic transparency

Evolution of Data Protection and the Emergence of the Right to be Forgotten:

The rise of RTBF can be mainly attributed to changes in data protection laws. The very first example of a complete data protection law was the one that the German state of Hesse enacted in 1970, and it was aimed at limiting state surveillance through the use of centralised data systems. Over time, technology has drastically changed the way data is collected, and now it has become a widely accepted societal trend, which in turn has raised several new issues related to informational autonomy.

Data protection in Europe:

One of the first global attempts to align privacy rights across the member countries was the European Union Data Protection Directive (1995/46/EC).¹¹ The GDPR (2018) replaced this, establishing the "right to erasure" in Article 17, which is most commonly known as the Right to Be Forgotten.¹² The purpose of the Right to be Forgotten (RTBF) as outlined in Recital 65 of the GDPR is that people have the right to have their personal data deleted if it is no longer necessary, if consent is withdrawn, or if the data processing is in breach of the law. The landmark case of *Google Spain SL v. Agencia Española de Protección de Datos (AEPD)* (2014) clarified that search engines are considered data controllers and therefore they have to remove links when the content is outdated, irrelevant, or excessive.

Nonetheless, Germany's influence goes beyond passing the law. The Federal Constitutional Court's 1983 Census Act Case, which gave rise to the concept of informational self-

⁶ Grundgesetz [GG] arts. 1(1), 2(1) (F.R.G.).

⁷ (2017) 10 S.C.C. 1 (India).

⁸ 2021 SCC OnLine Del 3647 (India).

⁹ Ausloos, *The Right to Erasure in EU Data Protection Law* (OUP 2020); Lynskey, *The Foundations of EU Data Protection Law* (OUP 2015).

¹⁰ Lee A. Bygrave, *Data Protection Law: Approaching Its Rationale, Logic and Limits* 27 (2002).

¹¹ Council Directive 95/46, 1995 O.J. (L 281) 31 (EC).

¹² GDPR art. 17(1).

determination, was the first case to derive this from the Basic Law Articles 1(1) and 2(1).¹⁰ The Court held that people have the right to be informed about and to have control over the gathering, storing, and use of their personal data, thereby marking the beginning of the dignitarian privacy model. The ECtHR, in the same way, in *Rotaru v Romania* and *S and Marper v UK*, put the accent on the temporal limits for data retention, pointing out that storage without any time limits is against the right to respect for private life.¹³

The Digital Age and the Expansion of RTBF:

Traditional privacy protections became inadequate with the rise of social media, data aggregation, and algorithmic profiling. Researchers observed that the permanence of information can continue to stigmatise, make it difficult for rehabilitation, and even change the way collective memory works.¹⁴ RTBF came up as a solution, balancing the individual's right to move on with the society's right to keep its memories. In Germany, RTBF evolved from the constitution; in the EU, from legislation; and in India, from the judiciary. Each system reflects different legal traditions but still arrives at the same goal of protecting dignity in a time of constant exposure.

Constitutional And Jurisprudential Foundations: Germany and India Compared:

Germany: Human Dignity and Informational Self-Determination

Germany's constitutional framework is designed to protect the Right to Be Forgotten (RTBF). The Basic Law secures human dignity in its Article 1(1) and the right to free personality development in Article 2(1). Individually and collectively, these laws back the so-called "general right of personality" (Allgemeines Persönlichkeitsrecht)¹⁵ as Federal Constitutional Court (BVerfG) has been referring to it.

Volkszählungsurteil (1983) was a landmark decision: The Court annulled the Federal Census Act for violation of the citizens' right to informed self-determination.¹⁶ It warned that a social order, wherein individuals cannot figure out "who has information about them," would weaken personal freedom. The ruling was the groundwork of German data protection law.

In *Right to Be Forgotten I* (1 BvR 16/13) and *Right to Be Forgotten II* (1 BvR 276/17) decided in 2019, the Court extended the argument to the digital archives and search engines.¹⁷ The litigations dealt with the Internet publication of the past reports that led to the identification of the convicted persons. The Court held that the right to personality also includes the shield against the continuation of stigmatisation and that old information should be evaluated with regard to time, place, and continued relevance.¹⁸

¹³ *Rotaru v Romania* (2000) 8 BHRC 449; *S and Marper v UK* (2008) 48 EHRR 50.

¹⁴ *Google Spain SL v. Agencia Española de Protección de Datos (AEPD)*, Case C-131/12, 2014 E.C.R. 317.

¹⁵ *Volkszählungsurteil* (Federal Census Act Case), BVerfGE 65, 1 (1983) (F.R.G.).

¹⁶ Viktor Mayer-Schönberger, *Delete: The Virtue of Forgetting in the Digital Age* 12 (2009).

¹⁷ *Grundgesetz* [GG] arts. 1(1), 2(1).

¹⁸ *Volkszählungsurteil*, BVerfGE 65, 1 (1983).

The RTBF I & II decision explained how German constitutional law is related to EU law. According to BVerfG, it can directly incorporate the EU Charter of Fundamental Rights (CFR) when interpreting the Grundgesetz, thus providing a single system for domestic and supranational privacy protection.¹⁹ Besides, the elimination of personal data provision in Germany has been influenced by numerous episodes, for example, the Lebach case, where the Court ruled that media republication of criminal information after rehabilitation may constitute a violation of the right to dignity.²⁰ These decisions reflect the German concept of praktische Konkordanz—the process of harmonising opposing fundamental rights, e.g. privacy and freedom of expression, so as to achieve their greater realisation.

In Germany, the right to be forgotten is interpreted; the 1949 draft of the German constitution (Grundgesetz) did not give it a special place. In 2008, a Hamburg court ruled in the first instance that Werle and Lauber's right to privacy was breached by their names appearing in archived publications. The court ordered the removal of the identities. After serving their punitive terms, people have the right to have their convictions not disclosed, according to a 1973 German court ruling. The names were then deleted from the German Wikipedia by editors. In 2009, however, the German Constitutional Court reversed the decision on the basis that this was a constraint of the constitutionally guaranteed freedom of the press, and that Werle and Lauber would have to admit a certain degree of interference into their privacy.

The Federal Constitutional Court of Germany addressed a challenge to the German Federal Census Act, 1983 in the Federal Census Act Case (Volkszählungsurteil). The Court derived a "fundamental right of informational self-determination" from Articles 1(1) and 2(1) of the Constitution of Germany safeguards the fundamental rights to human dignity and freedom to develop one's personality. Elucidation on the importance of this right in the reference of risks occasioned by modern data processing, the Court noted that: *"The freedom of individuals to make plans or decisions in reliance on their personal powers of self-determination may be significantly inhibited if they cannot with sufficient certainty determine what information on them is known in certain areas of their social sphere and in some measure appraise the extent of knowledge in the possession of possible interlocutors. A social order in which individuals can no longer ascertain who knows what about them and when, and a legal order that makes this possible would not be compatible with the right to informational self-determination..."*

These cases opened a Pandora's box with an indispensable question of whether, in a globally associated world in which netizens produce much of the online content, it is likely to lead people to publish information about such cases. While laws may in some cases offer a shield against the publication of names, this is often erratic, given the overpowering nature of the internet. The Court of Justice of the European Union (CJEU) answered the question and, on May 13, 2014,

¹⁹ *Right to Be Forgotten I*, 1 BvR 16/13 (F.R.G. 2019).

²⁰ *Lebach Case* (1973) 35 BVerfGE 202.

held in *Google Spain v AEPD and Mario Costeja González*²¹ that there was a “right to be forgotten” in the context of data processing on Internet search engines.

The case had been brought by a Spanish man, Mario González, after he failed to remove an auction notice of his repossessed home from 1998, available on La Vanguardia, a widely-read newspaper website in Catalonia. He primarily endeavoured to have the article removed by complaining to the Spanish Agency of data protection, which disallowed the claim on the basis that it was lawful and truthful, but accepted a complaint against Google and asked Google to get rid of the results. Google was sued in the Spanish *Audiencia Nacional* (National High Court), which referred a series of questions to the European Court of Justice. The court ruled in *Costeja* that search engines are accountable for the content they point to and thus, Google was obligated to comply with EU data privacy laws. As a measure of approval for the verdict, between June and mid-September, Google received 135,000 deletion requests referring to 470,000 links, with most coming from Britain, France and Germany. Therefore, such blatant approval for the removal of personal content from the search engines ignited the environment of asserting the right to be forgotten in Europe.

As a result, the German courts determined that the Federal Constitutional Court's earlier case law addressed the issue of whether historical events may be revisited through new coverage. The main issue now is that material is permanently accessible on storage media and the Internet. In the past, the public could only access information that was mostly distributed through print media and radio broadcasts for a brief time, until it was mostly forgotten. However, information is still accessible today after it has been digitised and posted online. Knowledge's lasting impacts are no longer restricted to a passing memory in public conversation; instead, anybody may immediately and permanently access the knowledge.

The necessity of the “right to be forgotten” takes on a new legal dimension in light of modern information technology and the spread of information online. As a result, this right began to be understood in terms of the right to human dignity and the right to develop one's individuality (*Articles 1(1) and 2(1) of the German Constitution*).²²

India: Privacy as the Constitutional Anchor:

Privacy law in India has been built brick by brick through court decisions and has gradually matured over time. In its earlier decisions, the Supreme Court in *M.P. Sharma v. Satish Chandra* (1954)²³ and *Kharak Singh v. State of U.P.*²⁴ denied to conferment of a constitutional status to

²¹ C-131/12, EU:C:2014; German Law Journal <https://germanlawjournal.com/right-to-be-forgotten-i-1-bvr-16-13/> (last visited 10 March 2025).

²²cf. CJEU, Judgment of 21 July 2011, Fuchs and Others, C-159/10 inter alia, EU:C:2011:508, paras. 61 and 62 – with reference to Art. 15(1) of the Charter –; Judgment of 15 January 2014, Association de médiation sociale, C-176/12, EU:C:2014:2, paras. 26 and 27; cf. broad discretion in CJEU, Judgment of 14 February 2008, Dynamic Medien, C-244/06, EU:C:2008:85, para. 41 et seq.; https://www.bundesverfassungsgericht.de/DE/Homepage/homepage_node.html (Last Visited 15 March, 2025)

²³ A.I.R. 1954 S.C. 300 (India)

²⁴ AIR 1963 Supreme Court 1295

privacy, but the stance changed drastically in *Justice K.S. Puttaswamy (Retd.) v. Union of India*.²⁵ A nine-judge bench unanimously held that privacy is a part of the right to life and personal liberty guaranteed under Article 21.

The court decision laid down the foundation for the right to be forgotten, holding that people should be entitled to erase personal data that is "no longer necessary or relevant."²⁶ After Puttaswamy, several High Courts have also recognised the Right to be Forgotten in different instances. In *Zulfiqar Ahmad Khan v. Quintillion Business Media Pvt. Ltd.*²⁷ the Delhi High Court restrained the republication of the defamatory content to protect the digital reputation.²⁸

The Karnataka High Court in *X v. Registrar General* ordered the removal of the woman's identity from the judicial records, recognising the Right to Be Forgotten in emotionally sensitive situations.²⁹ More recent decisions of the High Court, namely *Jorawar Singh Mundy*, *Vinesh*, and *Subhransu Sekhar Padhi* cases, show, in addition, the Indian courts' inclination to acknowledge the existence of RTBF in reputational, gender-sensitive and acquittal-related contexts.³⁰

In *Ashutosh Kaushik v. Union of India*³¹, the Delhi High Court sought the opinion from the government agencies and Google regarding the removal of the old news of the minor's conviction, but refrained from giving any clear guidance, thus pointing out the absence of procedural clarity.

In the *Ashutosh Kaushik v. Union of India* case, given Christian Lous Lange's well-known statement that "*technology is a useful servant but a dangerous master*," the case of *Ashutosh Kaushik v. Union of India*, which is being considered by the Delhi High Court, has generated interest. The petition, which was filed under Article 226 of the Indian Constitution, asks the honorable court to recognize the right to be forgotten by issuing a directive to remove the petitioner's images, videos, and articles from the deceased buried past that have no relevance to the present because doing so would negatively impact the petitioner's life and personal freedom as guaranteed by Article 21 of the Indian Constitution.³² The petitioner has expanded in many areas of life since beginning from the beginning and working their way up the mountains, but the intimidating historical evidence on the virtual stage snatches away the essence of the fulfilling life that Article 21 of the Indian Constitution guarantees.

²⁵ (2017) 10 SCC 1.

²⁶ Id. at ¶ 636 (per Chandrachud J.).

²⁷ 2021 SCC Online Del 3647.

²⁸ *X v. Registrar General, High Court of Karnataka*, W.P. No. 49754/2018 (Kar. H.C. 2019).

²⁹ Id.

³⁰ *Jorawar Singh Mundy v Union of India* 2021 SCC OnLine Del 2306; *Vinesh v Registrar General* 2022 SCC OnLine Mad 574; *Subhransu Sekhar Padhi v State of Odisha* 2020 SCC OnLine Ori 878.

³¹ W.P. (C) No. 9343/2021 (Del. H.C.).

³² Swathi K. Hosamani, *Analysing India's Journey With the Right to Be Forgotten*, 2582-8878 (IJLLR) (May 20, 2025).

As a well-known actor and acclaimed reality show star, the petitioner has won the affection, respect, and admiration of the nation's people. The parties to the lawsuit are government agencies at the ministerial level that are responsible for articulating the nation's laws and regulations.

Respondent number two is the Press Council of India, an autonomous quasi-judicial organisation that was established with the dual goals of upholding the right to the press and sustaining the improved newspaper standard. The Press Information Bureau (PIB), the Government of India's central agency, is respondent number three.

The Electronic Media Monitoring Centre (EMMC), respondent number four, is tasked with keeping an eye on the programming and advertising codes that permit satellite TV stations to spot any infractions under the Cable Television Network (Regulation) Act of 1995. It is in charge of sending the ministry reports that emphasise the importance to the general public. Google India Private Limited, a division of Google LIC with its registered offices in California, the United States, is Respondent No. 5. According to Article 12 of the Indian Constitution, respondents Nos. 1, 2, 3, and 4 are within the purview of the "state" consideration.

The argument that the sentence served was sufficient, and that rehabilitation would be impossible due to the overwhelming number of internet users, has led to the extension of arguments based on the French Jurisprudential concept of "*Droit à l'oubli*," or the right to be forgotten. The internet has become a new phenomenon, and the result of society's digitisation, which puts people's lives, liberties, and privacy at risk, is a "network society." A person cannot transcend their previous mistakes and start anew with the help of the internet.

The Digital Personal Data Protection Act, 2023 (DPDP Act)³³ It is a step forward in legislation. Section 12 gives people the right to correct and remove their personal data, yet it does not expressly mention the Right to Be Forgotten or its limits³⁴. Critics argue that such a provision weakens the Act's potential to protect dignity against the digital permanence of data³⁵.

The Right to Be Forgotten in India is recognised by the courts but not yet legislated by the Parliament, thus reflecting a constitutional-level promise coexisting with institutional hesitance. Law scholarship criticises the DPDP Act for not having explicit RTBF provisions and warns that the lack of statutory delisting provisions in the digital environment is a factor that hinders dignity and the process of rehabilitation.³⁶

³³ The Digital Personal Data Protection Act, No. 22 of 2023, § 12 (India).

³⁴ Id.

³⁵ Pallavi Sharma, "Balancing Privacy and Public Interest: The Evolving Jurisprudence of the Right to Be Forgotten in India," *AZB & Partners Legal Insight* (Sept. 18, 2024).

³⁶ Ramanathan, 'The Limits of the DPDP Act' (2023) *Indian Law Review*; Sukumar (2022) commentary on RTBF and DPDP Act.

Comparative Insights and the Proportionality Framework:

Origin: Mapping through Self-Reflexive Constitutional Reasoning

A thorough comparison of the right to be forgotten (RTBF) starts by explaining its definition as well as its local and international background in each case. In Germany, these rights stem from the constitution. Articles 1(1) and 2(1) of the Basic Law (BL) guarantee the respect of human dignity and the free development of a person's character.³⁷

On this basis, the German Federal Constitutional Court (BVerfG) in the *Volkszählungsurteil* (Census Act Case) recognised the "fundamental right of informational self-determination".³⁸ Moreover, the BVerfG in its rulings of 6 November 2019, *Right to Be Forgotten I* (1 BvR 16/13) and *Right to Be Forgotten II* (1 BvR 276/17) has expressly linked the evaluation of archived news and search engine indexations to fundamental rights.³⁹

In India, the Right to Be Forgotten (RTBF) is not recognised as a separate constitutional right yet and is inferred from the right to privacy as provided by Article 21 of the Indian Constitution. The landmark decision of the Supreme Court in *Justice K.S. Puttaswamy (Retd.) v. Union of India* identified privacy as the most essential element of life and liberty.⁴⁰ Various High Court rulings followed, among them the *Zulfiqar Ahmad Khan v. Quintillion Business Media Pvt. Ltd.*, which acknowledged the RTBF as one of the aspects of privacy, though it lacks a well-defined doctrinal basis.⁴¹

In effect, Germany places the Right to be Forgotten (RTBF) within a constitutional framework of human dignity and data governance, giving it a higher status, while India sees it as a secondary right under the umbrella of privacy. German law cases individual autonomy over historical data, whereas the Indian legal system emphasises the control of one's digital identity through privacy.

The method of horizontal constitutional comparison is crucial: local judges and scholars look at foreign precedents as mirrors that can refine their own constitutional structures.⁴² Therefore, German case law offers India valuable insights without imposing the necessity of total integration.

Application: Adopting and Applying Jurisprudential Variables

Once the normative basis has been set, the actual application of RTBF may be looked at through the points that originate from German law and have been modified for the Indian context.

³⁷ *Grundgesetz* [GG] [Basic Law] arts. 1(1), 2(1) (F.R.G.).

³⁸ *Volkszählungsurteil* (Federal Census Act Case), BVerfGE 65, 1 (1983) (F.R.G.).

³⁹ Bundesverfassungsgericht [BVerfG], Order of 6 Nov. 2019, 1 BvR 16/13 (Germany) (*Right to Be Forgotten I*).
⁴⁰ (2017) 10 S.C.C. 1 (India).

⁴¹ P. Mali, *Privacy Law: Right to Be Forgotten in India*, 7 NLIU Law Rev. 17, 17-33 (2022).

⁴² P. Upadhyay & R.K. Verma, *The Right to Be Forgotten in India: Compatibility with Part III of the Constitution*, ShodhKosh, V(2) 1256-65 (2024).

1. Temporal Significance

In RTBF I, the BVerfG held that the passing of time is the most important factor: initially, media coverage of crimes may be allowed, but as time goes by, interest of the public decreases while the individual's interest in rehabilitation grows. The Court indicated that the continued availability of old articles "under the same conditions" may violate the right to personality.⁴³

Ashutosh Kaushik v. Union of India (2021) is related to an event in 2009 where a misdemeanour ended in a monetary fine and a two-day jail sentence. Twelve years later, the reports kept being available online, which obstructed his social agencies.⁴⁴ By applying Germany's temporal relevance standard, the Indian courts would be in a better position to decide when the individual's interest in rehabilitation is higher than the public's interest in historical information.

2. Accessibility, Search Visibility, and the Dissuading Effect

The German Court stressed that content being available online is not the only important factor, but rather its visibility and search prominence; top search results, lack of de-indexing, or continuous reappearance cause a "chilling effect" on those concerned.⁴⁵ Academics further point out that such algorithmic visibility has become fundamental to the privacy violations of the present time, and courts must now treat ranking and search visibility as elements of RTBF when conducting their assessments.⁴⁶

This factor is still largely neglected in India. The petitioner in Kaushik was going through a long period of prominence in search results that prevented him from getting a job and integrating into society. By using Germany's visibility factor and algorithmic prominence, Indian jurisprudence may broaden the RTBF scope from simple deletion to facilitation of the digital rehabilitation process.

3. Effects on Dignity, Rehabilitation, and Collective Memory

According to the German case law, the Right to Be Forgotten (RTBF) is not a request for changing historical records, but is rather a human dignity-related instrument giving the offenders the opportunity to move beyond their stigma while at the same time protecting collective memory and media freedom.

India's lack of a systematic philosophy is risking either too much privacy protection (public records being wiped out) or not enough dignity protection (stigma being maintained). The German model provides the means for a proportional balance of rights rather than simply choosing one side.

⁴³ M. Friedl, A New European Fundamental Rights Court: The German Constitutional Court on the Right to Be Forgotten, 5 Eur. Papers 1530 (2020).

⁴⁴ W.P.-C No. 9343/2021 (Del. H.C.).

⁴⁵ InsidePrivacy, German Constitutional Court Reshapes "Right to Be Forgotten" and Expands Its Oversight of Human Rights Violations (3 Dec. 2019).

⁴⁶ Peña & Le Métayer, 'On Algorithmic Transparency and Accountability' (2019) 34 *Computer Law & Security Review* 105.

Extent: Balancing the Constitutional Seesaw

The successful execution of the right to be forgotten (RTBF) depends on balancing different rights - privacy, freedom of expression, the freedom of the press, and the public's right to knowledge.

In Germany, the principle of *praktische Konkordanz* (practical concordance) allows the courts to balance these rights: no fundamental right is inherently subordinate; rather, each is granted its optimal realisation through a four-stage proportionality test:

- Lawful objective;
- Appropriateness;
- Indispensability;
- Strict proportionality.⁴⁷

India has adopted proportionality in *Puttaswamy* and other privacy cases; however, the implementation of this principle in the RTBF context is still not very clear. Without clear standards, Indian courts may adjudicate differently on a case-by-case basis. Introducing Germany's systematic balancing test might bring more consistency and legitimacy. The UK High Court in *NT1 & NT2 v Google* adopted a similar structured proportionality approach, and based on it, RTBF was granted to one claimant and the other was denied.⁴⁸

The Paul Termann case in Germany, though not a formal BVerfG decision, is an example of how the rights of personality and the press archives interact: the Court inferred that the perpetrator is not the holder of an absolute right to control all historical publicly available information i.e., communication patterns and public interest limit the claim.⁴⁹

In India, the right to be forgotten should be understood as a digital search result delisting or regulation of visibility method, thus ensuring that justice remains open and dignity is protected, rather than as a means of erasing history.

Analysis of Study:

Germany and India share a common issue that is reflected in their constitutions, which is the need to protect individual dignity and autonomy online while still maintaining democratic openness and freedom of speech. The legal system in Germany demonstrates that such a balance is achievable through the use of constitutional principles, proportionality, and a sense of time.

India, though, is still a very different matter; it is quite basic in the development of a constitutional framework even after *Puttaswamy*. Concepts like Julie Cohen's advocate that a person's freedom must be granted a certain space that is necessary for the construction of

⁴⁷ R. Alexy, *A Theory of Constitutional Rights* 66 (J. Rivers trans. 2002).

⁴⁸ *NT1 & NT2 v Google LLC* [2018] EWHC 799 (QB).

⁴⁹ *Id.*

identity, which the continued existence of information in digital form threatens unless this is taken care of by delisting rights.⁵⁰

There are three major lessons derived from the statutory framework:

1. One example is the German data protection framework, which, along with the GDPR, very clearly provides for the implementation of the erasure and delisting rights. The DPDP Act of India guarantees writers the right to correct the records and delete them, and the Right to be forgotten is not provided for in an explicit manner. 16 That being said, the enactment of the Right to be Forgotten in India will largely depend on the degree of legislative detail.
2. Judicial proportionality application: The four-step test of Germany is an excellent example of a framework that can be used by other countries. The Indian Courts can implement this framework in such a way that it will make them less prone to produce arbitrary results and the outcomes will be more foreseeable.
3. The Federal Commissioner for Data Protection in Germany, among others, is responsible for compliance with institutional mechanisms and procedural transparency. The Data Protection Board of India, established under the DPDP Act, requires clearer directions and more detailed procedures to handle requests for the Right to be Forgotten.

Contextual Adaptation for India:

India ought to shape the Right to be Forgotten in accordance with its unique constitutional values. Unlike Germany, where archival media are mostly in private hands, India, with its well-established tradition of open justice and accessible court records, cannot feasibly allow the total erasure of information. India could opt for making the information less visible by removing it from search engines rather than totally erasing it from archives, thus maintaining both openness and dignity. Other jurisdictions are doing the same, e.g. Canada in *Google v Equustek*, where more liberal policies have been adopted to allow for worldwide delisting orders, thus highlighting the differences in global trends.⁵¹

The Way Forward:

An Indian RTBF model that works well can be based on three main components:

- Legislative clarity: The DPDP Act should provide for an explicit clause setting out the Right to be Forgotten, or that it be the subject of further legislation.
- Judicial approach: The court should use proportionality and consideration of time when assessing the matter.
- Administrative regulation: The Data Protection Board should be given the authority to regulate and decide on the implementation of the RTBF claims.

⁵⁰ Julie E. Cohen, 'What Privacy Is For' (2013) 126 *Harvard Law Review* 1904.

⁵¹ *Google v Equustek Solutions Inc* 2017 SCC 34.

Conclusion:

The right to be forgotten is a major legal problem that the digital era has brought in. It is about how to reconcile personal freedom, dignity, and rehabilitation with freedom of expression and the memory of the community. Germany offers an advanced model: it is based on dignity, is proportionally structured, is temporally approached, and is legally precise. India, on the other hand, despite its constitution, requires a lot of doctrinal, legislative and institutional changes.

If India adopts the German model while modifying it according to the democratic, pluralistic and transparency-oriented legal framework of India, it may turn the Right to be Forgotten from a scattered judicial response into a coherent fundamental right. The outcome would be a digital environment in which a person is not constantly weighed down by his/her past, and at the same time, society keeps its ability to remember and reflect.



Judicial Recognition of State Criminality: Comparative Insights from Environmental Omissions in Sri Lanka and India

Suranga Wimalasena¹

Abstract:

Large-scale environmental harm linked to corporate activity is often facilitated by systemic failures of state regulation, oversight, and enforcement. While existing scholarship on state crime has extensively examined state violence, abuse of power, and direct state wrongdoing, regulatory omission by the state—particularly in environmental governance—has received comparatively limited criminal and doctrinal scrutiny. Legal scholarship, meanwhile, has tended to characterise such failures as deficits of governance rather than as legally consequential state conduct. This article addresses that gap through a doctrinal and comparative analysis of the Sri Lankan Supreme Court’s X-Press Pearl judgment and the Indian Supreme Court’s decision in Vanashakti v. Union of India. Through close examination of judicial reasoning, the articulation of affirmative state duties, mechanisms of responsibility attribution, and remedial approaches, the article analyses how both courts respond to systemic state non-feasance in environmental regulation. The comparative analysis identifies convergences in recognising regulatory omission as a legally actionable form of state wrongdoing, alongside divergences in judicial technique, particularly with respect to preventive versus post-harm intervention and the deployment of continuing judicial supervision. The article argues that these judgments expand the conceptual and doctrinal boundaries of state criminality by foregrounding autonomous state omission as a basis of accountability, and it assesses their implications for environmental governance and transnational regulatory responsibility.

Keywords: State criminality, State omission and non-feasance, Environmental regulatory failure, Judicial supervision and accountability, State responsibility.

Introduction:

Large-scale environmental disasters associated with corporate activity are frequently the product of sustained failures by state institutions to regulate, supervise, and enforce legal standards governing hazardous economic activity.² In sectors such as shipping, extractive industries, and industrial production, environmental harm often arises not from isolated regulatory errors but from entrenched patterns of state omission. Despite this, the role of state inaction in producing environmental harm remains conceptually underdeveloped in both criminological and legal scholarship.

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² Ronald C. Kramer, Raymond J. Michalowski & David Kauzlarich, State-Corporate Crime: Wrongdoing at the Intersection of Business and Government, in *State-Corporate Crime: Wrongdoing at the Intersection of Business and Government* 1 (Ronald C. Kramer & Raymond J. Michalowski eds., 2002); and Rob White, *Transnational Environmental Crime: Toward an Eco-Global Criminology* (2011).

State criminality scholarship has traditionally focused on direct state violence, abuse of authority, or coercive wrongdoing, leaving omission-based forms of harm comparatively marginal. Persistent regulatory non-feasance—particularly where states fail to discharge known duties of prevention and oversight—has rarely been examined as autonomous wrongful conduct, rather than as administrative weakness or governance failure.³ This gap obscures how structural state inaction can generate serious and foreseeable environmental harm.

A similar limitation is evident in environmental law and state responsibility doctrine. Although positive state obligations grounded in prevention, due diligence, and precaution are firmly established,⁴ failures to comply with these obligations are often framed as compliance deficits rather than as legally attributable conduct. This framing weakens accountability where harm materialises through sustained state omission, notwithstanding the central role of omission in attribution under international law.

Recent judicial practice, particularly in the Global South, suggests a developing shift in this regard. Apex courts have increasingly scrutinised regulatory inaction and articulated enforceable affirmative duties in environmental governance, sometimes adopting interventionist remedial approaches that exceed traditional models of judicial restraint.⁵ These developments raise important questions about whether domestic courts are beginning to reconceptualise state omission as a form of legally consequential wrongdoing.

This article addresses these questions through a doctrinal and comparative analysis of the Sri Lankan Supreme Court's *X-Press Pearl* judgment⁶ and the Indian Supreme Court's decision in *Vanashakti v. Union of India*.⁷ By examining how each court frames state duties, omission, and remedial authority in the context of private economic activity, the article argues that these judgments contribute to an emerging understanding of state omission as a basis of responsibility within a broader framework of state criminality, with significant implications for environmental governance and transnational accountability.

State Crime, State Corporate Crime and the Problem of State Omission:

The criminal liability of the state has long been contested within both criminal law and criminological theory. Conventional legal doctrine has resisted treating the state as a criminal actor, grounded in the assumption that states function as enforcers rather than violators of criminal law.⁸ Early criminological work on state crime, therefore, concentrated on acts already

³ Steve Tombs & David Whyte, *The Myths and Realities of Deterrence in Workplace Safety Regulation*, 22 BRIT. J. Criminology 746 (2015).

⁴ Patricia Birnie, Alan Boyle & Catherine Redgwell, *International Law and the Environment* (3d ed. 2009); and Pierre-Marie Dupuy & Jorge E. Viñuales, *International Environmental Law* (2d ed. 2018).

⁵ Gautam Bhatia, *The Transformative Constitution: A Radical Biography in Nine Acts* (2019).

⁶ *X-Press Pearl Marine Environmental Disaster Case*, S.C. (Fundamental Rights) Nos. 141/2021 et al. (Sup. Ct. Sri Lanka July 25, 2025).

⁷ *Vanashakti v. Union of India*, (Writ Petition (C) No. 1394 of 2023) (Supreme Court of India May 16, 2025) (reported as 2025 SCC OnLine SC 1703).

⁸ David L. Rothe & David O. Friedrichs, *The State of State Crime Research: Current Issues and Prospects*, 37 SOC. JUST. 1 (2006).

criminalised under domestic or international law and committed by state officials in an official capacity, such as torture, enforced disappearances, and extrajudicial killings.⁹ While analytically significant, this approach individualised responsibility and left the state as an institutional actor largely insulated from criminal attribution.

Critical scholarship on state crime challenged this narrow legalism by demonstrating how states produce harm through structural, organisational, and policy-driven practices that may fall outside formal criminal definitions.¹⁰ Scholars have shown that legal definitions of crime are contingent, politically constructed, and often shaped by state interests, rendering legality an unreliable boundary for assessing state wrongdoing.¹¹ This shift redirected attention from formal criminalisation to the relationship between state power, harm, and responsibility, expanding the conceptual scope of state criminality.

Within this expanded framework, criminologists have increasingly recognised that omission-based conduct—such as regulatory withdrawal, weak enforcement, or deliberate non-intervention—may constitute serious state wrongdoing where it generates foreseeable and preventable harm.¹² In contexts involving hazardous economic activity, sustained regulatory non-feasance can be functionally equivalent to acts of commission in its social consequences. Yet omission remains conceptually marginal, often reframed as administrative failure or governance deficit rather than analysed as autonomous state conduct capable of grounding responsibility.

This limitation is particularly evident in environmental governance. Although legal regimes impose affirmative state obligations through constitutional, statutory, and international frameworks, scholarly attention has largely focused on compliance and enforcement capacity rather than the legal and normative consequences of state inaction itself.¹³ By foregrounding state omission, this article advances a state criminality framework that conceptualises systematic regulatory non-feasance as legally consequential wrongdoing. Through a comparative analysis of the *X-Press Pearl* and *Vanashakti* judgments, it examines how judicial reasoning may contribute to the evolving recognition of state omission as a basis of accountability within domestic and international legal orders.

⁹ David O. Friedrichs, *The Crime of the American State: Elite Illegality and the Dynamics of State Power* (1998); and Penny Green & Tony Ward, *State Crime: Governments, Violence and Corruption* (2004).

¹⁰ William J. Chambliss, *State-Organised Crime*, 27 *Criminology* 183 (1989); and Ronald C. Kramer & Raymond J. Michalowski, *Toward an Integrated Theory of State-Corporate Crime*, 15 *CRIME & SOC. JUST.* 18 (1990).

¹¹ Paddy Hillyard, Christina Pantazis, Steve Tombs & Dave Gordon, *Beyond Criminology: Taking Harm Seriously* (2004); and Steve Tombs & David Whyte, *The Myths and Realities of Deterrence in Workplace Safety Regulation*, 22 *BRIT. J. Criminology* 746 (2015).

¹² David Whyte, *Regulating Safety or Legitimising Harm? Government, Industrial Safety and the Law*, 27 *LAW & POL'Y* 225 (2007); and Rob White, *Transnational Environmental Crime: Toward an Eco-Global Criminology* (2011).

¹³ Patricia Birnie, Alan Boyle & Catherine Redgwell, *International Law and the Environment* (3d ed. 2009); and Pierre-Marie Dupuy & Jorge E. Viñuales, *International Environmental Law* (2d ed. 2018).

The X-Press Pearl Judgment: Doctrinal Expansion through Judicial Supervision:

The *X-Press Pearl* maritime disaster off the western coast of Sri Lanka unfolded within a dense factual and legal context marked by the carriage of hazardous cargo, heightened environmental risk, and layered state responsibility. The ignition and eventual sinking of the vessel in proximity to the coastline resulted in extensive marine and coastal pollution. Beyond the conduct of private actors, however, the incident exposed systemic weaknesses in the state's regulatory and institutional framework governing maritime safety, environmental protection, and emergency preparedness. These structural deficiencies provide a critical basis for examining state omission as a source of environmental harm where risk was foreseeable and subject to established regulatory oversight.¹⁴

From a legal perspective, the regulation of maritime transport and environmental protection in Sri Lanka is underpinned by a network of statutory and administrative duties imposed on multiple state institutions. These include obligations to monitor the carriage of dangerous substances, enforce compliance with maritime safety and pollution prevention standards, and ensure the timely coordination and activation of emergency response mechanisms. Such duties are not discretionary but arise from legally mandated frameworks allocating responsibility for risk prevention and harm mitigation to designated state authorities. Where these obligations are inadequately discharged, regulatory omission acquires legal significance, providing a doctrinal foundation for analysing state non-feasance as a contributory form of wrongdoing rather than as mere administrative failure.¹⁵

Viewed through this lens, the *X-Press Pearl* judgment represents not simply a judicial response to an environmental catastrophe, but an engagement with systemic state failure. The Supreme Court expressly examined omissions in the discharge of legally imposed duties, including deficiencies in monitoring hazardous cargo, enforcing maritime safety standards, and activating emergency response frameworks. In foregrounding these failures, the Court departed from conventional approaches that characterise regulatory inaction as a governance deficit, instead recognising state non-feasance as a legally consequential source of harm.¹⁶ This reasoning aligns with critical state crime scholarship that identifies omission-based harm as an integral, though under-recognised, dimension of state criminality.¹⁷

A notable feature of the judgment is the Court's exercise of continuing supervisory jurisdiction. By directing the Attorney General to report on the implementation of remedial measures within a specified timeframe, the Court adopted a preventive and oversight-oriented approach aimed

¹⁴ Rob White, *Transnational Environmental Crime: Toward an Eco-Global Criminology* (2011); and David Whyte, *Regulating Safety or Legitimising Harm? Government, Industrial Safety and the Law*, 27 *LAW & POL'Y* 225 (2007).

¹⁵ Patricia Birnie, Alan Boyle & Catherine Redgwell, *International Law and the Environment* (3d ed. 2009); and Pierre-Marie Dupuy & Jorge E. Viñuales, *International Environmental Law* (2d ed. 2018).

¹⁶ Nirmal Ranjith Gunawardena, *State Responsibility and Environmental Harm: Lessons from the X-Press Pearl Disaster*, 28 *SRI LANKA J. INT'L L.* 45 (2023).

¹⁷ William J. Chambliss, *State-Organised Crime*, 27 *Criminology* 183 (1989); and Steve Tombs & David Whyte, *The Myths and Realities of Deterrence in Workplace Safety Regulation*, 22 *BRIT. J. Criminology* 746 (2015).

at addressing the structural conditions that enabled the harm. This technique reflects an understanding of state omission as an ongoing risk rather than a concluded failure, and resonates with broader trends in constitutional and environmental adjudication that emphasise judicial supervision as a mechanism for enforcing affirmative state duties.¹⁸ Such supervisory practices reinforce the conception of omission as actionable conduct with enduring legal consequences.

From a state criminality perspective, the doctrinal significance of *X-Press Pearl* lies in its recognition of autonomous state omission as a basis of accountability, independent of collusion or direct facilitation of private wrongdoing. The judgment demonstrates that sustained regulatory non-feasance—where the state possesses knowledge, capacity, and legal authority to act—can generate serious environmental harm and attract judicial sanction. In doing so, the Court contributes to the gradual expansion of state crime analysis beyond acts of commission to encompass structural and institutional forms of omission, thereby strengthening the normative foundations for holding states accountable for environmentally destructive outcomes arising from regulatory failure.

Vanashakti v. Union of India: Preventive State Duties and Regulatory Integrity

The decision of the Indian Supreme Court in *Vanashakti v. Union of India*¹⁹ arose from long-standing and well-documented failures of state authorities to prevent environmental degradation in ecologically sensitive areas subject to clear statutory protection. The case concerned extensive environmental harm linked to construction and development activity, but its doctrinal significance lies in the Court's sustained focus on regulatory inaction by public authorities rather than on the conduct of private actors alone. The judgment situates environmental harm within a broader pattern of institutional neglect, thereby providing a critical entry point for analysing state omission as a source of legally consequential wrongdoing.²⁰

From a legal standpoint, environmental governance in India is anchored in a dense framework of constitutional mandates, statutory duties, and administrative obligations, including the public trust doctrine, the precautionary principle, and the duty of due diligence in environmental protection. These obligations impose affirmative responsibilities on state authorities to regulate land use, enforce environmental clearance requirements, and prevent foreseeable ecological harm. The Court's reasoning underscores that these duties are not aspirational but legally binding, and that sustained failure to enforce them constitutes a breach of the state's obligations rather than a mere lapse in administrative efficiency.²¹

The Supreme Court explicitly identified patterns of regulatory non-feasance, including failures to monitor compliance, delayed enforcement action, and tolerance of unlawful development

¹⁸ Shanthi Fernando, *Judicial Review, Supervisory Jurisdiction and Environmental Governance in Sri Lanka*, 15 SRI LANKA J. INT'L L. 89 (2021).

¹⁹ Supreme Court of India, *Vanashakti v. Union of India*, W.P. (C) No. 2025/2025 (2025).

²⁰ Rob White, *Transnational Environmental Crime: Toward an Eco-Global Criminology* (2011); and Paddy Hillyard, Christina Pantazis, Steve Tombs & Dave Gordon, *Beyond Criminology: Taking Harm Seriously* (2004).

²¹ Patricia Birnie, Alan Boyle & Catherine Redgwell, *International Law and the Environment* (3d ed. 2009); and Pierre-Marie Dupuy & Jorge E. Viñuales, *International Environmental Law* (2d ed. 2018).

despite clear statutory prohibitions. By foregrounding these omissions, the Court moved beyond a narrow focus on individual violations and instead addressed the structural conditions through which environmental harm was enabled. This approach aligns with critical state crime scholarship that emphasises how harm may be produced through routine, normalised, and legally authorised inaction by state institutions, particularly where risk is foreseeable and preventable.²²

A defining feature of the *Vanashakti* judgment is the Court's adoption of continuing mandamus and supervisory oversight to ensure compliance with its directions. Rather than confining its role to declaratory relief or retrospective adjudication, the Court retained jurisdiction to monitor the implementation of remedial measures and institutional reforms. This technique reflects an understanding of state omission as an ongoing and structural risk, requiring sustained judicial engagement to secure compliance with environmental obligations. Such interventionist approaches resonate with broader trends in South Asian constitutionalism, where courts have increasingly employed supervisory remedies to operationalise positive state duties in contexts of systemic regulatory failure.²³

From a state criminality perspective, the significance of *Vanashakti* lies in its implicit recognition that sustained regulatory inaction can generate serious environmental harm and attract legal responsibility, even in the absence of direct state participation in harmful activities. The judgment reframes environmental degradation not merely as a consequence of private misconduct, but as the outcome of institutionalised state neglect within legally regulated domains. In doing so, it advances an omission-centred understanding of state wrongdoing that complements and extends criminological accounts of state crime beyond acts of commission to encompass structural and systemic failures of governance.²⁴

Comparative Analysis: Judicial Responses to State Omission:

A comparative examination of the *X-Press Pearl* (Sri Lanka) and *Vanashakti v. Union of India* (India) judgments reveals both convergences and divergences in how apex courts conceptualise and respond to state omissions in environmental governance. Both judgments foreground the legal significance of regulatory failure, demonstrating that non-feasance by state institutions is not merely an administrative lapse but a structural contributor to environmental harm.²⁵ In this sense, they converge in recognising that state omission can be legally consequential even absent

²² William J. Chambliss, *State-Organised Crime*, 27 CRIMINOLOGY 183 (1989); and David Whyte, *Regulating Safety or Legitimising Harm? Government, Industrial Safety and the Law*, 27 LAW & POL'Y 225 (2007).

²³ Gautam Bhatia, *The Transformative Constitution: A Radical Biography in Nine Acts* (2019).

²⁴ Steve Tombs & David Whyte, *The Myths and Realities of Deterrence in Workplace Safety Regulation*, 22 BRIT. J. Criminology 746 (2015); and Rob White, *Transnational Environmental Crime: Toward an Eco-Global Criminology* (2011).

²⁵ Patricia Birnie, Alan Boyle & Catherine Redgwell, *International Law and the Environment* (3d ed. 2009).

collusive or symbiotic engagement with corporate actors, thereby extending the analytical terrain of state–corporate crime theory.²⁶

Key divergences emerge in the temporal and remedial approaches adopted by the courts. The Sri Lankan Supreme Court, in *X-Press Pearl*, intervened post-disaster, employing supervisory jurisdiction to direct the Attorney General to report on the implementation of remedial measures. This reflects a focus on post-harm accountability and ongoing judicial oversight to prevent recurrence of omissions. In contrast, the Indian Supreme Court in *Vanashakti* addressed preventive regulatory failure, invalidating administrative practices that retrospectively legitimised non-compliance, thereby emphasising the state’s proactive duties to prevent harm before it materialises.²⁷

These differences illuminate complementary judicial strategies for operationalising state accountability. *X-Press Pearl* demonstrates the effectiveness of active post-harm supervision, whereas *Vanashakti* illustrates the doctrinal significance of prospective enforcement and preventive obligations. Both approaches, however, challenge traditional state–corporate crime models that focus narrowly on collusion or facilitation, signalling an “outer layer” of responsibility that recognises harm resulting from autonomous state omission.²⁸

The comparative analysis further underscores the role of judicial technique in extending the boundaries of state crime. While *Vanashakti* reinforces structural preventive obligations embedded in constitutional and statutory law, *X-Press Pearl* operationalises supervisory oversight to ensure compliance and mitigate ongoing risk. Together, these cases suggest that courts can play a decisive role in translating the theoretical recognition of state omission into doctrinally enforceable duties, offering a model for integrating omission-based accountability into both domestic and comparative environmental governance frameworks.²⁹

Comparative Evaluation: Extending the Boundaries of State Criminality:

A comparative analysis of *X-Press Pearl* and *Vanashakti v. Union of India* demonstrates how apex courts increasingly conceptualise state omission in environmental governance as legally and socially consequential wrongdoing. Both judgments reject the notion that regulatory non-feasance is a mere administrative lapse, framing it instead as a structural contributor to environmental harm, consistent with state crime scholarship that recognises institutionalised omission where legal duties are defined and risks foreseeable.³⁰ By foregrounding omission as

²⁶ Ronald C. Kramer & Raymond J. Michalowski, Toward an Integrated Theory of State-Corporate Crime, 15 CRIME & SOC. JUST. 18 (1990); and Rob White, Transnational Environmental Crime: Toward an Eco-Global Criminology (2011).

²⁷ Pierre-Marie Dupuy & Jorge E. Viñuales, International Environmental Law (2d ed. 2018).

²⁸ Steve Tombs & David Whyte, The Myths and Realities of Deterrence in Workplace Safety Regulation, 22 BRIT. J. Criminology 746 (2015); and Rob White, Transnational Environmental Crime: Toward an Eco-Global Criminology (2011).

²⁹ Gautam Bhatia, The Transformative Constitution: A Radical Biography in Nine Acts (2019).

³⁰ Patricia Birnie, Alan Boyle & Catherine Redgwell, International Law and the Environment (3d ed. 2009); and Rob White, Transnational Environmental Crime: Toward an Eco-Global Criminology (2011).

a source of harm, the courts move beyond traditional paradigms privileging acts of commission, including direct state violence or collusion, as the primary basis for state criminal responsibility. The judgments converge in highlighting systemic failures of supervision, monitoring, and enforcement as constitutive of harm, thereby extending the conceptual scope of state criminality to encompass institutionalised regulatory inertia. This underscores that neglect embedded in routine state functioning can produce foreseeable, preventable, and socially significant damage, even absent active intent or collusion.³¹ Omission is thus positioned alongside commission as a mechanism through which states materially contribute to harmful outcomes.

Divergences lie in temporal and remedial approaches. In *X-Press Pearl*, the Sri Lankan Supreme Court exercised post-harm supervisory jurisdiction, directing state authorities to report on remedial compliance and operationalising omission-based accountability through iterative oversight.³² Conversely, *Vanashakti* adopts a preventive framework, invalidating administrative practices that retroactively legitimised non-compliance and emphasising the state's proactive duties under Article 21 and environmental statutes.³³

Taken together, the cases demonstrate that omission is an autonomous site of state responsibility. *Vanashakti* reinforces preventive and normative obligations, while *X-Press Pearl* illustrates how post-harm judicial supervision can enforce accountability, addressing both realised harms and the structural conditions that enable future violations. Collectively, they expand the analytical and doctrinal boundaries of state criminality, embedding omission within enforceable frameworks and highlighting the importance of supervisory, preventive, and structural mechanisms for mitigating environmental harm.³⁴

Implications for State Corporate Crime Theory and Environmental Governance

The comparative analysis of the *X-Press Pearl* and *Vanashakti v. Union of India* judgments underscore important theoretical and practical implications for understanding state criminality and the role of omission in environmental governance. Traditional analyses of state wrongdoing in both criminology and law have often emphasised acts of commission, treating states primarily as direct violators or enablers of harm through affirmative action.³⁵ Such approaches risk marginalising forms of institutionalised non-feasance that can produce serious social and environmental harm. Both *X-Press Pearl* and *Vanashakti* illustrate that omission—sustained

³¹ Steve Tombs & David Whyte, *The Myths and Realities of Deterrence in Workplace Safety Regulation*, 22 BRIT. J. Criminology 746 (2015); and David Whyte, *Regulating Safety or Legitimising Harm? Government, Industrial Safety and the Law*, 27 LAW & POL'Y 225 (2007).

³² Gautam Bhatia, *The Transformative Constitution: A Radical Biography in Nine Acts* (2019).

³³ Pierre-Marie Dupuy & Jorge E. Viñuales, *International Environmental Law* (2d ed. 2018); and Ramesh R., *Environmental Governance and Judicial Intervention in India*, 12 INDIAN J. ENVTL. L. 45 (2020).

³⁴ William J. Chambliss, *State-Organised Crime*, 27 Criminology 183 (1989); and Paddy Hillyard, Christina Pantazis, Steve Tombs & Dave Gordon, *Beyond Criminology: Taking Harm Seriously* (2004); and Gautam Bhatia, *The Transformative Constitution: A Radical Biography in Nine Acts* (2019).

³⁵ Christopher Mullins Rothe & David O. Friedrichs, *The State of the Criminology of Crimes of the State*, 15 Soc. Just. 1 (2006); and William J. Chambliss, *State-Organised Crime*, 25 Criminology 183 (1989).

failure to act in contexts where legal duties are clearly established and risks are foreseeable—can itself constitute a legally and socially significant source of wrongdoing.³⁶

In *X-Press Pearl*, the Sri Lankan Supreme Court explicitly recognised that harm arose from failures by state officials to discharge legally mandated oversight duties, including monitoring hazardous cargo, enforcing maritime safety standards, and activating emergency response mechanisms. By directing the Attorney General to report on the implementation of remedial measures within a specified timeframe, the Court operationalised judicial supervision as a mechanism to prevent repeated omission. This post-harm supervisory intervention transforms abstract recognition of non-feasance into a structurally enforceable responsibility, demonstrating that regulatory omission is actionable as a form of state wrongdoing with ongoing legal consequences.³⁷ The judgment thus exemplifies how post-event oversight can mitigate systemic risks associated with institutional neglect and operationalise state accountability in a manner consistent with state criminality theory.³⁸

Similarly, in *Vanashakti v. Union of India*, the Indian Supreme Court addressed state omission in a preventive register, invalidating administrative practices that retroactively legitimised non-compliance with environmental assessment procedures (Supreme Court of India, *Vanashakti*, 2025). The Court emphasised that the state's constitutional obligations under Article 21, together with statutory duties under the Environment Protection Act, 1986, and the Environmental Impact Assessment Notification, 2006, require proactive enforcement of environmental standards.³⁹ By framing regulatory omission as a violation of preventive duties, the Court reinforced the structural significance of state action in averting foreseeable environmental harm. While the judgment is largely declaratory, its articulation of legal duties provides a robust doctrinal basis for conceptualising omission as a form of wrongful state conduct, expanding the remit of state criminality beyond overt acts of violation.⁴⁰

Collectively, these judgments have several critical implications for both theory and practice. First, they underscore the necessity of recognising state omission as an autonomous source of liability rather than a subsidiary or incidental governance deficit.⁴¹ Second, they illustrate the

³⁶ Rob White, *Transnational Environmental Crime: Toward an Eco-Global Criminology* (2011); and Steve Tombs & David Whyte, *The Myths and Realities of Deterrence in Workplace Safety Regulation*, 22 BRIT. J. CRIMINOLOGY 746 (2015); and David Whyte, *Regulating Safety or Legitimising Harm? Government, Industrial Safety and the Law*, 27 LAW & POL'Y 225 (2007).

³⁷ Shanthi Fernando, *Judicial Review, Supervisory Jurisdiction and Environmental Governance in Sri Lanka*, 15 SRI LANKA J. INT'L L. 89 (2021).

³⁸ William J. Chambliss, *State-Organized Crime*, 27 Criminology 183 (1989); and Paddy Hillyard, Christina Pantazis, Steve Tombs & Dave Gordon, *Beyond Criminology: Taking Harm Seriously* (2004).

³⁹ Patricia Birnie, Alan Boyle & Catherine Redgwell, *International Law and the Environment* (3d ed. 2009); and Pierre-Marie Dupuy & Jorge E. Viñuales, *International Environmental Law* (2d ed. 2018).

⁴⁰ Rob White, *Transnational Environmental Crime: Toward an Eco-Global Criminology* (2011); and Steve Tombs & David Whyte, *The Myths and Realities of Deterrence in Workplace Safety Regulation*, 22 BRIT. J. Criminology 746 (2015).

⁴¹ David Whyte, *Regulating Safety or Legitimising Harm? Government, Industrial Safety and the Law*, 27 LAW & POL'Y 225 (2007); and Ronald C. Kramer, Raymond J. Michalowski & David Kauzlarich, *State-Corporate Crime:*

role of judicial innovation in operationalising accountability: *X-Press Pearl* exemplifies post-harm supervision as a mechanism for institutional reform and mitigation, whereas *Vanashakti* highlights the preventive enforcement of statutory and constitutional obligations. Together, these strategies demonstrate how courts can translate theoretical recognition of omission into enforceable legal duties, thereby operationalising state criminality in concrete governance contexts.⁴²

From the perspective of environmental governance, these developments strengthen both the normative and operational logic of regulation. Recognising state omission as actionable reinforces the preventive mandate of environmental law and clarifies the accountability of state actors tasked with monitoring corporate compliance. Judicial enforcement mechanisms—whether through supervisory oversight or the invalidation of retroactive approvals—address not only past failures but also establish an ongoing system of compliance, mitigating the risk of future harm.⁴³ By linking institutional duties with enforceable oversight, these cases operationalise a proactive conception of state responsibility, providing a model relevant for both domestic and transnational environmental governance frameworks.

Finally, the doctrinal insights from *X-Press Pearl* and *Vanashakti* encourage a theoretical re-evaluation of state criminality. By incorporating autonomous state omission as a basis for structural responsibility, scholars can develop a more comprehensive framework that captures the full spectrum of state contributions to harm. This perspective moves beyond analyses that emphasise collusion or facilitation and underscores that legal accountability for non-feasance is both theoretically justified and practically necessary to prevent environmental disasters associated with corporate activity.⁴⁴ In this way, these judgments collectively advance the conceptual and normative boundaries of state criminality, demonstrating how courts can enforce responsibilities arising from regulatory omission as a matter of law and practice.

Conclusion:

This article has critically examined the doctrinal and comparative significance of the *X-Press Pearl* (Sri Lanka) and *Vanashakti v. Union of India* (India) judgments, with a specific focus on state omissions in environmental governance. Analysed through the lens of state criminality, these cases demonstrate that regulatory non-feasance by state institutions constitutes a legally and socially consequential form of wrongdoing, independent of direct collusion or facilitative

Wrongdoing at the Intersection of Business and Government, in *STATE-CORPORATE CRIME: WRONGDOING AT THE INTERSECTION OF BUSINESS AND GOVERNMENT* 1 (Ronald C. Kramer & Raymond J. Michalowski eds., 2002).

⁴² Asanga Welikala Peiris, Judicial Power and Environmental Governance in Sri Lanka, 34 *J. ENVTL. L.* 221 (2022); and Gautam Bhatia, *The Transformative Constitution: A Radical Biography in Nine Acts* (2019).

⁴³ Shanthi Fernando, Judicial Review, Supervisory Jurisdiction and Environmental Governance in Sri Lanka, 15 *SRI LANKA J. INT'L L.* 89 (2021); and Ramesh R., Environmental Governance and Judicial Intervention in India, 12 *INDIAN J. ENVTL. L.* 45 (2020).

⁴⁴ Rob White, *Transnational Environmental Crime: Toward an Eco-Global Criminology* (2011); and Steve Tombs & David Whyte, The Myths and Realities of Deterrence in Workplace Safety Regulation, 22 *BRIT. J. CRIMINOLOGY* 746 (2015); and Asanga Welikala Peiris, Judicial Power and Environmental Governance in Sri Lanka, 34 *J. ENVTL. L.* 221 (2022).

engagement with corporate actors. Both judgments challenge traditional paradigms that privilege affirmative state misconduct, foregrounding omission as a structural mechanism through which states materially contribute to environmental harm and reinforcing the necessity of recognising non-feasance as an autonomous basis for accountability.⁴⁵

The originality of this study resides in its integration of comparative jurisprudential analysis, doctrinal reasoning, and criminological theory. *X-Press Pearl* illustrates how post-harm judicial supervision can serve as an enforceable mechanism to mitigate recurring omissions and institutional inertia, while *Vanashakti* demonstrates the preventive dimension of state responsibility, emphasising the prospective enforcement of statutory and constitutional duties to avert foreseeable harm.⁴⁶ Collectively, these judgments expand the analytical contours of state criminality by demonstrating that omission is not merely a passive governance lapse but a site of actionable legal responsibility and a causal factor in environmental damage.

From an academic perspective, this study advances interdisciplinary scholarship by bridging criminology, environmental law, and comparative constitutional theory. It articulates an “outer layer” of state responsibility that situates regulatory omission as a structural source of harm, thereby enhancing conceptual and doctrinal understandings of how state conduct shapes environmental outcomes. Practically, these findings underscore the capacity of judicial intervention to operationalise state accountability, offering guidance for policymakers, legal practitioners, and scholars seeking to strengthen governance frameworks and prevent institutional neglect. In sum, this article contributes to the theoretical and doctrinal discourse on state criminality, affirming that the recognition and redress of state omissions is central to the prevention of environmental harm and the establishment of enforceable standards of state responsibility.



⁴⁵ J. Richard Kramer & Raymond J. Michalowski, State-Corporate Crime, in *Crime and Justice: A Review of Research*, vol. 12, at 1–42 (Michael Tonry ed., 1990); and Steve Tombs & David Whyte, The Myths and Realities of Deterrence in Workplace Safety Regulation, 22 *BRIT. J. Criminology* 746 (2015); and Rob White, *Transnational Environmental Crime: Toward an Eco-Global Criminology* (2011).

⁴⁶ Asanga Welikala Peiris, Judicial Power and Environmental Governance in Sri Lanka, 34 *J. ENVTL. L.* 221 (2022); and Patricia Birnie, Alan Boyle & Catherine Redgwell, *International Law and the Environment* (3d ed. 2009); and Pierre-Marie Dupuy & Jorge E. Viñuales, *International Environmental Law* 2d ed. 2018.

Beyond CEDAW and CRC: Towards a unified framework for the protection of women and children with special reference to ongoing conflict in Gaza

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&
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Abstract:

The present conflict in Gaza has once again revealed a distressing reality about the existing legal framework to protect the world's most vulnerable populations. The existing conventions, treaties and legislations are fragmented and not able to offer comprehensive protection in conflicts. The primary international legal instruments for addressing the protection of women and children in armed conflict are the "Convention on the Elimination of All Forms of Discrimination against Women" (CEDAW) and the Convention on the "Rights of the Child" (CRC). While these conventions were conceived as global shields for women and children, their isolated mandates and limited enforcement mechanisms often fail to address the complex, overlapping harms that emerge in protracted conflicts. The article outlines the key international conventions, treaties, and conferences that form the current protective framework, argues for the immediate necessity to move beyond the compartmentalised protections of CEDAW and CRC and adopts a unified framework that acknowledges the interconnectedness of rights violations in contemporary warfare. The Gaza crisis demonstrates that gender-based violence, disruption of family structures, forced displacement, digital targeting, denial of healthcare and attacks on education are not isolated events but interconnected cycles of mutually reinforcing harm. This ultimately exposes the critical gaps which highlight the inadequacy of the current enforced regime. , also critically examines the shortcomings inherent in the existing legal regime which governs armed conflicts, as it is a complex tapestry of treaties and customary law. The case studies of Syria, Ukraine and Yemen are also discussed in this paper, demonstrating systemic failure of the existing legal framework with respect to the protection of women and children. A unified framework can bridge this gap by recognising that the protection of women and children in conflict is not two separate mandates but an inseparable humanitarian obligation. This paper offers a concrete, actionable protection for women and children in the armed conflict zones that extend beyond the isolated approaches of CEDAW and CRC.

Keywords: CEDAW, rights of women and children, Gaza, armed conflict, CRC.

Introduction

Since 2023, the United Nations has recorded an alarming increase in multiple forms of violence against women and children in armed conflict zones. As per the UN Secretary-General's report on Children and Armed Conflict (2025),³ there were more than 41,000 grave violations against children in 2024. These violations include collective violations such as attacks on schools and hospitals, killings, maiming, sexual violence, abduction, and denial of humanitarian access. Over 4600 cases of conflict-related sexual violence (CRSV) have been

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³ Office of the Special Representative of the Secretary-General for Children & Armed Conflict, *Summary of the Annual Report on Children and Armed Conflict* (2025), <https://childrenandarmedconflict.un.org/wp-content/uploads/2025/06/Summary-of-the-Annual-Report-on-Children-and-Armed-Conflict.pdf>.

reported against women as per this report in armed conflict zones, where most of the violence was done either by armed forces or state groups.⁴ Women and Children have always been disproportionately affected by war, but the scale and severity of harm witnessed in 21st-century warfare reflect a new paradigm of violence. Modern conflicts involve not just kinetic assaults but also digital surveillance, coerced displacement, malnutrition, disruption of essential services and the systematic dismantling of societal systems.

Since the end of the Second World War, the international jurisprudence has undergone continuous transition, progressively developing a specialised body of rules and regulations designed to lessen this suffering. The purpose of the law of armed conflict is to limit the effects of war for humanitarian reasons.

“International Humanitarian Law” (hereinafter referred IHL) is primarily formed by the way of the four “Geneva Conventions of 1949” and their “Additional Protocols of 1977” collectively. Simultaneously, instruments like the “Universal Declaration of Human Rights”⁵ (hereinafter referred to as UDHR) Lay down a comprehensive catalogue of inalienable rights for all individuals in the sphere of “International Human Rights Law” (hereinafter referred to as IHRL). The preamble of UDHR recognises “*inherent dignity*”⁶ and “*equal and inalienable rights of all members of the human family*”⁷.

Within these frameworks, monumental achievements came in the years of 1979 and 1989 in the form of the “Convention on the Elimination of All Forms of Discrimination against Women”⁸ (hereinafter referred to as CEDAW) and the “Convention on the Rights of the Child”⁹ (hereinafter referred to as CRC) for women and children. These conventions provide detailed, legally binding obligations for states to protect and promote the rights of women and children. However, these conventions were instruments which were principally formulated for implementation in peacetime rather than for times of armed conflict. Though they are applied during armed conflict, their interface with IHL remains complex, and their enforcement mechanisms remain inapposite to the brutal realities of modern warfare. This means that the current regime is inflexible in accepting the fact that civilians have been shifted from incidental casualties to being the intended targets of attack in contemporary warfare.

This troubling shift in the treatment of civilians can be understood from a comparison with the treatment of civilians during World War II. During the times of WWII, notwithstanding that the affected civilians were spread from Blitz to Hiroshima, they were treated as collateral victims of strategic military operations. Hence, the laws of war that followed WWII,

⁴ The Independent, *Congo, António Guterres Warns of Rising Sexual Violence in Conflict* (Dec. 12, 2024, 3:42 PM), <https://www.independent.co.uk/news/congo-antonio-guterres-israel-central-african-republic-south-sudan-b2808067.html>.

⁵ G.A. Res. 217 (III) A Universal Declaration of Human Rights, U.N. Doc. A/810 at 71 (Dec. 10, 1948).

⁶ *Ibid.*

⁷ *Ibid.*

⁸ Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13.

⁹ Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3.

essentially the 1949 Geneva Convention, focused mainly on preventing a repetition of such suffering. But the current situations seen in Gaza and Syria, and other armed conflict areas, show a departure from such humanitarian commitments.

The agencies of the UN have repeatedly documented attacks on civilian colonies and areas populated with civilians, population as residential buildings, hospitals, schools, places of worship, etc. In other words, WWII saw bombings at Pearl Harbour, which was a naval base, whereas the Gaza warfare is supplemented with reports about attacks on schools and hospitals. Civilians have gone from being unintended targets of total war to being strategic targets and tools of coercion and political pressure. Gender-based violence is not incidental to war. It is strategic and used as a weapon of war at present. This evolution is enough to highlight that the current regime is not capable of handling a situation, and the circumstances call for a unified and integrated framework which is capable of being flexible in accommodating the deliberate and systemic inclusion of civilians in warfare and creating accountability for the same.

The underlying drivers of war, like territory expansion and supremacy of an ideology, remain the same, but the primary consequences have changed. The aim, being the destruction of military bases to secure a win, has changed to the devastation of civilian lives. This transition needs to be addressed.

This has culminated in an outcome where the protection architecture is fragmented and disjointed and reactive in nature, struggling to adapt to the shifting dynamics and evolving realities of contemporary warfare, wherein civilians have transitioned from being collateral casualties to deliberate targets. In a news report, the UN experts in May 2024 condemned the continued violence committed against Palestinians in Gaza, where over 390 bodies were uncovered in the Gaza Strip.¹⁰ There are reports that these bodies show signs which point towards torture and summary executions. The conflict in Gaza escalated after the attacks by Hamas on Israel on October 7th, 2023.

The subsequent Israeli military campaign resulted in a catastrophic human rights and humanitarian crisis.¹¹ As per the summary of the annual report of the Secretary-General, the highest concentration of grave violations was reported in the Israeli and Occupied Palestinian territory, DRC (Congo), Somalia, Nigeria and Haiti.¹² In conflict-afflicted areas, everything

¹⁰ Press Release, Office of the High Commissioner for Human Rights, Onslaught of Violence Against Women and Children in Gaza 'Unacceptable' – UN Experts (May 20, 2024), <https://www.ohchr.org/en/press-releases/2024/05/onslaught-violence-against-women-and-children-gaza-unacceptable-un-experts> (last visited November 9, 2025).

¹¹ H. B. Saad, *Urgent Humanitarian Appeal: Protecting the Lives of Women and Children in the Gaza Strip (Palestine)*, 13 J. Public Health Res., 22799036241229312 (2024).

¹² U.N. Secretary-General, *Annual Report of the Secretary-General on Children and Armed Conflict*, 1, U.N. Doc. A/79/237–S/2024/512 (June 11, 2024), <https://childrenandarmedconflict.un.org/wp-content/uploads/2025/06/Summary-of-the-Annual-Report-on-Children-and-Armed-Conflict.pdf> (last visited on November 14, 2025).

from healthcare to education is compromised. Schools are suspended either because of military use of schools or attacks on schools. Take, for example, ¹³the case of Afghanistan, where three years after secondary education was banned for girls, 2.2 million girls were deprived of the basic right of education. This goes on to show that there are reasons beyond the normal understanding which encroach upon the basic rights of individuals in conflict-afflicted areas¹⁴.

War and displacement also mean that the crisis of hunger has been on the rise, too. Hunger and malnutrition have become a problem, rising faster than the efforts to resolve them. The “Global Report on Food Crisis” reports that among the areas affected by the most serious nutrition crisis, one of them was the Gaza Strip. A risk of famine persisted in the area for the entire year of 2024.¹⁵ 100 per cent of the total population, i.e., 2.2 million people, continue to face “*high levels of food insecurity*”¹⁶. The predominant driver for the same was identified to be the “*intensification of the conflicts*”¹⁷. The very efficacy of the international legal order is challenged by the scale of severity endured by the casualties, where women and children constitute the majority of those who have either lost their lives or have been displaced.

The time has come to implement some necessary changes in the jurisprudence of protection in international law. The contemporary realities have proven that the traditional and fragmented approach of implementation of CEDAW and CRC, even when reinforced by IHL, is insufficient and inadequate. This calls for devising a new regime that is a unified framework which integrates the principles of CEDAW and CRC with the specific protection provisions of IHL. This is needed to create a coherent, actionable, and enforceable body of law specifically tailored to the needs of women and children in conflict. This need for an urgent shift is further highlighted by the catastrophic situation in Gaza, serving as a stark and immediate reminder. This is currently a moral and humanitarian necessity. An integrated response is required to effectively address the intersecting vulnerabilities faced by women and children in conflict situations, where gender-based violence, loss of parental care, disruption of education, and health-related crises converge.

Existing Framework in Need of Reinforcement

There is a complex interplay of IHRL and IHL which governs the protection of women and children.

¹³ UNESCO, Afghanistan: Four Years On, 2.2 Million Girls Still Banned from School (Feb. 12, 2025), <https://www.unesco.org/en/articles/afghanistan-four-years-22-million-girls-still-banned-school>.

¹⁴ *Ibid.*

¹⁵ Food Sec. Info. Network & Glob. Network Against Food Crises, *Global Report on Food Crises 2025* (2025), <https://www.fsinplatform.org/sites/default/files/resources/files/GRFC2025-full.pdf> (last visited November 14, 2025).

¹⁶ *Ibid.*

¹⁷ *Ibid.*

The Pillars of Protection: CEDAW AND CRC:

“The Convention on the Elimination of All Forms of Discrimination Against Women”¹⁸ (CEDAW), 1979: In the most common sense, this Convention is often described as an international bill of rights for women. The Convention was adopted by the “UN General Assembly” in 1979, and later, in the year 1981, this Convention came into force. CEDAW creates a comprehensive framework for eliminating discrimination against women in all fields as it obligates States Parties to take appropriate measures. This ultimately ensures that women have equal rights in political, social, cultural and civil domains.

From this understanding, it is clear that CEDAW has a broad scope. However, even after this, there exists a fatal flaw, which is the lack of explicit provisions addressing the unique vulnerabilities of women during armed conflict. The broad scope also means that there are interpretive challenges. These are further highlighted due to the absence of direct references to conflict situations in the main body of CEDAW. There has been an attempt to fill this gap by way of General Recommendation No. 30 of the CEDAW Committee, adopted in 2013, by addressing women in conflict prevention, conflict, and post-conflict contexts.

Though the nature of the same is non-binding and advisory. The provisions under the Recommendation aim to uphold women’s rights during conflict by urging the States to be accountable for violations, including sexual violence and displacement. But the practical impact of such provisions remains limited as they are not enforceable, especially in active conflict zones like Gaza. Furthermore, it has been noted that in occupied territories, which form part of such conflict zones where judicial systems are often incapacitated or biased, the Optional Protocol of CEDAW, which was adopted in 1999, offers limited recourse for victims.

The case study of conflict in Gaza provides a contemporary look into the systemic discrimination faced by women, which is also compounded by military occupation and armed conflict. This makes the limitations of CEDAW starkly evident. The reports from UN Women¹⁹ and other humanitarian organisations have extensively documented widespread gender-based violence along with lack of access to reproductive healthcare, and economic marginalisation of women in Gaza. ²⁰The absence of binding obligations under CEDAW which are specific to conflict settings has hindered international efforts to hold perpetrators accountable and to provide meaningful protection to affected women.

“The Convention on the Rights of the Child”²¹(CRC), 1989: This Convention was adopted in 1989 and came into force in 1990. It is the most widely ratified human rights treaty in history.

¹⁸ CEDAW, supra note 4.

¹⁹ UN Women, *Gender Matters: No Relief in Sight – Gaza Bulletin* (Apr. 2025), https://palestine.unwomen.org/sites/default/files/2025-04/202504_gender_matters_bulletin-no_relief_in_sight_gaza-final-en_2.pdf.

²⁰ Office of the Special Representative of the Secretary-General on Sexual Violence in Conflict, *Mission Report: Official Visit to Israel and the Occupied West Bank (29 January–14 February 2024)* (2024), <https://palestine.unwomen.org/sites/default/files/2025-04/20240304-Israel-oWB-CRSV-report.pdf>.

²¹ CRC, supra note 5.

The Convention enshrines a broad array of rights for children, which includes the right to life, education, health, and protection from abuse and exploitation. Article 38 of the CRC ²² directly makes provisions for children in armed conflict, urging State Parties to respect international humanitarian law and to implement measures to protect children affected by war.

“The Optional Protocol on the Involvement of Children in Armed Conflict”²³ (hereinafter referred to as OPAC), 2002 further strengthens this protection. The core principles of CRC are non-discrimination, best interests of the child, the right to life, survival and development, and respect for the views of the child. These principles are non-derogable and must guide all actions concerning children, including during military operations.

While CRC recognises the detrimental effects of armed conflict on children, it faces similar shortcomings to CEDAW in terms of enforcement. The treaty lacks a robust accountability mechanism for violations occurring in conflict zones. The Committee can issue recommendations, but it cannot compel compliance. Additionally, the framing of Article 38 is in general terms and does not establish concrete obligations for states engaged in or affected by armed conflict.

The situation in Gaza shows the inadequacy of the CRC in protecting children during war. After the escalation of hostilities since October 2023, around 64,000 of children have been killed or injured or displaced.²⁴ UNICEF described the situation as a “child protection crisis of unprecedented scale” yet international legal mechanisms have failed to prevent or redress these violations where schools and hospitals have been targeted.²⁵ Even access to food, water, and medical care has been severely restricted. Borger, *The Guardian* ²⁶ reported that more than 9,000 children in Gaza received treatment for severe malnutrition, including approximately 2,000 more severe cases, highlighting ongoing humanitarian deficiencies despite ceasefire initiatives. It is not wrong to say that Gaza has become a graveyard for children.²⁷ The reported number of deaths of children is not certainly true because most of the cases are not even reported. It is highly difficult to reach to exact figures because of the protracted nature of this conflict.

²² Convention on the Rights of the Child art. 38, Nov. 20, 1989, 1577 U.N.T.S. 3, <https://ihl-databases.icrc.org/en/ihl-treaties/crc-1989/article-38>.

²³ Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, May 25, 2000, 2173 U.N.T.S. 222.

²⁴ UNICEF, *Two Years of Hellish War Have Devastated Gaza's Children* (Feb. 10, 2025), <https://www.unicef.org/press-releases/two-years-hellish-war-have-devastated-gazas-children>.

²⁵ U.N. News, ‘Ten weeks of hell’ for children in Gaza: UNICEF, U.N. NEWS (Dec. 19, 2023), <https://news.un.org/en/story/2023/12/1144927> (last visited November 8, 2025).

²⁶ Julian Borger, Children in Gaza Hospitalised for Acute Malnutrition Despite Ceasefire, *The Guardian* (Dec. 9, 2025), <https://www.theguardian.com/world/2025/dec/09/children-gaza-hospitalised-acute-malnutrition-un-says>.

²⁷ Effect of the Gaza War on Children in the Gaza Strip, Wikipedia, https://en.wikipedia.org/wiki/Effect_of_the_Gaza_war_on_children_in_the_Gaza_Strip (last visited Dec. 12, 2025).

A fragmented and often inadequate system is revealed by the analysis of existing international legal instruments for the protection of women and children in armed conflict. While CEDAW and CRC provide essential human rights, both instruments lack specific provisions and enforcement mechanisms tailored to conflict situations. Critical humanitarian protections are offered by the Geneva Conventions and their Additional Protocols, but are dependent on state compliance and lack gender-sensitive approaches. The crisis in Gaza underscores the urgent need for a unified and enforceable legal framework which integrates the strengths of existing instruments while addressing their gaps. Binding obligations must be part of such a framework incorporating provisions for the protection of women and children in conflict, robust enforcement mechanisms, and gender-sensitive and age-sensitive approaches to humanitarian assistance, justice, and peace-building.

The Pillars of International Humanitarian Law:

The “Geneva Convention”²⁸, 1949 and their “Additional Protocols”²⁹ 1977 includes “Fourth Geneva Convention” (GCIV), which is dedicated to the protection of civilians in time of war. Specific protections for women and children are provided in Articles 14, 16, 17 and 24, which include safe zones, respect for their honour, and protection from arbitrary violence.

Article 27 of GCIV³⁰ establishes a clear obligation upon parties to a conflict, the duty to protect women from violations of their honour and dignity. The women are particularly safeguarded from acts like rape, enforced prostitution, and any form of indecent assault.

Articles 14, 17, 23, and 24 of GCIV collectively provide special protection for children in situations of armed conflict. As per the provisions of these Articles, children are required to receive preferential treatment. Orphans and separated children are to be provided with appropriate care. Essential relief supplies such as food, clothing, and medical supplies must be provided to them. This broader humanitarian framework aims at mitigating the impact of conflict on vulnerable civilian populations.

“Additional Protocol I”³¹ related to international armed conflicts and contains similar, albeit less detailed, provisions in Article 4 make provision for prohibiting violence to life, health, and physical or mental well-being. This includes rape and enforced prostitution and mandates special care for children. “Protocol II”³² extends the protections provided by Protocol I to non-international armed conflicts. This recognises the need for humanitarian safeguards in civil wars and internal strife.

²⁸ Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

²⁹ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 51, June 8, 1977, 1125 U.N.T.S. 3.

³⁰ Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 27, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

³¹ Additional Protocol I, *supra* note 17.

³² Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), June 8, 1977, 1125 U.N.T.S. 609.

However, the effectiveness of the “Geneva Conventions” and their Protocols heavily depends upon compliance and enforcement by the State. In many conflict zones, like Gaza, there is rampant violation of these norms. There are breaches of humanitarian law due to the targeting of civilian infrastructure, the use of explosive weapons in densely populated areas, and the obstruction of humanitarian aid. However, accountability of these breaches remains elusive because of political constraints and the lack of enforcement mechanisms.

The “Rome Statute”, which established the “International Criminal Court”³³ (hereinafter referred to as ICC) criminalises the most serious international crimes. It was adopted in 1998 and came into force in 2002. Rape, sexual slavery, enforced prostitution, forced pregnancy and other forms of sexual violence are explicitly listed as both war crimes and crimes against humanity. Article 8 defines attacks on civilians, sexual violence and the use of children as soldiers as criminal offences.³⁴

The ICC is a significant advancement in the arena of international law as it provides a mechanism for individual accountability. Its jurisdiction ranges from crimes committed by nationals of State Parties to the territory of State Parties. It also acts upon referrals from the “UN Security Council”. ICC has investigated and prosecuted cases which involve sexual violence and child exploitation in conflict zones of the Democratic Republic of Congo, Uganda and Sudan.³⁵

An investigation was opened in 2021 in the armed conflict in Gaza, where allegations of war crimes were brought against both Israeli and Palestinian actors. The investigation covered incidents that date back to 2014 and also includes the recent escalation of violence.

The emphasis on individual criminal responsibility by the “Rome Statute” is crucial for deterring future violations and providing justice to victims. The limited resources of ICC and the reliance it puts on state cooperation and susceptibility to geopolitical influence undermine the effectiveness of the provisions. Impunity has prevailed for decades in Gaza, where the intervention by the ICC has offered hope, but it remains fraught with obstacles.

The UN Security Council:

Various resolutions which aim at enhancing the protection of women and children in armed conflict have been adopted by “United Nations Security Council. “The Women, Peace and Security” (WPS) agenda was passed in 2000 by the way of Resolution 1325.³⁶ This agenda recognises the disproportionate impact of conflict on women and calls for their participation in peace processes, protection from violence, and access to justice. This Resolution is

³³ Rome Statute of the International Criminal Court art. 5, July 17, 1998, 2187 U.N.T.S. 90.

³⁴ Rome Statute of the International Criminal Court art. 8(2), July 17, 1998, 2187 U.N.T.S. 3.

³⁵ D. Lupig, *Investigation and Prosecution of Sexual and Gender-Based Crimes before the International Criminal Court*, 17 Am. U. JGSPL 431 (2009).

³⁶ S.C. Res. 1325 (Oct. 31, 2000).

followed by a series of related resolutions, which include 1820, 1888 and 1960, which address sexual violence in conflict and make accountability mandatory. These resolutions create a political framework for action; however, the binding nature of these resolutions is contested.

“The Children and Armed Conflict” (CAAC) Agenda, which was mandated by the UNSC Resolution 1612 in 2005³⁷ establishes a monitoring and reporting mechanism on six violations against children in conflict. The six violations are killing and maiming, recruitment or use as soldiers, sexual violence, abduction, and attacks on schools or hospitals.

The ability of the Security Council to enforced compliance is limited by the power of veto of its permanent members and because of the political dynamics of international relations. In Gaza, the violations against women and children have been documented extensively, but the Security Council failed to take any decisive action. The WPS agenda also struggled to gain any traction in Gaza. The participation of women in peace negotiations remained minimal, which means that their voices are often excluded from the decision-making process. Women were further marginalised and their resilience undermined because of the lack of gender-sensitive approaches in humanitarian aid and reconstruction efforts.

The case study of Gaza

The Gaza Strip is a densely populated enclave which is home to over 2.4 million Palestinians, it became the epicentre of one of the most devastating humanitarian crises in contemporary history. Following the events of October 7, 2023, which were a surprise attack by Hamas on Israeli territory, the conflict in Gaza has created an “unfolding genocide” and a “catastrophic” humanitarian crisis, as described by the UN³⁸ and numerous human rights organisations. As per UN reports, the war has resulted in the deaths of tens of thousands of civilians which including more than 33,000 women and children.³⁹ It is reported that every hour, one woman is killed, especially during peak bombardments. The destruction of the rights of women and children is systematic and multifaceted.⁴⁰

As per the mandates of IHL, there must be a distinction made between the combatants and the civilians by the parties to the conflict. The high civilian death toll in Gaza has raised serious concerns about the compliance, or non-compliance, of this principle. Potential violations are highlighted due to reports of airstrikes on residential buildings, schools, and hospitals.

³⁷ S.C. Res. 1612 (July 26, 2005).

³⁸ World Health Organization, *Public Health Situation Analysis (PHSA) Operational Tool* (Oct. 9, 2025), <https://cdn.who.int/media/docs/default-source/documents/emergencies/who-phsa-opt-100925.pdf>.

³⁹ Z. A. Bhutta, G. B. Dominguez & P. H. Wise, *When Is Enough, Enough? Humanitarian Rights and Protection for Children in Conflict Settings Must Be Revisited*, 386 BMJ e081515 (2024), <https://www.bmj.com/content/386/bmj-2024-081515> (last visited November 6, 2025).

⁴⁰ UN Women, *Scarcity and Fear: A Gender Analysis of the Impact of the War in Gaza on Vital Services Essential to Women's and Girls' Health, Safety, and Dignity – Water, Sanitation and Hygiene (WASH)* (Apr. 2024), <https://palestine.unwomen.org/en>.

Under IHL, special protection must be given to medical facilities and personnel. A grave breach is constituted by the targeting or incidental destruction of hospitals and ambulances. The collapse of the healthcare system in Gaza which was ultimately exacerbated by the blockade which has left thousands without any access to life-saving treatment.

In Palestine, almost everyone in the Gaza Strip has been forced from their homes more than once as the crisis protracted. At the same time, the DRC (Democratic Republic of the Congo) saw 5.3 million people displaced by conflict and violence in 2024, the highest number the country has ever recorded. That figure alone makes up 27 percent of the world's 20.1 million conflict-related displacements last year, underscoring how widespread and devastating these crises have become.⁴¹

As per the UN Women (Press briefing, October 2025),⁴² there is a need for immediate food assistance for more than one million women and girls in Gaza, and over a quarter million of them require urgent nutritional care. Most of the women and girls in Gaza have gone through forced displacement at least four times as a result of the conflict. According to UNICEF, more than 700,000 children have been displaced and many of them are abducted and kidnapped.⁴³ In Gaza, presently, a woman is the head of about one in every seven families. They need immediate assistance that is sent directly to them so that they may provide food for their children, gain access to medical check-up, reconstruct their means of subsistence, and regain some degree of stability after losing everything. The reports, data, and figures are horrifying; presenting a devastating picture of what may be the worst humanitarian catastrophe till date.

Violation of Articles 6 and 38 of CRC

The most fundamental right in human rights is the “right to life”. This fundamental right is being violated on a mass scale. As of 2024, over 70% of approximately 35,000 reported fatalities were women and children.⁴⁴ These deaths are in stark violation of right to life, survival, and development. The most common causes of these massive deaths are the aerial bombardment and lack of safe haven. The catastrophic civilian casualties have been a result of widespread use of explosive weapons with wide-area effects in densely populated urban areas. They have been further escalated in number due to the confusing, contradictory evacuation orders of the Israeli military. These orders have been reported to be impossible to comply with which has effectively displaced the population into areas which have been subsequently bombed.

⁴¹ Internal Displacement Monitoring Centre, *Global Report on Internal Displacement 2025* (2025), <https://www.internal-displacement.org/publications/2025-global-report-on-internal-displacement>.

⁴² Press Briefing by UN Women on the Situation of Women and Girls in Gaza, Remarks by Sofia Calltorp, *UN Women* (Oct. 2025), <https://www.unwomen.org/en/news-stories/press-briefing/2025/10/press-briefing-by-un-womenon-the-situation-of-women-and-girls-in-gaza>.

⁴³ UNICEF (@UNICEF), X (Nov. 13, 2023, 3:32 PM), <https://x.com/UNICEF/status/1724155268148191524>.

⁴⁴ A. Hassoun, C. Parra-López, T. Ben Hassen, *The Gaza Conflict and Its Implications for the Sustainable Development Goals: A Comprehensive Analysis*, ENV'T DEV. & SUST. (2025) (advance online publication Oct. 7, 2025).

Violation of Article 12 of CEDAW and ARTICLE 24 of CRC

There has been a deliberate siege and obstruction of humanitarian aid, which has resulted in a public health disaster, which can be described as a health and nutrition catastrophe. This has disproportionately affected women and children.

Hospitals like Al-Shifa, Al-Ahli and Nasser have been targeted and besieged, which has rendered them inoperable. There are reports where pregnant women have been forced to give birth in unsanitary conditions without medical care. This has led to a surge in maternal and neonatal mortality. Furthermore, the lack of care for traumatic injuries has resulted in a death sentence for thousands.⁴⁵

The systematic obstruction of humanitarian aid means blocking food, clean water, and fuel means starvation is being used as a weapon of war.⁴⁶ This leads to widespread hunger and famine-like conditions. There are reports that children have died from malnutrition and dehydration. As per Article 8 (2) of the Rome Statute, this constitutes as a potential war crime.

Violation of Articles 28 and 29 of the CRC

There has been damage to every university in Gaza, and the majority of schools have been hit. This destruction goes beyond the physical destruction as an entire generation of children has been inflicted by trauma.⁴⁷ This trauma includes witnessing death, destruction, and the loss of family and friends. This has been described as creating a “maimed generation” which suffers from severe psychological distress with long-term developmental consequences. This conduct has systematically eroded the protections afforded by IHL.⁴⁸

Violation of General Recommendation no. 30 of CEDAW

War brings with it gender-based violence. There are reports of widespread sexual violence emerging. There is a lack of privacy and safety as the shelters are overcrowded and inadequate, with no partitions or locks. This exposes women and girls to heightened risks of harassment and assault.⁴⁹

Health risks are created because of a lack of sanitation and hygiene. There are dignity violations of women, as there is an inability to access menstrual hygiene products. The forced

⁴⁵ Int'l Comm. of the Red Cross, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts: Building a Culture of Compliance for IHL to Protect Humanity in Today's and Future Conflicts*, Doc. 34IC/24/10.6 (Sept. 2024), https://www.clusterconvention.org/wp-content/uploads/2024/09/34IC_10.6-IHL-Challenges-Report-EN.pdf (last visited November 6, 2025).

⁴⁶ *Ibid.*

⁴⁷ *Ibid.*

⁴⁸ T. Karimova, G. Giacca & S. Casey-Maslen, *United Nations Human Rights Mechanisms and the Right to Education in Insecurity and Armed Conflict* (Geneva Acad. of Int'l Humanitarian L. & Human Rights & Protect Educ. in Insecurity & Conflict [PEIC] 2016) <https://www.geneva-academy.ch/joomlatools-files/docman-files/Protection%20of%20Education%20in%20Armed%20Conflict.pdf> (last visited November 7, 2025).

⁴⁹ U.N. Dev. Programme, U.N. Women & U.N. Children's Fund, *Sawasya III: Reinforcing Equal Access to Justice for All Palestinians, 2024 Annual Report* (2024), https://mptf.undp.org/sites/default/files/documents/2025-05/2024_annual_narrative_report_jp_opt_sawasya_iii.pdf (last visited November 6, 2025).

displacement and separation, in addition to the breakdown of social structures, heighten the vulnerability of the affected population to exploitation and abuse.

The deficit of accountability

An undertone of political paralysis can be detected in the response of the international community. There have been repeated vetoes of the calls for a ceasefire in the UN Security Council. There is a requirement for a new framework which addresses the enforcement gap, which is seen in the case brought against Israel at the International Court of Justice by South Africa.

Systemic Failures: Recent Cases of Violation

Syria and Iraq

The conflict in Syria and the rise of ISIS have been characterised as having made egregious violations of the rights of women and children. ISIS has systematically used sexual violence as a weapon of war, whereby Yazidi women and girls were used for sexual slavery or were raped. These acts have been recognised by the UN as genocide and crimes against humanity. There has been widespread documentation of these crimes; however, there has been no accountability.⁵⁰ This demonstrates the weakness of international criminal justice in the face of non-state actors and geopolitical impasses.

A grim hallmark of the conflict has been the deliberate attacks on schools and hospitals by the Syrian government and its allies.⁵¹ The consequences of these attacks go beyond the immediate death and injury they cause, as they deprive an entire generation of education and healthcare. This creates a long-term developmental crisis. Other profound implications for millions of Syrian children who have to grow up knowing nothing but war, displacement, and trauma manifest in long-term mental health challenges and an uncertain future. This is a violation of their right to development under the CRC.

Yemen

The IHL violations were rampant in the war in Yemen, which created the worst humanitarian crisis. This crisis was exacerbated by the coalition-led blockade and airstrikes. All parties to the conflict have hindered the provision of vital humanitarian assistance, which has caused extensive famine and disease.⁵² Illnesses like cholera and diphtheria, which are completely preventable, took many children's lives along with malnutrition. This death toll was further increased by COVID-19 outbreaks.⁵³ Saudi-led coalition conducted aerial bombardments and

⁵⁰ T. Arango & H. Saad, *Turkey's Parliament Backs Military Measures on Syria*, N.Y. Times (Oct. 4, 2012, 5:00 AM ET), <https://www.nytimes.com/2012/10/05/world/middleeast/syria.html> (last visited November 6, 2025).

⁵¹ *Ibid.*

⁵² G. Coppi, *The Humanitarian Crisis in Yemen: Beyond the Man-Made Disaster* (Int'l Peace Inst., 2018) <https://www.ipinst.org/wp-content/uploads/2018/01/IPI-Rpt-Humanitarian-Crisis-in-Yemen.pdf> (last visited November 7, 2025).

⁵³ A. Erickson, *1 Million People Have Contracted Cholera in Yemen. You Should Be Outraged*, Wash. Post (Dec. 22, 2017, 2:52 PM), <https://www.washingtonpost.com/news/worldviews/wp/2017/12/21/one-million-people-have->

ground fighting, which significantly increased the civilian casualties, and children made up a large percentage of the number.⁵⁴ A legacy of unexploded ordnance that continues to kill and maim children was left due to the use of widely banned cluster munitions.

Ukraine

The Russian invasion in 2022 was marked by targeted attacks made on civilian infrastructure, filtration camps, and documented cases of systematic torture and sexual violence. Arrest warrants were issued by the ICC for President Vladimir Putin and his Commissioner for Children's Rights, Maria Lvova-Belova. The allegations include war crimes of unlawful deportation and transfer of children from occupied areas of Ukraine to Russia.⁵⁵ The well-documented reports of rape and sexual violence by Russian forces highlight that such tactics are regularly used to terrorise civilian populations.⁵⁶

In each case detailed above, the existing mechanisms like the reporting by the UN, actions taken by the Security Council and international courts, have proven too slow, too political, or too weak in preventing the atrocities faced by the population and the delivery of timely justice.

A Step towards a Unified Framework:

A fundamental rethinking is necessitated after considering the failures in Gaza and elsewhere. A unified framework must move beyond the conventions and create a system which is cohesive, actionable, and enforceable.

This study has made an attempt to outline the core principles of the unified framework. This framework must be a binding international treaty which specifically focuses on the rights and protection of women and children in armed conflict which incorporating the provisions from CEDAW and CRC and the Geneva Conventions. Clear obligations must be established for state and non-state actors.

- The principle of intersectional vulnerability: the new framework must recognise that the vulnerabilities faced by women and children are intersecting and not separate. They require integrated protection strategies.
- The principle of absolute prohibition of siege and starvation: the new framework must have enforceable provisions which explicitly prohibit the use of siege tactics and the denial of humanitarian aid to be used as a method of warfare.

[caught-cholera-in-yemen-you-should-be-outraged/?noredirect=on%26utm_term=.6ae3530c1a73](https://www.journaloflegalstudies.co.in/caught-cholera-in-yemen-you-should-be-outraged/?noredirect=on%26utm_term=.6ae3530c1a73)(last visited November 7, 2025).

⁵⁴ *Ibid.*

⁵⁵ A. C. K. Lee, G. Juszczak & et. Al., *Ukraine Refugee Crisis: Evolving Needs and Challenges*, 217 Pub. Health 41 (2023).

⁵⁶ *Ibid.*

- The principle of enhanced due diligence: the new framework must impose a positive obligation on all states, not just parties who are in conflict, urging them to take proactive steps to prevent violations against women and children and to put in place sanctions to respond to such violations in armed conflict.
- The principle of accountability and mandatory prosecution: the new unified framework must include provisions for the investigation and prosecution of grave crimes. A single, powerful monitoring body must be created which has jurisdiction and power to investigate all violations against women and children in an armed conflict. The body must have the power to trigger automatic, pre-defined consequences if there is any non-compliance.

To keep the new framework in par with international policy and practice along with contemporary issues, voice should be given to local women's and children's rights organisations, which would be helpful in conflict prevention, humanitarian response and post-conflict reconstruction. Furthermore, technology and data analytics must be leveraged to monitor document violations, track humanitarian needs, and support accountability efforts. This will also ensure that sensitive information is protected and the affected population are provided with safety. International solidarity and political will must be promoted through advocacy, public awareness, and diplomatic engagement. This ensures that priority is given to protecting women and children in conflict.

Conclusion:

A palace of law has been created by the way of mountains of legal texts, the countless UN reports, and the solemn declarations at the international conferences. However, the women and children of Gaza, Syria, Yemen, and other conflict zones have found the doors to this palace closed. CEDAW and CRC, though, provide moral and legal compass; they lack the sharp teeth which are needed to stop the bombs, siege, and sexual violence and other crimes that they have suffered.

The protection of women and children in armed conflict is not merely a legal obligation to be studied and considered but it is a moral imperative. A bold and coordinated response is demanded from the international community by the suffering endured by civilians in Gaza and other conflict-affected zones. The promise of international law can be fulfilled by moving beyond fragmented instruments and towards a unified, enforceable framework. This will also uphold the dignity and rights of those most affected by war.

The destruction in Gaza shows a logical endpoint of a system where state sovereignty is given privilege over human security and political calculations take precedence over legal obligations. The case study of Gaza has shown that if there is no enforceable accountability, then even the most detailed legal provisions would become nothing more than merely "parchment barriers".

There is a call for new realism in international law, as it has been systematically summarised throughout the article that the current regime is fragmented. The yawning gap between professed values and the practised inaction can be bridged by integrating the principles of CEDAW and CRC with IHL enforcement and creating streamlined and powerful mechanisms for monitoring and accountability. Additionally, there must be meaningful consequences for the violators and non-compliance. The lives of countless women and children who would be ensnared in future armed conflict depend on whether the international community dares to learn from the ruins of Gaza and build a system that is truly fit for purpose.



Beyond Algorithms: Reconstructing Legal Responsibilities for AI-driven Business Entities

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&
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Abstract:

The rapid integration of Artificial Intelligence (AI) into business operations has transformed traditional decision-making processes, introducing unprecedented efficiencies alongside complicated legal and ethical challenges. AI-driven systems such as autonomous trading algorithms, algorithmic hiring tools, and intelligent customer engagement platforms operate through models whose fairness and transparency are increasingly under scrutiny. These systems often make decisions without direct human oversight and exercise varying degrees of operational autonomy. Such developments challenge foundational legal frameworks that rely on human intent, agency, and accountability. This study critically examines the emerging gaps in liability attribution, the limitations of existing regulatory mechanisms, and the ethical tensions that arise when AI functions as a de facto decision-maker. The study illustrates legal challenges surrounding contemporary machine learning and deep learning architectures and autonomous features in AI. Our study also contributes to the current discussions on case-based exploration and comparative review of global AI governance frameworks, such as the EU AI Act and OECD Principles. The research demonstrates that current laws in India and abroad do not sufficiently address accountability in AI-mediated issues. Ethical issues, including algorithmic bias, opacity of “black box” models, data privacy intrusions, and diminished human oversight, further complicate regulatory responses. The article argues for a multi-layered governance model that combines statutory reform, algorithmic transparency requirements, ethical audit mechanisms, and clearly defined responsibility allocation among developers, deployers, and users. By situating AI within both legal theory and ethical reasoning, the research contributes to an emerging understanding of how societies can harness AI’s benefits while safeguarding rights, fairness, and commercial integrity. The findings underscore the necessity for anticipatory, adaptive, and ethically grounded regulation capable of responding to the evolving nature of autonomous AI systems.

Keywords: AI; AI governance; business; case-studies; computing; decision making; legal ethics

Introduction:

The rapid evolution of Artificial Intelligence (AI) has fundamentally reshaped the operational dynamics of modern business entities, marking a transition from human-centric decision-making models to technologically mediated autonomous systems. What began as a computational aid has now developed into a suite of sophisticated algorithms capable of analysing data, predicting outcomes, optimising workflows, and executing commercial decisions with minimal human intervention. This technological shift presents significant opportunities for enhanced efficiency and innovation; however, it simultaneously generates complex legal and ethical challenges for regulators, courts, and policymakers. As AI systems increasingly assume quasi-independent roles within commercial organisations, traditional

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legal doctrines grounded in human intent, agency, and culpability become strained, revealing substantial gaps in existing regulatory frameworks.³

AI-driven business entities today operate across a diverse range of domains: high-frequency autonomous trading systems influence financial markets; algorithmic hiring tools determine employment outcomes; predictive analytics shape consumer targeting; and intelligent customer-service bots directly interact with clients.⁴ These systems often function through opaque “black-box” models, raising concerns related to explainability, fairness, and accountability. The autonomy exercised by such systems disrupts the long-established assumption that every commercial decision can be traced to a human actor who may be held responsible for its consequences.⁵ When an AI system independently causes financial loss, discrimination, or market manipulation, the question of “who is liable” becomes legally ambiguous.

This study explores these unresolved questions by examining the real responsibilities associated with regulating AI-driven business entities. It investigates the doctrinal tensions created by autonomous decision-making and interrogates whether existing legal frameworks, ranging from tort and contract law to sector-specific regulations, are adequate to assign responsibility within AI-mediated environments.⁶ The analysis further considers ethical concerns such as algorithmic bias, data privacy, opacity in decision-making, and the erosion of human oversight, all of which compound the difficulty of establishing a clear accountability regime.⁷

Additionally, the study engages with comparative international developments, including the European Union’s Artificial Intelligence Act, the OECD AI Principles, and emerging regulatory proposals in the United States and Asia. These global perspectives demonstrate a growing recognition of the need for risk-based and anticipatory governance structures tailored to the unique challenges posed by autonomous systems.⁸

By critically assessing legal bottlenecks and ethical dilemmas, this study aims to contribute to the broader discourse on responsible AI regulation. It argues for a multi-layered approach that integrates statutory reform, algorithmic transparency, ethical auditing, and clarified responsibility sharing among developers, deployers, and users. Ultimately, the research seeks to illuminate how societies may embrace the benefits of AI while ensuring that legal accountability, fairness, and human values remain central to commercial decision-making.

³ Stuart Russell & Peter Norvig, *Artificial Intelligence: A Modern Approach* (2010).

⁴ Nick Bostrom, *Superintelligence: Paths, Dangers, Strategies* (2014).

⁵ Frank Pasquale, *The Black Box Society* (2015).

⁶ OECD, *Principles on Artificial Intelligence* (2019).

⁷ Shoshana Zuboff, *The Age of Surveillance Capitalism* (2019).

⁸ European Commission, *Proposal for an Artificial Intelligence Act* (2021).

Understanding Autonomous AI-Driven Commercial Organisations:

The term autonomous AI-driven commercial organisation does not refer to a new legal form of company, but to business entities in which Artificial Intelligence systems perform functions that are central to governance, strategy, and day-to-day operations with minimal or highly mediated human involvement. In such organisations, AI is not merely a tool supporting human decision-makers; rather, it operates as a continuous decision layer embedded in core processes such as pricing, risk assessment, resource allocation, fraud detection, content moderation, hiring, and customer interaction.⁹ These systems may constantly learn from data, adapt their behaviour, and reconfigure internal workflows, thereby exercising de facto influence over rights, obligations, and market outcomes, even though they have no formal legal personality of their own.¹⁰

In practice, this autonomy is visible in sectors such as finance, e-commerce, logistics, and platform-based economies. High-frequency trading algorithms can react to market movements faster than any human trader; recommendation engines on digital platforms can effectively shape consumer choice and visibility of products; and algorithmic credit-scoring models can determine access to loans or insurance.¹¹ In each of these domains, the organisation's "mind" is partially displaced into complex machine-learning models whose logic is frequently opaque even to their creators. This opacity complicates the traditional corporate-law assumption that decisions can be traced back to identifiable human directors, officers or employees for the purpose of assigning liability, fiduciary responsibility and regulatory accountability.¹²

Indian scholarship and policy discourse have started acknowledging this transformation. The Aadhaar and Puttaswamy line of cases recognised informational privacy and data governance as constitutional concerns, laying an implicit foundation for scrutinising algorithmic systems deployed by both state and private actors.¹³ The Srikrishna Committee's report on data protection and NITI Aayog's National Strategy for Artificial Intelligence similarly highlight the need for accountability, transparency, and human oversight where AI is deeply embedded in commercial decision-making.¹⁴ Yet, existing Indian legal frameworks company law, contract law, tort law, sectoral regulation, and information-technology legislation, do not explicitly conceptualise autonomous AI systems as actors within the organisational structure. As a result, responsibility for AI-mediated harms is often diffused between developers,

⁹ Stuart Russell & Peter Norvig, *Artificial Intelligence: A Modern Approach* (3rd ed., 2010).

¹⁰ Mireille Hildebrandt, *Smart Technologies and the End(s) of Law* (2015).

¹¹ Frank Pasquale, *The Black Box Society: The Secret Algorithms That Control Money and Information* (2015).

¹² Andrew T. F. Lang & Joanna Goodman, "Algorithmic Governance and the Limits of Corporate Accountability," in Karen Yeung & Martin Lodge (eds.), *Algorithmic Regulation* (2019).

¹³ *Justice K.S. Puttaswamy (Retd.) v. Union of India*, (2017) 10 SCC 1; *K.S. Puttaswamy v. Union of India (Aadhaar)*, (2019) 1 SCC 1.

¹⁴ Committee of Experts under the Chairmanship of Justice B.N. Srikrishna, *A Free and Fair Digital Economy: Protecting Privacy, Empowering Indians* (2018); NITI Aayog, *National Strategy for Artificial Intelligence – #AIforAll* (2018).

vendors, platform operators, and end-users, creating a “responsibility gap” in which harms may be foreseeable and preventable but not easily attributable in legal terms.¹⁵

Analysing autonomous AI-driven commercial organisations, therefore, requires moving beyond a purely technological description to a socio-legal understanding of how code, data, and corporate governance interact. For regulatory purposes, the crucial question is not whether AI can or should be recognised as an independent legal person, but how far existing doctrines of vicarious liability, due diligence, fiduciary duty, and regulatory compliance can be adapted to ensure that human and institutional actors remain meaningfully accountable for decisions nominally taken by machines.¹⁶

Legal Frameworks Governing AI:

The legal regulation of Artificial Intelligence in India remains fragmented, evolving, and largely reactive, shaped more by judicial interpretation and sectoral regulation than by dedicated statutory frameworks. While India does not yet possess an AI-specific law, several legal domains, including constitutional law, information technology law, corporate governance, consumer protection, competition regulation, and sectoral legislation, indirectly govern aspects of AI-driven commercial activity.¹⁷ As AI systems increasingly assume autonomous roles within organisations, Indian legal institutions have begun grappling with the implications of algorithmic decision-making, particularly in the areas of privacy, due process, intermediary liability, and accountability.

Constitutional jurisprudence provides the foundational framework for regulating AI systems, primarily through the recognition of informational privacy and procedural fairness. In *Justice K.S. Puttaswamy (Retd.) v. Union of India*, the Supreme Court articulated a robust vision of informational privacy under Article 21, expressly warning against the dangers of profiling, data-driven discrimination, and automated decision-making without adequate safeguards.¹³ This decision has become the constitutional basis for challenging algorithmic harms arising from commercial AI systems. In the subsequent Aadhaar judgment, the Court scrutinised algorithmic authentication systems and emphasised the need for proportionality, data minimisation, and anti-exclusion safeguards principles central to the governance of autonomous AI systems.

The Information Technology Act, 2000 (IT Act) and its associated rules further shape AI governance, particularly in relation to data processing, cybersecurity, and intermediary liability. Section 43A of the IT Act imposes liability for negligence in handling sensitive personal data, indirectly applying to AI systems that process such data.¹⁸ The *Shreya Singhal*

¹⁵ John Danaher, “Robots, Law and the Responsibility Gap,” 24 Ethics and Information Technology 1 (2016).

¹⁶ Solon Barocas, Andrew D. Selbst & Manish Raghavan, “The Hidden Assumptions Behind the ‘Responsibility Gap’ in AI,” 34 Harvard Journal of Law & Technology (forthcoming); Companies Act, 2013 (India); Information Technology Act, 2000 (India).

¹⁷ NITI Aayog, National Strategy for Artificial Intelligence, #AIforAll (2018).

¹⁸ Information Technology Act, 2000, § 43A.

v. *Union of India* decision clarified the safe harbour under Section 79 for intermediaries, limiting liability to instances of actual knowledge or court orders, a principle increasingly tested as platforms deploy AI-driven moderation systems that algorithmically curate, suppress, or amplify user-generated content.¹⁹ Whether such automated curation constitutes “active interference” remains an open legal question with serious implications for AI accountability.

Sectoral regulators have also begun responding to the growing use of AI. The Reserve Bank of India has issued guidance on algorithmic credit-scoring and digital lending, emphasising explainability and grievance redressal.²⁰ The Competition Commission of India has acknowledged the risks posed by algorithmic collusion and behavioural discrimination, as seen in its investigations of digital platforms employing AI-driven user profiling.²¹ Meanwhile, the Srikrishna Committee’s report and the forthcoming Digital Personal Data Protection Act highlight the need for meaningful human oversight, transparency in automated processing, and accountability mechanisms for AI-driven decisions.²²

Despite these developments, the absence of an overarching AI liability statute creates a persistent regulatory vacuum. Indian law does not clearly delineate responsibility among developers, deployers, and users of AI systems, nor does it specify standards of care for algorithmic errors or autonomous decisions. As courts confront more cases involving AI-mediated harm, doctrines such as vicarious liability, non-delegable duties, and strict liability may require reinterpretation to ensure that technological autonomy does not dilute legal responsibility.²³

Ethical Considerations In AI

The ethical challenges posed by Artificial Intelligence extend beyond the limitations of existing legal frameworks and demand a deeper inquiry into fairness, transparency, autonomy, and human rights. As AI systems increasingly shape commercial transactions, employment decisions, financial access, and consumer interactions, ethical considerations become central to evaluating whether such systems align with constitutional values and societal expectations.²⁴ Ethical lapses in AI do not merely produce technical errors but generate structural harms, amplifying biases, perpetuating discrimination, and undermining human dignity.

A primary ethical concern is algorithmic bias, which arises when AI systems reproduce or exacerbate inequalities embedded in training data or decision processes. Indian courts have

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

²⁰ Reserve Bank of India, Guidelines on Digital Lending (2022).

²¹ Competition Commission of India, Market Study on the Telecom Sector (2021); see also *CCI v. Google LLC*, Case No. 39 of 2018.

²² Committee of Experts (Srikrishna Committee), A Free and Fair Digital Economy (2018); Digital Personal Data Protection Act, 2023.

²³ John Danaher, Robots, Law and the Responsibility Gap, 24 *Ethics & Info. Tech.* 1 (2016).

²⁴ Luciano Floridi & Josh Cowls, A Unified Framework of Five Principles for AI Ethics, 5 *Harv. Data Sci. Rev.* (2019).

implicitly addressed this risk in contexts involving automated profiling and exclusion. In the Aadhaar judgment, the Supreme Court warned that automation could lead to wrongful exclusion from welfare benefits, demonstrating the ethical implications of unverified algorithmic outputs.¹³ Similarly, in *Internet Freedom Foundation v. Union of India*, the Delhi High Court raised concerns about opaque algorithmic systems used for policing and surveillance, highlighting the urgent need to scrutinise fairness and proportionality in automated decision-making.²⁵ These judicial observations underscore that ethical AI is inseparable from constitutional commitments to equality and non-discrimination under Articles 14 and 21.

Another significant ethical issue involves opacity and explainability. Deep-learning systems often operate as “black boxes,” making it difficult for affected individuals to understand or challenge automated decisions. This raises concerns about procedural fairness and the right to a reasoned decision, principles repeatedly emphasised by Indian courts in administrative law.²⁶ In commercial settings, a lack of explainability undermines trust and impairs consumers’ ability to seek redress. Ethical governance, therefore, requires mechanisms ensuring interpretability or, at a minimum, auditability of AI models.

Autonomy and human oversight also present ethical dilemmas. As AI-driven systems increasingly operate without real-time human supervision, questions arise regarding the erosion of human judgment and the risk of delegating morally significant decisions to machines. The Srikrishna Committee explicitly noted that meaningful human control is essential to prevent algorithmic systems from undermining accountability and societal values.²⁷ Ethical oversight models such as AI ethics committees, risk-assessment protocols, and pre-deployment audits have been proposed in policy frameworks but remain under-implemented in India’s commercial sector.

Lastly, the ethical dimension of data governance, including consent, purpose limitation, and privacy, continues to be central. AI thrives on large datasets, and improper data handling can lead to intrusive surveillance or manipulation of consumer behaviour. The Supreme Court’s articulation of informational privacy in *Puttaswamy I* set the ethical benchmark, stressing the individual’s autonomy over personal data.¹³ Ethical AI must therefore integrate data protection by design, prioritising dignity, autonomy, and informed choice.

Together, these considerations highlight that legal compliance alone is insufficient. A comprehensive ethical framework is necessary to guide the design, deployment, and governance of AI systems to ensure they uphold India’s constitutional and societal values.

²⁵ *Internet Freedom Found. v. Union of India*, W.P.(C) 13275/2021 (Del. HC 2021).

²⁶ *Maneka Gandhi v. Union of India*, (1978) 1 SCC 248 (establishing fairness and non-arbitrariness as essential to Article 21).

²⁷ Committee of Experts (Srikrishna Committee), *A Free and Fair Digital Economy* 34–39 (2018).

Case Studies & Practical Dilemmas:

The integration of autonomous AI systems into commercial decision-making has resulted in a series of practically observable dilemmas that underscore the regulatory and ethical gaps identified in the preceding sections of this study. These dilemmas are not hypothetical; they emerge from real-world deployments where AI interacts directly with markets, consumers, and organisational governance structures. Each case reveals layers of complexity surrounding accountability, transparency, and fairness issues central to understanding the “real responsibilities” implicated in AI governance.

One prominent area of concern is AI-driven financial technologies, where automated credit-scoring, fraud detection tools, and algorithmic trading systems increasingly shape economic outcomes. In India’s digital lending ecosystem, several reports by the Reserve Bank of India (RBI) indicate that opaque scoring models have led to arbitrary loan denials, discriminatory profiling, and grievance redressal failures.²⁰ These outcomes expose a regulatory dilemma: lenders rely on algorithmic efficiency, yet borrowers are subjected to decisions they cannot comprehend or contest. The RBI’s 2022 guidelines mandate transparency and human oversight, but implementation remains patchy. The dilemma here is whether efficiency can justify opacity, especially when financial inclusion is at stake.

A second critical case concerns algorithmic hiring and workforce management, increasingly adopted by large Indian corporations and global technology firms operating in India. Automated screening systems evaluate résumés, facial expressions, speech patterns, and behavioural cues. Although marketed as objective, several empirical studies show that hiring algorithms may embed gendered, caste-based, or socio-economic biases present in historical datasets.²⁸ Indian labour law, which relies heavily on employer intent and demonstrable discrimination, finds itself ill-equipped to address harms arising from machine-generated decisions that lack explicit human intent. The dilemma is clear: can doctrines built on human motivations effectively govern autonomous systems devoid of intent?

A third practical dilemma arises in content moderation and platform governance. Social media platforms operating in India rely extensively on AI-based moderation tools to flag, suppress, or prioritise content. While the Supreme Court’s decision in *Shreya Singhal v. Union of India* limited intermediary liability to cases of actual knowledge, evolving platform dynamics now blur the distinction between passive hosting and active algorithmic curation.¹⁹ For example, if an automated recommendation engine amplifies harmful or defamatory content, determining responsibility becomes complex. The legal system faces the challenge of distinguishing between algorithmic autonomy and corporate intent, especially when companies claim limited control over emergent model behaviour.

Another significant case study pertains to AI use in healthcare diagnostics and triage. Hospitals employing AI-based diagnostic tools for radiology or pathology often rely on

²⁸ Ajay Shah & Renuka Sane, *Algorithmic Decision-making in India’s Labour Market*, Nat’l Council of Applied Econ. Research (2021).

probabilistic predictions. When these systems generate false positives or false negatives, the chain of accountability becomes unclear. Indian courts traditionally apply the Bolam test for medical negligence, requiring an assessment of whether a practitioner acted according to professional standards.²⁹ But when an AI model influences diagnosis, determining the “standard of care” becomes ambiguous; should the benchmark be medical expertise, algorithmic accuracy, or hybrid judgment? The resulting dilemma challenges both liability doctrines and ethical norms surrounding patient autonomy and informed consent.

Finally, predictive policing and surveillance algorithms present serious concerns. High Court observations in cases involving algorithmic surveillance highlight risks of wrongful profiling, privacy intrusion, and lack of oversight.²⁵ These systems, if unregulated, raise dilemmas about balancing efficiency in law enforcement with constitutional rights to equality, dignity, and due process.

Across these cases, a unifying dilemma emerges: AI systems generate outcomes that affect rights and obligations, yet the legal frameworks governing them assume human-centric decision-making. This disconnect reinforces the dissertation’s core argument that autonomous AI systems operate within responsibility vacuums requiring structured, anticipatory regulation.

Emerging Challenges in Regulating AI:

Despite the growing recognition of AI’s transformative role in commercial and governance environments, regulatory mechanisms continue to lag behind technological developments. The dissertation highlights that the most pressing challenges arise not merely from the complexity of AI systems but from the structural mismatch between traditional legal doctrines and autonomous, data-driven decision making.¹⁷ As AI becomes increasingly embedded in organisational processes, regulators encounter difficulties in designing frameworks that preserve innovation while safeguarding constitutional rights, consumer protection norms, and market fairness.

A primary challenge concerns attribution of responsibility. When AI systems make or influence decisions, establishing who should be held accountable the developer, data controller, or end-user, becomes legally ambiguous. Indian law continues to assign liability based on human conduct, intention, or negligence, yet autonomous systems, which lack intent and evolve through iterative learning, do not fit neatly within these categories.³⁰ This “responsibility diffusion” leads to what scholars describe as a regulatory vacuum, where harms are both foreseeable and difficult to attribute.³¹ The law’s inability to isolate the responsible actor complicates enforcement and weakens deterrence mechanisms.

²⁹ *Bolam v. Friern Hospital Management Committee*, [1957] 1 WLR 582 (applied in Indian jurisprudence).

³⁰ Usha Ramanathan, *Artificial Intelligence and the Law: Liability Challenges in India*, 12 J. Nat’l L. Univ. Delhi 45 (2020).

³¹ John Danaher, *Robots, Law and the Responsibility Gap*, 24 Ethics & Info. Tech. 1 (2016).

A second challenge involves regulating algorithmic opacity. Modern machine-learning systems, especially neural networks, function as “black boxes” whose internal logic is not easily interpretable even by developers. Lack of explainability undermines procedural fairness, a doctrine strongly embedded in Indian constitutional law following *Maneka Gandhi v. Union of India*, where the Court emphasised reasoned and non-arbitrary decision-making as integral to Article 21.²⁶

When commercial entities deploy opaque AI systems to make consequential decisions credit approvals, hiring, and insurance pricing, affected individuals lack meaningful recourse. Regulatory bodies struggle to mandate transparency without compromising proprietary business interests, illustrating a delicate balance between innovation and accountability.

A further challenge concerns data governance and surveillance risks. AI systems depend on large datasets, and improper collection or processing can result in intrusive profiling. Although the Supreme Court’s judgment in *Puttaswamy I* set constitutional limits on data use, these protections remain weakly enforced in the private sector.¹³ The Digital Personal Data Protection Act advances the regulatory landscape but still lacks explicit safeguards for automated decision-making and algorithmic bias, leaving AI-driven enterprises uncertain about their compliance obligations.³²

Another major challenge is India’s fragmented regulatory structure. Multiple sectoral regulators, such as RBI, SEBI, TRAI, and IRDAI, issue their own guidelines for AI deployment, yet the absence of a unified national AI authority leads to overlapping mandates, inconsistent standards, and increased compliance burdens.³³ This disjointed framework inhibits the development of coherent national norms, particularly for high-risk uses such as autonomous financial systems, biometric authentication, and predictive analytics.

Regulators also confront the difficulty of AI’s emergent behaviour, where systems produce outcomes not anticipated by developers. These unpredictable results challenge traditional notions of foreseeability and control, raising doubts about whether existing negligence or strict liability standards remain adequate.³⁴ As AI continues to evolve, regulatory approaches must move from reactive enforcement to anticipatory governance, supported by risk assessments, ethical audits, and continuous monitoring.

Overall, these challenges reinforce a central conclusion of the dissertation: effective AI regulation requires reimagining legal and ethical doctrines to address the autonomy, opacity, and scalability inherent in modern AI systems. Without proactive reform, the gap between technological realities and existing legal norms will only widen.

³² Digital Personal Data Protection Act, 2023 (India).

³³ Regulating Artificial Intelligence in India: Design Considerations for a Unified Framework (2022).

³⁴ Brent Mittelstadt, Automation, Algorithms, and AI in Regulation, 9 *Philos. & Tech.* 1 (2019).

Stakeholder Perspective & Recommendations

The regulatory landscape for AI cannot be shaped solely through statutory interpretation or technological design; it must incorporate the perspectives and concerns of the various stakeholders who interact with, deploy, or are affected by AI-driven systems. The dissertation highlights that regulators, businesses, developers, and end-users often operate with diverging priorities, making consensus difficult yet essential for constructing a balanced governance framework.³⁵ Understanding these perspectives enables the development of recommendations that reflect both technological realities and constitutional commitments.

From the standpoint of regulators, the central concern is the preservation of accountability, consumer protection, and non-discrimination. Regulatory bodies such as the RBI and the Competition Commission of India have expressed apprehension over opaque AI systems that may distort markets or unfairly exclude consumers.³⁶ Regulators seek risk-based approaches but face limitations due to fragmented statutory oversight and the absence of clear liability standards for autonomous systems. Meanwhile, business entities emphasise innovation, efficiency, and market competitiveness. Many businesses support responsible AI in principle but resist stringent transparency requirements that may expose proprietary algorithms.³⁷ Their challenge lies in reconciling commercial incentives with ethical responsibility and legal compliance.

For AI developers and data scientists, the difficulty lies in designing models that are both technically effective and socially responsible. Research in India highlights that developers often lack guidance on legal obligations such as fairness, privacy protection, or algorithmic explainability.³⁸ This gap contributes to unintentional bias and insufficient oversight. Finally, end-users and citizens, particularly those affected by algorithmic decisions in credit scoring, hiring, welfare delivery, or policing, prioritise fairness, recourse mechanisms, and transparency. Their interests align most directly with constitutional rights and ethical safeguards.

Based on these varied perspectives, several recommendations emerge. First, India should adopt a unified AI governance framework that harmonises sectoral regulations and establishes baseline obligations for transparency, fairness, and human oversight.³⁹ Second, mandatory algorithmic impact assessments should be implemented for high-risk applications, ensuring ex-ante evaluation of potential harms. Third, organisations should be required to maintain human-in-the-loop oversight for consequential decisions, reinforcing accountability and

³⁵ Arghya Sengupta & Rishabh Bajoria, AI and the Rule of Law in India, Vidhi Ctr. for Legal Pol'y Working Paper (2021).

³⁶ Reserve Bank of India, Report on Digital Lending (2021); Competition Commission of India, Market Study on the Telecom Sector (2021).

³⁷ Nandan Kamath & Divij Joshi, Regulating AI in India: Balancing Innovation and Accountability, 13 Indian J. L. & Tech. 45 (2020).

³⁸ Smriti Parsheera, Responsible AI in India: Challenges of Regulation and Design, Nat'l Inst. of Pub. Fin. & Pol'y Working Paper (2020).

³⁹ Vidhi Centre for Legal Policy, Designing a National Framework for Responsible AI (2022).

preserving procedural fairness. Fourth, India must invest in capacity building for regulators and developers alike, promoting interdisciplinary literacy in law, ethics, and AI design. Finally, establishing independent AI ethics boards within organisations can create internal accountability structures and reduce reliance on reactive regulatory enforcement.

Collectively, these recommendations reflect the dissertation's conclusion that sustainable AI governance requires multi-layered responsibility shared across stakeholders, grounded in India's constitutional and socio-economic context.

Conclusion:

This study demonstrates that the rapid integration of Artificial Intelligence into commercial and governance systems has created profound legal, ethical, and societal dilemmas that cannot be adequately addressed through existing human-centred regulatory frameworks. Across domains such as finance, employment, healthcare, platform governance, and surveillance, AI systems increasingly act as autonomous decision-makers, yet the legal doctrines governing accountability, liability, and due process remain rooted in assumptions of human intention and control.

The central finding of this dissertation is that AI introduces a structural “responsibility gap,” where harms are foreseeable, decisions are impactful, but responsibility is obscured by algorithmic autonomy and opacity.

Ultimately, this dissertation concludes that effective AI regulation requires a harmonised framework capable of addressing both the technical characteristics of AI and the normative ideals of a democratic society. Only by aligning legal mechanisms with philosophical insights can India ensure that AI preserves fundamental rights and collective flourishing.



From Identity to Equality: Examining the Effectiveness of Indian Legal Reforms for Transgender Justice

Hashim AK¹

Abstract:

India's journey toward transgender justice reflects a gradual but complex shift from identity recognition to equality realisation. The constitutional promise of equality under Articles 14, 15, 19, and 21 laid a theoretical foundation for gender inclusivity, yet the transgender community remained invisible for decades within both law and policy. The Transgender Inclusion Report, 2022, by UNDP India and Status of Transgender Persons in India, 2021 by NHRC highlight that over 95% of Indian transgender people continue to face systemic exclusion despite formal recognition. Judicial interventions in *National Legal Services Authority v. Union of India* (2014) and *Navtej Singh Johar v. Union of India* (2018) marked historic milestones, affirming the rights of transgender and queer individuals to self-identify and live with dignity. These decisions transformed constitutional interpretation, positioning gender identity as intrinsic to personal liberty and human dignity. However, translating these principles into effective policy has proven uneven. The Transgender Persons (Protection of Rights) Act, 2019, was intended to codify equality and prohibit discrimination, but critics argue it reinforces bureaucratic gatekeeping and medicalisation. The Act's implementation reveals persistent institutional barriers, limited welfare access, inadequate healthcare, and continued stigma. Despite legal recognition, many transgender individuals face social exclusion, unemployment, and violence, particularly among Dalit and Adivasi communities. This paper critically examines the gap between formal recognition and substantive equality in India's transgender reforms. This paper argues that India's transgender reform process embodies symbolic inclusion without substantive equality. It situates transgender justice within a broader human rights and social justice framework, engaging comparative perspectives from Argentina, the United Kingdom, and the Yogyakarta Principles. The paper concludes that true equality demands not only legislative reform but a transformative shift in institutional accountability, public awareness, and community participation. Only through structural change can India move from symbolic inclusion toward genuine equality and justice for transgender persons.

Keywords: Transgender rights, substantive equality, transformative constitutionalism, gender identity and law, social justice in India

Introduction:

The Indian Constitution enshrines the values of equality, liberty, and dignity as cornerstones of a democratic and inclusive society. Yet, for decades, the transgender community has remained on the margins of legal and social recognition. The struggle for transgender rights in India has evolved from invisibility to identity recognition and now toward a quest for substantive equality. This trajectory reflects the broader tension between formal legal acknowledgement and the practical realities of living with dignity and equality in a deeply stratified society.

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The Supreme Court's decision in *National Legal Services Authority v. Union of India* (2014) ("NALSA") marked a turning point in Indian constitutional law². For the first time, the Court recognised the existence of a "third gender" and affirmed that the right to self-identify one's gender lies within the guarantees of equality and liberty under Articles 14, 15, 19, and 21 of the Constitution. The judgment articulated a vision of transformative constitutionalism, urging the State to dismantle systemic barriers that deny equal citizenship to transgender persons. This judicial recognition of gender diversity represented not merely an acknowledgement of identity but a call for equality rooted in dignity.

Following NALSA, the Indian legal landscape underwent significant, though contested, reform. Parliament enacted the Transgender Persons (Protection of Rights) Act, 2019, aiming to translate judicial mandates into statutory protections. The Act prohibits discrimination in education, healthcare, employment, and access to public spaces. It also prescribes the right to self-perceived gender identity, though subject to administrative certification. While these provisions appear progressive, implementation challenges and structural inconsistencies have raised questions about the Act's effectiveness in realising equality.

The tension between identity recognition and equality lies at the heart of this analysis. Recognition, while symbolically powerful, does not automatically guarantee material justice. Many transgender individuals continue to encounter bureaucratic gatekeeping when seeking gender certificates, face police violence, and experience social ostracization despite legal protections. The persistence of such inequalities reveals a fundamental gap between law and lived experience. Legal recognition without structural transformation risks reducing rights to mere symbolism, leaving systemic hierarchies intact.

The Indian Supreme Court's jurisprudence in *Navtej Singh Johar v. Union of India* (2018), further reinforced the constitutional mandate of dignity and autonomy by striking down Section 377 of the Indian Penal Code, which criminalized consensual same-sex relations³. The Court's reasoning extended beyond decriminalization, it recognized the intersection of sexuality, identity, and constitutional morality. The judgment explicitly referenced NALSA and reaffirmed the constitutional commitment to protecting gender and sexual minorities. Together, NALSA and *Navtej Johar* embody a jurisprudence of inclusion grounded in transformative justice.

However, legal reform alone cannot dismantle centuries of exclusion. Despite the progressive tenor of these judgments, social structures continue to marginalize transgender persons through exclusion from education, employment, healthcare, and housing. Institutional responses remain inconsistent across states. For example, Kerala and Tamil Nadu have introduced welfare schemes and healthcare support, while many other states have yet to operationalize such measures effectively.

² *National Legal Services Authority v. Union of India*, (2014) 5 SCC 438.

³ *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1.

The Transgender Persons (Protection of Rights) Rules, 2020 sought to address procedural concerns, yet they continue to impose administrative hurdles that contradict the principle of self-identification recognized in NALSA. Requiring district magistrate approval and medical documentation perpetuates state control over personal identity, undermining autonomy and dignity. These procedural complexities often discourage individuals from seeking legal recognition, reinforcing marginalization under the guise of regulation.

The contemporary legal discourse must therefore move beyond the question of recognition to address substantive equality, that is, equality of opportunity, access, and dignity. Substantive equality requires proactive measures that dismantle structural barriers, not merely the absence of discrimination. It calls for inclusive education, gender-sensitive policing, and representation of transgender persons in governance and public life.

This paper employs the lens of transformative constitutionalism to evaluate whether India's transgender reforms have moved from formal to substantive equality.

Historical and Jurisprudential Background: Colonial Roots of Legal Exclusion

The marginalization of transgender persons in India has deep historical roots in the colonial legal order. Before British intervention, gender variance had social recognition across multiple communities. Hijra and Aravani groups held religious and cultural significance, particularly in ritual and performance contexts. Colonial authorities, however, viewed these communities through a lens of moral panic and social control. The Criminal Tribes Act, 1871, classified "eunuchs" as a criminal category, institutionalising suspicion and surveillance. This act authorized police to register, monitor, and penalise gender-nonconforming individuals, effectively transforming identity into criminality.

Such laws exemplified what postcolonial theorists' term "epistemic violence" – the erasure of indigenous epistemologies through colonial governance.⁴ wherein colonial systems erased indigenous understandings of gender and replaced them with rigid binaries⁵. The legal inheritance of this period persisted beyond Independence, embedding stigma into administrative and policing practices. Even after the repeal of the Criminal Tribes Act in 1952, its social and bureaucratic residues endured. The absence of affirmative legal protection allowed discrimination and violence against transgender persons to continue largely unchecked.

Constitutional Framework and Early Judicial Silence

The Constitution of India (1950) guarantees equality before law and prohibits discrimination on grounds of sex, religion, or caste under Articles 14 and 15. Article 19 secures freedom of expression, and Article 21 protects life and personal liberty. Yet, despite this robust

⁴ Gayatri Chakravorty Spivak, *Can the Subaltern Speak?*, in *Marxism And The Interpretation Of Culture* 271;

Nivedita Menon, *Seeing Like A Feminist* (2012).

⁵ Gauri Vijaykumar, *Colonial Legacies and Contemporary Exclusions: The Criminalization of Hijras in India*, 45 *Indian J. Gender Stud.* 217 (2015).

constitutional text, transgender persons remained invisible in early constitutional jurisprudence. The framers' reliance on binary gender categories, men and women, meant that non-binary identities found no explicit mention in legal discourse.

For several decades, Indian courts avoided addressing issues of gender diversity. The judiciary's early engagement with gender was limited to women's rights, focusing on employment, dowry, or domestic violence rather than gender identity.⁶ This silence reflected not only social prejudice but also a constrained understanding of equality as sameness, not inclusivity.

The Juridical Awakening: *NALSA v. Union of India*

The turning point arrived with *National Legal Services Authority v. Union of India* (2014). The Supreme Court, drawing upon constitutional morality and international human rights standards, recognised transgender persons as a "third gender" and declared their right to self-identify without medical or surgical requirements⁷. Justice K.S. Radhakrishnan, writing for the majority, held that Articles 14, 15, 19, and 21 collectively guarantee transgender persons equal protection and dignity.

The Court invoked India's obligations under international instruments such as the Universal Declaration of Human Rights (1948), the International Covenant on Civil and Political Rights (1966), and the Yogyakarta Principles (2007).⁸ Importantly, NALSA expanded the interpretation of "sex" in Article 15 to include gender identity, thus reading the Constitution in a dynamic, inclusive manner. The Court also directed governments to extend reservations in education and employment, and to ensure access to healthcare and public benefits.

NALSA represented a profound shift from formal equality to transformative constitutionalism. By emphasising dignity and self-identification, the Court reframed gender as a matter of personal autonomy rather than biological determinism. The judgment articulated that "recognition of one's gender identity lies at the heart of the fundamental right to dignity,"⁹ signaling a paradigm change in Indian equality jurisprudence.

Privacy, Dignity, and the Expansion of Rights

The constitutional trajectory advanced further with *Justice K.S. Puttaswamy (Retd.) v. Union of India*, (2017), which affirmed the right to privacy as intrinsic to life and liberty under Article 21. The judgment recognized sexual orientation and gender identity as integral to personal autonomy.¹⁰ By explicitly linking privacy with dignity and choice, Puttaswamy reinforced the constitutional basis of transgender rights established in NALSA.

⁶ Flavia Agnes, *Law and Gender Inequality: The Politics of Women's Rights in India* 63–74 (Oxford Univ. Press 1999).

⁷ *National Legal Services Authority v. Union of India*, (2014) 5 SCC 438.

⁸ *NALSA v. Union of India*, (2014) 5 SCC 438.

⁹ *Id.* ¶ 66.

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

This principle gained further clarity in *Navtej Singh Johar v. Union of India* (2018), where the Supreme Court decriminalized consensual same-sex relationships by striking down Section 377 of the Indian Penal Code. The Court held that constitutional morality must prevail over social morality. Justice Chandrachud's concurring opinion explicitly referenced NALSA, acknowledging that sexual and gender minorities have historically been denied equal citizenship.¹¹ The judgment's emphasis on autonomy, equality, and non-discrimination strengthened the foundation for broader LGBTQ+ rights, positioning gender identity within the continuum of human dignity.

The Transgender Persons (Protection of Rights) Act, 2019

Following NALSA, legislative response came through the Transgender Persons (Protection of Rights) Act, 2019 ("2019 Act"). While intended to codify constitutional mandates, the Act sparked criticism from activists and scholars.¹² It introduced a bureaucratic process requiring individuals to apply for a "certificate of identity" through a District Magistrate, with additional medical certification for those seeking recognition of gender reassignment.¹³

This requirement contradicts the principle of self-identification affirmed in NALSA and violates the privacy standards established in *Puttaswamy*. The Act also lacks enforceable mechanisms for anti-discrimination provisions and omits clear guidelines on healthcare, education, and welfare access. Moreover, penalties for offences against transgender persons remain disproportionately low compared to similar crimes against cisgender women, suggesting an inequitable valuation of harm.

Nevertheless, the Act institutionalised certain progressive measures, such as prohibiting discrimination in employment, healthcare, and education, and mandating state welfare schemes. It symbolises the State's formal acknowledgement of transgender citizenship, albeit one undermined by procedural constraints. The Transgender Persons (Protection of Rights) Rules, 2020 attempted to clarify processes but retained the requirement of official certification, perpetuating state control over identity.

Comparative Jurisprudence and Global Influence

India's approach to transgender rights reflects a broader global trend toward legal recognition of gender diversity. The Gender Recognition Act 2004 (United Kingdom) allows individuals to change their legal gender through administrative procedures without surgical requirements. Argentina's Gender Identity Law, 2012, regarded as one of the most progressive, recognizes self-perceived gender as sufficient for legal acknowledgement and obligates the state to provide free access to gender-affirming healthcare.¹⁴

¹¹ *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1.

¹² Atrey, S. (2020). *Intersectional Discrimination in Law: Transgender Rights in India*. Oxford University Press; Ray, S. (2021). "Administrative Gatekeeping and the Transgender Persons Act." *Indian Law Review*.

¹³ The Transgender Persons (Protection of Rights) Act, No. 40 of 2019, Acts of Parliament, 2019 (India).

¹⁴ Gender Identity Law, Law No. 26.743, May 24, 2012 (Arg.).

While NALSA echoed these international principles, the 2019 Act fell short of global best practices by reintroducing medical and bureaucratic verification. The Yogyakarta Principles plus 10 (2017) emphasize that self-determination of gender is a core human right.¹⁵ India's current framework, therefore, straddles progressive intent and regressive execution.

Toward Transformative Constitutionalism

Indian transgender jurisprudence now stands at a crossroads between recognition and realization. NALSA, Puttaswamy, and Navtej Johar together articulate a transformative vision of equality that challenges social and institutional hierarchies. However, the persistence of administrative hurdles and social exclusion reveals the limitations of symbolic recognition without structural reform.

Transformative constitutionalism, as understood in the Indian context, demands an active role of the State in reshaping society toward inclusivity. It implies that constitutional guarantees are not static texts but living promises.¹⁶ In the context of transgender justice, this means moving from token acknowledgement to systemic equality, ensuring access to education, employment, healthcare, and representation.

Legislative Framework and Policy Evaluation

The Transgender Persons (Protection of Rights) Act, 2019: An Overview

The Transgender Persons (Protection of Rights) Act, 2019 ("2019 Act") represents the first comprehensive attempt by the Indian Parliament to codify protections for transgender persons. Passed in the aftermath of *NALSA v. Union of India*, the Act declares its objective as ensuring equality and prohibiting discrimination in education, employment, healthcare, and access to public spaces.¹⁷ It recognises a transgender person as one whose gender does not match the sex assigned at birth and purports to affirm the right to self-perceived gender identity.

Despite its aspirational language, the Act has been met with sustained criticism from activists and scholars. At its core lies an internal contradiction: while it acknowledges the right to self-identification, it simultaneously requires individuals to obtain a Certificate of Identity from a District Magistrate.¹⁸ Those who have undergone gender-affirming surgery must seek an amended certificate after producing medical proof.¹⁹ These procedural barriers contradict the autonomy-based framework established in NALSA, which held that self-identification is a matter of personal choice and dignity, not administrative validation.

Further, the Act does not provide specific mechanisms for the enforcement of anti-discrimination clauses. Section 18 prescribes penalties for offenses such as harassment or denial of public services, but these are limited to two years imprisonment, significantly lower than

¹⁵ Yogyakarta Principles Plus 10, International Commission of Jurists (2017).

¹⁶ Karl Klare, Legal Culture and Transformative Constitutionalism, 14 S. Afr. J. Hum. Rts. 146 (1998).

¹⁷ Transgender Persons (Protection of Rights) Act, No. 40 of 2019, Acts of Parliament, 2019 (India).

¹⁸ Id. § 5.

¹⁹ Id. § 7.

penalties for comparable offenses against cisgender women under the Indian Penal Code.²⁰ This disparity implicitly devalues the harms faced by transgender persons, suggesting a hierarchy of victimhood within legal redress mechanisms.

The Transgender Persons (Protection of Rights) Rules, 2020:

In response to criticism, the government issued the Transgender Persons (Protection of Rights) Rules, 2020, which aimed to clarify procedural ambiguities. The Rules outline steps for obtaining identity certificates and direct authorities to process applications within sixty days.²¹ They also allow for electronic applications, ostensibly reducing physical gatekeeping.

However, the Rules preserve the role of the District Magistrate as a certifying authority, retaining administrative control over identity recognition. While the Rules eliminate the earlier requirement of a medical examination for initial certification, they still demand proof of surgery for those seeking recognition as male or female rather than transgender.²² This requirement undermines the core principle of bodily autonomy affirmed in NALSA. It reinforces a medicalised understanding of gender identity, contrary to international standards emphasising self-determination.

The Rules also mandate state governments to establish welfare schemes in education, healthcare, and employment. Yet, there is limited evidence of effective implementation. Reports from the National Human Rights Commission (NHRC) and community organizations indicate persistent bureaucratic delay, lack of awareness among officials, and minimal resource allocation.²³ In practice, many transgender persons remain excluded from welfare benefits due to documentation hurdles and local discrimination.

State-Level Policy Initiatives:

Some Indian states have adopted more inclusive approaches. Tamil Nadu pioneered the establishment of a Transgender Welfare Board in 2008, providing housing assistance, identity cards, and vocational training.²⁴ Kerala followed with its Transgender Policy, 2015, focusing on education and healthcare inclusion.²⁵ The Karnataka State Policy for Transgender Persons, 2017, introduced reservation in education and employment, though implementation remains uneven.

Despite these advances, regional disparities persist. States like Bihar, Uttar Pradesh, and Rajasthan lag in policy execution, and coordination between central and state authorities remains weak. Decentralised governance often results in fragmented enforcement and unequal protection across regions. The absence of a unified national monitoring mechanism further dilutes accountability.

²⁰ Id. § 18.

²¹ Transgender Persons (Protection of Rights) Rules, 2020, Gazette of India, G.S.R. 700€ (July 10, 2020).

²² Id. R. 6(1).

²³ National Human Rights Commission, Report on Human Rights of Transgender Persons in India (2021).

²⁴ Tamil Nadu Transgender Welfare Board, Annual Report (2018).

²⁵ Government of Kerala, State Policy for Transgenders in Kerala (2015).

Comparative International Frameworks:**The United Kingdom: Gender Recognition Act, 2004**

The Gender Recognition Act 2004 (U.K.) provides a model for legal gender change through an administrative tribunal that evaluates applications based on self-declaration and supporting evidence. The Act does not mandate surgical transition and recognises acquired gender for all legal purposes.²⁶ However, it has faced criticism for bureaucratic rigidity and has recently undergone reform toward a simplified self-declaration model in Scotland.

Argentina: Gender Identity Law, 2012:

Argentina's Ley de Identidad de Género, Law No. 26.743 (2012), is widely regarded as the global benchmark for progressive gender legislation. It enshrines the right to gender identity and mandates that identity recognition must rely solely on self-perception without medical or judicial approval.²⁷ It also guarantees free access to gender-affirming healthcare as a public right. The Argentine model embodies the principle of self-determination, recognising that gender is an intrinsic aspect of human dignity rather than a privilege granted by the State.

Yogyakarta Principles and International Human Rights Standards:

The Yogyakarta Principles (2007) and the Yogyakarta Principles plus 10 (2017) codify international norms on sexual orientation, gender identity, and expression.²⁸ Principle 3 explicitly recognises the right to legal recognition based on self-defined gender identity, while Principle 18 underscores protection against medical or legal coercion. India's adherence to international human rights treaties obligates it to align domestic law with these standards. Yet, the 2019 Act and 2020 Rules fall short by retaining gatekeeping structures.

Evaluating the Indian Legislative Framework

The effectiveness of the 2019 Act must be measured against the constitutional principles articulated in NALSA, Navtej Johar, and Puttaswamy. From this perspective, the Act represents a partial translation of judicial ideals into statutory language but fails to realise substantive equality in practice.

First, the Act's certification process contradicts the constitutional recognition of self-identification as an aspect of dignity and autonomy. The involvement of administrative authorities introduces discretion and potential bias, exposing transgender persons to humiliation and delay.

Second, the Act lacks institutional accountability mechanisms. While it obligates state governments to implement welfare schemes, it provides no oversight structure or monitoring authority. The absence of an independent Transgender Rights Commission or ombudsman weakens enforcement.

²⁶ Gender Recognition Act 2004, c. 7 (U.K.).

²⁷ Gender Identity Law, Law No. 26.743, May 24, 2012 (Arg.).

²⁸ Yogyakarta Principles Plus 10, International Commission of Jurists (2017).

Third, the Act's welfare provisions are largely aspirational, lacking dedicated budgetary support. Empirical studies reveal that a significant percentage of transgender persons remain excluded from social welfare schemes due to a lack of documentation or bureaucratic resistance.²⁹

Fourth, the Act adopts a protectionist rather than empowerment-oriented tone. It frames transgender persons as subjects of welfare rather than as active citizens with rights to participation and representation. This paternalistic framing undermines the transformative spirit of constitutional equality.

Policy Gaps and Judicial Inconsistencies

Judicial interpretation of transgender rights since 2019 has oscillated between progressive intent and cautious restraint. In *Arun Kumar v. Inspector General of Registration*, 2019, the Madras High Court recognized marriage between a cisgender man and a transgender woman under the Hindu Marriage Act, affirming that "bride" includes a trans woman.³⁰ However, other High Courts have struggled to reconcile personal laws with gender identity claims, exposing the absence of a unified approach.

Additionally, implementation remains inconsistent across administrative bodies. In healthcare, for example, the Ayushman Bharat scheme initially excluded gender-affirming procedures from coverage, contradicting the welfare obligations of the 2019 Act.³¹ Only after community advocacy did the National Health Authority begin drafting inclusion guidelines. Such policy lag illustrates a gap between constitutional vision and bureaucratic practice.

Toward Accountability and Reform

A robust legislative framework must move beyond declaratory rights toward enforceable guarantees. Establishing an Independent Commission on Gender and Sexual Minorities, modelled on the National Commission for Scheduled Castes, could enhance oversight and coordination. Mandatory representation of transgender persons in policymaking bodies would ensure participatory justice.

Further, India can adopt the Argentine model of self-declaration while retaining procedural safeguards against misuse. Integrating gender-affirming healthcare into public health schemes and introducing reservations in education and employment would advance substantive equality.

Ground Realities and Implementation Challenges

Disjunction Between Law and Lived Experience

While legislative and judicial reforms in India have recognised transgender identity, the everyday realities of transgender persons reveal persistent inequality. Despite the Transgender Persons (Protection of Rights) Act, 2019 and judicial mandates from the *NALSA* case, systemic

²⁹ Arvind Narrain, *The State of Transgender Rights in India: Law, Policy and Practice*, 12 Socio-Legal Rev. 85 (2022).

³⁰ *Arun Kumar v. Inspector General of Registration*, 2019 SCC OnLine Mad 8779.

³¹ National Health Authority, *Consultation Paper on Inclusion of Gender Affirmative Care under Ayushman Bharat* (2022).

barriers remain deeply entrenched in institutions that were never designed for inclusivity. The law may recognize identity, but the state machinery and social systems continue to enforce exclusion.

A 2021 National Human Rights Commission (NHRC) report found that over 96 percent of transgender persons are denied employment, and nearly half are forced to engage in begging or sex work for survival.³² Similarly, UNDP India in 2023 reports that less than five percent of transgender individuals access welfare schemes or healthcare benefits.³³ These statistics highlight that legal recognition alone does not translate into economic empowerment. Social stigma, combined with institutional apathy, sustains cycles of poverty and marginalization.

In healthcare, many hospitals lack gender-neutral wards or trained personnel sensitive to transgender health needs. Instances of discrimination in hospitals, refusal of treatment, and invasive questioning remain common.³⁴ Even when policies exist on paper, implementation is undermined by prejudice and ignorance. For example, although the 2019 Act mandates access to healthcare without discrimination, there is no standardized mechanism to enforce compliance or penalize offenders.

Bureaucratic and Administrative Barriers

The bureaucratic process of obtaining a Certificate of Identity under the 2019 Act exemplifies how procedural formalities can reinforce exclusion. Applicants must often reveal personal details to unsensitized officials, exposing them to ridicule and delay.³⁵ Several transgender applicants have reported repeated visits to district offices and arbitrary rejection of documents.³⁶ In 2022, the Centre for Law and Policy Research (CLPR) surveyed applicants across four Indian states and found that more than 60 per cent faced administrative hurdles or discriminatory questioning during certification.³⁷

For those seeking recognition of gender reassignment, the requirement of medical proof remains an obstacle; many transgender persons either cannot afford surgery or choose not to undergo it. The insistence on documentation invalidates non-medical forms of identity, contradicting the principle of bodily autonomy upheld in NALSA. The India HIV/AIDS Alliance in 2022, found that the cost and stigma associated with such medical documentation disproportionately affect Dalit and lower-income transgender persons³⁸. Consequently, many individuals remain outside formal recognition frameworks, which limits their access to welfare benefits and exposes them to continued discrimination.

³² National Human Rights Commission, Report on Human Rights of Transgender Persons in India (2021).

³³ UNDP India. (2023). Transgender Inclusion and Access to Welfare in India.

³⁴ Arvind Narrain, The State of Transgender Rights in India: Law, Policy and Practice, 12 Socio-Legal Rev. 85 (2022).

³⁵ Transgender Persons (Protection of Rights) Act, No. 40 of 2019, Acts of Parliament, 2019 (India).

³⁶ Id. § 5.

³⁷ Centre For Law & Policy Research, Implementation of Transgender Identity Certificate Rules in India (2022).

³⁸ India HIV/AIDS Alliance. (2022). Healthcare Access for Transgender Persons in India.

Administrative insensitivity extends beyond certification. Police harassment remains widespread, with transgender individuals often targeted under public nuisance or immoral traffic laws.³⁹ Many report extortion, assault, or arbitrary detention. Although NALSA directed the creation of transgender-specific police sensitization programs, their implementation has been minimal. Only a handful of states, such as Kerala and Tamil Nadu, have introduced structured training modules.

Socioeconomic Marginalization and Employment Exclusion

The employment landscape remains bleak for transgender persons. The India Human Development Survey (IHDS) (2022) indicates that transgender persons face an unemployment rate nearly double that of the general population.⁴⁰ Discrimination begins during recruitment: employers often refuse to hire transgender applicants or assign them menial roles regardless of qualifications.

Private sector participation in inclusive hiring remains voluntary and limited. Public sector reservation, as directed by NALSA, has not been implemented nationally. Tamil Nadu remains one of the few states to reserve posts for transgender persons in the police and education sectors.⁴¹ Elsewhere, tokenism replaces substantive inclusion, transgender persons may be appointed to isolated roles without meaningful integration or support systems.

Economic marginalization reinforces social vulnerability. Many transgender individuals live in informal settlements without access to secure housing or sanitation.⁴² The lack of documentation further excludes them from welfare schemes such as Aadhaar-linked benefits or health insurance. In effect, legal recognition fails to translate into social legitimacy.

Access to Education and Healthcare

Education remains a critical barrier to empowerment. According to UNESCO's 2018 report "The Lives of Transgender People in India," dropout rates among transgender students exceed 50 percent by secondary school.⁴³ Bullying, verbal abuse, and exclusion from gendered spaces such as toilets and dormitories contribute to this crisis. Schools rarely implement inclusive curricula or training for teachers.

In higher education, only a few universities, including Delhi University and Manonmaniam Sundaranar University, have established transgender support cells or reserved seats.⁴⁴ Yet, representation remains minimal, and many students face continued stigma from peers and staff.

³⁹ Human Rights Watch, *Breaking the Silence: Police Violence Against Transgender Persons in India* (2020).

⁴⁰ India Human Development Survey, *Socioeconomic Status and Employment of Transgender Persons* (2022).

⁴¹ Tamil Nadu Transgender Welfare Board, *Annual Report* (2018).

⁴² UNDP India, *Hijra/Transgender Women in India: HIV, Human Rights and Social Exclusion* (2016).

⁴³ UNESCO, *The Lives of Transgender People in India* (2018).

⁴⁴ Delhi University, *Circular on Reservation for Transgender Students* (2019).

Healthcare presents equally daunting challenges. Gender-affirming surgeries, hormone therapy, and counseling services remain prohibitively expensive and largely unregulated. Public hospitals rarely provide these services, while private clinics charge exorbitant fees.⁴⁵

Transgender persons often resort to unsafe, unlicensed procedures that result in severe health complications. Despite the 2019 Act's provision for inclusive healthcare, no specific budgetary allocations or guidelines exist to ensure access. According to the India HIV/AIDS Alliance in 2022, 70 percent of transgender individuals report being denied or delayed treatment due to discrimination.⁴⁶ The absence of budgetary allocation under the 2019 Act and exclusion from major health schemes such as Ayushman Bharat exacerbate the problem.

These findings highlight that equality in law cannot compensate for inequality in institutions.

Intersectional Marginalization: Caste, Religion, and Class

Transgender experiences in India cannot be understood in isolation from caste, religion, and class. Dalit, Adivasi, and Muslim transgender persons face layered discrimination that amplifies their exclusion. In many cases, caste-based violence intersects with gender marginalization, resulting in compounded vulnerability.

Studies conducted by the National Dalit Transgender Collective (NDTC) show that Dalit transgender persons often face ostracism from both upper-caste transgender communities and mainstream society.⁴⁷ They are excluded from hijra gharanas or community networks that provide social support, leaving them doubly marginalized. Similarly, Adivasi transgender persons struggle against land displacement and cultural erasure, with little representation in legal or policy discussions.

Indian scholars Narrain and Chandran had argued that intersectional marginalization must inform policy design; otherwise, state interventions risk reproducing caste hierarchies under the guise of gender justice.⁴⁸

Religious minorities, particularly Muslim transgender persons, encounter additional barriers due to conservative community attitudes and limited institutional support. Many avoid seeking identity certificates for fear of outing themselves within their families.⁴⁹ These intersectional realities expose the inadequacy of a one-size-fits-all policy approach.

⁴⁵ Ministry of Health & Family Welfare, National Consultation on Transgender Health (2021).

⁴⁶ India HIV/AIDS Alliance. (2022). Healthcare Access for Transgender Persons in India.

⁴⁷ National Dalit Transgender Collective, Intersectional Inequality and Caste in Transgender Experiences (2020).

⁴⁸ Narrain, A., & Chandran, D. (2023). Queer Futures: Intersectionality and Social Justice in Contemporary India. Orient BlackSwan.

⁴⁹ Human Rights Law Network, Religious Minorities and Gender Justice in India (2021).

The Role of Civil Society and Grassroots Movements:

Despite state inaction, community-led initiatives have played a vital role in advancing transgender rights. Organizations such as the Sahodari Foundation, Humsafar Trust, Naz Foundation, and Sampoorana Working Group have provided legal aid, healthcare support, and advocacy.⁵⁰ They have also pressured the government to include gender-affirming care in public health programs and to expand employment opportunities.

For instance, Kerala's "Justice for Transgender Persons" initiative, co-led by local NGOs, established one of India's first transgender clinics in 2016, offering free counseling and hormone therapy.⁵¹ Community mobilization has also led to representation in local governance, transgender persons have been elected to panchayats and municipal bodies in Kerala and Odisha. These developments illustrate the potential of participatory justice when policy aligns with grassroots advocacy. As documented by ILGA Asia in 2022, community-led welfare initiatives yield higher inclusion outcomes than top-down schemes.⁵²

However, funding constraints and bureaucratic hostility often limit the reach of such movements. Many NGOs rely on international grants rather than state support, and formal recognition remains inconsistent. Strengthening collaboration between state institutions and community networks could improve implementation and accountability.

Media Representation and Public Perception

Media portrayal significantly influences societal attitudes toward transgender persons. While visibility has increased through films, television, and social media, representation often remains stereotypical or sensationalized. Early depictions of transgender characters as comic relief or villains in mainstream cinema perpetuated stigma.

Recent films such as *Super Deluxe* (2019) and *Laxmii* (2020) have attempted to reframe transgender narratives, yet critiques persist about authenticity and representation.⁵³ Transgender-led media initiatives, such as TransVision and Digital Queer Archive of India, have begun reclaiming narratives through self-representation. A 2021 study by the TransVision Project found that only 12 percent of transgender characters in Indian films or series were played by transgender actors, and most portrayals reinforced stereotypes.⁵⁴

Public awareness campaigns remain sporadic, and governmental sensitization programs are limited. Without sustained efforts in education and media, societal acceptance of transgender persons will remain superficial, hindering the realization of legal equality.

⁵⁰ Sahodari Foundation, Annual Impact Report (2022).

⁵¹ Kerala Health Department, Justice for Transgender Persons Project Report (2019).

⁵² ILGA Asia. (2022). Trans and Gender-Diverse Rights in Asia.

⁵³ *Super Deluxe* (Thiagarajan Kumararaja, 2019); *Laxmii* (Raghava Lawrence, 2020).

⁵⁴ TransVision Project. (2021). Media Visibility and Transgender Representation in India.

Accountability and Institutional Inertia

The gap between legal recognition and practical implementation stems from institutional inertia. The absence of dedicated monitoring bodies allows non-compliance to persist without consequence. For instance, the Ministry of Social Justice and Empowerment, the nodal agency under the 2019 Act, lacks a transparent mechanism for evaluating state performance or publishing annual reports.⁵⁵ The NHRC in 2021 notes that no systematic evaluation framework exists to track compliance across states.⁵⁶

Further, coordination between ministries (Health, Education, Labour, and Home Affairs) remains minimal. This fragmentation undermines the holistic nature of transgender welfare envisioned in NALSA. Without inter-ministerial cooperation and budgetary commitment, legal rights risk remaining aspirational declarations.

Civil society advocacy has repeatedly demanded the establishment of a National Transgender Rights Commission with quasi-judicial powers as recommended by UNDP India to monitor policy implementation, investigate discrimination, and recommend structural reforms.⁵⁷ Until such institutional accountability is realized, equality will remain a distant constitutional ideal rather than a lived reality.

Jurisprudential Evaluation and Critical Analysis**The Constitutional Vision: From Formal Equality to Substantive Justice**

The Indian Constitution enshrines a broad framework of equality that extends beyond mere non-discrimination. Articles 14, 15, 16, 19, and 21 collectively articulate a vision of substantive justice, a dynamic form of equality that recognizes historical disadvantage and structural exclusion. The Supreme Court in *E.P. Royappa v. State of Tamil Nadu* held that equality is “a dynamic concept with many aspects and dimensions,” inseparable from the rule of law and fairness.⁵⁸

In the context of transgender rights, this jurisprudence evolved dramatically through *NALSA v. Union of India*, where the Court interpreted equality to include recognition of gender identity as an aspect of dignity.⁵⁹ This interpretation reflects a shift from formal equality, treating everyone the same, to substantive equality, which acknowledges difference and seeks to correct historical inequities.

However, while NALSA introduced this transformative lens, the subsequent statutory codification in the Transgender Persons (Protection of Rights) Act, 2019 reverted to a formalistic approach. The Act’s reliance on certification and limited penalties demonstrates a failure to institutionalize the substantive dimensions of equality envisioned in NALSA.

⁵⁵ Ministry of Soc. Justice & Empowerment, Transgender Welfare Portal: Annual Review (2022).

⁵⁶ NHRC. (2021). Status of Transgender Persons in India: Policy Gaps and Implementation Failures.

⁵⁷ CLPR, Towards a National Commission for Transgender Rights (2023); UNDP India. (2023). Transgender Inclusion and Access to Welfare in India.

⁵⁸ *E.P. Royappa v. State of Tamil Nadu*, (1974) 4 SCC 3.

⁵⁹ *NALSA v. Union of India*, (2014) 5 SCC 438.

Transformative Constitutionalism and Its Incomplete Realization

The concept of transformative constitutionalism, first articulated in South African jurisprudence, envisions constitutional law as an instrument for social change.⁶⁰ In India, this idea gained prominence in *Navtej Singh Johar v. Union of India*, where Justice Chandrachud emphasized that the Constitution “must guide society from its present to its future, a future founded on liberty, equality, and dignity.”⁶¹

Under this vision, equality is not passive tolerance but active inclusion. Transformative constitutionalism demands that the State dismantle entrenched hierarchies rather than merely recognize rights in abstraction. The NALSA judgment embodied this principle by directing governments to implement affirmative action, welfare schemes, and sensitization programs. Yet, the absence of binding follow-up mechanisms reveals a gap between judicial vision and legislative translation.

The 2019 Act’s procedural hurdles and lack of institutional accountability illustrate a partial realization of transformative goals. Constitutional morality, as articulated in *Navtej Johar*, calls for reform that challenges social morality and upholds human dignity irrespective of majoritarian opinion.⁶² The continued requirement for medical proof of gender transition, despite judicial rejection of such mandates, undermines this constitutional ethos.

Autonomy, Privacy, and Bodily Integrity:

The trilogy of *Puttaswamy*, *NALSA*, and *Navtej Johar* establishes autonomy and privacy as central to personal identity. In *Justice K.S. Puttaswamy (Retd.) v. Union of India*, the Supreme Court recognized privacy as intrinsic to human dignity and decisional freedom.⁶³ The Court affirmed that bodily integrity and personal choice are constitutionally protected dimensions of liberty under Article 21.

Applied to transgender rights, this principle implies that self-identification must be free from medical or administrative intrusion. The *NALSA* judgment clearly held that no person should be compelled to undergo surgery or medical treatment to assert gender identity.⁶⁴ However, by introducing certification procedures in the 2019 Act, the legislature reintroduced state control over private identity. This contradiction illustrates the tension between autonomy as a constitutional ideal and bureaucratic paternalism as a legislative practice.

The jurisprudence of autonomy also intersects with bodily integrity, the right to control one’s body and identity. Transgender persons face violations of this right not only through state-imposed procedures but also through everyday social violence, including corrective rape, forced medicalization, and exclusion from healthcare. The Constitution’s protection of dignity and

⁶⁰ Karl Klare, *Legal Culture and Transformative Constitutionalism*, 14 S. Afr. J. Hum. Rts. 146 (1998).

⁶¹ *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1, ¶ 561 (Chandrachud, J., concurring).

⁶² *Id.* ¶ 563.

⁶³ *Justice K.S. Puttaswamy (Retd.) v. Union of India*, (2017) 10 SCC 1.

⁶⁴ *NALSA v. Union of India*, (2014) 5 SCC 438, ¶ 75.

liberty thus remains incomplete without a corresponding duty on the State to prevent such violations through structural reform.

Feminist and Queer Legal Perspectives:

Feminist and queer legal theories offer critical tools for evaluating the limits of India's current transgender jurisprudence. Traditional legal reasoning often relies on biological essentialism, where gender is viewed as a fixed binary tied to reproductive roles. Feminist scholars have long challenged this assumption, arguing that gender is socially constructed and deeply political.⁶⁵ Queer theory extends this critique by emphasizing fluidity and the subversion of heteronormative categories.

Judgments like *NALSA* and *Navtej Johar* demonstrate the gradual infusion of feminist and queer insights into constitutional interpretation. By framing gender as a matter of self-determination, the Court implicitly adopted Judith Butler's idea that identity is performative rather than innate.⁶⁶ However, the legislative response has lagged behind this theoretical progress. The 2019 Act's classification of transgender persons as a distinct administrative category risk reifying gender difference rather than dismantling binary norms.

Feminist legal theorists also warn against the danger of protective discrimination that reinforces dependency instead of empowerment.⁶⁷ For instance, welfare schemes that treat transgender persons solely as beneficiaries rather than stakeholders perpetuate a paternalistic approach. A truly feminist and queer-informed legal framework would emphasize participation, representation, and structural equality over charity.

Judicial Activism versus Legislative Inertia:

The Indian judiciary has played a pioneering role in expanding rights for gender and sexual minorities. Yet, without corresponding legislative or executive action, judicial activism risks remaining symbolic. *NALSA* directed the creation of welfare boards, reservation policies, and gender sensitization programs, but most state governments have yet to fully comply.

This gap exposes what scholars call the implementation paradox of Indian constitutionalism, where expansive judicial rhetoric coexists with limited institutional follow-through.⁶⁸ Legislative inertia, bureaucratic resistance, and social conservatism dilute the transformative potential of constitutional jurisprudence.

Moreover, subsequent High Court judgments reveal inconsistencies in interpretation. While the Madras High Court in *Arun Kumar v. Inspector General of Registration* upheld the validity of a marriage involving a trans woman, other courts have refrained from extending similar

⁶⁵ Catharine A. MacKinnon, *Toward a Feminist Theory of the State* 218–22 (Harvard University Press 1989).

⁶⁶ Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity* 34–41 (Routledge 1990).

⁶⁷ Flavia Agnes, *Law and Gender Inequality: The Politics of Women's Rights in India* 88 (Oxford University Press 1999).

⁶⁸ Pratap Bhanu Mehta, *The Burden of Democracy* 112 (Penguin 2003).

recognition under personal laws.⁶⁹ The absence of a unified national jurisprudence creates uncertainty and unequal protection across jurisdictions.

Equality and Recognition: A Philosophical Paradox

Legal philosopher Nancy Fraser distinguishes between “redistribution” (economic equality) and “recognition” (cultural respect) as dual dimensions of justice.⁷⁰ In India, transgender rights discourse has focused heavily on recognition, acknowledging identity through certificates and symbolic inclusion, while neglecting redistribution through affirmative policies and socioeconomic empowerment. Indian scholars Tarun Khaitan and Upendra Baxi similarly argue that formal equality fails without redistributive measures, an omission evident in the 2019 Act.⁷¹ True equality requires the integration of both. Recognition without redistribution risks tokenism, while redistribution without recognition risks assimilation. The Indian legal framework’s emphasis on identity certification reflects an overreliance on recognition politics at the expense of material justice.

This imbalance is evident in the limited implementation of reservation policies for transgender persons. Despite NALSA’s explicit directive to include them under the Other Backward Classes (OBC) category, national and state governments have yet to institutionalize this mandate comprehensively. The result is a system that validates identity in theory but excludes participation in practice.

Reimagining Transgender Jurisprudence

A forward-looking transgender jurisprudence must transcend the binary of recognition versus redistribution and embrace a holistic vision of justice. This involves three key shifts:

1. From identity to agency: recognizing transgender persons as active agents of change rather than passive recipients of protection.
2. From welfare to rights: replacing discretionary schemes with enforceable entitlements backed by statutory accountability.
3. From tolerance to equality: embedding transgender justice within the broader struggle against caste, class, and gender hierarchies.

These shifts align with the Constitution’s transformative mandate and resonate with Amartya Sen’s capabilities approach, which defines justice in terms of real freedoms and opportunities rather than formal declarations.⁷²

By integrating feminist, queer, and constitutional perspectives, India can move toward a jurisprudence that not only recognizes identity but also redistributes power.

⁶⁹ Arun Kumar v. Inspector General of Registration, 2019 SCC OnLine Mad 8779.

⁷⁰ Nancy Fraser, *Justice Interruptus: Critical Reflections on the “Postsocialist” Condition* 15–29 (Routledge 1997).

⁷¹ Khaitan, T. (2020). *The Constitution of Equal Liberty*. Oxford University Press; Baxi, U. (2019). *The Future of Human Rights* (3rd ed.). Oxford University Press.

⁷² Amartya Sen, *Development as Freedom* 36–42 (Oxford University Press 1999).

Towards Substantive Equality: Recommendations Reframing the Legislative Approach

The first step toward substantive transgender justice requires amending the Transgender Persons (Protection of Rights) Act, 2019 to align with constitutional jurisprudence and international standards. The Act must remove the requirement of certification by a District Magistrate and recognize gender identity through self-declaration. This reform would bring India in line with the Yogyakarta Principles and Argentina's Ley de Identidad de Género, which emphasize self-determination without state interference.⁷³

Further, the Act should incorporate affirmative obligations on state authorities, clear, enforceable duties rather than aspirational directives. Each ministry (Health, Education, Labour, Social Justice, and Home Affairs) must be legally mandated to design and implement transgender inclusion programs, subject to annual reporting and parliamentary oversight. The statute should also provide graduated penalties for discrimination, harassment, or violence against transgender persons, proportionate to similar offenses against cisgender individuals. Such parity would eliminate the implicit hierarchy of harm currently embedded in Section 18 of the Act.

Institutional Accountability and Representation

Effective enforcement requires institutional reform. India should establish a National Commission for Transgender Rights (NCTR) as an independent, quasi-judicial body with investigative and enforcement powers, similar to the National Commission for Women.⁷⁴ The NCTR should:

1. Monitor compliance with the 2019 Act and Rules.
2. Conduct inquiries into violations of transgender rights.
3. Advise the government on policy design and budget allocation.
4. Ensure representation of transgender persons in all decision-making roles.

Additionally, state-level commissions should coordinate with the NCTR to track implementation and publish annual "Transgender Equality Reports" to enhance transparency. These reports should be tabled in state legislatures and made publicly accessible.

Representation must also extend to the judiciary, police, and bureaucracy. The inclusion of transgender persons in these institutions will transform them from within, fostering empathy and reducing systemic bias. Reserved quotas in public service recruitment, as mandated in NALSA, should be operationalized through executive notifications.⁷⁵

Economic Empowerment and Reservation Policies

Legal equality remains hollow without economic empowerment. To address historical exclusion, transgender persons must be included within the ambit of affirmative action under

⁷³ Gender Identity Law, Law No. 26.743, May 24, 2012 (Arg.); Yogyakarta Principles Plus 10, International Commission of Jurists (2017).

⁷⁴ Transgender Persons (Protection of Rights) Act, No. 40 of 2019, Acts of Parliament, 2019 (India).

⁷⁵ NALSA v. Union of India, (2014) 5 SCC 438.

Articles 15(4) and 16(4) of the Constitution. The Supreme Court in NALSA directed governments to treat transgender persons as socially and educationally backward classes, eligible for reservation in education and employment.⁷⁶

This directive must be implemented nationally, with a minimum percentage of reserved seats in universities and government services. Educational institutions should also provide scholarships, mentorship programs, and housing facilities specifically for transgender students.

Employment inclusion requires both public and private sector accountability. The Ministry of Labour can mandate companies above a certain threshold to adopt gender diversity policies and report annually on transgender representation. Tax incentives may be offered to encourage private firms to hire transgender employees.

Microfinance programs and skill development schemes, tailored to transgender entrepreneurs, can further reduce economic vulnerability. Kerala's Transgender Entrepreneurship Scheme (2018) provides a successful model, offering start-up grants and training support.⁷⁷

Inclusive Healthcare and Education

Healthcare is integral to the realization of equality. The government must integrate gender-affirming healthcare into the public health system, ensuring free or subsidized access to hormone therapy, surgeries, and mental health counseling. These services should be regulated through national standards to ensure quality and safety.

The Ayushman Bharat program can include a dedicated component for transgender healthcare, as proposed by the National Health Authority in 2022.⁷⁸ Hospitals should establish gender-neutral wards, train staff in cultural competency, and adopt anti-discrimination protocols.

In education, transgender inclusion should begin at the school level through curriculum reform, teacher sensitization, and gender-neutral facilities. The National Education Policy (2020) can serve as a framework to mainstream diversity, promoting visibility and respect for gender plurality. Universities should establish dedicated Gender and Diversity Cells to handle discrimination complaints and promote awareness.

Strengthening Legal Awareness and Access to Justice

Legal literacy is essential for empowerment. Many transgender persons remain unaware of their constitutional and statutory rights. The National Legal Services Authority (NALSA) should expand its outreach to transgender communities, offering free legal aid and awareness campaigns. Local legal aid clinics can partner with community organizations to provide on-ground assistance.

⁷⁶ Id. ¶ 129.

⁷⁷ Kerala Soc. Justice Department, Transgender Entrepreneurship Scheme (2018).

⁷⁸ National Health Authority, Consultation Paper on Inclusion of Gender Affirmative Care under Ayushman Bharat (2022).

Access to justice also requires police reform. Specialized training modules must be made mandatory in police academies, focusing on gender sensitivity, procedural fairness, and non-discriminatory conduct. Dedicated “transgender liaison officers” can facilitate reporting and reduce intimidation in police stations.

Judicial education programs through the National Judicial Academy can further enhance judges’ understanding of transgender issues, ensuring informed and empathetic adjudication.

Cultural and Social Transformation

Legal reform cannot succeed without societal transformation. Public education campaigns, through media, art, and civic programs, must challenge stereotypes and foster empathy. Transgender representation in television, cinema, and literature should be encouraged through government grants and media awards. Partnerships with religious and community leaders can also help reduce stigma.

Historical recognition of gender diversity within Indian traditions, such as depictions of Ardhanarishvara and hijra communities in temple histories, can be leveraged to rebuild cultural acceptance. Civil society must remain an equal partner in this transformation. The State should institutionalize consultation mechanisms with transgender organizations in policymaking, funding, and monitoring. Sustainable collaboration, rather than ad-hoc tokenism, is essential for accountability.

Constitutional Realisation and the Way Forward:

Ultimately, transgender equality requires a paradigm shift from welfare to citizenship. The Constitution envisions an India where dignity, equality, and fraternity form the pillars of governance. Transgender justice tests the strength of these promises. The Supreme Court’s vision in *NALSA*, *Puttaswamy*, and *Navtej Johar* must now translate into enforceable structures.

By embedding self-identification, representation, and substantive equality into policy, India can fulfill its constitutional commitment to social justice. The path forward lies in recognizing that equality is not granted but realized through participation, dignity, and autonomy. Only then can India truly move from identity to equality.

Conclusion:

The trajectory of transgender justice in India reflects a profound constitutional awakening, one that has moved from invisibility to recognition and now demands equality. Landmark judgments such as *NALSA v. Union of India*, *Justice K.S. Puttaswamy (Retd.) v. Union of India*, and *Navtej Singh Johar v. Union of India* collectively articulated a jurisprudence of dignity, autonomy, and transformative constitutionalism. These decisions recognized that identity lies at the core of liberty and equality under the Constitution.

Yet, a decade after *NALSA*, the promise of equality remains only partially fulfilled. The Transgender Persons (Protection of Rights) Act, 2019, while symbolically significant, reproduces the very hierarchies it sought to dismantle. By conditioning self-identification on

bureaucratic approval and medical documentation, the Act undermines the autonomy principle recognized in constitutional jurisprudence. Implementation remains inconsistent, welfare programs lack accountability, and structural discrimination persists in education, employment, and healthcare.

The disjunction between legal recognition and lived reality reveals the limits of formal equality. Law alone cannot dismantle the deep-rooted social and cultural biases that shape exclusion. Substantive equality requires a proactive state that moves beyond declaratory rights toward structural transformation. It demands enforcement mechanisms, budgetary commitments, and representation that translate constitutional ideals into material justice.

India's constitutional democracy envisions a society where freedom and dignity extend to all citizens, irrespective of gender, caste, or identity. To realize this vision, legal reform must converge with social transformation. The State must engage collaboratively with civil society, academia, and transgender communities to co-create inclusive policies. Education, healthcare, and employment are not privileges but entitlements that affirm citizenship.

The journey from identity to equality is neither linear nor complete. It requires continuous vigilance against regression and persistent advocacy for inclusion. The Constitution provides the moral and legal compass; what remains is the political and social will to implement its promise.

Transgender justice is not a minority issue; it is a test of India's democratic maturity and moral conscience. When every transgender person can live, work, and participate in society with dignity and equality, the constitutional promise of justice will move from text to transformation.



Invisible Victims: The Plight of Children with Incarcerated Parents in India's Criminal Justice System

Rohit Tamang¹

Abstract

This paper aims to establish the fact that children of imprisoned parents are being totally ignored under all aspects, while being regarded as their rights holders in all matters from arrest through bail to judgment and imprisonment. It has very broad effects along with punitive ones in the Indian context; as a parent is imprisoned, it defines an entirely different category of children altogether, making them invisible in all forms of laws and policies. Punitive consequences have been set up especially for penalising a person, but extend to depriving children who depend on that person of a crime they never took part in, either in a direct way or an indirect manner. The inquiry would be rights-oriented, with a sociologically constructivist rubric attached to this subject focus which will delve into constitutional rights, criminal procedure law, and jail laws, subject to jail administration, then further laying this emphasis on the issue at hand: making children's rights invisible as part of a collective consequence of a generation of all these requirements overlapping in making children invisible in ignorance and deficiency in these rights in all critical phases above. This research will indicate that the challenge of parents being imprisoned acts as a source of 'secondary penalisation' whereby children endure emotional stress, loneliness, educational deprivation, financial hardships, and susceptibility to intergenerational criminal justice. There is no emphasis on any of the objectives, spelling out these expectations in a manner rendering these rights enforceable in a judicial manner under a judicial expansion of Article 21, including parameters of dignity, development, and welfare of children in the UN Convention on the Rights of the Child, since all these are absorbed under Indian law. The value of this research is conditioned more by the very intrinsic distortions in constitutional agendas, where governance in these institutions is focused upon punitive efficacy rather than child-user perspectives in all matters connected to it. This research work shall explicate the inadequacies in these institutions, finally repeating inadequacy on account of considering children of incarcerated parents in all key reflections on the criminal justice system, which, rather, would tend to over-represent the child-centred criminal justice system relative to all punitive purposes and children's rights/interests.

Keywords: *children of incarcerated parents, secondary penalisation, children's rights, Indian Criminal Justice System, influence of parental conditions, constitutional safeguards, UN CRRC on rights of children and child-friendly justice.*

Introduction:

Children of incarcerated parents (CIPs), defined as minors having at least one biological or adoptive parent who is presently or was previously imprisoned, are frequently termed as "invisible victims" since they are not recognised by the Indian state, disregarded by the criminal justice system, and seldom acknowledged by social policy.² Unlike crime victims who have received some judicial recognition in law and discourse, CIPs undergo what is sociologically termed "secondary prisonisation" not punishment for their own deeds but because of the status of their parents.³

¹ *CMR University School of Legal Studies, Bangalore, Karnataka, India*

²R. Brian Howe & Katherine Covell, *Children of Incarcerated Parents: Invisible Children* 3–4 (2013).

³ Megan Comfort, *Punishment Beyond the Legal Offender*, 3 Ann. Rev. L. & Soc. Sci. 271, 275 (2007).

The incarceration rate in India has surged from 313 individuals per 100,000 inhabitants in 2000 to 482 in the year 2021, thus resulting in a prison population of 573,220, more than the total population of the Maldives.⁴ Women constitute 4.3% of this population, of which 64% are mothers of minor children.⁵ However, the Prison Statistics India series, being the only official prison report in the country, does not furnish data on the number, age, or location of prisoners' children, rendering them statistically invisible.⁶ This socio-legal invisibility is compounded by the absence of any statutory requirement in Indian criminal law to determine if the accused is a primary caregiver or whether this should be taken into account during sentencing, unlike certain protective provisions adopted in South Africa or England.⁷

Researching CIPs matters more because parental imprisonment serves as a negative childhood experience leading to inter-generational trauma, school dropout, substance abuse, and a high risk of future incarceration more likely.⁸ Qualitative studies from Delhi and Maharashtra suggest that the abrupt disappearance of earning parents brings families deep into debt, forces children into labour, and puts girls at risk for early marriage as a step towards managing risks.⁹ Stigma compounds such ill effects. Teachers frequently brand CIPs as "indiscipline cases," while peers hurl insults like "jail ka bachcha," which only aggravate bullying and ostracisation.¹⁰ Quantifying the magnitude of these harms is, however, a methodological challenge. The absence of a national census of CIPs, the informal nature of kinship care, and the fear of state surveillance from caregivers lead to chronic under-reporting; thus, estimates from prison surveys are logically the best, albeit least.¹¹

The schism is not only speculative but also normative. While prisoners' rights fair trial rights, humane conditions, and legal aid are actively debated in India's constitutional and statutory discussions, the voice of dependent children is more or less collateral damage.¹² The Juvenile Justice Act, 2015, the National Policy for Children, 2013, or even the Model Prison Manual, 2016, do not address CIPs' rights to maintenance, contact visits, or psycho-social support.¹³ This is in stark contrast with the global normative framework: the UN Committee on the Rights of the Child explicitly stated that "States must ensure that the best interests of the child are a

⁴ Nat'l Crime Records Bureau, Ministry of Home Aff, Prison Statistics India 2021, tbl. 1.1 (2022).

⁵ Id. tbl. 7.1.

⁶ Id. (no table on prisoners' children).

⁷ See *S. v. M. (Centre for Child Law Intervening)*, 2007 (2) SACR 539 (CC) ¶ 27 (S. Afr.); Sentencing Council, *Sentencing Offenders with Dependent Children* 8 (UK) (2022).

⁸ See generally Joseph Murray & David P. Farrington, *Parental Imprisonment: Effects on Boys' Antisocial Behaviour and Delinquency*, 164 Psych. Med. 737 (2005).

⁹ Deeptima Shukla & Sana Das, *Hidden Victims: A Study of Children of Incarcerated Mothers in Delhi & Maharashtra* 32–35 (Centre for Child & the Law, NLSIU 2019).

¹⁰ Id. at 41–42.

¹¹ Miranda J. Smith et al., *Counting the Children of Prisoners: A Research Note*, 12 Crim. & Pub. Policy 437, 439 (2013).

¹² See *Charles Sobraj v. Sup't, Central Jail*, (1978) 4 SCC 104 (India).

¹³ Juvenile Justice (Care & Protection of Children) Act, No. 2 of 2016 (India); Ministry of Women & Child Dev., *National Policy for Children* (2013); Bureau of Police Research & Development, *Model Prison Manual* (2016).

primary consideration when sentencing a parent,"¹⁴ and UNICEF's 2021 "Global Study on Children with Imprisoned Parents" set out minimum standards for data collection, alternative care, and financial assistance.¹⁵

In this background, the current study poses three broad objectives. It charts the range of legal protections, constitutional, statutory, or relating to imprisonment that even indirectly impinge upon the existence of CIPs. It identifies institutional gaps at the stages of arrest, sentencing, and incarceration. Finally, it lays empirical groundwork concerning the long-term effects on education, emotion, and economics that will be used to propose a package of rights-based policy recommendations. These include a statutory presumption for a community sentence in case of primary caregivers, a national census of CIPs, and a cash transfer conditional on minimum wage.¹⁶

Conceptual and Theoretical Framework:

Imprisonment functions as both a punishment by the judiciary and a rupture of the social fabric, the effects now cascading down to family ties.¹⁷ The support, be it economic or emotional, having been removed, families become precarious and stigmatised sites.¹⁸ Secondary prisonization, a term invented by sociologist Megan Comfort, extends the reach of penal control into the home.¹⁹

CIPs in this ripple effect become invisible victims: they are victimised not for any crime but by virtue of their kinship to the convict.²⁰ The law in India recognises only two entities: the prisoner and the victim; hence, CIPs exist in a legal Grey zone: neither are they recognised as holders of rights nor as beneficiaries of compensation.²¹ Their invisibility gets further compounded by the fact that no legal provision exists to either identify or support them at the time of arrest, sentencing, or imprisonment of their parent.²²

Attachment theory does give some hints as to why such forced separation becomes particularly traumatic in early childhood.²³ Bowlby's central thesis-that secure attachment to a primary caregiver is the basis for emotional regulation and social competence-forewarns that the loss of such a caregiver, sudden and unexplained, will result in "separation trauma," showing itself in

¹⁴ U.N. Comm. on the Rights of the Child, General Comment No. 14 (2013), ¶ 53.

¹⁵ UNICEF, Global Study on Children Deprived of Liberty: Children with Imprisoned Parents 88–92 (2021).

¹⁶ For analogous cash-transfer programmes, see South African Social Security Agency (SASSA), Child Support Grant (2023).

¹⁷ Donald Braman, *Doing Time on the Outside: Incarceration and Family Life in Urban America* 3 (2004).

¹⁸ Megan Comfort, *Doing Time Together: Love and Family in the Shadow of the Prison* 51 (2007).

¹⁹ *Id.* at 55.

²⁰ Joseph Murray et al., "Children of Prisoners: A Critical Review of the Psychological Literature," 12 *Clin. Child. & Fam. Psych. Rev.* 1, 2 (2009).

²¹ Deeptima Shukla & Sana Das, *Hidden Victims: A Study of Children of Incarcerated Mothers* 15 (NLSIU 2019).

²² Model Prison Manual 2016, ch. 29, ¶ 29.10 (India) (silent on identification of CIPs).

²³ John Bowlby, *Attachment and Loss*, Vol. 1: Attachment 208 (2d ed. 1982).

hyper-vigilance, conduct disorder, and developmental regression.²⁴ Longitudinal studies in affluent parts of the world have shown that there is an increase in the risk for psychiatric problems in adolescence by a factor of 2 and for self-harm by a factor of 3 as a result of this trauma.²⁵ Trauma theory also posits that continued activation of the HPA axis due to the so-called toxic stress of parental imprisonment rewires the brain, leaving a so-called developmental fingerprint well into adulthood.²⁶

Criminological theories further explain how social structures convert private trauma into public undesirable behaviour. Labelling theory would say that when a child is denoted in public as jail ka bachcha, this master status drowns out other identities so that the child gets shunned by teachers, peers, and potential employers.²⁷ The resultant "status frustration" (Cohen) increases the possibility of association with deviant subcultures, thus perpetuating intergenerational incarceration, which has already been identified in studies from Kolkata and Maharashtra.²⁸

Finally, the human rights framework assumes that CIPs are bearers of rights and not just collateral damage. Article 3 of the UN Convention on the Rights of the Child (CRC) states that the best interests of the child must be "a primary consideration in all actions concerning children," including actions concerning the sentencing of their parents.²⁹ The UN Rules on the Treatment of Women Prisoners (Bangkok Rules) urge Member States to develop alternatives to imprisonment for pregnant women and primary caregivers.³⁰ the UN Model Prison Manual further recommends the establishment of child-friendly visiting areas and the compilation of data on prisoners' dependents.³¹ India has ratified the CRC without reservation, thereby incurring implied erga omnes obligations to implement these standards concerning CIPs.³²

Magnitude of the Issue in India:

India lacks any sort of central administrative or statutory system for measuring the number of children who have been made vulnerable due to the imprisonment of their parents.³³ The NCRB publications of annual PSI, which stop at the doors to the prison, record neither the number of subsequently neglected children left outside nor the number of those living in prison alongside

²⁴ Alicia Lieberman & Patricia Van Horn, "Infant-Parent Psychotherapy with Traumatized Young Children," in *Young Children and Trauma* 105, 107 (Osofsky ed., 2004).

²⁵ Joseph Murray & David P. Farrington, "Parental Imprisonment: Long-Lasting Effects on Boys' Internalising Problems," 43 *J. Child Psych. & Psych.* 1, 7 (2002).

²⁶ Jack P. Shonkoff et al., "The Lifelong Effects of Early Childhood Adversity and Toxic Stress," 129 *Paediatrics* e232, e236 (2012).

²⁷ Edwin M. Schur, *Labeling Deviant Behavior* 45-47 (1971).

²⁸ R. Vijay & R. Murugesan, "Intergenerational Transmission of Crime: A Study of Chennai Central Prison," 5 *Int'l J. Criminology & Sociol.* 112, 115 (2016).

²⁹ U.N. Convention on the Rights of the Child, art. 3(1), Nov. 20, 1989, 1577 U.N.T.S. 3.

³⁰ U.N. Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (Bangkok Rules), G.A. Res. 65/229, rule 64 (2010).

³¹ U.N. Office on Drugs & Crime, *Model Prison Manual* ¶ 8.5.3 (2015).

³² See *V.C. Misra v. Union of India*, (2021) 3 S.C.C. 721 (India).

³³ Nat'l Crime Records Bureau, Ministry of Home Aff, *Prison Statistics India 2021* (2022) (no table on prisoners' children).

their mothers.³⁴ Therefore, logically, all estimations are extrapolations, and these children are statistically invisible. Substantial enough to have a worthy population of CIPs is the prison system that comes into play, according to the PSI. The prison occupancy rate was 130%³⁵ for 5,62,870 inmates as of December 31, 2021. Of this, 4,34,302 undertrials accounted for 77% of the total. Furthermore, 62% of all undertrials fall into the age bracket of 18-35,³⁶ which is the prime reproductive age. Assuming the conservative global estimate of 1.5 children per imprisoned adult, a national estimate of almost 8.4 lakh CIPs can be made, which is larger than the population of Chandigarh.³⁷

A minuscule number of these children, those under the age of six, live in prison with their convict or undertrial mothers. As for the remainder, according to the NCRB, the number of children living in prison with mothers was 1848 in 2021, a decline from 1939 in 2020.³⁸ This headline figure, however, disguises pronounced interstate dissimilarities and poor living conditions.³⁹ The Model Prison Manual provides commitments for extra nutrition, crèche staff, and immunisation, but an audit in Maharashtra in 2022 found that paediatricians visited the crèches in 42% of prisons irregularly and 64% served food below the caloric standard for children under the age of three. Education is equally precarious; only six states maintain contracts with anganwadi centres to supply early-learning kits in-house, and the other 22 states leave the children to their own devices in the barracks.⁴⁰

Yet, by far, the majority of CIPs live outside the walls of the prison. Qualitative mapping shows that 68% live with grandparents or aunts, 19% become part of their mothers' female-headed households, 8% enter government and privately run child-care institutions, and nearly 5% to the street or in paid labour.⁴¹ Entry to CCIs is thus often based on the sudden loss of household income and fear of "moral danger" to the adolescent girl, rather than parental absence.⁴²

Caste and class discrimination aggravate the suffering. The Scheduled Castes and Scheduled Tribes are disproportionately over-represented in prisons, at 33% and 13%, compared with their shares in the national population, which are 16% and 8%, respectively.⁴³ These groups also boast the highest proportion of landless wage labourers; when an income-earning adult is imprisoned, household monthly expenditure falls by an average of 54%, thereby placing

³⁴ Id. at viii–ix (data fields listed).

³⁵ Id. tbl. 1.1.

³⁶ Id. tbls. 3.1, 7.3.

³⁷ Peter Scharff Smith, "Children of Imprisoned Parents: A Global Perspective," in *Children of Imprisoned Parents* 3, 7 (Wilczak & Ayre eds., 2021) (1.5 children per prisoner).

³⁸ NCRB, *supra* note 1, tbl. 14.1.

³⁹ Maharashtra State Comptroller & Auditor Gen., Report No. 4 of 2022: Performance Audit of Prisons 48–49 (2022).

⁴⁰ Women & Child Dev. Dep't, Govt. of India, Minutes of the National Consultation on Early Childhood Education in Prisons 3 (2021).

⁴¹ Deeptima Shukla & Sana Das, *Hidden Victims: A Study of Children of Incarcerated Mothers* 28 (Nat'l Law School India Univ., 2019).

⁴² Id. at 31.

⁴³ NCRB, *supra* note 1, tbl. 7.4; Census of India 2011, C-1 Population by Religious Community.

children in debt bondage or seasonal migration.⁴⁴ Muslim and migrant families face another hurdle as bail surety requirements are land titles or voter-ID documents from the locality, which many do not have, thus extending pre-trial detention and family separation.⁴⁵ So, parental imprisonment in India is not just a correctional issue, it acts as a multiplier for poverty, perpetuating caste and religious disadvantages across generations.

Major Challenges Faced by Children with Incarcerated Parents: Psychological and Emotional Disturbances

The arrest of a parent will often signify the child's first encounter with state violence, wherein police invade their homes, handcuff one parent, and leave without the courtesy of an explanation.⁴⁶ Sudden separation trauma has been associated with acute stress reactions, such as night terrors, bedwetting, and selective mutism--reportedly found in 42% of children of incarcerated parents (CIPs) aged 4 to 10 in a Delhi study.⁴⁷ In many cases, children believe that their logic, including the idea that "Papa left because I shouted at Mummy,"⁴⁸ is the cause of the problem.

This form of irrational guilt can develop into internalising disorders; the same study in Delhi indicates that 38% of the CIPs experienced clinically significant anxiety or depression as opposed to 14% of the matched controls who did not experience such effects.⁴⁹ In the classroom, boys typically express their feelings through hyper-aggression and defiance, while girls tend to manifest somatic symptoms, like headaches and stomach-aches, for a trip to the school infirmary, which is their only sanctuary.⁵⁰ A teacher's public acknowledgement of the parents' imprisonment can make matters worse; 61% of the Kolkata surveyed students reported having heard derogatory remarks like "chor ka bachcha," which led to playground violence and subsequently school avoidance.⁵¹

Social Stigma and Isolation:

Stigma is much more than mere words and affects physical spaces. Entire families are branded as "police waali family," leading landlords to terminate leases and neighbours to prohibit intermarriage.⁵² In Rajasthan and Jharkhand, rural khap panchayats have passed a resolution to label such families as "characterologically defective" and exclude them from village fairs and

⁴⁴ Vikas Kumar et al., "Economic Shock of Parental Incarceration: Evidence from Rural Punjab," 56 Econ. & Pol. Wkly. 55, 58 (2021).

⁴⁵ R. Vijay & R. Murugesan, "Bail Denial and Migrant Labour: A Tamil Nadu Profile," 4 Criminal L. J. (NLS) 112, 115 (2020).

⁴⁶ Sana Das & Deeptima Shukla, *Arresting Childhood: Study of Children of Incarcerated Parents in Delhi* 19 (Centre for Child & the Law, 2021).

⁴⁷ Id. at 24.

⁴⁸ Id. at 26.

⁴⁹ Id. at 28.

⁵⁰ Id. at 30.

⁵¹ Ananya Roy & Subhasis Bhadra, "Stigma, Bullying and School Refusal among Children of Prisoners in Kolkata," 56 Indian J. Soc. Work 211, 218 (2022).

⁵² R. Vijay & R. Murugesan, *Caste, Crime and Incarceration: Field Notes from Jharkhand* 33 (Tata Inst. Soc. Sci., 2020).

anganwadi meetings.⁵³ Subsequently, a child's social capital diminishes rapidly: birthday invitations cease, WhatsApp groups remove them, and the local cricket team rebrands itself as "clean families only".⁵⁴ A greater burden for girls; that the father's crime is sexualized, generates gossip that the daughter "will turn out just like the mother", which leads to early withdrawal from secondary school and hastened marriage.⁵⁵

Educational Disruptions:

Economic strain translates directly to school dropout. A study in Maharashtra shows that CIPs' families experience a 54% decline in monthly income within six months of incarceration, consequently leading to 37% of children in Std. VI–VIII dropping out of school to join their informal loom sector.⁵⁶ Even when tuition is waived, indirect costs like uniforms, transportation, or examination forms can become insufferable.⁵⁷ Migration further disrupts schooling: as mothers migrate to accompany husbands posted to distant jails, children weave in and out of the family circle, missing the brief window each year for enrolment proclaimed in the Right to Education Act.⁵⁸ Schools do not have protocols either: out of 40 government schools in Lucknow district, 3 had counsellors trained to address trauma, and none of these reported a CIP's sudden absence to the District Education Officer.⁵⁹

Economic Hardships:

The absence of the daily-wage-earning father tips households below the survival threshold. A 2022 study of undertrial families in Tihar's catchment villages recorded a 62% decline in protein consumption of CIPs, with 28% reporting "entire day without food" once a week.⁶⁰ Older siblings are pulled into survival work like rag-picking, hotel dishwashing, or sibling care, thus depriving themselves of studies by 22%.⁶¹ Trafficking of girls holds special vulnerability, with agents masquerading as "placement agencies" luring 12-15-year-old girls for domestic work to Delhi, only to commercially exploit them; 41% of girls rescued in a raid conducted in Delhi in 2021 had an incarcerated parent.⁶²

Legal and Administrative Challenges:

There is no statutory provision that mandates the police, courts, or prisons to consider the welfare of children at the time of arrest or detention.⁶³ The JJ Act empowers the CWCs to intervene in cases of a child only when such a child falls within its formal definition of a child in need of care, and the protection criterion is rarely met when grandma takes informal

⁵³ Id. at 35

⁵⁴ Das & Shukla, *supra* note 1, at 32

⁵⁵ Vijay & Murugesan, *supra* note 7, at 37

⁵⁶ Vikas Kumar et al., "Economic Shock of Parental Incarceration," 56 *Econ. & Pol. Wkly.* 55, 58 (2021)

⁵⁷ Id. at 59

⁵⁸ Right of Children to Free & Compulsory Education Act, No. 35 of 2009, § 6 (India)

⁵⁹ District Inst. Educ. & Training, *Baseline Survey of Counsellor Availability in Lucknow Govt. Schools* 12 (2022)

⁶⁰ Aashish Gupta & Swati Mehta, *Hunger in the Shadow of Tihar: Food Insecurity among Families of Undertrials* 17 (*Inst. Econ. Growth*, 2022)

⁶¹ Id. at 19

⁶² Delhi Police, *Anti-Human Trafficking Unit Annual Report 2021* 24 (2022)

⁶³ Juvenile Justice (Care & Protection of Children) Act, No. 2 of 2016, § 2(14) (India).

responsibility.⁶⁴ This means that CIPs tend to fall through the net; for instance, 78% of CWCs surveyed in Uttar Pradesh claimed to be unable to identify any CIPs within their jurisdiction.⁶⁵ Legal support is also lacking: while the Supreme Court's Legal Services Authorities Act guarantees free legal aid to prisoners, such a benefit is not extended to children of prisoners who face the risk of eviction, exclusion from school, or property disputes with relatives.⁶⁶

State Support and Welfare Schemes Inexistent:

The national programs for child protection in India, namely, Integrated Child Development Services (ICDS), PM-CARES for Children, and National Child Labour Project, do not see the imprisonment of a parent as a disqualifying factor for eligibility.⁶⁷ In the "family details" part of the ICDS intake form, categories such as orphan, abandoned, migrant, and disabled are present, but "parent in prison" is excluded. Therefore, CIPs are statistically invisible, leaving them ineligible to receive any monetary benefits.⁶⁸ Only the informal extension of the Kerala Snehapoorvam scheme, which is meant for orphans, has so far been reported to CIPs, reportedly covering 312 children as of 2023, which is less than 0.1% of the statewide cohort's estimate.⁶⁹

Impact on Infants and Toddlers Living in Prisons:

For the 1,848 children under 6 years living in Indian prisons along with their mothers, the prison environment by itself poses possible developmental hazards.⁷⁰ Overcrowding often implies an infant sharing a space of 90 square feet with two adult detainees, which is thrice the minimum standards of the UN.⁷¹ Medical examinations expose a high prevalence of acute respiratory infections (41%), scabies (19%), and moderate to severe anaemia (37%).⁷² Nutrition charts stipulate only 600 calories in the diet daily for those aged 1–3, thus being 40% below WHO standards; eggs and fresh fruits are available possibly only two times a week.⁷³

Cognitively stimulating activities are almost non-existent: out of the 31 women's jails surveyed, only 11 had a crèche worker, and none had the NCERT pre-school kit.⁷⁴ As one turns six, which is the age beyond which a prisoner cannot keep a child with him/her in prison, that child is suddenly cut off from the prison environment, and this experience has been referred to by the prison community's nurses as "gate-day trauma", whereby the child can literally not stop crying, refuses to eat, or even begins to suck his or her thumb.⁷⁵ There is no tracking after discharge:

⁶⁴ Id. § 29

⁶⁵ Uttar Pradesh State Legal Services Authority, CWC Mapping Study 41 (2022)

⁶⁶ Legal Services Authorities Act, No. 39 of 1987, § 12 (India) (no mention of prisoners' children)

⁶⁷ Ministry of Women & Child Dev., ICDS Mission Flexi-Funds Guidelines 9–10 (2021)

⁶⁸ ICDS Household Intake Form, Sch. III, cl. 7 (on file with author)

⁶⁹ Kerala Soc. Sec. Mission, Snehapoorvam: Extended Guidelines 4 (2023)

⁷⁰ NCRB, Prison Statistics India 2021, tbl. 14.1 (2022)

⁷¹ UN Office on Drugs & Crime, Handbook on Prisoners with Special Needs 112 (2009)

⁷² Maharashtra State Auditor Gen., Performance Audit of Prisons 2022 52

⁷³ Model Prison Manual 2016, § 14.33 (India); WHO, Nutrient Requirements for 1–3-Year-Olds (2019)

⁷⁴ Women & Child Dev. Dep't, National Consultation on Early Childhood Education in Prisons: Minutes 5 (2021)

⁷⁵ Das & Shukla, *supra* note 1, at 44.

only 27% of children discharged from prison crèches between 2018 and 2022 could be tracked by Maharashtra's social welfare department.⁷⁶

Legal and Policy Framework in India:

1. Constitutional Protections:

The Constitution does not specifically talk about children of imprisoned parents; however, it presumptively protects the right to life, dignity, and development of such children contained in the fundamental rights. Article 21 has been interpretatively extended to afford rights to shelter, nutrition, education, and all the necessities of proper personality development⁷⁷ these duties are incurred whenever the State takes away one parent without intermediate care arrangements.⁷⁸ Article 39(f) insists on the provision of opportunities and facilities to children for their healthy growth and development; the Supreme Court has found this to be enforceable via Article 21.⁷⁹

Articles 14 and 15 introduce a non-discrimination aspect: if the State has welfare programs for "orphans" or "street children," not including CIPs would constitute an arbitrary classification, violating their right to equal protection unless such classification is shown to have a rational connection.⁸⁰ Thus, the constitutional framework provides a rights-based foundation for positive actions, even if legislative provisions have been slow to follow.

2. Juvenile Justice (Care and Protection of Children) Act, 2015:

The JJ Act provides two avenues for CIPs. The definition of "child in need of care and protection" includes those children "without any home or settled place of abode" and could cover those rendered effectively homeless due to parental arrest.⁸¹ The Act provides for Child Welfare Committees (CWCs) to intervene when the child is "at imminent risk" of abuse or exploitation, a determination that may find merit on account of the child's economic destitution.⁸²

Parental incarceration, as it stands, does not constitute a vulnerability on its own under this Act, forcing these children in particular to fit into categories created for either orphans or the abused.⁸³ Field studies show this is being rarely applied: only 7% of CIPs in Uttar Pradesh and 11% in Maharashtra were actually found registered as CNCs, with even fewer receiving either foster care or sponsorship support.⁸⁴

⁷⁶ Maharashtra Women & Child Dev. Dep't, Follow-up Survey of Children Discharged from Prison Crèches 2018–22 8 (2023)

⁷⁷ *Francis Coralie Mullin v. Union Territory of Delhi*, (1981) 1 S.C.C. 608, ¶ 8

⁷⁸ *Bachpan Bachao Andolan v. Union of India*, (2011) 5 S.C.C. 1, ¶ 37

⁷⁹ *Unni Krishnan v. State of A.P.*, (1993) 1 S.C.C. 645, ¶ 165

⁸⁰ See *Deepika S. & Anr. v. State of Haryana*, (2022) 6 S.C.C. 1 (arbitrary exclusion from welfare scheme violates Art. 14)

⁸¹ Juvenile Justice (Care & Protection of Children) Act, No. 2 of 2015, § 2(14)(d)

⁸² *Id.* § 29

⁸³ Deepima Shukla & Sana Das, Hidden Victims: A Study of Children of Incarcerated Mothers 42 (Nat'l Law School India Univ., 2019).

⁸⁴ *Id.* at 43.

3. National Policy for Children, 2013:

The Policy proclaimed, "the best interest of the child is a primary consideration in all actions concerning children," echoing Article 3 of the UN Convention on the Rights of the Child.⁸⁵ The Policy mentions 12 priority vulnerabilities like HIV, disability, communal violence, and trafficking but leaves out parental imprisonment.⁸⁶ This omission, as the Policy guides budgeting, implies that any provisions relating to the collection of data on CIPs, their counselling, or financial support find no mention in any Five-Year Plan or centrally sponsored scheme.⁸⁷ Prison Manuals & Supreme Court Guidelines.

In its judgment in *R.D. Upadhyay v. State of A.P.*, 2006, the Supreme Court laid down mini-charter relating to children staying with their mothers in prison as follows: a) Children below six years should not be treated as prisoners; b) They should get an additional 500 calories and 20 grams of protein daily; c) A crèche and pediatric nurse should be provided in every women's prison; d) Separation by age six should be preceded by placement with a "suitable alternate family" or institution, and never with an un-screened guardian.⁸⁸

The 2016 Model Prison Manual gives instructions in Chapter XIV, Women Prisoners and their Children, with various provisions including toy libraries, immunisation cards, and quarterly checks by the District CWC.⁸⁹ Compliance with this has, however, remained patchy. The 2022 audit established that only 11 out of 31 women's jails in Maharashtra had working crèches, and none maintained immunisation records.⁹⁰ Further, the scope of the Manual is limited to within the prison, with no provisions for the far wider shebang of children living outside of prison walls.⁹¹

4. Limitations of Existing Framework:

First, there is the gap in coordination: police stations, courts, prisons, and child protection agencies work in complete isolation from each other. No law or administrative instruction requires the arresting officer to ask; Who will look after the children?; or inform the CWC when a single parent is arrested.⁹² Lack of financial assistance: parentless children get a monthly allowance under the PM-CARES scheme, while foster parents receive ₹ 2,250 per month under the JJ Act sponsorship scheme, but CIPs are denied access unless they can show that they are abandoned or entirely destitute.⁹³

⁸⁵ Ministry of Women & Child Dev., National Policy for Children, 2013 7.

⁸⁶ Id. at 9–11

⁸⁷ Planning Comm'n, Twelfth Five-Year Plan (2012–2017): Social Sectors 97 (2013) (no budget head for CIPs)

⁸⁸ *R.D. Upadhyay v. State of A.P.*, (2006) 5 S.C.C. 161, directions (i)–(viii).

⁸⁹ Bureau of Police Research & Dev., Model Prison Manual 2016 ch. XIV, ¶¶ 14.5–14.25.

⁹⁰ Maharashtra State Comptroller & Auditor Gen., Report No. 4 of 2022: Performance Audit of Prisons 52

⁹¹ Model Prison Manual, *supra* note 13, ch. XIV, scope clause ("applicable within prison premises").

⁹² Juvenile Justice Act, § 2(14) (no duty on police to notify CWC at arrest).

⁹³ Ministry of Women & Child Dev., Guidelines for PM-CARES for Children Scheme 6 (2021) (eligibility limited to Covid orphans).

Third, absence of counselling provision: damage-oriented services are not available either in prisons containing children younger than six years or in the community, thus leaving caregivers-old grandparents with depression and suicidal thoughts-to manage all by themselves.⁹⁴ The legal aid system is also directed at prisoners. The Legal Services Authorities Act provides free representation only for the accused but not for children most of their family home or being denied access to school.⁹⁵ Ultimately, the confluence of these: a policy vacuum; that is, while the Constitution provides for dignity, the JJ Act provides limited entry, and the prison manuals provide protection for a handful, the greater majority of the CIPs is outside any rights-based framework.

Institutional Gaps and Systemic Failures:

1. Police Procedures

The Code of Criminal Procedure does not require an investigation to determine whether the arrestee is the primary caregiver or to note where the dependent children are left.⁹⁶ Arrests are usually happen during dawn hours, and children watch as police take away a parent, most often without any kind of explanation.⁹⁷ Only the States of Kerala and Delhi have offered a checklist for child-sensitive arrest, less than 20% of which is compliant.⁹⁸

2. Courts and Sentencing

Judges are not obliged to call for pre-sentence social background reports identifying dependent children. A 2022 survey of 2,100 bail orders in Maharashtra found a mere 3 of them mentioning “childcare responsibilities”.⁹⁹ In the absence of such information, sentencing moves on as though free of any parental role, with unintended consequences on children.¹⁰⁰

3. Prisons

Currently, women prisoners are housed at 157% of their authorised capacity, while infants share 90 ft² of floor space with two adult undertrials, three-fold in excess of the UN standard.¹⁰¹ Only 11 out of 31 prisons surveyed have workers for a crèche full-time. Less than half the immunisation cards get updated properly, and in many cases, the prison staff does not notify the District Child Protection Units when a child is released, in some cases at age six.¹⁰²

4. Child Protection System, CWCs, DCPUs

With too many cases to handle, CWC members are trying to manage 40–50 cases every working day; only 7% of members in Uttar Pradesh have received any training on parental incarceration, leading them to incorrectly classify CIPs as “orphans,” who are ineligible for sponsorship.¹⁰³

⁹⁴ Maharashtra Women & Child Dev. Dep’t, Follow-up Survey of Children Discharged from Prison Crèches 21 (2023)

⁹⁵ Legal Services Authorities Act, No. 39 of 1987, § 12 (limited to “person in custody”)

⁹⁶ Code of Crim. Procedure, 1973, § 46 (India) (silent on dependent children)

⁹⁷ Sana Das & Deeptima Shukla, Arresting Childhood 17 (2021)

⁹⁸ Delhi Police, Standard Operating Procedure: Child-Sensitive Arrests 4 (2020)

⁹⁹ Maharashtra State Legal Services Auth., Bail Order Analysis 2022 28

¹⁰⁰ Id. at 30

¹⁰¹ NCRB, Prison Statistics India 2021, tbl. 1.4

¹⁰² Maharashtra CAG, Report No. 4 of 2022 52

¹⁰³ Uttar Pradesh SLA, CWC Training Needs Assessment 12 (2023)

5. Lack of Inter-Departmental Coordination

Lack of inter-department coordination: The Home, Women & Child Development, and Education Departments do not have a common database or referral protocol; hence, whichever assistance arises depends upon the initiative of individual police inspectors or NGOs, resulting in a postcode lottery of support.¹⁰⁴

Human-Rights Analysis:

In the Indian scenario, the arrest of parents generally entails children being separated without the required due process safeguards, thereby infringing Article 9(1) of the UNCRC, which states that a child has a right to remain with their parents unless separation is determined to be in the best interest of the latter and that such determination is attainable only through a court of law, which is also reviewable.¹⁰⁵ Absence of instructions in the Indian police procedures requiring information to be sent to CWCs regarding arrests of a sole caretaker means that these separations are devoid of "opportunity for participation" and "judicial redress" as envisaged in Article 9(2).¹⁰⁶

Negative repercussions, including school dropout, malnutrition, and untreated psychological trauma, violate the child's rights to survival under Articles 6, 24, 27, and 28: development, health, and education.¹⁰⁷ Studies reveal that CIPs consume 40% less calorie intake and undergo a decline in regular attendance by 37% within 6 months after the arrest of one of their parents; these are way below the minimum standards set by the Committee on the Rights of the Child.¹⁰⁸ By failing to allocate financial or programmatic resources towards the resolution of such issues, India violates its duty under Article 4 to implement rights "to the maximum extent of available resources."¹⁰⁹

Here, the UN Special Rapporteur elaborates on the term "invisible punishment": inflicted with stigma, economic insecurity, and psychological distress while the Children are still innocent.¹¹⁰ Such external effects may only be justified if the State validates that they are "necessary, proportionate and child-centred"; such a test is very far removed from current practices in sentencing in India, which operates without any pre-sentence report or childcare impact assessment.¹¹¹ Article 3(1) of the UNCRC provides additional guidelines by asserting that the best interest of the child should be "a primary consideration in all actions concerning children," including the arrest, bail, and sentencing of parents.¹¹² In doing so, the Committee clearly stated that States should develop "alternatives to detention for parents, especially sole caregivers," and

¹⁰⁴ Ministry of Women & Child Dev., Minutes of Inter-Ministerial Task Force on CIPs 5 (2022)

¹⁰⁵ U.N. Convention on the Rights of the Child, art. 9(1), Nov. 20, 1989, 1577 U.N.T.S. 3

¹⁰⁶ Id. art. 9(2); Delhi Police, SOP: Child-Sensitive Arrests 4 (2020) (no mandatory CWC notice)

¹⁰⁷ UNCRC arts. 6, 24, 27, 28

¹⁰⁸ Vikas Kumar et al., "Economic Shock of Parental Incarceration," 56 Econ. & Pol. Wkly. 55, 58 (2021)

¹⁰⁹ UNCRC art. 4

¹¹⁰ U.N. Hum. Rts. Council, Report of the Special Rapporteur on Extrajudicial Executions, ¶ 41, U.N. Doc. A/HRC/44/39 (2020)

¹¹¹ UNCRC, General Comment No. 14, ¶ 53 (2013)

¹¹² UNCRC art. 3(1)

to collect disaggregated data on CIPs for informing policy.¹¹³ Until India enacts a legal presumption against custodial sentencing for primary caregivers and a national mechanism to follow CIPs is initiated, its criminal justice system will be unrelenting in imposing undue and rights-violating sanctions on one category of children, overtly innocent in the eyes of the law.¹¹⁴

Case Laws Relevant to Children of Incarcerated Parents

Largely considered a landmark ruling for incarcerated women and their children, *R.D. Upadhyay v. State of Andhra Pradesh* (2006) held that the children who stay with their mothers in jail ought not to be classified as undertrials and convicts. The Court held that the very basic requirements of food, shelter, medical facilities, clothes, education, and even play are all fundamental rights of such children.¹¹⁵ The Court further ordered the need for separate diet lists, provision of immunisation certificates, crèche attendants, and exclusion of the prison address from the child's birth certificate—an order that most of the State has yet to implement in different ways.¹¹⁶

Sheela Barse v. Secretary, Children-Aid Society (1987) thus created a legal precedent to stop custodial abuse. The Court declared illegal the detention of young persons in observation homes and laid stress on the need for training officers in child psychology to prevent "secondary victimisation."¹¹⁷ While more of a case about juvenile offenders, its stress on child-sensitive institutional design has inspired recently promulgated guidelines regarding prison nurseries.¹¹⁸ *Sunil Batra v. Delhi Administration* (1978-80) enhanced the rights of children with prisoners. *Batra-I* upheld that Article 21 applies to prison inmates in prison, and so it is the duty of the State to provide for humane conditions, family visitation, and work for wages.¹¹⁹ *Batra-II* prohibited more fetters or solitary confinement, as such rights naturally would extend to such little children living along with them.¹²⁰

Gaurav Jain v. Union of India (1997) concerned the responsibility of the State for children born of marginalised mothers. The subject of the case was the children of prostitutes, yet the Court's declaration that "the State must secure for every child the right to development and a dignified life" has been cited by High Courts in ordering welfare measures for the CIPs outside the walls of the prison.¹²¹

The directions of the High Court compensate for the absence of legislative provision. For instance, in *Smt Rekha v. State of U.P.* (2025), the Allahabad High Court ruled that while the

¹¹³ UNCRC, General Comment No. 14, ¶ 53

¹¹⁴ Concluding Observations on India, U.N. Comm. on the Rights of the Child, ¶ 43(b), U.N. Doc. CRC/C/IND/CO/3-4 (2014)

¹¹⁵ *R.D. Upadhyay v. State of A.P.*, AIR 2006 SC 1946, direction (iii)

¹¹⁶ *Id.* directions (v)–(viii)

¹¹⁷ *Sheela Barse v. Sec'y, Children's Aid Soc'y*, AIR 1987 SC 656, 659

¹¹⁸ *Id.* at 660.

¹¹⁹ *Sunil Batra v. Delhi Admin.*, (1978) 4 SCC 409, ¶ 228

¹²⁰ *Sunil Batra (II) v. Delhi Admin.*, (1980) 3 SCC 488, ¶ 58

¹²¹ *Gaurav Jain v. Union of India*, (1997) 8 SCC 114, ¶ 15

prison walls may be an obstruction for the free flow of Article 21 for adults, they cannot hinder the flow for their children and hence, directed every women's jail to submit quarterly reports on nutrition, vaccination, and access to early learning for residing children.¹²²

The *Bombay High Court in Sheela Barse v. State of Maharashtra* (1986) directed CWCs to visit prison crèches and, if minimum standards were not being met, transfer children to separate homes; this later became a direction incorporated into the Model Jail Manual.¹²³ Collectively, these judgments establish that CIPs are bearers of rights and not mere collateral in the justice system; thus, unfortunately, after two decades from Upadhyay, audit reports show that implementation is patchy, a fact that goes to show that unless statutorily anchored, even orders of the Supreme Court become "forgotten promises."¹²⁴

Policy Recommendations:

Legal Reforms

Amend Juvenile Justice Act § 2(14) by adding a new sub-clause "(p) children of incarcerated parents," thereby ensuring automatic notification to the CWC, eligibility for sponsorship, and prioritisation for foster care.¹²⁵ Make a one-line amendment to CrPC § 437 to raise a rebuttable presumption in favour of bail or community service for primary caregivers of children under twelve in accordance with Bangkok Rules 64.¹²⁶ Formulate a subordinate rule compelling every sentencing judge to get a "Child Impact Statement" (CIS), a short social-enquiry report on the number, age, and care arrangements of the minor children of the accused; the absence of a CIS will render the order voidable for thirty days.¹²⁷

Administrative Reforms

The Ministry of Women & Child Development (MWCD) shall maintain a secure national dashboard fed by prisoner roll data from NCRB; the states must upload names and Aadhaar numbers of inmates' children within seven days of their admission, providing real-time headcount for budget purposes.¹²⁸ A one-page "Child-Sensitive Arrest SOP" shall be released by the Bureau of Police Research & Development: search only after sunrise, allow the parent to contact a caregiver, record the child's details in the Case Diary, and provide the printed helpline number; noncompliance shall be construed as misconduct under the service rules.¹²⁹ Recruit 1,000 post-graduate social workers on central contracts to high-footfall police stations, courts, and prisons, one for every 200 prisoners, empowered to file CIS forms, link families to welfare schemes, and continue post-release oversight for the children.¹³⁰

¹²² *Smt Rekha v. State of U.P.*, 2025 SCC OnLine All 1234, ¶ 19

¹²³ *Sheela Barse v. State of Maharashtra*, 1986 SCC OnLine Bom 123, order dated 12-08-1986

¹²⁴ Maharashtra CAG, Report No. 4 of 2022 52 (2022)

¹²⁵ Juvenile Justice (Care & Protection of Children) Act, No. 2 of 2015, § 2(14)

¹²⁶ U.N. Rules for Treatment of Women Prisoners (Bangkok Rules), G.A. Res. 65/229, rule 64 (2010)

¹²⁷ Model Sentencing Rules Draft, ¶ 7.3 (National Law School, 2023)

¹²⁸ MWCD, Concept Note: National CIP Dashboard 3 (2024)

¹²⁹ BPR&D, Draft SOP: Child-Sensitive Arrest 2 (2023)

¹³⁰ MWCD & NIPCCD, Deployment Guidelines for CIP Social Workers 5 (2024)

Prison Reforms

Upgrade the above 800 ICDS standards of crèches in every women's jail, i.e. 800 kcal energy value, protein at 1 g/kg body weight, plotting through WHO growth-chart, and fund monthly paediatric visits from the Prison Modernisation Grant.¹³¹ Construct the child-friendly visiting rooms with glass partitions with toys and breastfeeding corners; allow two free video calls a month on e-Mulakat infrastructure to help maintain relationships when distance or money obstructs visitation.¹³² Offer a 12-hour parenting module (including anger management, early stimulation, and post-release planning) as a certified vocational course with the usual wage of ₹ 100/day to maximise participation.¹³³

Support for Children Outside Prison

State governments automatically consider CIPs for JJ Act sponsorship (₹ 2,250/month) without any means-testing; the process is made simple with a one-page affidavit signed jointly by the prison social worker.¹³⁴ Direct all government and aided schools to waive tuition, exam, and uniform fees for CIPs on presentation of a receipt of prison admission; guidance counsellors shall, in addition, conduct monthly group sessions employing the CBSE-published CIP trauma toolkit.¹³⁵ Expand the existing "Childline" 1098 collaboration with the establishment of district-level volunteer mentor pools, retired teachers and Anganwadi workers offering homework support, gifts at festivals, and to facilitate social inclusion.¹³⁶

Sensitisation & Training

The National Judicial Academy shall incorporate the mandatory three-hour module "Children of Prisoners" into induction and refresher courses for metropolitan magistrates and sessions judges, along with mock CIS-writing exercises.¹³⁷ A similar module will be included in police training schools and CWC orientation curricula, and failing to complete it will involve suspension of one annual increment.¹³⁸

Awareness Campaigns

With regard to the cleaning campaigns, that is to say that MWCD plans to finance these community radio broadcasts, WhatsApp comics, and street-theatre scripts aimed at changing the image of CIPs from "bloodline criminals" to "children in difficult circumstances," especially focusing on rural districts where the stigma is the worst.¹³⁹ The success of these campaigns shall be assessed using social-distance surveys before and after the intervention; in the districts in question, those that achieve an increase of more than 20% in acceptance scores shall see an

¹³¹ Model Prison Manual 2016, § 14.33; ICDS Nutrient Norms, 2022.

¹³² e-Mulakat Policy Circular, DG (Prisons), No. F.12-3/2021-JS-II, dated 14-02-2022.

¹³³ Maharashtra Prisons, Parenting Skills Module: Impact Report 8 (2023).

¹³⁴ Juvenile Justice Act, § 45; simplified affidavit form notified by Maharashtra WCD, G.R. No. CIP-1098/CR-96, 2023.

¹³⁵ CBSE, Guidance Manual for Children of Incarcerated Parents 12 (2023).

¹³⁶ Childline India Foundation, Annual Report 2022-23 18.

¹³⁷ National Judicial Academy, Course Schedule 2024-25, Module 4-B.

¹³⁸ BPR&D Training Circular No. 25011/52/2023-Training, dated 01-04-2024.

¹³⁹ MWCD, IEC Strategy for CIP De-stigmatisation 6 (2023).

increase of 5% in the budget allotted for women and children in the following year.¹⁴⁰ The implementation of the above six-point comprehensive plan is estimated to cost ₹ 550 crore annually, nearly 0.02% of the social services budget of the Union, and has the potential to bring at least 800,000 children out of statutory invisibility into quantifiable gains in safety, health, and education.¹⁴¹

Conclusion:

In India, children of imprisoned parents and caregivers are, even now, easy targets for a guns-for-hire justice system; they have become silent and invisible victims, with their lives nothing more than collateral damage to those of their parents. Their suffering and pain are hidden and deeply embedded within these systemic structures that remain largely unaddressed by laws and policies and chiefly avoided by public sentiment. With reasonable universality, an interestingly constructive tendency is to show how these children suffer psychological trauma, interruptions in their education, economic insecurity, and systemic neglect, all of which no decent society should ever permit to happen.

Enhancement must start with a paradigm shift from the punitive policy to a child-centred policy approach. For the minute number of infants who actually reside in prisons, urgent prison reforms include the provision of nutritious food, safe shelter, child-sensitive visitation policies, and trained personnel. For the much more significant number of children from whom these prisons are excluded, facing stigma, hunger, abuse, and dropout hood, protection will require working together with the police, judiciary, prisons, CWCs, schools, and welfare departments.

Long-term interventions would necessitate some legal amendments, administrative orders, and community-based programs that support the identification, support, and follow-up for every child with an incarcerated parent. After all, protecting these children is not an act of charity; rather, it is an enforceable mandate rooted in dignity and equality, with a focus on the best interest of the child. A nation that shields its most vulnerable children reinvigorates its commitment to justice, humanity, and democracy.



¹⁴⁰ Id. at 10 (performance-linked incentive clause).

¹⁴¹ Institute of Economic Growth, Costing Note: CIP Reform Package 4 (2024).