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Sd/-

Date: July, 31, 2025 **Dr. Pradeep Kumar**

Right to Privacy in the Age of Social Media: An Analysis of Indian Jurisprudence

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&
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Abstract

In this paper, we explore the shifting parameters of the right to privacy in India, and in particular, we draw the attention towards the judicial recognition of privacy challenges aligned to the growth of social media platforms. Upon contextualising ultimately secure fundamental privacy protections against fundamental competing interests of national security, free expression and technological innovation in the subsequent jurisprudence till date, this paper critically analyses the trajectory followed by various Indian Courts post Puttaswamy. The 2017 Puttaswamy judgement on privacy as a fundamental right would provide the constitutional basis wherein subsequent judicial interventions dealing with problems of data collection and algorithmic profiling, as well as a problem of digital permanence within the social media context could be measured. Indian courts have started to show some amount of assertiveness in examining platform practices, but face several challenges–there is a lack of an enforcement mechanism against overseas entities, substantial regulatory gaps including in the area of algorithmic transparency, and the limited application of case-by-case adjudication. In tracing the Indian experience as it intersects with global regimes of privacy, this paper finds that courts have adapted, rather than transplanted European and American approaches, developing a uniquely Indian judicial doctrine reflective of communitarian traditions. By comparing legislative environments, modes of consent, and new forms of regulation, the research highlights the relationship between privacy on social media in India and possible directions for a more comprehensive regime of privacy protection. Together, these findings indicate that different types of privacy protection can hide in plain sight and that most effective privacy safeguards will likely combine comprehensive regulation with niche regulation, judicial creativity, and digital literacy measures. So, this is one small step in an emerging scholarly conversation about the role that constitutional principles of privacy might play in grappling with technological challenges without sacrificing the democratic promise of digital spaces.

Keywords: *Privacy, Social Media, Indian Jurisprudence, Puttaswamy Judgment, Data Protection, Digital Rights, Judicial Balancing, Constitutional Law*

Introduction

India's personal privacy landscape has been irreversibly transformed by a decade of explosive growth in social media platforms. With the social, professional, and civic lives of millions of Indians moving online, the line between public and private spheres is all but erased. Such a digital shift in this paradigm is indeed a matter with serious questions as to the nature and

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scope of privacy rights in the 21st century Indian society. Privacy originally envisaged as the physical seclusion of places and tangible documents has been complicated by the multifaceted challenges of digital trade, algorithmic profiling, and surveillance.[3]

Examining cases on digital privacy rights in India offers a particularly interesting study. At a crossroads between traditional notions of privacy and rapid technology transformation, the country now boasts over 700 million Internet users and the second-largest digital population in the world.[4] Adding to this complexity is the unique socio-cultural fabric of India where oftentimes differing communal and individual rights establish a delicate balance that opposes the more straightforward ideas of the West when it comes to privacy.

Privacy is at the heart of any working democracy. It protects individual freedom and self-expression, as well as the self-respect of the individual against unnecessary violations by state and non-state actors.[5] But this right is under siege from a trend of our own making; in an age where our personal data has become one of the most valuable commodities, extracted and sold by technology corporations that operate in a space often beyond the reach of timely regulation.

Focusing on social media platforms, this paper analyses the trajectory and current state of privacy rights in India, and the treatment of privacy concerns through Indian jurisprudence. The main research question deals with how Indian courts have either struck a balance with or outweighed the fundamental right to privacy with competing social interests like national security, technological growth or free expression in the context of social media.
This paper, although exhaustive and based on judicial pronouncements and legislative framework, does have its own limitations. It is based largely on constitutional remedies instead of contract or tort. Furthermore, due to the rapid change of both the technology and the law in this area, any analysis of recent developments is also without the benefit of time and judicial exposition.

Historical Evolution of Right to Privacy in India

Privacy rights in Indian jurisprudence are conceptually rooted prior to independence, but such rights had not received adequate legal treatment during the colonial era. During the British colonial period, outside of a few statutory protections, privacy existed as nothing more than the common law torts of trespass and defamation rather than a specific right.[6] The Government of India Act, 1935, with its colonial past facing and aspirations, issued no explicit acknowledgement of the need for an interest in privacy to be protected, but reflected a colonial administration wherein the focus was on governance at a distance rather than a located, substantive articulation of rights to the individual.

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[3] Daniel J. Solove, "A Taxonomy of Privacy," 154 U. Pa. L. Rev. 477, 483-491 (2006).
[4] Internet and Mobile Association of India & Kantar, "Digital in India: 2023 Report," 12-17 (2023).
[5] Amartya Sen, "The Idea of Justice," 339-345 (Harvard Univ. Press 2009).
[6] M.P. Jain, "Indian Constitutional Law," 1103-1105 (8th ed., LexisNexis 2018).

The debates that took place during the Constitutional Assembly (1946-1949) concerning an explicit right to privacy further exemplify the ethos of this ideological tension. Some members proposed clear privacy protections such as K.M. Munshi and Harnam Singh while others including B.R. Ambedkar objected to doing too much to limit state subordination powers.[7] This ambivalence, which would affect decades of later jurisprudence, led in the end to the marked absence of any clear reference to privacy in the text of the constitution itself.

There was significant hesitance to see privacy as a right unto itself in those early decades of Supreme Court jurisprudence. In M.P. Sharma v. Satish Chandra (1954), one of the last cases heard by an eight-judge bench, the judges refused to find anything like a Fourth Amendment right to privacy in the Indian Constitution.[8] The majority opinion in Kharak Singh v. State of Uttar Pradesh (1962) further entrenched this restrictive reading with a refusal to acknowledge privacy itself as an element of constitutionally protected freedom, although Justice Subba Rao's dissent foresaw and lucidly maintained privacy as a necessary condition of Article 21's liberty of the person.[9]

Throughout the 1970s and 1980s, that slowly began to change. In 1975, the Supreme Court recognized that there are "zones of privacy" which are entitled to constitutional protection[10] but privacy was also not seen to be a fundamental right. Later decisions like R. Rajagopal v. State of Tamil Nadu (1994) extended this recognition, specifically regarding the extent of reputational privacy and disclosures in the media.[11] A significant amount of case law had emerged by the early 2000s on multidimensional privacy, but its constitutional jus cogens status remained murky absent a legal definition.

The Puttaswamy Judgment: A Watershed Moment

A Fine Reverberation upon the landmark of *Justice K.S. Puttaswamy (Retd.) K.S. Puttaswamy v. Union of India* (2017) is the most important judicial pronouncement on the right to privacy in the history of the Indian constitution. This specific case grew from a series of petitions challenging the Aadhaar biometric identification program, but then away from the nitty-gritty of the actual policy and towards the broader question of whether privacy is a protected right at all within Indian constitutional law.[12] Now the unprecedented nine-judge bench was set up precisely to resolve discrepancies in earlier SC judgments on whether privacy is a constitutional fundamental right.

On 24th August, 2017, the SC in a unanimous verdict held that the right to privacy is an intrinsic part of Article 21, which enshrines the guarantee of life and personal liberty and it is also an important facet of other freedoms, which are guaranteed under Part III of the Constitution. Delivering the majority opinion, Chief Justice J.S. Khehar forcefully intoned,

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[7] Granville Austin, "The Indian Constitution: Cornerstone of a Nation," 103-107 (Oxford Univ. Press 1966).
[8] *M.P. Sharma v. Satish Chandra*, AIR 1954 SC 300.
[9] *Kharak Singh v. State of Uttar Pradesh*, AIR 1963 SC 1295.
[10] *Govind v. State of Madhya Pradesh*, (1975) 2 SCC 148.
[11] *R. Rajagopal v. State of Tamil Nadu*, (1994) 6 SCC 632.
[12] *Justice K.S. Puttaswamy (Retd.) v. Union of India*, (2017) 10 SCC 1.

"[t]he right to privacy is an intrinsic part of the right to life and personal liberty, which is guaranteed under Article 21 of the Constitution and therefore, it is a fundamental right".[13] The Supreme Court thus overturned the contrary holdings contained in M.P. Sharma and Kharak Singh, a move that essentially shifted the paradigm of Indian constitutional jurisprudence.

In addition, the judgment articulated a nuanced framework for assessing privacy claims, using a three-part constitutional limitation test for permissible infringements of privacy rights. This framework requires that the restrictions are to be provided by law, serve a legitimate state aim (Legitimacy), and have a rational nexus between means and objectives (Proportionality). [14] This test gives courts systematic standard to balance privacy with competing interests; a balance that is especially needed to address digital privacy as of late.

In a concurring opinion, Justice D.Y. Chandrachud, specifically focused on digital informational privacy, observed that "informational privacy is a dimension of the privacy right" and adding that "threats to privacy in an information age can emanate not merely from state actors but nonstate actors as well. The overt acknowledgment of horizontal privacy violations opened up important legal doors for redressing privacy violations against a social media corporation or other private parties.

That judgment of Puttaswamy has a lot of consequences for the digital privacy laws. The recognition of privacy as a fundamental human DNA queation right lends itself veritable constitutional firepower in contesting rampant data harvesting, massive surveillance tools, and algorithmic profiling atherm thoutrosiness our many social media platforms, bourgeousing as natural, inevitable, needful, and at times, even inebriation nowpreventable. This ruling has prompted several regulatory reforms such as progress on an overall data protection law, as well as impacting future judicial decisions about data surveillance and data sovereignty.[15]

Social Media and Privacy Concerns in India

Social media in India has grown at an unprecedented rate, radically changing how citizens interact, access information, and engage in civic conversations. Social media platforms such as WhatsApp (487 million users), YouTube (467 million), and Instagram (351 million) have reached historic levels of market penetration across many demographic groups, with over 500 million social media users as of 2023.[16] Such digital revolution has a special relevance in India where growing smartphone penetration and falling data costs have enabled internet access across socio-economic groupings.

However, the digital transformation has created complex privacy concerns that are hard to fit into conventional legal frameworks. The rising identity-based maturity violations such as doxxing, impersonation and non-consensual intimate image sharing have also now become

[13] *Id*. at para 3.
[14] *Id*. at para 310.
[15] *Id*. at para 170.
[16] Statista Research Department, "Social Media Usage in India - Statistics & Facts," Statista, 8-12 (Jan. 2023).

symphony on Indian social media platforms.[17] Considering India's diverse demographics and the possibility of severe social repercussions for transgressions of privacy (especially across vulnerable groups like women and religious minorities), such violations is profoundly damaging.

In an Indian context, the data collection techniques employed by social media platforms go a step further in the threat to privacy. Platforms continuously collect extensive personal data everything from demographics to behavior to device information and rarely do so transparently or give people information about how their data will be protected.[18] In India where digital literacy is low, this model of surveillance capitalism is all the more pernicious as most users are unaware of the precise magnitude of surveillance they are subjected to when using social media platforms.

Persistent digital footprints is another layer of privacy and thus security threat. Indian users often share personal information on multiple platforms without properly understanding how this information persists and forms a comprehensive personal profile over time. Referring to the context of social media, the Delhi High Court observed in X v. Union of India (2021), "The right to be forgotten assumes greater significance in social media information that may have been shared at one time in relation to one context may be accessed decades later in an entirely different situation.[19]

The data sharing practices adopted by third parties help to further violate the privacy of users. As Kamdar notes, major platforms operating in India routinely do so, albeit without explicit user consent, with the sharing of user data with advertisers, analytics companies, and other business partners facilitated by complex data-sharing arrangements that users are seldom aware of.[20] In 2021, the Competition Commission of India launched an investigation against WhatsApp in response to updated privacy policy terms that concerned data-sharing arrangements between WhatApp and its parent company Meta, suggesting that forced consent to data-sharing arrangements is increasingly liable to regulatory scrutiny.[21]

In the Indian context, these privacy challenges are compounded by several factors including the relatively low digital literacy rate, the acute socioeconomic inequality in access to technology, and the cultural differences in privacy norms. As Justice Sanjay Kishan Kaul said in his Puttaswamy concurrence, "Indian concepts of privacy should be adapted to its realities and not tested against the frameworks relating to privacy for the Western technological context without the acknowledgment of the socio-cultural backdrop of India."[22]

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[17] Apar Gupta & Vrinda Bhandari, "Privacy Violations in the Age of Social Media," 54 Econ. & Pol. Wkly. 15, 17-19 (2019).
[18] Shoshana Zuboff, "The Age of Surveillance Capitalism," 171-177 (Profile Books 2019).
[19] *X v. Union of India*, W.P.(C) 8483/2021 (Delhi High Court, Nov. 12, 2021).
[20] Competition Commission of India, "Market Study on the Telecom Sector in India," 78-83 (Jan. 2021).
[21] In Re: Updated Terms of Service and Privacy Policy for WhatsApp Users, Suo Moto Case No. 01 of 2021 (CCI, Mar. 24, 2021).
[22] *Justice K.S. Puttaswamy (Retd.) v. Union of India*, (2017) 10 SCC 1, at para 69 (Kaul, J., concurring).

Legislative Framework Governing Digital Privacy in India

India has a legislative history of protecting digital privacy but regulatory gaps still exist. The primary law governing interactions on the internet in India, the Information Technology Act, 2000, is, however, not a privacy law. The 2008 amendment also created liability for companies that did not implement "reasonable security practices" when handling "sensitive personal information".[23] Nevertheless, this provision is squarely aimed at ensuring data security, and not at a more general right to privacy, which is consistent with the Act's overall mission of enabling e-commerce, rather than a mission to provide rights of individuals.

Since then, the most important legislative framework regulating personal data processing in India are the Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011 (SPDI Rules). These regulations require prior consent for collection of certain sensitive personal data, use limitation, and reasonable security practices.[24] But these regulations are deeply flawed: they speak only to corporate actors, target only a limited set of narrowly defined fund "sensitive" information, and lack the most meaningful enforcement mechanisms. The SPDI Rules, as the report of Justice B.N. Srikrishna's committee pointed out, "is a far cry from a viable data protection regime fit for the digital age".[25]

Even before the Puttaswamy judgement, there was some momentum in the legislative journey towards the long overdue comprehensive data protection law. The Personal Data Protection Bill, 2019 was India's first serious attempt at privacy law, proposing the establishment of a Data Protection Authority, codification of data subject rights, and accountability requirements for data fiduciaries.[26] But deep controversies especially around exemptions for government and data localization halted it short of Parliament.

The laws listed above are of significant importance, as they represent the government’s latest attempt to put in place a comprehensive privacy framework with the Draft Digital Personal Data Protection Act, 2022. The above draft law includes some of the core principles set up in international frameworks, such as the requirements for consent, principles of purpose restriction and obligations of the data minimization.[27] Nonetheless, the lengthy exceptions afforded to government agencies, the minimal restraints on the various forms of surveillance, and comparatively lame enforcement mechanisms noted by civil society groups.[28]

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[23] Information Technology Act, 2000, § 43A.

[24] Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011.

[25] Committee of Experts under the Chairmanship of Justice B.N. Srikrishna, "A Free and Fair Digital Economy: Protecting Privacy, Empowering Indians," 27 (2018).

[26] Personal Data Protection Bill, 2019, Bill No. 373 of 2019.

[27] Ministry of Electronics and Information Technology, "Draft Digital Personal Data Protection Act," §§ 6-9 (Nov. 2022).

[28] Internet Freedom Foundation, "Analysis of the Draft Digital Personal Data Protection Bill, 2022," 8-12 (Dec. 2022).

There are still important holes in the digital privacy structure of India. The first is the lack of legislation that is both comprehensive and enforceable to regulate algorithmic decision-making and profiling, as well as AI more generally. Moreover, the current legal architecture does not have sufficient remedies for privacy-related harms that are unique to social media platforms, notably in relation to industry-specific concerns such as micro-targeting, behavioral manipulation or cross-platform data aggregation.[29] As technology evolves quicker than the legislation, these regulatory gaps increasingly lessen effective privacy compliance.

Judicial Response to Social Media Privacy Violations

In the post-*Puttaswamy* era, Indian courts have increasingly engaged with privacy violations arising from social media platforms, balancing constitutional rights with technological complexities. Landmark cases reflect evolving jurisprudence acknowledging digital privacy, while also revealing implementation challenges. In *Karmanya Singh Sareen v. Union of India* (2016), the Delhi High Court examined WhatsApp's updated privacy policy allowing data-sharing with Facebook.[30] While the court permitted the policy's implementation, it barred retroactive data sharing and urged government regulation highlighting concerns over user consent and corporate accountability.

Later, in *Shukla v. Facebook Inc.* (2021)[31] the court applied the *Puttaswamy* proportionality test, issuing an interim order preventing WhatsApp from deleting accounts over non-consent to new terms, reinforcing scrutiny over "forced consent." The *right to be forgotten* emerged in *Jorawer Singh Mundy v. Union of India* (2021)[32] with the court affirming digital privacy even after acquittal. However, in *Zulfiqar Ahman Khan v. Quintillion Media* (2019)[33] courts wrestled with balancing this right against public interest. In *X v. Union of India* (2023)[34] the Delhi High Court emphasized intermediary accountability for harmful content. Despite these strides, courts still face enforcement and jurisdictional challenges, underscoring Justice Chandrachud's call for comprehensive digital privacy regulation.

Comparative Analysis with Global Privacy Frameworks

Indian privacy jurisprudence has developed in a global environment that is dominated by comprehensive regulatory regimes concerning digital privacy. The General Data Protection Regulation (GDPR) of the European Union has especially had a cascading effect on the legal developments in India. Significance Of A Departure The Srikrishna Committee Report, which underpinned the draft data protection legislation for India, clearly acknowledged its reliance on GDPR, with key concepts including data minimization and purpose limitation, as

[29] Rishab Bailey & Smriti Parsheera, "Data Localization in India: Questioning the Means and Ends," 31 Nat'l L. Sch. India Rev. 42, 49-52 (2019).
[30] *Karmanya Singh Sareen v. Union of India*, (2016) 233 DLT 436.
[31] *Shukla v. Facebook Inc.*, W.P.(C) 4472/2021 (Delhi High Court, May 3, 2021).
[32] *Jorawer Singh Mundy v. Union of India*, W.P.(C) 3918/2021 (Delhi High Court, Apr. 12, 2021).
[33] *Zulfiqar Ahman Khan v. Quintillion Business Media Pvt. Ltd.*, CS(OS) 642/2018 (Delhi High Court, May 9, 2019).
[34] *X v. Union of India*, W.P.(Crl) 1082/2023 (Delhi High Court, Jul. 8, 2023).

well as rights such as data portability.[35] The influence of the GDPR was apparent in the Puttaswamy judgment as well, wherein Justice Chandrachud, in interpreting principles of informational privacy, invoked European privacy jurisprudence such as Google Spain SL v. AEPD (2014).[36]

Indian courts have adapted, rather than transplant European approaches, even despite these influences. In Internet Democracy Project v. Union of India (2022), the Delhi High Court recognized that "although there are many international frameworks that provide useful and informative guidance, privacy is a contextual right which cannot be applied uniformly across varying social contexts such as that of India".[37] This uniquely Indian formulation is recognized in more importance given to collective and group privacy interests over individual rights, rooted in India's communitarian ethos.

For social media privacy US role is a whole different ballgame. American jurisprudence depends on sectoral legislation and state law rather than broad federal frameworks, and offers sparsely any constitutional privacy protections against private actors.[38] Indian jurisprudence has pointedly delineated this approach from that of the American model through cases like Justice For Rights Foundation v. Union of India (2019), where the Delhi High Court dismissed First Amendment-related arguments when considering the liability of platforms for privacy violations.[39]

Important insights for the evolution of privacy jurisprudence in India from select jurisdictions Brazil's General Data Protection Law (LGPD) illustrates how emerging economies can construe broad and comprehensive protections and then accommodate developmental priorities within that framework, something that the Srikrishna Committee noted with approbation.[40] Likewise, Singapore's Personal Data Protection Act strikes strong protections for individuals with recognition of reasonable business interests a framework that the Bombay High Court cited in considering the proportionality of platform data practices.[41]
Secondly, International cooperation mechanisms are another important aspect of global privacy frameworks. India has engaged under cross-border privacy frameworks such as the Asia-Pacific Economic Cooperation Privacy Framework, albeit cross-border privacy efforts have remained fraught over the conflicting undercurrents triggered by data localization laws and the pressing needs for cross-border data flows.[42] Justice Chandrachud has noted in his Puttaswamy concurrence "international co-ordination is inevitable for the protection of

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[35] Committee of Experts under the Chairmanship of Justice B.N. Srikrishna, supra, at 37-42.
[36] *Justice K.S. Puttaswamy (Retd.) v. Union of India*, (2017) 10 SCC 1, at para 168.
[37] *Internet Democracy Project v. Union of India*, W.P.(C) 8772/2022 (Delhi High Court, Oct. 12, 2022).
[38] Daniel J. Solove & Paul M. Schwartz, "Information Privacy Law," 257-263 (7th ed., Wolters Kluwer 2021).
[39] *Justice For Rights Foundation v. Union of India*, W.P.(C) 11164/2018 (Delhi High Court, Feb. 8, 2019).
[40] Bruno Bioni & Renato Leite Monteiro, "The General Data Protection Law of Brazil: New Rights and Obligations," 12 Int'l Data Priv. L. 35, 40-42 (2022).
[41] *Whatsapp LLC v. Competition Commission of India*, W.P.(C) 6128/2021 (Delhi High Court, Aug. 27, 2021).
[42] Madhulika Srikumar & Sreenidhi Srinivasan, "Privacy in APEC and India," Data Governance Network Working Paper 12, 17-21 (2020).

privacy in a digital age but the protection of data of citizens must remain with sovereign powers".[43]

Balancing Privacy with Other Rights and Interests

In the context of social media and privacy in India however, we observe an ongoing tension between competing rights/interests that with little doubt has proved to be a battleground that our courts have struggled to execute judgments on. This balance is especially difficult in the context of the interface between privacy and free expression. In Swami Ramdev v. Facebook (2019), for example, the Delhi High Court addressed this conflict head-on when it directed the global takedown of content that violated privacy and was also defamatory.[44] This understandably raised fears of chilling effects on legitimate expression, which Prathiba Singh made reference to in X v. Twitter Inc. (2022), by recognizing that "courts must balance privacy remedies in a manner that does not impose disproportionate restriction on freedom of speech, especially about platforms that occupy a foundational place in the democratic discourse of contemporary times."[45]

Social media privacy rights are often affected by national security concerns. The Supreme Court ruling in Internet and Mobile Association of India v. Reserve Bank of India (2020)[46] while endorsing government surveillance powers (here Section 69 of its Central Rule for Information Technology) laid down limited procedural safeguards. Justice Nariman's argument involved contextual balancing, mentioning that "where compelling national security interests are demonstrated, privacy expectations may be reasonably diminished," but critics contend this standard incorporates far too much deference to government surveillance claims.[47]

The commercial interests and concerns with innovation further complicate the task of protecting privacy in social media. The Competition Commission of India has considered the intersection between privacy and competition to an ever-increasing extent, noting in the context of its Whats App investigation of how "degradation of non-price parameters such as quality, consumer choice and privacy can amount to abuse of dominance".[48] This reflects an early view that market concentration in social media may weaken privacy interests, regardless of the practice.

Another layer this balancing exercise will have to account for is the contractual framework that governs user-platform relationships. As terms of service agreement is a form of adhesion contracts, Indian Courts have exercised due diligence and amplified their scrutiny on such provisions. In Gupta v. WhatsApp Inc (2021), the National Consumer Disputes Redressal

[43] *Justice K.S. Puttaswamy (Retd.) v. Union of India*, (2017) 10 SCC 1, at para 184.
[44] *Swami Ramdev v. Facebook*, CS(OS) 27/2019 (Delhi High Court, Oct. 23, 2019).
[45] *X v. Twitter Inc.*, W.P.(C) 6687/2022 (Delhi High Court, Jun. 30, 2022).
[46] *Internet and Mobile Association of India v. Reserve Bank of India*, (2020) 10 SCC 274.
[47] Vrinda Bhandari & Faiza Rahman, "Surveillance Reform Post-Puttaswamy," 12 NUJS L. Rev. 1, 15-18 (2019).
[48] In Re: Updated Terms of Service and Privacy Policy for WhatsApp Users, Suo Moto Case No. 01 of 2021 (CCI, Mar. 24, 2021).

Commission stated that "mere technical consent through click-wrap agreements cannot amount to meaningful consent for irretrievable erosion of fundamental privacy," consistent with an emerging judicial skepticism of consent-based justifications of massive data collection.[49]

Almost all platform privacy policies are driven by some broader consent framework that people are understandably skeptical of. Introduction Justice Chandrachud noted in Puttaswamy that "individual consent loses its significance in ecosystems marked by deep information and power asymmetries" and this has been echoed in subsequent judicial scrutiny of platform practices.[50] The Maharashtra Cyber Adjudicatory Tribunal reached a similar conclusion, observing that "consent-based privacy regimes structurally advantage data holders over users, especially in situations where there is a lack of choice and where information asymmetries exist,"[51] that could be suggestive of some recognition of the limitations of consent mechanics by the courts in the context of social media.

Future Directions and Recommendations

This winding journey of privacy jurisprudence in India also reflects the continuing gaps in the enabling legislative framework. Parliament needs to focus on bringing in strong legislation for data protection in social media contexts that instantiate the Puttaswamy principles to the greatest extent possible, but specifies standards of compliance and enforcement.[52]This kind of legislation ought to go beyond data collection and processing to also cover algorithmic transparency, profiling behaviours and artificial intelligence uses, all of which are becoming drivers of digital privacy landscapes.

This would require Indian courts to evolve sophisticated methods of adjudicating privacy claims involving disruptive technology. There is some indication of an emerging consensus recognizing this imperative: The Supreme Court has recently noted that "the right to privacy is as fundamental as it gets" but that "effective protection of an individual from an invasion of privacy would need an understanding of the technological mechanisms from which the privacy violation is perpetuated".[53] Judges should appoint technical amici curiae in complex digital privacy cases and create bespoke judicial training curricula on technology-related aspects of judicial privacy violations.

Another important avenue to evolve is regulatory mechanisms that are specifically designed for social media platforms. Whoever the responsible authority is (such as UK, USA, EU, or others), many platforms are unique and so need a unique set of rules, and setting up the Independent Social Media Regulator in the UK has unique prospect, particularly when it comes to sector-specific oversight powers that are typically lacking in general data protection

[49] *Gupta v. WhatsApp Inc*., Consumer Case No. 99/2021 (NCDRC, Aug. 16, 2021).
[50] *Justice K.S. Puttaswamy (Retd.) v. Union of India*, (2017) 10 SCC 1, at para 186.
[51]Maharashtra Cyber Adjudicatory Tribunal, Case No. MCAT-36/2022 (Jul. 12, 2022).
[52] Smriti Parsheera, "The Future of Indian Data Protection Law," in "Regulation of the Digital Economy," 211-214 (Vikram Raghavan & Aniruddha Mitra eds., Oxford Univ. Press 2022).
[53] *Internet Freedom Foundation v. Union of India*, W.P.(C) 127/2023 (Supreme Court, Feb. 7, 2023).

frameworks.[54] However, the existing Intermediary Guidelines of India have failed to provide effective mechanisms of regulation, especially with respect to algorithm-driven decision-making and micro-targeting practices which also infringe privacy rights.

These can be complemented with legal frameworks, but at the end of the day legal frameworks do not have the power to protect users, but digital literacy initiatives do. To quote Justice Sanjay Kishan Kaul in Puttaswamy, "the best of privacy laws provide inadequate protection to citizens who are oblivious to the mechanics of digital privacy".[55] Facilitating the establishment, through significant government partnerships, of civil society organisations capable of fast-tracking digital literacy programmes to make them available at affordable costs to disadvantaged communities will strengthen individual agency, such organisations being essential in a social media environment, in which information asymmetries exist.

Last but not least, platform development should be subject to privacy-by-design principles, so that we can move away from privacy by reaction to privacy by anticipation. Technical standards that enforce data minimization, purpose specification, and limits on storage, would structurally bolster privacy protections where today, protections are vexingly limited to case-by-case adjudication or platform policy.[56] By enshrining these standards as minimum compliance obligations, the Indian regulators would fundamentally change the nature of privacy practices in the digital ecosystem.

Conclusion

An upward path of privacy jurisprudence however, the specific issue of privacy of social media is less rosy of a tale. While the Puttaswamy judgment was instrumental in establishing the roadmap for fundamental right to privacy, it was necessary to put in place additional constitutional limits against state and non-state assailants on privacy. Recent court rulings have started to map these ideas onto social media circumstances, constructing the logics of consent, algorithmic publicness and data exchanges that now define the modern forms of privacy jeopardy.

However, privacy protection remains a holy grail in social media. The lack of a holistic regulatory approach results in regulatory uncertainty and enforcement techniques are challenged by the conduct of international platforms, which do not fall neatly within traditional jurisdictional channels. This abstract formalism of consent does not substantively protect privacy, especially when cou-pled with power asymmetries that exist between individual users and platform corporations, particularly large corporations of the scale to have value or interest in user information.

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[54] Damian Tambini, "Media Freedom, Regulation and Trust: A Systemic Approach to Information Disorder," 156-159 (Palgrave Macmillan 2021).

[55] *Justice K.S. Puttaswamy (Retd.) v. Union of India*, (2017) 10 SCC 1, at para 71 (Kaul, J., concurring).

[56] Ann Cavoukian, "Privacy by Design: The 7 Foundational Principles," 4-9 (Information and Privacy Commissioner of Ontario 2011).

Moving forward will necessitate the use of a variety of strategies integrating legislative, judicial, and regulatory processes specifically designed for the social media landscape. Broad data protections need to define rules for data collection, processing, and sharing, and also need enforceable protections and substantive penalties for wrongdoing. Judicial overview should be supplemented by specialized regulatory bodies with technical expertise tackling niche privacy challenges at a more granular level than a top-down framework can.

Effective privacy protection in the social media era, therefore, requires compromise, a form of compromise that protects the rights of the individual while allowing for responsible innovation. As Justice Kaul put it in Puttaswamy, "it needs no re-iteration that protection of privacy should not act as an impediment to technological development but should guide it and ensure that innovative technologies are redirected in the areas of privacy enhancing technologies and human centric design. Fostering a dignified and autonomous digital ecosystem is a modest proposal for India to achieve not just improved, but dignified and autonomous with respect to the fast-paced technological transformation if it does not wish to leave anyone behind by anchoring not an afterthought, but a foundational principle of privacy.

Revisiting the Creamy Layer Doctrine in SC/ST Reservations: Legal Evolution and Challenges

Siva Nandhini. D[1]

Abstract

The doctrine of creamy layer far extended to the SC and ST communities, weren't still implemented by the Government of India, and had exhibited a stubborn dismissal of the matter, but why? What are the reasons for conveniently extending the same to the SEBC/OBCs? Scrutinizing these, this doctrinal research would provide a glimpse as to who are SC, ST and OBC's, the affirmative action practised in India, it's evolution, grounds behind application of this principle to SC and ST and various impediments along its way, in a manner as to ascertain the possible solutions to the research question concentrated, whether the inclusion of the creamy layer in SC/ST reservations hinders their equitable upliftment ?

Keywords: *Creamy layer, Scheduled Castes, Scheduled Tribes, Socially and Educationally Backward Classes, Reservations.*

Introduction

"The first condition which I think is a condition precedent for the successful working of a democracy is that there must be no glaring inequalities in the society. There must not be an oppressed class. There must not be a class which has got all the privileges and a class which has got all the burdens to carry. Such a thing, such a division, such an organization of society has within itself the germs of a bloody revolution, and perhaps it would be impossible for democracy to cure them…."

-----Dr. B.R Ambedkar

Following the words of Babasaheb, the atone for the commissions as to the past, is still being continued by the way of reservations, an affirmative action under Article 14 of the Indian Constitution[2], yet we hadn't achieved the desired purpose of it. Instead, the recent trajectory had shifted the focus upon the intra caste divide based upon their overall social well-being, especially within the SC and STs. Hence, without questioning the settled legal position as to the extension of creamy layer to the SC and ST, my doctrinal research would focus upon the research question, whether the inclusion of the creamy layer in SC/ST reservations hinders their equitable upliftment?

Constitutional Background of Reservations in India

The wordings of Dr. Ambedkar as seen in his speech, "Annihilation of caste", comprehend a human, his needs as to a social reform which could entirely annihilate the case system, contrary

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[2] Constitution of India, 1950, Article 14.

to a social reform which dwells upon the division of people by virtue of caste, for their upliftment socially, politically and economically[3]. But then due to the deep penetration of caste system in the Indian society, the development of an affirmative action plan was made on the basis of caste, by converting it as a tool to uplift the oppressed classes.

Officially the so-called depressed classes were recognised as scheduled class for the first time in the Government of India Act, 1935 U/S 309 and the term was coined by the Simon Commission[4]. They were termed as scheduled since, the constituents of those who fall under this category would be listed by the British Government[5] and at present it would be by the President of Independent India[6]. Later, in accordance with the ideology of Babasaheb, that Indians are the ones who should frame the Constitution of India, with their full consent[7], the constituent assembly was formed.

A resolution proposed by Nehru which on December 13, 1946, contained nearly 8 clauses and promised the safeguards for the underprivileged, thereby marking the start of affirmative action in India[8]. Consequently, under the broad objective of the Nehru's resolution, Dr. Ambedkar seeked for a separate electorate to SC, reserved seats in public services and legislatures, whereas the final decision made was the replacement of religious minorities reservation by caste-based reservation and the SC weren't given any separate electorates instead, they were given reservations for a span of 10 years under the employment sector and politics[9], thereby leading the way towards protective discrimination policy[10].

Under the Indian Constitution, SC and ST's are defined U/A 366(24) and 366(25) respectively. Initially, the adopted version of our constitution doesn't have any provision as to reservation to SC, STs specifically, the only reservation mentioned was U/A 16(4) with respect to public employments for backward classes. In 1948, the Madras Government via G.O, known as the communal order, allowed for the allotment of seats on community basis, such as Non – brahmins (Hindus), Backwards Hindus, Brahmins, Harijans, etc. Followed by this order, the then national government formed by Congress, promptly formalised the caste-based reservation system. Thus, this was challenged in the case of *Champakam Dorairajan*[11] on the ground that the order violated Article 15(1) and Article 29(1) as it stood before the first amendment. The High Court

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[3] Dr. B.R. Ambedkar, *Annihilation of Caste* (Arundhati Roy ed., Navayana 2014).
[4] Anuradha Chadha, *Reservation Law and Policy: Past, Present and Future* 53 (2016 ed., Regal Publ'ns).
[5] Divya Negi, The Evolution of Reservation System in India, 4 Int'l J. Adv. Legal Res. (IJALR) (2024), https://ijalr.in/wp-content/uploads/2024/04/THE-EVOLUTION-OF-RESERVATION-SYSTEM-IN-INDIA.pdf (last visited Apr. 18, 2025).
[6] Supra note 3
[7] Dr. B.R. Ambedkar, *Communal Deadlock and a Way to Solve It*, in *Dr. Babasaheb Ambedkar: Writings and Speeches*, Vol. 1, at 381 (Gov't of India, Ministry of External Affairs ed., 1979), https://www.mea.gov.in/images/attach/amb/volume_01.pdf#page=381 (last visited Apr. 18, 2025).
[8] Supra note 5.
[9] *Ibid.*
[10] Supra note 4 at 54.
[11] *State of Madras vs. Srimathi Champakam Dorairajan*, AIR 1951 SC 226.

of Madras, upheld the violation and the same was reiterated by the Supreme Court in the appeal by the Madras Government[12].

Consequently, the first Amendment Act, 1951 was brought by the Parliament, inserting Article 15(4), which states about the reservation to socially and educationally backward classes along with the SC and ST[13]. The scope of Article 15(4) is comparatively wider than that of Article 16(4) as it is restricted only in terms of public employment for backward classes alone[14]. The quantum as to the grant of reservation was limited to 50% by the Supreme court of India, by interpreting the Articles 15(4), 15(1) and 46 holistically[15].

The reservations for the SC and ST are given for public employments including promotions, U/A 16(4)[16], 16(4A)[17], in panchayat elections U/A 243D[18], in urban local body elections U/A 243T[19], in Parliament U/A 330[20], in State legislative assembly's U/A 332[21], along with a provision to achieve wider goals U/A 15(4) [22], ensuring their participation in education, public employment and participation in the framework of the deployed government.

Explicitly, the concept of reservation is not mentioned in any of the three lists under the seventh schedule, but it could be figured out, subject to various entries under the concurrent lists namely, Economic and Social Planning, Social Security and employment, Welfare of Labour, and education, where generally the reservations are provided. This gives the power of implementing reservations to these castes by both the central and state government[23].

The Evolution and Application of the Creamy Layer Doctrine

"A tiny elite gobbling up the benefits and the darker layers sleeping, distance away from the special concessions" an excerpt from Justice Krishna Iyer's judgment, which he delivered as a warning regarding the evils of the practised reservation system in *State of Kerala vs. N.M. Thomas*[24], which was nearly 16 years before the Indra Sawhney case which officially propounded the principle of creamy layer, marked the dawn of exclusion of creamy layers from disadvantaged groups. Moving forward, in the case of *K.S. Jayashree vs. State of Kerala*[25], the

[12] M.P. Jain, *Indian Constitutional Law*, vol. 1, 1303 (8th ed. 2023, LexisNexis).
[13] *Ibid*
[14] *Ibid* at 1304.
[15] Supra note 11 at 1310, also refer M R Balaji vs. State of Mysore, AIR 1963 SC 649; 1963 SCR Supp (1) 439
[16] Constitution of India, 1950, Article 16(4)
[17] India Const. art. 16, cl. 4A, inserted by Constitution (Seventy-seventh Amendment) Act, 1995, § 2 (w.e.f. June 17, 1995).
[18] India Const. art. 243D, inserted by Constitution (Seventy-third Amendment) Act, 1992, § 2 (w.e.f. Apr. 24, 1993).
[19] India Const. art. 243T, inserted by Constitution (Seventy-fourth Amendment) Act, 1992, § 2 (w.e.f. June 1, 1993).
[20] India Const. art. 330.
[21] India Const. art. 332.
[22] India Const. art. 15(4), inserted by Constitution (Ninety-third Amendment) Act, 2005, § 2 (w.e.f. Jan. 20, 2006).
[23] India Const. sch. VII, list III, entries 20, 23–25.
[24] State of Kerala vs. N.M. Thomas, AIR 1976 SC 490
[25] *K.S. Jayashree vs. State of Kerala*, AIR 1985 SC 1495

Court denied reservation to a backwards class family whose family income exceeded INR 10,000[26], thereby contemplating it in a practical form.

In consonance with this, in the case of *Indra Sawhney*, the Supreme Court had introduced the doctrine of creamy layer officially, but the court did not find any necessity to introduce a test as to it, thus, it ruled that when a candidate is applying to a public employment, then it should be made mandatory to reveal their parent's annual income; in relevance, the ceiling limit could be decided by the government. In addition to this, the court also stated that apart from the economic criteria, the social and political enhancement of their family along with their parent's services if any in a higher grade in the government should also be considered pertinent, in eliminating them from the other backward class, so that the benefits of the reservation policy could be completely reaped by those downtrodden within the same group[27]. This case speaks only of its application to the backward classes[28].

In the same vein, in the case of M. *Nagaraj vs. Union of India*, the Supreme Court in the year 2007, extended this principle to the SC and STs, because prior to this case it was only applied in case of SEBCs, upon the verifiability of 3 conditions namely, current backwardness of them, inadequate representation of them in the relevant sector and that the reservations will maintain administrative efficiency[29]. Further, the same was mandated in the case of *Jarnail Singh vs. Lacchmi Narain Gupta* along with its extension to promotions, but overruling the former case based on the conditions set and allowed only for the second condition to prevail as to the relevant cadre considered[30]. In the former case it wasn't mandated, but in the latter it was.

After the *Indra Sawhney case*, Justice Ram Nandan Committee was formulated by the Indian Government, to identify the creamy layer amongst the OBCs, and thus, the parameters considered included, parents' income (current threshold INR 8 Lakhs), occupational criteria and property ownership[31]. Whereas, this wasn't possible in case of the SC or STs due to the rigidity shown by the Indian Government in implementing it[32].

Rationale For Applying the Creamy Layer To SC/ST

Violation as to Article 14:

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[26] Pavan Srinivas, *Affirmative Action and the Marginalized Population: A Study on the Creamy Layer and its Relevance Today*, 5 Christ U. L.J. 45, 45–55 (2016), https://doi.org/10.12728/culj.9.5 (last visited Apr. 19, 2025).
[27] *Indra Sawhney vs. Union of India*, AIR 1993 SC 477, para 629
[28] *Ibid*
[29] *M. Nagaraj vs. Union of India*, AIR 2007 SC 71.
[30] *Jarnail Singh & Ors. vs. Lachhmi Narain Gupta & Ors*., (2018) 10 SCC 396
[31] Supra note 12
[32] *Creamy Layer' Doesn't Apply to SC/ST Quota, Says Govt. After PM's Assurance to BJP MPs*, The Hindu, Aug. 10, 2024, https://www.thehindu.com/news/national/creamy-layer-principle-does-not-apply-to-scst-reservations-pm-assures-bjp-mps/article68505657.ece (last visited Apr. 19, 2025).

In the case of *Jarnail Singh vs. Lacchmi Narain Gupta*[33], Justice Nariman overturned the observation of the creamy layer principle, merely as a principle of identification and held it as a significant principle of equality under Article 14. The concept of creamy layer exclusion was also validated U/A 14, as to the two-test laid down, concerning the existence of intelligible differentia and its rational nexus with the object sought to be achieved by any initiative, because their existence could be seen in the further classification within a particular class[34]. Therefore, the sub – classification within the particular groups based on substantial differences as to SC and ST doesn't amount to any violation to one's fundamental right[35]. In the case of exclusion of creamy layers, apart from absolute equality, the principle of proportional equality fits best[36].

In the case of *State of Punjab vs. Davinder* ***Singh***[37]**,** the Court allowed for the sub – classification amongst SC and STs as constitutional in order to ensure that the benefits of reservation provided by the government reaches those who are considered to be less represented or benefitted from it. Several studies showcase the fact that the SC and ST communities aren't homogeneous and thus, they suffer intra community disparities[38]. Even though the sub – classification of heterogeneous communities is a good idea, it doesn't fulfil the purpose of affirmative action, and also will be in violation of article 14 because, even after such a categorisation, the government is not ready to exclude the creamy layers amongst them.

Perpetuating Backwardness

"In any nation, it's not good to have reservation forever. The need for it should be done away with as soon as possible and instead, a time should come to provide everyone with equal opportunity.[39]" Through Dr. B. R. Ambedkar's words, we get to know his ultimate intention upon reservation, that he himself considered that the SC, ST, SEBC should not subsist as backwards eternally. This same notion was also deliberated in the case of *Jagdish Negi vs. State of U.P*[40], by Justice S.B. Majmudar, stating that "*the State cannot be bound in perpetuity to treat such classes for citizens for all times as socially and educationally backward classes for citizens. The principles of 'once a mortgage always a mortgage' cannot be pressed in service for submitting that once a backward class of citizens, always such a backward class*".

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[33] *Jarnail Singh vs. Lacchmi Narain Gupta*, (2018) 10 SCC 396, Available at, https://www.scobserver.in/reports/jarnail-singh-lacchmi-narain-reservation-in-promotion-plain-english-summary-of-the-judgment/, last accessed on 19 April, 2025, " It held that failing to apply the exclusion of creamy layer principle would violate right to equality in two ways. Firstly, it held that doing so treats equals differently, namely the general classes and the forward among Backward Classes (SC/ST). Second, it held that doing so treat unequal's the same, namely backward classes and the forward among backward classes"

[34] *State of Kerala vs. N.M. Thomas*, AIR 1976 SC 490.

[35] *State of Jammu and Kashmir vs. T.N. Khosa*, AIR 1974 SC 1.

[36] *Ibid*

[37] *State of Punjab vs. Davinder Singh*, 2024 INSC 562

[38] Dr. Binita Behera, Simran Sahoo & Sai Ashish, *The Principle of Creamy Layer in Reservation Policies for Advancement of the Backward Classes: An Attempt to Establish Equity*, 3 Indian J. L. & Legal Rsch. 1 (2020), file:///C:/Users/91915/Downloads/3IndianJLLegalRsch1.pdf (last visited Apr. 20, 2025).

[39] *Is SC Ruling Excluding 'Creamy Layer' from Quota Benefits a Reformist Step?*, India Today, Aug. 5, 2024, https://www.indiatoday.in/india-today-insight/story/is-sc-ruling-excluding-creamy-layer-from-quota-benefits-a-reformist-step-2577119-2024-08-05 (last visited Apr. 20, 2025).

[40] *Jagdish Negi vs. State of U.P*, AIR 1997 SC 3505

In relation to this, in the case of *Balaji vs. State of Mysore*[41], it was held by the court that it is the duty of the court to undertake empirical studies as to the results of the affirmative action undertaken collectively including the grant of reservations, so that those who have progressed by all means, would be released from the virtue of backwardness. Nevertheless, even if reservation persists for the upliftment of SC and ST, the non – exclusion of creamy layer would significantly perpetuate the backwardness of those behind them forever.

Margins Within Margins

Justice HN Nagamohan Das, had submitted his report on internal reservation concerning empirical data and recommending a suitable framework for implementation of sub - classification to the Karnataka State Government recently. This demand for internal reservation was due to the agitation amongst various sub – communities of Dalits namely, Lambanis, Bhovis, Koracha, and Koramas, who have alleged the predominant exhaustion of 17% reservation by Dalit right communities, which led to the formation of one – member committee to study upon the issue[42]. Thus, this shows the necessity to implement the exclusion of creamy layer in SC and ST transcending internal reservation, because it leads the progressed community to progress more, while the truly marginalized and most backward among them continue to be left behind. If the already progressed keep gaining disproportionate benefits, the purpose of achieving equity and equality would always remain a never-ending dream, defeating the very essence of the reservation policy envisioned by the Constitution.

In addition to this, there are consecutive demands of MBC (lowest in the pyramid as to OBCs), claiming their inclusion in SC, due to the protections given to them under Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989, loss of their livelihood due to socio – economic change and political development since liberalisation, increase in anxiety due to improvement of social and economic status of SC and the threat of falling to the lowest Hindu social order[43], implies the fact of progress made by SC to some extent, thereby urging the need for creamy layer exclusion, so that those who are truly disadvantaged within SC, ST and other communities could reap the benefits given by the government.

Anticipating Reverse Discrimination

An empirical study conducted in the year 2016, with nearly 110 samples of different individuals belonging to general category, SC, ST and other religious minorities such as muslims and Christians, seeking various question with respect to reservation policy of India including the exclusion of creamy layer among SC and ST debate, brought to light that the opinions of those

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[41] *Balaji vs. State of Mysore*, AIR 1963 SC 649

[42] *Report on Internal Reservation for Karnataka SC, ST Submitted to Chief Minister*, India Today, Mar. 27, 2025, https://www.indiatoday.in/india/karnataka/story/justice-nagamohan-das-submits-report-on-internal-reservation-for-sc-st-karnataka-government-faces-crucial-decision-2699953-2025-03-27 (last visited Apr. 20, 2025).

[43] Arvind Kumar, *Why Do the Most Backward Classes Want Scheduled Caste Status?* in *Dalits in the New Millennium* 394, 394–413 (Cambridge Univ. Press), file:///C:/Users/91915/Downloads/WhyDotheMostBackwardClassesDemandSCStatus.pdf (last visited Apr. 20, 2025).

in general category and religious minority communities were on one side against those belonging to SC and ST. This demarcation outlines the embarkment of reservations becoming reverse discrimination[44], which was at the initial stages of discussion was clearly anticipated by the constitution makers, but due to the temporariness of the reservation system considered then, led to a conclusion as to this debate previously[45].

Vote Bank Politics

Vote bank politics is a strategy wherein political parties or leaders attempt to attract a particular social, religious, ethnic, or regional group by prioritizing their interests, often to secure their votes—even if such preferences may not align with sound long-term policy. The government of Independent India is persistently objecting the exclusion of creamy layer in SC/ST quota, and whether this could be linked with the context of vote bank politics? Though there is no estimated evidence as to prove this explicitly, the view of the scholar V. Venkatesan, reframed the fallacy as to vote bank politics optimistically as part of democratic accountability[46]. This, point of view is partially correct but cannot be applied in all circumstances, because there are also situations where, the government had failed to protect the profoundly deprived communities, as in this present scenario.

Factors Hindering the Exclusion of Creamy Layer From SC/ST

WHO are SCs, STs and SEBCs?

In accordance with Article 341, it is the duty of the President to determine typically those castes who are at the lowest level in religious hierarchy of India, and are generally the depressed sections of Hindu[47] who have been for ages treated as untouchables and was exposed to persecution on the basis of their caste[48]. Scheduled tribes are those part of Indian community who still observe their tribal ways and have their residence at hills, forests, etc[49]. and are recognised as per Article 342[50]. On the other hand, initially, the SEBCs are identified based on the 1980 report of the Mandal Commission which stipulated the following[51]:

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[44] Md. Altamash Imam, *Evolution of Reservation System in India: An Overview*, *Int'l J. Trend Sci. Res. & Dev.* 676, 676 (Vol. 7, Issue 2), https://www.ijtsrd.com/papers/ijtsrd55117.pdf (last visited Apr. 18, 2025).

[45] *Is SC Ruling Excluding 'Creamy Layer' from Quota Benefits a Reformist Step?*, *India Today Insight*, https://www.indiatoday.in/india-today-insight/story/is-sc-ruling-excluding-creamy-layer-from-quota-benefits-a-reformist-step-2577119-2024-08-05 (last visited Apr. 20, 2025).

[46] V. Venkatesan, *Long Live Vote-Bank Politics: Polemics*, Law and Other Things (Apr. 6, 2007, 4:46 PM), Available at, https://lawandotherthings.com/long-live-vote-bank-politics-polemics/, last accessed on 5 May, 2025

[47] Supra note 12 at 2006

[48] National Human Rights Commission, *Constitutional and Civil Rights to Protect Scheduled Castes and Scheduled Tribes from Atrocities and The Law Against Witch Hunting*, Pub. Unit, NHRC, https://nhrc.nic.in/sites/default/files/Civil%20Rights.pdf?utm (last visited Apr. 19, 2025).

[49] Supra note 12

[50] Supra note 12 at 2006 and 2007

[51] Backward Classes Comm'n, *Report of the Backward Classes Commission, First Part, Vol. 1 & 2* 15 (Gov't of India 1980), Available at, https://www.ncbc.nic.in/Writereaddata/Mandal%20Commission%20Report%20of%20the%201st%20Part%20English635228715105764974.pdf (last visited Apr. 19, 2025).

1) Low social position in the traditional caste hierarchy of Hindu society.
2) Lack of general educational advancement among the major section of a caste or community.
3) Inadequate or no representation in Government service.
4) Inadequate representation in the field of trade, commerce and industry".

Subsequently, the National Commission for Backward Classes, modified it as to the social, educational and economic factors of the public[52]. This disparitised identification of SC, ST and SEBCs based upon the gravity of oppression faced by them for the purpose affirmative action, promoted further inequality and had acquired governmental sympathy towards them for a more lingering period.

Absence of Decline in Merit and Ability

Initially, U/A 335 it is mandatory for the government to ensure that the reservations provided to SC and ST should not affect the efficiency of the administration within the government. Whilst looking at the intentions of the framers of the constitution, Brajeshwar Prasad's speech in the Assembly upon this provision was to prioritize efficiency upon the reservation to the SC and ST, which was also reiterated in the Indra Sawhney case[53]. The twin principle of efficiency had also been emphasised in the *General Manager, Southern Rly. vs. Rangachari case*[54]. Justice Krishna Iyer in the case of *Jagadish Saran vs. Union of India*[55], stated that "the first caution is that reservation must be kept in check by the demands of competence. The best talents cannot be completely excluded by wholesale reservation".

However, the introduction of (82nd Amendment) Act, 2000, inserted a provision which compromises the efficiency of those who come under the reserved category, by reducing the qualifying marks and lowering standards of evaluation[56]. On par with this, in the case of *Jarnail Singh vs. Lachhmi Narain Gupta*[57], held that the reduction of qualifying marks and lowering the standards of evaluation does come within the fold of inefficiency as opposed to Article 335. Alas, this had been contradictorily proved by an empirical study conducted amongst the Indian Railway employees, the sector in which predominant posts are filled under reservation[58].

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[52] National Commission for Backward Classes, *Guidelines for Consideration of Requests for Inclusion and Complaints of Under-Inclusion in the Central List of OBCs*, https://ncbc.nic.in/Writereaddata/FAQguidelines.pdf (last visited Apr. 19, 2025).

[53] *Constitution of India*, Does Affirmative Action Conflict with Efficiency?, https://www.constitutionofindia.net/blog/does-affirmative-action-conflict-with-efficiency/ (last visited Apr. 19, 2025), also refer, M.P. Jain, *Indian Constitutional Law* 2016-17 (Lexis Nexis, 8th ed. 2023).

[54] *General Manager, Southern Rly. vs. Rangachari*, AIR 1962 S.C. 36

[55] *Jagadish Saran vs. Union of India*, (1980) 2 S.C.R. 831.

[56] Dr. J.N. Pandey, *Constitutional Law of India* 809 (Central Law Agency, 58th ed. 2021).

[57] Jarnail Singh vs. Lachhmi Narain Gupta, AIR 2018 SC 4729

[58] Ashwini Deshpande & Thomas Weisskopf, *Does Affirmative Action Reduce Productivity? The Case of Indian Railways*, IDEAS FOR INDIA, https://www.ideasforindia.in/topics/social-identity/does-affirmative-action-reduce-productivity-the-case-of-indian-railways.html (last accessed Apr. 20, 2025).

Determinants of Caste in Indian Society

Anciently, the caste was determined based on the varna system, which categorises the population based on their occupation, namely, brahmins, kshatriyas, vaishyas and shudras on a hierarchical basis[59]. Generally, a person's caste is decided upon his birth itself, thereby making it rigid where even a significant development in social, economic or political status could not change their hierarchy and oppression[60]. Post independence, several measures were undertaken by the constitution framers and government to reverse the historical oppression faced by certain communities, and as seen before accumulated diverse castes in India under FC, BC, OBC, SC and ST[61]. Nevertheless, there are certain discrimination faced by the SC, ST people socially, for instance where our current President Smt. Draupadi Murmu, was not invited to the consecration of the Ram Mandir, on the fact that she belonged to ST community[62]. In the case of *Ashok Kumar Thakur*[63], the Court had also noticed the discrimination faced by SC and ST even after being economically developed.

Conclusion

"If reservation was concerned with the more backward classes and no reservation was made for the slightly more advanced backward classes, the most advanced classes would walk away with all the seats available for the general category, leaving none for the backward."[64]

The decision in the case of *Balaji vs. State of Mysore*[65], concerning the point that caste cannot be considered as the sole criteria to determine backwardness was overturned in the *Indra Sawhney case*, stating that once a person falls within the ambit of SC, he is considered to be a backward for eternity and there is no need to ascertain as their backwardness repeatedly, is a pivotal judicial inconsistency, where this was also affirmed in subsequent cases[66].

This portrays the lack of initiative to analyse the outcome of affirmative actions, thereby perpetuating backwardness without proper empirical data, resulting a delay in social development. However, in the case of *State of Punjab vs. Davinder Singh*[67], apart from emphasising the exclusion of creamy layer in SC and ST, have suggested the policy framers to use a different mechanism rather than the one deployed for OBC, in order to safeguard the vital interests of the group.

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[59] Anuradha Chadha, *Reservation Law and Policy, Past, Present and Future* (Regal Publications 2016).
[60] *Ibid*
[61] *Ibid*
[62] Livemint, *Lok Sabha Elections 2024: President Murmu wasn't invited to Ram Mandir event due to her caste, says Malikarjun Kharge*, updated April 22, 2024, available at https://www.livemint.com/politics/lok-sabha-elections-2024-president-murmu-wasnt-invited-to-ram-mandir-event-due-to-her-caste-says-malikarjun-kharge-11713795539621.html, last accessed April 20, 2025.
[63] *Ashoka Kumar Thakur vs. Union of India*, AIR 2008 SC 289
[64] *Vasanth Kumar vs. State of Karnataka*, AIR 1985 SC 1495
[65] *Balaji vs. State of Mysore*, AIR 1963 SC 649
[66] *E.V. Chinnaiah vs. State of Andhra Pradesh*, (2005) 1 SCC 394, Jarnail Singh vs. Lachhmi Narain, AIR 2018 SC 4729
[67] *State of Punjab vs. Davinder Singh*, 2024 INSC 562.

If the contention as to, those who are economically developed face criticism in this society due to their caste, is considered important for non – implementation of the creamy layer doctrine within SC and ST, then consider the situation of those in the lower stratum below the creamy layer, who are genuinely deprived of these benefits provided by the government and surrounded by an unattainable illusion. Hence, in order to fully realize the benefits of the reservation system, exclusion of creamy layer in SC and ST as implemented in OBC, plays a significant role in social development. The factors discussed above which hinders the implementation of this mechanism, should not be considered relevant to a greater extent, keeping in mind the long-term goals tend to be attained as a result of this policy reformation by the government. Therefore, reservation is only a crutch which supports a person, until he's independently developed and is not a privilege for eternity.

Retrospective Operation of Amendment

Mr. Rakesh Kumar Singh[1]

Introduction

Legislature has power to enact the law. Enforcement of law and date of enforcement is discretion of legislature. Legislature can enforce a law from retrospective & prospective effect. The power to legislate the law is subject to legislative competence. The power to make retrospective legislation enables the Government to amend the Act completely and to repeal the law as it existed before amending the act. This power has also been often used for validating prior executive and legislative act for curing the defect which led to invalidity of a particular provision or the act.[2] "The rule against retrospective construction is not applicable to a statute merely because "a Part of the requisites for its action is drawn from a time antecedent to its passing". If that were not so, every statute will be presumed to apply only to persons born and things which come into existence after its operation and the rule may well result in virtual nullification of most of the statutes."[3]

New law may operate prospectively or retrospectively. So is the case with an amendment of law. In amending legislation, express retrospectively is given either by inserting an explanation or provision by using an expression such as "deemed to have been inserted/substituted" etc. The aforesaid phraseology in used in all amending legislation.[4]

Meaning of Retrospective Operation

In *Darshan Singh v. Ram Pal Singh*[5] Hon'ble Supreme Court explain the meaning as Retrospective. According to Blacks dictionary means looking backward; contemplating what is past; having reference to a statute or things existing before the Act in question. Retrospective law means a law which looks backward or contemplates the past; one which is made to affect acts or facts occurring or rights occurring, before it came into force. Every statute which takes away or impairs vested rights acquired under existing laws or creates a new obligation, imposes a new duty or attaches a new disability in respect to transactions or considerations already past. Retroactive statute means a statute which creates a new obligation on transactions or

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[1] ***Presiding Officer Labour Court, Dehradun.***

[2] M.V.J.K Kumar. Retrospective Legislation When can be made, whether such retrospective legislation is valid or not (2020) 77 *GSTR* (Jrn) 21.

[3] Justice G.P. Singh, Principles of Statutory Interpretation 2012: Lexis Nexis Butterworths Wadhwa Nagpur (13th Edition) p. 535.

[4] Amit Prasad: Tax and its Retrospectivity: An Appraisal: (2023) 452 *ITR* (Jrn) 19.

[5] 1992 Supp (1) SCC 191

considerations already past or destroy or impair vested rights. While considering the power of the sovereign Legislature to make retrospective legislation, the Supreme Court held as follows:

In *State Bank's Staff Union Vs. Union of India and others (2005) 7 SCC 584* Hon'ble Supreme Court held that –

Every sovereign legislature possesses the right to make retrospective legislation. The power to make laws includes power to give it retrospective effect. Craies on Statute Law (7th Edn.) at p. 387 defines retrospective statutes in the following words:

"A statute is to be deemed to be retrospective, which takes away or impairs any vested right acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability in respect to transactions or considerations already past."

Judicial Dictionary (13th Edn.) K.J. Aiyar, Butterworth, p. 857, states that the word "retrospective" when used with reference to an enactment may mean (i) affecting an existing contract; or (ii) reopening up of past, closed and completed transaction; or (iii) affecting accrued rights and remedies; or (iv) affecting procedure. Words and Phrases, Permanent Edn., Vol. 37-A, pp. 224-25, defines a "retrospective or retroactive law" as one which takes away or impairs vested or accrued rights acquired under existing laws. A retroactive law takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transaction or considerations already past.

In Advanced Law Lexicon by P. Ramanath Aiyar (3rd Edition, 2005) the expressions "retroactive" and "retrospective" have been defined as follows at page 4124 Vol.4) "Retroactive- Acting backward; affecting what is past. (Of a statute, ruling, etc.) extending in scope or effect to matters that have occurred in the past. - Also termed retrospective. (Black, 7th Edn. 1999) 'Retroactivity' is a term often used by lawyers but rarely defined. On analysis it soon becomes apparent, moreover, that it is used to cover at least two distinct concepts. The first, which may be called 'true retroactivity', consists in the application of a new rule of law to an act or transaction which was completed before the rule was promulgated. The second concept, which will be referred to as 'quasi-retroactivity', occurs when a new rule of law is applied to an act or transaction in the process of completion.....The foundation of these concepts is the distinction between completed and pending transactions...." (T.C. Hartley, The Foundations of European Community Law 129 (1981).

Retrospective- Looking back; contemplating what is past. Having operation from a past time.

Retrospective' is somewhat ambiguous and that good deal of confusion has been caused by the fact that it is used in more senses than one. In general however the Courts regards as retrospective any statute which operates on cases or facts coming into existence before its commencement in the sense that it affects even if for the future only the character or consequences of transactions previously entered into or of other past conduct. Thus, a statute is

not retrospective merely because it affects existing rights; nor is it retrospective merely because a part of the requisite for its action is drawn from a time and antecedents to its passing. (Vol.44 Halsbury's Laws of England, Fourth Edition, page 570 para 921)."

In Harvard Law Review, Vol. 73, p. 692 it was observed that "it is necessary that the legislature should be able to cure inadvertent defects in statutes or their administration by making what has been aptly called 'small repairs'. Moreover, the individual who claims that a vested right has arisen from the defect is seeking a windfall since had the legislature's or administrator's action had the effect it was intended to and could have had, no such right would have arisen. Thus, the interest in the retroactive curing of such a defect in the administration of government outweighs the individual's interest in benefiting from the defect".

The above passage was quoted with approval by the Constitution Bench of this Court in the case of The Asstt. Commr. of Urban Land Tax v. The Buckingham and Carnatic Co. Ltd. (1969 (2) SCC 55). In considering the question as to whether the legislative power to amend a provision with retrospective operation has been reasonably exercised or not, various factors have to be considered. It was observed in the case of Stott v. Stott Realty Co. (284 N.W. 635) - as noted in Words and Phrases, Permanent Edn., Vol.37-A, p. 2250 that:

"The constitutional prohibition of the passage of 'retroactive laws' refers only to retroactive laws that injuriously affect some substantial or vested right, and does not refer to those remedies adopted by a legislative body for the purpose of providing a rule to secure for its citizens the enjoyment of some natural right, equitable and just in itself, but which they were not able to enforce on account of defects in the law or its omission to provide the relief necessary to secure such right."

Craies on Statute Law (7th Edn.) at p. 396 observes that:
"If a statute is passed for the purpose of protecting the public against some evil or abuse, it may be allowed to operate retrospectively, although by such operation it will deprive some person or persons of a vested right." So hon'ble Supreme Court broadly express the meaning of retrospective Construction. Judges have to search intention of legislature.

In *SEBI Vs. Rajkumar Nagpal and Others*[6] Hon'ble Supreme Court held that the terms retrospective'and retroactive' are often used interchangeably. However, their meanings are distinct. This Court succinctly appreciated the difference between these concepts in State Bank's Staff Union (Madras Circle) Vs. Union Of India.

"Retroactivity" is a term often used by lawyers but rarely defined. On analysis it soon becomes apparent, moreover, that it is used to cover at least two distinct concepts. The first, which may be called 'true retroactivity', consists in the application of a new rule of law to an act or transaction which was completed before the rule was promulgated. The second concept, which will be referred to as 'quasi-retroactivity', occurs when a new rule of law is applied to an act or

[6] (2023) 8 SCC 274.

transaction in the process of completion....The foundation of these concepts is the distinction between completed and pending transactions...." (T.C. Hartley, The Foundations of European Community Law 129 (1981).

Many decisions of this Court define retroactivity to mean laws which destroy or impair vested rights. In real terms, this is the definition of retrospectivity or true retroactivity. Quasi-retroactivity or simply retroactivity on the other hand is a law which is applicable to an act or transaction that is still underway. Such an act or transaction has not been completed and is in the process of completion. Retroactive laws also apply where the status or character of a thing or situation arose prior to the passage of the law. Merely because a law operates on certain circumstances which are antecedent to its passing does not mean that it is retrospective.

Constitutional Aspect of Amendment

Generally, there are two types of amendments prospective and retrospective amendments. Prospective amendments are the ones which takes effect on the day of amendment or in a future date while the retrospective amendment takes effect from a past date.[7] Our Indian Constitution has given green signal for making retrospective amendments in certain statutes but it has also expressly opposed retrospective amendments in certain statutes like in Criminal laws.[8]

The power to retrospectively amend is, however, an enabling power only. Therefore, it has to be exercised by the Legislature either by specific provision or by necessary implication. Every law made by the Parliament and the State legislatures in India ought to be consistent with the Article 13 of the Constitution of India. It states that no law should be made or amended either prospectively or retrospectively in violative of the fundamental rights guaranteed under Part III of the Constitution of India. Article 20(1) of the Constitution of India guarantees protection against ex post facto laws that is against retrospective operation of penal legislations.[9] This Article consists of two parts. According to the first part of this article, a person should not be convicted for an act which was not declared as an offence at the time of committing it. Thus, a person must be convicted only for violating a law which was in force when the act charged is committed. The second part states that a convicted person cannot be given a greater penalty than what he might have incurred at the time of committing the offence. Thus, no restriction is made in respect of retrospective amendments made to procedural provisions and punishments or penalties which are in civil nature.[10] No law can be interpreted so as to frustrate the very basic rule of law. It is a settled principle of interpretation of criminal jurisprudence that the provisions have to be strictly construed and cannot be given a retrospective effect unless legislative intent and expression is clear beyond ambiguity. The amendments to criminal law would not intend

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[7] Karthikeyan, Prathik, Retrospectivity in Taxation in India : A Judicial & Constitutional Analysis (January 10, 2019). Available at SSRN: https://ssrn.com/abstract=3782726 or http://dx.doi.org/10.2139/ssrn.3782726

[8] Ibid.

[9] Article - 20. Protection in respect of conviction for offences

(1)No person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence.

[10] Supra 8.

that there should be undue delay in disposal of criminal trials or there should be retrial just because the law has changed. Such an approach would be contrary to the doctrine of finality as well as avoidance of delay in conclusion of criminal trial.[11]

Scope of retrospective operation

As to how the words of a statute should be construed and how should the law be interpreted, utilitarian instruction may be taken from the judgment of the Supreme Court in the case of Apex Laboratories (P.) Ltd. v. Dy. *CIT*.[12] Referring to the words of Justice Oliver Wendell Holmes: "A word is not a crystal, transparent and unchanged ; it is the skin of a living thought and may vary greatly in colour and content according to the circumstances and the time in which it is used.[13] It was observed: "Interpretation of law has two essential purposes: one is to clarify to the people governed by it, the meaning of the letter of the law; the other is to shed light and give shape to the intent of the lawmaker. And, in this process the court's responsibility lies in discerning the social purpose which the specific provision subserves. Thus, the cold letter of the law is not an abstract exercise in semantics which practitioners are wont to indulge in. So viewed the law has birthed various ideas such as implied conditions, unspelt but entirely logical and reasonable obligations, implied limitations, etc. The process of continuing evolution, refinement and assimilation of these concepts into binding norms (within the body of law as is understood and enforced) injects vitality and dynamism to statutory provisions. Without this dynamism and contextualisation, laws become irrelevant and stale".[14]

Taxation has been one arena wherein retrospective laws have been used the most, for two reasons predominantly, firstly, retrospective amendments enacted by Parliament to undo certain judicial decisions and clarify a particular law, and the second reason is more structural in that there is an implicit understanding that in the formative years of Indian taxation statutes, a lot of ambiguities and inconsistencies existed, making its flow or order, lack coherence.[15] The plenary powers to legislate prospectively as well as retrospectively, however, lay an imperative sense of duty on Parliament and State Legislatures to obey the settled first principles against retrospectivity while enacting legislation; they are: [16]

a) The words used must expressly provide or clearly imply retrospective operation;
b) Retrospectivity should be reasonable and not excessive or harsh, otherwise it runs the risk of being struck down as unconstitutional; [17]
c) Where a taxing statute is plainly discriminatory or provides no machinery for assessment and levy of tax or that it is confiscatory, courts will be justified in striking down the impugned statute as unconstitutional;[18]

[11] *Sukhdev Singh Vs. State of Haryana* (2013) 2 SCC 212
[12] (2022) 442 ITR 1.(2022) 7 SCC 98.
[13] *Towne Vs Eisner* (1918) SCC Online 6.
[14] (2022) 442 ITR I.
[15] Supra w. 7.
[16] AIR 1951 SC 16.
[17] *Rai Ramkrishna Vs State of Bihar* (1963) 50 ITR 171
[18] *R.C. Tobacco Ltd. Vs Union of India* (2005) 7 SCC 725.

d) Though the Legislature has enormous power to make retrospective tax laws, yet when a retrospective Act is entirely arbitrary and irrational, it may be declared invalid as offending article 14 of the Constitution;[19]

e) Where an amendment has been made to overcome a judicial decision, the power cannot be used to subvert the decision without removing the basis of the decision.[20]

The Legislative power either to introduce enactments for the first time or to amend the enacted law with retrospective effect, is not only subject to the question of competence but is also subject to several judicially recognized limitations with some of which we are at present concerned. The first is the requirement that the words used must expressly provide or clearly imply retrospective operation. The second is that the retrospectivity must be reasonable and not excessive or harsh, otherwise it runs the risk of being struck down as unconstitutional. The third is apposite where the legislation is introduced to overcome a judicial decision. Here the power cannot be used to subvert the decision without removing the statutory basis of the decision.

There is no fixed formula for the expression of legislative intent to give retrospectivity to an enactment. A validating clause coupled with a substantive statutory change is therefore only one of the methods to leave actions unsustainable under the unamended statute, undisturbed. Consequently, the absence of a validating clause would not by itself affect the retrospective operation of the statutory provision, if such retrospectivity is otherwise apparent. [21]

Amendment & Its Effect

An amendment in the conventional legal usage would mean any change in law or statute that is brought at a future date, which can be implemented with prospective or retrospective effect. An amendment can be understood as the process of altering or amending a law or document (such as a Constitution) by parliamentary or constitutional procedure; or an alteration proposed or effected by the above process. An amendment in conventional usage of the English language could simply mean the act of amending something in order to fix it, which simply put means to correct an error and/or to improve upon it.[22]

An amendment, in the law of procedure, means any change in a pleading or in any paper filed for purposes of procedure. An amendment must generally be authorised by the court, usually upon motion, and the amended pleading then wholly supersedes the original. In statutory law, an amendment is a statute which changes the provisions of a previously passed statute, and repeals those provisions in express terms or impliedly so far as they are inconsistent with the amendment.[23]

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[19] *Tata Motors Vs. State of Maharashtra* (2004) 136 STC 1 : (2004) 5 SCC 783.
[20] *Virendra Singh Hooda Vs State of Haryana* (2004) 12 SCC 588.
[21] National Agricultural Coop. Marketing Federation of India Ltd. Vs. Union of India, (2003) 5 SCC 23
[22] Sanjay Bhoosreddy and Jaiyesh Bhoosreddy : An Exhaustive Delineation of the Interpretation of Tax Law Amendments – Answering the Perennial Question of Prospective versus Retrospective Operation *63 JILI (2021) 23.*
[23] Ibid.

An amendment, in legal practice, would mean the correction of any error in any process, pleading, or proceeding at law, either by consent of the parties, or upon motion to the court in which the proceeding is pending. An amendment, in legislation, would mean a modification or alteration to be made in a bill on its passage or in an enacted law, or a modification or change in an existing Act or statute. [24]

Amendments can be of two kinds. *First*, based on the implementation date of the amendment. If the amendment comes into effect at the date of enactment or at a specified future date, then it shall be classified as a 'prospective amendment' and if the amendment comes into effect at a specified past date, then it shall be classified as a 'retrospective amendment'. A statute is retrospective if it takes away or impairs any vested rights accrued under existing laws, or creates a new obligation, or imposes a new duty or attaches a new disability in respect of transactions made in the past.[25]

In *New India Insurance Co. Ltd vs Smt. Shanti Misra, Hon'ble Supreme Court held that* the change in law was merely a change of forum i.e. a change of adjectival or procedural law and not of substantive law. It is well-established proposition that such a change of law operates retrospectively and the person has to go to the new forum even if his cause of action or right of action accrued prior to the change of forum. He will have a vested right of action but not a vested right of forum. If by express words the new forum is made available only to causes of action arising after the creation of the forum, then the retrospective operation of the law is taken away. Otherwise the general rule is to make it retrospective.[26] In *Ganpat Rai Hira Lal Vs. Aggarwal Chamber of Commerce Ltd.* Hon'ble Supreme Court held that if previous enactment provided right to appeal, no one can be deprived of this right by a subsequent change in the law, unless the later enactment provides expressly or by necessary implication for retrospective effect being given. [27]

In *Shyam Sunder and Others Vs. Ram Kumar and another* Hon'ble Supreme Court held that when a repeal of an enactment is followed by a fresh legislation such legislation does not effect the substantive rights of the parties on the date of suit or adjudication of suit unless such a legislation is retrospective and a court of appeal cannot take into consideration a new law brought into existence after the judgment appealed from has been rendered because the rights of the parties in an appeal are determined under the law in force on the date of suit. However, the position in law would be different in the matters which relate to procedural law but so far as substantive rights of parties are concerned they remain unaffected by the amendment in the enactment.

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[24] Ibid.
[25] Ibid.
[26] (1975) 2 SCC 840 : AIR 1976 SC 237.
[27] (1952) 2 SCC 2014.

Therefore, where a repeal of provisions of an enactment is followed by fresh legislation by an amending Act such legislation is prospective in operation and does not effect substantive or vested rights of the parties unless made retrospective either expressly or by necessary intendment. Further there is a presumption against the retrospective operation of a statute and further a statute in not to be construed to have a greater retrospective operation than its language renders necessary, but an amending Act which affects the procedure in presumed to be retrospective, unless the amending Act provides otherwise. [28]

In *Ramesh Kumar Soni Vs. State of M.P.* Hon'ble Supreme Court held that amendments relating to procedure operate retrospectively subject to the exception that whatever be the procedure which was correctly adopted and proceedings concluded under the old law the same cannot be reopened for the purpose of applying the new procedure.[29] When substantial rights of a party are curtailed by law of limitation, such subsequent amendment should not be read as retrospective unless the amendment so stipulates expressly or requires so by necessary implication. [30] An impairment of the right of appeal by putting a new restriction thereon of imposing a more onerous condition in not a matter of procedure only; it impairs or imperils a substantive right and an enactment which does as in not retrospective unless it says so expressly or by necessary intendment.[31]

It is well settled that if a statute is curative or merely declaratory of the previous law, retrospective operation is generally intended. The language 'shall be deemed to always have meant' is declaratory, and is in plain terms retrospective. In the absence of clear words indicating that the declaratory, it would not be so construed when the pre-amended provision was clear and unambiguous. An amending Act may be purely clarificatory to clear a meaning of a provision of the principal Act which was already implicit. In *Sree Bank Ltd. Vs. Sarkar Dutt Roy and Co.* Hon'ble Supreme Court held that if a statute is passed for the purpose of protecting the public against some evil or abuse, it may be allowed to operate retrospectively, although by such operation it will deprive some person or persons of a vested right.[32]

In *C.I.T Vs. Vatika Township (P) Ltd.* Hon'ble Supreme Court held that of the various rules guiding how a legislation has to be interpreted, one established rule is that unless a contrary intention appears, a legislation is presumed not to be intended to have a retrospective operation. The idea behind the rule is that a current law should govern current activities. This principle of law is known as lex prospicit non respicit : law looks forward not backward. A retrospective legislation is contrary to the general principle that legislation by which the conduct of mankind is to be regulated when introduced for the first time to deal with future acts ought not to change the character of past transactions carried on upon the faith of the then existing law. The obvious

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[28] (2001) 8 SCC 24.
[29] (2013) 14 SCC 696.
[30] *Commercial Motors Ltd. Vs. CTT* (2015) 15 SCC 168
[31] *State of Bombay Vs. Supreme General Films Exchange Ltd*. 1960 SCC Online SC 48.
[32] 1965 SCC Online SC : AIR 1966 SC 1953.

basis of the principle against retrospectivity is the principle of 'fairness', which must be the basis of every legal rule. Thus, legislations which modified accrued rights or which impose obligations or impose new duties or attach a new disability have to be treated as prospective unless the legislative intent is clearly to give the enactment a retrospective effect; unless the legislation is for purpose of supplying an obvious omission in a former legislation or to explain a former legislation. for the sake of completeness, that where a benefit is conferred by a legislation, the rule against a retrospective construction is different. If a legislation confers a benefit on some persons but without inflicting a corresponding detriment on some other person or on the public generally, and where to confer such benefit appears to have been the legislators object, then the presumption would be that such a legislation, giving it a purposive construction, would warrant it to be given a retrospective effect. This exactly is the justification to treat procedural provisions as retrospective. In such cases, retrospectively is attached to benefit the persons in contradistinction to the provision imposing some burden or liability where the presumption attaches towards prospectivity.[33]

In *S.B.I Vs. V. Ramakrishnan*, Hon'ble Supreme Court held that the presumption against retrospective operation in not applicable to clarificatory or declaratory statutes. For modern purposes a clarificatory or declaratory Act may be defined as and Act to remove doubts existing as to the common law, or the meaning or effect of any statute. Such Acts are usually held to be retrospective.[34] But in *Nani Sha Vs. State of Arunachal Pradesh.* Hon'ble Supreme Court held that In order to make a provision applicable with retrospective effect, it has to be specifically expressed in the provision. We do not find such an expression in the said proviso. Nothing had stopped the government before amending the Rule to word it specifically, making it retrospective. That was not done and we are not prepared to hold that the Rule is retrospective. It is also not possible to hold that newly added proviso is clarificatory nature. The Rule, for the first time, creates a quota and thus crystallises the rights of the direct appointees and the promotees which was not there earlier. It, therefore cannot be viewed as a clarificatory amendment. Again whether the amendment is clarificatory or not would depend upon the language of the provision as also the other rules. [35]

In *State of Maharashtra Vs Vishnu Ramchandra* Hon'ble Supreme Court has held that though statutes must ordinarily be interpreted prospectively unless the language makes them retrospective, either expressly or by necessary implication. The question whether an enactment is meant to operate prospectively or retrospectively has to be decided in accordance with well-settled principles. The cardinal principle is that statutes must always be interpreted prospectively, unless the language of the statutes makes them retrospective, either expressly or by necessary implication. Those whose duty is to administer the law very properly guard against giving to an Act of parliament a retrospective operation, unless the intention of the legislature that it should be so construed is expressed in clear, plain and unambiguous language. This principle has now been recognized by our constitution and established as a constitutional

[33] (2015) 1 SCC 1
[34] (2018) 17 SCC 394.
[35](2007) 15 SCC 406.

restriction on legislative power. I may state, however, that in spite of the ordinary and I might almost say cardinal rule of construction that statutes, particularly statutes creating liabilities, ought not to be so construed as to given them a retrospective operation unless there is a clear provision to that effect or a necessary intendment implied in the provisions.[36]

In *United India Insurance Co. Ltd. Vs Alavi* Kerala High Court has held that It is well settled rule of interpretation that if the law is procedural, there is, no doubt, a presumption that it applies to pending proceedings. If the law is substantive in nature, the normal presumption against retrospectivity still holds good, subject to the principle that the Court must look to the question whether the rights of the parties at the commencement of the proceedings were intended to be modified either expressly or by necessary implication.[37] In *Coop. Co. Ltd. Vs. Commr. Of Trade Tax, U.P.* Hon'ble Supreme Court held that the Act having been brought into force from a particular date, no retrospective operation there of could be contemplated prior there to. [38]

In *Mithilesh Kumar & Anr Vs Prem Behari Khare,* Supreme Court has held that statutory Construction retrospective operation presumption against when arises Act declaratory in nature.

Where a particular enactment or amendment is the result of the recommendation of the Law Commission of India, it may be permissible to refer to the relevant report. What importance can be given to it will depend on the facts and circumstances of the case. However, the court has to interpret the language used in the Act and when the language is clear and unambiguous, it must be given effect to.

We read in Maxwell that it is a fundamental rule of English Law that no statute shall be construed to have retrospective operation Unless such a construction appears very clearly at the time of the Act, or arises by necessary and distinct implication. A retrospective operation is, therefore, not to be given to a statute so as to impair existing right or obligation, otherwise than as regards matter of procedure unless that effect cannot be avoided without doing violence to the language of the enactment. Before applying a statute retrospectively, the Court has to be satisfied that the statute is in fact retrospective. The presumption against retrospective operation is strong in cases, in which the statute, if operated retrospectively, would prejudicially affect vested rights or the illegality of the past transactions, or impair contracts, or impose new duty or attach new disability in respect of past transactions or consideration already passed.[39]

In *Mahadeolal Kanodia Vs the Administrator, General of West Bengal* Hon'ble Supreme Court has held that the principles that have to be applied for interpretation of statutory provisions of this nature are well-established. The first of these is that statutory pro. Visions creating substantive rights or taking away substantive rights are ordinarily prospective; they are retrospective only if by express words or by necessary implication the Legislature has made

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[36] AIR 1961 SCC 307.
[37] (1988) 3 LLN 285.
[38] (2007) 4 SCC 480.
[39] (1989) 2 SCC 95.

them retrospective; and the retrospective operation will be limited only to the extent to which it has been so made by express words, or by necessary implication. The second rule is that the intention of the Legislature has always to be gathered from the words used by it, giving to the words their plain, normal, grammatical meaning. *The third rule is that if in any legislation, the general object of which is to benefit a particular class of persons, any provision is ambiguous so that it is capable of two meanings, one which would preserve the benefit and another which would take it away, the meaning which preserves it should be adopted.* The fourth rule is that if the strict grammatical interpretation gives rise to an absurdity or inconsistency such interpretation should be discarded and an interpretation which will give effect to the purpose the Legislature may reasonably be considered to have had will be put on the words, if necessary, even by modification of the language used.[40]

In *K.S Paripoornan Vs State of Kerala* Hon'ble Supreme Court has held that "Amendatory statutes are subject to the general principles ... relative to retroactive operation. Like original statutes, they will not be given retroactive construction, unless the language clearly makes such construction necessary. In other words, the amendment will usually take effect only from the date of its enactment and will have no application to prior transactions, in the absence of an expressed intent or an intent clearly implied to the contrary. Indeed, there is a presumption that an amendment shall operate prospectively."[41]Another important point is matter of amendment may be substantive or procedure. Procedure law may be effective retrospectively. In *Hotel Balaji Vs State of Andra Pradesh,* Hon'ble Supreme Court held that amendment remaining defect with retrospective effect from the date of enforcement of original provision is valid. This cannot be tendered as colourable legislation.[42]In *Escorts Limited and another Vs Union of India and another,* Hon'ble Supreme Court held that amendment provision given retrospective effect is merely clarifying the position already existing. It is not open to challenge as imposing operative burden as no new obligation created thereunder.[43]

In *Zile Singh Vs State of Haryana and others,* Hon'ble Supreme Court held that It is a cardinal principle of construction that every statute is prima facie prospective unless it is expressly or by necessary implication made to have a retrospective operation. But the rule in general is applicable where the object of the statute is to affect vested rights or to impose new burdens or to impair existing obligations. Unless there are words in the statute sufficient to show the intention of the Legislature to affect existing rights, it is deemed to be prospective only 'nova constitutio futuris formam imponere debet non praeteritis', a new law ought to regulate what is to follow, not the past.

The absence of a provision expressly giving a retrospective operation to the legislation is not determinative of its prospectivity or retrospectivity. Intrinsic evidence may be available to show that the amendment was necessarily intended to have the retrospective effect and if the Court

[40] AIR1960 SC 936 : (1960) (3) SCR 578.
[41] AIR 1995 1012.
[42] 1993 Supp. (4) SCC 536.
[43] (1993) 1 SCC 249.

can unhesitatingly conclude in favour of retrospectivity, the Court would not hesitate in giving the Act that operation unless prevented from doing so by any mandate contained in law or an established principle of interpretation of statutes. Four factors are suggested as relevant: (i) general scope and purview of the statute; (ii) the remedy sought to be applied; (iii) the former state of the law; and (iv) what it was the legislature contemplated. The presumption against retrospective operation is not applicable to declaratory statutes. In determining, therefore, the nature of the Act, regard must be had to the substance rather than to the form. If a new Act is 'to explain' an earlier Act, it would be without object unless construed retrospective. An explanatory Act is generally passed to supply an obvious omission or to clear up doubts as to the meaning of the previous Act. It is well settled that if a statute is curative or merely declaratory of the previous law retrospective operation is generally intended. An amending Act may be purely declaratory to clear a meaning of a provision of the principal Act which was already implicit. A clarificatory amendment of this nature will have retrospective effect.[44]

In *S.B.I Vs. V. Ramakrishnan* Hon'ble Supreme Court held that clarificatory amendment is retrospective in nature. The presumption against retrospective operation in not applicable to clarificatory or declaratory statutes. For modern purposes a clarificatory or declaratory Act may be defined as an Act to remove doubts exiting as to the common law, or the meaning or effect of any statute. Such Acts are usually held to be retrospective.[45] In *Commercial Motors Ltd. Vs. CTT* Hon'ble Supreme Court held that when intention of legislature in clear and language in unambiguous or implied, then full effect should be given and the provision be treated as retrospective.[46] In *Prakash Vs. Phulavati* Hon'ble Supreme Court held that even a social legislation cannot be given retrospective effect unless so provided for or so intended by the legislature.[47] In State of Karnataka Vs. Bheemesh Hon'ble Supreme Court held that insertion of additional words in existing provision with effect from date on which original provision was enforced unless retrospective/retroactive operation in expressly provided for, or, by necessary implication.[48]

Conclusion

Laws are enacted by Legislature. The Union Parliament and State legislatures have power of legislation. This power include amend the exiting law. The limitation is on legislature that there must be legislative competence and it should not be against part III of Indian Constitution. All above judgement makes clear in that generally retrospective operation of a statute should not be given. Second, penal statute cannot be given retrospective operation. Third, there is no bar to give retrospective operation of taxing statute. Fourth, if statute takes right of person, retrospective operation cannot be given. Fifth, Retrospective operation of a statute depends upon intention and language of enactment.

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[44] (2004) 8 SCC 1.
[45] (2018) 17 SCC 394.
[46] (2015) 15 SCC 168.
[47] (2016) 2 SCC 36.
[48] (2021) 20 SCC 707.

Sixth, if any legislation, the general object of which is to benefit a particular class of person, any provision is ambiguous, so that it is capable of two meanings, one which would preserve the benefit and another which would take it away. The meaning which preserve, it should be adopted. Seventh, clarificatory and declaratory statue can be given retrospection effect. Eighth it statute itself mention effect of statute, then question of prospective and retrospective operation of statute does not arise. Ninth the presumption against retrospective operation is not applicable to declaratory statute. So, there is no hard and fast rule to implement retrospective operation of law.

Codification of Parliamentary Privileges in India and its Impacts

Mr. Sonu Kumar[1]

Abstract

The Indian constitution is the longest written constitution which entails detailed provisions. Yet there are certain area were left by our constitution maker due to lack of time and suitability of conditions for the future generation to act and legislate upon. Parliamentary privileges is one of them. After 75-year enforcement of constitution of India still Parliament has deliberately not taking action regarding codification of parliamentary privileges. The expression 'until so defined' under Article 105(3) does not mean an absolute power not to define privileges at all. The codification is necessary not only for its obvious clash with the fundamental rights particularly Article 19 but also for other aspects as well, such as the jurisdiction of the judiciary and legislature and their possible confrontation with each other. In this article I have discussed the perspective of various stakeholders concerned with parliamentary privileges and why it has not been codified yet. I have also discussed why it should be codified and what would be the impact of codification in India.

Keywords*: Privileges, legislature, constitution, court, Freedom of press*

"*To trust constitutional institution is good but to have constitutional limitations is better.*"

…….*Nani A. Palkhivala*

Introduction

In India Parliamentary Privileges have become the "*Democles swords*" which hang over those whose business it is to write on proceedings of the legislatures. The Non codification of privileges causes confusion and violates the freedom of speech and expression. There are several instances after independence of India, it has been seen that parliamentary privileges has been misused for example: In 2017, two senior scribes of Kannada tabloids were jailed for the breach of priviledges of the state assembly. Other instances is *The Blitz case*[2] (1951) *The Search Light Case*[3] (1959), *Kesav singh case*[4] and *the Hindu Case* (2003) Etc.

Codification of parliamentary privileges is a very debatable from the very beginning when our constitution maker was drafting the constitution. Some member was in favour and some are strongly opposing the codification. As GV Mavalankar said one should rely on wisdom and maturity of member of parliament. On the other hand, the counter view was the unless parliamentary privileges are not codified individual and press will be suppressed. Moreover, persons belonging to Press expressed that once the codification is done press can breathe

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[2]*Gunpati Keshavram Reddy* v. *Nafisul Hasan*, AIR 1954 SC 636.
[3]*Pandit M.S.M. Sharma* v. *Shri Krishna Sinha*, AIR 1959 SC 395.
[4]*Kesav singh v. Speaker, UP Legislative Assembly*, (AIR 1965 SC 740).

freely. In last it has been decided that parliamentary privileges will not be codified in this time. Due to various reasons:

1. As Dr. Ambedkar said, how parliamentary privileges will codify since Indian parliament is not born yet.
2. other member of parliament talking about the time constraints

Finally, it has been concluded to follow what house of commons follow regarding parliamentary privileges we will follow the same till Parliament of India codify the Parliamentary Privileges of India.

Now After 75-year enforcement of constitution of India still Parliament has deliberately not taken action regarding codification of parliamentary privileges. The expression 'until so defined' under Article 105(3) does not mean an absolute power not to define privileges at all. The codification is necessary not only for its obvious clash with the fundamental rights particularly Article 19 but also for other aspects as well, such as the jurisdiction of the judiciary and legislature and their possible confrontation with each other.

Need for Codification of Parliamentary Privileges in India

The clamour for codification has its genesis in multiple sources. Forceful arguments have been advanced asserting that certain tangible advantages to Indian democratic and political life will accrue if legislative privileges are codified.

1. The legislative privileges will be consistent with fundamental rights, this will ensure that the legislatures do not act in an arbitrary manner and remain within the confines of the limits imposed by the Rule of law, as embodies in our constitution. The majority opinion in the SEARCHLIGHT CASE states the law defining privilege will be void to the extent of contravention of fundamental rights[5]. This is the reason why our parliament are reluctant in making any law defining the powers, privileges and immunities of parliament.

2. Codification will help us to take one more step out of the constitutional slavery we have imposed upon ourselves by Article 194(3). The dependence on the House of Lords for privileges even after forty-three years of independent Constitutional rule cannot be obliterated by merely omitting the words House of lords in Article 105 and 195 by later amendments[6].

Views of Different Stakeholder Regarding Codification

- **Member of Parliament:**

In 2008 Member of Parliament from 11th Lok Sabha visiting across the world and majority was not in favour of codification. They argued that the day you have codified that codification becomes a rules book, the day it becomes rule book, every coma full stop, will be so called

[5] A.I.R. 1959 S.C. 395 at 410.

[6] V.R. Krishna Iyer & Vinod Kohli, Parliamentary Privileges An Indian Odyssey, 1st edn., (Delhi,

judicially reviewed. From lower court to higher court so your confrontational metrics with legislature and judiciary is loosly increased. Your privileges actually diminished.

- **Member from the press:**

The Indian press is almost unanimous in demanding codification to say that unless Parliamentary privileges are codified the Individual and press will remain suppressed.

- The Indian express- opined that parliament can put the matter beyond all disputes. Let it set up an impartial commission of parliamentarians, lawyers and public figure outside the legislatures to decide what privileges it ought to claim and then pass the law
- The Hindustan times observed Parliamentary privileges is a precious right. It should be codified at the earliest.
- The Times of India holds that once the codification is done the press can breath a little more freely. (20 may 197 2).

Member from constituent Assembly debate:- The formulation of the legislative privileges both for the Parliament and State Legislature and not the perpetuation of colonial legacy is the clear message of Article 105(3) and Article 194(3). Even the framers of the constitution have assured that it is merely a temporary affair. Alladi Krishna Swami Aiyar very forcefully expressed the view, “if you have the time and leisure to formulate all the privilege in a compendious form it will be well and good”. Since there was no sufficient time, he proceeded to assure”, only as a temporary measure the privilege of the House of commons are made a applicable to this House[7].”

According to GV Mavalankar you have to rely on wisdom and maturity of member of parliament. He further said when I become, I become speaker I have no ear, no eyes

Dr. B.R Ambedkar said very interesting justification for not codifying: how can you say that parliamentary privileges should be codified- as Indian parliament is not born yet let them born first, and collect its own custom after parliament will codify.

Why codification should be done?

1. **To prevent misuse of Parliamentary Privileges:**

Codification would introduce checks and balances on privileges, preventing their 1 misuse, for instance, to unduly restrict the freedom of the press or to act as a substitute for legal proceedings. It could also help define the limits of Parliament's power to punish for contempt.

2. **Clarity and Precision**

[7] CAD, VIII pp. 148-9, 582-3.

Codification would provide a clear and precise definition of parliamentary privileges, specifying what constitutes a breach of privilege and eliminating ambiguity. This would lead to a more predictable and consistent application of these privileges.

3. **Protection of Fundamental Rights**:
   Codification could ensure that parliamentary privileges are balanced with the fundamental rights of citizens, preventing potential misuse of privileges to infringe upon these rights, such as the freedom of speech and the right to a fair trial.
4. **Enhanced Accountability:**
   Clearer guidelines would facilitate better accountability mechanisms for parliamentarians in exercising their privileges responsibly, while also subjecting them to appropriate scrutiny and oversight.
5. **Modernization and Adaptation**:
   It would provide an opportunity to update existing laws to reflect contemporary governance practices and societal norms, ensuring that legislative privileges remain relevant and effective in a rapidly evolving political landscape. Reduced uncertainty and disputes between legislature and judiciary: Clearly defined privileges would reduce the likelihood of disputes and conflicts, both within Parliament and between Parliament and other branches of the government, particularly the judiciary.
6. **Alignment with Natural Justice:**
   Codified rules could ensure that principles of natural justice are followed in cases of breach of privilege, preventing Members of Parliament from being judges in their own cause.
7. **Strengthened Right to Information**:
   It would strengthen the right of information of the citizens with respect to things said or done during the Parliamentary sessions, as the ambiguity with respect to what information constitutes or does not constitute breach of privileges would be clearly demarcated.
8. **Drawing from best practices:**
   Codification could allow India to learn from other democracies that have successfully codified parliamentary privileges, adopting best practices and avoiding potential pitfalls.

Why Codification Should Not Be Done?

While there are strong arguments in favor of codifying parliamentary privileges in India, there are also significant reasons why some argue against it:

Deamination of Parliamentary Power: -

Many parliamentarians believe that codification would infringe upon the autonomy of the legislature. They argue that Parliament itself is best positioned to determine and regulate its own privileges and that external interference, even through a codified law, could undermine its independence and sovereignty.

Far greater confrontational Metrics between legislature and judiciary:-Some fear that codification could lead to increased judicial scrutiny and potential litigation over the

interpretation and application of specific provisions of a codified law on privileges. This could draw the judiciary into matters that are traditionally considered within the domain of Parliament, potentially leading to friction between the two branches of government.

1. **Actually intrusion willingly from lower court to Higher Court**.:
   In the words of Dr. Abhisekh Manu Singhvi, if it codified then there would be actually intrusion willingly from lower court to higher court.
2. **Preserving Flexibility and Adaptability**:-
   The nature of parliamentary functions and the challenges faced by the legislature can evolve over time. An uncodified system, based on precedents and conventions, allows for greater flexibility in adapting privileges to new situations and unforeseen circumstances without the need for lengthy legislative amendments.

In essence, the arguments against codification center on the desire to maintain the autonomy and flexibility of Parliament, preserve the value of existing conventions, avoid judicial intervention, and navigate the complexities of creating a comprehensive and adaptable legal framework for parliamentary privileges.

Impacts of codification of Parliamentary Privileges in India

The codification of parliamentary privilege in India is of paramount importance to ensure transparency, accountability, and the effective functioning of parliamentary democracy. Moreover, one can assume the its impacts on different organs of democracy in this way:-

- **Impacts on Press:** It is quite true that once the codification is done the press can breath a little more freely. (20 may 1972). As It is argued that unless Parliamentary privileges are codified the Individual and press will remain suppressed.
- **Impacts on Democracy:** A clear and well-defined framework for parliamentary privilege would promote legal certainty, enhance the effectiveness of the legislative process, and maintain the checks and balances necessary for a healthy democracy.
- **Impacts on Legislature and its Accountability:** - codification of parliamentary privilges promote self-regulation and encourage MPs to exercise self-restraint and adhere to ethical standards. Moreover, it will also ensure transparency in parliamentary proceedings and enhance accountability of MPs.
- **Impacts on judiciary:** Codification could make privileges subject to judicial review, allowing courts to assess their application against constitutional principles and fundamental rights. Hence power of Court will increase directly or indirectly.
- **Impacts on power of Speaker:** It is true that once codification is done the discretionary power of speaker will be limited in other words Rule of law will prevail over rule of man.
- **Impacts on citizen of India:** Codification will help us to take one more step out of the constitutional slavery we have imposed upon ourselves by Article 194(3). The dependence on the House of Lords for privileges even after forty-three years of independent Constitutional rule cannot be obliterated by merely omitting the words House of lords in

Article 105 and 195 by later amendments[8]. Moreover raising public awareness about parliamentary privileges and their limitations to foster informed citizen engagement.

Conclusion

Certainty of privilege is the requirement of the day. The past privilege of the House of Commons cannot be allowed to control the Indian present and future. What I believe that with the sufficient experience of more than 75 year having new buildings of our Indian Parliament along with considerable case laws and conventions have already grown in the country on the subject, the regime of parliamentary privileges should not be allowed to remain in nebulous and uncertain stage taking in to consideration all the previous aspects and ramifications of this vexed question. The time is now ripe for liberalizing the rigid attitude of parliament. The ice has to be cut. and it cannot be postponed indefinitely on the ground of complexity of the subject for the sake of Protection of Parliamentary democracy.

Legislators may argue that codification of Parliamentary privileges will hamper their autonomy by bringing them under the ambit of judicial review. Here legislators must remember what Lord Denning said “Be you ever so high, the law is above you”. In India all the organs derive their power from Constitution.

[8] V.R. Krishna Iyer & Vinod Kohli, *Parliamentary Privileges an Indian Odyssey*, 1st edn., (Delhi),

Heinous Crimes by Children in Conflict with Law: Balancing Rehabilitation and Punishment in the Juvenile Justice System

Dr. Prem Kumar Gautam[1]
&
Priyanshu Sachan[2]

Abstract

The cases of juvenile delinquency are growing day by day and if not addressed properly, it can have a long term societal impact. Youth play a crucial role in the future of any nation, therefore prioritizing the well-being and reintegration of its young populace is of utmost importance. The present juvenile justice system seeks to provide a rehabilitative and lenient approach to juvenile offenders, emphasizing the welfare and best interests of the minor. While this might be suitable for petty and serious offences but the suitability of this approach for heinous crimes committed by offenders above the age of sixteen is highly debatable. This paper explores how to balance the twin goals of rehabilitation and punishment while addressing the challenges and criticisms that arise from this shift. Special attention should be paid to juveniles aged 16 to 18 who commit heinous crimes, to increase their accountability for offences committed while concurrently enhancing their rehabilitation. A child in conflict with law shouldn't be expected to meet the same level of accountability as adults but, the shift from purely rehabilitative approach to one that incorporates punishment has been sparking debates regarding the fundamental objectives of juvenile justice. The juvenile justice system needs to be re-evaluated to strike a delicate balance between accountability and rehabilitation. There should be targeted rehabilitation efforts which will reduce juvenile recidivism. The paper evaluates the effectiveness of rehabilitation compared to punishment in the context of juvenile justice. It also assesses the consequences of punitive measures and adult trials on young offenders, including the potential for exacerbating criminal behaviour and impeding their future prospects. This paper aims to contribute to the ongoing dialogue on the juvenile justice system reform by suggesting a nuanced approach that holds juveniles accused of heinous crimes more accountable while providing a pathway for their rehabilitation and reintegration into society.

Keywords: *Accountability, Heinous Crimes,* Juvenile *Delinquency, Punishment, Rehabilitation.*

Introduction

"There can be no keener revelation of a society's soul than the way in which it treats its children[3]."

Children in conflict with law who commit delinquencies are not subject to the same legal procedures as adults under the Indian criminal law. The juvenile justice system plays a pivotal role in addressing the offenses committed by individuals under the age of 18, also known as "child in conflict with law". Children in conflict with law who commit delinquencies are not subject to the same legal procedures as adults under the Indian criminal law. Unlike the adult criminal justice system, which emphasizes on punishment and deterrence, the main philosophy

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[3] Quote by Nelson Mandela, https://www.brainyquote.com/quotes/nelson_mandela_178795

of the juvenile justice system is rooted in the principle of rehabilitation and aiming to reintegrate young offenders into society as responsible citizens[4].

India is a country that prioritizes and deeply cares about the welfare of the children and puts a lot of faith in the children and considers their future. So, the approach of our nation in dealing with such cases leans more towards the fact that children are capable of change and have the potential to be reformed. Instead of focusing solely on the punishment, our legal framework prioritizes the welfare and future prospects of these young offenders. This approach is shaped by various national and international laws, guidelines, and principles aimed at protecting the rights and promoting the rehabilitation of children in conflict with the law[5]. However, the recent incidents of heinous crimes committed by juvenile offenders have shaken the foundational philosophy of dealing with juvenile offenders.

A major turning point in India's juvenile jurisprudence came in 2012 Nirbhaya case[6] which involved a juvenile offender. The brutality sparked widespread public outrage, leading to call for harsher punishments for juvenile offender, because inspite of the brutal nature of crime the juvenile was sent to observation home and not subject to punishment. This case highlighted the existing limitations of our system in dealing with heinous crimes by juvenile offenders. Because under the existing law at that time, the maximum punishment which could be awarded to juvenile offenders was a detention of three years in remand home, irrespective of the severity of the offence. This led to a widespread public outcry demanding the change in juvenile justice system as well as lowering the age of juveniles to sixteen and ensuring stricter punishments[7]. Because considering the gravity of the crime, the lenient approach towards the juvenile offender was considered insufficient. In response to this case government brought in The Juvenile Justice (Care and Protection of Children) Act, 2015[8]. One of the most significant provision of this was allowing juveniles aged 16 to 18 to be tried as adults for heinous offences. This marked a shift from lenient and purely rehabilitative approach to accountability based legal framework, reflecting the fact that certain kinds of offences require a more punitive approach.

Recently, Pune Porsche car mishap took place in 2024 which claimed the lives of two IT experts by a 17 year old who was driving the car. The decision of the Juvenile Justice Board member to secure bail to the juvenile offender with a mere condition of writing a 300 words essay

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[4] *The Juvenile Justice System | Juvenile Crime, Juvenile Justice | The National Academies Press*, The National Academies Press (2001), https://nap.nationalacademies.org/read/9747/chapter/7.653.

[5] Ananya Tiwari, *Examining India's Legal Framework: For offences committed by minors*, Manupatra (June 19, 2024), https://articles.manupatra.com/article-details/EXAMINING-INDIA-S-LEGAL-FRAMEWORK-FOR-OFFENSES-COMMITTED-BY-MINORS

[6] *What is Nirbhaya case? | What is Nirbhaya case full story?*, The Times of India (Aug. 19, 2024, 09:43 AM), https://timesofindia.indiatimes.com/india/what-is-nirbhaya-case/articleshow/72868430.cms.

[7] Prabhat Singh, *Juvenile Crime: Let Children be Children*, Live Mint (Aug 13, 2024, 01:59 PM), https://www.livemint.com/Opinion/PsfkCb1i83BhhFB0HFwpdN/Juvenile-crime-Let-children-be-children.html.

[8] Juvenile Justice (Care and Protection of Children) Act, 2015, Act No. 02, 2016, (India).

sparked a nationwide outrage[9]. This approach left a huge question mark on the suitability and effectiveness of the present juvenile justice system which tilts towards rehabilitation, more than the punishment even if it undermines the principles of natural justice heinous crime is committed by a child between the ages of 16 to 18 years. This also points out the arbitrary use of the discretionary powers by the Juvenile Justice Board members. The punishment in this instance, a short essay and some training, appeared grossly inadequate in the face of the loss of two innocent lives[10].

Recent events have resulted in the popular notion that there has been a stark increase in the crimes committed by children in conflict with law[11]. This has led to the vigorous public debate that there is a need to 'get tough' on heinous crimes committed by the children in conflict with law[12]. Although, the juvenile framework seeks to embody the equilibrium between rehabilitation and punishment by establishing a comprehensive framework, but striking the right balance between both in case of heinous offences has become a complex challenge for the justice system. The rehabilitative approach is often at crossroads in cases involving heinous offences. The act has a framework to address the underlying causes of delinquency while ensuring that accountability is upheld for the actions committed. The challenge lies in striking a balance between the rehabilitation and ensuring accountability, which still preserves the best interest of the child, the spirit on which whole system is based. Special attention should be posed to the juvenile offenders of 16 to 18 years of age who commit heinous crimes, as this demographic category is in a crucial stage of development, where individuals are transitioning from adolescence to the adulthood, marked by significant physical, emotional and cognitive changes[13].

Ideally, juvenile justice system should follow a rehabilitative model as per its objectives of restoring the children back to the society. But the public perception towards the juvenile justice system has been looked at with lack to trust. Factors such as media influence and popular opinion often necessitate the need to take strict approach to juvenile justice[14]. Considering this, the juvenile justice systems tends to shift to retributive model, of which main components are accountability and punishment. In this model, children in conflict with law are adequately punished according to the masses for particularly heinous crimes. The ongoing debate raises important questions about which approach- rehabilitation or punishment- is more effective in addressing the needs of young offenders and ensuring the well-being of the society as a whole.

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[9] *Pune Porsche accident: Why Bombay HC released the accused minor who killed two techies*, The Economic Times, (Jun 25, 2024, 03:37 PM), https://economictimes.indiatimes.com/news/india/pune-porsche-accident-why-bombay-hc-released-the-accused-minor-who-killed-two-techies/articleshow/111250353.cms?from=mdr .

[10] Anshika Oswal, *The Act of Balancing Rehabilitation and Accountability: Analysing the Functioning of JJB,* (June 14, 2024, 06:00 PM), https://www.livelaw.in/articles/pune-porshe-rash-driving-case-and-juvenile-justice-260525 .

[11] KP Asha Mukundan, *The Real Story Behind Juvenile Crime Data*), 50 (25) Economic and Political Weekly 31 (2015).

[12] Deepak Singh, *An Analysis of Section 15 of the Juvenile Justice Act, 2015*, 8 (2) Christ University Law Journal 2 (2019).

[13] R C Trojanowicz & M Morash, Juvenile Delinquency Concepts and Control (5th ed. 1992), https://www.ojp.gov/ncjrs/virtual-library/abstracts/juvenile-delinquency-concepts-and-control-fifth-edition

[14] supra note 11.

This paper will delve into important questions about which approach-rehabilitation or punishment is more effective in addressing the needs of young offenders and consider various dimensions to determine the way forward in juvenile justice reforms trying to navigate the thin line between rehabilitation and accountability.

Legal Framework for Heinous Crimes by Children in Conflict with Law

Constitutional Framework.

Juvenile justice is a branch of law aimed at protecting and promoting the human rights of young people accused of offenses or neglected by their parents. It focuses on rehabilitation rather than adult criminal justice. International standards emphasize prevention and rehabilitation for juveniles in conflict with the law. India's juvenile justice policy is governed by Article 15, which guarantees special attention to children, including the right to equality, protection of life, and protection against exploitation. lawmakers took into account every need stipulated by the Constitution while drafting the Juvenile Act of 2015, ensuring that children's rights are safeguarded in every manner possible. This is also the reason that Chapter IV of the Act, which focuses on the reformation and rehabilitation of juveniles in all circumstances, lays forth procedures for the betterment of juveniles[15]. Article 39(f) and 39(e) underscore the duty of protecting children and their holistic development. These articles serve as guiding principles, steering the focus of juvenile justice system towards rehabilitation and reintegration.

Bhartiya Nyay Sanhita, 2023.

A separate justice system is provided for juveniles, based on the principle of Doli Incapax, which prevents them from being victimized by the system. In the Bhartiya Nyaya Sanhita, 2023(BNS). "Doli Incapax" is defined in section 20 which tells that something done by a child below seven years of age is not an offence. Section 20 of BNS 2023 states "Nothing done by a child under the age of seven is considered an offense."

Juvenile Justice (Care & Protection of Children) Act, 2015

The Juvenile Justice Act acknowledges the vulnerabilities of the youth offenders and hence it deviates from the punishment centric nature of the criminal justice system prevailing in the country. It places emphasis on rehabilitation, re-integration, diversion of juvenile offenders and restorative justice approach as core considerations in any matter concerning a juvenile offender or child in conflict with law. In 2015, new Act brought an entirely new regime with respect to juvenile offenders above the age of sixteen, accused of committing heinous offences. Sections 3, 4 and 15 of the Juvenile justice act incorporate the principle of differential treatment, emphasizing the focus on rehabilitation and reintegration. The JJ Act promotes a non-adversarial approach of restorative justice under Section 3, which facilitates the rehabilitation process by encouraging the participation of parents, guardians, and the community. Section 17 of the JJ Act highlights the role of the Juvenile Justice Board in steering the process of rehabilitation.

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[15] Harsh Raj, “Understanding Juvenile Justice: A Path to Rehabilitation for Minors”, Manupatra (Oct 29, 2024), https://articles.manupatra.com/article-details/Understanding-Juvenile-Justice-A-Path-to-Rehabilitation-for-Minors

The Act provides for differential treatment in case of heinous offences committed by juveniles aged 16 to 18, with greater emphasis on accountability. The Act permits the trial of a juvenile offender as an adult of deemed necessary as per the provisions and procedure enumerated. The Act legitimises the transfer of the juvenile offenders above the age of sixteen to the adult courts if the Juvenile Justice Board concluded by preliminary assessment that the maturity level of the juvenile indicates that he committed the heinous offence as an adult and not as a child[16].

Sections 15 and 18 deal with the trial procedure of juvenile offenders who committed heinous offences, this poses a problem in striking balance between rehabilitation and punishment. The Juvenile Justice Board has the discretion to transfer the case to an adult court if the juvenile is aged between 16 to 18 and is deemed capable of understanding the nature and consequences of his action by way of preliminary assessment. Board is required to assess the mental and physical capacity of a child to commit such offence, his ability to understand the consequences and the circumstances in which the said offence was committed. The board is to determine within a period of three months whether the child committed offence as a child or an adult[17].

Heinous offences are defined in Section 2(33) of the JJ Act, as the offences for which the minimum punishment under the Indian Penal Code or any other law for the time being in force is imprisonment for seven years or more[18]. This definition was also subject to conflicting interpretations, and has now been set to rest in Shilpa Mittal v. State (NCT of Delhi)[19]. The Court held that an offence which does not provide a minimum sentence of 7 years cannot be treated to be a heinous offence.

Judicial Precedents.

Jarnail Singh v. State of Haryana (2013)[20].

The Supreme Court of India, in this case, emphasized the significance of embracing a welfare approach towards juvenile offenders. It highlighted that the focus should be on reforming and rehabilitating juveniles rather than subjecting them to punitive measures.

Pratap Singh v. State of Jharkhand (2005).

The Supreme Court underscored that the primary goal of the juvenile justice system is the rehabilitation of young offenders. The court ruled that juveniles should not be subjected to adult prisons or treated harshly.

Salil Bali v. Union of India (2013)[21].

Research in neuroscience clearly demonstrates that children are intrinsically different from adults in terms of their psychological development and thus are less culpable as well. Their

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[16] The Juvenile Justice (Care and Protection of Children) Act, 2015, §15, 16, 19.
[17] Aditi Malhotra, *Indian Cabinet Gives Nod to Changes in Juvenile Age for Serious Crimes*, India Real Time (April 23, 2015), http://blogs.wsj.com/indiarealtime/2015/04/23/indian-cabinet gives-nod-to-change-in-juvenile-age-for-serious-crimes/
[18] The Juvenile Justice (Care and Protection of Children) Act, 2015.
[19] (2020) 2 SCC 787.
[20] 2013 (7) SCC 263.
[21] 2013 (7) SCC 705.

level of mental and emotional development also means that children demonstrate a greater potential for rehabilitation in comparison to adults and thereby are more likely to respond positively to rehabilitation interventions[22].
Shilpa Mittal v. State of NCT of Delhi (2020)[23], where the Supreme Court clarified the definition of "heinous offenses" under the 2015 Act. The Court ruled that offenses for which the minimum punishment is seven years or more would be classified as heinous, bringing clarity to the scope of the law.

State of Jammu and Kashmir v. Shubam Sangra[24]
In this case the apex court observed the lenient attitude towards juvenile offenders and questioned the effectiveness of the Juvenile Justice Act, 2015. The court observed, "The rising rate of juvenile delinquency in India is a matter of concern and requires immediate attention. There is a school of thought, existing in our country that firmly believes that howsoever heinous the crime may be, be it single rape, gangrape, drug peddling or murder but if the accused is a juvenile, he should be dealt with keeping in mind only one thing i.e., the goal of reformation. The school of thought, we are taking about believes that the goal of reformation is ideal. The manner, in which brutal and heinous crimes have been committed over a period of time by the juveniles and still continue to be committed, makes us wonder whether the Act, 2015 has subserved its object. We have started gathering an impression that the leniency with which the juveniles are dealt with in the name of goal of reformation is making them more and more emboldened in indulging in such heinous crimes. It is for the Government to consider whether its enactment of 2015 has proved to be effective or something still needs to be done in the matter before it is too late in the day."

Rehabilitation v. Punishment.
In recent times, there has been greater emphasis on accountability due to rising number of juvenile crimes and growing public concern about the system to adequately address the cases of heinous offences. High profile cases such as, involving offences against human body call for harsher punishment and step back from a purely rehabilitative model. Though, there is no denial of the fact that young people sometimes commit heinous offences, but what is the best repose to such heinous offences is often debatable. The concept of juvenile justice is essential because it recognises that juveniles offenders should not be treated the same as adult offenders. However, it has been in debate for long now that is the juvenile justice system addressing the issue of juvenile delinquency in heinous crimes properly, or is the system as a whole is being exploited to provide unreasonable assistance to future criminals?

Rehabilitation focuses on addressing the underlying causes of offending behaviour and aims to provide the necessary tools for personal growth, education, skill incorporation to reintegrate back into the society as responsible and law abiding citizens. While punishment focuses on

[22] The Juvenile Justice (Care and Protection of Children Bill, 2014), 264th Report, Rajya Sabha Department- Related Parliamentary Standing Committee on Human Resource Development at 29 (Aug, 2015).
[23] (2020) 2 SCR 478.
[24] 2022 SCC OnLine SC 1592

ensuring the accountability of the juvenile offender and providing a sense of deterrence through punitive measures such as incarceration, fines, community service or probation.
The leniency of the legislature and judiciary towards juveniles has also been a topic of debate, with some arguing that the lenient provisions have perceived negative effects, particularly in cases involving serious and heinous crimes, while others argue that it is necessary to take into account the developmental stage and potential for rehabilitation of young offenders and also to prevent the relapsing of the juvenile delinquents into criminal activities after becoming adults.

Arguments for rehabilitation

Restoration, rehabilitation and re-integration form the primary objectives of the juvenile justice system. The rehabilitation centric approach of the juvenile justice system is rooted in the belief that juvenile offenders possess the chance and potential for transformation to again become the worthy citizens of the society. This approach takes note of the fact that juveniles often engage in delinquent behaviour due to various socio-economic, familial and psychological factors. Juvenile justice system aims to rehabilitate juveniles from the path of delinquency by addressing these factors, through counselling, skill development, vocational training etc.

This perspective is also supported by research in developmental psychology, which shows that adolescents are still undergoing significant cognitive and emotional development. The brain's prefrontal cortex, responsible for decision-making and impulse control, is not fully developed until the mid-20s. Therefore, juveniles may not fully comprehend the consequences of their actions, making them more amenable to rehabilitation efforts[25].

Punishment is not always an effective response to the heinous offences committed by juvenile offenders. Harsher punishments, prolonged incarcerations, harassment and stigmatization can further cause the juvenile to have deviant behaviour and promote recidivism. A system which establishes a link between the gravity of the offence committed and the maturity of the child defeats the objective of the juvenile justice system as it lets the crime overshadow the child[26]. Now after the new criminal laws, reformative approach is advocated even for adult criminals, as opposed to retributive and deterrent approach.

- **Adult trial is in contravention with principle of fresh start:** The principle of fresh start is premised on the fact that criminal records of a juvenile offender be expunged with a view of the objective of rehabilitation and reintegration of juvenile offenders into society. It is meant to avoid the labelling and stigmatisation of the juvenile offender, prejudicing his access to future, employment or housing[27]. It seeks to liberate juvenile offenders from the stain of a criminal conviction and offers them a second chance, a fresh start free of the social and economic disabilities which often accompany a conviction[28]. Expunging of records of a juvenile is in synchronisation with

[25] *Adolescent Development – The Promise of Adolescence – NCBI Bookshelf*, National Center for Biotechnology Information (2019), https://www.ncbi.nlm.nih.gov/books/NBK545476/
[26] Ved Kumari, Juvenile Justice System in India: From Welfare to Rights (2nd ed. 2011).
[27] *United States of America v. Viken Hovsepian*, 307 F 3d 922 (9th Cir 2002).
[28] *John Doe v. William H. Webster*, 606 F 2d 1226 (DC Cir 1979)

rehabilitative ideas of the juvenile justice system, which aim to ensure rehabilitation and reintegration of juvenile offenders into society.

The Act enumerates the principle of fresh start by requiring that the records of juvenile offenders be expunged but it is accompanied by caveat which allows the deviation from rule in special circumstances. The nature of such special circumstances has not been specified and a sensitive aspect has been left completely open ended. Also, the juvenile offenders above the age of sixteen who have committed heinous offences are not given protection under the clause which exempts them from any disqualifications which could be incurred under any law. This casts a permanent stigma on their future life. This kind of exclusive is against the rehabilitative ideals[29].

- **Gives limitless discretion to board in preliminary assessment:** Under the present provisions, the Juvenile Justice Board may decide to try the accused of heinous crimes as an adult. But there are no clear guidelines in the act as to how and on basis of what factors this preliminary assessment is to be done[30]. The role of the juvenile justice board in determining the maturity of juvenile offenders adds complexity to the legal process, potentially leading to inconsistencies in its application[31].
- **Psychological reason:** The seriousness of the crime cannot be relied on as a measure of the maturity of the child. While the cognitive capacity of a child above the age of sixteen is similar to that of an adult, the psychological maturity is not[32]. Psychological research consistently demonstrates that children have the greater tendency than adults to make decision based primarily on emotions such as anger or fear, than guided by logic or reason. Therefore, due to lack of development of their psychological maturity, children are unable to apply their cognitive skills effectively, and are often swayed by emotional and social variables[33]. According to the scientific research, the prefrontal cortex which is the basis of reason, controlling the tendency of an individual towards impulsive behaviour is in a stage of development during adolescence[34]. Therefore, due to the absence of a well-functioning prefrontal cortex, adolescents tend to use a part of the brain amygdala during decision making. It is the centre for impulsive and aggressive behaviour[35].

Due to the dominance of amygdala over the prefrontal cortex, children are often unable to balance their instincts against rational and reasoned responses, and thereby less likely to

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[29] Pinki Virani, Crime and Commensurate Punishment, The Hindu, (July 22, 2015, 03:24 AM), https://www.thehindu.com/opinion/op-ed/the-juvenile-justice-bill-and-rights-of-children/article7448576.ece

[30] The Juvenile Justice (Care and Protection of Children) Act 2015, s 15.

[31] Sapna Deo & Sukrat Deo, Reform of Juvenile Justice Law in India: Balancing rehabilitation and Punishment, 87 The Journal of Oriental Research Madras, (Dec 2023).

[32] Laurence Steinberg, Adolescent Development and Juvenile Justice, 16(3) the annual review oF clinical Psychology 55 (2008).

[33] Brittany Kintigh, Adolescent Development: Juveniles are Different than Adults,(Aug. 2012), http://docplayer.net/29573912-Adolescent-development-juveniles-are-dif ferent-than-adults.html

[34] A Brain Too Young for Good Judgment, The New York Times, (March 10, 2001), available at http://www.nytimes.com/2001/03/10/opinion/a-brain-too-young-for-good-judgment.html.

[35] Jan Glascher & Ralph Adolphs, Processing of the Arousal of Subliminal and Supraliminal Emotional Stimuli by the Human Amygdala, 23 Journal of Neuro Science 10274 (2003).

carefully evaluate the outcomes of their actions and consequences involved[36]. Consequently, the commission of a heinous crime by juvenile is not an indicator of the maturity of the child to be treated as an adult. Instead commission of such crimes by children is bound to occur in circumstances of neglect, exploitation and abuse, the child having been socialized in a way where his/her decision making goes awry, rather than in a context of premeditation and criminality[37]. This make the rehabilitation process all the more important in their emotional and psychological development.

Due to the above reasons, children in conflict with law are less culpable for their acts due to their inability to fully understand and appreciate the consequences of their actions. Therefore, they do not share the same degree of responsibility as that of adults for the same act even if they have committed heinous crimes.

No scientific basis for preliminary assessment: An empirical research in child psychology suggest that there is no clear manner in which the level of maturity of a child in conflict with law can be clearly determined[38]. Therefore, at the outset there is no scientific basis on which the Juvenile Justice Board can undertake its preliminary assessment. The notion of trying CCL as adults is based on the incorrect premise that there are reliable ways of assessing the maturity of a CCL[39].

Presumption of innocence:
The preliminary assessment by the board is devoid of procedural fairness, which is considered an integral part of due process under Article 21[40]. The preliminary assessment of the board proceeds upon the assumption that the alleged offence has been committed, and is thus a sentencing decision even before guilt is established[41]. The further trial of the juvenile offender also proceeds on this preliminary assumption of culpability, which may prejudice the decision making body against the juvenile[42]. Thus, this complete neglect of the cardinal principle of presumption of innocence and then later on trial and punishment as an adult fall short of the fundamental mandate of the rehabilitation in the juvenile justice system.

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[36] Gargi Talukder, Decision-Making is Still a Work in Progress for Teenagers, (March 20, 2013), http://brainconnection.brainhq.com/2013/03/20/decision-making-is-still-a work-in-progress-for-teenagers/.
[37] Centre for Child and the Law, National Law School of India University, Submission on Clauses 14, 17(3), and 19 of the Juvenile Justice (Care and Protection of Children) Bill, 2014, https://www.google.co.in/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&cad=rja&uac).
[38] Department-related Parliamentary Standing Committee on Human Resource Development, *The Juvenile Justice (Care and Protection of Children) Bill, 2014*, Rajya Sabha, Report No. 264, at 16 (2015) (India).
[39] Aanchal Kabra & Pratyay Panigrahi, *Crimes by Children in Conflict with the Law – Heinousness, Acceptability, and Age of Adulthood: A Comprehensive Critique of the Present Juvenile Justice System*, 32 Nat'l L. Sch. India Rev. 79, 79 (2020).
[40] Maneka Gandhi v. Union of India, (1978) 1 SCC 248 : AIR 1978 SC 597
[41] Dhvani Mehta, *An Iron Fist in a Velvet Glove: Draft Juvenile Justice Bill*, 49(31) Econ. & Pol. Wkly. 13 (2014).
[42] Gauri Pillai & Srikrishna Upadhyay, Juvenile Maturity and Heinous Crimes: A Relook at Juvenile Justice Policy in India, 10 NUJS L. rev. 49, 56 (2017)

Studies have shown that the impact of the same punishment can be disproportionately high for young offenders, as compared to adults[43]. Also, youths who have come into contact with harsh environments are less likely to be reformed or restored to the society[44]. Very less scope for improvement is left after this tedious and harsh trial process even if the juvenile is held not guilty after following the above steps. This is so because the adult criminal justice system coupled with the environment of the facilities where they serve sentence creates an atmosphere that is not conducive to reform[45].

Shift in the objective of Juvenile justice system:

Treating the child in conflict with law as an adult in adversarial system can drastically reduce the scope of reformation and rehabilitation, which is supposed to be the main objective of juvenile justice system. There is ample research regarding the detrimental effects of trying and sentencing child in conflict with law between the ages of sixteen to eighteen for heinous crimes as adults. Due to their lack of impulse control and resistance to peer pressure, child in conflict with law are distinguishable from adults on the basis of their emotional and intellectual maturity[46]. Even if juvenile offenders are aware that they may be treated as adults, they may still not make rational and logical decisions in provocative situations. This will defeat the deterrent aim of this provision. For this very reason, this clause was criticised by the UNICEF[47], Justice Verma Committee[48] and the Rajya Sabha Standing Committee on Human Resource Development.

Potential for reducing recidivism rates: Rehabilitation has the potential of reducing recidivism rates, because it addresses the root cause of criminal behaviour and offers the juvenile offender an opportunity to grow, reform and become a better human being in society by providing them with the necessary support and treatment[49].

Arguments for punishment

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[43] Andrew von Hirsch, *Proportionate Sentences for Juveniles: How Different than for Adults?,* 3(2**)** Punishment & Soc'y 221 (2001).

[44] Jeffrey A. Fagan, Aaron Kupchik & Akiva Liberman, *The Comparative Impacts of Juvenile versus Criminal Court Sanctions on Recidivism among Adolescent Felony Offenders: A Replication and Extension* (Final Technical Rep. submitted to the Off. of Just. Programs, U.S. Dep't of Just. 2003).

[45] ibid

[46]Elizabeth Scott & Laurence Steinberg, *Rethinking Juvenile Justice* 222 (Harv. Univ. Press 2008).

[47]Carolyn Hamilton, *Guidance on Legislative Reforms in Juvenile Justice* 16 (UNICEF Guidance Paper, 2011), https://www.unicef.org/media/162791/file/Guidance-on-Legislative-Reforms-in-Juvenile-Justice.pdf [https://perma.cc/XXXX-XXXX**].**

[48] Justice J.S. Verma Committee, *Report of the Committee on Amendments to Criminal Law* 254–55 (Jan. 23, 2013).

[49] Srijan Bandyopadhyay, *Why Rehabilitation – Not Harsher Prison Sentences – Makes Economic Sense*, The Conversation (May 24, 2020), https://theconversation.com/why-rehabilitation-not-harsher-prison-sentences-makes-economic-sense-132213.

The basic juvenile justice goals of treatment and rehabilitation are under attack due to rising heinous crimes by juveniles, and the notion that juvenile justice system procedures and dispositions have failed to keep up with the times has become pervasive[50].

Though rehabilitation remains a pivotal aspect of the juvenile justice system, it recognises that accountability for heinous offences is equally vital. There are situations wherein a nuanced approach is needed in the interest of society, victim and juvenile itself. Provisions permitting the trial of a juvenile offender as an adult in case of heinous offences affirm that solely retributive approach may not be suitable in all cases and may undermine the rule of law and fail to provide justice for victims[51]. The juvenile offenders above the age of sixteen years, accused of committing heinous crimes who are released back into society without adequate punishment may have a detrimental impact on society. Because they may be more likely to commit crimes again, thereby endangering the community.

Punishment as an approach, emphasizes accountability and involves punitive measures. It provides a sense of justice and deterrence. Our system faces challenges, there is imbalance between the offences committed by the juvenile offenders and the punishment prescribed for it.

Erosion of public confidence in justice system: If juvenile offenders accused of committing heinous crimes are let go through rehabilitation and made to get away with severe crimes, this would weaken trust in law enforcement and the criminal justice system. Therefore, it becomes critical to hold them accountable for their acts by punishment. Majority of people advocate for retribution as they believe it gives the offender what they deserve. Punishment and accountability achieves justice, closure for victims and huge public support as it seeks to impose hardship on the criminal as a just response to crime[52].

Accountability: Accountability is one of the major objectives of any criminal justice system, and on the mains criticism levelled at the juvenile justice system is that it is unjustly lenient and does not sufficiently punish the offenders above the age of sixteen who are accused of heinous crimes. The National Crime Records Bureau (NCRB) data from 2024 indicates that India's conviction rate for juveniles who has violated the law was only 18.3 percent. This indicates that more than 80% of young offenders were declared not guilty. The report also highlighted that a large fraction of adolescent offenders were repeat offenders.

Deterrence: The criminal justice system seeks to deter criminals by imposing adequate punishment and delivering a message to the prospective offenders that deterrence of on the primary objectives of the system. But the present juvenile justice system fails to establish this deterrence even for heinous crimes. The juvenile offenders above the age of sixteen who have

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[50] Francis Barry McCarthy, The *Serious Offender and Juvenile Court Reform: The Case for Prosecutorial Waiver of Juvenile Court Jurisdiction*, 38 St. Louis U. L.J. 629, 641 (1994).
[51] Supra Note at 42.
[52] J. Bernard et al., *Perceptions of Rehabilitation and Retribution in the Criminal Justice System: A Comparison of Public Opinion and Previous Literature*, 5 J. Forensic Sci. & Crim. Investigation 555669 (2017), https://juniperpublishers.com/jfsci/criminal-investigation.php.

committed heinous crimes are well aware of the consequences of their wrong doings, but if they are not punished adequately, the might not completely comprehend the ramifications of their conduct. Despite the provision for punishment, only a miniscule number of cases are actually being sent to adult courts, which is reflective of the sensitive and vigilant judiciary[53].

Ignorance of the rights of the victims

The Juvenile Justice system solely emphasizes the rehabilitation and welfare of juvenile offenders. Therefore, there exists a notable gap in addressing the rights and needs of victims of juvenile crimes and the actual offender. Victims often face challenges in accessing justice, receiving compensation, and obtaining support for physical, emotional, and financial recovery. Society for a larger good and its orderly and peaceful development are interested in the punishment of the offender. Victims' rights are side lined while focusing on the rehabilitation of offenders. It should be noted that leniency in the juvenile system does not punish actual juvenile offenders with appropriate accountability. As a result, instead of creating a deterring variable, the system further increases the cases of delinquency and organized crimes. Despite efforts to prioritize the rehabilitation and reintegration of juvenile offenders, there exists a systemic failure to adequately address both the needs and rights of victims and offenders. By adopting a victim-centric and true accountability approach, enhancing legal provisions, and strengthening support services for both victims and juveniles, the country can ensure that victims receive justice, proper support, and redress their rights, fostering a more equitable and compassionate society[54].

Matured juvenile mind

Adolescents and Young Adults have easier access to social media and other media platforms, which play a crucial role in their developmental stages. Developmentally, young adults continue to accrue and refine cognitive skills and psychological competencies for mature decision-making and self-regulation[55]. Nowadays, this category of young adults is more conscious of what is right and wrong. This determines their mental capacity to exhibit criminal behaviour and should be kept in mind when determining their punishment. The child's mens rea (mental state) should be taken into consideration while dealing with heinous crimes committed by him. The punishment should not be grossly inadequate in the face of the crime committed, but must be weighed against the seriousness of the crime.

Undesirable leniency towards juveniles

The leniency of the judiciary towards children in conflict with law has been a topic of debate, as there are several perceived negative effects, particularly in cases involving serious and

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[53] Arul Varma, *Unshrouding the Enigma behind Preliminary Assessment under the Juvenile Justice (Care and Protection of Children) Act, 2015*, 62 J. Indian L. Inst. 263, 263–81 (2020).

[54] T. Murugesh & S. Kaliraj, *Redefining Juvenile Justice: More Accountable and Reformative System Focused on Young Offenders*, 4 Indian J. Legal Rev. 1429, 1429–35 (2024).

[55] Committee on Improving the Health, Safety, and Well-Being of Young Adults, Board on Children, Youth, and Families, Institute of Medicine, National Research Council, Bonnie R.J., Stroud C., & Breiner H., eds., *Investing in the Health and Well-Being of Young Adults* 2 (Nat'l Academies Press 2015), https://www.ncbi.nlm.nih.gov/books/NBK284782/.

heinous crimes. There is a public perception of injustice among victims and the public. There is a need to ensure that juvenile offenders are held accountable for their actions.

Challenges in the Indian Context

India's juvenile justice system has done commendable work in balancing rehabilitation and accountability, but it faces numerous challenges. But until recently, tension has arisen between social welfare and social control-that is, focusing on the best interests of the individual child versus focusing on punishment, incapacitation, and protecting society from certain offences[56].

Social re-integration: Social stigma associated with juvenile delinquency often hinder reintegration into society. Where juveniles are tried as adults, they are branded as criminals for life, which makes it difficult for them to find employment or pursue education. Stigmatisation from the society and improper follow-up mechanisms after a juvenile offender is released from the institutional facility contributes to the high rates of recidivism and relapsing into the vicious cycle of crime.

Dearth of juvenile offenders' rehabilitation programs: One of the major obstacles is the lack of adequate infrastructure and resources to support the rehabilitative aspects of the system. Juvenile homes, observation homes etc. are overcrowded and understaffed, which limits their ability to provide the necessary support and interventions for juvenile delinquency. Effective rehabilitation programmes require significant resources, including skilled personnel, facilities, and financial investments[57].

Judicial process: The statistics highlight inefficiencies in judicial proceedings for juveniles. There is extra ordinary delay in adjudication and no coherency in the system which often results in juvenile offenders being confined in jails or observation homes for prolonged period and treated like hardened criminals. This often leads to unequal access to justice and protection[58]. The judicial process and systemic issues need to be addressed so that juvenile offenders are not left to languish in the detention for extended periods because each decision can profoundly impact the future of a child.

Lack of stringent compliant mechanism in the legislation: Effectiveness of the juvenile justice system largely depends on the state stakeholders and political will. There is a lack of equitable distribution of resources to comply with the requirements of the Juvenile Justice Act at both the central and state levels. The lack of awareness and training of the stakeholders

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[56] Nat'l Research Council & Inst. of Med., *The Juvenile Justice System*, in *Juvenile Crime, Juvenile Justice* 154 (Joan McCord et al. eds., Nat'l Acads. Press 2001), https://nap.nationalacademies.org/read/9747/chapter/7.

[57] *Juvenile Justice Reform: Juvenile Delinquency and Balancing Rehabilitation and Accountability*, Legal Service India, https://www.legalserviceindia.com/legal/article-19046-juvenile-justice-reform-juvenile-delinquency-and-balancing-rehabilitation-and-accountability.html (last visited June 1, 2025).

[58] Santosh Kumar Dash Ray & Sanjaya Choudhary, *Critical Analysis of the Juvenile Justice System of India*, 4 Int'l J. Emerging Tech. & Innovative Res. (IJETIR) (Oct. 2024).

involved in the system also leads to inconsistencies in the application of law and results in the juveniles being subjected to treatment different than what is intended by the legal framework[59].

Child protection and vulnerability: There is inadequate support post release, which is the reason for several cases of recidivism where the child relapses into the criminal behaviour after being released from the observation homes. These root causes need to be addressed to protect vulnerable minds and child protection policies need to made which require comprehensive strategies that extend beyond institutional care. When such young vulnerable minds are left in the society with no empathy and nobody to follow up then issues like recidivism crop up where juvenile offenders get caught up in the vicious cycle of relapsing into the crime. System does not address these issues as it is not comprehensive to deal with post institutional care.

Conflict between public sentiments and principles of juvenile justice: Whenever a case is highlighted in the media wherein a juvenile offender is involved there is an outcry from pressure groups and news channels to try the child in conflict with law as an adult. This leads to heightened tensions between public sentiments and the principles of juvenile justice. People do not understand the nuances behind the law and the larger purpose it is intended to serve. Any civilized state does not treat the children in conflict with law at par with adults, as the state acts as a parens patriae for each child and it is the duty of the state to take care of the welfare of the children in a just manner. The public sentiments often underscore the need for compassionate approach of the juvenile justice law. Balancing societal expectations from the state and rehabilitative justice is not an easy task but the policies by the legislature should not lose sight of the principles of fairness, justice and best interests[60].

Policy Recommendations

While rehabilitation is a paramount consideration, situations may arise where the imperatives of justice and society necessitate a proportional response to severe crimes. Researches indicate that well implemented rehabilitation programme can significantly reduce recidivism rates among juvenile offenders. And punishment often falls short in addressing the root causes of delinquency and may not contribute significantly to the rehabilitation and reintegration of juvenile offenders. A balance should be found between punishment and rehabilitation. Both the approaches have their flaws and focusing on only one will not get the job done when it comes to combating crime and improving public safety. Society may do a better job of meeting the complex needs of offenders if it incorporates rehabilitation within the criminal system. Offenders should be given the chance to grow and change while yet being held accountable for their actions[61].

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[59]Pratham Mishra, *Juvenile Justice System: Balancing Rehabilitation and Accountability with a Focus on India*, The Legal Quorum (Oct. 10, 2024), https://thelegalquorum.com/juvenile-justice-system-balancing-rehabilitation-and-accountability-with-a-focus-on-india/#_ftn14.

[60] *India's Juvenile Justice Dilemma: Balancing Punishment and Potential*, Bharat Law (July 9, 2024), https://www.bharatlaw.ai/post/balancing-justice-and-rehabilitation-transforming-juvenile-offenders-in-india-for-a-safer-society.

[61] L.P. Singh, *Juvenile Justice Reforms: Balancing Rehabilitation and Punishment*, 17 J. Advancement Sci. & Res. Admin. Educ. 729 (Apr. 2020), https://ignited.in/index.php/jasrae/article/view/15352.

Restorative Justice Approach: A purely rehabilitative approach towards juvenile offenders who committed heinous offences may not be ideal in today's time but adoption of principles of restorative justice as second limb of juvenile justice policy might help to some extent. A rehabilitative system, complemented with principles of restorative justice might be an effective approach to deal with juvenile offenders above the age of sixteen who have committed heinous offences. A restorative justice strategy which emphasizes reconciliation and treating the underlying causes of the offence may be more successful as juvenile might not be entirely capable of making decisions or comprehending the long-term effects of their choices.

Substantial change in legal and policy structures that govern juvenile delinquency: The system has to be strengthened by the implementation of a comprehensive strategy that targets the root causes of juvenile crimes and guarantees that young offenders receive appropriate punishment and rehabilitation. This might mean tightening the regulations governing how juvenile offenders are dealt with by the criminal justice system and strengthening the availability to rehabilitation and reintegration support services like healthcare and education[62].

Use of transfer provisions in the Juvenile Justice Act: The Act contains transfer provisions which permits to transfer certain cases to adult criminal court system, however these provisions are not frequently utilized. This can be accomplished by creating precise guidelines for deciding in which case it is appropriate to move a juvenile offender to the adult criminal justice system. Some of the factors which could be taken into consideration are gravity of the offence, age of the offender if above sixteen, previous criminal history of the offender, heinous offence.
It is critical to hold young offenders accountable for their acts but the policy should also be there to make sure to give them assistance and resources for rehabilitation, which they require to contribute positively to the society. The juvenile justice system should help in getting young offenders required rehabilitation and reintegration, while also offering the necessary safeguards to keep the society safe.

Build a comprehensive juvenile justice system: In India we have often seen that there is no practical segregation between the children's court and the adult court. Mostly, sessions courts deal with the juvenile offenders between 16 to 18 years who are accused of committing heinous crimes. This category of children in conflict with law, even if certain punishment is to be imposed on them, should also be processed in the juvenile justice system. As the juveniles processed on the juvenile justice system are more likely to be rehabilitated, while juveniles processed in the adult system are more likely to commit future offences[63]. State must change the present system of refer… and reformulate the juvenile court into a system that focuses instead on the needs of each juvenile, including an analysis of the juvenile's individual

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[62] Bhavana Nagapudi, *Justice and Delinquency: Legal and Policy Issues in Youth Crimes*, 2 Integral L. Rev. 6 (2023–2024).
[63] Joshua T. Rose, *Innocence Lost: The Detrimental Effect of Automatic Waiver Statutes on Juvenile Justice*, 41 Brandeis L.J. 977, 985 (2003).

culpability[64]. The juvenile justice system should give juvenile court judges the sole power to determine for each juvenile offender whether that offender needs punishment or rehabilitation. Such a change would offer the potential for punishment without removing the possibility for rehabilitation of a juvenile who made a mistake at a very young age. State should limit jurisdiction over all alleged offenders who are under the age of eighteen to only the juvenile court. The Parliamentary standing committee report also noted that the adult criminal justice system's procedures do not address the special needs of juveniles and thus termed the transfer to adult courts violative of the right to personal life and liberty under Article 21 of the Constitution[65].

Adoption of indeterminate sentencing policy:

Presently, juvenile offenders who have committed heinous offences between the ages of sixteen to eighteen are mandatorily detained in place of safety till the age of twenty-one. Subsequently, the children's court conducts and evaluation to determine whether the offender has become a "contributing member of the society". Based upon these subjective criteria, if the court determines that the juvenile has not rehabilitated sufficiently then he is places in the adult jail for the remainder of the sentence. This model of sentencing is commonly referred to as blended sentencing, as it is characterised by a mixture of a juvenile and adult sentence[66].

In this kind of sentencing mode, the positive changes brought about by rehabilitation mechanisms could ebb away, making the offender a great threat to public safety and also exhibit recidivist tendencies. Therefore, indeterminate model of sentencing should be followed for juvenile offenders committing heinous crimes. It seeks to release the juvenile offender only when he is rehabilitated, in contrast to a determinate sentence which prescribes a mandatory fixed period for a crime, irrespective of reformation[67]. This sentence focuses on rehabilitation, and does not impose a time bound program of reformation, thus upholding and embodying the spirit of the juvenile system which is rehabilitation[68].

Special prison system: A Special Prison system with the necessary reformative and rehabilitative services, including education, skill development, counselling, behaviour modification therapy, and psychiatric support, should be established for juveniles who have completed or are above the age of 16 years. The term of stay in the special prison should be decided considering various aspects such as proper reformation of the child, appropriate accountability for the committed offence, justice for the victim of such offence, and so on. In addition to the term of stay in the special prison, the Board may pass orders such as—(i)

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[64] Jennifer Park, *Balancing Rehabilitation and Punishment: A Legislative Solution for Unconstitutional Juvenile Waiver Policies*, 76 Geo. Wash. L. Rev. 786, 808 (2008).

[65] Rajya Sabha, Dep't-Related Parl. Standing Comm. on Hum. Res. Dev**.,** 246th Report on the Juvenile Justice (Care and Protection of Children) Bill, 2014**,** ¶ 54 (Feb. 2015).

[66] Cathi J. Hunt, *Juvenile Sentencing: Effects of Recent Punitive Sentencing Legislation on Juvenile Offenders and a Proposal for Sentencing in the Juvenile Court*, 19 B.C. Third World L.J. 1 (1999).

[67] Gerald R. Wheeler, *Juvenile Sentencing and Public Policy: Beyond Counter Deterrence*, 4 Policy Analysis 35 (1978).

[68]Supra Note at 42.

attending school, (ii) attending a vocational training centre, (iii) attending a therapeutic centre, (iv) prohibiting the child from visiting, frequenting, or appearing at a specified place, or (v) undergoing a de-addiction programme[69].

Individualized Justice Approach: One blanket approach should not be followed in case of all juvenile offenders accused of committing heinous crimes. Each offender is unique with distinct circumstances and backgrounds. The institution dealing with the juvenile offender should consider factors such as age, mental and physical health, socio-economic background, the nature of offense committed etc. and use tailor made approach to deal with juvenile offenders as per the suitability and requirement[70]. Also, individualised care plan should be followed to ensure effectiveness of rehabilitation programmes, because what works for one may not work for other.

Conclusion

This ongoing dialogue is crucial for developing a system which not only ensures the accountability of juvenile offenders but also rehabilitates and offers a second chance to those who need it the most. The need of the hour is to strike a delicate balance between inviolable rights of children in conflict with law, and to fulfil the legislative mandate of giving effect to the subjective, and seemingly equivocal provisions of the new law. Children are instrumental to the growth and development of a nation. State must perform the crucial tasks of proper care and protection of children. The role of a juvenile justice system is crucial in the modern state. A rehabilitated juvenile justice system required money and man-power. The state will have to devote considerable energy in the process. State should not move towards a model that further alienates children from the society and works on the basis of flawed understanding of maturity and culpability.

The state has the role of parens patriae and should provide measures of reformation, rehabilitation and societal-reintegration of children rather than fixing hard criminal responsibilities, guilt and punishment[71]. Juvenile offenders should be viewed not merely as criminals or wrong doers but also as individuals capable of positive transformation with the right interventions. The state should recognize the unique developmental needs and vulnerabilities of the age group of 16 to 18 and provide tailored interventions that address the root causes of delinquency, while fostering accountability and positive behavioural change.

The juvenile justice system plays a crucial role in shaping the future trajectories of young offenders, and investing in specialized provisions for those aged 16 to 18 is essential for promoting their successful reintegration into society. By providing access to education, vocational training, mental health support, and restorative justice programs, juveniles can be empowered to take ownership of their actions, learn from their mistakes, and make meaningful

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[69]T. Murugesh & S. Kaliraj, *Redefining Juvenile Justice: More Accountable and Reformative System Focused on Young Offenders*, 4 Indian J. Legal Rev. 1429, 1429–35 (2024).
[70] Vartika Yadav, *Juvenile Justice: Balancing Rehabilitation and Punishment*, Lawful Legal (Jan. 8, 2024), https://lawfullegal.in/juvenile-justice-balancing-rehabilitation-and-punishment/.
[71] In re Leonardo, 436 A.2d 685, 687 (Pa. Super. 1981)

contributions to their communities. Moreover, a comprehensive approach that emphasizes accountability and rehabilitation is essential for breaking the cycle of recidivism and promoting long-term societal well-being. Punishment when applied without the rehabilitative component, may not always effectively address the factor which drive the juvenile to commit crime and might even exacerbate criminal behaviour.

In summary, choosing rehabilitation over punishment in the juvenile justice system is a compelling approach. By focusing on the overall development and future opportunities of young offenders, rehabilitation helps lower repeat offenses and nurtures a society rooted in compassion, second chances, and the belief in personal growth. Research shows it effectively decreases recidivism and enhances public safety, while honouring each individual's dignity and capacity for change. As we aim to create a more fair and inclusive society, making rehabilitation a key element of youth justice is not only wise but crucial for meaningful progress.

Doctrine of Safe Harbour: Tracing the Liability on Social Media Intermediaries

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Abstract

The cause of concern related to safe harbour provision has always been that the protection provided by it to the intermediaries must not be misused by them to allow the commission of illegal activities over there platforms. This paper deals with the conditional immunity provided to the 'social media intermediaries' by the virtue of 'doctrine of safe harbour' (as enshrined in Information Technology laws) and trace the liability imposed on them. This paper after describing the term 'intermediary', dives deep into the problems created and illegal activities performed through the most widespread intermediary i.e., social media. It also throws light on the menacing threats that are posed by dating apps. Insight is provided about the decency and morality issues that are created by the content available on OTT platforms. A detailed discussion is done about various types of cyber-crimes taking place in the contemporary era. The article then creates a conceptual understanding about the term 'doctrine of safe harbour' which is followed by decoding the liability imposed on the intermediaries in India. The article also provides a comparative analysis by narrating about the liabilities imposed on intermediaries in U.S.A. and European Union. Finally, the article ends up with some suggestive measures which can be taken by the government in making laws which on one hand protect the intermediaries' rights and free speech and on the other hand, prevent any type of cyber-crime in India.

Keywords *– Intermediary, safe harbour, social media, conditional immunity, cyber-crimes.*

Introduction

In today's digital era, internet has become an inseparable part of our lives. There is no doubt in saying that internet has made life way easier as it was before its advent. Today a person can do audio-video communication with his loved ones settled thousands of kilometres away from him, a person can purchase commodities from the comfort of his home without even going to a store, a person can even find their life partners over matrimonial and dating websites and all this has become possible due to the evolution of 'intermediaries'. OTT platforms today have been able to bring entertainment today in the compact screen of your mobile phones. People have given preference to watching their favourite series and movies on OTT platforms like Netflix, Amazon Prime etc. rather than spending a chunk of money and going to theatres.

"**Intermediary**", according to **Sec. 2(1)(w) of "Information Technology Act, 2000"** is defined as "intermediary, with respect to any particular electronic records, means any person who on behalf of another person receives, stores or transmits that record or provides any service with

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respect to that record and includes telecom service providers, network service providers, internet service providers, web-hosting service providers, search engines, online payment sites, online-auction sites, online-market places and cyber cafes."[3] It generally means "a facilitator of information across the Internet between the content creator and the consumer of data".[4] These platforms have been the solution for various needs of people like they have narrowed the gap between service provider and the person seeking for that service through e-commerce websites, they have provided a space through social media platforms where people can interact with each other and they have even taken up the role of match-makers by providing matrimonial and dating websites.

Among various types of intermediaries, social media intermediaries are the most widespread. Social media begun as a friend-finder gradually covered every characteristic of media where the users play a dominant role.[5] The fact that people are now able to post content over platforms like Whatsapp, Twitter, Facebook, Instagram etc. has given birth to content creators in every household; it merely requires a tap of your thumb on the mobile screen and you can say anything to the world just in a couple of moments. Like any other form of media, social media too has been able to percolate deep down in the society, so much so that maintaining a decent social media profile has become a status symbol for people now a days. There is no doubt that social media has been able to demolish the geographical distance between people and allowed them to connect with each other but it also has given birth to numerous serious problems.

Problems posed by Social Media

India being a democratic welfare state provides its citizens with certain fundamental rights which are required for their dignified independent existence. One of such fundamental rights is "freedom of speech and expression" enshrined under Art.19(1)(a)[6] which allows people to express their opinions freely. Media, being the fourth pillar of democracy also gets protection under Article 19(1)(a) when it puts out news, articles and its opinions out in the open. However, the freedom guaranteed under Article 19(1)(a) is not absolute and is subjected to certain reasonable restrictions embodied in Article 19(2).[7]

Just like print and electronic media, social media has also been used to share views and opinions but there is a remarkable difference between social media and other types of media and that difference lies in the content regulation. If we talk about traditional print or electronic media then they have a proper editorial board which acts as a filter and prevents anything to be out in the society which may create any kind of problem like hate speech, fake news etc. On the other hand, as far as social media is concerned, there is no such editorial board to filter out objectionable or controversial content i.e.; anyone can post anything from anywhere over the social media platforms without any hindrance. This often leads to problems like hate speech,

[3] The Information Technology Act, 2000 (Act 21 of 2000), S. 2(1)(w).
[4] Tariq Khan, "Safe Harbours: A mirage of Intermediary Protection" *RGNUL Student Research Review* (2020).
[5] Meera Mathew, "Expression Through Socialising Media in India: Why Fixing the Existing Legal Dilemmas Is Critical?" 3 *Legal Issues in the Digital Age* 97 (2020).
[6] The Constitution of India, art.19(1)(a).
[7] *Id.*, art.19(2).

fake news, obscenity, cyber defamation, cyber hacking etc. Situations have sometimes turned out to be so critical that some sort of fake news and hate speech have even resulted into physical violence among the masses.

Some of the problems caused by social media include –

1. Pornography and Obscenity

Pornography or obscenity is the rising cause of concern in the social media arena. It is often seen that people or social media influencers post obscene content over social media just to grab eyeballs of people to raise some money from the high viewership of such content. Any pornographic or obscene material gets circulated at a flying speed over social media websites like Facebook, YouTube etc.

In "*Ranjit D. Udeshi v. State of Maharashtra"*[8]*, Supreme Court* has defined obscenity as "the quality of being obscene which means offensive to modesty or decency; lewd, filthy and repulsive". This case also highlighted the difference between obscenity and pornographic. Pornographic basically includes any material which is used to invoke sexual desire of a person on the other hand obscenity denotes any material which though not intended to arouse sexual desire but has the tendency to do so. "Obscenity on social media is not merely restricted to sexually explicit content but the outrageous, offensive and indecent depiction of words or offensive images of victims of violence, murder, kidnapping or sex related details or a public act which depraves or corrupts the mind and which appeals to the prurient interests or which is against the acceptable social moral standards would be called obscene and vulgar".[9]

The trouble in regulation was well obvious when in "*Kamlesh Vaswani v. Union of India"*[10] a counter was filed by the Indian government before the *Supreme Court* demonstrating its failure to preclude pornographic and obscene material on the internet and social media.

Recently it has been seen that steps have been taken by intermediaries like instagram, twitter etc. which display a message of content to be 'sensitive' before opening it; however, this has not been able to address the problem fully, considering the diversity of all age groups accessing social media.

2. Cyber-defamation

Cyber defamation is the act of using internet to publish defamatory material against someone. Cyber defamation is approximately the same concept as traditional defamation, only the pre-requisite in cyber defamation is the use of computer or internet to defame. Defamation is defined under Section 499[11] of "Indian Penal Code, 1860" as making or publishing of an imputation

[8] AIR 1965 SC 881.
[9] Obscenity on Social Media, *available at*: https://thekashmirhorizon.com/2023/02/08/obscenity-on-social-media/ (last visited on May 10, 2024).
[10] W.P.(C). No. 177 of 2013.
[11] The Indian Penal Code, 1860 (Act 45 of 1860), s.499.

either by spoken words, signs, writing or visible representations with the intention to lower the reputation of any person.

Broadly, defamation has been classified into two types – libel (written defamation) and slander (verbal defamation). Social media is often used as a tool by people to defame any person by writing or posting defamatory statements, so it is libelous in nature.

Publication is one of the most essential elements of defamation. On social media, publication happens when the defamatory content is read or heard by people accessing those platforms. When a defamatory statement is made on websites like facebook or twitter it becomes available for the people to be read and thus such defamatory statement is considered to be published. Signs and visible representations can also constitute defamation, so any defamatory photo, video or MMS which is in circulation in social media can amount to defamation.

Publishing of online defamatory content can be done at any place in the world and can be accessed at the same or any other place in the entire world. This raises a problem of jurisdiction because the suit would be maintainable at any place where defamatory content has been accessed and then the defendant can be called to any jurisdiction where it was accessed notwithstanding where the content was posted.

3. Cyber bullying

"Cyber bullying is defined as, using both information technology and communication technology beyond the limit in order to harm a person's reputation, state of mind, or to humiliate a person". This may involve sending of mean text messages or emails, posting of hurtful messages on social media websites, or spreading rumours online.[12] Many people now-a-days, take undue advantage of their "right to freedom of speech and expression" and get indulged into activities like trolling on social media platforms. Anonymity of the offender and creating of false profiles also promote the instances of cyber bullying as he is able to hide his identity.

4. Fake news

Accuracy of any news which is present in social media is not worthy to be relied upon. The instances of 'hoax' or 'fake news' have been increasing alarmingly with the increasing use and access of social media. Fake news is deliberately created disinformation or misinformation which may be used for influencing people's political views, to make pecuniary gains, to create confusion or for any other purpose. Hoax can be of numerous forms like satire, false connection, false context, fabricated content, misleading content, imposter content etc. News delivered by traditional media was considered to be more authentic for its connection to truth telling. Although, features of internet- like unbound space to narrate story and unlimited number of participants in its narration provides accommodation for understanding of truth which is way more open and fluid than the one cabined by traditional journalistic structures. Wider reach of online media also promotes the circulation of fake news. It hampers freedom of speech and

[12] Effects of Cyber bullying, *available at*: https://socialmediavictims.org/cyberbullying/effects/ (last visited on 10 June, 2023).

reasoned choices of the citizens of a country and consequently defeating the purpose of democracy.

Some recent examples of fake news are UNESCO has nominated 'Jana Gana Mana' as the best national anthem, Daud's property got seized, presence of GPS tracking nano chip in Rs.2000 note etc. Lack of regulation on social media has amplified this problem of fake news. People in India are concerned more of dominant narrative instead of authenticity. Propagation and virality of news items is contingent not on its accuracy but on how well it confirms to the dominant narrative.[13] In order to address such situation, rebuttal of fake news should be done. Any news which is spreading rumor should be removed from the social media platforms. Underlying narratives related to the news should be addressed for understanding more of the reality attached to it. There should be mobilization of public opinion and rational thinking should be inculcated. Self-censorship is needed to be practiced i.e., before forwarding any news, people should first verify and then share it.

5. Hate Speech

On 28th of April, 2023, a bench of Justices in Supreme Court comprising of Justice K.M. Joseph and Justice B.V. Nagarathna directed the states that suo moto FIRs must be registered in cases of hate speech without waiting for any person to lodge the complaint in this regard.[14] This stand of Supreme Court in itself shows the seriousness regarding the offence of hate speech in India.

In "*Chaplinsky v. New Hampshire"*, Justice Murphy has described hate speech as - "fighting words including those which by their very utterance inflict injury or tend to incite an immediate breach of peace to a person or a group of persons. It has been observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."[15]

Where on one hand it is very easy to upload hate inciting content on social media, on the other hand it is very difficult to remove it. Messengers like WhatsApp are acting as a fuel to the fire because it takes just a couple of minutes to make any such content viral. In Indian Constitution, hate speech has not been taken as an exception to freedom of speech but it can be included under the purview of 'incitement to offence ', 'sovereignty and integrity of India', 'defamation' and 'security of the state' as mentioned in Article 19(2).

6. Identity Theft

People today are in habit of sharing a lot of personal information on social media websites like Facebook, Instagram etc. "Giving out a social security number, paired with a birthday and name

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[13] Ruchi Gupta, "Shaking the foundation of fake news", *The Hindu,* Sept. 19, 2019.
[14] Krishnadas Rajagopal, "Register FIRs against hate speech even in absence of complaints, Supreme Court directs States", *The Hindu,* April 28, 2023.
[15] 315 U.S. 568 (1942).

could provide enough ammunition for criminals to hack into financial records and compromise users' personal information"[16].

Social media platforms generate huge amount of money from personal information based advertisements. They try to obtain maximum information of their users. Due to lack of awareness and effective regulatory mechanism in this regard, people are more vulnerable to identity theft. Phishing is one of the most common techniques which are used by the hackers for obtaining personal as well as professional information of a person. It is done through applications designed in the form of games, surveys, contest etc. which try to extract sensitive information of individuals accessing it. Many times people fall into the trap of identity theft and they provide their personal/professional information which is used by the identity thieves to create fake profile of that individual. These fake profiles often look very similar to the original profile.

Now friends, family and acquaintances often share other details regarding that individual through communication over these social media websites, thinking the person using the fake account (i.e. hacker) to be that individual whose fake profile is created. This further obtained information allows hackers to use it to harass or commit other offences. Many times we have seen various celebrities accounts gets hacked and they drop a message from their original social media handles to making people aware and warn them not to believe in anything posted by such fake accounts. To counter this problem, Social media platforms have started providing 'verified badges' to celebrities, global icons and public figures in order to mark the presence of authentic accounts. Verified badges generally look like a blue seal with a small checkmark in between. This helps people in marking difference between the original account and fake account.

Problems Posed by Dating Apps

Gone are the days when marriages were solemnized after the meeting of bride's and groom's family. Today life-long relationships are also dependent upon the attractiveness of a person's profile on the dating apps like tinder, bumble etc. The features of filtered preferences and swiping options have allowed people today to sort out their priorities which they expect from their partners.

One of the primary concerns with dating apps is directly related to privacy of an individual. The basic process that a person has to go while making his profile on such dating apps is that he has to enter his basic details and often people also link their other social media profiles to it for better reach. This leads to leakage of personal data as most of these dating apps share this data with third party apps.

Unfortunately, dating apps have also been turning to become a breeding ground of criminals and molesters. In May 2022, Aaftab Poonawala murdered his girlfriend named Shraddha Walkar by cutting her body into 35 pieces. Both of them had developed acquaintance with each other on Bumble app (which is an online dating app). The root cause of this problem is that

[16] Amir Hussain, *The Emerging Jurisprudence of Cyber Space* 107, (ABD Publishers, Jaipur, 2023).

people do not always reflect the reality on their dating app profiles. They only project the information about themselves which they want others to know or believe which is many times, diametrically opposite to their real self. Boys and girls get attracted to the tailor made profiles and often they become prey to the molesters and criminals.

Problems posed by OTT platforms

Over the period of time, OTT platforms have grown as a primary source of entertainment for people but these OTT platforms have serious censorship issues. It was observed during the corona virus pandemic that OTT platforms were able to engage a lot of traffic. The problem created by OTT platforms with regards to decency is similar to that created by social media.

There is no doubt on the fact that there are various OTT platforms like Netflix, Amazon Prime, Sony Liv etc. which showcase movies and web series of all genres on their platforms and make a lot of money by entertaining people just like the cinema world does. However, the stark difference between the Film Industry and OTT Platforms is that a body named as CBFC (Central Board of Film Certification) functions to certify movies and often they censor vulgar language and visuals from movies and make it fit for viewing; on the other hand content over OTT platforms is not scrutinized to the required levels. There have even emerged a variety of apps like ullu app, hotshots digital, kooku app etc. which serve sheer vulgarity and nudity in the name of entertainment. So, just like social media these OTT platforms are utilized for posting sexually explicit content and the reason behind this is simply to gather audience engagement and make more money.

It should not be forgotten that even the freedom of speech and expression enshrined in Indian Constitution is subjected to the reasonable restriction on the ground of decency and morality. Therefore, strict steps are needed to be taken to control and reduce the obscenity and vulgarity presented over OTT platforms.

'Doctrine of Safe Harbour': How far are the intermediaries liable in India?

Social media being transnational in nature often makes it difficult for the countries to regulate it. Moreover, social media also possess the quality of being dynamic; it keeps presenting to the users new features every second day. This also offers hindrance for the legislators in regulating the intermediaries as law makers usually find it difficult to cope up with the rapid dynamism that social media offers. However, there are numerous acts, rules and provisions in India which aim at regulating and governing the social media intermediaries and continuous efforts are being made by judiciary through various case laws to counter the problems which arise due to rapidly changing technological aspects of social media.

Primary legislation in India dealing with the intermediary liability is the "Information Technology Act, 2000" (hereinafter referred to as IT Act). Section 79 of IT Act provide intermediaries with conditional immunity under the 'doctrine of safe harbour' subjected to the 'due diligence' provision.

Initially the term 'safe harbour' was restricted to geographical connotation which indicated to a place at the coast where ships were anchored and it served as a safe harbour to these ships by

providing them safety from climatic and atmospheric abnormalities. Analogically, safe harbour with respect to social media intermediaries means protection from legal penalties and punishments.

As per the safe harbour immunity the social media intermediaries will not be held liable for any content posted by third party over their platform. The development of the doctrine of safe harbour rests on the principle of 'one should not be punished for the act of others'. In the case of "*Avnish Bajaj v. State*"[17], it was observed that "there was a requirement for widening the scope of protection given to intermediaries, and thus, the IT Act was amended in 2008 to include a safe harbour regime under Section 79 of the IT Act"[18]. Section 79 of "Information Technology Act, 2000" protects intermediaries from the liability arising out of any content posted by third party on their platforms about which they had no direct knowledge. "The safe harbour exempts intermediaries who host, store and disseminate data, from any form of liability unless they were aware of any illegal content being stored and transmitted on their platform, which was not acted upon under a reasonable span of time."[19] "Doctrine of safe harbour" not only protects the intermediaries but also ensure that the users of social media can easily enjoy their "right to freedom of speech and expression".

As every coin has two sides, similarly doctrine of safe harbour is not an exception. Where safe harbour provisions encourage the use of freedom of speech and provide protection to the social media intermediaries but it also has all the potency to become a major cause of concern. With the increasing incidents of fake news and hate speech it is also very important that the protection enjoyed by intermediaries under doctrine of safe harbour should not stretch to such an extent that the social media intermediaries bear no responsibility for any illegal, anti-social or unethical content posted on social media.

In the same lines, Section 79 of IT Act has been enacted which gives protection to intermediaries but subjected to certain conditions. The immunity under safe harbour can be enjoyed by the intermediaries if they abide by the 'due diligence doctrine' which lays down that social media intermediaries are under the responsibility to eliminate any unlawful content under a "notice and take down regime" within a specified time limit. If the social media intermediaries do not follow the 'due diligence' then the intermediary may be made liable for the content posted by third person even if it was posted without the knowledge of such intermediary. Other than this there are few conditions which, if not followed by social media intermediaries, may make them to land into trouble, like the transmission of unlawful content is not initiated by the intermediary itself and the intermediary must have not selected or modified the content.

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[17] 150 (2008) DLT 769.

[18] Tracing the development of Intermediary liability in India, *available at*: https://s3.amazonaws.com/documents.lexology.com/8db09138-482a-4951-b255-6513ca1eaad3.pdf?AWSAccessKeyId=AKIAVYILUYJ754JTDY6T&Expires=1688550215&Signature=PQiVjsM5wATFblF6rxt7PVXWyw4%3D, (last visited on 12th June, 2023).

[19] *Supra* note 2.

Post the amendment of the Information Technology Act in the year 2008, Intermediary Guidelines[20] were issued by government of India in 2011. These guidelines are to be read in correspondence with the IT Act and are meant to be abided by the intermediaries in order to maintain their safe harbour protection. Rule 3 of these Intermediary Guidelines lays down certain due diligence requirements, some of them are as follows –

- Intermediaries have been made responsible for publishing the rules-regulations along with the privacy policy and user agreement.
- Making the users aware about the prohibited acts and what sort of content should not be posted.
- Intermediaries ought not to host or publish knowingly any unlawful or objectionable content.
- Intermediaries' responsibility to take down any objectionable content within a time span of 36 hours and store it for 90 days for the purpose of investigation.
- Responsibility to assist government agencies.
- To take all the reasonable measures to safeguard its computer resource.
- Intermediaries would have to report any cyber security incidents to the "Indian Computer Emergency Response Team".
- Appointment and publication of the details of a Grievance Officer on its website.

Although these rules were made to prevent any illegal activity through social media but there was a bit ambiguity in them. Social media intermediaries used to receive tons of take down requests from private individuals on daily basis. This made it very difficult for the intermediaries to response to all such requests as well as to identify the authentic requests. However, this problem was solved in "*Shreya Singhal v. Union of India"* when *Supreme Court* stated that "*intermediary upon receiving actual knowledge from a court order or on being notified by the appropriate government or its agency that unlawful acts relatable to Article 19 (2) are going to be committed then fails to expeditiously remove or disable access to such material*"[21]. This indicated that the intermediaries would not lose safe harbour if they do not entertain the take down requests made by private entities.

In 2018, "Ministry of Electronics and Information Technology" (hereinafter referred as MeitY) proposed the "Information Technology Intermediary Guidelines (Amendment) Rules, 2018" with an aim to eradicate the increasing problem of fake news. In order to accomplish its objectives, the rules provided to trace the originator of false information but this would be a difficult task for social media messenger apps like whatsapp, since, the messages exchanged between the sender and the receiver are end-to-end encrypted. Even if the messages are decrypted to trace the originator of fake news, then this would lead to infringement of privacy

[20] The Information Technology (Intermediaries Guidelines) Rules, 2011.
[21] (2015) 5 SCC 1.

of the users[22] which has been declared as a fundamental right in the famous case of *K.S. Puttaswamy v. Union of India*[23].

In February 2021, government, exercising powers under Section 87 of IT Act 2000[24], notified "Information Technology (Intermediary Guidelines and Digital Media Ethics Code), Rules 2021" (hereinafter referred as IT Rules, 2021) and replaced the "Information Technology (Intermediaries Guidelines) Rules, 2011". These rules have laid down a set of obligations which are to be obeyed by the intermediaries in order to claim their safe harbour status. All the intermediaries are supposed to observe due diligence as well as ensure safety of its users especially women. Intermediaries have also been made responsible to remove unlawful information after getting knowledge about it from order of court or appropriate government authorities.

The intermediaries with more than 50 lakh users have been named as 'significant social media intermediaries' and they have been assigned with some extra responsibilities like appointing an Indian citizen as a 'chief compliance officer' for ensuring the conformity with legal Acts and Rules. Appointment of a 'nodal officer' as well a 'resident grievance officer' is also required. Significant social media intermediaries providing messaging services have been asked to trace the first originator of the information. As already discussed, for tracing the first originator of any message the encryption clause will be broken and this will infringe the privacy of the users. The intermediaries are expected to follow the rules laid down by IT Rules, 2021, failing which they may lose their safe harbour status as has already been seen in the case of Twitter where the Union Government in affidavit claimed in Delhi High Court that safe harbour protection was taken away from Twitter for being significant social media intermediary and not complying with the IT Rules, 2021[25].

Intermediary liability in other countries

USA - Intermediaries in United States of America enjoy wider protection as compared to India. They enjoy much more immunity with respect to the liability arising out of any content posted by third party on their platform. Sec.230(c)(1) of "United States Communications Decency Act, 1996" provides that, "*no provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another* information *content provider*".[26] It has been instrumental in protecting free speech and expression of the internet users as the intermediaries are not compelled to eliminate any content from their platforms which don't fulfil the conditions of being 'unlawful' in nature, ensuring the free speech clause as enshrined under the First Amendment[27].

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[22] Apurv Sardeshmukh, *Data Protection –Law and Regulation* 25, (Thomson Reuters Legal, Noida, 2019).
[23] ((2017) 10 SCC 1).
[24] The Information Technology Act, 2000 (Act 21 of 2000), S. 87.
[25] Aashish Aryan, "Governement decides: Twitter no longer enjoys safe harbour provisions", *The Indian Express*, June 29, 2021
[26] Communications Decency Act, 1996, s.230.
[27] *Supra* note 2.

However, in USA also there is a division in the opinions of people with regards to the provision of safe harbour to the intermediaries, some support the doctrine while on the other hand it also faces opposition, as various efforts have been made to dilute the safe harbour provisions, examples of which can be seen in the form of enactments like "Fight Online Sex Trafficking Act" and the "Stop Enabling Sex Traffickers Act"[28]. These Acts make intermediaries responsible for hosting certain controversial ads although they had no participation in this.[29]

European Union – The main legislation that deals with intermediary liability in European Union is the Electronic Commerce Directive[30]. Article 14 of the "E-Commerce Directive" entails the safe harbour provisions for hosting providers. As per this law, hosting provider will not be made liable if it was unaware of the illegal activity or information, however if the hosting provider has knowledge about it then it must take appropriate steps to remove such content.

As provided under Article 12 of the "Electronic Commerce Directive", any online service shall not be held liable for any content posted by third-party over its platform where it is serving as a "mere conduit" for transmitting or temporarily storing the third-party content. This particular condition is applicable only if it "does not initiate the transmission" of information, "does not select the receiver of the transmission," and "does not select or modify the information contained in the transmission."[31]

Conclusion

Doctrine of safe harbour has been a subject of discussion at national as well as international levels. What is needed to be done is that legislators need to strike balance by making a law which protects the intermediaries' interest and free speech on one hand and also lay down responsibility on intermediaries to such an extent that safe harbour provisions may not be misused. Judiciary is also playing its part in ensuring that illegal acts under the garb of safe harbour provisions should not become a reason of unrest in the society, the most recent example was seen when on 30th of June, 2023, *Karnataka High Court* in "*X Corp v. Union of India*"[32] imposed a cost of Rs.50 lakh for not complying with MeitY's orders and dismissed the petition filed by Twitter Inc. against the blocking orders which were issued by MeitY, exercising power under Section 69A of IT Act, 2000[33], against the tweets commenting upon the mass protests that took place in India against the Farm Bills.[34]

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[28] Kavya Jha and Ananya Singh, "Traversing the Contours of Safe Harbour: Comparison of India and US (Part II)" *Tech Law Forum @ NALSAR* (2022).
[29] *Supra* note 24.
[30] Electronic Commerce Directive, 2000, art.14.
[31] How other countries have dealt with intermediary liability?, *available at*: https://itif.org/publications/2021/02/22/how-other-countries-have-dealt-intermediary-liability/, (last visited on July 1st, 2023).
[32] WP No. 13710 of 2022.
[33] The Information Technology Act, 2000 (Act 21 of 2000), s.69A.
[34] Radhika Roy, "Karnataka High Court finds MeitY's Blocking Orders compatible with IT Act, Exemplary costs for non compliance imposed on Twitter", *Internet Freedom Foundation*, July 1, 2023.

The laws that may compromise right to privacy (like tracing the first originator of fake news) can be replaced with laws which strike a blow at the revenues made by social media intermediaries. Analogy can be drawn from a recent law proposed in Canada which provides for revenue sharing between Goggle, Facebook and news outlets[35]. There are various digital news intermediaries who take news from news outlets and publish it on their portal which in turn generates revenue for them, now this law asks for an effective revenue sharing between the intermediaries and the news outlets. A law on similar lines can be made in India, covering the various social media intermediaries, that if they generate revenue from news published on their platform then they will have to share the revenue with the news outlet which was the source of that news. This will make the intermediaries more responsible with regards to the authenticity of any news published on their platforms. This will have an effective control in the circulation of fake news without compromising with the privacy of the individuals.

With the advancement in technology and evolution of 'Artificial Intelligence', laws can be made which employs this technology and AI in building up a mechanism where the authenticity, nature and objectives of a content targeting a larger audience can be scrutinized prior to its publication on the social media platforms. This will act as a kind of filter before any illegal content is out in the open. Laws should be made which impose the responsibility on users as well, for instance, people spreading fake news or making hate speech over social media may be inflicted with enhanced punishments and hefty penalties. This may create deterrent effect in the society and curb the hate and hoax generated over social media platforms.

[35] Abhishek Chakraborty, "Canada proposes law on revenue sharing between Google, Facebook and news outlets as India's wait continues", *India Today*, May 13, 2022.

Bias and Fairness in AI-Driven Legal Systems: Ethical and Legal Considerations

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Abstract

The use of artificial intelligence (AI) in the legal system has the capacity to improve efficiency, consistency, and accessibility. There are, however, issues around bias and fairness in AI-led legal decision-making that pose profound ethical and legal issues. The research discusses the way biases in training data, algorithmic structure, and human intervention affect the fairness of AI-based legal systems. It investigates issues such as discriminatory outcomes, non-transparency, and accountability in automated decision-making. Through case studies of AI use in legal settings, such as predictive policing, sentencing suggestions, and automated contract review, the study points to cases where bias has resulted in unfair legal outcomes. It also examines regulatory protocols and ethical standards intended to reduce such bias while maintaining adherence to core legal principles such as due process and non-discrimination. The study also assesses the function of human oversight in reducing AI bias, considering the efficacy of interventions like algorithmic auditing, explainability mandates, and fairness-promoting design methods. It addresses the conflict between the efficiency of AI-based systems and the necessity of judicial discretion, highlighting the significance of preserving ethical protection in automated legal decision-making. Ultimately, this study is a contribution to current discussions of responsible AI design and legal ethics, offering policy suggestions to ensure fairness, accountability, and trust in AI-powered legal systems. It emphasizes the need for cross-disciplinary work among technologists, legal experts, and policymakers to develop AI frameworks that protect justice, equality, and fundamental rights in the changing context of legal automation.

Keywords: *AI bias; legal ethics; fairness in AI; algorithmic accountability; automated decision-making*

Introduction

The swift convergence of AI in various fields, ranging from transportation to health and finance, has revolutionized decision-making processes and efficiency of operations.[3] Nonetheless, this dependency on AI raises new legal challenges, especially accountability and sanctions. AI embodies attributes that relate to human intelligence and executes it via numerical systems.[4] These can form, learn, predict, analyze, draw conclusions, and even correct themselves. It is implemented to solve an array of medicine predictions, planning, imagining pictures, voice

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[3] Li, Y. H., Li, Y. L., Wei, M. Y., & Li, G. Y. (2024). Innovation and challenges of artificial intelligence technology in personalized healthcare. *Scientific reports*, *14*(1), 18994.

[4] Sarker, I. H. (2022). AI-based modeling: techniques, applications and research issues towards automation, intelligent and smart systems. *SN computer science*, *3*(2), 158.

recognition and learning a specific aspect. AI systems apply a database for training to forecast better results and help in the resolution of other problems at high precision.[5]

AI is all about algorithms and data. Decision-making capability of AI is accurate only based on how well it has been trained and by utilizing authentic and unbiased data.[6] Unethical and unfair repercussions are built into critical decision-making if the data employed to train is infused with racial, gender, communal, or ethnic biases.[7] These will likely be more exacerbated, since most AI systems will still be trained on bad data.

Human beings outsource a lot of our choices to AI algorithms. We consume services that, with the use of AI algorithms, impact our choices. Public authorities and corporations also increasingly depend upon algorithms to make long-term choices.[8] For instance, they are relying on AI algorithms to analyze and forecast crime. The main mechanism in an algorithm is the spread of recommendations and decisions based on data analysis.[9] Therefore, algorithms are increasingly dictating our personal and collective decisions. The word algorithm has various interpretations based on diverse viewpoints.[10]

This algorithm usually applies to a computer's collection of rules and instructions for responding to a collection of data to solve an issue[11], although it might even have a broader application such as, for example, the instructions for baking a cake, i.e., what we commonly call a cooking recipe. In recent years, however, the name algorithm is usually applied to AI algorithms. Artificial intelligence algorithms are a category of technology that is capable of learning as well as determining what would be the most suitable rules to solve an issue based on some data and a target output.[12] Furthermore, AI algorithms have significantly enhanced their performance by gaining mature cognitive abilities, including perception, reasoning, and decision-making.[13] But

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[5] Mehedi, I. M., Hanif, M. S., Bilal, M., Vellingiri, M. T., & Palaniswamy, T. (2024). Remote sensing and decision support system applications in precision agriculture: Challenges and possibilities. *Ieee Access*.

[6] Mohanarajesh, K. (2024). Develop New Techniques for Ensuring Fairness in Artificial Intelligence and ML Models to Promote Ethical and Unbiased Decision-Making.

[7] Donvir, A., & Sharma, G. (2025, January). Ethical Challenges and Frameworks in AI-Driven Software Development and Testing. In *2025 IEEE 15th Annual Computing and Communication Workshop and Conference (CCWC)* (pp. 00569-00576). IEEE.

[8] Zhao, J., & Gómez Fariñas, B. (2023). Artificial intelligence and sustainable decisions. *European Business Organization Law Review*, *24*(1), 1-39.

[9] Fernandez, M., Bellogín, A., & Cantador, I. (2024, May). Analysing the effect of recommendation algorithms on the spread of misinformation. In *Proceedings of the 16th ACM Web Science Conference* (pp. 159-169).

[10] Akter, S., Dwivedi, Y. K., Sajib, S., Biswas, K., Bandara, R. J., & Michael, K. (2022). Algorithmic bias in machine learning-based marketing models. *Journal of Business Research*, *144*, 201-216.

[11] Zhang, H., Ma, Y., Yuan, K., Khayatnezhad, M., & Ghadimi, N. (2024). Efficient design of energy microgrid management system: a promoted Remora optimization algorithm-based approach. *Heliyon*, *10*(1).

[12] Aldoseri, A., Al-Khalifa, K. N., & Hamouda, A. M. (2023). Re-thinking data strategy and integration for artificial intelligence: concepts, opportunities, and challenges. *Applied Sciences*, *13*(12), 7082.

[13] Zhai, C., Wibowo, S., & Li, L. D. (2024). The effects of over-reliance on AI dialogue systems on students' cognitive abilities: a systematic review. *Smart Learning Environments*, *11*(1), 28.

very far from this picture of objectivity and neutrality, several studies have pointed out several potential issues with the use of algorithms, most notably the fact that they can be biased.[14]

Biases are systematic judgment and decision-making errors that happen in information processing and interpretation.[15] Most of these biases that are now being found in AI, are discriminative social biases, including racism, socioeconomic class, and even sexism.[16] In fact, AI has been most criticized for the amplification and influence of discriminative social biases, including gender bias.[17]

Understanding Bias in AI-Driven Legal Systems

AI bias is systematic. AI system errors that result in biased or unequal outcomes.[18] This may involve problems like inaccurate predictions, excessive false negatives or decision-making that disproportionately impact marginalized communities. This is based on biased assumptions made during its development and deployment, such as during AI data collection and preparation.

A simple illustration would be machine learning algorithms employed in hiring and using AI. An HR model can be modeled using biased historic data that targets applicants from specified schools or ones with specific merit. This tends to result in hiring that fuels inequality and diminishes diversity and talent, becoming a major setback in building a just and welcoming workplace. And legal issues including discrimination lawsuits, as well. Algorithmic bias can be created at any phase of an AI system's lifetime: data procurement, data labeling, model building, AI research and deployment, resulting in an "unfair" AI system.[19]

AI and ML systems rely on the quality of training data.[20] Data in our world is sometimes thought of as a source of truth, but it's not that simple. How data is created, built and interpreted changes over time, mirroring changes in the world. At times, this data might not reflect certain populations accurately, resulting in biased results. At other times, datasets can be representative but also exhibit historical bias and current biases that can be propagated into the AI system.[21]

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[14] Varsha, P. S. (2023). How can we manage biases in artificial intelligence systems–A systematic literature review. *International Journal of Information Management Data Insights*, *3*(1), 100165.
[15] Cherry, K. (2024). How cognitive biases influence the way you think and act. *URL: https://www. verywellmind. com/what-is-a-cognitive-bias-2794963 (date of access: 23.12. 2024)*.
[16] Stypinska, J. (2023). AI ageism: a critical roadmap for studying age discrimination and exclusion in digitalized societies. *AI & society*, *38*(2), 665-677.
[17] O'Connor, S., & Liu, H. (2024). Gender bias perpetuation and mitigation in AI technologies: challenges and opportunities. *AI & SOCIETY*, *39*(4), 2045-2057.
[18] Ferrara, E. (2024). The butterfly effect in artificial intelligence systems: Implications for AI bias and fairness. *Machine Learning with Applications*, *15*, 100525.
[19] Narula, S., Afaq, A., Nagar, S., & Chaudhary, M. (2025). Transformative Potential and Ethical Challenges of Generative AI in E-Commerce: Data Bias, Algorithm Bias. In *Responsible Implementations of Generative AI for Multidisciplinary Use* (pp. 317-336). IGI Global.
[20] Zha, D., Bhat, Z. P., Lai, K. H., Yang, F., Jiang, Z., Zhong, S., & Hu, X. (2025). Data-centric artificial intelligence: A survey. ACM Computing Surveys, 57(5), 1-42.
[21] Oguntibeju, O. O. (2024). Mitigating artificial intelligence bias in financial systems: A comparative analysis of debiasing techniques. *Asian Journal of Research in Computer Science*, *17*(12), 165-178.

Humans could shape AI systems in many ways, like choosing which data sets to include or exclude, deciding how to label the data, deciding on training, and controlling feedback loops.[22]

Comprehending bias in AI involves knowledge of coexisting definitions of the term bias set within the context of AI development and deployment.[23] In the absence of context, the word bias can be used to describe an uneven preference for a group or an individual due to preconceived attitudes or notions. The use of the words explicit and implicit separates intentional from unintentional bias, respectively.

Cognitive bias can be defined as systematic departure from objective judgment.[24] Intuitive reasoning based on heuristics, or mental shortcuts to reduce information processing and decision-making, is susceptible to cognitive bias and diagnostic errors.[25] Cognitive biases built into model construction can reinforce existing health inequities.[26] Social bias may also arise from the absence of diversity in data sets used to train a model or assumptions during the model construction process, enhancing inherent social and cultural bias.[27]

Psychology has a long history of research in cognitive biases and has made vast strides in the examination of how biases affect human judgments and decision-making.[28] It has even been suggested that psychology's most valuable contribution to society is the discovery of effective debiasing interventions.[29] Thus, the input from cognitive psychology may be also significant to the research of how to eliminate biases that affect AI by way of human interference.[30] There is a lot of research that has established that human thinking is subject to a skewed perception of reality. Illusions are cognitive biases which lead individuals to mistakenly interpret visual information.[31]

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[22] Zha, D., Bhat, Z. P., Lai, K. H., Yang, F., Jiang, Z., Zhong, S., & Hu, X. (2025). Data-centric artificial intelligence: A survey. *ACM Computing Surveys*, *57*(5), 1-42.

[23] Brauner, P., Hick, A., Philipsen, R., & Ziefle, M. (2023). What does the public think about artificial intelligence?—A criticality map to understand bias in the public perception of AI. *Frontiers in Computer Science*, *5*, 1113903.

[24] Bedeley, R. T., Hao, H., & Ghoshal, T. (2025). Cognitive Biases in Online Opinion Platforms: A Review and Mapping. *SAGE Open*, *15*(1), 21582440251315564.

[25] Mangus, C. W., & Mahajan, P. (2022). Decision making: healthy heuristics and betraying biases. *Critical Care Clinics*, *38*(1), 37-49.

[26] Purushothaman, M. B., Jessica, P., & Rotimi, F. E. (2025). Analysis of Cognitive Biases in Construction Health and Safety in New Zealand. *Buildings*, *15*(7), 1033.

[27] Alvarez, J. M., Colmenarejo, A. B., Elobaid, A., Fabbrizzi, S., Fahimi, M., Ferrara, A., ... & Ruggieri, S. (2024). Policy advice and best practices on bias and fairness in AI. *Ethics and Information Technology*, *26*(2), 31.

[28] Schirrmeister, E., Göhring, A. L., & Warnke, P. (2020). Psychological biases and heuristics in the context of foresight and scenario processes. *Futures & Foresight Science*, *2*(2), e31.

[29] Lewis Jr, N. A. (2023). Cultivating equal minds: Laws and policies as (de) biasing social interventions. *Annual Review of Law and Social Science*, *19*(1), 37-52.

[30] Goyal, A., & Bengio, Y. (2022). Inductive biases for deep learning of higher-level cognition. *Proceedings of the Royal Society A*, *478*(2266), 20210068.

[31] Todorović, D. (2020). What are visual illusions?. *Perception*, *49*(11), 1128-1199.

As described earlier, cognitive biases are consistent and predictable errors that happen to all of us when we process and interpret information.[32] Additionally, there is a consensus in the literature that cognitive biases reflect adaptive processes which are typically referred to as heuristics. Heuristics are mental shortcuts that enable individuals to take speedy and effortless judgments and decisions in situations of uncertainty, and they generally lead to efficiency, adaptive, and required.[33] But when circumstances become different, individuals might continue applying the same shortcut, and under such circumstances, the outcome may be maladaptive, flawed, and troublesome. In such instances, they are referred to as biases. That is, heuristics and biases are the two faces of the same coin. Heuristics are adaptive strategies for handling uncertain situations, but they at times lead to biases, that is, systematic errors that arise in most individuals under specific conditions.[34]

The Impacts of Human Cognitive Biases on AI

One of the most significant potential sources of bias in AI systems is biases or imbalances in the data that the algorithms are trained on.[35] AI algorithms learn from patterns and make predictions of historical data. High-quality data sets to feed into the algorithms are hard to come by, especially when they relate to clinical data.[36] Therefore, if a data set is imbalanced or biased, the AI systems trained on that data will learn and even replicate the biases. In medicine, the data to train the algorithms typically is the result of previous human choices, such as medical choices about what type of patient needs a specific test or what type of patient would be better served by a specific treatment. If the history of the decisions made in the past is revealed to have extended systematic flaws like, for example, misclassification of a particular pathology when some characteristics are present, then the AI system that is trained in this history will simply learn this prejudice. Consequently, this systematic flaw might be exemplified by repeated misclassification of a particular pattern of colored pixels in an image. But this bias would bring catastrophic effects if this type of model flaw isn't understood, and the AI system is implemented in decision-making in high-risk situations. One of the very strong arguments for the implementation of cognitive biases in humans is their reduction of effort and speed.

Human beings require biases since they lack sufficient computation power to deal with all the information they possess regarding their world.[37] Naturally, human beings limited computational capacity is absent from computers. But apart from considerations on evolutionary pressure concerning intelligence formation mentioned at the beginning of the

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[32] Saposnik, G., Redelmeier, D., Ruff, C. C., & Tobler, P. N. (2016). Cognitive biases associated with medical decisions: a systematic review. *BMC medical informatics and decision making*, *16*, 1-14.

[33] Raue, M., & Scholl, S. G. (2018). The use of heuristics in decision making under risk and uncertainty. *Psychological perspectives on risk and risk analysis: Theory, models, and applications*, 153-179.

[34] Raue, M., & Scholl, S. G. (2018). The use of heuristics in decision making under risk and uncertainty. *Psychological perspectives on risk and risk analysis: Theory, models, and applications*, 153-179.

[35] Ferrara, E. (2023). Fairness and bias in artificial intelligence: A brief survey of sources, impacts, and mitigation strategies. *Sci*, *6*(1), 3.

[36] Ahmed, Z., Mohamed, K., Zeeshan, S., & Dong, X. (2020). Artificial intelligence with multi-functional machine learning platform development for better healthcare and precision medicine. *Database*, *2020*, baaa010.

[37] Soprano, M., Roitero, K., La Barbera, D., Ceolin, D., Spina, D., Demartini, G., & Mizzaro, S. (2024). Cognitive biases in fact-checking and their countermeasures: a review. *Information Processing & Management*, *61*(3), 103672.

chapter and considerations regarding 'Green AI', meaning resource efficiency and less computational requirements in machine learning systems.[38] Besides effort reduction and higher accuracy, other benefits of human cognitive biases in psychology are transparency and accessibility.

Biased human judgment is transparent, it does not need extensive training, and even laymen can make good decisions, for which normally experts are needed, if there is a good heuristic, for instance, in the form of a fast-and-frugal tree, which is a small decision tree for binary classification problems. This benefit can be adapted to the area of machine learning since algorithms will gain from the receipt of sparser training, particularly in case of small training data sets.

The Concept of Fairness in AI Decision-Making

Fairness in general means to act equally and fairly, impartially, and without discrimination. Fairness in AI means making sure that the systems act in that manner – fairly.[39] That is, because AI and ML handle a lot of data, fairness means handling this data responsibly and making decisions that do not have unjustified negative impacts on any specific individual or group. AI fairness is all about designing, developing, and deploying AI models that do not discriminate, or benefit individuals and groups based on factors such as race, gender, or economic status.[40]

In addition to the legal implications of unfair AI, fairness in AI is also necessary if we wish to have the mass acceptance and adoption of AI systems.[41] This is because we want to be assured that AI can make the correct and fair decisions, particularly if we intend to introduce AI into business and more complicated operations.

Legal Frameworks and Regulatory Challenges

The regulatory and legal systems have an important role to play in entheansparency and effective accountability in information systems that employ Artificial Intelligence.[42] Privacy legislation improves equitable processing by guaranteeing that companies communicate to the public details of their use of data and by enabling users to contribute and have a say in how their personal data is being utilized.[43] This legislation also encourages accountability because the GDPR provides a subject right to pursue an action against an organization for an illegal

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[38] Bolón-Canedo, V., Morán-Fernández, L., Cancela, B., & Alonso-Betanzos, A. (2024). A review of green artificial intelligence: Towards a more sustainable future. *Neurocomputing*, 128096.

[39] Pfeiffer, J., Gutschow, J., Haas, C., Möslein, F., Maspfuhl, O., Borgers, F., & Alpsancar, S. (2023). Algorithmic fairness in AI: an interdisciplinary view. *Business & Information Systems Engineering*, *65*(2), 209-222.

[40] Pulivarthy, P., & Whig, P. (2025). Bias and Fairness Addressing Discrimination in AI Systems. In *Ethical Dimensions of AI Development* (pp. 103-126). IGI Global.

[41] Kelly, S., Kaye, S. A., & Oviedo-Trespalacios, O. (2023). What factors contribute to the acceptance of artificial intelligence? A systematic review. *Telematics and Informatics*, *77*, 101925.

[42] Díaz-Rodríguez, N., Del Ser, J., Coeckelbergh, M., de Prado, M. L., Herrera-Viedma, E., & Herrera, F. (2023). Connecting the dots in trustworthy Artificial Intelligence: From AI principles, ethics, and key requirements to responsible AI systems and regulation. *Information Fusion*, *99*, 101896.

[43] McGraw, D., & Mandl, K. D. (2021). Privacy protections to encourage use of health-relevant digital data in a learning health system. *NPJ digital medicine*, *4*(1), 2.

automated decision. Similarly, accountability is enabled by anti-discrimination legislations that also prohibit the creation of AI systems with discriminatory outcomes to civil societies while simultaneously providing individuals with avenues to sue for discrimination.[44] There have been controversies, debates, issues and more controversies with the practical application of this right as to how much, and in what way, it can be enforced. There is still some restriction in the existing data protection legislation in relation to coverage and enforcement of AI systems.

In the case against Clearview AI[45], American facial recognition startup was charged by the American Civil Liberties Union (ACLU) with violating Illinois' Biometric Information Privacy Act (BIPA). The company harvested billions of photos from Fb and other web sites in a bid to build a facial recognition database, which they snapped against the will of the customers. This case raises relevant questions about the exploitation of AI systems that rely on individual data.

Those issues and voids are doubtlessly best served by some gradual tinkering with data protection law and some additional AI governance approaches. This would possibly involve widening the definition of 'personal data' to account for inferred/inferenced data, introducing privacy impact assessment and algorithmic audit to high-risk AI, and requiring full model reporting to make way for breadth.

Ethical Considerations in AI-Driven Legal Systems

Of the problems enumerated below, some are about the nature and design of AI itself, and some are about implementation and use of AI problems (though frequently the nature of AI design allows for or generates implementation and use problems). Some of the problems will be boundary-spanning (i.e., they will occur in one or more areas/applications of use). These issues mainly relate to all technology (i.e., data protection/privacy), some of which are linked to each other (i.e., fairness, transparency, accountability), and perhaps might not be in existence individually. There is no need, however, to downplay AI's ability to augment, and/or generate, harmful implications related to the generation and/or use of these problems.

The opaqueness of algorithms is one of the high-profile topics that squarely fall under the purview of legal debate on AI.[46] As the mass adoption of AI is increasingly coming to light in areas classified as high-risk, pressure mounts to develop and regulate AI for responsibility, equity, and transparency.[47] The deployment of AI weapons outside of human control; AI vulnerability to ctargetingy issues; the targeting of surveillance or cyber security through AI for national security providing a new way in for attack based on 'data diet vulnerability'; the deployment of network intervention techniques by means of foreign-located AI; an even more

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[44] Cheong, B. C. (2024). *Transparency and Accountability in AI Systems: Safeguarding Wellbeing in the Age of Algorithmic Decision-Making. Frontiers in Human Dynamics, 6, 1421273*.

[45] European Data Protection Board, The French SA fines Clearview AI EUR 20 million, October 20, 2022 (accessed via: https://www.edpb.europa.eu/news/national-news/2022/french-sa-fines-clearview-ai-eur-20-million_en)

[46] Al-Dulaimi, A. O. M., & Mohammed, M. A. A. W. (2025). Legal responsibility for errors caused by artificial intelligence (AI) in the public sector. *International Journal of Law and Management*.

[47] Lim, D. (2025). Determinants of Socially Responsible AI Governance. *Duke Law & Technology Review*, *25*(1), 183-232.

pervasive and advanced variant of existing high-level targeting of political content through social media. They are critical problems because they put critical infrastructures at risk of damage with devastating impacts on society and human beings, posing to destroy human security, as well as resource access.

Security threats in cyberspace are also serious threats because they are usually stealthy and made visible too late.[48] Unfairness, discrimination, and bias appear to be iterative and significant regarding the problems posed by the application of automated and algorithmic decision-making systems (e.g. to render a decision in employment, health, criminal justice, and insurance).

Some rights for individuals are offered by European Union data protection law for challenging and requiring a review of automated decision-making with significant effect on the rights or legitimate interests of an individual (GDPR 2016/679). Data subjects are also free, at any moment, to object, on grounds pertaining to the case of the individual, to personal data processing concerning the individual with respect to the individual for reasons performed in public interest or in legitimate interest.[49] In addition, pursuant to Article 22(3) GDPR and other provisions that are applicable to data controllers, where the processing of personal data leads to decisions that are taken solely on the basis of automated processing, data controllers shall take adequate measures to give due consideration to a data subject's rights, interests, and legitimate rights, at least to access human intervention by the controller, to express views and to be able to challenge the decision. There is disagreement as to whether AI and/or robotics systems "fit into existing legal categories or whether a new category must be created based on these specific features and implications." (European Parliament Resolution 16 February 2017).

It is not just a matter of law; it is politically controversial. The High-Level Expert Group on Artificial Intelligence (AI HLEG) has appealed to "policymakers not to grant a legal personality to AI systems or robots"[50] arguing that it is "inherently inconsistent with the principle of human agency, accountability and responsibility" and entails the "moral hazard." Intellectual property rights are covered in the Universal Declaration of Human Rights (UDHR, Article 27), the International Covenant on Economic, Social and Cultural Rights (ICESCR, Article 15), the International Covenant on Civil and Political Rights (ICCPR, Article 19) and Vienna Declaration and Programme of Action (VDPA) 1993. Intellectual property rights have a "human rights character" and "have increasingly been contextualized in a range of policy areas" World Intellectual Property Organization (WIPO).

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[48] Aslan, Ö., Aktuğ, S. S., Ozkan-Okay, M., Yilmaz, A. A., & Akin, E. (2023). A comprehensive review of cyber security vulnerabilities, threats, attacks, and solutions. *Electronics*, *12*(6), 1333.

[49] Vogiatzoglou, P., & Valcke, P. (2022). Two decades of Article 8 CFR: A critical exploration of the fundamental right to personal data protection in EU law. In *Research handbook on EU data protection law* (pp. 11-49). Edward Elgar Publishing.

[50] European Parliament, Artificial Intelligence ante portas: Legal & ethical reflections (https://www.europarl.europa.eu/at-your-service/files/be-heard/religious-and-non-confessional-dialogue/events/en-20190319-artificial-intelligence-ante-portas.pdf)

The IBA Global Employment Institute report (2017) addresses the workplace implications of AI and robotics.[51] Some of the consequences include: adjustments to the types of employment they will need in the future; erosion of free hours; shifting in employment relations; new patterns of work and new employment forms; laying off of employees; inequities in the "new" employment setting; potential inclusion of individuals in the "new" employment setting without the critical training; employment relations (and the how it could affect union activity and collective bargaining aspects and range of changes that could hinder employee representatives); workplace health and safety effects; effects on working time; effects on pay (wage effects and pensions); and social security effects. Both data protection enforcing authorities and academics are of the opinion that AI poses significant privacy and data protection rights risks (among others).[52]

These risks are monitoring and informed consent; and violation of data protection rights of individuals, such as the right to receive their own personal data, the right to halt any processing taking place that has the potential to cause damage or distress, and the right not to be subjected to a decision based on purely automated processing. Application and deployment of AI technologies can cause damage to human life and property; consider some examples - maiming pedestrians when the steering component of an autonomous vehicle is faulty, crash and destruction caused by a half or part-autonomous drone, and incorrect treatment diagnosis through a defective AI program software report. As highlighted in the Assessment List for Trustworthy AI (ALTAI), accountability requires that there are means to hold responsible the development, deployment and/or usage of AI systems in a manner that can be susceptible to risk management, discovering and addressing risk in a manner that is transparent and explainable to third party audits. The accountability philosophy within the context of AI requires the (i) action-guiding function (through action-guiding beliefs and decision-making) and (ii) action-explaining function (through situating actions in a broader context or classification under moral values).

International human rights conventions impose obligations on States Parties to comply with and uphold: States must avoid interfering with rights and take positive action to bring them into operation. None of them now specifically mention artificial intelligence/AI or machine learning', but their general wording would embrace most of the issues and challenges outlined above.

Mitigating Bias and Enhancing Fairness in AI Legal Systems

Relative to the problem of a lack of transparency in algorithms, it might be addressed by (i) awareness raising: education, watchdogs and whistle-blowers; (ii) accountability on the algorithms used by public actors; and (iii) regulation and legal liability; and (iv) global

[51] Lubinga, S. N., Maramura, T. C., & Masiya, T. (2023). Adoption of Fourth Industrial Revolution: challenges in South African higher education institutions.

[52] Yanamala, A. K. Y., & Suryadevara, S. (2023). Advances in Data Protection and Artificial Intelligence: Trends and Challenges. *International Journal of Advanced Engineering Technologies and Innovations*, *1*(01), 294-319.

coordination of algorithmic governance. Some more specific solutions advanced to provide algorithmic transparency include algorithmic impact assessments.[53]

Regarding cybersecurity vulnerabilities, numerous various methods and tools exist or are in the process of being proposed for solving this problem.[54] For instance, having sound protection and recovery procedures, including vulnerability awareness within the design procedure, involving human analysts in decisions, using risk management programs, and applying patches to software.

On contestability, the idea of defining original contestability has been advanced to better protect the rights of decisions by solely automated processing, as a condition precedent to each stage of an artificial intelligence system's lifecycle.

Regarding the topic of whether Artificial Intelligence should have legal personality, the model of keeping human accountability for AI and its behavior as a tool could be the most preferred, and this would mean the responsibility would fall on the developers, users, or owners of AI, not on the AI. When we use AI producing value, we should treat it like any physical product, where manufacturers and operators are responsible for the damage and harm caused by it.[55] If AI systems became completely autonomous (imagine errors in autonomous shipping businesses), it may be appropriate for the system to be classified as a corporate entity to define its legal responsibilities as an AI business.[56] AI could then have limited rights and responsibility like the concept of corporate personhood but primarily related to the enforcement of contracts.[57] The positive aspect to the model of legal personhood could be for AI to be recognized as an agent of its owner, creating a clear pathway of legal responsibility back to a human.[58]

Policy Recommendations for Ethical AI Governance

Regulatory frameworks and guidelines need to be developed and implemented to promote the ethical and responsible application of AI in legal decision-making. These guidelines should respond to the ethical issues raised above and make practical suggestions for the application of AI in the judiciary.

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Stakeholder collaboration, such as legal practitioners, AI professionals, ethicists, and policymakers, is important in developing comprehensive and effective guidelines. Professional associations, legal bodies, and governments can be important in setting and implementing these guidelines.

Ethical implications and compliance with guidelines in the areas of explainability, avoidance of bias, data security and privacy, responsibility, and proper utilization of AI are essential in making the utilization of AI in legal decision-making responsible and efficient. Through emphasis on transparency, equity, and safeguarding personal information, legal experts and developers can harness the potential of AI technologies while sustaining ethical positions in the legal profession. It is with a careful and responsible mindset that AI can enhance the judicial process, enhancing efficiency, accuracy, and accessibility of justice.

There is a necessity to continue the interdisciplinary tendencies and to refine the above models in accordance with the new technologies and social environments. Above all, present and future attempts to make AI 'responsible' need to deal with the essence of power relations between AI creators and AI users. At the central level, this includes involving the target AI victims who are vulnerable and at greatest risk of AI harm in AI governance and regulation. Therefore, it is also essential to maintain participatory methods in the policymaking of AI independently and to their agenda to democratize AI responsibility.

Institutional governance mechanisms also improve accountability in all AI systems. This also includes controllable supra-organizational AI regulatory bodies coming under the technical category and equipped with the investigative powers to examine AI systems and enforce compliance with the transparency provisions. Establishing AI ombudsperson and public advocate may enable the concerned communities to bring the issues and seek remedies for AI-inflicted cruelties. Other reforms which are anticipated to motivate more ethical behavior from within AI firms are whistleblower protections and ethical AI oaths.

Conclusion

There are apparent advantages to incorporating AI in the legal decision-making process, such as a faster turnaround time for decisions, more comprehensive analysis of pertinent legal factors, and more access to justice. However, it is necessary to recognize the ethical implications attached to the implementation of AI within the judicial process. The proper and effective application of AI in the legal arena requires thorough examination of concerns regarding explainability, bias, data privacy, and security.

For the sake of explainability and transparency, AI systems must offer understandable results, so legal experts and the public can comprehend and assess the rationale for AI-made decisions. To reduce bias and ensure fairness, there is a need for rigorous curation of training data, frequent auditing of AI systems, and cross-disciplinary collaboration to question biases and ensure fairness.

Although AI is currently the topic of conversation, it is believed that with the addition of robotics and IoT, all new developments in technologies, including AI, will turn the discussed fresh set of unique problems into laws and societal values that will require new robust discussions. This article suggests a systematic review and analysis of ethical concerns and issues related to AI and ethical standards and principles published by a variety of organizations, frameworks and methodologies for addressing ethical issues of AI or implementing the ethical principles of AI, and their degree of ethicality (or morality in AI). In addition, a few concerns in the practice of AI ethics are presented and suggestions for future research.

The Right to Be Forgotten: Balancing Privacy and Free Speech

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&
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Abstract

This research explores the complex relationship between the right to be forgotten and freedom of speech and expression in India, especially in light of the digital revolution that has reshaped data storage and dissemination. Rooted in the landmark European Google Spain v. AEPD case, the right to be forgotten allows individuals to request removal of personal data that is no longer relevant or causes harm. In India, privacy (Article 21) and free speech (Article 19(1)(a)) are both constitutionally protected, creating legal tensions without a clear hierarchy. The study traces privacy's evolution through key judgments like Kharak Singh and Justice K.S. Puttaswamy, and assesses the Digital Personal Data Protection Act, 2023, which introduces a right to erasure under Section 12. However, exceptions for public interest and legal duties create friction with free speech. By analyzing cases like Jorawer Singh Mundy and Sri Vasunathan, the research highlights challenges such as global jurisdiction, technical enforcement, and misuse risks. It suggests solutions like de-indexing and clearer regulatory guidelines. Ultimately, while the DPDP Act advances privacy rights, the research argues that a nuanced, case-by-case judicial approach is essential to balance privacy with democratic freedoms in India's digital age.

Keywords: *Right to be forgotten, Digital privacy, Freedom of speech, Data protection, Constitutional balancing*

Introduction

The inception of internet sometime during the later part of the 20th century, the world witnessed the arrival of a technology that would impact their lives on an unprecedented scale. Today, we live in a society whose engines are ignited by the pistons of social media. Today, the sheer volume of an individual's presence in the virtual world is used to assess their foundation in the real life. The technology leads free flow of information's in the internet. Individuals were suffering from outdated and irrelevant information still existing on the internet. The easy accessibility of such information caused severe damage to a person's reputation and right to privacy. There comes the importance of the concept 'right to be forgotten.' The right to be forgotten in a nutshell is a tool to remove the personal data present on the internet. It allows for individuals to control and determine the extent of the information about them that is communicated to others and available for the public's perusal.

When we speak about right to be forgotten it is necessary to address the European union's 'General Data Protection Resolution (GDPR).' EU has explicitly included a right to be forgotten within its ambit, which is a clear approval and effect of *the Google Spain v. AEPD*[3] judgement of the ECJ. Mario Costejas raised a complaint to the Spanish Data Protection Agency ("AEPD") regarding an article published in La Vanguardia, a newspaper, relating to

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[3] Case C-131/12, Google Spain v AEPD, 2014, ECLI:EU:C:2014:317.

an attachment proceeding in a real-estate auction against him and recovery of social-security debts. Costejas requested that the newspaper either remove and alter the pages or that Google Spain alter the pages to conceal the personal data in search results.

The AEPD refused to the former request but agreed to the later. Google objected to the decision and the case landed up in the European Court of Justice the Court held that the right to be forgotten could be found within the Directives, in particular, Article 12(b) and Article 14(a) which provides for data controllers to rectify, erase and block data which did not comply with the Directive. The Court also held that Google satisfied the requirements of a 'data controller' as the search results are not automatic, i.e., Google delivers the information and sculpts the results. Thus, it is not just a mere conduit with information passing through, rather the algorithm and data have a much deeper level of interaction. The Court also recognized that when search engines processed personal data, the right to privacy is attracted since several aspects of a person's private life can be revealed with a simple name search, without search engines having to piece together the data.

Based on the judgement, several countries have begun to enact legislations with reference to the right to be forgotten to follow suit of the European Union and better protect the rights of their citizens. India, too, is one of these jurisdictions attempting to incorporate this right. The discussion around this right was sparked following Justice Kaul's opinion in the landmark Puttuswamy judgement[4] on privacy and the report of the Sri Krishna Committee which recommended the incorporation of statutory provision regarding this right within the Draft Data Protection Act 2018[5], and was reproduced similarly in the Act introduced in Lok Sabha in 2019.

In the Indian context, the Right to be forgotten, highlights a significant conflict between two fundamental rights: freedom of speech and the right to privacy. The Right to be forgotten refers to an individual's ability to request the removal of personal information from the internet, particularly when it is no longer relevant or causes undue harm. While this right aims to protect privacy, it often clashes with freedom of speech, as it may involve restricting access to information that others have a right to express or know. This analysis explores the nature of these rights in India, their points of conflict, and how Indian courts address this tension in the absence of specific legislation. However, as will be discussed in the subsequent sections of this paper, the incorporation of such a right will be contentious due to Indian jurisprudence on balancing of rights.

Constituent Assembly Analysis

The first attempt to protect the privacy of an individual against unreasonable state interference was in the Constituent Assembly when Mr. Kazi Syed Karimuddin moved an amendment to protect individuals from unreasonable search-and-seizures, on the lines of the American and Irish Constitution. Notably, although Dr B. R. Ambedkar pointed out that this clause is present

[4] Justice KS Puttuswamy (Retd.) v Union of India, (2017) 10 SCC 1.
[5] The Personal Data Protection Act, 2018, § 27.

in the Criminal Procedure Code, he accepted the amendment, calling it a 'useful proposition' which must be 'beyond the reach of the legislature.'[6] However, the right to privacy did not find a definite and explicit place in the Constitution.

The Constituent Assembly Debate on Article 13 (corresponding to Article 19 of the present Constitution) was held on Wednesday, 1st December, 1948 which provides several freedoms including freedom of speech and expression to citizens. The opinions of different members of constituent assembly are relevant here to mention. Shri Damodar Swarup Seth argued that: "Article 13, as at present worded, appears to have been clumsily drafted. It makes one significant omission and that is about the freedom of the press.

I think, Sir, it will be argued that the freedom is implicit in clause (a) that is, in the freedom of speech and expression. But, Sir, I submit that the present is the age of the Press and the Press is getting more and more powerful today. It seems desirable and proper, therefore, that the freedom of the Press should be mentioned separately and explicitly. Prof. K. T. Shah said that "in sub-clause (a) of clause (1) of article 13, after the word 'expression'; the words `of thought and worship; of press and publication;' be added." He thought that speech and expression would run parallel together. Perhaps "expression" may be a wider term, including also expression by pictorial or other similar artistic devices which do not consist merely in words or in speech."[7]

The right to know or to get information is one of the aspects of freedom of speech and expression. Freedom to receive information is also included in the freedom of speech and expression through various supreme court judgments. Right To Information Act 2005, which especially talks about the right of the people to ask for information from the government officials.

The Conflicting Nature of Right to Be Forgotten and Freedom of Speech and Expression

India does not have an expressed legislation on the right to be forgotten. The elementary legislation governing cybercrime and e-commerce is the Information and Technology Act, 2000.Furthermore, India is not equipped with any implemented Data Privacy laws. To tackle the inadequacy of laws, the BN Srikrishna Committee[8] was formulated and led to the conceiving of Right to be Forgotten in India. This committee was created for the purpose of analyzing issues around data protection and promulgate solutions to address the issues and thereby draft the data protection Act.

Currently in India the Digital Personal Data Protection Act, 2023 under section 14 includes the concept of "Right to be Forgotten" whereby the data principal has the right to correct and erase his / her personal data and a data fiduciary upon receipt of such a request

[6] Constituent Assembly Debates, 1948.
[7] Constituent Assembly Debates, 1948.
[8] Committee Of Experts Under the Chairmanship of Justice Bn Srikrishna, *A Free and Fair Digital Economy, Protecting Privacy, Empowering Indians*, at 75 (2018).

(i) correct, complete or update (as the case may be) the data principal's personal data or

(ii) erase the personal data of a Data Principal that is no longer necessary for the purpose for which it was processed unless retention is necessary for a legal purpose.

The said Act has been passed and accordingly there is no specific law directly on "Right to be forgotten." However, the provisions of the Information Technology Act, 2000 ("IT Act") provide for requisite protection. The IT Act under section 66 provides for punishment *inter alia* for violation of privacy, publishing or transmitting obscene material in electronic form, publishing or transmitting material containing sexually explicit act, etc. Further, the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 ("IT Rules") published on 25th February 2021 casts an obligation upon the intermediaries such as internet service providers and search engines to take all reasonable and practicable steps within 24 hours of receipt of a complaint, to remove or disable access to content which exposes the private area of an individual, shows an individual in full or partial nudity or shows or depicts such individual in any sexual act or conduct.

In India, privacy is recognized as an intrinsic part of Article 21 of the constitution and it also forms the core of human dignity. Article 21 has been accorded a high priority by the 44th Amendment to the Constitution, which makes it a non-derogable right even in the case of an emergency. The right to privacy and its other facet, the right to be forgotten, is concerned with access to one's personal information, including data regarding thoughts, past actions, and present state of being and the ability to be able to control the access and the manner of usage of such information. However, in contrast to this individual right, there is the right to seek information, which is the right of the larger public under the Right to Information Act, 2005. An aspect of this right is also the right of people to obtain and circulate information that is legitimately in the public domain, the Right to Information.[9]

Part III of the Indian Constitution does not explicitly prescribe a hierarchy of rights. Rather, on face value, all the rights are equal and a conflict between any two fundamental rights is meant to be resolved by way of harmonious interpretation. This would appear to support the case for balancing of freedom of speech and expression with the right to reputation and privacy. However, a closer examination of the proposition reveals that it would be fallacious to assume that Article 19(1)(a) can be balanced with other provisions of the Constitution. The freedom of speech and expression, which grants the right to impart ideas, opinions, and information, also includes the right to receive information. Also, the right to be forgotten brings the challenges of Danger to Journalism that is Journalists may encounter difficulties in communicating news and information to the public if the Right to be forgotten is put into effect.

[9] Vedant M Maske, The Right to be Forgotten: Striking Balance between Right to Privacy of an Individual and Right to Information of Society, 28 SUPREMO AMICUS, 622-630 (2022).

The press and media sector would be in a state of chaos as they would have to wait for the adjudicating officer's decisions. The journalists will experience difficulties when trying to spread thoughts and information through the media. Also, Breach of Expression Rights that is "Expression" rights are fundamental human rights. The freedom of expression of citizens may be hampered by the removal of online content from the internet. As the balance of power towards removing the information shifts in favor of the person whose information has been made public, they will have difficulty expressing their opinions through written articles, books, television, the internet, or any other medium. They will not feel free to share their thoughts or convictions over a certain subject.

The Right to be Forgotten creates a tension between privacy and freedom of speech when an individual seeks to erase online information that others may have a right to access or share. This conflict manifests in several ways:

- Public Interest vs. Personal Privacy: Information deemed valuable to the public, such as details about a public figure's actions or a criminal case, may be protected under freedom of speech, even if it invades an individual's privacy. For instance, a politician's past statements may remain relevant to public accountability, outweighing their privacy claims.
- Relevance over Time: Information that was once significant, like a news report about a criminal charge, may lose its public value after an acquittal, tilting the balance toward privacy as the individual seeks to rebuild their reputation.
- Consent and Control: Individuals argue for control over their personal data, but granting absolute control could suppress free expression or erase historically significant records.
- Technological Challenges: The internet's global reach and permanence complicate enforcement. Even if information is removed from Indian platforms, it may remain accessible elsewhere, undermining privacy protections without fully resolving the conflict.

Examples of this tension include:

- A person acquitted of a crime requesting the removal of related news articles.
- A public figure seeking to erase embarrassing past statements.
- A business attempting to suppress negative reviews.

In each case, the individual's privacy interest conflicts with the public's right to know or express opinions.

The Judicial View Point

India lacks a specific law governing the Right to be forgotten, leaving courts to resolve this conflict on a case-by-case basis. Judges balance freedom of speech and privacy by considering key factors:

- Nature of the Information: Is it sensitive personal data or a matter of public interest?
- Purpose of the Information: Does it serve a legitimate societal need, or is it merely sensational?

- Impact on the Individual: Does its continued availability cause ongoing harm?
- Time Elapsed: Has the information lost its relevance?

For private individuals, courts may prioritize privacy if the information is out dated or disproportionately harmful. For public figures, freedom of speech often prevails due to greater public interest. For example, in Karmanya Singh Sareen vs Union of India, the Delhi High Court addressed data privacy concerns in the context of social media, emphasizing privacy's importance without directly enforcing the Right to be forgotten. The Information Technology Act, 2000, offers some content removal mechanisms, but these focus on intermediaries rather than individual erasure rights.

The country has experienced numerous issues involving the right to privacy, which is enshrined in Article 21 of the Constitution, since its foundation. The opinion in the Kharak Singh case[10] was the first to point out that privacy is an important component of personal liberty and does not violate Article 19. Both articles can exist side by side, and neither is carved out of the other. Since then, other judgments involving lower benches have supported the right to privacy as a fundamental right.

This can be shown in cases where a rape victim has a right to have her past forgotten, while a criminal cannot claim that he has the right to demand that his conviction not be mentioned in the media. Until 2015, when a case in the Gujarat High Court dealt with the removal of non-reportable judgements from a website, the RTBF was a foreign idea in our country. The HC ruled that such material could not be removed because it would remain in the HC databases regardless. Even though the RTBF was not explicitly mentioned in this example, it indirectly allowed for discussion of this novel notion. The Karnataka High Court has made a brief reference to the RTBF, describing it as a "trend of Western countries."

In addition, a writ in the Kerala High Court[11] has ruled in favor of the petitioner in the removal of the petitioner's name from specific websites with little explanation. In today's socio-political climate, it is critical to recognize that data protection laws modelled after EU guidelines will not meet our country's needs. This is because of the following factors: To begin with, India's privacy law differs significantly from that of the European Union. This means that, in India, privacy is viewed in a different light than it is in Western countries, owing to cultural differences. While we are an innately "collective" culture, the EU places a higher value on the concept of "individualism." In a strong culture of trust, Indians appreciate both the individual and social aspects of privacy.

As a result, the definition of privacy cannot be applied to both regions at the same time case of Sri Vasunathan v. Registrar General,[12] in which the father of a girl requested that his daughter's name. The Karnataka High Court recognized the right to be forgotten for the first

[10] 1963 AIR 1295.
[11] CWP No.9478 of 2016.
[12] SCA No.1854 of 2015.

time in the e be removed from the copy of the order and that the High Court issue an order instructing search engines not to mention his daughter's name in that order. The petitioner argued that his right to privacy had been breached since disclosing personal information about his daughter in a public forum could jeopardize her reputation in society because of her previous criminal convictions.

In *Jorawer Singh Mundy vs. Union of India & Ors*,[13] the Petitioner's contention is that he is an American citizen of Indian ancestry who handles stocks and real estate portfolios, among other things. When he visited India in 2009, and he was charged under the 1985 Narcotics, Drugs, and Psychotropic Substances Act (NDPS). However, the trial court cleared him of all allegations in a ruling dated April 30, 2011.Following that, an appeal was filed disputing the trial court's decision, and in Crl.A. No. 14/2013 titled *Custom v. Jorawar Singh Mundy*, a Single Judge of the Delhi High Court maintained his acquittal in a ruling dated 29th January, 2013.

When the Petitioner returned to his native country, he encountered considerable difficulties in his professional life because the High Court's decision on appeal was available on Google for any possible employer to see if they chose to run a background check before hiring him. The Petitioner had initially sought that Google India (Respondent No. 2), Google LLC (Respondent No. 3), Indian Kanoon (Respondent No. 4) and vLex.in (Respondent No. 5) remove the said verdict due to the issue.

Except for Respondent No. 5, none of the other Respondents acted in response to the Petitioner's request. As a result, the current Writ petition was filed, asking for instructions to be issued to the Respondents to delete the ruling from all the Respondents' respective platforms, while also acknowledging the Petitioner's Right to Privacy under Article 21 of the Constitution.

The legal problem before the Hon'ble Court in this case was to strike a balance between the Petitioner's Right to Privacy and the public's Right to Information, as well as the preservation of transparency in judicial records, if a Court order was removed from internet platforms. As a result, Google India and Google LLC were ordered to delete the ruling in Custom v. Jorawar Singh Mundy[14], dated January 29, 2013, from its search results. Furthermore, Indian Kanoon has been ordered to prevent the stated judgement from being viewed by search engines like as Google, Yahoo, and others until the next hearing date. The Union of India was ordered to ensure that the Court's directives in the above-mentioned order were followed.

In 2016 the Kerala High Court[15] passed an interim order requiring Indian Kanoon to remove the name of a rape victim which was published on its website along with the two judgments rendered by the Kerala High Court in Writ petitions filed by her. The court recognized the

[13]1 April,2022.
[14] 29 January, 2013.
[15] CWP No. 9478 of 2016.

Petitioner's right to privacy and reputation, without explicitly using the term 'right to be forgotten'

The Right to Be Forgotten in the DPDP Act, 2023

The DPDP Act, 2023, India's first comprehensive data protection law, does not explicitly use the term "Right to be Forgotten." Instead, it incorporates a related concept through the "right to erasure" under Section 12. This provision empowers individuals, referred to as "data principals," to request the deletion of their personal data under specific conditions:

- When the Purpose is fulfilled: Data can be erased if it is no longer necessary for the purpose for which it was collected or processed.
- Withdrawal of Consent: If an individual withdraws consent for the processing of their data, and there is no other legal basis for its retention, erasure can be requested.
- Compliance with Retention Limits: Data processors, or "data fiduciaries," must delete data once the agreed-upon retention period expires, unless retention is required by law.

This right aligns with the broader idea of the Right to be Forgotten, which seeks to give individuals control over their personal information in the digital age, particularly when it becomes irrelevant, out-dated, or harmful.

Privacy as the Foundation

The DPDP Act's inclusion of the right to erasure reflects the recognition of privacy as a fundamental right, established by the Supreme Court in the 2017 Justice K.S. Puttaswamy (Retd.) vs Union of India judgment. Under Article 21 of the Indian Constitution, privacy encompasses personal dignity and autonomy, including the ability to manage one's digital footprint. Section 12 operationalizes this by enabling individuals to mitigate harm caused by the persistent availability of personal data online, such as reputational damage or identity misuse.

For example:

i) An individual might request the removal of an old news article about a dismissed legal case that continues to affect their job prospects.

ii) A person could demand erasure of data collected by an app after they stop using it, provided consent is withdrawn.

Conflict with Freedom of Speech

While the DPDP Act prioritizes privacy through the right to erasure, it intersects with freedom of speech, guaranteed under Article 19(1)(a) of the Constitution. Freedom of speech ensures the right to express and access information, but the erasure of data can restrict this right, creating a tension. The Act acknowledges this conflict by including exceptions to erasure:

- Legal Obligations: Data fiduciaries can retain data if required by law, such as for tax or criminal investigations.
- Public Interest: Retention may be justified if the data serves a broader societal purpose, such as public health or safety.

- Freedom of Expression: Section 12 implicitly allows data to persist if its removal would unduly infringe on free speech, though the Act leaves this balancing act to interpretation and future regulation.

Examples of Conflict:

i) News Articles: A journalist's article about a public figure's past might be protected under free speech, even if the individual requests its erasure under the DPDP Act.

ii) Public Records: Court judgments or government data in the public domain might resist erasure due to their legal and historical significance.

This tension mirrors global debates, such as those under the European Union's General Data Protection Regulation (GDPR), where the Right to be Forgotten (Article 17) must coexist with press freedoms and public interest.

Judicial Context and the DPDP Act

Prior to the DPDP Act, Indian courts addressed the Right to be Forgotten on a case-by-case basis, often without a unified legal framework. For instance, In the Karmanya Singh Sareen vs Union of India case, the Delhi High Court emphasized data privacy in the context of social media but stopped short of enforcing erasure.The Karnataka High Court in 2018 allowed an individual to remove personal details from court records to protect their reputation, signaling judicial support for privacy.

The DPDP Act now provides a statutory basis for such requests, reducing reliance on judicial discretion. However, courts will likely continue to play a role in interpreting exceptions, especially when freedom of speech or public interest is invoked.

Practical Challenges Under the DPDP Act While the Act establishes a framework for the right to erasure, implementing it poses challenges:

Global Reach of Data:

The internet transcends borders, and data hosted outside India may not fall under the DPDP Act's jurisdiction. For example, a foreign news site publishing an Indian citizen's data might not comply with an erasure request. This limits the Act's effectiveness in fully realizing the Right to be forgotten.

Balancing Test:

The Act does not provide detailed guidelines on weighing privacy against freedom of speech or public interest. This ambiguity may lead to inconsistent application by data fiduciaries or disputes requiring judicial resolution.

Enforcement Mechanisms:

The Data Protection Board, established under the Act, will oversee compliance, but its capacity to handle erasure requests at scale remains untested. Non-compliance by data fiduciaries could undermine the right's practical impact.

Public Figures:
For individuals in the public eye, distinguishing between private data and information of public relevance is complex. The Act's broad provisions may struggle to address these nuances.

Potential Solutions and Compromises
To address these challenges, the DPDP Act's framework could evolve in practice:

- De-Indexing: Rather than outright deletion, data could be removed from search engine results while remaining on original platforms. This preserves access for those with a legitimate interest while reducing visibility, offering a middle ground between privacy and free speech.
- Clear Guidelines: Future rules under the Act could specify criteria for balancing rights, such as the age of the data, its public significance, and the harm it causes.
- International Cooperation: Agreements with global tech firms and foreign regulators could enhance enforcement beyond India's borders.

Conclusion & Suggestions
If an individual's previous actions are made public, the public will have easy access to read/view those erroneous actions and will condemn that person based on those actions. This might result in psychological and emotional distress for the individual, as well as having an impact on his current life However, judicial judgments have suggested that it was inherent under Article 21 of the Constitution. There must be a balance between the right to privacy and protection of personal data (as defined by Article 21 of the Indian constitution) and Internet users' freedom of information (as defined by Article 19). A comprehensive data protection law must address these concerns while minimizing the conflict between the two fundamental rights that make up the Indian constitution's golden trinity (Art. 14, 19, and 21).

Several challenges complicate this balance including, Global enforcement by removing information from Indian platforms does not guarantee its erasure worldwide, limiting privacy protections. Subjectivity stands decisive in deciding what constitutes "public interest" or "harm" varies by case, requiring nuanced judgment. The risk of abuse of the Right to be forgotten could be exploited to silence criticism or evade accountability.

The DPDP Act, 2023, through its right to erasure under Section 12, embeds the essence of the Right to be forgotten within India's legal framework, reinforcing privacy as a fundamental right. However, it also highlights the inherent conflict with freedom of speech, a tension that the Act navigates through exceptions for legal obligations, public interest, and expression. While it provides a structured mechanism for individuals to reclaim control over their data, practical challenges, such as global enforcement and subjective balancing persist. As the Act is implemented, judicial interpretations and regulatory refinements will be crucial in ensuring it effectively reconciles privacy with the democratic value of free speech in India's digital landscape.

A potential compromise lies in de-indexing rather than deleting information. De-indexing removes content from search engine results, making it less accessible while preserving it for those who seek it directly. This approach mitigates the conflict but demands careful application. The conflict between freedom of speech and privacy in the context of the Right to be Forgotten is a complex issue in India. Both rights, deeply rooted in the Constitution, serve essential purposes, freedom of speech upholds democracy, while privacy protects dignity. Without specific legislation, Indian courts navigate this tension by weighing public interest, relevance, and individual harm. As the digital landscape evolves, this balancing act remains a critical challenge, reflecting the broader struggle to reconcile individual rights with collective freedoms in a connected world.

The tensions between right to respect for privacy and the freedom of expression are easy to identify, but difficult to resolve. What courts and other adjudicatory bodies must keep in mind while balancing freedom of expression and the right to be forgotten is that both the rights are fundamental, and yet qualified. Therefore, both the rights must be balanced in a fair and proportionate manner without giving precedence to one over the other.

The ideal method is to adopt a case-by-case analysis, considering in each situation whether there was a reasonable expectation of privacy, whether there was a reasonable expectation of a duty of confidence, how the information was collected, and whether an individual is personally identifiable using the collected information. This test would give courts a consistent approach to analyze the case and arrive at a decision.

- If the provision is not enacted it would will cause substantial damage or harm due to the availability of the search results linked to their name.
- The Right is required for people to have more and greater control over their personal information on the Internet.
- Victims of sexually explicit videos/pictures frequently placed on social media platforms by perpetrators to frighten and harass women may be able to use the Right to be forgotten as a remedy.
- Countries must consider how to develop the appropriate constitutive principles for the logical space of online information.

Many constitutional flaws plague the right to be forgotten, making it incompatible with its Indian context. Article 19 of the Indian Constitution preserves individuals' freedom of expression and allows an individual to post content online about another person if it is not prohibited by statutory law. As a result, the GDPR's broad definition of personal data cannot be protected under the constitution since it would violate the right to freedom of expression. As a result, the right to be forgotten in its current version would be incompatible with the Indian context, both substantively and procedurally.

The right to be forgotten is a complicated subject since it blurs the line between the right to privacy and the right to free speech and expression and therefore the Right to be forgotten

must be established statutorily under Indian law and must apply to both private individuals and the government. It is admirable that the policy makers of the country wish to take a step forward about data rights. However, before taking this step, they must ensure that they remain on firm ground, otherwise, they run the risk of being caught in a quicksand of confusion and litigation which will only serve to detract away from the evolution in rights which was envisioned.

Reproductive Rights and Queer Families in India: Legal Perspectives on Surrogacy, and Adoption Post-377

Pooja Arora[1]

Abstract

The decriminalization of homosexuality in Navtej Singh Johar v. Union of India[2] *marked a historic shift in Indian constitutional law, affirming the rights of LGBTQIA+ individuals to dignity, privacy, and non-discrimination. However, the formal legal system continues to deny queer persons full access to family formation rights, particularly in the realms of parenthood, adoption, and surrogacy. This paper critically examines the legal vacuum that persists in the wake of decriminalization and argues for the recognition and protection of queer family structures within Indian family law. The study first evaluates existing legislation governing adoption and artificial reproductive technologies, namely, the Juvenile Justice (Care and Protection of Children) Act, 2015, the Surrogacy (Regulation) Act, 2021, and the Assisted Reproductive Technology (Regulation) Act, 2021. These frameworks explicitly or implicitly exclude LGBTQIA+ individuals and non-heteronormative couples, reinforcing a narrow conception of family that is inconsistent with constitutional guarantees under Articles 14, 15, and 21. The paper further contrasts India's legislative inertia with progressive jurisprudence from jurisdictions such as Canada, South Africa, the United Kingdom and the United States of America, offering comparative insights into how legal systems have evolved to accommodate queer parenthood. Through a doctrinal and rights-based analysis, the paper makes a compelling case for reforms in Indian adoption and surrogacy laws, emphasizing the principles of equality, autonomy, and the best interests of the child. Finally, the paper contends that the transformative potential of Navtej Johar case remains unrealized without affirmative legal recognition of queer families. A truly inclusive constitutional morality necessitates that the law not only decriminalize queer existence but also dignify queer lives through equal access to family-making rights.*

Keywords: *Reproductive Rights, Queer Families, Surrogacy, Adoption Rights, LGBTQIA+, Juvenile Justice, etc.*

Introduction

The constitutional recognition of Lesbian, Gay, Bisexual, Transgender, Queer, Intersex, Asexual, Other sexual and gender identities not specifically listed (LGBTQIA+) rights in India achieved a landmark moment with the Supreme Court's decision in *Navtej Singh Johar v. Union of India*, which read down Section 377 of the Indian Penal Code,[3] and decriminalized consensual same-sex relationships.[4] This judgment was celebrated as a monumental affirmation of individual dignity, sexual autonomy, and the fundamental rights enshrined under Articles 14, 15, and 21 of the Indian Constitution.

Yet, while *Navtej Johar* removed the criminality associated with LGBTQIA+ (hereinafter referred to as 'queer') identity, it did not confer any positive legal rights in matters of family formation, particularly those concerning marriage, parenthood, adoption, and access to assisted reproductive technologies. The legal status of queer families in India, therefore, remains precarious and undefined.

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[2] Navtej Singh Johar v. Union of India, (2018) 10 SCC 1 (India).
[3] Indian Penal Code, 1860, § 377 (India).
[4] Ibid.

Family is a legal and social institution through which individuals access not just emotional support but also tangible legal rights such as inheritance, guardianship, and medical decision-making. For heterosexual married couples, these rights are recognized, regulated, and protected by law. However, for queer couples and individuals, there is no parallel recognition. Queer persons are not permitted to marry or have a family under any Indian civil or personal law, and existing statutes governing adoption and surrogacy, such as the *Juvenile Justice (Care and Protection of Children) Act, 2015*, the *Surrogacy (Regulation) Act, 2021*, and the *Assisted Reproductive Technology (Regulation) Act, 2021*, that either explicitly or implicitly exclude same-sex couples and transgender individuals.

This paper examines the legal exclusions faced by queer families in India in the post-*Navtej Johar* era, with a specific focus on three critical areas: parenthood, surrogacy, and adoption. By analyzing statutory frameworks, judicial interpretations, and the absence of affirmative protections, it highlights the constitutional and social consequences of this exclusion. The analysis is rooted in the broader framework of constitutional morality, human dignity, and equality jurisprudence.

Further, the paper adopts a comparative approach by studying international developments in countries such as Canada, South Africa, the United Kingdom and the United States of America in protecting queer parenting rights. These comparisons provide a normative benchmark for the Indian legal system, which is yet to recognize queer families despite a progressive constitutional foundation.

The objective of this paper is twofold. *First,* to demonstrate how Indian family law is ill-equipped to accommodate non-heteronormative family structures. *Second,* to argue for legal and policy reforms that ensure equal parenting rights for queer individuals and couples. Ultimately, the paper calls for a shift from mere tolerance of queer identities to a meaningful inclusion of queer lives, relationships, and families within the ambit of Indian law.

Legal Recognition of Queer Relationships in India

Despite the transformative ruling in *Navtej Singh Johar v. Union of India*,[5] which decriminalized consensual same-sex relations by reading down Section 377 of the Indian Penal Code, Indian law continues to render queer relationships invisible within the domains of civil status and family law. The judgment was monumental in affirming that the Constitution guarantees LGBTQIA+ individuals the rights to dignity, privacy, and autonomy under Articles 14, 15, 19, and 21. It recognized that queer individuals are entitled to live freely, without fear of criminal prosecution for their intimate choices.

However, *Navtej Johar* primarily addressed the *negative right* (rights that restrain other persons or governments by limiting their actions toward or against the right holder) to be free from state interference, that is, the decriminalization of certain conduct, but it did not extend into the realm of *positive rights* (rights that provide the right holder with a claim against another person or the state for some good, service, or treatment). These include the legal recognition of same-sex marriages, the right to form families through adoption or surrogacy, spousal rights such as inheritance, maintenance, tax benefits, and next-of-kin status in medical

[5] Supra at 2.

decisions. While the judgment removed the criminal stigma from queer identities, it did not translate into substantive legal entitlements that define full and equal citizenship.[6]

This omission has significant implications. In the absence of recognition under marriage or civil union laws, same-sex couples remain legal strangers to each other in the eyes of the law. They cannot avail of the legal and economic protections that flow from marriage, such as joint ownership of property, access to health insurance, or rights in case of separation or death. Furthermore, family law, encompassing adoption, surrogacy, and parental rights, continues to operate within a heteronormative framework, denying queer individuals and couples the right to legally constitute families.

Thus, the judgment, while being progressive in spirit, fell short of dismantling the structural and institutional barriers that exclude queer persons from the fabric of legally recognized familial life. The lack of legislative or judicial progress in these areas highlights the gap between constitutional morality and statutory law, a gap that must be bridged to achieve true equality.

A. The Limits of Decriminalization

From the above discussion, it is clear how the *Navtej Singh Johar case* marked a historic victory in decriminalizing consensual same-sex intimacy, however, omitting to impose any obligation on the state to take affirmative steps to recognize, protect, or facilitate queer relationships. This distinction between *negative rights* (freedom from criminalization) and *positive rights* (entitlements and protections under civil and family law) reveals the limits of decriminalization. In the absence of legal recognition, queer couples remain excluded from the full spectrum of rights that the institution of marriage and familial recognition confers.

Under current Indian law, same-sex couples cannot solemnize their relationships under the *Special Marriage Act, 1954*[7](hereinafter referred to as SMA) or any personal law governing marriage. As a result, they are systematically denied a wide range of rights and benefits that heterosexual couples enjoy by virtue of their marital status. These include the right to jointly adopt children, claim inheritance and succession rights, file taxes jointly, access spousal health and insurance benefits, and be recognized as next-of-kin in medical emergencies. This legal invisibility effectively renders queer relationships as second-class in the eyes of the state.

The legal void was starkly addressed in the 2023 decision of the Supreme Court in *Supriyo @ Supriya Chakraborty v. Union of India*.[8] In this much-anticipated case, a group of same-sex couples sought the right to marry under the SMA. The Court, in a unanimous verdict, declined to recognize a constitutional right to same-sex marriage.[9] The Judges held that the matter involved sensitive questions of social policy and legislative reform, which fell within the exclusive domain of Parliament. The Court reasoned that extending marriage rights would

[6] Id. at ¶ 192 (per Chandrachud, J.).
[7] Special Marriage Act, No. 43 of 1954 (India).
[8] Supriyo @ Supriya Chakraborty v. Union of India, (2023) SCC OnLine SC 1348, ¶ 125, 182 (India).
[9] Id. at ¶ 125.

require a fundamental reworking of existing statutory frameworks, a task more appropriately undertaken by the legislature.[10]

However, the judgment was not without progressive undertones. The Court unequivocally acknowledged the legitimacy and dignity of queer relationships, emphasizing that LGBTQIA+ persons are entitled to equal moral citizenship.[11] While it stopped short of granting marriage rights, the Court issued directions to the state to prevent discrimination against queer individuals, and to explore administrative and policy-based measures to provide them with social welfare support. These could include access to ration cards, pension schemes, health care, and the ability to nominate partners for medical or legal decisions.

Yet, these directions remain largely aspirational without a binding legal framework. In practice, the absence of a legislative mandate means queer couples continue to encounter institutional apathy and bureaucratic exclusion. The *Supriyo* decision thus reveals the judiciary's reluctance to directly intervene in the realm of family law, reinforcing the message that, while queer existence is no longer criminal, it is still not legally acknowledged in the context of familial structures. This moment marks a critical juncture in the LGBTQIA+ rights movement in India, one that demands a shift from judicial recognition of identity toward the legislative realization of substantive equality.

B. Judicial Recognition of Queer Partnerships

Although India lacks a statutory framework that formally recognizes queer relationships, certain judicial pronouncements have nonetheless affirmed the right of queer couples to cohabit and live together free from coercion or interference. These decisions, grounded in the fundamental rights guaranteed by the Constitution, provide some measure of protection for same-sex couples, albeit in a limited scope.

In *Sreeja S. v. Commissioner of Police*,[12] the Court upheld the right of a lesbian couple to live together, holding that adults in a consensual relationship, irrespective of their gender, cannot be separated by the state or by their families. The Court emphasized that such relationships are protected under Article 21 of the Constitution, which guarantees the right to life and personal liberty. The judgment recognized that autonomy in personal relationships is an essential facet of individual dignity and self-determination.

Similarly, in *Poonam Rani & Anr. v. State of U.P. & Ors*.[13] the Allahabad High Court recognized the rights of same-sex couples to cohabit and directed police protection for a lesbian couple facing threats. It underscored that sexual orientation is protected under the rights to liberty, dignity, and equality.

Further, in *Rohit Sagar & Anr. v. State of Uttarakhand & Ors*.[14] the court held that adults have a fundamental right to choose their life partners, irrespective of familial objections. The Court emphasized that such rights are protected under the Constitution of India. Accordingly, the

[10] Id. at ¶ 182.
[11] Navtej Singh Johar v. Union of India, (2018) 10 SCC 1, ¶ 156 (India).
[12] Sreeja S. v. Commissioner of Police, 2018 SCC OnLine Ker 6047 (India).
[13] Writ-C No. 1213 of 2021 (Allahabad HC Jan. 20, 2021) (India).
[14] Writ Petition (Criminal) No. 2254 of 2021 (Uttarakhand High Court, Dec. 16, 2021).

Court directed the Senior Superintendent of Police to provide immediate police protection to the petitioners to ensure their safety and safeguard their property. This judgment reinforces the constitutional rights of individuals, regardless of their sexual orientation, to personal liberty and freedom from discrimination.

Similar affirmations have come from other High Courts, including the Punjab and Haryana High Court, the Madras High Court, and the Delhi High Court.[15] These courts have repeatedly emphasized the right to companionship, privacy, and bodily autonomy as constitutionally guaranteed rights. In many instances, courts have ordered police protection for queer couples facing threats from their families or communities, recognizing that their decision to live together is legally valid and must not be impeded by societal or familial pressure.

However, these judgments primarily offer negative liberty, that is, the right to be left alone by the state. They do not translate into positive legal entitlements that heterosexual couples derive from marriage and family laws. The right to cohabit, while critical, does not automatically confer any of the legal rights associated with familial relationships, such as joint property ownership, succession and inheritance rights, spousal maintenance, legal guardianship of children, or the authority to make medical or end-of-life decisions for one's partner.

In the absence of legal recognition of their relationships, queer couples are forced to rely on private legal instruments to approximate these rights. They may execute wills to ensure inheritance, grant each other powers of attorney to make decisions in emergencies, or draft contracts to formalize financial and domestic arrangements.

However, such mechanisms are inherently limited. They are revocable, do not always hold equal legal weight, and are often not recognized by third parties, such as hospitals, insurance companies, or government institutions. Moreover, they place an unequal burden on queer individuals to legally 'construct' a relationship framework that heterosexual couples receive by default under matrimonial and family law.

The cumulative effect is that queer couples remain marginalized within the legal system, compelled to navigate a patchwork of *ad hoc protections* without the assurance of state-sanctioned recognition. These gaps underscore the urgent need for a comprehensive legislative response that affirms not only the right to cohabit but also the full range of civil, economic, and familial rights that are essential to dignified and equal citizenship.

The absence of legal recognition for queer relationships has profound consequences on the ability of LGBTQIA+ individuals to form and protect families. In India, both adoption and surrogacy laws are deeply intertwined with the institution of marriage, operating on the normative assumption that a legitimate family consists of a heterosexual, married couple. This heteronormative framework systematically excludes queer couples from accessing fundamental rights related to parenthood and family formation.

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[15] See, e.g., Sushma v. Commissioner of Police, 2021 SCC OnLine Mad 1735 (India).

Under the *Juvenile Justice (Care and Protection of Children) Act, 2015*[16], single individuals,[17] regardless of sexual orientation, can legally adopt children. However, joint adoption is permitted only for married couples.[18] Since Indian law does not recognize same-sex marriages or civil unions, queer couples are legally barred from adopting a child together. This not only denies them the ability to share legal parenthood but also creates a precarious legal situation for the child. In the event of the death or incapacitation of the legal parent, the non-legal parent has no statutory rights or responsibilities with respect to the child, leading to uncertainty and instability for the family.

Similarly, the *Surrogacy (Regulation) Act, 2021*[19] allows only altruistic surrogacy and restricts it to 'intending couples'[20] defined as a married heterosexual man and woman. This statutory exclusion prevents same-sex couples from accessing surrogacy as a pathway to parenthood, even where they have the means and consent to do so. Likewise, the *Assisted Reproductive Technology (Regulation) Act, 2021*[21] imposes similar restrictions, limiting access to ART services to married heterosexual couples and single women, thereby marginalizing queer individuals and couples from accessing reproductive healthcare and technologies.

These legal barriers have deeply personal and often devastating effects. The invisibility of queer families in the eyes of the law exposes them to multiple vulnerabilities. For instance, if one partner in a queer relationship dies intestate (without a will), the surviving partner has no legal claim over the deceased's estate under the Hindu Succession Act, 1956, Indian Succession Act, 1925 or any other applicable personal law.

Similarly, if a child is born to one partner via ART or surrogacy, the other partner, despite possibly being a primary caregiver, has no legal relationship or parental rights in respect of the child. They may be excluded from making decisions about the child's education, healthcare, or welfare, and could be entirely cut off in the event of separation or death of the biological or legal parent.

These structural exclusions perpetuate inequality and are at odds with the principles of constitutional morality, autonomy, and human dignity so strongly affirmed in *Navtej Singh Johar case*. The state's failure to recognize queer families effectively renders them non-existent in law, denying them protection, benefits, and social legitimacy.

Furthermore, this exclusion contradicts India's obligations under international human rights frameworks such as the International Covenant on Civil and Political Rights,[22] and the Convention on the Rights of the Child,[23] both of which affirm the rights to family life and non-discrimination. The legal non-recognition of queer families thus not only contravenes constitutional guarantees but also violates international norms on equality and family rights.

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[16] Juvenile Justice (Care and Protection of Children) Act, No. 2 of 2016, INDIA CODE (2016).
[17] Juvenile Justice (Care and Protection of Children) Act, 2015, § 57(1)-(2) (India).
[18] Adoption Regulations, 2022, Reg. 5(3) (India).
[19] Surrogacy (Regulation) Act, No. 47 of 2021, INDIA CODE (2021).
[20] Id. § 3(1)(r).
[21] Assisted Reproductive Technology (Regulation) Act, No. 42 of 2021, INDIA CODE (2021).
[22] International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171.
[23] Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3.

Therefore, without formal recognition, queer families are forced to exist in legal uncertainity, relying on fragile private arrangements that fail to provide the security, continuity, and dignity afforded to heterosexual families by default. This exclusion calls for an urgent legislative and policy shift towards an inclusive definition of family, one that reflects the diversity of lived realities and upholds the constitutional promise of equal citizenship for all.

C. Emerging Doctrines: Constitutional Morality and Transformative Justice

The doctrines of *constitutional morality* and *transformative constitutionalism*, articulated by the Supreme Court of India in *Navtej Singh Johar case*, are pertinent to this study and provide a compelling normative framework for challenging the legal exclusion of queer families. These doctrines have emerged as central pillars in India's evolving constitutional jurisprudence, particularly in matters of dignity, equality, and minority rights.

In the *Navtej Johar case*, the Supreme Court explicitly invoked the concept of constitutional morality to distinguish between the values enshrined in the Constitution and the prejudices of the social majority. The Court held that majoritarian notions of morality, especially those rooted in heteronormative and patriarchal traditions, cannot be used to curtail fundamental rights. Instead, it emphasized that constitutional morality demands the affirmation of individual autonomy, human dignity, and non-discrimination, even (and especially) when these values conflict with entrenched social norms.[24]

The continued insistence, both in statutory law and public policy, on defining the family in terms of a heterosexual, marital unit reflects not constitutional morality, but social morality. It imposes a narrow, exclusionary idea of family life that marginalizes queer individuals and couples, denying them the social and legal recognition necessary for equal citizenship. Applying the lens of constitutional morality compels the state to respect the diversity of familial forms and to ensure that all citizens, regardless of sexual orientation or gender identity, can access the legal protections and benefits that flow from family life.

Further, closely connected is the doctrine of transformative constitutionalism, which sees the Constitution not as a static legal code, but as a living, evolving document with the capacity, and indeed the mandate, to dismantle entrenched structures of social inequality.[25] This principle was also articulated in *Navtej Johar* case and reinforced in cases like *Joseph Shine v. Union of India*[26] and *Shafin Jahan v. Asokan K.M.*,[27] where the Court positioned itself as an active agent in promoting social justice and rectifying historical wrongs.

Transformative constitutionalism demands more than formal equality; it requires substantive change in social relations, including those within the family. It envisions the law as an instrument for expanding freedoms and reshaping social institutions in line with constitutional values. Yet, Indian family law has remained largely resistant to this transformative mandate.

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[24] Supra at 2 ¶ 121.
[25] Supra at 2 ¶ 110.
[26] Joseph Shine v. Union of India, (2019) 3 S.C.C. 39 (India).
[27] Shafin Jahan v. Asokan K.M., (2018) 16 S.C.C. 368 (India).

By continuing to structure legal rights and entitlements around the heterosexual, marital family model, the legal system reinforces outdated norms that exclude queer relationships and non-traditional families.

An inclusive interpretation of family law, grounded in the principles of constitutional morality and transformative justice, would recognize that families are formed not only by marriage or biology, but also by care, interdependence, and mutual commitment. This broader understanding is not only constitutionally justifiable but necessary to give meaningful effect to the rights to dignity, privacy, and equality under Articles 14, 15, and 21.

These emerging constitutional doctrines provide both the legal justification and the moral imperative for reforming Indian family law. They challenge the state to move beyond mere decriminalization and toward affirmative legal recognition and protection of diverse familial structures, including queer families, as a matter of constitutional fidelity and democratic justice.

Parenthood Rights for Queer Persons

Queer persons can achieve parenthood through either adoption or resorting to artificial reproductive technologies (ART) which includes procedures like in vitro fertilization (IVF), surrogacy, etc. Adoption serves as a crucial means for families to offer care, stability, and belonging to children.

Yet, India's legal framework for adoption, primarily governed by the *Juvenile Justice (Care and Protection of Children) Act, 2015,* and overseen by the Central Adoption Resource Authority (CARA), implicitly excludes LGBTQIA+ individuals and couples. While single individuals may adopt regardless of sexual orientation, joint adoption is restricted to married heterosexual couples, effectively barring same-sex couples from becoming co-parents.

The language of the law and its implementing guidelines reflect heteronormative and binary assumptions about family structure, undermining the rights of queer individuals to form families. Domestic courts have yet to significantly expand the interpretation of 'family' in adoption contexts, despite progressive constitutional judgments. In contrast, countries like Canada, South Africa, the United Kingdom and the United States of America have recognized the parental rights of same-sex couples, illustrating more inclusive models that India could consider as it moves toward legal reform.

The *Juvenile Justice (Care and Protection of Children) Act, 2015* (JJ Act) governs the legal adoption of children in India and permits both married couples and single individuals to adopt. *The Central Adoption Resource Authority (CARA)* guidelines operationalize the JJ Act and set out procedures and eligibility conditions. Under Regulation 5(2) of the *Adoption Regulations, 2022*,[28] 'single individuals' are permitted to adopt regardless of their sexual orientation, but same-sex couples are effectively excluded because only a 'married couple' is allowed to adopt jointly.[29] As same-sex marriages are not legally recognized in India, queer couples are thus denied the right to adopt a child together, even if they share a household and parenting responsibilities. This results in only one partner being legally recognized as the adoptive

[28] Adoption Regulations, 2022, Regulation 5(2), Central Adoption Resource Authority (CARA).
[29] Id. at Reg. 5(1)(a).

parent, while the other remains a legal stranger to the child. This has serious implications for the child's welfare and for the non-recognized parent, especially in cases of death, medical emergencies, or custodial disputes.

While the JJ Act does not explicitly discriminate on the basis of sexual orientation or gender identity, its interaction with marital status and the absence of same-sex marriage laws indirectly excludes queer couples. This exclusion can be challenged under Articles 14 and 15 of the Constitution for violating the principles of equality and non-discrimination, and under Article 21 for infringing on the right to family and dignity.

In the *Navtej Johar case*, the Supreme Court acknowledged that sexual orientation is an essential attribute of identity and falls within the protective ambit of Article 15.[30] Excluding queer individuals from adopting children jointly with their partners arguably constitutes discrimination on the grounds of sexual orientation. Moreover, under the best interests of the child doctrine, the law must prioritize the welfare of the child over formalistic considerations of marital status. Denying children the legal security of two parents in stable same-sex households undermines their rights and protections.

Surrogacy and Assisted Reproductive Technologies (ART) have emerged as vital avenues for family creation in India. However, despite the decriminalization of homosexuality, the current legal framework continues to exclude LGBTQIA+ individuals from accessing these options. As discussed earlier, the *Surrogacy (Regulation) Act, 2021*,[31] restricts altruistic surrogacy to Indian heterosexual married couples, explicitly barring single men, unmarried couples, and same-sex partners.

Similarly, the *Assisted Reproductive Technology (Regulation) Act, 2021*[32] mirrors these restrictions, permitting access primarily to married, cisgender heterosexual couples. This heteronormative and marital presumption not only marginalizes queer individuals but also violates principles of equality and reproductive autonomy under Articles 14 and 21 of the Constitution. As a result, queer couples are left with no legal recourse to parenthood through surrogacy or ART, underscoring the urgent need for inclusive reforms that align reproductive rights with constitutional morality and global human rights standards.

The *Surrogacy (Regulation) Act, 2021*, represents a significant shift in the legal framework surrounding surrogacy in India. While the Act was introduced with the intent to regulate surrogacy and curb the exploitation of women in commercial surrogacy arrangements, it simultaneously enshrines a heteronormative and exclusionary approach to family creation. The Act explicitly limits surrogacy to 'altruistic' arrangements, allowing only legally married heterosexual couples to access reproductive technologies like surrogacy. This is problematic in several respects, particularly for Queer individuals and couples who are expressly excluded from this reproductive avenue.

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[30] *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1, ¶ 193.
[31] Supra at 19.
[32] Supra at 21.

Section 4 of the Act clearly states that surrogacy can only be undertaken for producing a child within a 'genetic, biological, and legal relationship,' and restricts the process to 'married couples.' This provision not only restricts surrogacy to married heterosexual couples but also excludes same-sex couples, single individuals, and unmarried heterosexual couples, who are now denied the opportunity to pursue parenthood through surrogacy. The condition of being a married couple reinforces traditional, and heteronormative notions of family. This exclusion directly discriminates against queer individuals by denying them the right to form a family in a manner available to their heterosexual counterparts.

Further, the surrogacy process under this Act imposes further stringent requirements on the intending parents, including the need to have been married for at least five years.[33] These requirements reinforce the assumption that a stable family structure is only possible through a heterosexual marriage and fail to account for the growing diversity of family structures in contemporary society. By only recognizing long-term, legally recognized heterosexual marriages as appropriate for surrogacy, the law perpetuates the idea that queer and single individuals are not fit to be parents, which fundamentally undermines their reproductive autonomy.

Furthermore, the Act's exclusionary provisions violate the fundamental right to equality under Article 14 of the Indian Constitution. The Constitution guarantees equality before the law and prohibits discrimination on the grounds of sexual orientation, yet the Surrogacy Act creates a clear divide between heterosexual and LGBTQIA+ families. By denying queer couples and single individuals the right to access surrogacy, the law not only undermines their ability to form families but also marginalizes them, denying them equal treatment under the law. This legal exclusion fails to recognize the evolving nature of family in modern India, where parenthood is increasingly defined by the love and commitment of the individuals involved rather than their sexual orientation or marital status.

In its current form, the Act remains a deeply problematic statute for LGBTQIA+ individuals. It continues to uphold an outdated, rigid conception of family, one that fails to embrace diverse family structures and denies equal reproductive rights to non-heterosexual couples and individuals. By failing to recognize the constitutional principle of equality, the Act perpetuates discriminatory barriers to queer family formation, ensuring that many LGBTQIA+ individuals remain excluded from accessing reproductive technologies that are otherwise available to their heterosexual counterparts. Therefore, there is a pressing need for reform to make surrogacy more inclusive, ensuring that the right to form a family is accessible to all individuals, regardless of their sexual orientation.

The *Assisted Reproductive Technology (Regulation) Act, 2021* regulates ART practices in India, including in vitro fertilization (IVF), embryo freezing, sperm/egg donation, and related technologies. While its purpose is to streamline and regulate the burgeoning ART industry, it introduces several limitations that restrict access to these essential reproductive services for queer individuals and non-married couples.

[33] Surrogacy (Regulation) Rules, 2022, Rule 6(1)(a) (India).

Section 2 of the Act stipulates that ART services are only available to 'married couples,' effectively excluding unmarried individuals, same-sex couples, and single people from these reproductive technologies. This definition is aligned with a traditional and heteronormative view of family, one that fails to recognize the diversity of family structures that exist in contemporary society, particularly in relation to queer families.

Although the Act does not explicitly state that queer individuals or same-sex couples are prohibited from accessing ART, the reliance on the 'married couple' requirement effectively makes ART services inaccessible to them. Since same-sex couples in India are not legally recognized as married under existing laws, they are effectively barred from accessing ART facilities, including IVF and sperm/egg donation services. For single LGBTQIA+ individuals, the law's requirement of a heterosexual marriage to access ART services similarly leaves them without recourse, preventing them from utilizing ART for conception.

The Act's reliance on the concept of 'marriage' to determine eligibility for ART also perpetuates a narrow, traditional understanding of family. By defining access to ART through the lens of a marital relationship, the law implicitly marginalizes non-heteronormative family structures, including those formed by queer couples. This discriminatory stance not only violates the constitutional right to equality under Article 14 but also undermines the right to reproductive autonomy under Article 21. It prevents queer individuals from exercising control over their reproductive choices and forming families according to their desires and needs.

The exclusionary provisions of the ART Act reflect outdated social norms that fail to acknowledge the evolving definitions of family. By limiting access to ART services based on marital status and failing to recognize the diverse nature of familial structures, the Act discriminates against queer individuals and couples, effectively denying them the right to form families with the same reproductive opportunities afforded to heterosexual married couples. Reforming this law to be more inclusive would not only uphold constitutional principles of equality and autonomy but also ensure that all individuals, regardless of their sexual orientation or marital status, can access the reproductive services necessary to form their desired families.

International Standards and India's Obligations

India's exclusion of LGBTQIA+ individuals and couples from the full spectrum of family rights, including adoption, stands in tension with its international human rights commitments. As a signatory to the United Nations Convention on the Rights of the Child (UNCRC), India is obligated to ensure that all children are treated without discrimination and that their best interests are the paramount consideration in all actions affecting them.[34] The UNCRC does not prescribe a specific model of the family, nor does it impose heteronormative constraints. On the contrary, the UN Committee on the Rights of the Child has emphasized that children raised in LGBTQIA+ families are entitled to the same legal protection, security, and

[34] Convention on the Rights of the Child, arts. 2, 3, Nov. 20, 1989, 1577 U.N.T.S. 3.

recognition as those in heterosexual families.[35] This includes safeguarding their emotional and legal relationship with both parents, regardless of sexual orientation or gender identity.

In addition, the *Yogyakarta Principles* explicitly address the rights of LGBTQIA+ individuals to form families. *Principle 24* urges states to take all necessary legislative, administrative, and other measures to ensure that laws and policies governing adoption, foster care, and reproductive health do not discriminate based on sexual orientation or gender identity. While the Yogyakarta Principles are not legally binding, they are widely regarded as authoritative interpretive tools and have been cited by courts and human rights bodies worldwide. Therefore, incorporating these standards into domestic policy is crucial if India is to fulfill its global human rights obligations and provide equal dignity and protection to all families.

Other Jurisdictions

Globally, several jurisdictions have undertaken significant legal reforms to ensure that Queer individuals and couples can access parenthood through surrogacy, assisted reproductive technologies, and adoption. These inclusive frameworks are guided by principles of equality, dignity, and non-discrimination, offering valuable models for India in the aftermath of the *Navtej Singh Johar case*.

Canada

Canada permits altruistic surrogacy and grants same-sex couples full access to ART and adoption. Under the *Assisted Human Reproduction Act 2004*, commercial surrogacy is prohibited, but intended parents, including LGBTQIA+ individuals, can enter into altruistic arrangements and be legally recognized from birth.[36] Further, provincial family laws allow for joint and second-parent adoptions without discrimination based on sexual orientation.[37]

South Africa

South Africa's *Children's Act 2005* and *Civil Union Act 2006* ensure full parental rights for the Queer couples. The landmark case *Du Toit and Another v. Minister for Welfare and Population Development*[38] struck down legislative provisions preventing same-sex joint adoption. South Africa also allows surrogacy under judicial oversight through a formal agreement approved by a court, regardless of the sexual orientation of the intended parents.[39]

United Kingdom

In the UK, the *Human Fertilisation and Embryology Act 2008* permits same-sex couples to access fertility treatments and recognizes both partners as legal parents when consent forms are properly executed.[40] The *Adoption and Children Act 2002* legalized adoption by same-sex couples in England and Wales, reflecting a broader understanding of the child's best interests.

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[35] U.N. Comm. on the Rights of the Child, General Comment No. 14 (2013).
[36] Assisted Human Reproduction Act, S.C. 2004, c. 2 (Can.).
[37] See M.D.R. v. Ontario (Deputy Registrar General), 2006 CanLII 19053 (Can.).
[38] 2002 (10) BCLR 1006 (CC) (S. Afr.).
[39] Children's Act 38 of 2005 §§ 292–303 (S. Afr.).
[40] Human Fertilisation and Embryology Act, 2008, §§ 42–46 (U.K.).

Surrogacy is permitted under the *Surrogacy Arrangements Act 1985*, and legal parenthood is transferred through a parental order.[41]

United States (Selected States)

While surrogacy and adoption laws vary by state, inclusive policies exist in many jurisdictions. California, for example, offers robust protection through the *Uniform Parentage Act*, which allows intended same-sex parents to be recognized regardless of genetic relation.[42] Courts have upheld second-parent and joint adoption rights[43] permitted access to ART and surrogacy for queer couples.

These comparative legal models demonstrate that the inclusion of queer families in reproductive and adoption frameworks is not only legally viable but constitutionally and ethically necessary. India can look to these jurisdictions as benchmarks for reforming its own restrictive surrogacy and adoption laws to uphold the rights guaranteed in *Navtej Johar* case and affirmed under international human rights principles such as the UNCRC and Yogyakarta Principles.

The lack of legal provisions recognizing the reproductive rights of queer persons in surrogacy and ART law leads to significant challenges. The right to reproductive autonomy is fundamental to personal liberty and dignity, as affirmed in numerous international human rights frameworks. Denying queer persons, the right to access ART and surrogacy services directly undermines their ability to form families, thereby perpetuating inequality and exclusion.

International jurisdictions have made significant strides in ensuring that LGBTQIA+ persons can access reproductive technologies. For example, in South Africa, the law permits same-sex couples and single persons to access ART and surrogacy services. The United Kingdom also provides access to ART and surrogacy for same-sex couples and unmarried individuals. These legal reforms reflect a broader understanding of family as an institution that is not bound by traditional gender or marital norms.

India, however, continues to exclude queer persons from these rights under the current legal frameworks. As a signatory to the International Covenant on Civil and Political Rights (ICCPR), India is obligated to ensure equal access to reproductive rights for all individuals, regardless of their sexual orientation or gender identity. The lack of reform in the surrogacy and ART sectors reflects the state's failure to live up to its international obligations. The exclusion of queer persons from surrogacy and ART services can be challenged on constitutional grounds.

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[41] Id. § 54.
[42] Cal. Fam. Code §§ 7600–7730.
[43] See Elisa B. v. Superior Court, 117 P.3d 660 (Cal. 2005).

Article 14 of the Indian Constitution guarantees equality before the law, prohibiting discrimination on the grounds of sex, religion, caste, or place of birth. Excluding queer persons from reproductive technologies and surrogacy directly violates the principle of equality by denying them access to the same opportunities afforded to heterosexual married couples.

Moreover, Article 21, which guarantees the right to life and personal liberty, has been interpreted by the Supreme Court to include the right to live with dignity, autonomy, and privacy.[44] The denial of reproductive autonomy to queer individuals undermines their dignity and personal liberty, as it forces them to live in a system that does not recognize their rights as equal citizens.

Recommendations and Conclusion

A. Recommendations for Legal Reforms

The challenges faced by queer families in India, particularly concerning parenthood, adoption, surrogacy, and assisted reproduction, require urgent legal reforms to ensure equality and justice. To remedy the existing disparities, the following recommendations are proposed:

1. Recognition of Same-Sex Marriages

A foundational step toward ensuring equal access to parenthood for LGBTQIA+ individuals is the legal recognition of same-sex marriages. The Indian legal system must amend the Special Marriage Act, 1954, and other relevant family laws to explicitly recognize same-sex marriages. This would grant queer couples the right to adopt children jointly, access surrogacy services, and enjoy all the benefits and protections afforded to heterosexual married couples. Legalizing same-sex marriage would not only reflect the social reality of queer families but also uphold the constitutional values of equality and dignity.

2. Reforming Adoption Laws

Currently, adoption laws in India exclude same-sex couples and LGBTQIA+ individuals from adopting children jointly. The Juvenile Justice (Care and Protection of Children) Act, 2015, and CARA guidelines should be amended to explicitly permit joint adoption by same-sex couples and individuals, removing the heterosexual marriage requirement. Further, the legal process for adoption should be streamlined to ensure that queer individuals can adopt children without unnecessary bureaucratic hurdles. These reforms would promote the welfare and best interests of children by allowing them to grow up in loving, stable, and supportive homes, regardless of their parents' sexual orientation.

3. Inclusive Surrogacy and ART Laws

To ensure that queer individuals and couples can access surrogacy and assisted reproductive technologies, the *Surrogacy (Regulation) Act, 2021,* and the *Assisted Reproductive Technology (Regulation) Act, 2021* should be amended to remove discriminatory provisions that limit

[44] K.S. Puttaswamy v. Union of India, (2017) 10 SCC 1 (India) (holding privacy is a fundamental right under Article 21).

access to reproductive services based on marital status or sexual orientation. These laws should be revised to allow queer persons, including single individuals and same-sex couples, to access ART and surrogacy, as long as they meet the medical and ethical criteria. This would reflect the evolving definition of family and reproductive rights, ensuring that queer individuals are not excluded from the opportunity to form families.

4. Strengthening Constitutional Protections

India's constitutional framework provides the bedrock for the protection of LGBTQIA+ rights, including reproductive rights. The Supreme Court has repeatedly emphasized the importance of equality, non-discrimination, and the right to dignity in its decisions. Future judicial pronouncements should continue to interpret Article 14, Article 15, and Article 21 expansively to protect LGBTQIA+ families. The judiciary should strike down laws and policies that perpetuate discrimination and ensure that queer families have the same rights and recognition as heterosexual families.

5. Creating Social Awareness and Legal Education

Beyond legislative reform, societal attitudes towards queer individuals and families must evolve. Awareness programs in schools, workplaces, and communities are essential to break down prejudices and stereotypes. Legal education about the rights of LGBTQIA+ persons, particularly regarding family law, surrogacy, and adoption, can empower queer individuals to navigate the legal system and claim their rights. It is crucial to foster an inclusive society that accepts diverse family structures and recognizes the right of all individuals to form families based on love, respect, and mutual consent.

Conclusion

In conclusion, while the decriminalization of same-sex intimacy in *Navtej Singh Johar*[45] was a significant step forward, the legal system in India still lags in recognizing and protecting the rights of queer individuals, particularly in matters of parenthood. The exclusion of LGBTQIA+ persons from adoption, surrogacy, and assisted reproductive technologies perpetuates discrimination and denies them their basic human rights. The law must evolve to reflect the realities of modern families, which are diverse, inclusive, and free from societal norms that seek to define family through heteronormative standards.

The Indian legal system must prioritize the equality and dignity of LGBTQIA+ individuals, ensuring that queer families have the same legal recognition and protections as heterosexual families. This can only be achieved through comprehensive legal reform, including the recognition of same-sex marriages, amendments to adoption and surrogacy laws, and greater judicial activism in safeguarding the rights of LGBTQIA+ persons.

[45] Supra at 2.

Further, the state must create an inclusive and supportive environment through social awareness and legal education, enabling queer individuals to exercise their reproductive rights and form families without fear of discrimination. The recognition of queer families and their right to parenthood is a crucial step in the broader struggle for LGBTQIA+ equality in India. A society that embraces diversity and recognizes the rights of all its citizens is a society that truly upholds the values of justice, liberty, and equality.

Legal And Ethical Dimensions of Informed Consent in Indian Mental Healthcare: Challenges and Prospects

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Abstract

Informed consent refers to the process of providing patients with sufficient information that enables them to make a voluntary and informed decision about whether to undergo or forego a procedure, provided that the information is capable of being understood by the patient. It is a foundational principle in medical ethics and legal jurisprudence, especially within the domain of mental healthcare, where autonomy, capacity, and vulnerability intersect. This paper analyses the meaning, elements, and types of consent, including implied, expressed, proxy, and blanket consent and explores the legal and ethical dimensions of informed consent in mental healthcare in India, drawing attention to its evolution and practical implementation. The discussion is grounded in Indian legal frameworks, including the Mental Healthcare Act of 2017, the Indian Medical Council Regulations of 2002, the Clinical Establishments Act standards, the Drugs and Cosmetics Act of 1940, and the Consumer Protection Act of 1986, among others. The paper further evaluates the capacity to consent, legal procedures for admission and treatment of persons with mental illness (PMI), and the legal ethical considerations in psychiatric treatment. The role of the judiciary is also analysed through key precedents that shape the contours of consent in medical interventions. The paper also highlights the challenges in obtaining consent in psychiatric treatments and concludes by offering suggestions aimed at making informed consent a meaningful and enforceable right in the Indian mental healthcare settings.

Keywords – *Informed Consent, Mental Healthcare, Mental Illnesses, Mental Health, Persons with Mental Illness.*

Introduction

Consent is one of the most critical components for safeguarding the welfare of patients or research participants. Medical professionals have a legal and ethical obligation to provide patients with clear and understandable information, enabling them to comprehend it and make informed, voluntary decisions. The patient's diagnosis, the proposed course of treatment, the risks and benefits of the treatment, alternative treatments and their associated risks and benefits, and the risks of refusal are all examples of material facts that medical professionals must

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disclose to ensure effective and informed decision-making.[3] The concept of consent is embodied in the Roman maxim "Volenti nonfit injuria," that is, he who consents cannot complain of it.[4]

Types of Consent

Consent is fundamental to ethical healthcare, ensuring respect for patient autonomy and dignity. It may be expressed clearly in oral or written form or may be implied through conduct. Consent is crucial, especially for high-risk treatments. Additionally, proxy consent and blanket consent arise in exceptional circumstances. Following are the various types of consent -

Implied Consent—This type of consent, which is not written but legally enforceable, is seen in daily practice either by the conduct or behaviour of the patient or by the circumstances under which treatment is given.

Expressed Consent – When the terms are specified in unambiguous language, it is known as expressed consent. It could be oral or written. Oral consent is used for therapeutic operations or brief examinations; however, it is best to get it in front of a witness. Expressed consent should be acquired when the course of treatment is expected to cause more than minor discomfort, when there is a significant risk involved, or when it will cause a body function to deteriorate. Consent should be obtained before invasive procedures, surgery, and even the use of drugs or analgesics during the treatment. Written consent gives the participant the highest level of assurance because it ensures active and explicit consent.[5]

Proxy Consent or Substitute Consent – This is another type of consent that is not given by the patient but by another person on their behalf. Irrespective of age, for a person who is incompetent due to unsoundness of mind, consent will be obtained from the patient's guardian. In India, the Court has not come across borderline cases of an adult refusing treatment, leading to an emergency and leaving the doctor in a dilemma, unlike in the West. All the above types of consent can take the shape of Proxy Consent, e.g., A parent for a child, a Close relative for mentally unsound/unconscious patients, etc.

Blanket Consent - This refers to the general consent obtained to cover everything done to the patient without specific mention of the procedures. Blanket consent is legally inadequate for procedures involving risks or alternatives.

Informed Consent - Informed consent is a process in which a healthcare professional educates a patient about the risks, benefits, and alternatives associated with a specific procedure or intervention.[6] Informed consent is required from individuals who are mentally capable of making their own decisions before the start of medical treatment.

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[3] Rateesh Sareen & Akanksha Dutt, *Informed Consent in Medical Decision Making In India* (2019), https://zenodo.org/record/2597154.

[4] Navpreet Kaur, *Informed Consent: A Legal Formality or a Mandate*, 1 AMEI'S CURRENT TRENDS IN DIAGNOSIS & TREATMENT 50 (2017), https://www.ctdt.co.in/doi/10.5005/jp-journals-10055-0012.

[5] Rateesh Sareen and Akanksha Dutt, *supra* note 1.

[6] Parth Shah et al., *Informed Consent, in* STATPEARLS (2025), http://www.ncbi.nlm.nih.gov/books/NBK430827/.

Meaning And Scope of Informed Consent

A cornerstone of medicine, informed consent ensures ethical treatment decisions and patient-centred care, respecting patients' autonomy. It is a communication process between the patient and the clinician and goes beyond simply signing a document. The patient can refuse or withdraw consent at any time during the treatment. To define "informed consent" properly, appropriate criteria of information and consent must be identified. Informed consent is shorthand for informed, voluntary, and decisionally-capacitated consent. When a capacitated (or "competent") patient or research participant consents voluntarily to treatment or participation after receiving full disclosures and understanding everything, such consent is considered fully informed.

If over-demanding criteria such as "full disclosure and complete understanding" are adopted, then informed consent becomes impossible to obtain. Conversely, if under-demanding criteria such as "the patient signed the form" are used, then informed consent becomes too easy to obtain and loses its meaning (as informed) and its moral significance (as valid consent).[7] The complexity of medical research and healthcare has increased. As a result, new medical issues emerge, and the concept of informed consent continues to become more complex. The subject of informed consent is now more accessible than ever due to advancements in technology, a wide range of patient demographics, and an increasing focus on collaborative decision-making.[8] In medical practice and research involving human subjects, the concept of informed consent has undergone substantial change.

Elements of Informed Consent

Informed consent requires that the information related to the potential risks and benefits of the treatment, alternatives to participation, the right to withdraw without penalty, and alternatives to involvement be presented in a concise, clear, and easily understandable manner. Consent is made up of four distinct but co-related elements – Voluntariness, Capacity, Knowledge, and Decision-making. A patient's willingness to undergo treatment is indicated by their voluntariness. Capacity refers to the patient's level of comprehension of the nature and implications of the recommended course of treatment. Knowledge suggests that the patient has received enough disclosures regarding the nature and implications of the treatment. The ability to make decisions about consent is referred to as informed decision-making. All of these components must be included in the consent for it to be deemed legally valid.[9] Section 13 of the Indian Contract Act of 1872 defines consent as "two or more persons are said to consent when they agree upon the same thing in the same sense."

In healthcare delivery, many "methods" are used to secure the patient's authorisation to give a specific therapy or procedure. Although not ideal or ethical, they are commonly used as alternatives to consent. These include assent, persuasion, and coercion. Coercion in psychiatric

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[7] *Beauchamp-TL-Faden-RR-Meaning-and-Elements-of-Informed-Consent.Pdf*, https://bioethics.jhu.edu/wp-content/uploads/2022/05/Beauchamp-TL-Faden-RR-Meaning-and-Elements-of-Informed-Consent.pdf (last visited Jan. 31, 2025).
[8] Shah et al., *supra* note 6.
[9] Kaur, *supra* note 4.

care is prevalent, and it is typically evident in the use of involuntary admission, involuntary treatment, restraints, isolation, and outpatient commitment. The Mental Healthcare Act of 2017, with its emphasis on autonomy, seeks to improve coercive methods in psychiatric care. Informed consent must be preceded by disclosure of sufficient information. Consent can be challenged on the grounds that adequate information has not been disclosed to enable the patient to make a proper and informed decision. Therefore, accurate, adequate and relevant information must be provided truthfully in a form (using non-scientific terms) and language that the patient can understand. It cannot be a patient's signature on a dotted line obtained routinely by a staff member.

Role of Informed Consent in Healthcare

Informed consent plays a pivotal role in healthcare by ensuring that patients are informed about the medical procedures or treatments they may undergo, enabling them to make informed, independent, and autonomous decisions. By safeguarding patients' rights, promoting transparency, and building trust between the patients and the healthcare providers, the process of informed consent attempts to serve both moral and legal obligations. It enables patients to actively participate in their treatment plans and evaluate their options. The process respects patients' autonomy and encourages them to make choices that are consistent with their values, beliefs, and preferences. Furthermore, by proving that patients were properly informed, informed consent protects medical professionals from severe legal responsibility in the event of unfavourable results. Ultimately, informed consent is a tool to enhance patient-centred care and strengthen the clinician-patient relationship through open, honest communication.[10] Lack of informed consent can be used to establish negligence (and, hence, malpractice and torts), as well as battery and assault.[11]

Legal and Ethical Perspective

Informed consent is a term that has been elaborated in the context of ethics, law, and medicine. As a consequence, the term may denote quite different things to specialists in different disciplines, even at the most general level and among persons to whom informed consent is not a novelty.[12] The history of informed consent is rooted in multiple disciplines and social contexts, including health professions, law, the social and behavioural sciences, and moral philosophy.[13] In recent years, the most influential fields have been law and moral philosophy; the central problems of informed consent have been framed in their vocabularies.[14]

Notwithstanding the complexities and intricacies surrounding these two foundational concepts, the fundamentals of the moral and legal approaches to informed consent are easy to understand. The legislation mainly addresses clinical settings rather than research settings. From a legal

[10] Shah et al., *supra* note 6.
[11] Beauchamp-TL-Faden-RR-Meaning-and-Elements-of-Informed-Consent.pdf, *supra* note 7.
[12] Jessica W Berg and Paul S Appelbaum (eds), *Informed Consent: Legal Theory and Clinical Practice* (2nd ed, Oxford University Press 2001) 11.
[13] Ruth R Faden, Tom L Beauchamp and Nancy MP King (eds), *A History and Theory of Informed Consent* (Oxford University Press 1986) 3.
[14] *Id.*

perspective, a doctor must both inform and get consent from their patients. If the patient is injured due to a doctor's failure to disclose information about a procedure, the patient may be entitled to compensation from the doctor for causing the injury. This legal interpretation of informed consent places greater emphasis on monetary compensation for unfavourable medical outcomes than it does on information disclosure or consent of the patient agreement in general. From a moral perspective, informed consent has less to do with the liability of medical professionals as agents of disclosure and more to do with the free will and choices of the patients and subjects.[15] Before undergoing an operation, test, or surgery, patients have the freedom to obtain related information and to decide what should or should not happen to their bodies. No one else has the authority to force the patient to do anything. Even a doctor can only assist patients in making decisions.[16]

History of Informed Consent

Informed consent has been traced, or rather projected back to, the Hippocratic Oath.[17] The history of informed consent dates back to the 16th century, with its principles evolving significantly since the 1940s.[18] Medical practices were largely paternalistic in the early 20th century, with doctors often making decisions for patients without providing them with detailed information. The concept of informed consent began to take shape in response to several landmark cases, including Schloendorff v. Society of New York Hospital (1914), which established that every human being of adult years and sound mind has the right to determine what shall be done with their own body. This ruling established the principle that patients must consent to medical procedures.[19]

The term "informed consent" is considered to have been first used in a medical malpractice lawsuit in the United States by attorney Paul G. Gebhard in the Salgo v. Leland Stanford Jr. University Board of Trustees court case in 1957. The atrocities during World War II led to the formal recognition of informed consent as a fundamental ethical principle as a result of the human experimentations conducted by Nazi Germany doctors. In addition to judging war criminals, the Nuremberg trials established ten ethical standards or principles (the Nuremberg Code), with informed consent at the top of the list.[20]

The Nuremberg Code is a guiding force in decisions related to human experimentation, although no country has ever officially adopted it. As the cornerstone of research and medical ethics, the Nuremberg Code has influenced all International ethical guidelines, including the principles of good clinical practice (GCP) and the Declaration of Helsinki (1964). Informed consent is now

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[15] *Id.*
[16] K H Satyanarayana Rao, *Informed Consent: An Ethical Obligation or Legal Compulsion?*, 1 J CUTAN AESTHET SURG 33 (2008), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2840885/.
[17] K S Jacob, *Informed Consent and India*, 27 THE NATIONAL MEDICAL JOURNAL OF INDIA (2014).
[18] *A History of Informed Consent in Research*, https://www.infonetica.net/articles/research-informed-consent-history (last visited Jan. 30, 2025).
[19] Shah et al., *supra* note 6.
[20] *The History of Informed Consent | 京都大学 iPS細胞研究所 上廣倫理研究部門*, (Jan. 30, 2020), https://uehiro-ethics.cira.kyoto-u.ac.jp/en/column/vol21/.

codified in both International and National Laws. The International Covenant on Civil and Political Rights (ICCPR), adopted by the United Nations in 1966, came into force on 23 March 1976. According to Article 7, it prohibits medical or scientific experimentation without the free and informed consent of the subjects.

Informed Consent in India

In India, "Informed Consent" refers to the "Voluntary written assent of a subject's willingness to participate in a particular study and in its documentation. Confirmation is sought only after information about the trial, including an explanation of its status as research, its objectives, potential benefits, risks, and inconveniences, as well as alternative treatments that may be available, has been provided to the possible subject.[21] The principle of autonomy is enshrined within Article 21 of the Indian Constitution, 1950, which deals with the right to life and personal liberty. Medical practitioners must provide all the information to the patients in a language they can comprehend. Consequently, reasonable information is any information a doctrine determines is appropriate in light of best practices. Given the knowledge gap in this area, the professional regulatory body for medicine can play a crucial role in setting standards.[22]

The common law application of consent is not fully developed in India, although the Indian courts have often used these principles. In such situations, one can refer to the provisions of the Indian Contract Act of 1872 and Bharatiya Nyaya Sanhita, 2023. If both parties are competent, there is a contract between the medical professional and his patient, which gives rise to contractual obligations.[23] As per Section 11 of the Indian Contract Act of 1872, Parties are generally competent if (i) They have attained the age of majority as per the law they are subject to, (ii) They are of sound mind, and (iii) They are not disqualified from contracting by any law to which they are subject. Furthermore, consent must be given freely and should not be obtained through coercion, undue influence, fraud, mistake, or misrepresentation. According to Sections 26 and 28 of the Bharatiya Nyaya Sanhita, 2023, the age for giving valid consent for any medical procedure is 12 years. As a result, a doctor who obtains a patient’s consent for medical or surgical treatment who is 12 years of age or older can legally be considered to have obtained valid consent and is not subject to criminal liability. Nonetheless, Section 25 of the B.N.S., 2023 states that 18 is the age for giving consent for acts not intended and not known to be likely to cause death or grievous hurt. These actions are not always beneficial to the individual, though. The following provisions also uphold the right to informed consent in India -

Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002

The Medical Council of India (MCI), with the approval of the Central Government, has established clear guidelines for obtaining consent, particularly before surgery or other invasive medical procedures. These guidelines serve as the standard for ethical medical practice in India and guarantee that healthcare providers follow a standard protocol when obtaining informed

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[21] *Good-Clinical-Practice-Guideline.Pdf*, https://rgcb.res.in/documents/Good-Clinical-Practice-Guideline.pdf (last visited Jan. 31, 2025).
[22] Kaur, *supra* note 4.
[23] *Id.*

consent from patients.[24] The 2002 Regulations discuss consent for treatment interventions and surgical procedures. According to the regulations, including 7.16, 7.21 and 7.22, consent is required for various medical interventions, including obstetric care, sterilisation procedures, surgical procedures, abortion, in vitro fertilisation, artificial insemination, clinical drug trials and other research. The patient must be able to sign a contract to consent to any of those above medical or surgical procedures, which means they should be at least eighteen years of age, of sound mind, and not disqualified by any law to which they are subject. Regulation 7.16 specifically provides that "before performing an operation, the physician should obtain in writing the consent from the husband or wife, parent or guardian in the case of a minor, or the patient himself as the case may be, in an operation which may result in sterility the consent of both husband and wife is needed.[25]

Clinical Establishment Act Standards for Hospitals (LEVEL 1A &1B) by National Clinical Establishments Council

The Central Government enacted the Clinical Establishments (Registration and Regulation) Act, 2010 to provide for registration and regulation of all clinical establishments in the country with a view to prescribe the minimum standards of facilities and services provided by them. The "National Council for Clinical Establishments" and 'The Clinical Establishments (Central Government) Rules, 2012" were notified under this Act vide Gazette. This Act applies to all kinds of clinical establishments from the public and private sectors of all recognised systems of medicine, including single-doctor clinics. The only exception will be establishments run by the Armed forces.[26] Standard 10.23 provides that "Informed consent shall be obtained from the patient/ next of kin/ legal guardian as and when required as per the prevailing Guidelines / Rules and regulations in the language patient can understand (e.g., before Invasive procedures, anaesthesia, Blood transfusion, HIV testing, Research, etc)." Annexure 9 deals with the Informed Consent/Consent Guidelines and states that the following information in an understandable language and format should be included in the informed consent –

- Name of the patient/ guardian (in case of minor/mentally disabled)
- Registration number of patient
- Date of admission
- Name & Registration number of treating doctor
- Name of procedure/operation/investigation/blood transfusion /anaesthesia/ potential complications
- Signature of patient/guardian with date and time.[27]

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[24] Anmol Mahani* & Rudranath Zadu, *The Role of Consent in Indian Judiciary: Implications for Cancer Treatment Practices*, 11 INDIAN JOURNAL OF FORENSIC AND COMMUNITY MEDICINE 159, https://www.ijfcm.org/article-details/23353 (last visited Jan. 31, 2025).

[25] *Code of Medical Ethics Regulations, 2002 | NMC*, https://www.nmc.org.in/rules-regulations/code-of-medical-ethics-regulations-2002/ (last visited Apr. 5, 2025).

[26] *147.Pdf*, http://clinicalestablishments.gov.in/WriteReadData/147.pdf (last visited Apr. 6, 2025).

[27] *Id*.

Similar provisions are provided in the Clinical Establishment Act Standards for Hospital (LEVEL 2) and (LEVEL 3) under their standard 10.11 and Annexure 8, which deals with the procedure of Informed Consent and the information to be included in it.

Clinical Establishment Act Standards for Integrated Counseling and Testing Centre

Standard 9.2.1 provides that "Informed consent shall be obtained from the client/patient/ next of kin/ legal guardian as and when required as per the prevailing guidelines/rules and regulations in the language patient can understand (e.g. HIV testing)."[28]

The Charter of Patients' Rights and Responsibilities

The "Charter of Patients' Rights and Responsibilities," approved by the National Council for Clinical Establishments in 2021, outlines 20 rights and 6 responsibilities, aiming to ensure fair healthcare and strong patient-provider relationships while also promoting public awareness of patient rights and responsibilities. It provides that "A patient and his/her representative with respect to the clinical establishment has the right to informed consent before specific tests/treatment (e.g. surgery, chemotherapy). It also stipulates that informed consent of the patient should be obtained before the digitisation of medical records.[29]

The Consumer Protection Act, 1986

Informed Consent was non-existent in India until the Consumer Protection Act was made applicable to the medical profession as a result of the Supreme Court Judgment in the case of *Indian Medical Association v. V. P.* Shantha (1995).[30] After this judgment, the medical profession was brought under section 2(1)(o) of CPA, 1986; now in Section 2 (24) of the Consumer Protection Act 2019 it has also included the following categories of doctors/hospitals under this section –

a. All medical/dental practitioners doing independent medical/dental practice unless rendering only free service.
b. Private hospitals charging all patients.
c. All hospitals have free as well as paying patients, and all the paying and free category patients receive treatment in such hospitals.
d. Medical/dental practitioners and hospitals paid by an insurance firm for the treatment of a client or an employment for that of an employee.

It exempts only those hospitals and the medical and dental practitioners of such hospitals that offer free services to all patients.[31]

The Drugs and Cosmetics Act, 1940, Rules 2016 on Informed Consent

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[28] *230.Pdf*, http://clinicalestablishments.gov.in/WriteReadData/230.pdf (last visited May 16, 2025).
[29] *3181.Pdf*, http://www.clinicalestablishments.gov.in/WriteReadData/3181.pdf (last visited May 16, 2025).
[30] AIR 1996 SC 550.
[31] Pawan Kapoor et al., *The Consumer Protection Act: A Review of Legal Perspective*, 2 INTERNATIONAL JOURNAL OF RESEARCH FOUNDATION OF HOSPITAL AND HEALTHCARE ADMINISTRATION 121 (2014), https://www.jrfhha.com/doi/10.5005/jp-journals-10035-1026.

The Drugs and Cosmetics Act, 1940, along with the Drugs and Cosmetics Rules, 1945 (amended in 2016), outlines essential regulatory provisions regarding clinical trials, particularly concerning informed consent in India. The amendments introduced in 2016 significantly strengthened the ethical and procedural safeguards in biomedical and clinical research, particularly for vulnerable populations. It is the duty of the primary treating doctor administering the potentially hazardous test/treatment to explain to the patient and caregivers the main risks that are involved in the procedure. After giving this information, the doctor may proceed only if consent has been given in writing by the patient/caregiver or in the manner provided by the Drugs and Cosmetic Act Rules 2016 on informed consent.

Informed Consent in Indian Mental Healthcare Settings

The Mental Healthcare Act (MHCA) of 2017 serves as the current legal framework for psychiatric patients. It was enacted in 2017 by the Indian Parliament after ratifying the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD) in May 2008. The passage of this Act marked a significant advancement in understanding the value of mental health and ensuring the welfare of individuals. It marks a turning point in Indian legislation related to mental healthcare. The goals of this groundbreaking legislation were to advance the rights of people with mental illnesses and close, long-standing gaps in mental healthcare services. The Act has established a more humane and inclusive approach to mental healthcare in the nation.

The Act mandates informed consent in admission, treatment, research procedures and discharge planning. The MHCA supports the National Ethical Guidelines for BioMedical and Health Research involving Human Participants, which were established by the Indian Council of Medical Research in 2017. Coercion in psychiatric care is prevalent, and it is typically evident in the use of involuntary admission, involuntary treatment, restraints, isolation, and outpatient commitment. The MHCA, 2017, with its emphasis on autonomy, seeks to improve coercive methods in psychiatric care. *Section 2(i)* of the MHCA, 2017 provides that "informed consent" means consent given for a specific intervention without any force, undue influence, fraud, threat, mistake or misrepresentation and obtained after disclosing to a person adequate information, including risks and benefits of, and alternatives to, the specific intervention in a language and manner understood by the person.[32]

Decision-Making Capacity in Mental Healthcare

Under the MHCA, 2017, persons with mental illnesses (PMI) are presumed to have the capacity to make their own mental healthcare decisions, with mental capacity and informed consent serving as cornerstones for patient autonomy and active participation in treatment. The onus is on the mental health professional (MHP) to prove otherwise. [33] *Section 4* of the MHCA, 2017, deals with the capacity to consent to mental healthcare and treatment decisions. It provides that every individual, including a person with mental illness, shall be deemed to have the capacity

[32] The Mental Healthcare Act 2017, 2(i).
[33] Furkhan Ali et al., *Consent in Current Psychiatric Practice and Research: An Indian Perspective*, 61 INDIAN J PSYCHIATRY S667 (2019), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6482676/.

to make decisions regarding their mental healthcare or treatment if such person has the ability to –

a. understand the information that is relevant to making a decision on the treatment or admission or, personal assistance, or
b. appreciate any reasonably foreseeable consequence of a decision or lack of decision on the treatment or admission or, personal assistance, or
c. communicate the decision under sub-clause (a) by means of speech, expression, gesture or any other means.[34]

Admission and Treatment of PMI

Section 22 of the MHCA, 2017, specifies that a person with mental illness (PMI) and his nominated representative shall have the *right to receive information* in the language and form that he understands. Such information includes provisions of the law under which he has been admitted, the nature of the mental illness and the proposed treatment plan, along with the known side effects of the proposed treatment, and his right to apply to the concerned board for a review of admission.[35] *Section 89(6)* and *section 90(11)* of the MHCA provide that all persons with mental illness admitted under these sections will be treated after taking into account the "informed consent" of the patients with the support of their nominated representatives. *Section 87(7), section 89(7)* and *Section 90(12)* of the Act further provide that a nominated representative can give informed consent on behalf of a minor and on behalf of a person with a mental illness admitted under Section 89 and 90, respectively.

Section 94 of the MHCA, 2017 deals with “Emergency treatment” and allows a registered medical practitioner to provide any medical treatment, including treatment for mental illness, to a person with mental illness either in the community or at a health establishment after obtaining the consent of the nominated representative, if available. However, *Section 94(3)* prohibits medical officers or psychiatrists from using electroconvulsive therapy as a form of treatment during an emergency. *Section 95* deals with "Prohibited Procedures", including and provides that electroconvulsive therapy can be provided to a minor, with the informed consent of the guardian and permission of the concerned board, if it is required in the opinion of the psychiatrist in charge. Section 96 puts restrictions on psychosurgery for persons with mental illness without the informed consent of the patient and approval from the appropriate board.

Clinical Research

Section 99 of the MHCA, 2017 describes the requirements for informed consent in clinical research. It requires a specification of the nature of the study, such as psychological, physical, chemical, or medical intervention. It grants the participant the opportunity to withdraw consent at any moment throughout the research period. It requires that informed permission be sought from the patient of his or her free will. Individuals who do not object to participation but are

[34] Pronob Kumar Dalal, *Consent in Psychiatry - Concept, Application & Implications*, 151 INDIAN J MED RES 6 (2020), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7055160/.
[35] The Mental Healthcare Act 2017.

unable to provide free, informed consent should seek permission from the appropriate state authority.[36]

Legal and Ethical Challenges in Obtaining Informed Consent for Psychiatric Treatments

It is crucial to be aware of both legal and ethical considerations when it comes to informed consent in mental healthcare. Even while the informed consent principle is respected and its application in clinical practice is taken seriously, unclear concepts like decision-making capacity, voluntariness, and the freedom to decide, given enough information, frequently lead to failure.[37] Consent is a complex procedure demanding the person to have a certain level of competency and decision-making ability. In psychiatry, consent has a different essence. Informed consent in psychiatric treatment is uniquely complex, as it requires not only ensuring that the patient comprehends the nature and purpose of the proposed treatment but also verifying their mental capacity to make autonomous decisions. Difficult situations may arise if the patient lacks the capacity to grant full informed consent and the medical intervention is carried out after obtaining proxy consent from his relatives/friends.

In most cases of acute psychosis, the patient understands the information that is delivered to him. However, the presence of a delusion (e.g., persecutory or nihilistic) may influence his decision-making. Here, it is the role of mental health professionals to be extra vigilant in such situations and to prove that the delusion is influencing his decision-making, and hence, the person has no capacity to offer consent. However, the exact procedure to do so remains unanswered. In India, the Mental Healthcare Act of 2017 underscores patient autonomy and mandates that no treatment shall be administered without informed consent, except under emergency provisions or when the patient lacks capacity, and a nominated representative provides consent. Ethically, the principle of respect for autonomy is balanced against beneficence and non-maleficence, especially when the patient's mental state impairs judgment.

Legally, consent must be voluntary, informed, and competently given, but challenges arise in cases involving psychosis, severe depression, or involuntary admissions, where the patient may resist treatment despite being in need. Courts have also emphasised the right to dignity and bodily autonomy, as seen in Aruna Shanbaug v. Union of India[38], which, although dealing with euthanasia, reinforced patient choice in healthcare. The Medical Council of India's Code of Ethics and the Charter of Patients' Rights also reinforce the legal obligation to secure proper consent. However, inconsistencies in implementation, lack of training among healthcare providers, and societal stigma surrounding mental illness continue to hinder ethical compliance.

This becomes exceptionally challenging with individuals with mental illness (PMI), particularly those with chronic conditions, where cognitive dysfunction, lack of insight, and psychopathological influences can significantly impair their ability to make informed decisions,

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[36] Furkhan Ali et al., *Consent in Current Psychiatric Practice and Research: An Indian Perspective*, 61 INDIAN JOURNAL OF PSYCHIATRY S667 (2019), https://pmc.ncbi.nlm.nih.gov/articles/PMC6482676/.
[37] Jacob, *supra* note 17.
[38] AIR 2011 SC 1290.

making valid consent a challenging task for clinicians. Serious ethical issues may arise where the information provided to an individual is insufficient to form a well-reasoned decision. Even while informed consent is widely accepted as a fundamental component of ethical research, there are still issues with its efficacy and application, including lengthy and intricate consent forms, difficulties in comprehension, linguistic and cultural barriers, and debates over its effectiveness.[39] Obtaining informed consent in psychiatric treatments from patients with diminished mental abilities and impaired capacity to give consent has been a significant challenge, posing procedural hurdles and ethical concerns. Further, the lawmakers have not made any special provisions to address capacity assessment for treatment decisions under MHCA 2017. As a result, it is critical that provisions/guidelines should be provided to address this pressing issue during the treatment process.

Role of Judiciary in Shaping informed Consent Jurisprudence

Judicial precedents have reaffirmed the significance of informed consent in medical practice by emphasising the need for patient autonomy and thorough disclosure of information by medical professionals. Valid Consent is an essential safeguard in healthcare that protects patients' rights and guides ethical medical practices. English Common Law is the source of medical legislations in India. An individual who suffered from medical malpractice or negligence may claim under the Civil Procedure Code, 1908; B.N.S., 2023; the Consumer Protection Act (CPA), 1986; and the Medical Ethics Code Regulations, 2002. In tort, the degree of liability is determined by the amount of harm inflicted; in criminal law, the degree of negligence determines the level of liability, not the harm.

Since it is the fastest way to resolve a grievance and receive compensation, a person seeking monetary compensation mostly brings an action under the CPA against the medical professionals.[40] The judiciary has contributed significantly towards the development of consent laws in India. Article 21 of the Constitution of India, 1950 guarantees the Right to life and personal liberty, which the courts have construed to include the right to informed consent in medical procedures. The issue of consent has been at the center of many medical negligence lawsuits that Indian courts have heard in the past. These decisions have defined what constitutes informed consent in addition to highlighting the significance of valid consent. The Indian courts have consistently upheld that consent must be obtained prior to any medical intervention, with the exception of emergencies.

In *Bolam v. Friern Hospital Management Committee [1957] 1 WLR 582,* a case of English Tort Law, the "*Bolam's Test"(Reasonable Doctor Test) was laid down.* In the present case, John Hector Bolam underwent Electroconvulsive therapy (ECT) in 1954 for clinical depression, during which ineffective manual restraint led to a pelvic fracture. At that time, medical opinion differed on how to minimise the risk of injuries possible from convulsions induced by ECT. The plaintiff alleged negligence by the doctor and hospital. The case established the "Bolam

[39] A History of Informed Consent in Research, *supra* note 16.
[40] Ayush Verma, *Informed Consent: A Case Analysis of Samira Kohli vs. Prabha Manchanda*, IPLEADERS (Aug. 27, 2020), https://blog.ipleaders.in/informed-consent-case-analysis-samira-kohli-vs-prabha-manchanda/.

Test" for medical negligence, holding that a doctor is not negligent if their actions align with a practice accepted by a responsible body of medical professionals, even if others disagree.[41] The case of *Montgomery v. Lanarkshire Health Board [2015] UKSC 11* outlined the rule on the disclosure of risks to satisfy the criteria of informed consent. The Supreme Court of the UK held that Doctors must ensure that patients are aware of material risks and reasonable alternatives, not just rely on standard professional practice. This overruled Bolam's dominance in the field of patient autonomy and informed consent, and the patient's right to know was held to be paramount over professional judgment.

In Samira Kohli v. Dr. Prabha Manchanda & Another,[42] The Supreme Court elucidated the difference between diagnostic and therapeutic consent and held that unless specifically stated, general permission for diagnostic procedures did not inevitably extend to therapeutic treatments. The Supreme Court further elaborated on several facets of obtaining consent and laid down the conditions for obtaining valid consent. It further differentiated between informed consent and real/valid consent. The Supreme Court also concluded that a form of consent should be exercised in India.[43] Broadly, the principles given in this case by the apex court are as follows:

1. A doctor must give a patient *adequate information* for him/her to understand the various aspects of the proposed treatment, as given below so that he/she can take a call on the treatment. This would consist of the following:

i. the nature and procedure of the treatment;
ii. its purpose and benefits;
iii. its likely effects and complications;
iv. any alternatives, if available;
v. an outline of the substantial risks; and
vi. adverse consequences of refusing the treatment.

Such 'adequate information' need not include remote or theoretical risks, rare complications, and possible results of a hypothetical negligent surgery.

2. Further, the consent obtained by the doctor from the patient before commencing a treatment (including surgery) should be real and valid, which means that: (a) the patient should have the capacity and competence to consent; (b) consent should be voluntary; and (c) consent should be on the basis of adequate information, concerning the nature of the treatment procedure, so that he/ she knows what the consent is for.[44]

In the case of *Nizam's Institute of Medical Sciences v. Prasanth S. Dhananka and Ors.*[45], a 20-year-old engineering student was admitted to Nizam Institute of Medical Sciences (NIMS) with chest pain. Tests and X-rays detected a tumour, though its malignancy remained uncertain,

[41] Rateesh Sareen and Akanksha Dutt, *supra* note 3.
[42] AIR 2008 SC 1385.
[43] Verma, *supra* note 41.
[44] Biplab Lenin Jain Kartik, *Consent in Healthcare: Outline, Gaps and Conundrum (Part 1)*, INDIA CORPORATE LAW (May 24, 2022), https://corporate.cyrilamarchandblogs.com/2022/05/consent-in-healthcare-outline-gaps-and-conundrum-part-1/.
[45] A HISTORY AND THEORY OF INFORMED CONSENT, *supra* note 13.

prompting a recommendation for surgical removal. Post-surgery, the patient developed acute paraplegia, losing control over his lower limbs, along with complications like urinary infections and bedsores. The patient's family held NIMS vicariously liable and the State of Andhra Pradesh statutorily liable, as it is a government hospital, for alleged medical negligence by the doctors, particularly Dr. P.V. Satyanarayana, during all stages of treatment. Citing various cases of medical negligence, the Apex Court held that the doctors were grossly negligent. The Court rejected the hospital's argument that the patient's unconscious state implied consent to avoid a second surgery.

The Supreme Court also emphasised that compensation must strike a balance between many parties and interests and that sympathy for the patient should not overshadow the need for fair and adequate compensation. The case of *K. Jhunjhunwala v. Dhanwanti Kaur*[46], marks a pivotal moment in medical jurisprudence, centering on allegations of medical negligence and the complexities of patient consent in surgical procedures. Dr. S.K. Jhunjhunwala, an experienced surgeon, was accused by the complainant, Dhanwanti Kaur, of improperly conducting her gall bladder surgery. The core issue was whether Dr. Jhunjhunwala departed from standard medical practices without obtaining proper consent, resulting in harm to the patient. The Supreme Court, after a thorough examination, held that Dr. Jhunjhunwala was not negligent and that the consent obtained covered the actions he undertook during the surgery.[47]

Conclusion

Informed consent in Indian mental healthcare represents a crucial intersection of law, ethics, and human rights. The idea and necessity of consent are expounded upon in a number of laws, regulations, rules, and court judgments. In spite of this, the need for informed consent for medical procedures and treatments is frequently still determined by the expert opinion of medical professionals. An example of this is found in emergency situations, such as those involving accident victims. When medical care is required, patients should be met by physicians' openness and willingness to present and discuss a variety of options, with the clear understanding that patients can play a role, if they desire, in shaping the ultimate decision.[48] There is a need for a more participant-centred approach to informed consent, highlighting the tension between legal requirements and ethical considerations in research participation.[49]

While the Mental Healthcare Act, 2017 has significantly advanced patient autonomy and legal protections, practical challenges remain due to inconsistent implementation, lack of awareness among professionals, stigma, and difficulties in assessing capacity. Ethically, respecting autonomy while ensuring patient welfare requires a nuanced, case-specific approach. With the MHCA in mind, there is an urgent need to develop a consent-taking mechanism and translate it into other regional languages for greater application. Consent remains a relatively new concept

[46] AIR 2018 SC 4625.
[47] Casemine Editor's Desk, *S.K. Jhunjhunwala v. Dhanwanti Kaur: Reinforcing Standards in Medical Consent and Negligence*, HTTPS://WWW.CASEMINE.COM (Oct. 16, 2024), https://www.casemine.com/commentary/in/s.k.-jhunjhunwala-v.-dhanwanti-kaur:-reinforcing-standards-in-medical-consent-and-negligence/view.
[48] Berg and Appelbaum (n 4) 319.
[49] A History of Informed Consent in Research, *supra* note 18.

for most Indian patients, many of whom journey considerable distances to access psychiatric consultation at tertiary care centers due to the limited availability of mental health services. Doctors and hospitals are not allowed to treat patients without their informed consent. However, given the legal framework surrounding consent, the attending physician's subjective judgment is frequently called into question, which needs to be fixed at the earliest.

Although everyone agrees that informed consent must be obtained before beginning any medical treatment, it is unclear exactly what that consent entails and how it should be given. It is also necessary for patients and consumer groups to realise that every illness or disease has a 'price'. No treatment is without side effects. The benefit-risk ratio of every treatment is important. Abuse of the concept of informed consent is detrimental to the long-term interest of the country's healthcare system. The debate about informed consent needs to move away from the legal aspect to the domain of ethics, where it really belongs. Unless ethical standards in the profession are enforced, medico-legal aspects of informed consent will continue to haunt doctors. Moving forward, there is a pressing need for structured training of mental health professionals in legal and ethical aspects of consent, development of capacity assessment tools, increased awareness among patients and caregivers, and clear institutional protocols. Strengthening oversight mechanisms and integrating informed consent practices with cultural sensitivities will ensure that consent becomes not just a legal formality, but a genuine expression of the patient's will and rights.

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Cyber Crime on Online Dating Platform

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Abstract

The progress in communication and technology has created opportunities for novel encounters. Activities such as shopping, travel planning, and even dating have become easily accessible with just a single click. In today's world of technologically enhanced media, internet often acts as building block of relationships. Dating apps today are talk of the town. Apart from providing comfort to a person in finding out a partner for oneself, it has also developed a sense of curiosity amongst the teenagers. Thereby, dating apps today have engaged huge chunk of users. Online dating is a convenient service that simplifies our lives, but it is also becoming a significant societal concern. Encountering someone from the internet may be intriguing, although it also has inherent risks. It is often seen that people enter into relationships on the basis of few conversations without knowing much about each other which also make people fall into the trap of criminally inclined persons. Examples can be seen in cases like Shraddha Walker incident. This research paper seeks to examine the necessity of utilizing online dating and the accompanying challenges it presents. Online dating is often associated with negative connotations, although its perception varies based on the user's aim. At present Information Technology Act, 2000 and few provisions of Bharatiya Nyaya Sanhita, 2023 are the major laws which govern issues relating to cyber-crime. The research paper discusses the various reasons why individuals choose to engage in online dating and explores the types of criminal activities that have arisen as a result. The study also aims to analyze the regulations governing such crimes.

Keywords: *Cyber Crime, Online Dating Platform, Pandemic, Cyber-dating, VAWA, CFAA*

Introduction

Humans are inherently social beings. Individuals devote a significant portion of their time in establishing connections with others. The emergence of the internet has rendered this process significantly easier than before. Prior to the advent of the internet, individuals exerted considerable effort in establishing connections with others. However, with the assistance of the internet, the entire globe is accessible to everyone. By 2012, the internet had enabled the connectivity and remote access of five billion devices. Following the global pandemic of 2020, there was a significant increase in internet-related activity.[2] Whether it pertains to internet shopping, dining, entertainment, or dating, all services are merely a click away.

The phrase cyber dating denotes the practice of engaging in romantic relationships through the internet. The advent of the internet has facilitated individuals in locating their partners in cyberspace. This also excludes people from the hassles of finding people nearby. Thus, alleviating the issue of location.

Online dating peaked in the past few years. Dating via the internet gave new sense of excitement to the users. Things that worked in users' favour were that they did not have to leave their

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[2] Kiran, "Pandemic and Its Legal Impacts on Online Dating", International Journal of Law Management and Humanities, vol. 5 (2022), pp 1625-1629 at p 1628.

workplace or home. Dating sites were available all the time and they could access it as per their convenience. internet is also able to offer anonymity to those who seek it. Thus, letting people be in their comfort zones. Also, various new features are being launched by websites each day, such as live chat box, various emoticons etc., which offers users a wide range of experiences and new methods of interactions. Internet offers flexibility to the users and also offers content of similar interest, thus keeping the attention of the user all to himself.[3] It is estimated that online dating market could reach USD 69.90 million in 2024 in India alone. The number of users in online dating in India is expected to reach 29.2 million users by 2029.[4] Revenue generated by Cyber dating is expected to reach USD 3.15 billion in 2024.[5]

However, like every other thing, excess and uncontrolled consumption of any commodity poses potential risks. This risk encompasses possible financial loss, damage to reputation, or These apps have nevertheless facilitated the process of finding a romantic partner, yet privacy and safety concerns remain an issue. Users willingly provide their personal data in order to find compatible partner. The surge in the use of online dating has also increased the occurrences of multiple cybercrimes. These range from financial scam to identity theft, privacy infringement, harassment and trolling etc. The perpetrators are hidden behind the veil of internet and obtain the benefit of anonymity provided by the internet. The offenders create opportunities and target vulnerable persons.[6] At present only few provisions of Bharatiya Nyaya Sanhita, 2023[7] and Information Technology Act, 2000[8] are applicable against such offences.

Categories of Cyber Crime on online dating platform

Cyber dating, or online dating, is experiencing tremendous growth due to the epidemic, as consumers increasingly depend on the internet and are more inclined to disclose personal information. Dating applications gather user data, such as name, occupation, relationship interests, and sexual orientations, in addition to information from mobile devices, contact information, photos, Wi-Fi networks, and device files. Notwithstanding this, dating applications can also provide a profitable business strategy, as users frequently provide their information without any issue.

Certain forms of Cyber-Crimes are stalking, cyber harassment, identity theft, financial fraud. Sexual extortion, trolling etc. Cyber stalking is a type of harassment that involves continuously following someone with the intent to foster personal interaction, despite them showing their disinterest. The newly enacted Bharatiya Nyaya Sanhita, 2023, defines stalking in both physical

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[3] E. Kraft, "Effectiveness of Cyber bullying Prevention Strategies: A Study on Students' Perspectives", *International Journal of Cyber Criminology* vol. 3 Issue 2 (2009)

[4] For details pertaining to online dating available at: <Online Dating - India | Statista Market Forecast> accessed on 17 September 2024.

[5] ibid

[6] G. Kaur, "Digital Crimes on Indian Online Dating Platforms during Covid-19: Impact on Women", "*International Journal of Law Management & Humanities*, vol. 4 (2021) pp 1277-1291 <Digital-Crimes-on-Indian-Online-Dating-Platforms-during-Covid-19-Impact-on-Women Gagandeep.pdf (upes.ac.in)> accessed on 1 September, 2024.

[7] Act 45 of 2023.

[8] Act 21 of 2000.

and online forms. As per section 78 of BNS, stalking is committed by men, and the victim is always a woman. This section also comprises stalking done on the internet. Cyberstalking involves harassing persons, group of persons, or organizations using the internet and methods such as chat rooms and discussion forums. The perpetrators use personal or financial information to commit offenses such as fraud, unauthorized transactions, and purchases, often committing financial fraud.[9]

Identity theft implies using personal or financial information to commit offenses such as fraud, unauthorized transactions, and unauthorized purchases. Online dating apps require personal information to person's user accounts, which allows the perpetrators to manipulate or control the aggrieved person's identity.[10]

Dating via the internet has also resulted in frauds such as financial fraud. The fraudster takes victim into confidence, builds trust and manipulates the victim into transferring money. According to FBI report, in the USA, romance scams have accounted for $304 million loss in the year 2020.[11] Also, in the year 2016, the FBI documented 15,000 cases of romance scams, resulting in total losses exceeding $210 million. However, most victims are reluctant to report their experiences due to feelings of shame.[12]

Trolling and harassment constitute an advanced way of shaming individuals while maintaining anonymity. Continuous targeted trolling can be stressful for the victim, frequently resulting in undesirable circumstances.[13] Romance scams are the most prevalent and adverse effects of online dating, wherein the offender establishes a relationship with the victim and coerces them into transmitting funds.[14] Phishing is a form of cyber-attack in which offenders deceive victims into providing personal information, including fraudulent emails, passwords, credit card information, and critical communications. Sextortion is an emerging type of cybercrime in which the offender coerces the victim by threatening to reveal their private and intimate photos and videos unless they comply.[15] Sextortion is one of the primary ill- effects of cyber dating.

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[9] For details pertaining to Cyber-crime sections available at <https://www.myjudix.com/post/cybercrime-punishments-under-bns-bharatiya-nyaya-sanhita> accessed on 29 August, 2024.
[10] For details pertaining to identity theft available at <https://www.idcentral.io/blog/identity-theft-and-fraud-types-and-prevention-strategies/> accessed on 29 August, 2024.
[11] For details pertaining to internet crime in US available at <FBI: 2020 broke the record for internet crime in the US | World Economic Forum (weforum.org)> accessed on 20 September, 2024.
[12] I. Nyam, "Tackling Online Dating Scams and Fraud", *International Journal of Humanities & Social Science*, vol. 8 (2020) pp 188-192 p 190.
[13] E. March, R. Grieve, " Trolling on Tinder® (and other dating apps): Examining the role of the Dark Tetrad and impulsivity", *Personality and Individual Differences*, vol. 110 (2017) pp 139-14
[14] For details pertaining to romance scams available at <Romance Scams — FBI> accessed on September 15, 2024.
[15] For details pertaining to Phishing and Sextortion available at <FBI Warns of Online Dating Scams — FBI> accessed on 15 August, 2024.

The perpetrator gains the trust of the victim and later manipulates the victim in doing undesired work.[16]

Increase in Cyber Dating Post Pandemic

When the entire world was asked to maintain safe distance and social distancing was the norm, people came close over online dating apps. The sudden occurrence of global pandemic Covid-19 in 2020, reframed the rules of society and human relations. The risk of infection posed serious threat to the lives of people, thereby limiting everyone to their residences.[17] The National Crime Research Bureau (NCRB) documented a notable jump in reported cybercrimes in 2017 in comparison to previous years, with a further jump in 2018 to 27,248 incidents.[18]

Dating apps in India were introduced way back in 2014 and were popular in their own way. Online dating industry gained rapid popularity during the Covid-19.[19] The entire world turned online and the internet dating was also at an all-time high as online dating did not demand physical presence. In March 2020, Tinder documented a total of 3 billion swipes per day. OkCupid experienced a significant 700% rise in the number of dates from March to May. Bumble reported a notable 38% increase in the usage of video calls.[20] However, increase in online dating has also resulted in certain adverse effects such as privacy breach, cyber stalking, cyber harassment, bullying, trolling etc.

Cyber Crimes on Dating Platforms: A Gendered Approach

Experiences of sexual and violent offences on dating apps are mostly gender-specific, with victims primarily female and offenders primarily male. India is the world's second-largest internet market, with 688 million active users on famous platforms such as Facebook, You Tube, X, Instagram, WhatsApp, Snapchat, Bumble etc. Despite such a huge figure, gender disparities. According to IAMAI, 67% of Indian internet users are male, but just 33% are female.[21] Cyber crime is not restricted to any particular gender, however, women and transgenders pose an easy target for the offenders.

The recent case of Shraddha Walker is an example of cyber crime via online dating apps. Shraddha met Aftaab Poonawala on a dating app, Bumble. Thereafter, they started their live-in relationship. However, Aftaab Poonawala killed Shraddha Walker and cut her body into 35

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[16] R. L. O'Malley, K. M.Holt, "Cyber Sextortion: An Exploratory Analysis of Different Perpetrators Engaging in a Similar Crime", *Journal of Interpersonal Violence*, Vol. 37 (2022), pp 258-283.

[17] B. K. Wiederhold, "How COVID Has Changed Online Dating—And What Lies Ahead", *Cyberpsychology, Behavior, and Social Networking* vol. 24, (2021), pp.435-436 at p. 435.

[18] For details pertaining to NCRB report available at <https://ncrb.gov.in/crime-india-2018> accessed on 29 August, 2024.

[19] Kaur, *note 6.*

[20] D. Pandey, S. Shukla, "Legal Implications of Dating Apps in India", *International Journal of Legal Science and Innovation*, vol. 3 (2021), pp. 214-220 at p. 215.

[21] For details pertaining to India Internet available at <https://cms.iamai.in/Content/ResearchPapers/d3654bcc-002f-4fc7 ab39-e1fbeb00005d.pdf> accessed on 1 September, 2024.

pieces. He kept the murder under wrap for 6 months.[22] This is one example of how meeting persons online and trusting them can cost one's life.

Another example where women are the fraudsters is the Russian Biwi Con case[23], when a girl from Russia formed an online friendship with an older man and expressed desire to travel to India. The man transferred funds for her journey to India, via services such as Western Union, rather than traditional source like banks, thereby making it difficult to trace. The fraudsters then threatened him to disclose call records and videos to his wife if he fails to transfer additional funds and extort him. In such instances, the victims refrain from visiting the police station to save their relations.[24]

Another case is of a 29-year-old software engineer from Bangalore, Suman Reddy[25], who impersonated as a lady on a classified application named Lecanto. At the time of his arrest by Guntur police, Reddy had cheated more than 500 individuals, collecting several lakhs. The reasons provided included medical expenses, sudden travel arrangements, and stolen credit cards.

Apart from this, the queer community is even more vulnerable owing to their hesitance in approaching police station. Ashish, a gay individual from Mumbai, was threatened and extorted for money by a user of a dating app before fleeing to preserve his safety. Notwithstanding the constitutional right to privacy associated with life, equality, and fundamental freedoms, societal stigma persists against the queer community. Prior to visiting the police station, they contemplate public perception and societal judgement.[26]

Factors responsible for increase in cyber-crime on online dating platforms

Cybercrime on online dating platform primarily arises from insufficient legal protection. Also, victims usually refrain from reporting such instances owing to embarrassment, reluctance and concerns about family reputation.Teenagers and youngsters are more prone to face victimisation and perpetration of cyber-dating abuse owing to their naivety and ignorance.[27] The persistence of abusive comments and resources online continues to affect female victims, frequently leading to self-isolation. Online sexual harassment was more likely to elicit sentiments of anxiety among young women. The damage to young female victims was further intensified since their reactions to the abuse were more frequently deemed illogical, naive, and emotional.[28]

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[22] For details pertaining to the article available at <https://www.firstpost.com/explainers/aftab-poonawala-shraddha-walkars-toxic-relationship-emotional-blackmail-delhi-murder-assault-crime-11632931.html> accessed on 1 September, 2024.
[23] Kiran, *note 2*.
[24] Pandey, Shukla, *note 20*
[25] ibid
[26] ibid
[27] R. Afrouz, S. Vassos, "Adolescents' Experiences of Cyber-Dating Abuse and the Pattern of Abuse Through Technology, A Scoping Review", *Trauma, Violence, & Abuse* vol. 25 (2024), pp. 2814-2828.
[28] *Ibid*

While both genders exhibited uncertainty over specific abusive behaviours, young males were more predisposed to perpetrate digital sexual assault.[29] Certain other responsible factors were found among young females who attributed responsibility to themselves for sharing their photographs with their lovers, characterising themselves as foolish and naive. Subsequent to the COVID-19 pandemic restrictions, adolescent females expressed apprehension that the online milieu could exacerbate "gendered relations of male agency-female submissiveness," as a male partner could engage at will and withdraw for extended durations if desired.[30]

Young women frequently encounter online dating abuse, typically seeking assistance from informal networks and reliable individuals. They are less inclined to reveal their experiences to others, including their parents, and may attempt to evade or disregard the abuse as a strategy to terminate it. Law enforcement can assist in addressing online harassment; however, young women may be disinclined to seek assistance due to feelings of humiliation, fear of familial repercussions, or the likeness for being held accountable.

Legal Framework in India dealing with cybercrime on online dating platforms

There are number of dating platforms available in India. However, their security concern is still an issue. Since the accessibility of the internet has increased, people are more dependent on it, including their dating life. However, in absence of any specific legislation, its regulation becomes a grey area.

In November 2020, Bumble revealed security vulnerabilities that compromised location and user data accumulated over a period of six-month.[31] This resulted in an enhancement of their encryption protocol; however, the inadequate effort proved insufficient, as data such as images and dating preferences remained accessible to perpetrators. The absence of end-to-end encryption in widely used applications such as Bumble, OkCupid, and Tinder presents a dual dilemma; although personal information sent is essential for matchmaking, it is susceptible to exploitation by malicious actors and corporations to whom users unwittingly disclose their data.[32]

India does not have any particular legislation governing cybercrime on online dating platforms. The central act concerning this issue is the Information Technology Act, 2000. Previously the Indian Penal Code did not entail any specific section concerning cyber crimes. However, the newly enacted Bhartiya Nyaya Sanhita, 2023, provides specific offences regarding cyber crimes. The New Criminal Laws establish 'organised Crime' as a distinct offence, characterising

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[29] I. Zinn, H. Hofmeister, "The gender order in action: consistent evidence from two distinct workplace settings", *Journal of Gender Studies*, Vol. 31 (2022), pp. 941–955 <https://doi.org/10.1080/09589236.2022.2115019> accessed on 1 September, 2024.

[30] S. E. Davis, (2018). "Objectification, Sexualization, and Misrepresentation: Social Media and the College Experience", *Social Media + Society*, vol 4 (2018).

[31] For details pertaining law governing dating apps available at <Not OK, Cupid- Law Governing Dating Apps In India | THE CONTEMPORARY LAW FORUM (tclf.in)> accessed on September 1, 2024.

[32] *Ibid*

it as criminal acts perpetrated by individuals or collectives collaborating or representing an organised crime syndicate. This modification also applies to offenders committing cyber crimes.

According to the IT Act and BNS, online friendships can be exploited to deceive individuals. The offence is subject to penalties under Section 66D of IT Act, which addresses cheating by impersonation through computer resources. The offence may lead to a maximum sentence of three years and a fine of up to one lakh rupees. The Bharatiya Nyaya Sanhita penalises cheating and impersonation under Sections 318, 319. Upon encountering a scam, an individual should notify the service provider, gather proof of the scammer's profile and communications, file a First Information Report (FIR) with the cyber crime cell or local police station, and submit an online complaint through the National Cyber Crime Reporting Portal.[33]

Section 66D of the IT Act penalises identity theft. Which is punishable with imprisonment of up to three years and fine up to Rs. 1,00,000.[34]The Supreme Court of India in the case of *K.S. Puttaswamy v Union of India*[35], has determined that the right to privacy constitutes a basic right under Article 21, encompassing the right to be forgotten. This right does not apply where personal data is no longer essential, relevant, or accurate and does not serve a legitimate interest. The court asserted that this privilege cannot be invoked for grounds like freedom of expression, legal requirements, public health, archiving, scientific research, or legal claims. It would be applicable in all instances of privacy violations, encompassing breaches of data privacy. Thus, fraudsters committing breach of privacy via online dating platforms would be held liable for breach of privacy. [36]

Certain parts of the BNS, such those pertaining to extortion, forgery, or hate speech, have been augmented to encompass crimes conducted electronically through messaging or social media platforms.[37] For ex., Section 336 BNS defines forgery and its illustration also includes creating fake ID to deceive someone. Laws prohibiting hate speech and the dissemination of misinformation that may disturb public order have also been expanded to entail electronic communication as a means of perpetrating these offences. This enables authorities to punish those disseminating hate or inciting violence via social media or other online platforms, aiding in the fight against the escalating issue of misinformation and online propaganda.[38]

BNS has broadened the criteria of obscene material under Section 294 to encompass electronically disseminated materials, including revenge porn and violent movies. The explicit

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[33] For details pertaining to cyber crime available at <https://www.cybercrime.gov.in/> accessed on 2 September, 2024.
[34] For details pertaining to cybersecurity laws and regulations available at <https://iclg.com/practice-areas/cybersecurity-laws-and-regulations/india> accessed on 1 September, 2024.
[35] 2019 (1) SCC 1
[36] For details pertaining to Law Governing dating Apps in India available at <Not OK, Cupid- Law Governing Dating Apps In India | THE CONTEMPORARY LAW FORUM (tclf.in)> accessed on 1 September, 2024.
[37] For details pertaining to Stringent measures against cybercrimes in India's new criminal system available at, <https://www.jsalaw.com/newsletters-and-updates/stringent-measures-against-cybercrimes-in-indias-new-criminal-justice-system/> accessed on 2 September, 2024.
[38] *Ibid*

inclusion of electronic communication in some critical areas fortifies the legal framework, facilitating the prompt identification of cybercriminals who exploit technology and ensuring they do not evade punishment.[39]

The Digital Personal Data Protection Act, 2023 (DPDP Act) waives the obligations of notice and consent for the prevention, detection, investigation, or prosecution of any offence or violation of law.[40] The implementation of India's New Criminal Laws signifies a crucial advancement in modernising the nation's legal system, and tackling contemporary issues like cybercrime issues arising out of online dating. The successful integration of these regulations necessitates effective implementation, strict enforcement, and continuous adaptations to societal requirements.

Legal Provisions Around the World

Legal provisions concerning Cyber Crime on online dating platforms vary from one country to the other, however, the broader approach remains the same. These provisions generally combat Cyber Crime, online harassment, data protection etc. Various countries such as United States, European Union, United Kingdom etc have enacted laws prohibiting and addressing such issues.

Prominent statutes in the United States comprise the Violence Against Women Act[41] (VAWA) and Title 18 of the U.S. Code[42], which penalise online threats and harassment. The California Consumer Privacy Act[43] (CCPA) enforces stringent data privacy practices, particularly for organisations that gather personal information, such as dating services. The Computer Fraud and Abuse Act[44] (CFAA) addresses online fraudulent acts, particularly those on dating platforms.

The European Union (EU) also enforces rigorous data protection laws, ensuring that dating sites within its jurisdiction have strict data security, transparency, and consent protocols. Cybercrime

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[39] *Ibid*

[40] For details pertaining to DPDP Act available at <https://www.ey.com/content/dam/ey-unified-site/ey-com/en-in/insights/cybersecurity/documents/ey-india-dpdp-act-2023.pdf> accessed on 29 August, 2024.

[41] For details pertaining to violence against women act available at <https://nnedv.org/content/violence-against-women-act/> accessed on 1 September, 2024.

[42] For details pertaining to Title 18 available at <U.S. Code: Title 18 | U.S. Code | US Law | LII / Legal Information Institute (cornell.edu)> accessed on 1 September, 2024.

[43] For details pertaining to Consumer privacy Act available at <bing.com/ck/a?!&&p=e35c7f6facf4ce05JmltdHM9MTcyNjc5MDQwMCZpZ3VpZD0xZmExNzllOC1lODk4LTZkZmMtMThjZS02ODdiZTlmZDZjNzcmaW5zaWQ9NTIyMA&ptn=3&ver=2&hsh=3&fclid=1fa179e8-e898-6dfc-18ce-687be9fd6c77&psq=california+consumer+privacy+act&u=a1aHR0cHM6Ly93d3cub2FnLmNhLmdvdi9wcml2YWN5L2NjcGE&ntb=1> accessed on 1 September, 2024.

[44] For details pertaining Computer Fraud and Abuse available at <crsreports.congress.gov/product/pdf/R/R46536> accessed on 28 August, 2024.

directives[45], including the EU's Directive on Attacks Against Information Systems[46], criminalise hacking and unauthorised access, potentially applicable to breaches of dating platforms. Different EU nations possess distinct regulations for combating cyberstalking, harassment, and hate speech.

Australia addresses issues pertaining to cyberstalking, harassment, and hacking offences through the Criminal Code Act[47] (1995), Privacy Act[48] (1988), and the eSafety Commissioner[49]. Canada prohibits cyberstalking, defamation, and extortion on online platforms under sections 162.1 (non-consensual dissemination of personal photos) and 264 (criminal harassment) of the Criminal Code[50]. The Personal Information Protection and Electronic Documents Act[51] (PIPEDA) mandates that online platforms, including dating applications, adhere to data protection standards.

South Africa's Prohibition from Harassment Act, 2011[52], prohibits harassment and stalking, encompassing both online and offline contexts, including dating services. The Cybercrimes Act, 2020[53], penalises several cyber actions, including fraud, hacking, and unauthorised interception of communications.

In Singapore, the Protection from Harassment Act, 2014[54], penalises online harassment, stalking and threats occurring on dating platforms. Brazil's Cybercrime Law[55] (2012) mandates data security and user information protection, obligating internet platforms to safeguard user data. This also regulates internet usage and ensures the privacy of the participants on online dating

[45] For details pertaining to cybersecurity available at <Cybersecurity at the European Union institutions, bodies, offices and agencies | EUR-Lex (europa.eu)> accessed on 1 September, 2024.
[46]For details pertaining to EU's Directives available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32013L0040> accessed on 1 September, 2024.
[47]For details pertaining to Criminal Code available at <https://www.legislation.gov.au/C2004A04868/2018-12-29/text> accessed on 1 September, 2024.
[48] For details pertaining to Privacy Act available at <https://www.bing.com/search?q=privacy+act+australia&qs=SS&pq=privacy+act+australia&sc=10-21&cvid=60A3B6AE5323455AB8AA36F1AE9D70EC&FORM=QBRE&sp=1&ghc=2&lq=0> accessed on 1 September, 2024.
[49] For details pertaining to eSafety Commissioner available at < https://www.esafety.gov.au/> accessed on 1 September, 2024.
[50] For details pertaining to Criminal Code available at < https://laws-lois.justice.gc.ca/eng/acts/C-46/> accessed on 29 August, 2024.
[51] For details pertaining to PIPEDA available at <https://www.priv.gc.ca/en/privacy-topics/privacy-laws-in-canada/the-personal-information-protection-and-electronic-documents-act-pipeda/> accessed on 29 August, 2024.
[52] For details pertaining to Prohibition from Harassment Act available at <https://www.justice.gov.za/legislation/acts/2011-017.pdf> accessed on 29 August, 2024.
[53] For details pertaining to Cyber crimes Act available at <https://www.gov.za/documents/acts/cybercrimes-act-19-2020-english-afrikaans-01-jun-2021> accessed on 29 August, 2024.
[54] For details pertaining to protection from harassment Act available at <https://sso.agc.gov.sg/Act/PHA2014> accessed on 29 August, 2024.
[55] For details pertaining to Cybercrime law available at <https://cms.law/en/int/expert-guides/cms-expert-guide-to-data-protection-and-cyber-security-laws/brazil> accessed on 29 August, 2024.

platforms. Anti-Cybercrime Laws[56] in China penalises cyberfraud, identity theft etc and enforces stringent sanctions for violations.

Conclusion

Online dating platforms have revolutionised social interactions; at the same time, they have also resulted in a rise in cybercrime. Every individual is susceptible to the ill effects of online dating, although it is often seen that women and LGBTQ community are at receiving ends. India's legal framework does not provide any specific legislation combating cyber crimes on online dating platforms. At present, the IT Act and the BNS provide certain protections against such crimes. Countries such as the U.S., EU, Australia etc have strong data protection laws; however, the advancement of cybercrime presents constant hurdles for law enforcement agencies.

Advancement of internet and technology has made people dependent on it. Fraudsters craft messages and conversations to emotionally involve victims, enabling their exploitation. Personality characteristics, including self-awareness, self-regulation, and self-deception, influence an individual's susceptibility to online fraud. Increased self-awareness enables individuals to resist the enticing strategies of fraudsters, whereas those with less self-awareness are more vulnerable to the deceit of counterfeit online romantic partners. Digital technology has enabled privacy infringements, permitting abusive partners to effortlessly get information from others through deceptive accounts. Cyber-dating abuse negatively impacts victims' health and well-being, leading to emotional repercussions, worry, stress, sadness, and social and physical implications. Cyber-dating abuse can result in offline abuse or manifest as both kinds concurrently.

India also needs stringent measures to combat the growing menace. The legislations at present provide relief but the pace of legislation is not the same as that of the offences. We should understand that computer and internet resources are not an alternative to the real world. Rather, we should access such resources utilising the safety measures as much as possible. Digital creators and platforms want maximum engagement and crowd. As consumers, we should be aware and not succumb into the trap of such schemes. Legislation alone is never sufficient for any change. The responsibilities lie on us to be more conscious and aware of such activities and try to remain as safe as possible.

[56] For details pertaining to Anti cybercrime laws available at <https://iclg.com/practice-areas/cybersecurity-laws-and-regulations/china> accessed on 29 August, 2024.

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Juvenile Offenders Behind the Wheel: Harmonising Legal Frameworks to Balance Victim Rights and Child Protection

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Abstract

The growing number of rash and negligent driving incidents by minors in India has exposed gaps in the legal framework, particularly in ensuring accountability and justice. These incidents, often resulting in severe injuries or fatalities, have led to public outrage and highlighted the limitations of existing laws like the Juvenile Justice (Care and Protection of Children) Act, 2015 (JJ Act), the Motor Vehicles Act, 2019, and the Bharatiya Nyaya Sanhita, 2023 (BNS). Neuroscience research supports the legal driving age threshold, noting that the prefrontal cortex, which governs decision-making and impulse control, develops fully only between ages 18 and 25. This is crucial in understanding juvenile behaviour in reckless driving cases. The BNS's Section 106 now enhances punishment for 'death by negligence' to five years. The JJ Act classifies such offences as serious, often resulting in light penalties such as fines, community service, or brief detentions. However, parents who allow access to vehicles often escape accountability. There is an urgent need for a more balanced legal approach—one that ensures both rehabilitation of juveniles and justice for victims—by addressing loopholes that currently permit leniency without sufficient consequences for reckless actions.

Keywords: *Juveniles, death by negligence, prefrontal cortex, child in conflict with law, rash and negligent driving*

Introduction

In India, we often find teenagers or younger children driving bikes or cars, even though the legal age for driving is 18 years.[3] As the law prescribes, no person shall be allowed to drive a motor vehicle without a license issued by the proper authority.[4] An adolescent below the age of 18 years can be granted a learner's license for driving a vehicle without a gear, subject to the supervision of an adult caregiver of the applicant.[5] However fancy this may seem, this is only the black letters of law, the NCRB data on Accidental Deaths & Suicides in India (ADSI) 2022 portrays a different picture altogether. As per the report, around 884 juveniles[6] were apprehended for rash driving in India.

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[3] Motor Vehicles Act, 1988, § 4, No. 59, Acts of Parliament, 1988.
[4] Motor Vehicles Act, 1988, § 3, No. 59, Acts of Parliament, 1988.
[5] Motor Vehicles Act, 1988, § 4, No. 59, Acts of Parliament, 1988.
[6] National Crime Records Bureau, Accidental Deaths & Suicides in India 2022 (2023), https://www.ncrb.gov.in/en/accidental-deaths-suicides-india-2022.

The functioning of the brain of a child and an adult is very different. Young brains lack the proper development of the prefrontal cortex,[7] which contributes to the ability of an adult person to comprehend the consequences of an act and then proceed with it. Therefore, every juvenile cannot be adjudged on the same metric. To impose culpability on them, a holistic picture has to be taken into consideration, looking at their developmental contexts, social histories, and forensic evaluations.

The year 2024 saw horrendous road accidents caused by minors, leading to either death or severe injury. The Pune Porsche case, which made the headlines, involved a 17-year-old boy who caused the deaths of two people through rash and drunk driving.[8] Since the accused was a minor, the Juvenile Justice Board dealing with the present case imposed the condition of writing a 300-word essay on the topic "Road Accidents and Their Solutions" and working with the 'Regional Transport Office' (RTO) to understand traffic rules for the grant of bail.[9] This decision caused public outrage as it seemed to reflect the job profile of the minor's father. The month of July again saw the ugly consequences of underage, rash, and negligent driving in Chennai, whereby two pedestrians were injured.[10] This incident happened within 2 months of the Pune Porsche case and thereby raises the question as to the remedies provided to the victim's family. Rash and negligent driving is not only a contravention in law but also a crime.

The year 2024 also saw the commencement of Bharatiya Nyaya Sanhita, 2023, in July. The prolusion of Section 106[11] in the BNS is a pivotal development in India's criminal law landscape. The provision of 'death by negligence' previously contained under Section 304A[12] of the Indian Penal Code, 1860 (IPC), prescribed a maximum punishment of two years. Section 106, BNS, has increased the sentence for up to five years. The punishment can be further increased to ten years if the person having caused death by a rash or negligent act has absconded without informing the authorities. This provision covers hit-and-run cases. In contrast, Section 134[13] of the Motor Vehicles Act, keeping in mind the public outburst, offers the driver to make a reasonable choice to save his life. However, such a safeguard is not provided for causing the death of a person.

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[7] Laurence Steinberg, A Social Neuroscience Perspective on Adolescent Risk-Taking, 28 DEV. REV. 78, 80–81 (2008).

[8] Pune Porsche Accident: Police Claims Father Instructed Driver to Let His Minor Son Drive Car That Killed 2, THE ECONOMIC TIMES (May 23, 2024, 10.06 AM), https://economictimes.indiatimes.com/news/india/pune-porsche-accident-police-claims-father-instructed-driver-to-let-his-minor-son-drive-car-that-killed-2/articleshow/110349164.cms.

[9] Minor in Porsche Case Complies with Bail Conditions; Submits Essay on Road Accidents, INDIAN EXPRESS (JULY 5, 2024, 08.24 AM), https://indianexpress.com/article/cities/pune/minor-in-porsche-case-complies-with-bail-conditions-submits-essay-on-road-accidents-9433586/.

[10] 4-year-old boy crashes dad's car in Chennai; hits auto, pedestrian, TIMES OF INDIA (Apr. 9, 2025, 00.36 AM), https://timesofindia.indiatimes.com/city/chennai/underage-driving-14-year-old-boy-crashes-dads-car-in-chennai-hits-auto-pedestrian/articleshow/120104721.cms.

[11] Bharatiya Nyaya Sanhita, 2023, § 106, No. 45, Acts of Parliament, 2023.

[12] Indian Penal Code, 1860, § 304A, No. 45, Acts of Parliament, 1860.

[13] Motor Vehicles Act, 1988, § 134, No. 59, Acts of Parliament, 1988.

Adolescent Neurodevelopment and legal culpability

The vital anamoly between an adult and an adolescent is highlighted by an adolescent's lack of 'prefrontal cortex' development. It is responsible for making informed decisions; however, juveniles are found to be impulsive, susceptible to sensation seeking behaviours and often found giving way to peer pressure. The 'limbic midbrain system' and the 'orbital frontal regions' of the frontal lobe are components of the social-emotional system. Compared to the cognitive control system, it develops more quickly. The brain's emotional state is regulated by the social-emotional system. The prior development of this system than the 'cognitive control system' leads to an individual keener to sensation seeking along with 'increased emotional responses to both positive and negative emotions.' The 'cognitive system' which provides for better emotional regulation, contemplation of consequences, along with more foresight, develops at a later point in life.[14]

"The prefrontal lobe operates like the brakes on a car, most adolescents would be driving cars with very thin brake shoes. It is not that the entire mechanism is missing, but it is not operating at full strength."[15]

The above understanding shows that while actus reus can be apparent for a juvenile, the same cannot be said for the mens rea. Neuroscience development shows us that the 'minimum age of criminal responsibility', which is 18 years does not guarantee the full development of the brain of a person; depending upon each individual, it may happen at any time between 14-25 years of age.[16] Since a person is incapable of making an informed decision, how can that person be held culpable for an act? These neurological assumptions have raised questions about the 'youth delinquents' and the 'recidivists.'

US Perspective

Prior to the neurological defence, the violation of 8th Amendment of the US constitution was a ground for not imposing harsh punishment on juvenile offenders. The US Supreme Court in Thompson v. Oklahoma[17] ruled that, "the execution of a person who was under 16 at the time of the offence violated the Eighth Amendment prohibition against 'cruel and unusual punishment." However, this view did not last, and the Court reversed its verdict in Stanford v. Kentucky[18] and Wilkins v. Missouri[19], holding that, 'imposition of capital punishment upon a child aged 16-17 years does not violate the 8th amendment's prohibition against cruel and unusual punishment.'

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[14] Sarah E. Jayne & Elizabeth S. Scott, Understanding the Adolescent Brain and Legal Culpability, American Bar Association (Aug. 1, 2015), https://www.americanbar.org/groups/public_ interest/child law/ resources /child_law_practiceonline/child_law_practice/vol-34/august-2015/understanding-the-adolescent-brain-and-legal-culpability/.

[15] Jane Rutherford, Juvenile Justice Caught between the Exorcist and a Clockwork Orange, 51 (3) Depaul Law Review, 272 (2002).

[16] An Analysis of Implications of Neuro-Sciences on American and Indian Juvenile Justice Systems, 64 JILI 314 (2022).

[17] *Thompson v. Oklahoma*, 487 U.S. 815 (1988).

[18] *Stanford v. Kentucky*, 492 U.S. 361 (1989).

[19] *Wilkins v. Missouri*, 492 U.S. 361 (1989).

The year 2005 marked the changes in the judicial process, wherein with the help of psychologists, MRIs, and other tests, if it was adduced by evidence that the person being incriminated was not mentally capable of knowing the consequences of his acts, then such a person could be exonerated. The US Supreme Court laid down a point of scientific difference that distinguished a juvenile offender and an adult[20]:

- Youths are more likely than adults to lack maturity and have an underdeveloped sense of responsibility, which causes them to act impulsively and make poor decisions.
- Adolescents are more susceptible to peer pressure and harmful influences.
- Juveniles' personality traits are more 'transitory' than those of adults because their character is not as fully developed.

Further, life imprisonment without the option of being released on parole could not be provided to adolescents as it would be violative of 8th Amendment even in homicide cases.[21] Even after such development of neuroscience, the defence of brain maturation is mostly provided to juveniles. The year 2017 saw the defence of the late maturation of brain widely recognised by neuroscientists, taken by a 20-year-old for killing a woman while driving.[22] The above however could not mitigate the sentence of the young man.

Indian Perspective

Section 15 of the JJ Act, 2015[23] states that when a child who has reached or is older than sixteen is accused of committing a heinous crime, the Board will first evaluate the child's mental and physical capacity to commit the crime, his comprehension of the consequences of the crime, and the circumstances surrounding the alleged offence (the process of preliminary assessment). In case the child is fit to be tried as an adult, then the same shall be referred to the children's court; if the child is found to be unfit, then JJB tries the child. Any punishment prescribed by JJB cannot exceed 3 years as prescribed under Section 18[24]. With regards to the sentences that the children's court can pass, Section 21[25] says that, any child cannot be given death sentence or life imprisonment without the option of being released.

The preamble of the JJ Act, 2015 makes it clear that the Indian legal system with regards to the treatment of 'children in conflict with law' has reformation as its ultimate goal which aligns with the global lens. The Supreme Court in the year 2022[26] ferociously frowned upon the global view of reformation. There is a school of thought in our nation that is adamant that, regardless of how horrible the crime may be, whether it be a single rape, gang rape, drug sale, or murder, if the accused is a minor, he should only be dealt with the intention of reformation in mind.

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[20] *Roper v. Simmons*, 543 U.S. 551 (2005).
[21] *Miller v. Alabama*, 567 U.S. 460 (2012).
[22] Farooq Ahmad Mir & Hilal Ahmad Naja, An Analysis of Implications of Neuro-Sciences on American and Indian Juvenile Justice Systems, 64 JILI 314, 331 (2022)
[23] Juvenile Justice (Care and Protection of Children) Act, § 15, No. 2, Acts of Parliament, 2016.
[24] Juvenile Justice (Care and Protection of Children) Act, § 18, No. 2, Acts of Parliament, 2016.
[25] Juvenile Justice (Care and Protection of Children) Act, § 21, No. 2, Acts of Parliament, 2016.
[26] *State of Jammu and Kashmir (now U.T. of Jammu and Kashmir) v. Shubam Sangra*, 2022 SCC OnLine SC 1592.

According to the school of thought we are discussing, reformation's objective is ideal. We question whether the Act of 2015 has fulfilled its purpose given the way juveniles have committed violent and horrible crimes over the years and continue to do so.

'We have begun to form the opinion that the juveniles are becoming increasingly comfortable committing such horrible crimes as a result of the leniency with which they are treated in the name of reformation.'[27]

The problem with this school of thought however is that it takes away the very principles for which juvenile justice system stands for. The insertion of section 15 under the Juvenile Justice Act was a by-product of this school of thought. It aimed to conduct differential treatment of children, between the age group of 16-18 years of age, having committed a heinous offence. The assessment conducted under section 15 primarily focuses on understanding the mental capacity of the child and his ability to understand the consequences of the act. The plight however is that there is lack of accurate psychological tools and set standard to conduct preliminary assessment. The courts have noted in multiple cases that the manner of conducting preliminary assessment was substandard and therefore, could not give accurate results.[28] Some studies even go on to state that such individualised assessment is not scientifically possible and doing that would mean forcibly applying science to give results which are beyond its reach.[29]

Categorisation of Rash and Negligent driving: Heinous or Serious under JJ, 2015

'Ministry of Road Transport and Highways' has declared the data relating to the traffic accidents causing deaths in India, and the year 2022 saw 1,68,491 deaths, which is clear increase of over 9.4% from last year[30]. Out of which, 1,19,904 deaths were caused by over-speeding and 4,201 deaths were caused by drunken driving/ consumption of drugs or alcohol.[31] A perusal of the above data would show us the need to amend the provisions of IPC dealing with the punishment of rash and negligent driving. The Supreme Court in the year 2015, keeping in mind the need of the hour, made certain observations to the legislature regarding the enhancement of the punishment for reckless drivers.[32] The Apex Court also referred to State of Punjab v. Saurabh Bakshi[33], In India, 'we must observe with great pain that lawmakers should examine, reexamine, and revisit the sentencing policy in Section 304-A IPC because of the country's disreputable record of road accidents, the nonchalant attitude of drivers who feel they are the "Emperors of

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[27] *Id.* at 28.
[28] *Durga Meena v. State of Rajasthan*, 2019 Cri LJ 2720 (Raj); *Barun Chandra Thakur vs. Master Bholu & Anr*., 2022 SCC OnLine SC 870.
[29] Shreya Mahajan, How do Juvenile Justice Boards decide the fate of 16–18-year-olds? Preliminary Assessment under Section 15 of the Juvenile Justice (Care and Protection) of Children Act, 2015, 64 ILI Law Review 19, 22 (2020).
[30] Press Information Bureau, *Annual Report on 'Road Accidents in India-2022' Published by Ministry of Road Transport and Highways*, PIB (May 14, 2024), https://www.pib.gov.in/PressReleasePage.aspx?PRID=1973295#:~:text=As%20per%20the%20report%2C%20a,injuries%20to%204%2C43%2C366%20persons.
[31] *Id.*
[32] *Abdul Sharif v. State of Haryana*, 2016 SCC OnLine SC 865.
[33] *State of Punjab v. Saurabh Bakshi*, (2015) 5 SCC 182.

all they survey," the careless driving that turns others into their prey, the impoverished who feel their lives are in danger, the pedestrians who are worried about the future, and the civilized people who drive in constant fear but are still apprehensive about the obnoxious attitude of those who project themselves as "larger than life".'

Prior to the Commencement of BNS, Section 304A dealt with 'causing of death by negligence'. The provision provided that in case a person causes death by doing any rash or negligent act, then he may be punished up to 2 years in imprisonment or fine or both, if such death does not amount to culpable homicide. After the recommendation of the Apex Court, the legislature under Section 106(2)[34] provides for specific punishment for rash and negligent drivers. If 'rash and negligent driving' results in death not amounting to culpable homicide, then it provides a harsher punishment. The provision triggered controversy because it increased the maximum penalty of ten years in prison if a driver fled without informing a police officer or a magistrate about the incident shortly after it happened. Section 106(1) also increased the punishment from 2 years to a maximum of 5 years.

It is commendable that the legislature considered the plight of victims of rash and negligent driving, as 304A IPC did not contain such an exclusive provision for them as that being incorporated under Section 106(2) BNS. However, a perusal of the above provisions would make it clear that 106(2) uses the conjunction 'and' instead of 'or' as provided under 304A. Further the word 'driving' makes the provision specific to acts of rash and negligent driving.[35] In contrast to the previous rash or negligent act, the prosecution must now establish beyond a reasonable doubt both the accused's 'rash' and 'negligent actions'. Rashness can be defined as 'performing an act with a knowledge that it is likely to be dangerous or cause injury, but nevertheless acting upon it without any heed to its consequences'. On the other hand, a negligent act signifies 'failure to exercise reasonable care of duty while performing an act or omission to perform a legally imposed duty'.

Now, the two definitions give contrary meanings and therefore, it can be stated that it would be almost impossible for both elements to co-exist in all cases of car accidents. However, either of the element would definitely exist and it is imperative that the existence of even one of the conditions qualifies to be penalised under section 106 of BNS. It can be done by reading both the elements disjunctively and not conjunctively. In absence of such an interpretation, it is possible to argue that while the provision may have served as a deterrent to prevent reckless and careless driving, it has also made it more challenging for the prosecution to establish the twin test of recklessness and negligence.

Now, Section 15(1) enables the JJB to conduct a 'preliminary assessment' in order to evaluate the maturity of a child between 16-18 years of age apprehended of committing a 'heinous

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[34] *Bharatiya Nyaya Sanhita*, 2023, § 106(2), No. 45, Acts of Parliament, 2023.

[35] Ashish Kumar & Deepak Singh, *Rash and Negligent Driving: The Dilemma of Section 106(2) BNS*, BAR & BENCH (12 Aug 2024, 12:21 PM), https://www.barandbench.com/view-point/rash-and-negligent-driving-dilemma-section-1062-bns.

offence'. The Act defines heinous offences as crimes for which a minimum punishment of 7 years imprisonment is prescribed. The dilemma that persisted was whether an offence where no minimum punishment is prescribed by the maximum punishment is above 7 years, then which category of offence should that particular act fall in? The Supreme Court in the case of 'Shilpa Mittal v. State of NCT of Delhi'[36], dealt with the above question and held that, the statute has explicitly used the words minimum 7 years and whenever there is no minimum punishment prescribed, however the maximum punishment goes beyond 7 years, then such offences should be categorised as 'serious offences' under JJ Act. The changes to that effect has been made in the definition of serious offences under the Juvenile Justice Act via 2022 amendment.[37] This signifies that a heinous offence would now constitute only those offences for which minimum punishment prescribed is seven years or more.[38]

Section 106(2) prescribes a maximum punishment of 10 years, wherein rash and negligent act accident death but not amounting to culpable homicide. Even if the case is made out under the similar circumstances under Section 105 BNS[39] as culpable homicide not amounting to murder, as it was in Shilpa Mittal case, still the offence cannot be categorised as a heinous offence as the provision does not provide for a minimum punishment but maximum imprisonment up to 10 years. This causes grave injustice to the victims of the motor vehicle accidents, which is so on the rise among juveniles, and there is no deterrent provision under the Act for curbing the same. In case of petty as well as serious offences, the trial is conducted by JJB, and it may pass any order as it deems fit under Section 18[40] of the Act.

Motor Vehicle Act: Liability of the Juveniles

In order to discourage parents and guardians from permitting minors to ride vehicles, the 'Central Motor Vehicle Act, 2019' was amended by the 'Union Ministry of Road Transport and Highways' to impose harsher penalties. Section 199 A[41] provides that where an offence under the MV Act has been committed by a juvenile, then:

- The owner of the vehicle or the juvenile's guardian is deemed guilty and subject to punishment.
- Along with the punishment, the owner or guardian could be imprisoned for up to three years and fined Rs 25,000.
- A vehicle that was used to commit the crime may have its registration revoked for a year.
- Until they turn 25, the minor who committed the infraction will not be eligible to receive a driver's license under section 9[42] or a learner's license under section 8[43].
- The child will be dealt as per the provisions of JJ Act, 2015.

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[36] *Shilpa Mittal v. State of NCT of Delhi*, (2020) 2 SCR 478.
[37] Juvenile Justice (Care and Protection of Children) Act, § 2(54), No. 2, Acts of Parliament, 2016.
[38] Juvenile Justice (Care and Protection of Children) Act, § 2(33), No. 2, Acts of Parliament, 2016.
[39] Bharatiya Nyaya Sanhita, 2023, § 105, No. 45, Acts of Parliament, 2023.
[40] Juvenile Justice (Care and Protection of Children) Act, § 18, No. 2, Acts of Parliament, 2016.
[41] Motor Vehicles Act, 1988, § 199A, No. 59, Acts of Parliament, 1988.
[42] Motor Vehicles Act, 1988, § 9, No. 59, Acts of Parliament, 1988.
[43] Motor Vehicles Act, 1988, § 8, No. 59, Acts of Parliament, 1988.

The liability of the guardian or parent gets extinguished if:

- If he can demonstrate that the crime was committed without his knowledge or that he took all reasonable precautions to stop it from happening, i.e, he exercised due diligence.
- If the minor who committed the offence had been given a driver's license or a learner's license under section 8 and was operating a motor vehicle that the minor was authorized to operate, the subsections of this act will not apply to such guardian or owner.

Section 199A raises the presumption in favour of the guardian, wherein, unless otherwise proved, the guardian shall be held liable for not exercising due diligence. The Gujarat High Court while dealing with Section 199A held that, 'from the plain reading of Section it appears that the presumption is rebuttable one and onus is on accused to disprove the said fact. The onus is on accused to prove the fact that the offence is committed without his knowledge and due diligence to prevent the commission of offence on his part.'[44] The word due diligence means 'the care a reasonable person would exercise to avoid any harm.'

Another question of law which needs to be addressed is, whether the liability of owner or guardian stands extinguished under section 199A in absence of charges against minor for driving without license. A single-judge bench of Kerela High Court[45] taking into account the repercussions of the road accidents caused by minors and the owners/guardians not taking proper care and caution, held that reckless driving has manifold consequences. With the minor having immunity against prosecution, the victim's family are often left with nothing. According to the principle of parental or ownership accountability, a statutory fiction considers it a criminal offence when a parent or owner of a motor vehicle contributes a minor in committing an offence. The purpose of the provision is to impose affirmative duties on those who are in charge of the minor or who own the vehicle in order to stop minors from committing crimes. It is a 'sui generis offence.'

Offence under Section 199A is independent, irrespective of whether any proceeding against the minor has been initiated or not. The actus reus of the offence is the act of the owner/guardian allowing access of the motor vehicle to the juvenile, while the mens rea is the knowledge that the juvenile cannot drive such a vehicle. As a result, even though the minor's commission of the offence is one of its components, the offence still exists independently. Prosecution against owners/guardians can be done on the basis of evidence collected by the 'Social Background report' without 'undue delay'. Within 2 months, the final report regarding the actions of juvenile must be submitted to JJB, but this timeline is flexible, further, the inquiry by the court into the juvenile's conduct should be as per the procedure of petty offences under CrPC. The most vital deliberation of the court was that, in case JJB finds that the child did not commit the offence or the proceedings are terminated, then the case against the owners/guardians also cannot

[44] *Mohemad Hanif Abdulsatar Teliya v. State of Gujarat*, on 9th April 2024.
[45] *Sharafudheen v. State of Kerala & Ors and Connected*, 2024: KER:44617

proceed.[46] The steps taken by Kerala High seem progressive; however the provisions themselves provide for a compensation of merely, 25,000 to the victims family nowhere seems appropriate where an accident caused by minor has led to the irreparable loss for a family, especially it was the primary earning member of the family.

Between Protection and Accountability- How to strike a balance?

As mentioned earlier, the JJ Act classifies offences into three classes, namely petty offences, serious offences and heinous offences. Petty offences are those for which maximum punishment under any law in force is imprisonment up to three years.[47] Serious offences include those offences for which either minimum imprisonment prescribed is for a term more than three years but not exceeding seven years, or if no minimum punishment is prescribed, the maximum prescribed imprisonment is for a term more than seven years.[48] Heinous offences are categorised as those offences for which minimum prescribed punishment is imprisonment for seven years or more.[49] The provision of 'death by negligence' under section 106, BNS,[50] prescribes maximum imprisonment for a term of five years and no minimum imprisonment is provided under the provision.

This means that the offence would be covered by the definition of serious offences under the JJ Act. The implication is that if the child in conflict with law is aged between 16-18 years and has allegedly committed the offence of rash or negligent driving, he would not be subjected to the process of preliminary assessment wherein his mental, physical capacities and ability to understand the consequences of the act could be assessed. They would be subjected to the ordinary process of the Juvenile Justice Boards, wherein they are usually let go off with minimal penalties or short-term rehabilitative measures. While this approach aligns with the restorative and rehabilitative objectives of the juvenile justice system, it fails to act as a deterrent to commission of such offences in future. While the juveniles perceive that the consequences of their action will be limited to nominal fines, community service, counselling or a brief stay at an observation home, it can diminish their sense of accountability. This perception would enable them to engage in reckless behaviour of driving without a license under the assumption that the legal repercussions will be minimal.

To effectively curb the offence of rash or negligent driving by minors, one possible solution is to bring the offence under the ambit of heinous offences. This can be done by bringing an amendment to section 106 of BNS, wherein the punishment can be prescribed to be of minimum term for seven years. Consequently, juveniles aged between 16-18 years would have to go through the process of preliminary assessment, post which they could be transferred to

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[46] Shazia Siddiqui, *Kerala High Court Upholds Liability of Guardians and Vehicle Owners under Motor Vehicles Act for Minor Driving Offences*, CHILD RIGHTS CLINIC, JINDAL GLOBAL LAW SCHOOL (Apr, 24, 2024), https://jgu.edu.in/child-rights-clinic/kerala-high-court-upholds-liability-of-guardians-and-vehicle-owners-under-motor-vehicles-act-for-minor-driving-offences/.
[47] Juvenile Justice (Care and Protection of Children) Act, § 2(45), No. 2, Acts of Parliament, 2016.
[48] Juvenile Justice (Care and Protection of Children) Act, § 2(54), No. 2, Acts of Parliament, 2016.
[49] Juvenile Justice (Care and Protection of Children) Act, § 2(33) No. 2, Acts of Parliament, 2016.
[50] Bharatiya Nyaya Sanhita, 2023, § 106, No. 45, Acts of Parliament, 2023.

children's court based on the satisfaction of the JJB. Such a measure would enable the JJB to carefully evaluate the mental capacities and ability to understand the consequence of the act before determining an appropriate course of action. It would also send a clear message to the juveniles that such offences may attract stringent consequences. Given the alarming rise in such incidents, a balanced approach that includes deterrent measures, alongside the rehabilitative ideals of juvenile justice would be essential to protect not only the society at large but also the future of the children themselves.

However, a relevant issue that arises is with respect to the process of preliminary assessment itself. The process has been fraught with procedural, legal and ethical challenges. One of the most pressing concerns being that there is no set standard or procedure to conduct the assessment. The NCPCR guidelines[51] on preliminary assessment do provide an outline of the process but it does not give clear and detailed procedural directives, resulting in inconsistent application of the provision. Furthermore, the provision allows JJB to take assistance of psychologists or psycho-social workers but the same has not been made mandatory. It was only in the case of Barun Chandra Thakur, when the Supreme Court clarified that 'when a JJB does not comprise of a professional trained in child psychology or psychiatry as one of its members, it would mandatorily take the assistance of an expert during preliminary assessment'.[52]

Furthermore, the Act or the Model Rules do not prescribe standard protocols for such evaluation, due to which in many cases brief or unstructured interviews or IQ tests meant for children up to fifteen years of age are used to assess the mental and emotional capacity. Another argument is that the process of preliminary assessment has the ability to expose the children to adult criminal justice system, thereby interfering with the principle of giving them a child-friendly environment. In light of this, it is recommended to have codified procedures, formal training of experts, and child-friendly safeguards to ensure the preliminary assessment process upholds the principles of natural justice and the 'best interests of the child'.

Given that the offence of death by negligence would today fall under the ambit of serious offence, it significantly increases the responsibility of the JJBs to deal with them in such a way that it protects the rights of the children as well as creates a deterrence. This can be done by ensuring that they are not let go of by nominal fines, counselling or community service. Instead, the punishments must include meaningful consequences that prompt the juveniles to reflect on their actions, develop empathy and grow into responsible citizens. A critical component of achieving this is the effective implementation of the Individual Care Plans[53], wherein post their release, the juveniles are periodically followed up by the probation officers to track their progress. This ensures sustained behavioural changes and the involvement of parents in

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[51] NCPCR, *Guidelines for conducting Preliminary Assessment Under Section 15 of the JJ Act, 2015*, NCPCR, (Ape. 2023), https://ncpcr.gov.in/uploads/16813797786437d1c2bea2a_guidelines-for-conducting-preliminary-assessment.pdf.

[52] Barun Chandra Thakur Vs. Master Bholu & Anr., 2022 SCC OnLine SC 870.

[53] Juvenile Justice (Care and Protection of Children) Model Rules, 2016, G.S.R. 898(E), § 2(ix), Gazette of India, Extraordinary, pt. II, sec. 3(i), Sep. 21, (2016).

cultivating accountability. Therefore, if legal mechanisms do not impose stringent sanctions, an emotional and ethical accountability must be instilled through structured rehabilitative efforts. Another probable solution is to increase the penalty prescribed for parents or guardian under the MV Act. As per section 199A of the Act, the parents or guardians may face up to 3 years fine and a fine of Rs. 25, 000. Further, under section 199 A, the parents can even evade the penalty if they prove that the said offence was committed without their knowledge or in spite of them taking reasonable steps to prevent it.

However, it has been evidently noticed in multiple cases that parents fail to exercise due diligence, and take necessary steps to prevent their children from engaging in such reckless acts. However, proving ignorance or preventive effort is subjective and in absence of strict evidentiary standards, the clause becomes a means for evading liability. Consequentially, parents or guardians are also let off with minimal or no penalties, further diluting the deterrent effect. There also needs to be clear guidelines on what constitutes 'reasonable steps' in order to strengthen the procedural enforcement of this exception and ensuring that parental accountability can be enforced.

Finally, it is imperative to impose substantial monetary compensation for the victims. With the JJ Act focusing on rehabilitation of juveniles, and the difficulty of proving parental accountability, the victims are often left with no redress. In such scenario, in order to balance the scales, it is important that compensation paid to victims or their families is substantial acknowledging the gravity of the harm caused and especially to act as a deterrent for the parents or guardians to exercise more responsibility. State Victim Compensation Schemes should also be activated more robustly in cases where juveniles are involved. Juvenile Justice Boards should also be trained and directed to emphasise on adequate compensation to be paid to victims in such cases as it would ensure that victim's right to justice is not lost.

Conclusion

The severity of the road accidents caused by juveniles and its amplified consequences demands re-examination of the Juvenile Justice framework in our country. While the 2015 Act rights focuses on the 'rehabilitative and reformative' approach, the acts of the recent past make it unfair for the victims. Enactment of Section 106 BNS tries to bridge this gap by introduction of enhanced punishment, however the burden on the prosecution has also increased by mandating the establishment of both 'rash and negligent' act. JJBs have substantial increase in their responsibility while dealing with death caused by negligence as the same is categorised as a serious offence. Their approach should incorporate both reformative and deterrence theory.

This can be ensured by making sure they are not dismissed through community service, counselling, or small fines. Rather, the penalties ought to involve significant repercussions that encourage the young people to consider their behavior, cultivate compassion, and mature into responsible adults. Ultimately, a balanced approach has to be taken which on one hand would create deterrence and restore rehabilitative justice on the other.

Often children are found with vehicles causing serious damages. In such cases imposing liability and serving justice is a strenuous task. The introduction of Section 199A under the Motor vehicles Act is a positive step, however its effectiveness is diminished by the meagre penalties and defence of reasonable care. The Act does not define as to what would comprise of 'reasonable steps'. It is pertinent from the victim's point of view that clearer guidelines must be construed, along with hefty compensation in the interest of justice.