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WHERE MINDS MEET LAW

# LEX MENTE LAW REVIEW

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# PREFACE

*Lex Mente - Volume 1* represents the beginning of an initiative aimed at encouraging meaningful, accessible, and student-driven legal research. This inaugural edition brings together a collection of articles written by young scholars who have explored contemporary legal issues with sincerity, analytical depth, and originality.

The idea behind *Lex Mente* is simple yet essential: to provide a platform where students can express their perspectives without academic barriers, develop research skills, and engage with the evolving nature of law. Through this volume, we hope to motivate readers to think critically, question established interpretations, and contribute to legal discourse with confidence.

Each paper included in this edition has been reviewed to maintain academic quality and ensure that it reflects the purpose of this publication. We are grateful to our contributors, mentors, and the editorial team whose dedication made this volume possible.

As we present this first edition, we remain committed to nurturing a space that supports legal scholarship and encourages more students to participate in future publications. We hope this volume serves as an inspiration and a stepping stone for many more academic contributions ahead

# MESSAGE FROM ADVISORY BOARD

*"The Lex Mente initiative represents an exemplary advancement in student-led legal research and academic publishing within the contemporary legal domain. By providing a scholarly platform for emerging researchers and students, Lex Mente strengthens the cultivation of critical inquiry and substantive legal writing, thereby enriching the academic discourse and promoting intellectual rigor within the legal community.*

*It is imperative for students and early-career scholars to engage thoroughly in research, academic writing, and analytical debate, as these endeavors are fundamental to their development as competent legal professionals. Lex Mente's mission to foster a robust research culture aligns with the evolving needs of legal academia and professional practice.*

*The journal's steadfast commitment to academic integrity and the production of original, well-reasoned scholarship underlines the importance of competence, ethical standards, and responsibility in legal research.*

*I extend my best wishes for the successful publication of Volume 1 and express optimism for Lex Mente's future as a leading forum for quality legal scholarship.*

***- Adv. Pushpila Bisht***

***Senior Counsel with the Union of India***

# MESSAGE FROM EDITOR-IN-CHIEF

*The Lex Mente Journal continues its commitment to engaging deeply with contemporary legal issues and the dynamic relationship between law, policy, and society. This volume reflects our belief that meaningful scholarship emerges from critical examination, informed analysis, and a willingness to engage with the complexities of the Indian legal landscape.*

*As an academic platform, we seek to encourage research that is rigorous, original, and impactful—work that not only expands legal understanding but also contributes to the evolving discourse on justice, rights, and governance. Every contribution to this volume embodies the intellectual curiosity and analytical depth that we aim to nurture within the legal community.*

*We remain dedicated to supporting scholars, practitioners, and students who engage thoughtfully with legal developments and offer nuanced perspectives on pressing issues. It is our hope that this edition furthers the journal's objective of enriching legal scholarship and fostering meaningful academic engagement."*

***- Dr. Purnima Bhardwaj***
***Assistant Professor***
***Shri Ramswaroop Memorial University,***
***Lucknow.***

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# ALGORITHMIC BIAS AND DUE PROCESS: SAFEGUARDING FAIR TRIAL RIGHTS IN THE DIGITAL ERA

***Prof. Joyce Francis Noronha[1] and Arya Nishikant Vartak[2]***

## ABSTRACT

*The rapid integration of artificial intelligence (AI) into judicial systems across the globe is clearly transforming the administration of justice. Today, AI-powered technologies automate tasks ranging from evidence review and risk assessment to sentencing recommendations, propelling courts and law enforcement agencies into the digital era. While AI offers the promise of efficiency, speed, and objectivity, mounting evidence reveals that its growing footprint also poses significant threats to fairness and due process, raising urgent ethical, legal, and social considerations.*

*Recent deployments of algorithms like COMPAS for reoffending prediction and facial recognition tools in policing have exposed grave risks inherent in the current design and application of AI. Notably, empirical studies show that the Black defendants face excessively high-risk compared to white peers, almost twice as likely in some settings.[3] Such disparities underscore how AI systems often replicate—and intensify—the prejudices hidden in historical training data. These problems extend beyond technical error, challenging core fair trial rights and the very foundations of procedural justice.[4]*

*This research adopts a doctrinal and analytical approach—scrutinizing legal standards, landmark case law, and policy reports—to dissect how algorithmic bias can undermine judicial discretion, transparency, and the inclusive functioning of courts. It explores the erosion of fundamental safeguards in justice systems: transparency of algorithmic operation, mandatory notification to defendants when AI is used, opportunities for independent review, and accessible avenues for contesting erroneous outcomes. Marginalized communities, usually excluded from both the design and adoption phases of* algorithmic systems, are at increased risk of unjust outcomes and diminished opportunities for meaningful participation.

[1] Prof. Joyce Francis Noronha, *Sonopant Dandekar Shikshan Mandali's Law College, Palghar.*
[2] Arya Nishikant Vartak, *Sonopant Dandekar Shikshan Mandali's Law College, Palghar*.
[3] Julia Angwin et al., Machine Bias: There's Software Used Across the Country to Predict Future Criminals. And It's Biased Against Blacks, *ProPublica* (May 23, 2016), https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing .
[4] Rebecca Wexler, When Is a Computer a Judge? It Depends on How You Define 'Judge', 105 *Cornell L. Rev.* 847, 870–72 (2020).

*Comparative analysis exposes divergent regulatory strategies. The fragmented approach in the United States offers limited protection against algorithmic bias, despite constitutional guarantees, while European Union regimes strive for harmonized protective standards under statues like the GDPR.[5] Article 21 of Constitution of India faces new challenges as courts grapple with the opacity of automated decision-making. International frameworks, such as Article 6 of the European Convention on Human Rights (ECHR), are increasingly invoked to guide best practices, but practical gaps remain across jurisdictions.[6]*

*Finally, the study argues that protecting fair trial rights today requires robust regulatory frameworks, vigilant oversight, and participatory mechanisms to hold AI systems accountable. That includes transparent algorithmic design, ongoing monitoring to detect bias, and measures that empower defendants and diverse communities to contest automated recommendations. Rather than allowing AI to replace human judgment, justice systems must harness these tools as assistants to support informed decision-making and deliver speedy justice—but never as final adjudicators. Failure to do so risks losing critical rights in translation from courtroom to code.*

*This evolving landscape calls for collaborative action among lawmakers, technologists, and civil society to develop safeguards that preserve fairness and equality in the digital age, ensuring that technological progress truly serves the cause of justice.*

**Keywords**: Artificial Intelligence/AI, Judicial Integrity, Accountability, Algorithmic Bias, Digital Privacy, Fair Trial, Due Process, Rule of Law.

[5] Regulation (EU) 2016/679, of the European Parliament and of the Council of 27 Apr. 2016 on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data (General Data Protection Regulation), 2016 O.J. (L 119) 1 (EU).
[6] European Convention on Human Rights art. 6, Nov. 4, 1950, 213 U.N.T.S. 221.

## INTRODUCTION

AI is transforming how decisions are made across multiple sectors, including healthcare, finance, governance, and, increasingly, the Judiciary. AI refers broadly to computer systems that can perform tasks that usually require human intelligence, such as learning, reasoning, perception, and decision-making. Over time, AI has evolved from simple rule-based systems in the 1950s and 1960s to complex machine learning (ML) and deep learning models that strengthen today's most advanced applications. Types of AI most relevant here include expert systems, natural language processing (NLP), ML, and predictive analytics, each contributing distinctively to the automation of decision-making.[7]

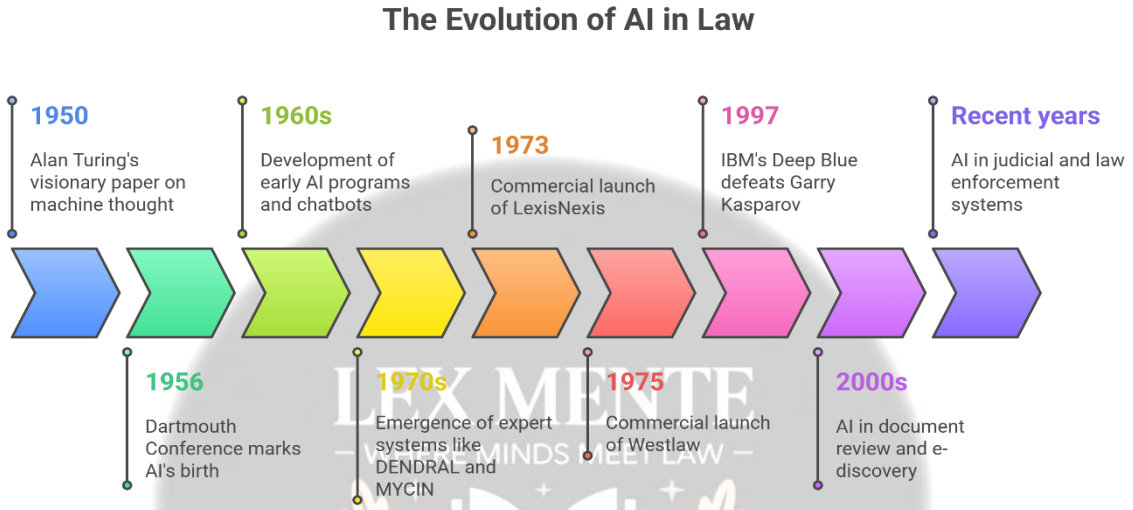


Figure 1: Source – Created by the Authors

In recent years, AI's presence has grown rapidly in core legal functions—streamlining court record management, assisting judges with legal research, predicting reoffending risks at bail hearings, and even analyzing evidence. Tools like risk-assessment algorithms are being used for pretrial release recommendations and predictive monitoring software aims to anticipate crime hotspots.[8] Such technologies promise faster, data-driven solutions, yet they introduce a new and urgent concern: algorithmic bias. Unlike traditional human error, algorithmic bias is systematic and can remain hidden within complex code or discriminatory data, influencing decisions at scale. In legal settings—where the stakes are liberty and justice—this poses profound threats to foundational rights like due process and fair trial, possibly reinforcing pre-existing inequalities under the guise of objectivity.[9]

[7] Alan M. Turing, Computing Machinery and Intelligence, 59 *Mind* 433 (1950).
[8] Andrew L.T. Chien, Predictive Analytics in Judicial Processes, 25 *Harv. J.L. & Tech.* 289 (2020)., Cynthia Rudin, Algorithms for Criminal Justice Risk Assessment, 34 *Ann. Rev. Stat. & Data Sci.* 297 (2019).
[9] Sonia K. Katyal, Algorithmic Decision-Making and Due Process, 115 *Calif. L. Rev.* 1793 (2027).

This paper is driven by four key research objectives:

a) To study how AI is being integrated into the justice system, particularly in areas where it supports courts and influences crucial decision-making processes.

b) It also explores how bias may become embedded in these technologies, examining the consequences for fairness, equality, and the right to due process.

c) To review the current safeguards and regulations designed to protect people's rights, considering what is needed to ensure that the growing presence of AI in legal settings upholds justice for all.

d) To consider the adequacy of India's existing legal, policy, and judicial responses to these issues as of 2025.[10]

The scope of this paper centers on AI's influence over judicial and law enforcement decision-making, especially in India, drawing select comparisons with global best practices, examining the divergent regulatory responses of India, the European Union, and the United States in mitigating algorithmic discrimination, procedural opacity, and institutional accountability.[11]

Recent policy and ethical frameworks, including UNESCO's Recommendation on the Ethics of Artificial Intelligence[12] and the OECD's Governing with Artificial Intelligence report, emphasize the necessity of transparency, explainability, and oversight in algorithmic decision-making.[13] Due to inconsistent enforcement marginalized communities continue to bear the brunt of systemic digital discrimination.[14] The preservation of judicial independence, therefore, requires embedding strong procedural safeguards, mandatory disclosure mechanisms, and human oversight within all AI-assisted decision processes.

The structure of the study unfolds as follows: the subsequent section examines the development and use of AI in the justice system, followed by an analysis of algorithmic bias and its effects on law, an overview of existing frameworks and guidelines, and ultimately, recommendations and a conclusion.

## CONCEPTUAL AND THEORETICAL FRAMEWORK

[10] Ministry of Electronics & Information Technology, India, *Draft Digital India Act, 2023*, https://www.meity.gov.in/.

[11] Nguyen Thi Thu Trang et al., Right to a Fair Trial When Applying Artificial Intelligence in Criminal Justice—Lessons and Experiences for Vietnam, 12 *J.L. & Sustainable Dev.* e601, e608 (2024).

[12] UNESCO, *Recommendation on the Ethics of Artificial Intelligence* (Nov. 23, 2021) https://www.unesco.org/en/articles/recommendation-ethics-artificial-intelligence

[13] OECD, *Governing with Artificial Intelligence: The State of Play and Way Forward in Core Government Functions* 28 (2025), https://doi.org/10.1787/795de142-en .

[14] Chaudhary Hamza Riaz, Legal Technology and Bias: A Threat to Fair Trial Rights? (July 19, 2025), https://ssrn.com/abstract=5357741.

This section deals with definitions of key terms, the theories identified theoretical base of this research and the relevance of the theories in evaluating AI in law and justice

**Artificial Intelligence:** There is no single definition of AI that most scholars would agree to. According to the "European Commission", AI refers to "systems that display intelligent behaviour by analysing their environment and taking actions with some degree of autonomy to achieve specific goals."[15]

**Algorithmic bias:** Is a socio-technical phenomenon.[16] Algorithmic bias refers to systematic and structured errors and bias points in AI systems or AI-based systems that produce biased results and inequalities without any justifiable reason[17]**.** The earliest development happened almost a decade ago in the form of the COMPAS (Correctional Offender Management Profiling for Alternative Sanctions) algorithm, which was created as an AI-based tool designed to "predict" the likelihood of a defendant's recidivism, to guide judicial decisions, and provide data-driven criteria for sentencing[18].

**Datafication**: refers to the quantification of human life through digital information, very often for economic value[19].

**Due process**: The notion of due process a basic legal concept that assures impartiality and equity in court proceedings. "No person shall be deprived of his right conferred by Article 21 except according to procedure established by law." It originated in Magna Carta of 1215, which established the idea that everyone is entitled to a fair hearing and a chance to defend themselves against charges. In the US the principle of due process is enshrined in the Fifth and Fourteenth Amendments of the constitution. These amendments guarantee that no person can be deprived of life, liberty, or property without due legal process.[20]

**Fair trial**: "Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him."[21]

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[15] European Commission, *Artificial Intelligence for Europe*, COM (2018) 237 final (Apr. 25, 2018), https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52018DC0237.

[16] M. Favaretto, E. De Clercq & B.S. Elger, Big Data and Discrimination: Perils, Promises and Solutions, 6(1) J. Big Data 12 (2019) https://doi.org/10.1186/s40537-019-0177-4.

[17] Robert et al. 2020; Kordzadeh and Ghasemaghaei 2022; Fazelpour and Danks 2021; Johnson 2020; Hooker 2021; Robert et al. 2020

[18] Brennan, W. Dieterich & B. Ehret, Evaluating the Predictive Validity of the COMPAS Risk and Needs Assessment System, 36 *Crim. Just. & Behavior* 21 (2009) https://doi.org/10.1177/0093854808326545.

[19] U.A. Mejias & N. Couldry, Datafication, 8(4) *Internet Policy Rev.* (2019) https://doi.org/10.14763/2019.4.1428/

[20] John V. Orth, Due Process of Law, *EBSCO Research Starters* (2025), https://www.ebsco.com/research-starters/law/due-process-law.

[21] Universal Declaration of Human Rights art. 10, G.A. Res. 217A (III), U.N. Doc. A/810 (Dec. 10, 1948).

**Large Language Models (LLMs):** are a category of deep learning models trained on immense amounts of data, making them capable of understanding and generating natural language and other types of content to perform a wide range of tasks.[22]

**Taxonomy of e-judges:** There are 3 types of e-judges based on their involvement in judicial proceedings and the degree of human involvement.

**(a) "Argument development AI":** The first conceptual model is "Argument Development AI", an e-judge is designed to support judicial reasoning by analysing vast repositories of legal texts, precedents, and case law. The judge's role as the ultimate arbiter of justice must remain intact.

**(b) "Supervised e-Judge":** "a human judge-in-the-loop" This model takes a more active role in the judicial process by assisting in the drafting of judgments.

**(c) "Autonomous e-Judge":** The most ambitious model is the Autonomous e-Judge, an AI system capable of independently deciding certain types of cases. This model could be particularly suited to routine or low-stakes matters, such as traffic violations or small claims disputes.[23]

**Black Box:** The "**black box problem**" in AI refers to the lack of transparency in how complex algorithms reach their decisions, making it difficult to understand or challenge outcomes.[24] In judicial settings, this undermines fair trial rights by preventing parties from scrutinizing, contesting, or appealing AI-driven decisions, thus threatening procedural fairness and accountability.[25]

**Rule of Law:** the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power and excludes the existence of arbitrariness or even of wide discretionary authority on the part of the government. It has 3 elements

i) Supremacy of Law

ii) Equality Before Law

iii) Predominance of Legal Spirit[26]

[22] Tom B. Brown et al., Language Models Are Few-Shot Learners, 33 *Adv. Neural Inf. Process. Syst.* 1877, 1877–1901 (2020)., Emily M. Bender et al., On the Dangers of Stochastic Parrots: Can Language Models Be Too Big? *Findings Ass'n Comput. Linguistics* 610, 610–23 (2021).

[23] Vytautas Mizaras, Opening of the Judicial Year 2025 Judicial Seminar – Artificial Intelligence and the Right to a Fair Trial (Jan. 31, 2025 https://www.echr.coe.int/documents/d/echr/speech-20250131-mizaras-jy-eng.

[24] Frank Pasquale, *The Black Box Society: The Secret Algorithms That Control Money and Information* (Harvard Univ. Press 2015).

[25] Christopher Slobogin, The Right to Transparency in Algorithmic Sentencing, 102 *Cornell L. Rev.* 967, 975–78 (2017).

[26] A.V. Dicey, *Introduction to the Study of the Law of the Constitution* 188 (10th ed. 1959).

## METHODOLOGY

This research mostly relies on doctrinal approach, complemented by comparative elements, to examine the safeguarding of fair trial rights against algorithmic bias in the digital era. The doctrinal method allows for in-depth analysis of legal principles, statutory frameworks, and judicial interpretations pertaining to due process and AI, as reflected in foundational documents such as the EU AI Act, GDPR, Digital Personal Data Protection Act (DPDPA) (2023), ECHR[27], and various national AI strategies and advisories[28]. Comparative analysis is incorporated through a review of policies and court practices across jurisdictions, drawing from case studies and reports focused on Singapore, South Korea, Australia, and the EU, such as "Navigating AI in the Courts: Lessons from Singapore, South Korea, and Australia" and "Governing with Artificial Intelligence."[29]

Secondary sources include statutes, landmark judicial decisions, scholarly articles, government advisories, international policy papers, and studies concerning AI implementation in courts[30]. Thematic analysis is employed to identify key concepts, emerging patterns, and recurring themes related to algorithmic bias and procedural safeguards.

This mixed qualitative approach is justified as it enables logical study of both theoretical and practical responses to algorithmic bias, synthesizes diverse national/international frameworks, and evaluates the effectiveness of current legal and policy mechanisms in protecting due process and fair trial rights in increasingly digital judicial contexts.[31]

## LEGAL AND REGULATORY FRAMEWORK

Advances in artificial intelligence (AI) and algorithmic decision-making pose profound challenges to safeguarding due process rights, particularly the right to a fair trial and procedural fairness.

### Constitutional Protections of Due Process in India:

**(a) Constitution of India – Article 21 (Right to personal liberty and Procedural fairness):**

It guarantees that no person shall be deprived of their life or personal liberty except according to "procedure established by law." Judicial interpretation has expanded this "procedure" to require fairness, justness, and reasonableness, thereby adopting substantive due process protections that include transparency, right to be heard, and non-arbitrariness in governmental

[27] Regulation (EU) 2024/1689, arts. 5, 9–13, 51, 53, 62, 72–74, Annexes IV, XII–XIII, 2024 O.J. (L 1689) (EU) https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L_202401689.
[28] NITI Aayog, *National Strategy for Artificial Intelligence* 74–82 (2018) (India).
[29] OECD, *supra note* 13.
[30] Ministry of Electronics & IT, Govt. of India, *Responsible AI for All: Principles for Responsible Management of AI Systems* 32–48 (2021).
[31] Future of Life Institute, *High-Level Summary of the EU Artificial Intelligence Act* (May 30, 2024).

actions[32]. The precept of procedural fairness incorporated in Article 21 extends to any state action adversely affecting individuals' rights, including decisions made or influenced by automated or AI-based systems.[33]

**(b) DPDPA, 2023:** India's legislative developments, establish obligations for data fiduciaries to ensure lawful, fair, and transparent processing of personal data, placing emphasis on consent, accuracy, and redressal mechanisms. These provisions are crucial in limiting discriminatory or biased algorithmic processes affecting individuals' legal rights.[34]

**Relevant International Provisions:**

**(a) ECHR – Article 6** enshrines the right to a fair trial, mandating impartiality, public hearings. The principle of transparency and the right to understand and challenge automated decisions have been emphasized in interpretations relating to AI use.[35]

**(b) GDPR:** The EU's (GDPR) require transparency, explainability, and accountability in automated decision-making processes, especially where such decisions have legal or similarly significant effects.[36]

**(c) EU Artificial Intelligence Act:** In June 2024, the EU adopted the world's first rules on AI. The AI Act applies primarily to providers and deployers putting AI systems and Global Partnership and Artificial Intelligence (GPAI) models into service or placing them on the EU market and who are based in the EU, and to providers of AI systems that are established in a third country, when the output produced by their systems is used in the EU.[37]

**Judicial Precedents Safeguarding Fairness and Transparency:**

Indian judiciary has progressively enforced due process guarantees in the context of technological advancement. Landmark Supreme Court rulings in 1996[38] and 2011[39] underscore the necessity of fair procedures, access to justice, and the right to be heard. The courts affirm that all state actions, including those leveraging technologies like AI, must withstand scrutiny for arbitrariness and ensure equality before law. Internationally, courts have stressed the importance of "explainability" of algorithmic decisions, mandating that affected individuals

[32] *India Const.* art. 21.
[33] *Maneka Gandhi v. Union of India*, (1978) 1 SCC 248 (India).
[34] *Digital Personal Data Protection Act*, No. 22 of 2023, India Code.
[35] Convention for the Protection of Human Rights and Fundamental Freedoms arts. 6, Nov. 4, 1950, 213 U.N.T.S. 222 [European Convention on Human Rights].
[36] Proposal for a Regulation of the European Parliament and of the Council Laying Down Harmonised Rules on Artificial Intelligence (Artificial Intelligence Act), COM/2021/206 final.
[37] Regulation (EU) 2024/1689, of the European Parliament and of the Council of 13 June 2024 on laying down harmonized rules on artificial intelligence (AI Act), 2024 O.J. (L 1689) 1 (EU), https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L_202401689.
[38] *State of Punjab v. Gurmit Singh*, (1996) 2 SCC 384 (India).
[39] *Mohd. Sukur Ali v. State of Assam*, (2011) 4 SCC 729 (India).

receive meaningful information about the logic and significance of such decisions to exercise their right to contest them. Judicial guidelines and legal policy frameworks often mandate human oversight over AI decisions, preventing over-reliance and addressing risks of systemic bias.[40][41]

**Emerging Legal Instruments and Proposals**

India's evolving legal landscape, exemplified by the DPDPA, 2023[42], along with sectoral judicial pronouncements, establishes a foundation to regulate AI's intersection with due process rights. At the international level, regulations such as the EU AI Act and frameworks by the OECD[43] propose harmonized standards for trustworthy AI, urging nations to embed fairness, transparency, and human rights into AI governance. Such frameworks are complemented by judicial guidelines[44], institutional oversight mechanisms, and technological standards for explainability and bias mitigation, representing an integrated approach to preserving the integrity of legal processes in the digital era.

## FINDINGS & ANALYSIS

**(a)** Use of AI and related tools has increased manifold over the past decade. Several legal tasks, including legal research, contract review, and prediction of case outcomes use AI technologies, such as ML algorithms, NLP, and computer vision. AI on the one hand optimizes the cost-efficiency trade off while of the other hand it raises concerns about privacy, bias, and accountability. The fear lurching in everyone's mind is that the rapidly growing AI intervention might replace human judges, and it might adversely affect the right to a fair trial and other fundamental rule of law values.

**(b)** In 2016 Dutch computer scientist J. van den Herik claimed that by 2030 or 2040, AI systems could deliver most judicial decisions autonomously.[45] Reed C. Lawlor, an American attorney had observed in 1963 that the computer "is not a substitute for lawyers and judges. It is a tool that will lighten their burdens and aid them in achieving clear thinking more readily and with less fatigue."[46]

[40] *Sant'Anna v. Italy*, App. No. 12045/86, 1996-V Eur. Ct. H.R. 1660.
[41] *Loomis v. Wisconsin*, 881 N.W.2d 749 (Wis. 2016) (U.S.).
[42] *Digital Personal Data Protection Act*, supra note 34, §§ 3, 4, 24., Ministry of Electronics & Information Technology, Govt. of India, *Digital Personal Data Protection Act, 202*3, https://www.meity.gov.in/
[43] OECD, *supra note* 13.
[44] Supreme Court of India, *Guidelines for Use of Advanced Technologies in Judicial Processes* (2024).
[45] Jaap van den Herik, In 2030 Zullen Computers Rechtspreken, *Mr Online* (Oct. 31, 2016) https://www.mr-online.nl/in-2030-zullen-computers-rechtspreken/.
[46] Reed C. Lawlor, What Computers Can Do: Analysis and Prediction of Judicial Decisions, 49(4) *ABA J.* 337 (1963).

**(c)** It makes sense to use algorithms in criminal proceedings for evidentiary purposes and for supporting decision-making despite the fact that these tools are still concealed in secrecy and opacity and that we do not understand how they generate their specific output[47].

**(d)** Litigation is adversarial, AI in the administration of justice causes a knowledge asymmetry between parties. Therefore, it is essential to ensure that the guarantees of the right of access to the judge and the right to a fair trial is not adversely impacted[48].

**(e)** Courts must uphold and serve the rule of law, which is one of the pillars of democracy. The right to a fair trial is at the core of human rights protection. If we were to design a system where an AI-powered judge replaces human judges, the AI judge would need to fully assume all the tasks of a human judge during legal proceedings, including those requiring the elusive "human touch". Judges are information processors and problem solvers—these roles can be replaced by AI. But judges need empathy, moral reasoning, which cannot be matched by AI models. In criminal cases, AI can be tasked with proposing sentences. However, the role of human judges is more extensive. Judges make reasoned choices between sentencing and other options like community service, therapy, or restorative measures based on evidence examined. Judges do not use the one size fits all approach. Judges use empathy which AI lacks.[4950] According to ECHR the right to adversarial proceedings and the principle of equality of arms are to aspects of the right to free trial. Equality of arms requires that all parties should be afforded fair and equal opportunities - to call witnesses and cross-examine the witnesses called by the other party. (51 ibid)

**(e) The Reasons for Judicial Decisions**

Judges are required to provide reasoned decisions. This evidences that the case has been heard. Providing reasoned decisions is procedural as well as vital to making both parties and society at large to respect judicial decisions. The reasons provided should help the parties to use the appeal window if required.

The black-box syndrome plagued the ML and first-generation generative AI systems. They could not offer reasons for their conclusions.[51] However modern models like OpenAI's o-series

[47] Francesca Palmiotto, The Black Box on Trial: The Impact of Algorithmic Opacity on Fair Trial Rights in Criminal Proceedings, in *Algorithmic Governance and Governance of Algorithms: Legal and Ethical Challenges* 61 (Martin Ebers & Marta Cantero Gamito eds., Springer 2021).

[48] CEPEJ, *European Ethical Charter on the Use of Artificial Intelligence in Judicial Systems and Their Environment* (2018).

[49] Richard A. Kulka & Joan B. K

[50] Dennis J. Devine & David E. Caughlin, Do They Matter? A Meta-Analytic Investigation of Individual Characteristics and Guilt Judgments, 20(2) *Psychol. Pub. Pol'y & L.* 109 (2014).

[51] Cynthia Rudin, Stop Explaining Black Box Machine Learning Models for High-Stakes Decisions and Use Interpretable Models Instead, 1 *Nat. Mach. Intell.* 206–15 (2019).

(GPT-o1, o3, o4-mini)[52], Google's Gemini 2.5 Pro, DeepSeek-R1[53] and extended-thinking modes like Claude—have overcome the deficiency to a large extent.

The main issue here is not whether AI can generate reasoned text but whether the AI-generated reasoning fulfils the criteria defined in Article 6 of ECHR[54]

**(f) A Public Hearing**

The public hearing requirement of a fair trial, prevents justice from being administered in secrecy. This ensures transparency and accountability. Litigants are protected because the proceedings are open to scrutiny. This enhances confidence in courts, it protects litigants, trust in the judiciary and the legal system.

The right to public hearing also includes a right to oral hearing at the court of first instance. Exceptions permitted only when they are justified and do not affect the fairness of the proceedings.[55]

ECHR Article 6(1) provides an extended definition of pronouncing judgement publicly. But allowing AI equipped judge to deliver judgement in secrecy especially when proprietary algorithms are used. These affect transparency and accountability.

## RECOMMENDATION

(a) AI use in the legal industry has increased rapidly over the past decade. While the use of AI in law has the potential to increase efficiency and reduce costs, it also raises concerns about privacy, bias, and accountability.

(b) Aligning AI in the judiciary requires meeting the standards with the individual rights codified in the ECHR. This includes upholding the guarantees of a fair trial—particularly the right to a legally established judge, the right to an independent and impartial tribunal, and the principle of equality of arms in judicial proceedings.

[52] OpenAI, Learning to Reason with LLMs (Sept. 12, 2024),https://openai.com/index/learning-to-reason-with-llms/. (accessed May 7, 2025).

[53] Daya Guo et al., Deepseek-R1: Incentivizing Reasoning Capability in LLMs via Reinforcement Learning, *arXiv* (Jan. 29, 2025), https://arxiv.org/abs/2501.12948 (accessed May 7, 2025).

[54] Tamera Lanham et al., Measuring Faithfulness in Chain-of-Thought Reasoning, *arXiv* (July 17, 2023) https://arxiv.org/abs/2307.13702 (accessed May 7, 2025); Miles Turpin et al., Language Models Don't Always Say What They Think: Unfaithful Explanations in Chain-of-Thought Prompting, 36 *Adv. Neural Inf. Process. Syst.* 74952 (2023).

[55] See, e.g., *Allan Jacobsson v. Sweden (No. 2)*, App. No. 16970/90, ¶ 46 (Eur. Ct. H.R. 1998); *Fredin v. Sweden (No. 2)*, App. No. 18928/91, ¶¶ 21–22 (Eur. Ct. H.R. 1998); *Mirovni Inštitut v. Slovenia*, App. No. 32303/13, ¶¶ 36–37 (Eur. Ct. H.R. 2018); *Göç v. Turkey*, App. No. 36590/97, ¶ 47 (Eur. Ct. H.R. 2002).

(c) As the European Commission for the Efficiency of Justice (CEPEJ) observes, when AI tools are employed to resolve disputes or assist judicial decision-making, they must not compromise the essential guarantees of access to a—presumably human—judge.[56]

(d) Equality of arms can be maintained only if judges grant open access to the affected parties to the AI algorithm relied upon in the decision making. The access should enable the party to challenge the algorithm's scientific validity, scrutinise the weight assigned to various elements, and identify any potential errors in its conclusions.

(e) Legitimacy is central to the judiciary, and public trust depends on judgments being delivered—and owned—by human judges. Although LLMs can draft persuasive legal text, people may not accept rulings resting solely on algorithms. Thus, any AI-assisted decision must include a transparent, reasoned justification authored and endorsed by the judge personally.

## CONCLUSION

Research consistently shows that justice systems often fail to deliver impartial outcomes. Studies reveal troubling links between judicial decisions and factors that should be irrelevant to case judgments, while the right to a fair trial is one of the most violated human rights internationally. Artificial intelligence and machine learning could help improve efficiency and fairness in legal processes by reducing delays and inconsistencies. However, using AI without critical oversight, especially when it learns from flawed past practices, may reinforce existing biases and perpetuate injustices. Careful implementation and monitoring are crucial to harness technology's benefits while minimizing risks to due process.[57] Artificial intelligence cannot constitute an independent and impartial tribunal (court) because of the following reasons:

a) Courts administer justice on behalf of the community or on behalf of the state. Administration of justice is one of the sovereign functions of the state.[58] Therefore it is unacceptable that the role of judges is usurped by programs, algorithms and AI systems. A judge should not only be able to apply the law but also be a member of a community. The belonging to community enables the judge to understand the finer nuances of the community and confers social legitimacy to their decisions.[59]

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[56] CEPEJ, *European Ethical Charter on the Use of Artificial Intelligence in Judicial Systems and Their Environment* 8 (2018).

[57] Helga Molbæk-Steensig & Alexandre Quemy, Artificial Intelligence and Fair Trial Rights, https://cadmus.eui.eu/bitstreams/b584d555-32c5-57aa-a2ea-b4957d88a6d6/download.

[58] *Vilho Eskelinen & Others v. Finland*, App. No. 63235/00, ¶ 47 (Eur. Ct. H.R. Apr. 19, 2007).

[59] Ian Kerr & Carissima Mathen, Chief Justice John Roberts Is a Robot (2019) (unpublished manuscript) (on file with Univ. of Ottawa); Tania Sourdin, *Judges, Technology and Artificial Intelligence: The Artificial Judge* 211–12 (Edward Elgar Publ'g 2021).

b) The social legitimacy of courts and judges is closely linked to the trust and confidence society places in the courts to ensure legitimacy of judgments. The solutions proposed for the use of AI mechanisms in the administration of justice are not sufficient to create an environment of informed trust[60]. They don't permit justice to be entrusted to computer programs or artificial intelligence.

Judges should not only be technically competent in order to perform the judicial functions assigned to them by the state but also possess moral integrity to perform the role in courts operating in states governed by rule of law.[61]

c) AI may help in reducing the emotional entanglement of the judge or other subjective factors of human beings in the decisions rendered by them.[62] However, justice cannot be rendered devoid of emotions or other subjective characteristics, within the four corners of laws, codes and analysis of judicial precedents. The judges make decisions based on their conscience.[63] At times Judges use intuition and absence of intuition makes the judgement unfair.[64] Judges reveal compassion, mercy and are just. However, these qualities cannot be found in AI. But AI indicates efficiency, reliability, speed and intelligence.

d) The administration of justice and the protection of the individual's right to a fair trial require that the court be composed of judges who are capable not only of processing information and drawing conclusions from it, but, above all, of taking decisions that affect the rights, freedoms, or duties of individuals in accordance with their conscience, intuition & mercy. Even the most advanced artificial intelligence will not possess these qualities, which are the essence of the discretionary and judicial power of the court and the judge.

**Petition Filed in Supreme Court on 10th November, 2025 claims that GenAI in judiciary may lead to fake case laws.** The petition cautioned that unregulated use of AI and machine learning in the judicial system could raise serious constitutional and human rights issues. It argued that relying on generative AI for judicial work risks errors like fabricated judgments

[60] Giuseppe Contissa & Giulia Lasagni, When It Is (Also) Algorithms and AI That Decide on Criminal Matters: In Search of an Effective Remedy, 28 *Eur. J. Crime Crim. L. & Crim. Just.* 300 (2020).
[61] *Guðmundur Andri Ástráðsson v. Iceland*, App. No. 26374/18, ¶¶ 220–21 (Eur. Ct. H.R. Dec. 1, 2020); *Xero Flor w Polsce sp. z o.o. v. Poland*, App. No. 4907/18, ¶ 244 (Eur. Ct. H.R. May 7, 2021); *Reczkowicz v. Poland*, App. No. 43447/19, ¶ 217 (Eur. Ct. H.R. July 22, 2021).
[62] Thomas Julius Buocz, Artificial Intelligence in Court: Legitimacy Problems of AI Assistance in the Judiciary, 2 *Retskraft* 44 (2018); Chronowski, Kalman & Szentgali-Toth, (n. 27), at 176.
[63] Christoph Grabenwarter, *European Convention on Human Rights: Commentary* 118 (CH Beck, Hart, Nomos 2014); Jakub Kisiel, The Constitutionality of Algorithmic Sentencing in Criminal Law in Poland, 3 *J. Crim. L. & Penal Sci.* 68 (2021).
[64] Tania Sourdin, supra note 11, at 1123; Marcin Górski, Why a Human Court? On the Right to a Human Judge in the Context of the Fair Trial Principle, 1 *Eucrim* 87 (2023).

and the perpetuation of bias, emphasizing that court decisions must be transparent and explainable, not left to algorithmic unpredictability. It was also noted that while AI can aid administrative tasks, it cannot substitute the essential human judgment required in judicial decisions. The Petition would be heard after 2 weeks from date of filing.[65]



[65] Krishnadas Rajagopal, Petition in Supreme Court Says GenAI in Judiciary May Lead to Fake Case Laws, *The Hindu* (Nov. 2025) https://www.thehindu.com/news/national/petition-in-supreme-court-says-genai-in-judiciary-may-cause-hallucinations-lead-to-fake-case-laws/article70262821.ece

# BALANCING RETRIBUTION AND REFORM: CONTEMPORARY CHALLENGES IN RAPE AND MURDER JURISPRUDENCE

***Simran Pal*** [66] ***and Padma Angmo***[67]

## ABSTRACT

*India's criminal justice system confronts an enduring tension between retributive and reformative philosophies, particularly in rape and murder cases. Through doctrinal analysis of landmark Supreme Court decisions and comparative international perspectives, this study exposes fundamental challenges in achieving equilibrium between punishment and rehabilitation. The "rarest of rare" doctrine established in Bachan Singh v. State of Punjab*[68] *has produced inconsistent application across cases including Machhi Singh*[69]*, Dhananjoy Chatterjee,*[70] *and the Nirbhaya case.*[71] *Contemporary issues— populist punitivism, media- driven justice, gender sensitivity versus procedural fairness, and competing victim-accused rights—reveal implementation gaps and judicial arbitrariness. Drawing upon comparative insights from the United Kingdom, United States, and South Africa, this paper proposes comprehensive reforms including structured sentencing guidelines, victim rehabilitation mechanisms, enhanced judicial training, and restorative justice principles to harmonize retribution with reformation while upholding constitutional morality and human dignity.*

**Keywords:** Retributive justice, Reformative theory, Death penalty, Rarest of rare doctrine, Constitutional morality, Restorative justice

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[67] Padma Angmo, *Central university of Punjab*.
[68] Bachan Singh v. State of Punjab, (1980) 2 SCC 684.
[69] Machhi Singh v. State of Punjab, (1983) 3 SCC 470.
[70] Dhananjoy Chatterjee v. State of West Bengal, (1994) 2 SCC 220.
[71] Mukesh v. State (NCT of Delhi), (2017) 6 SCC 1.

## INTRODUCTION

India's criminal justice system operates at the crossroads of competing imperatives: societal demands for retribution against heinous crimes and constitutional commitments to human dignity and reformation[72]. This tension intensifies in rape and murder cases that shock collective conscience yet require measured judicial responses consistent with constitutional values[73]. The Constitution's guarantee of equality, liberty, and life with dignity creates a framework simultaneously demanding justice for victims while protecting accused persons' fundamental rights.[74]

Since *Bachan Singh* (1980) established the "rarest of rare" doctrine,[75] courts have struggled to define when capital punishment becomes constitutionally permissible. The brutal 2012 gang rape and murder of Jyoti Singh (Nirbhaya) catalyzed nationwide protests and comprehensive legislative reforms through the Criminal Law (Amendment) Act, 2013.[76] However, these developments exposed fundamental questions about justice's nature—whether punishment should primarily serve retributive, deterrent, or reformative purposes.[77]

Contemporary challenges have intensified debate. Populist punitivism, amplified by media cycles and social activism, creates unprecedented pressure on courts to deliver swift, severe punishments.[78] This paper examines whether India's criminal justice system can achieve principled balance between retributive justice and reformative ideals while upholding constitutional morality and human rights.

## THEORETICAL FRAMEWORK

### Retributive Justice

Retributive theory, rooted in *lex talionis* ("an eye for an eye"), posits that punishment must be proportionate to moral culpability and crime gravity[79]. This theory views crime as violating moral order, creating debts payable through commensurate suffering.[80] In India, retributive principles find expression in the Indian Penal Code's graduated punishments

[72] India Const. art. 21.
[73] *Id.*
[74] India Const. arts. 14, 19, 21.
[75] Bachan Singh, (1980) 2 SCC at 718.
[76] The Criminal Law (Amendment) Act, 2013, No. 13, Acts of Parliament, 2013 (India).
[77] Mukesh, (2017) 6 SCC at 82-84.
[78] Anup Surendranath et al., *The Enduring Gaps and Errors in Capital Sentencing in India*, 32 Nat'l L. Sch. India Rev. 47, 52-55 (2020).
[79] Immanuel Kant, The Metaphysics of Morals 141-47 (Mary Gregor trans., Cambridge Univ. Press 1996) (1797).
[80] *Id.*

reflecting offense seriousness.[81] The Supreme Court recognized retribution as legitimate penological objective in *Dhananjoy Chatterjee*, describing certain crimes as "so brutal, savage and diabolical" that they warrant ultimate penalty.[82] However, pure retributivism faces criticism for inflexibility and failure to account for mitigating circumstances or transformation potential.[83]

**Reformative Justice**

Reformative theory shifts from punishment to rehabilitation, premising that offenders can transform into law-abiding citizens through appropriate interventions.[84] This approach emphasizes addressing underlying social, psychological, and environmental factors contributing to criminal behavior.[85] India's constitutional framework provides strong support for reformative approaches. Article 21's guarantee of life with dignity extends to prisoners, mandating humane treatment and rehabilitation opportunities.[86] The Probation of Offenders Act, 1958,[87] and Juvenile Justice Act, 2015,[88] embody reformative principles by prioritizing rehabilitation. The Supreme Court observed in *Mohd. Hanif Quareshi* that punishment's ultimate aim is transforming offenders into useful societal members.[89]

Critics argue that reformative approaches may inadequately address societal demands for accountability and deterrence, particularly regarding heinous crimes.[90] Reformative theory also faces practical challenges including resource constraints, inadequate rehabilitation infrastructure, and difficulties assessing genuine reformation.[91]

**Restorative Justice and Constitutional Morality**

Restorative justice seeks repairing harm through dialogue involving victims, offenders, and communities, emphasizing accountability, reparation, and healing.[92] While India's system remains predominantly retributive, restorative principles have gained recognition.[93] The Supreme Court endorsed victim-offender mediation in appropriate cases and emphasized

81 Indian Penal Code, 1860, No. 45, Acts of Parliament, 1860, §§ 299-377 (India).
82 Dhananjoy Chatterjee, (1994) 2 SCC at 224.
83 Anup Surendranath, *supra* note 11, at 58-61.
84 Probation of Offenders Act, 1958, No. 20, Acts of Parliament, 1958 (India).
85 Juvenile Justice (Care and Protection of Children) Act, 2015, No. 2, Acts of Parliament, 2016 (India).
86 Maneka Gandhi v. Union of India, (1978) 1 SCC 248, 283-84.
87 Probation of Offenders Act, 1958, § 4.
88 Juvenile Justice Act, 2015, § 3.
89 Mohd. Hanif Quareshi v. State of Bihar, AIR 1958 SC 731, 738.
90 Anup Surendranath, *supra* note 11, at 62-64.
91 National Crime Records Bureau, Prison Statistics India 2022, at 45-67 (2023).
92 Howard Zehr, Changing Lenses: Restorative Justice for Our Times 181-95 (25th anniv. ed. 2015).
93 Ankush Shivaji Gaikwad v. State of Maharashtra, (2013) 6 SCC 770, 779-80.

victim compensation as integral justice component.[94] Section 357A of the Code of Criminal Procedure mandates state governments establish victim compensation schemes.[95]

Constitutional morality, as articulated by Dr. B.R. Ambedkar and developed through judicial interpretation, provides overarching framework for evaluating punishment theories.[96] In *Navtej Singh Johar*, the Supreme Court distinguished "public morality" based on shifting prejudices from "constitutional morality" rooted in fundamental values of justice, liberty, equality, and fraternity.[97] Constitutional morality demands that criminal jurisprudence be guided by reason, dignity, and proportionality rather than public outcry or majoritarian sentiment.[98]

## EVOLUTION OF INDIAN JURISPRUDENCE

### Statutory Framework

The Indian Penal Code, 1860, establishes comprehensive offense and punishment frameworks.[99] Section 302 prescribes death penalty or life imprisonment for murder, while Section 376 addresses rape with graded punishments reflecting aggravating circumstances.[100] The Code of Criminal Procedure, 1973, particularly Sections 235(2) and 354(3), mandates bifurcated proceedings requiring courts hear parties separately on sentencing and record special reasons when awarding death penalty.[101]

Constitutional provisions establish foundational protections. Article 14 guarantees equality and prohibits arbitrary state action.[102] Article 21—guaranteeing no person shall be deprived of life or liberty except according to procedure established by law—has been transformatively interpreted in *Maneka Gandhi* to require that procedures be just, fair, and reasonable.[103]

### The 'Rarest of Rare' Doctrine

*Bachan Singh v. State of Punjab* (1980) fundamentally reshaped death penalty jurisprudence.[104] A five-judge Constitution Bench, by 4:1 majority, upheld capital

[94] *Id.* at 780-81.
[95] Code of Criminal Procedure, 1973, No. 2, Acts of Parliament, 1974, § 357A (India).
[96] Navtej Singh Johar v. Union of India, (2018) 10 SCC 1, 132-38.
[97] *Id.* at 134.
[98] *Id.* at 136-38.
[99] Indian Penal Code, 1860.
[100] *Id.* §§ 302, 376.
[101] Code of Criminal Procedure, 1973, §§ 235(2), 354(3).
[102] India Const. art. 14.
[103] Maneka Gandhi, (1978) 1 SCC at 283.
[104] Bachan Singh v. State of Punjab, (1980) 2 SCC 684.

punishment's constitutional validity while imposing significant constraints.[105] Justice Sarkaria articulated the "rarest of rare" principle: death penalty should be awarded only when alternative options are "unquestionably foreclosed."[106]

The Court established sentencing framework requiring judges consider both aggravating and mitigating circumstances.[107] Aggravating factors include manner of commission, motive, brutality, and victim vulnerability, while mitigating circumstances encompass offender's age, mental state, reform potential, and absence of criminal antecedents.[108] The judgment emphasized individualized sentencing, rejecting standardized death-eligible crime categories.[109]

Justice Bhagwati's dissent presciently warned that Section 354(3) CrPC's "special reasons" requirement provided insufficient guidance, leaving judges with "unguided standardless discretion" vulnerable to subjective application.[110] His apprehension that death sentences would be "arbitrarily and freakishly imposed" has been validated by subsequent empirical research demonstrating significant sentencing inconsistencies.[111]

**Application and Expansion: Machhi Singh to Nirbhaya**

In *Machhi Singh* (1983), the Supreme Court sought greater specificity by identifying five categories warranting capital punishment: manner of commission shocking collective conscience; certain motives (contract killings); anti-social or socially abhorrent nature (dowry deaths); magnitude (mass murders); and personality of victim.[112] While attempting to structure sentencing discretion, *Machhi Singh* paradoxically expanded death penalty scope by creating broad categories rather than narrowing application[113]

*Dhananjoy Chatterjee* (1994) involved rape and murder of 18-year-old Hetal Parekh by a security guard.[114] The Supreme Court upheld death sentence, describing the crime as "pre-planned cold blooded brutal murder" falling within "rarest of rare" category.[115] The case exposed socioeconomic disparities in death penalty application, as Dhananjoy was an

[105] *Id.* at 716-18
[106] *Id.* at 718.
[107] *Id.* at 719-21.
[108] *Id.*
[109] *Id.* at 720.
[110] *Id.* at 747 (Bhagwati, J., dissenting).
[111] Piyush Verma, *The Inevitable Inconsistency of the Death Penalty in India*, SSRN 5-8 (2021), https://ssrn.com/abstract=3891234.
[112] Machhi Singh v. State of Punjab, (1983) 3 SCC 470, 488-89.
[113] Anup Surendranath, *supra* note 11, at 70-72.
[114] Dhananjoy Chatterjee v. State of West Bengal, (1994) 2 SCC 220.
[115] *Id.* at 224.

illiterate man from marginalized background without resources for effective legal defense.[116] The 2012 Nirbhaya case triggered unprecedented public outrage and systemic reforms.[117] In *Mukesh v. State* (2017), the Supreme Court upheld death sentences for four convicts, describing the crime as reflecting "extreme depravity" and "diabolic" conduct shocking "collective conscience of society."[118] The case led to the Criminal Law (Amendment) Act, 2013, which substantially reformed sexual offense provisions, expanded rape definition, introduced new offenses, and enhanced punishments.[119] Section 376A IPC prescribes minimum twenty years rigorous imprisonment, extendable to life imprisonment or death, for rape causing death or persistent vegetative state.[120]

Critics questioned whether Nirbhaya sentencing was unduly influenced by media frenzy and public pressure rather than principled legal analysis.[121] The case highlighted tensions between demands for swift retributive justice and commitments to fair trial rights and due process.[122]

## CONTEMPORARY CHALLENGES

### Populist Punitivism and Media Trials

Contemporary India witnesses pronounced "penal populism"—political responses to crime fear through harsher punishments, often contrary to expert recommendations.[123] This phenomenon intensified following Nirbhaya, with media outlets conducting "trials by publicity" creating overwhelming pressure for death sentences.[124] Research demonstrates that 24-hour news coverage, sensationalist reporting, and social media mobilization significantly influence judicial outcomes, particularly in high-profile sexual violence cases.[125]

Media trials undermine constitutional safeguards by violating presumption of innocence, compromising fair trial rights, influencing judicial decision-making, and converting courtrooms into "moral theatres" where judges feel compelled to respond to public outcry.[126] In *State of Maharashtra v. Rajendra Javaliba*, the Supreme Court cautioned that "trial by

[116] Bikram Jeet Batra, *Dhananjoy Chatterjee Case: A Critical Analysis*, 3 Indian J. L. & Just. 88, 93-95 (2012).
[117] The Criminal Law (Amendment) Act, 2013.
[118] Mukesh v. State (NCT of Delhi), (2017) 6 SCC 1, 82-84.
[119] The Criminal Law (Amendment) Act, 2013, §§ 5-9.
[120] Indian Penal Code, 1860, § 376A.
[121] Anup Surendranath, *supra* note 11, at 75-78.
[122] *Id.*
[123] *Id.* at 52-55.
[124] *Id.*
[125] *Id.* at 54.
[126] State of Maharashtra v. Rajendra Javaliba, (1999) 2 SCC 453, 456.

press" is "totally unconstitutional and contemptuous" as it interferes with justice administration.[127] However, effective mechanisms to prevent media influence remain inadequate.[128]

Studies indicate trial courts frequently ignore structured discretion framework, with 36% of death sentences imposed same day as conviction without conducting mandatory sentencing hearings.[129] Such pronouncements reflect retributive fury rather than careful application of sentencing principles mandated by *Bachan Singh*.[130]

**Gender Sensitivity Versus Procedural Fairness**

Sexual violence cases create acute tensions between gender sensitivity and procedural rights.[131] Post-2013 reforms introduced victim-centric provisions: mandatory female police officers for recording statements, prohibition of character assassination during cross-examination, in-camera proceedings, and compensation schemes.[132] These measures recognize secondary victimization women often face within the criminal justice system.[133] However, concerns arise regarding potential erosion of accused rights.[134] The shift from "innocent until proven guilty" to *de facto* presumption of guilt in rape cases, restrictions on cross-examination potentially impeding effective defense, and enhanced punishments based on victim gender rather than proportionality raise constitutional questions.[135] In *Deepak Gulati v. State of Haryana*, the Supreme Court cautioned against false accusations and emphasized need for procedural safeguards.[136]

The gender-specific definition of rape under Section 375 IPC excludes male, transgender, and non-binary victims from statutory protection.[137] This violates Article 14's equality guarantee and contradicts the Supreme Court's recognition of transgender rights in *NALSA v. Union of India*[138] and constitutional morality principles articulated in *Navtej Singh Johar*.[139] The Supreme Court's *Handbook on Combating Gender Stereotypes* (2023)

[127] *Id.*
[128] Anup Surendranath, *supra* note 11, at 56.
[129] Project 39A, Death Penalty Sentencing in Trial Courts: A Study of Capital Cases in India 32-35 (2020).
[130] *Id.*
[131] The Criminal Law (Amendment) Act, 2013, §§ 7-8.
[132] *Id.*
[133] Supreme Court of India, Handbook on Combating Gender Stereotypes 12-18 (2023).
[134] Deepak Gulati v. State of Haryana, (2013) 7 SCC 675, 683-84.
[135] *Id.*
[136] *Id.* at 684.
[137] Indian Penal Code, 1860, § 375.
[138] NALSA v. Union of India, (2014) 5 SCC 438, 455-58.
[139] Navtej Singh Johar, (2018) 10 SCC at 136-38.

represents positive progress in sensitizing judges to avoid prejudicial assumptions.[140]

**Victim Rights Versus Accused Rights**

Criminal jurisprudence traditionally focused on state-accused relationships, marginalizing victims to passive witnesses.[141] Contemporary reforms recognize victims' autonomous rights including participation in proceedings, notification of bail hearings, right to legal representation, and compensation.[142] The Bharatiya Nagarik Suraksha Sanhita, 2023 (replacing CrPC), strengthens victim rights through enhanced compensation, protection, and participation provisions.[143]

However, victim rights must be reconciled with accused rights to prevent criminal processes from becoming merely adversarial between victims and accused.[144] Presumption of innocence, right against self-incrimination, right to legal representation, and right to fair trial remain fundamental constitutional protections.[145] In *Mofil Khan v. State of Jharkhand*, the Supreme Court emphasized balancing victim rights with justice administration integrity.[146] The challenge intensifies in cases involving severe public outrage.[147] Demands for immediate execution conflict with appellate rights, review petitions, and mercy jurisdiction.[148] Restorative justice offers potential reconciliation by bringing victims, offenders, and communities together in structured dialogue focused on healing and accountability.[149] While promising for certain offense categories, its applicability to heinous crimes remains debatable and culturally contested in India.[150]

**Inconsistency in Sentencing and Death Penalty Application**

Perhaps the most fundamental challenge facing Indian capital jurisprudence is "inevitable inconsistency"—the thesis that death penalty application remains inherently arbitrary regardless of procedural safeguards.[151] Empirical research reveals alarming disparities: similarly situated offenders receive vastly different sentences, socioeconomically marginalized defendants face disproportionately higher death penalty rates, and judicial

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140 Supreme Court of India, Handbook on Combating Gender Stereotypes 5-7 (2023).
141 Ankush Shivaji Gaikwad, (2013) 6 SCC at 779.
142 Bharatiya Nagarik Suraksha Sanhita, 2023, No. 46, Acts of Parliament, 2023, §§ 355-360 (India)
143 *Id.*
144 Mofil Khan v. State of Jharkhand, (2021) 2 SCC 480, 489.
145 India Const. art. 21.
146 Mofil Khan, (2021) 2 SCC at 489.
147 Mukesh, (2017) 6 SCC at 82-84.
148 Bikram Jeet Batra, *supra* note 49, at 95-97.
149 Howard Zehr, *supra* note 25, at 181-95.
150 *Id.*
151 Piyush Verma, *supra* note 44, at 5-8.

subjectivity overwhelms objective standards.[152]

Project 39A's research on death penalty sentencing documented systematic violations of *Bachan Singh* principles: 36% of death sentences imposed same-day without bifurcated hearings, inadequate consideration of mitigating circumstances, over-reliance on crime severity while ignoring offender circumstances, and inconsistent application of "rarest of rare" threshold.[153] Appellate courts correct many errors, with only 5% of trial court death sentences ultimately confirmed, but this high reversal rate itself demonstrates foundational inconsistencies.[154]

The absence of statutory sentencing guidelines leaves judges with unbounded discretion.[155] The Malimath Committee (2003) and Madhava Menon Committee (2007) recommended establishing sentencing commissions and guidelines, but legislative action remains absent.[156] In *State of Punjab v. Prem Sagar*, the Supreme Court acknowledged "urgent need" for sentencing guidelines, yet this exhortation went unheeded.[157]

Recent Supreme Court decisions reflect internal incoherence.[158] In *Manoj v. State of Madhya Pradesh* (2022), a three-judge bench mandated enhanced procedures including proactive judicial inquiry into mitigating factors.[159] However, less than a month later, a different bench in *Manoj Pratap Singh v. State of Rajasthan* bypassed these requirements.[160] Such inconsistency undermines public confidence and reinforces perceptions of arbitrariness.[161]

## COMPARATIVE PERSPECTIVES

### United Kingdom: Abolition and Rehabilitation

The United Kingdom abolished capital punishment through the Murder (Abolition of Death Penalty) Act 1965, implemented despite majority public support for retention.[162] Abolition followed Parliamentary debates emphasizing wrongful executions (Timothy Evans, Derek

[152] *Id.* at 9-12.
[153] Project 39A, *supra* note 62, at 32-35.
[154] *Id.* at 38-41.
[155] State of Punjab v. Prem Sagar, (2008) 7 SCC 550, 558.
[156] Committee on Reforms of Criminal Justice System (Malimath Committee), Report 128-35 (2003); Expert Committee on Prison Reforms (Madhava Menon Committee), Report 87-92 (2007).
[157] State of Punjab, (2008) 7 SCC at 558.
[158] Manoj v. State of Madhya Pradesh, (2022) 4 SCC 1.
[159] *Id.* at 18-21.
[160] Manoj Pratap Singh v. State of Rajasthan, (2022) 10 SCC 581.
[161] Chhannu Lal Verma v. State of Chhattisgarh, (2019) 8 SCC 464, 472.
[162] Murder (Abolition of Death Penalty) Act 1965, c. 71 (U.K.).

Bentley cases), ineffectiveness as deterrent, and state's ethical inability to take life.[163] British sentencing policy emphasizes rehabilitation and proportionality.[164] Life sentences with minimum terms allow individualized assessment of reformation and public safety.[165] The European Convention on Human Rights prohibits death penalty under Protocol 13, regarding capital punishment as inhuman and degrading treatment incompatible with human dignity.[166]

**United States: Constitutional Proportionality**

The United States presents a complex picture with federal system allowing state-level variations.[167] The Supreme Court's Eighth Amendment jurisprudence establishes proportionality as central requirement, holding punishments must not be "cruel and unusual."[168] In *Furman v. Georgia* (1972), the Court struck down arbitrary death penalty statutes, leading states to adopt guided discretion systems.[169]

Subsequent decisions refined proportionality doctrine.[170] *Coker v. Georgia* (1977) held death penalty disproportionate for rape not resulting in death,[171] and *Kennedy v. Louisiana* (2008) extended this principle to child rape.[172] These rulings establish that capital punishment should be reserved for homicidal crimes, recognizing life's irreversible nature distinguishes murder from other offenses.[173] American experience demonstrates that guided discretion systems theoretically structure sentencing, yet racial and socioeconomic disparities persist.[174]

**South Africa: Transformative Constitutionalism**

South Africa's Constitutional Court abolished death penalty in *S v. Makwanyane* (1995) shortly after apartheid's end.[175] The Court held that capital punishment violated constitutional rights to life, dignity, and freedom from cruel punishment.[176] Justice

[163] Death Penalty Project, The Abolition of the Death Penalty in the United Kingdom: 50 Years On 15-22 (2015).
[164] *Id.* at 23-28.
[165] *Id.*
[166] European Convention on Human Rights Protocol No. 13, May 3, 2002, E.T.S. No. 187, art. 1.
[167] *Furman v. Georgia*, 408 U.S. 238, 239-40 (1972).
[168] U.S. Const. amend. VIII.
[169] *Furman*, 408 U.S. at 239-40.
[170] *Coker v. Georgia*, 433 U.S. 584, 592 (1977).
[171] *Id.* at 598-600.
[172] *Kennedy v. Louisiana*, 554 U.S. 407, 446-47 (2008).
[173] *Id.*
[174] Roger Hood & Carolyn Hoyle, The Death Penalty: A Worldwide Perspective 234-48 (5th ed. 2015).
[175] *S v. Makwanyane*, 1995(3) SA 391 (CC) (S. Afr.).
[176] *Id.* para. 146.

Chaskalson's judgment emphasized that death penalty is irreversible, making errors irreparable; inherently arbitrary despite procedural safeguards; fails as deterrent; and incompatible with transformative constitutional values.[177] South Africa's abolitionist stance reflects commitment to *ubuntu* (humanity toward others) and restorative principles over retribution.[178]

**Global Trends**

Globally, 144 countries are abolitionist in law or practice, with only 55 retentionist countries.[179] International human rights instruments including the International Covenant on Civil and Political Rights (ICCPR) Second Optional Protocol advocate abolition.[180] This abolitionist momentum reflects growing consensus that state-sanctioned killing violates fundamental human dignity regardless of crime gravity.[181]

## CRITICAL ANALYSIS

**Doctrinal Incoherence**

The "rarest of rare" doctrine, though conceptually sound, suffers from inherent vagueness rendering consistent application impossible.[182] Justice Bhagwati's dissent in *Bachan Singh* correctly predicted that subjective judicial philosophy would dominate, producing arbitrary outcomes.[183] Four decades of jurisprudence validate this concern—no objective standard distinguishes "rarest of rare" from merely "rare" cases.[184]

*Machhi Singh*'s categorical approach contradicted *Bachan Singh*'s individualized sentencing mandate, creating confusion about whether crime categories or individual circumstances should predominate.[185] Subsequent decisions oscillate between these approaches without principled resolution.[186] The Supreme Court's acknowledgment in *Chhannu Lal Verma v. State of Chhattisgarh* that death sentences are "arbitrarily and freakishly imposed" constitutes judicial admission of systemic failure.[187]

**Procedural Inadequacy and Fair Trial Deficits**

[177] *Id.* paras. 83-95.
[178] *Id.* para. 111.
[179] Roger Hood & Carolyn Hoyle, *supra* note 107, at 11-13.
[180] International Covenant on Civil and Political Rights Second Optional Protocol, G.A. Res. 44/128, U.N. Doc. A/RES/44/128 (Dec. 15, 1989).
[181] Roger Hood & Carolyn Hoyle, *supra* note 107, at 11-13.
[182] Bachan Singh, (1980) 2 SCC at 747 (Bhagwati, J., dissenting).
[183] *Id.*
[184] Piyush Verma, *supra* note 44, at 6-8.
[185] Machhi Singh, (1983) 3 SCC at 488-89.
[186] Anup Surendranath, *supra* note 11, at 70-72.
[187] Chhannu Lal Verma, (2019) 8 SCC at 472.

Empirical evidence demonstrates widespread procedural violations undermining fair trial guarantees.[188] Same-day sentencing without bifurcated hearings, inadequate consideration of mitigating evidence, perfunctory application of balance sheet methodology, and socioeconomic biases affecting access to effective legal representation systematically compromise sentencing integrity.[189] Without statutory mandates, judicial guidelines remain precatory, vulnerable to being honored in breach.[190]

**Constitutional Morality Versus Popular Sentiment**

Constitutional morality demands that criminal justice be guided by reasoned principles rather than majoritarian anger.[191] However, populist punitivism, amplified by media trials, increasingly drives sentencing outcomes.[192] Courts face pressure to respond to societal outrage by awarding death penalties, transforming sentencing into symbolic gesture rather than individualized assessment.[193] When courts invoke "collective conscience" as sentencing justification, they risk substituting mob sentiment for constitutional reasoning.[194]

**Reformative Deficit**

India's theoretical commitment to reformative justice diminishes significantly for serious crimes like rape and murder.[195] Imprisonment conditions rarely facilitate genuine reformation.[196] Overcrowded prisons (capacity 433,033; population 573,220 as of 2022), inadequate rehabilitative programs, and prolonged pre-trial detention undermine reformative potential.[197] Even for death row convicts, prolonged incarceration offers no reformative intervention, converting imprisonment into prolonged torture awaiting execution.[198]

**Victim- Centric Justice: Incomplete Transformation**

While legislative reforms enhanced victim rights, implementation remains inadequate.[199]

[188] Project 39A, *supra* note 62, at 32-35.
[189] *Id.*
[190] Anup Surendranath, *supra* note 11, at 78-81.
[191] Navtej Singh Johar, (2018) 10 SCC at 136-38.
[192] Anup Surendranath, *supra* note 11, at 52-55.
[193] *Id.*
[194] *Id.* at 54-56.
[195] National Crime Records Bureau, *supra* note 24, at 45-67.
[196] *Id.*
[197] *Id.* at 12-15.
[198] Sunil Batra v. Delhi Administration, (1980) 3 SCC 488, 514-16.
[199] Ankush Shivaji Gaikwad, (2013) 6 SCC at 780-81.

Victim compensation schemes suffer from low awareness, bureaucratic hurdles, insufficient funding, delayed disbursements, and inadequate amounts.[200] More fundamentally, criminal justice's retributive focus provides limited healing for victims.[201] Punishment of offenders does not restore what was lost or address trauma.[202] Restorative approaches emphasizing dialogue, acknowledgment, reparation, and community support could better serve victim interests, yet remain marginal in Indian practice.[203]

## RECOMMENDATIONS

### Establishment of Sentencing Commission

Parliament should enact a Sentencing Act establishing independent Sentencing Commission comprising retired Supreme Court judges, legal scholars, criminologists, and social scientists.[204] The Commission should formulate presumptive sentencing guidelines providing structured frameworks for determining appropriate sentences while preserving judicial discretion for exceptional circumstances.[205]

Sentencing guidelines should specify: categorical ranking of offense seriousness; presumptive sentencing ranges; comprehensive list of aggravating and mitigating factors with relative weightings; mandatory procedural requirements for sentencing hearings; appellate review standards; and periodic revision mechanisms based on empirical data.[206] This approach reduces arbitrariness while maintaining flexibility for individualized justice.[207]

### Procedural Reforms

Statutory amendments should mandate: minimum 30-day gap between conviction and sentencing hearing; comprehensive pre-sentence investigation reports covering offender's social background, mental health, criminal history, employment, and family circumstances; mandatory consideration of psychiatric evaluations, probation officer reports, and victim impact statements; recorded reasons for each aggravating and mitigating factor accepted or rejected; and enhanced legal aid provisions ensuring competent representation at

[200] *Id.*
[201] Howard Zehr, *supra* note 25, at 181-95.
[202] *Id.*
[203] *Id.*
[204] Committee on Reforms of Criminal Justice System (Malimath Committee), *supra* note 89, at 128-35
[205] *Id.*
[206] *Id.* at 130-33.
[207] *Id.*

sentencing phase.[208]

Appellate courts should adopt stringent standards for reviewing sentencing decisions, treating procedural violations as reversible errors rather than curable defects.[209] Death penalty cases warrant *de novo* sentencing review rather than mere correctness standard.[210]

**Victim Rehabilitation and Restorative Justice**

Comprehensive victim rehabilitation frameworks should include: enhanced compensation amounts indexed to inflation and actual harm; streamlined disbursement procedures with strict timelines; psychological counseling and trauma therapy; vocational training and employment assistance; medical treatment including reconstructive procedures; legal assistance beyond criminal proceedings; and long-term support services.[211]

Restorative justice pilots should be implemented for appropriate offense categories, particularly juvenile crimes, first-time offenders, and cases where victims desire direct engagement.[212] Victim-offender mediation, family group conferencing, and community-based reintegration programs should supplement rather than replace criminal proceedings, providing additional avenues for accountability and healing.[213]

**Reformative interventions in Prisons**

Prison reforms should prioritize: infrastructure upgrades reducing overcrowding to international standards; comprehensive classification systems separating prisoners by offense severity, age, and reformation potential; individualized rehabilitation plans including education, vocational training, psychological counseling, and substance abuse treatment; prison staff training in rehabilitative approaches; earned remission incentives encouraging positive behavior; family visitation facilities maintaining social bonds; and pre- release preparation and post-release support.[214]

**Proportionality Review**

The Supreme Court should develop explicit proportionality doctrine for capital sentencing, holding death penalty unconstitutional for non-homicidal crimes absent extraordinary circumstances.[215] Legislative amendments should eliminate mandatory death penalty

[208] Manoj, (2022) 4 SCC at 18-21.
[209] *Id.*
[210] *Id.* at 21.
[211] Ankush Shivaji Gaikwad, (2013) 6 SCC at 780-81.
[212] Howard Zehr, *supra* note 25, at 181-95.
[213] *Id.*
[214] Expert Committee on Prison Reforms (Madhava Menon Committee), *supra* note 89, at 87-92.
[215] *Kennedy v. Louisiana*, 554 U.S. at 446-47.

provisions, ensuring all capital sentences result from individualized assessment.[216]

A comprehensive review of death penalty's continued validity should be undertaken by Constitution Bench considering: empirical evidence on deterrence effectiveness; inevitable arbitrariness despite procedural safeguards; socioeconomic disparities in application; global abolitionist momentum; constitutional morality principles; and availability of alternative sanctions (life imprisonment without parole) serving legitimate penological objectives.[217] While immediate abolition may be politically unfeasible, moratorium on executions pending comprehensive review would provide space for informed debate and evidence-based policymaking.[218]

**Gender- Sensitive Reforms**

Gender-neutral reform of sexual offense provisions should recognize all genders as potential victims while maintaining enhanced protections for particularly vulnerable groups.[219] Mandatory judicial training programs on gender sensitivity, trauma-informed practices, and implicit bias should be implemented.[220] Training should address: avoiding victim-blaming and character assassination; recognizing dynamics of sexual violence; maintaining procedural fairness for accused; effective cross-examination without re-traumatization; and dignified courtroom language and conduct.[221]

**Curbing Media Trials**

Contempt of court provisions should be effectively enforced against media outlets conducting pre-trial publicity prejudicing fair trial rights.[222] Guidelines should balance press freedom with judicial independence, prohibiting prejudicial reporting until verdict while permitting post-conviction analysis.[223] Public legal education initiatives should enhance understanding of criminal justice principles, due process importance, and dangers of mob justice.[224]

**Institutional Capacity Building**

Specialized training for judges, prosecutors, and defense counsel on death penalty and sexual

[216] Bachan Singh, (1980) 2 SCC at 720.
[217] Carolyn Hoyle, *Efforts Towards Abolition of the Death Penalty: Challenges and Prospects*, in The Oxford Handbook of the Death Penalty 567-82 (2023).
[218] *Id.*
[219] NALSA, (2014) 5 SCC at 455-58.
[220] Supreme Court of India, Handbook on Combating Gender Stereotypes 5-7 (2023).
[221] *Id.* at 12-18.
[222] State of Maharashtra v. Rajendra Javaliba, (1999) 2 SCC at 456.
[223] *Id.*
[224] Anup Surendranath, *supra* note 11, at 85-87.

offense litigation should be mandatory.[225] National Judicial Academy and State Judicial Academies should develop comprehensive curricula incorporating international best practices, constitutional jurisprudence, and empirical research.[226] Legal aid systems require substantial strengthening through enhanced budgets, better compensation attracting competent advocates, specialized panels for capital cases, and quality assurance mechanisms.[227]

## CONCLUSION

India's criminal justice system stands at a critical juncture where theoretical commitments to fairness, dignity, and reformation confront practical realities of public outrage, media pressure, and resource constraints.[228] Current frameworks, despite constitutional soundness and judicial pronouncements affirming balanced approaches, suffer from implementation gaps producing arbitrary, inconsistent, and occasionally unjust outcomes.[229]

The "rarest of rare" doctrine has proven unworkable in practice, leading to what Justice Bhagwati presciently termed "unguided standardless discretion."[230] Populist punitivism, amplified by media trials, increasingly displaces principled adjudication with performative justice responding to public outcry rather than constitutional reasoning.[231] The tension between victim rights and accused rights, while often portrayed as zero-sum, actually requires nuanced balancing recognizing legitimate interests of both.[232]

Comparative analysis demonstrates that global trends favor abolition of capital punishment and emphasis on rehabilitation over retribution.[233] The United Kingdom's Parliamentary leadership in abolition despite public opposition, the United States' evolving proportionality jurisprudence, and South Africa's transformative constitutional approach each offer valuable insights.[234] While direct transplantation of foreign models faces contextual challenges, underlying principles—dignity, proportionality, procedural fairness, and

[225] Expert Committee on Prison Reforms (Madhava Menon Committee), *supra* note 89, at 95-98.
[226] *Id.*
[227] *Id.* at 102-05.
[228] Bachan Singh, (1980) 2 SCC at 747 (Bhagwati, J., dissenting).
[229] Piyush Verma, *supra* note 44, at 5-8.
[230] Bachan Singh, (1980) 2 SCC at 747 (Bhagwati, J., dissenting).
[231] Anup Surendranath, *supra* note 11, at 52-55.
[232] Mofil Khan, (2021) 2 SCC at 489.
[233] Roger Hood & Carolyn Hoyle, *supra* note 107, at 11-13.
[234] *Id.* at 234-67.

evidence-based policymaking—have universal applicability.[235]

The path forward requires courage: legislative courage to enact sentencing guidelines constraining arbitrariness; judicial courage to resist populist pressures and apply constitutional principles consistently; executive courage to invest in rehabilitation infrastructure and victim support systems; and societal courage to engage in mature debate about punishment purposes transcending retributive impulses.[236]

Ultimately, the goal must be a criminal justice system that acknowledges crime's grievous harm to victims and society while recognizing offenders' human dignity and reformation potential.[237] Punishment should serve legitimate purposes—public safety, accountability, victim vindication—without degenerating into vengeance or spectacle.[238] The Constitution's promise of justice, liberty, equality, and dignity demands nothing less.[239]

As Mahatma Gandhi observed, "An eye for an eye will make the whole world blind."[240] This wisdom, central to India's independence movement, should guide contemporary criminal justice philosophy.[241] Retribution has its place in acknowledging harm and affirming societal values, but must be tempered by reformation recognizing human capacity for change and constitutional morality prioritizing dignity over vengeance.[242]



[235] *Id.*

[236] Committee on Reforms of Criminal Justice System (Malimath Committee), *supra* note 89, at 128-35.

[237] India Const. art. 21.

[238] Navtej Singh Johar, (2018) 10 SCC at 136-38.

[239] India Const. pmbl.

[240] Mahatma Gandhi, *An Autobiography: The Story of My Experiments with Truth* 276 (Mahadev Desai trans., Beacon Press 1957) (1927).

[241] *Id.*

[242] Navtej Singh Johar, (2018) 10 SCC at 136-38.

# MATERNAL MERCY AND JUDICIAL MASCULINITY: GENDERED SILENCING IN INDIA'S CAPITAL PUNISHMENT JURISPRUDENCE

***Reema Mariam Philip***[243]

## ABSTRACT

*This paper explores how gendered expectations and patriarchal morality shape judicial attitudes toward women sentenced to death, focusing on the case of Shabnam v. Union of India. As India's first woman to face the death penalty in independent memory, Shabnam's trial revealed not only a failure of due process but also the deeper social anxieties surrounding female defiance. Her motherhood, instead of evoking empathy, became a mark of betrayal; her womanhood, a justification for condemnation. Through an analysis of the "rarest of rare" doctrine, the paper argues that legal determinations of collective conscience often mirror social prejudices rather than objective justice. A comparative reflection on the case of Lisa Montgomery in the United States further illustrates how trauma and mental illness are routinely dismissed when women's actions violate traditional notions of femininity and nurture. Drawing from cultural texts such as Bandit Queen and Amrita Pritam's Ajj Aakhaan Waris Shah Nu, the study examines how law frequently silences women's grief and transforms their suffering into moral spectacle. Ultimately, the paper calls for a feminist jurisprudence of clemency—one that acknowledges context, trauma, and emotional complexity in sentencing. By urging the legal system to listen not just to guilt but to grief, it argues for a justice rooted in empathy rather than retribution, capable of confronting the gendered biases that continue to define capital punishment in India.*

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## INTRODUCTION

In the dim confines of Mathura prison, Shabnam waits not just for the gallows, but for history's judgment. She is India's first woman to be sentenced to death in independent memory. Her crime: the murder of seven family members. Her motive: love. but under those horror titles and news she was not someone we thought to be, she was someone who chose her love over society, but no one understood this. The courtroom did not just weigh evidence—it performed a morality play. Her motherhood was not a mitigating factor; it was a betrayal. Her femininity, not a plea for mercy, but a reason for revulsion. In the nation where motherhood is considered as a blessing her pregnancy was considered as a failure. the law didn't see her trauma, her struggles, or her emotions it only saw as a person committing wrong. she wasn't just punished for her actions; she was punished for stepping out of her role in society as well.

## THE "RAREST OF RARE" DOCTRINE: WHOSE CONSCIENCE DOES THE LAW SERVE?

Death penalty still plays a crucial role in India, but it is performed and used within the most extreme cases with uttermost caution and hence leading to the most vital doctrine ' the rarest of rare doctrine'[244]. This concept was first introduced from the case of Bachan Singh V State of India[245], the case briefly involves about Bachan Singh who was convicted the offence of killing his family and upon his bail he committed another heinous crime and then the court convicted him of death penalty. He pleaded to the court saying it was against article 21 [246]to punish him with death penalty, even Tho the punishment sustained this doctrine was introduced. the court had guidelines as to when the doctrine should be used like when:

Life imprisonment isn't enough, and the crime "shocks the collective conscience of society." [247](In other words, when society is so outraged by the crime that anything less than death would feel unjust.)

The main issue or the main controversy over here was about was collective conscience of society? Terms like "brutal crime" or "shocking society" sound aim but are subjective (based on opinion). What people find "shocking" or "unforgivable" often depends on cultural beliefs, media portrayal, and social norms — not necessarily on universal justice[248]. When a woman commits a crime, especially one that defies traditional roles (like being an obedient daughter, wife, or mother), society tends to judge her more harshly. She isn't just punished for the crime;

[244] *Bachan Singh v. State of Punjab*, (1980) 2 SCR 1057 (India).
[245] *Id.*
[246] *India Const.* art. 21.
[247] *Bachan Singh*, supra note 2, at 1080–81.
[248] *Machhi Singh v. State of Punjab*, (1983) 3 SCC 470 (India).

she's also condemned for not being the kind of woman society expects her to be. For example, a woman who kills someone might be seen as a "monster" not just for murder, but for betraying her femininity [249]or motherhood. Judges' decisions are influenced by: Their personal beliefs, The way the media presents the case, and public emotions or fears[250]. The doctrine "rarest of rare" rule was supposed to prevent unfair death sentences, but when conducted in practice we could see the foul of practical system where a case was judged because of her role not seeing her emotions her vulnerability. Shabnam was a woman sentenced to death in India. Shabnam was a woman sentenced to death in India. The case focused heavily on how horrific the crime was, but ignored her personal background such as emotional pressure, gender vulnerability, and the fact that she was a mother.[251] Instead of seeing her as a complex human being, the legal system treated her as a warning a woman who broke moral and social boundaries[252].

**CASE STUDY: SHABNAM V. UNION OF INDIA**

On the night of April 14, 2008, in Amroha, Uttar Pradesh, Shabnam, a well-educated woman from a respected family, committed a crime that stunned the country. With her partner Saleem, she killed seven members of her family, including a ten-month-old baby. Her family had opposed their relationship. The victims were first sedated, then attacked with an axe. [253]The trial court sentenced both to death. The Allahabad High Court upheld the decision in 2013, and in 2015, the Supreme Court rejected their appeals[254]. The judgment focused on the violence and betrayal. But it wasn't just about the crime—it was about who Shabnam was, and who she wasn't willing to be. She wasn't just punished for murder. She was punished for stepping outside the roles assigned to her: obedient daughter, nurturing mother, silent woman. Her identity as a mother was barely acknowledged. Even the fact that she gave birth in prison was brushed aside, treated as irrelevant. There was no real attempt to understand her emotional state, her vulnerability, or how Saleem may have influenced her decisions.

The Supreme Court said the crime shocked the collective conscience of society[255]. But what's more shocking is how quickly the system moved. Just six days after the judgment, the Sessions Judge issued death warrants—ignoring the 30-day window for filing a review petition, a right

[249] *Mohd. Arif v. Supreme Court of India*, (2014) 9 SCC 737 (India).
[250] *Shabnam v. Union of India*, (2015) SCC OnLine SC 484 (India).
[251] *Id.*
[252] *Id.*
[253] Shabnam v. Union of India, Case Analysis, *LexQuest* (Aug. 2015), https://www.lexquest.in/wp-content/uploads/2015/08/SHABNAM-V-UOI.pdf.
[254] *Id.*
[255] *Bachan Singh*, supra note 2, at 1080–81.

guaranteed under the Supreme Court Rules[256]. Most death penalty cases drag on for years. The Nirbhaya case took seven. Why was Shabnam's execution rushed? Was it because she defied the image of what a woman should be? This wasn't just a technical error. It was a violation of her rights. The Death Penalty Litigation Clinic at NLU Delhi stepped in, and the vacation bench of Justices A.K. Sikri and U.U. Lalit cancelled the warrants[257]. They reminded the court that Article 21—the right to life—applies even to those on death row. No one can be executed until every legal remedy has been exhausted. The court criticized the way the warrants were issued: no notice, no lawyer, no fixed date. This was against the rules set in Mohd. In the case of Arif v. Supreme Court of India[258], the Court determined that in instances involving the death penalty, review petitions should be examined in open court by a panel of three judges, given the gravity and permanence of such a sentence[259]. However, the swift Shabnam's execution was carried out indicated that the focus was not merely on adhering to protocol it highlighted a societal mindset that hastily punishes women who deviate from conventional roles. In this situation, the legal system seemed to function more as a tool for vengeance rather than a protector of rights. Shabnam's gender, her defiance, and her refusal to adhere to conventional family norms seemed to make her an easy target for both legal and societal judgment[260]. Viewed in this light, the procedural errors were not merely minor mistakes they highlighted how the justice system can react more swiftly and severely when a woman's conduct challenges societal moral standards. Instead of functioning as a space for careful legal consideration, the courtroom shifted into a platform for moral scrutiny. This case demonstrates how gender influences both the judicial process and societal perceptions. Shabnam faced punishment not only because of the crime she committed but also for going against her role in society. here the courtroom became a space where societal norms were maintained where her death sentence symbolized not only legal retribution but also the reinforcement of traditional moral and cultural values.

[256] *Supreme Court Rules*, Order XLVII, Rule 1 (2013) (India).
[257] *NLU Delhi, Grover, Ramachandran Get SC to Quash Death Penalty of Killing Couple*, *Legally India* (May 29, 2015), https://www.legallyindia.com/the-bench-and-the-bar/nlu-delhi-grover-ramachandran-get-sc-to-quash-death-penalty-of-killing-couple-2-days-after-stay-20150529-6029.
[258] *Mohd. Arif*, supra note 7.
[259] *Id.*
[260] *Death Penalty Litigation Clinic, NLU Delhi Intervention*, *Legally India* (May 29, 2015), https://www.legallyindia.com/the-bench-and-the-bar/nlu-delhi-grover-ramachandran-get-sc-to-quash-death-penalty-of-killing-couple-2-days-after-stay-20150529-6029.

## COMPARATIVE CASE: LISA MONTO GERMY

Lisa was a child who had the most traumatic childhood was the first to given capital punishment after federal US[261]. When Lisa was 11 her stepfather used to sexually abuse her drag her to a corner of the vanity let his friends raper her, he would slap her head against the concrete causing trauma head injuries which could be seen in her MRI scans. The abuse was not only by her stepfather alone her mother was part of this, but she would also sell Lisa's body to plumber or electrician whenever odd jobs was to be done[262]. She was executed for a crime where when she was 36 yrs old, she went to a pregnancy class faked being pregnant and befriended 23-year-old Bobbie Jo Stinnett, Lisa came to her house tore bobbie's belly and took the surviving child and jo died of intense bleeding. She was arrested and after trump put an end to the 17-yr heinous punishment she was executed as well[263]. But many failed to see what Lisa side of the story, Janet Vogelsang, a clinical social worker, spent several long days talking to Montgomery in 2016. After many hours slowly gaining the prisoner's trust, and learning about her childhood trauma, Vogelsang began to have a sense of Deja vu with similar sessions she had had with military veterans traumatized by war[264]. Porterfield told the Guardian that in her one-to-one sessions with the prisoner, she quickly came to recognize symptoms of trauma and mental illness.[265] "When I met with her, she would become spacey," she said.

"She would not be able to keep her train of thought, and describe strange ways of thinking to describe her reality. She lives in a state of disassociation, going in and out all the time. When I asked about her childhood, she would display an inability to connect to her emotions – with a blank facial expression, blank voice, talking about herself in the third person."[266]

Since Montgomery has received intensive psychiatric care and analysis in the prison system she has been variously diagnosed with bipolar disorder, PTSD, anxiety and depression, psychosis, mood swings, disassociation and memory loss. Exhaustive studies of her childhood

[261] *Lisa Montgomery – Cornell Center on the Death Penalty Worldwide*, https://dpw.lawschool.cornell.edu/advocacy/the-case-of-lisa-montgomery/.
[262] Maurice Chammah & Keri Blakinger, *What Lisa Montgomery Has In Common With Many On Death Row: Extensive Trauma, The Marshall Project* (Jan. 8, 2021), https://www.themarshallproject.org/2021/01/08/what-lisa-montgomery-has-in-common-with-many-on-death-row-extensive-trauma.
[263] *Id.*
[264] *Id.*
[265] Sandra Babcock, *Lisa Montgomery: A Victim of Incest, Child Prostitution and Rape Faces Execution, Death Penalty Worldwide* (Oct. 2020), https://dpw.lawschool.cornell.edu/wp-content/uploads/2020/10/Lisa-Alice-Profile-PDF.pdf.
[266] *Id.*

and early adulthood suggest that she was grappling with many of these conditions before, and leading immediately up to, the committing of her crime.[267]

In the months leading up to the murder, she had several episodes in which she told those around her that she was pregnant – a claim that was palpably false as she was involuntarily sterilized after the birth of her fourth child. She also displayed all the symptoms of her mental illness, including disassociation, memory loss and profound depression[268]. But the court didn't at her trauma The echoes with Shabnam's case are stark. Both women committed acts that defied social expectations of femininity and motherhood. Both were punished not only for violence but for violating the scripts society imposes on women—obedience, silence, and nurturing. Shabnam's identity as a mother was erased; Lisa's maternal instinct was grotesquely transformed into a weapon against her victim. In both cases, the courts sought simplicity rather than nuance. Trauma was sidelined. Context was dismissed. The woman became a cipher for societal anxieties.

These cases reveal a persistent pattern: when women transgress, particularly within the domestic sphere, the law functions not only as justice but as theatre. It performs social control. Courtrooms become stages where gender norms are reaffirmed, mercy is withheld, and the complexities of human suffering are eclipsed by the need for symbolic closure. The death penalty, in these instances, becomes more than punishment. It becomes a ritual designed to restore order, a mechanism to eliminate the woman who has disrupted the fragile social equilibrium, and a stark warning about the cost of defiance.[269]

## CULTURAL ARTEFACTS & LEGAL IMAGINATION: WHEN LAW REFUSES TO LISTEN TO GRIEF

There are countless moments in a courtroom where the space where justice was to be delivered it replaced with silence especially a women's, her voice is muffled, her pain flattened and her difference is turn to a spectacle to understand this silencing, we must step outside the legal archive and into the cultural one. Shekhar Kapur's Bandit Queen[270] is not just a film—it's a

[267] Petition for Writ of Habeas Corpus at 1–3, *Montgomery v. Warden of USP Terre Haute*, No. 4:12-cv-80 GAF (S.D. Ind. Jan. 12, 2021), https://dpw.lawschool.cornell.edu/wp-content/uploads/2020/10/Petition-Arguing-Lisa-Montgomery-is-Mentally-Incompetent-to-be-Executed.pdf.

[268] Tahir Rahman, *An Overvalued Desire for Motherhood Leads to Homicide*, *Psychology Today* (Oct. 1, 2024), https://www.psychologytoday.com/us/blog/clinical-and-forensic-dimensions-of-psychiatry/202410/an-overvalued-desire-for-motherhood

[269] M.K. Guru Prasath & T. Charumathi, *A Critical Analysis on Death Penalty and Gender Bias*, 4 *Int'l J. Advanced Legal Res.* (2023), https://ijalr.in/wp-content/uploads/2023/11/A-CRITICAL-ANALYSIS-ON-DEATH-PENALTY-AND-GENDER-BIAS-Guruprasath-M-K.pdf

[270] *Bandit Queen* (Kaleidoscope Ent. & Film Four Int'l 1994), based on *India's Bandit Queen: The True Story of Phoolan Devi* by Mala Sen.

scream. It tells the story of Phoolan Devi, a Dalit woman brutalized by caste and patriarchy, who retaliates with violence and is punished not only by the law but by the gaze of society. The film doesn't ask us to forgive her—it asks us to witness her. To see how the law failed to protect her and then punished her for surviving. Like Shabnam, Phoolan's story is framed through betrayal: not just of family, but of femininity itself. both the women here were seen as a threat to the society threat that it would affect their moral order, and both weren't given a right to be in their full complexity. Amrita Pritam's haunting poem Ajj Aakhaan Waris Shah Nu [271]echoes this grief. Written during the Partition, it calls upon the long-dead poet Waris Shah to rise and record the suffering of Punjab's daughters. "A million daughters cry out to you, Waris Shah," she writes, "speak from your grave." [272]The poem is not just about historical violence it's about the refusal of justice to hear women's pain. It's about the silence that follows screams. What does justice sound like when it listens to grief, not just guilt? It doesn't rush to punish. It pauses[273]. It asks what led to the act. the women here are not seen as a role model for society but rather it sees the women as a person of dignity Law, when stripped of empathy, becomes a tool of control. But when it listens to poems, to stories, to the quiet ache beneath defiance it begins to transform. It begins to feel.

## CONCLUSION: TOWARD A FEMINIST JURISPRUDENCE OF CLEMENCY

The death penalty is treated as a deterrent, to make people understand that if violent crime takes place, then there can be serious punishments. But in cases like Shabnam's, it becomes something more like a cultural judgment where the gender role plays. The courtroom doesn't just weigh evidence; it enforces expectations. Women who fought with violence who fought for something the loved wasn't just seen as criminals because of the crime they did but because of the role they didn't do, the role society assigned them to do. it's like blanket consent when you are a woman you are seen to be consented to the roles as a woman ahead. Shabnam's case shows how the law can erase context—trauma, coercion, motherhood—and replace it with symbolism. Her sentence wasn't just about justice; it was about restoring a social order she disrupted. To move forward to have a more humane justice system we need to focus on analysing the trauma and not just the guilt We need gender audits that expose bias in judicial reasoning. Clemency must be grounded in compassion, not in public outrage.

[271] Amrita Pritam, *Ajj Aakhaan Waris Shah Nu* (1948), translated in *I Say Unto Waris Shah*, Univ. of Lucknow Translation PDF.
[272] Sudip Das Gupta, *Poem Analysis: I Say Unto Waris Shah*, *PoemAnalysis.com*, https://poemanalysis.com/amrita-pritam/i-say-unto-waris-shah/.
[273] *Id.*

# SHADOWS BEHIND THE STATUTES: AN EMPIRICAL AND DOCTRINAL STUDY OF RAPE LAWS IN INDIA (IPC-POCSO-BNS)

***Rishita Jha[274] And Riya Dawra[275]***

## ABSTRACT

*This paper provides a critical analysis of the history of rape laws, their reforms, and issues in India particularly focusing on its historical and social legal aspects. It follows the history of sexual violence laws back to the Indian Penal Code of 1860, which was informed by colonial and Victorian moralities and ingrained patriarchal beliefs about female chastity. The paper further compares current legal provisions, such as the Protection of Children from Sexual Offences (POCSO) Act, 2012, which introduces a gender-neutral and child-centred system of sexual crimes against minors, and the Bharatiya Nyaya Sanhita (BNS), 2023, which proposes modernization of the criminal code in India and preserves the post-Nirbhaya reforms. Besides legal analysis, the paper will review statistics on rape cases from 2019 to 2024 and critically analyse problems that exist within the system that led to the low conviction rate, such as a delay in trial, a weak police investigation, corruption, and a lack of forensic infrastructure.*

*The authors say that amendments to legislation cannot solve the problem, but they need to be complemented with the sensitivity of judges, accountability of policing, awareness by citizens, sex education, and rehabilitation of victims, as well as accelerated processes of trials. The work results in the evaluation of interactions between law and social change and feminist activism, which identifies the importance of the holistic approach to providing justice, safety, and dignity to survivors. The study concludes that although India has achieved a significant milestone towards appreciating bodily autonomy, consent, and gender justice, total protection and equality of women and children is a continuous process.*

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## HYPOTHESIS

One of the issues that is prevalent in India about rape is the very poor conviction rate. This leads to the majority of the accused being found not guilty, thus ruining the confidence of a victim in the justice system. The investigations are not always sufficient, and in most scenarios, the accused can evade the course of justice through bribery or other means. As a result, the victims are reluctant to report such crimes.

Moreover, social attitudes contribute to the issue. Being in a male-dominated society, men are sometimes perceived to be able to do anything and get away with it, creating a culture of entitlement and violence against women. Absence of appropriate support mechanisms to victims, case delays, and failure to handle cases sensitively encourage even more people to keep silent and sustain the cycle of sexual violence. Gender equality has not been widely implemented through public awareness and education, and thus, patriarchal attitudes still prevail and hamper the fight to safeguard women.

## INTRODUCTION

*"The degree of civilization in a society can be judged by the way it treats its women."*

**-** *Fyodor Dostoevsky*

Rape is not merely a bodily crime but a serious encroachment on identity, dignity and humanity of a human being. It portrays the blacker side of the societal attitudes, where women and girls are still fighting to be equal, safe, and respected. Even after the changes in the law and the constitutional guarantees, rape is one of the worst crimes in India that breaks souls and reveals the gender bias that is still embedded in our society. As the maternizers and progenitors of life, women are likely to be exploited, objectified, and made silent by the fear and stigma of victimhood.

In India, rape is not a simple legal issue, but it is a social, psychological, and moral crisis. Every case that is reported does not only doubt the effectiveness of our laws but also our general conscience as a society. Since the notorious Nirbhaya case of 2012 to the numerous unreported cases, all the forms of sexual violence remind of the necessity to implement stricter enforcement, support victims and social reforms. As we practice justice and equality in all other areas, we should consider the protection and dignity of women to be our primary moral obligation. In the case of our society wanting to achieve genuine development and human society, we ought to make sure that no voice is suppressed, no survivor is disgraced, and no perpetrator is not punished.

## HISTORY OF RAPE LAWS

The rape laws in India indicate alteration in gender, justice and body autonomy.[276] The law of sexual violence has developed over time and has turned out to be more on human dignity rather than on moral principles. The first instance of rape being referred to under Indian Penal Code (IPC)1860 was rape which was characterized as penile-vaginal intercourse against her will informed by Victorian ethics that viewed rape as an affront to the dignity of a woman and not her health.[277] Sexual violence (rape in marriage) was not addressed, which showed patriarchal prejudices.[278] The law proved to be ineffective as cases such as the Mathura custodial rape (1979) brought the issue to the limelight and the Criminal Law (Amendment) Act, 1983 was enacted to address the issue of custodial rape and protection of the victim although the definitions of consent remained ambiguous.[279]

The Justice J.S. Verma Committee (2013) and the Criminal Law (Amendment) Act, 2013, which was led by the Nirbhaya gang-rape, redefined rape, described the meaning of consent and introduced new offences such as stalking and voyeurism.[280] The amendment of 2018 strengthened sentencing, especially the crimes committed against children.[281] The 2023 edition of the Bharatiya Nyaya Sanhita (BNS) brings in prior reforms, yet is still criticized on marital rape provisions.[282] On the whole, the history of rape laws is indicative of the moral and constitutional growth in India, where the conception of purity developed in the colonial times has been replaced by the concept of dignity, equality, and human rights of women.

### 1. Colonial Origins: The Indian Penal Code, 1860

The initial laws governing rape in India were expressed in the Indian penal code (IPC), 1860 that was drafted under the guidance of Lord Macaulay. Section 375 had a very restricted definition of rape and that was the sexual intercourse between a man and a woman, not with her consent or against her will.[283] The law only defined rape as penile and vaginal penetration and other forms of sexual behaviours were not included in the definition. There was also one exception in the criminal law; a man raping his own wife would not be considered rape

[276] *Criminal Law (Amendment) Act*, No. 13 of 2013, India Code.
[277] *Indian Penal Code*, No. 45 of 1860, India Code.
[278] A Critique of Rape Laws in India, *iPleaders Blog*, https://blog.ipleaders.in/critique-rape-laws-india/ (last visited Nov. 14, 2025).
[279] Rachit Garg, *id*, https://blog.ipleaders.in/critique-rape-laws-india/
[280] *Criminal Law (Amendment) Act*, No. 13 of 2013, India Code.
[281] Law on Rape, *Drishti Judiciary* (June 13, 2024) https://www.drishtijudiciary.com/current-affairs/law-on-rape.
[282] *Id*., https://www.drishtijudiciary.com/current-affairs/law-on-rape
[283] *Indian Penal Code*, supra note 4, § 375.

provided that the woman was not under a particular age.[284] The presence of the marital rape exception was an indication of a colonial and patriarchal perception of the world, which believed that men had ownership rights over women, and women had no right to their bodies. Even colonial days, and decades after independence, did not envisage rape as a crime of body dignity - rape was a crime against honour. The law was not only infrequently amended, but also slightly. In 1925, 1940, the age of consent was increased to 12 years and then to 14 and 16 respectively.[285] The laws were still socially and morally conservative with chastity and morality being the primary focus over women autonomy.

**1. The Mathura Case and the 1983 Criminal Law Amendment**

Mathura custodial rape case (Tukaram vs the case of State of Maharashtra, 1979)[286] was a milestone in the Indian legal history. The accused police officers in the crime were acquitted by the Supreme Court who claimed that there were no injuries that suggested that there was no consent. The ruling resulted in a series of protests across the country and a women rights movement advocating a shift in sexual assault legislation. Due to these demonstrations, the Criminal Law (Amendment) Act, 1983 was adopted and introduced radical amendments:

• Section 376A-D was introduced in the penal code, and it recognized aggravated forms of the crime of rape: custodial rape, rape by those presented with authority, and gang rapes. Evidence Act: Amendments were made and in particular, Section 114A was added that contained the requirement that there should be a presumption of not having the consent where the custodial rape was proved to have taken place.[287]

• The Crime Act also introduced protection concerning the disclosure of the name or identity of the victim in any publication or legal reports to the name or identity of the victim.[288] The amendments in 1983 marked the first time the legislature recognized the crimes of rape, that rape damages the person and dignity of a woman and not her chastity in the former case.

**3. Pre-Nirbhaya Era**

The laws also made slow but consistent progress between 1983 and 2012. The courts started to be more subtle in the interpretation of rape, yet old existent evidentiary traditions, like the two-finger test and character questions remained.[289] The Law Commission Reports (172nd Report,

[284] *Id.* § 375 Exception 2.
[285] *Id.* (as amended 1925, 1940).
[286] *Tukaram v. State of Maharashtra*, (1979) 2 SCC 143 (India).
[287] *Criminal Law (Amendment) Act*, No. 43 of 1983, § 3, India Code.
[288] *Indian Evidence Act*, No. 1 of 1872, § 114A, India Code.
[289] Nat'l Human Rights Comm'n India, *Interrogating Violence Against Women From the Other Side*, tbl. 3 (2020),https://nhrc.nic.in/assets/uploads/training_projects/InterrogatingViolenceAgainstWomenharboundreport2020.pdf.

2000) had several times proposed the broadening of the definition of the crime of rape to cover non-penile penetration, as well as to gender-neutralise the law.[290] Parliament was not interested or taking any action.

Cases of continued social stigma, inadequate investigations and time lag during the trials continued to deter reporting. Even ten years following the year 1983, it was only less than thirty percent of the reported rape cases that ended up being convicted as evidence of the wide discrepancy between the intentions of the law and actual implementation and enforcement.[291]

**4. Nirbhaya case and the 2013 criminal law**

The Nirbhaya gang rape which happened on the 16th of December, 2012, in Delhi was a turning point that shook the moral conscience of the nation. The government has responded to the general public anger by creating the Justice J.S. Verma Committee Report (2013)[292], which released an elaborate report that included suggestions of reforms that would enhance the safety and sexual assault legislation that women face. The Parliament approved the suggested reforms in the shape of the Criminal Law (Amendment) Act, 2013.[293]

The 2013 amendment altered the Indian law on rape by:

1. The broadening of the definition of rape: Section 375 was changed with the introduction of the definition of rape as any form of non-consensual penetration of vagina, mouth, urethra, or anus with a body part or object. This broadened definition erased the exclusive definition of only penile-vaginal penetration.

2. Redefining consent: This was explained by the law in Explanation 2 of Section 375 in which consent was explained as unequivocal voluntary agreement expressed either by a word, gesture or any communication.

3. Introduction of new sexual offences: New paragraphs were introduced that included the IPC-sexual harassment UID 354A, assault with intent to disrobe UID 354B, voyeurism UID 354C, stalking UID 354D.

4. Increased punishment: the amendment enlarged the minimum imprisonment of 7 years of rape to at least 10 years imprisonment, and sentence to life imprisonment or death in cases resulting in death or vegetative state of a victim.[294]

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[290] Cabinet Approves Bill to Amend Law on Rape, *PRS India Blog*, https://prsindia.org/theprsblog/cabinet-approves-bill-to-amend-law-on-rape.

[291] 32 Per Cent Conviction Rate in Rape Cases: NCRB, *Indian Express* (Dec. 4, 2019), https://indianexpress.com/article/india/32-per-cent-conviction-rate-in-rape-cases-ncrb-6149331/.

[292] Justice J.S. Verma Comm., *Report of the Committee on Amendments to Criminal Law* (2013), https://www.prsindia.org/report-summaries/justice-verma-committee-report-summary.

[293] *Criminal Law (Amendment) Act*, supra note 3, § 9.

[294] *Mukesh & Anr. v. State (NCT of Delhi)*, (2017) 6 SCC 1 (India).

5. Dignity of the victims: Indian Evidence Act has been revised to prohibit the inquiry of a woman regarding the history of her previous sexual relations (Section 53A)[295] and creating a presumption of not needing verification of certain types of evidentiary analysis.

**5. The 2018 Criminal Law (Amendment) Act:**

In 2018, the heinous Kathua and Unnao child rape cases led to protests all over the country against sexual violence against children, as well as the enactment of the Criminal Law (Amendment) Act, 2018. In reaction to the said incidences, the Amendment was formulated to enhance the Indian legal system in safeguarding children against sexual violence, and in raising the deterrent power that those who perpetrate sexual crimes. The act added more strict non-bailable acts in the Indian Penal Code. Specifically, Section 376AB offers a minimum sentence of 20 years of imprisonment, life imprisonment or death for rape of girl under 12 years[296]. Section 376DA and 376DB were introduced in court containing gang rape of a girl bellow 16 years of age and a girl bellow 12 years of age, respectively, and stipulated that in both cases a mandatory life and death sentence would be given. To make sure that justice was meted out, the amendment had a two-month period of police investigation and six months of any form of appeal both of which hastened the court proceedings. Also, the amendment raised the age of consent in sex activity, and it is as in line with the earlier legislation of the Protection of Children from Sexual Offences ("POCSO") Act, 2012 that offered that a child is anybody below 18 years. The union between these two laws served to seal any loopholes that may have been present in addition to showing the state interest in ensuring protection of children against sexual abuse and exploitation.

**6. The POCSO Act, 2012:**

Child-Centric Protection -The POCSO Act, 2012 addressed the dire need by offering a well-rounded, gender-neutral and child-friendly model of conducting such an inquiry and prosecuting sexual crimes committed against children[297]. It brought about certain offences that included penetrative sexual assault, sexual harassment, child pornography, aggravated sexual assault by persons in authority[298]. The POCSO Act mandates in-camera trials, specials courts and compulsory reporting, emphasizing rehabilitation alongside punishment[299].

**7. The Bharatiya Nyaya Sanhita, 2023/2024:**

[295] *Indian Evidence Act*, supra note 15, § 53A.
[296] *Criminal Law (Amendment) Act*, No. 22 of 2018, §§ 5–8, India Code.
[297] *Protection of Children from Sexual Offences Act*, No. 32 of 2012, §§ 3–6, India Code.
[298] *Id.* § 3.
[299] *Id.* §§ 24–33.

The Bharatiya Nyaya Sanhita (BNS), 2023, which replaced the IPC effective July 2024, aims to modernize criminal law with a focus on victim-centric justice and simplification. Section 64 of the BNS now governs rape offences, largely retaining the post-2013 framework while reorganizing language and penalties. The key characteristics are:

- Section 63 defines rape as any non-consensual sexual penetration of a woman, including oral, anal, and object penetration[300].
- Exceptions cover medical procedures and marital intercourse with wives over eighteen.[301]
- Punishments under Sections 64–70 mirror prior law, providing life imprisonment or death for aggravated cases such as gang rape or assault on minors.[302]

Therefore, although BNS puts together current reforms, it does not go further to criminalize marital rape that remains controversial.

## PRESENT SCENARIO OF RAPE LAWS IN INDIA

The current criminal law of rape in India is the Bharatiya Nyaya Sanhita, 2023 (BNS) which came into effect in July 2024 and which replaced the colonial Indian Penal Code (IPC). The current situation indicates the extension of the changes introduced by the Criminal Law (Amendment) Act, 2013, adopted following the Nirbhaya case, and is one of the most liberal stages in the history of the Indian criminal law.

### 1) Section 63 – Definition of Rape:

Section 63 defines "rape" as sexual intercourse or penetration by a man with a woman against her will or without her consent including penetration of the vagina, anus, urethra or mouth with any body part or object.[303] The main gist of this provision is that there was no free and valid consent. The law enumerates seven conditions under which the consent is invalid and they include; consent obtained by fear, coercion, intoxication, misconception, or consent obtained by a woman under eighteen years or incapable of expressing consent. Exception 1 excludes the legitimate medical procedures, whereas, Exception 2 does not exclude the marital rape exception of wives who are over the age of eighteen years[304]. In this part, a strong focus on the autonomy of a woman is made where it is declared that the consent should be free, deliberate, and not forced.

[300] *Bharatiya Nyaya Sanhita*, No. 45 of 2023, § 63, India Code.
[301] *Id.* § 63 Exceptions 1–2.
[302] *Id.* §§ 64–70.
[303] *Bharatiya Nyaya Sanhita*, supra note 27, § 63, https://legislative.gov.in/.
[304] *Id.* § 63 Exception 2 ("Sexual intercourse by a man with his own wife, the wife not being under eighteen years of age, is not rape").

**Amendments made to the IPC (Post-Nirbhaya Amendment):**

This is in line with Section 375 of the IPC that was vastly modified in 2013 following the Nirbhaya gang rape case to expand the definition of rape to further include penile-vaginal penetration[305]. The BNS still keeps these post-Nirbhaya changes but puts them in simpler and clearer words. It eliminates the archaic nature of the IPC and makes it clear that the emphasis is made on the validity of consent[306] and not on the physical character of the act. Non-consensual sex within marriage is, however, not considered an exception to the marital rape[307], and the matter is still faced with criticism.

**2) <u>Section 64 – Punishment for Rape:</u>**

The punishment of rape is a stricter imprisonment not less than ten years including life imprisonment in case of rape, but in addition to fine which is prescribed in Section 64.[308] It also offers more severe punishment in serious instances i.e. rape committed by law enforcement officers, government officials, military officers, custodial or medical staffs or anyone in a position of authority such as a teacher or a guardian.[309] In cases where the victim is pregnant, physically or mentally impaired and when he or she is helpless, the penalty is greater.[310] In cases where the crime has resulted in serious harm, mutilation of the person or recurring victimization of the same female, the sentence can be as long as the rest of the natural life of the criminal.[311] The fine imposed should be equivalent to the damage caused and help in restoring the victim.[312]

**Changes from the IPC (Post-Nirbhaya Amendment):**

This part corresponds to Section 376(1) and (2) of the IPC that were introduced in the aftermath of the Criminal Law (Amendment) Act, 2013 and which increased the minimum punishment and inserted new forms of aggravated rape. The BNS makes these provisions simpler in format and combines them together to enhance readability. Previously, in the IPC, life imprisonment may imply imprisonment of 14 years or till the end of the natural term of life- this was made

[305] *Criminal Law (Amendment) Act*, supra note 3, § 9; *Mukesh & Anr.*, supra note 21; see also Justice J.S. Verma Comm., supra note 19.
[306] *Id.* Explanation 2 ("Consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication communicates willingness to participate in the specific sexual act").
[307] *Id.* § 63 Exception 2; see also Law Comm'n of India, *172nd Report on Review of Rape Laws* (2000), https://lawcommissionofindia.nic.in/172nd-report-on-review-of-rape-laws/.
[308] *Bharatiya Nyaya Sanhita*, supra note 27, § 64(1) (India), https://legislative.gov.in/.
[309] *Id.* § 65(1) – (2).
[310] *Id.* § 65(3) – (4).
[311] *Id.* § 65(5) – (6).
[312] *Id.* § 64(2).

clear in the BNS, such that life imprisonment can only mean imprisonment till the end of the natural life of the convict.[313]

**3) Section 65 – Child Sexual Assault:**

Section 65 offers an increase in punishment when it comes to rape of a child who is under the age of sixteen.[314] The criminal will be sentenced to a strict imprisonment term of not less than twenty years that can be reduced to the whole life imprisonment, and will also pay a fine that will pay the medical and rehabilitation costs of the victim.[315] In the case of a victim under the age of twelve years, the sentence can be prolonged up to death.[316] The section mirrors the zero-tolerance of the legislature to child sexual abuse.[317]

**Changes from the IPC (Post-Nirbhaya Amendment):**

It is based on Section 376AB, 376DA, and 376DB of the IPC that was introduced following the Criminal Law (Amendment) Act, 2018, in relation to increasing instances of child rape. These provisions are brought together under the BNS and they become one and offer a simplified and standardized legal framework. It makes sure that child victims are compensated and given medical care, which were not mentioned clearly in the previous provisions of IPC.[318]

**4) Section 66 - Death or Vegetative State as a result of rape:**

Section 66 addresses the issues concerning the instances of rape that result in the death of the victim or renders her in an irreversible vegetative condition.[319] The offender will be sentenced to a strict imprisonment of at least two decades which could carry a lifetime imprisonment period to the rest of the natural life of the offender, or death. This part is the principle of proportionality and the act of destroying the body or the mind of the victim is the most severe offence that needs to be punished with a corresponding penalty.

**Changes from the IPC (Post-Nirbhaya Amendment):**

This part is similar to the Section 376A of the IPC which was added following the Nirbhaya case to provide the death penalty in case of rape resulting in death or vegetative state. The BNS, in its turn, is written in more explicit terms, which makes it consistent with the principles of

[313] *Bharatiya Nyaya Sanhita*, supra note 27, § 63(2); *Criminal Law (Amendment) Act*, supra note 3, §§ 9–10; see also *Indian Penal Code*, supra note 4, § 376(1)– (2) (as amended 2013).
[314] *Bharatiya Nyaya Sanhita*, supra note 27, § 65, https://legislative.gov.in/
[315] *Id.* § 65(1).
[316] *Id.* § 65(2).
[317] *Mukesh & Anr.*, supra note 21.
[318] *Criminal Law (Amendment) Act*, No. 22 of 2018, §§ 5–8, India Code (2018); see also *Bharatiya Nyaya Sanhita*, No. 45 of 2023, §§ 64–70 (India), https://legislative.gov.in/ (consolidating prior IPC §§ 376AB, 376DA, 376DB into a unified scheme addressing aggravated sexual assault against minors and mandating victim compensation and medical assistance).
[319] *Bharatiya Nyaya Sanhita*, No. 45 of 2023, § 66 (India), https://legislative.gov.in/.

human rights, although in the case of a victim-centred approach. The system of punishment has not changed, it has only been reformulated in more concrete terms, eliminating the areas of interpretation.[320]

**5) Section 67 -Marital Separation Rape:**

Section 67 will prosecute the act of sexual intercourse when a husband is living with his wife separately by force, under a court order, or otherwise. The sentence includes two to seven years in prison with a fine. This part recognizes that, in case of separation between spouses, conjugal rights remain suspended and thus, any sexual intercourse without consent will be considered rape.[321]

**Changes from the IPC (Post-Nirbhaya Amendment):**

This is a new provision that has been introduced in the BNS.[322] In the IPC, Section 376B was dealing with sexual intercourse between a husband and his wife when they were separated but their language was old.[323] The BNS translates it using more modern and gender-sensitive words, focusing on autonomy and dignity.[324] Even with this achievement, the principal exception of marital rape in Section 63 still exists, i.e. non-consensual intercourse in marriage (when they cohabit) is not a crime.[325]

**6) Section 68 – Sexual Intercourse by Persons in Authority:**

Section 68 criminalizes sexual exploitation by people in authority, trust, or fiduciary positions.[326] This statute is limited to public officials, custodians, and other employees in institutional settings who exploit their position and obtain sexual favours from women in their custody. The penalty is five to ten years of rigorous imprisonment together with a fine. The rationale behind this provision is to hold people with power over others accountable as well as to take preventative measures to address abuses of power through hierarchical relationships.

**Changes from the IPC (Post-Nirbhaya Amendment):**

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[320] *Indian Penal Code*, No. 45 of 1860, § 376A (India), as amended by *Criminal Law (Amendment) Act*, No. 13 of 2013 (India) (introducing enhanced punishment including death penalty for rape resulting in death or vegetative state, following the Nirbhaya case); *Mukesh & Anr. v. State (NCT of Delhi)*, (2017) 6 SCC 1 (India) (upholding death sentences in the Nirbhaya gang rape case); *Bharatiya Nyaya Sanhita*, No. 45 of 2023, §§ 63–70 (India) (retaining equivalent punishment for aggravated rape in more explicit statutory language); see also Justice J.S. Verma Comm., *Report of the Committee on Amendments to Criminal Law* (2013), https://www.prsindia.org/report-summaries/justice-verma-committee-report-summary.

[321] *Bharatiya Nyaya Sanhita*, No. 45 of 2023, § 67 (India), https://legislative.gov.in/.

[322] *Id.* § 63.

[323] *Indian Penal Code*, supra note 3, § 376B (prior to repeal by *Bharatiya Nyaya Sanhita*, 2023).

[324] Ministry of Law & Justice, *Press Note on the Introduction of Bharatiya Nyaya Sanhita, 2023* (July 2023), https://pib.gov.in/PressReleasePage.aspx?PRID=1949690.

[325] *Bharatiya Nyaya Sanhita*, supra note 4, § 63 Exception 2 (retaining the marital-rape exception for wives above 18 years of age).

[326] *Id.* § 68, https://legislative.gov.in/.

This paragraph corresponds with the Section 376C of the IPC that addressed sexual intercourse between people in authority. The BNS cleanses the language so it becomes more comprehensible and coercion in power relations is felt even in the absence of physical force. It emphasizes institutional responsibility, as well as has medical and custodial contexts explicitly.[327]

**7) Section 69 – Sexual Activity through Deceptive Means:**

Section 69 proclaims sexually acquired deceptively by way of a false promise of marriage or misunderstanding of trust in order to obtain consent. The offender can also be imprisoned to a maximum of ten years and given a fine. The clause is meant to deal with instances where consent has been obtained fraudulently with the understanding that a false consent is void.[328]

**Changes from the IPC (Post-Nirbhaya Amendment):**

Although the IPC lacked a direct section regarding this, such cases were tried in Sections 376 and 417 (cheating).[329] The BNS has become specific to sexual intercourse by fraudulent means and provides a more definite legal foundation and interpretation ambiguity.[330] This reform will guarantee the women who are fooled into sexual affairs are better protected by the law.[331]

**8) Section 70 – Gang Rape:**

Section 70 describes that a case of gang rape occurs when a woman is raped by two or more individuals who have a common intent. Everyone involved is equally culpable regardless of his or her defined roles. The penalty is severe imprisonment of at least twenty years and that may be life imprisonment till the end of natural life and a fine to the rehabilitation of the victim. In case of any person who is less than eighteen years old the penalty could be a life imprisonment or a death sentence.[332]

**Changes from the IPC (Post-Nirbhaya Amendment):**

This is based on Section 376D of the IPC that came into place in the aftermath of the Nirbhaya case in an attempt to mete out harsh measures on gang rape.[333] This is what the BNS has, albeit in more direct and simplified language. It also puts more focus on victim compensation and rehabilitation which is more human and victimistic unlike the IPC.[334]

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[327] *Id.* § 67; *Indian Penal Code*, supra note 3, § 376C; see also Justice J.S. Verma Comm., supra note 3.
[328] *Id.* § 69, https://legislative.gov.in/.
[329] *Indian Penal Code*, supra note 3, §§ 376, 417.
[330] *Bharatiya Nyaya Sanhita*, supra note 4, § 69.
[331] Justice J.S. Verma Comm., *Report of the Committee on Amendments to Criminal Law* 146–49 (2013), https://www.prsindia.org/report-summaries/justice-verma-committee-report-summary.
[332] *Bharatiya Nyaya Sanhita*, supra note 4, § 70, https://legislative.gov.in/.
[333] *Criminal Law (Amendment) Act*, No. 13 of 2013, § 9, inserting *Indian Penal Code* § 376D (India); see *Mukesh & Anr.*, supra note 3.
[334] Justice J.S. Verma Comm., *Report of the Committee on Amendments to Criminal Law* 239–41 (2013)

**9) Section 71 – Habitual Offenders:**

Section 71 offers severe treatment as a repeat offender to those that violate Sections 64 to 66 or 70. The second conviction may mean life imprisonment of the rest of the natural life of an offender or death penalty. It is aimed at ensuring that repeat sexual offenders are removed by incapacitative deterrence to ensure that society is not subjected to habitual criminals.[335]

**Amendments under the IPC (Post-Nirbhaya Amendment):**

This provision is in line with Section 376E of the IPC, which was introduced in the wake of the Nirbhaya incident to seek justice against the recurrent criminals. The BNS still keeps this provision intact but puts it in a different wording to make certain that it is construed literally and without ambiguity. The punishment regime is also the same, reinstating the desire of the legislature to discourage repetitive sexual offenses with the greatest punishments.[336]

## COMPARATIVE ANALYSIS OF RAPE LAWS: IPC, POST-NIRBHAYA AMENDMENTS, AND BHARATIYA NYAYA SANHITA (BNS), 2023

The definition and the scope of rape under law in India has changed radically over the decades, especially following the Nirbhaya gang rape case in 2012, which sparked one of the greatest revisions in the Indian Penal Code (IPC) that was first enacted in 1860.[337] The pre-2013 IPC limited the definition of rape to penile-vaginal penetration excluding all other types of sexual violence such as oral or anal penetration. This narrow definition did not support the diverse and brutal facts of sexual assault. Age of consent was established at sixteen years and the law did not have clear and consistent understanding of what consent meant that tended to give conflicting judicial meaning. Additionally, marital rape was not subject to prosecution when the wife was over fifteen years of age which was also a patriarchal decision that marriage meant that the wife was to give consent forever. Punishment was also not very harsh at seven years to life imprisonment and there were little protection measures on victims given that it afforded limited respect to the privacy of the survivor as well as his dignity in the trial process.

Following the Nirbhaya incident, the outcry of the people and suggestions of the Justice J.S Verma Committee resulted in the Criminal Law (Amendment) Act, 2013 that was a historic change in the way sexual offences were addressed in India.[338] The definition of rape was also

https://www.prsindia.org/report-summaries/justice-verma-committee-report-summary (recommending victim-centric reforms, including compensation and rehabilitation measures)

[335] *Bharatiya Nyaya Sanhita*, supra note 4, § 71 https://legislative.gov.in/

[336] *Indian Penal Code*, supra note 3, § 376E (inserted by *Criminal Law (Amendment) Act*, No. 13 of 2013, § 9); *Mukesh & Anr.*, supra note 3; *Bharatiya Nyaya Sanhita*, supra note 4, §§ 70–71 (reenacting the provision against repeat sexual offenders)

[337] *Mukesh & Anr.*, supra note 3.

[338] Justice J.S. Verma Comm., supra note 3.

broadened greatly to incorporate all penetrations that occurred regardless of whether those were vaginal, oral, anal and object penetration, in recognition of various forms of sexual violence. The age of consent was also increased to eighteen years, which stands with the international child protection standards. Explanation 2 to Section 375 IPC also gave a definite understanding of consent as an unambiguous voluntary act with the emphasis on the autonomy of the woman. Marital rape was still exempted but the condition was amended to exclude husbands under the circumstance that the wife was aged above eighteen and so the rule was slightly more safeguarding to minors. Sentences were increased with an increase to a minimum of ten years to life imprisonment and in instances of aggravated rape then the death sentence might be handed over. New crimes were introduced, including stalking, voyeurism, sexual harassment, which was a product of a better comprehension of gendered violence. There were also more robust victim protection measures that were included such as privacy, no disclosure of identity of a victim and no disclosure of the sexual history of the victim.[339]

## PROVISIONS UNDER THE PROTECTION OF CHILDREN FROM SEXUAL OFFENCES (POCSO) ACT

### Section 3 – Penetrative Sexual Assault:

The POCSO Act of 2018 defines penetrative sexual assault as any penetration, however minor, by the penis, any body part, or object into the vagina, mouth, urethra or rectum, or resulting in a child committing such acts with another individual.[340] The scope of this section also captures the oral sexual acts in this section such that any kind of sexual penetration would not be left out. Notably, the word child is employed in the law rather than gender hence making the provision gender-neutral and granting equal protection to both the male and female victims below the age of eighteen.[341] The wide phrasing of the section can be explained by a comprehensive attitude towards securing children against all possible sexually violating acts and the focus on the fact that the attitude of a minor to a sexual act does not matter in the eyes of the law.[342]

### Dissimilarity to IPC and BNS Rape Laws:

Rape is defined as any sexual activity performed by a man on a woman without her consent according to the Indian Penal Code (Section 375)[343] and its amendment Bharatiya Nyaya

[339] *Indian Evidence Act*, No. 1 of 1872, § 53A (India).
[340] *Protection of Children from Sexual Offences Act*, No. 32 of 2012, § 3(a)–(d), India Code.
[341] *Id.* § 2(1)(d) (defining "child" as any person below the age of eighteen years).
[342] *Id.* §§ 3–4 & 7; see also *POCSO Act is Gender Neutral*, 2025 Karn. H.C. (holding that "child" means any person below the age of 18, and "a person" includes both male and female).
[343] *Indian Penal Code*, supra note 3, § 375, https://www.indiacode.nic.in/showdata?actid=AC_CEN_5_23_00037_186045_1523266765688&orderno=424

Sanhita (Section 63).[344] Both of these laws are gender based, i.e. only women are victims and only males are perpetrators. Conversely, the Section 3 of POCSO is gender-neutral, in that both boys and girls can be sexually assaulted.[345] Furthermore, where IPC and BNS assume evidence that the consent was not available, POCSO assumes that any sexual intercourse between a minor and the perpetrator is an offence and eliminates the defence of consent. Hence, POCSO sets a more protectionist bar against the sexual penetration of minors since it makes the assumption that they lack the capacity to provide consent and punishes all sexual penetration of minors with no consideration of intent or consent.

**Section 4 – Punishment for Penetrative Sexual Assault:**

Penetrative sexual assault is punishable in section 4 of the POCSO Act according to which the offender will face a strict sentence of at least ten years of imprisonment, with the possibility of life imprisonment, and a fine.[346] In cases where the victim is under the age of sixteen years, the minimum term swells to twenty years that could rise up to imprisonment throughout the entire natural life of the offender.[347] The part also requires that fines applied must be just and reasonable and paid to the medical and rehabilitation costs of the victim and is thus a victim perspective of restorative justice in the punitive model.[348]

**Difference from IPC and BNS Rape Laws:**

The penalty of rape according to the Section 376 of the IPC and the Section 64 of the BNS is also subject to minimum of ten years imprisonment, which may be further increased to life imprisonment as well as a fine. Even so, POCSO transcends these directives on the explicit provision of a compulsory rehabilitative fine- making sure that the compensation is a benefit to the child survivor.[349] Besides, age-related increase in POCSO (with more severe punishment to victims under sixteen) is not found in the IPC and BNS, which only offer aggravated punishment in special situations, including rape by a public servant or a policeman. Consequently, POCSO is more child-oriented and welfare-focused whereas IPC and BNS are more deterrent-oriented and accountable to the population.

**Section 5 – Aggravated Penetrative Sexual Assault:**

[344] *Bharatiya Nyaya Sanhita*, supra note 4, § 63 https://www.mha.gov.in/sites/default/files/250883_english_01042024.pdf)
[345] *Protection of Children from Sexual Offences Act*, supra note 23, § 3 https://www.indiacode.nic.in/bitstream/123456789/2079/1/AA2012-32.pdf
[346] *Id.* § 4(1), https://www.indiacode.nic.in/bitstream/123456789/2079/1/AA2012-32.pdf
[347] *Id.* § 4(2).
[348] *Id.* § 4(3).
[349] *Id.* § 33(8).

Section 5 of POCSO Act enumerates those situations that aggravate penetrative sexual assault. These are those that result in grievous bodily or psychological harm, conception, HIV, or those done in opposition to children under that age of twelve or those who are handicapped.[350] When it is perpetrated by a person in power or authority, i.e. a parent, teacher, police officer, or institutional staff[351] or at the time of communal violence, disaster, or social unrest[352] it is also aggravated. Recurrent attacks[353], past sexual offence and offence committed to kill or humiliate the child in public also qualify under this classification. This is an exhaustive list of exasperating conditions that demonstrate how sensitive the legislature can be with regard to betrayal of trust and increased trauma on top of trauma due to abuse or other distressing situations.

**Difference from IPC and BNS Rape Laws:**

The aggravating circumstances are also stated in the IPC (Section 376(2)) and BNS (Section 64(2)- the rape by police officers, public servants or custodial authorities, etc.), but these are discussed in terms of the social or official status of the rapist rather than the vulnerability of the child.[354] In Section 5, POCSO, on the other hand, broadens the definition of aggravated to cover both situational and relational factors, including age, disability of the victim or the betrayal of trust by a person who took care of them.[355] Moreover, POCSO incorporates psychological damage and risk of infection (i.e. HIV) as aggravating factors, which are not so clearly stated in both the IPC and BNS. This renders POCSO much more thorough and aware of the peculiarities of child exploitation.

**Section 6 – Punishment for Aggravated Penetrative Sexual Assault:**

Aggravated penetrative sexual assault is very severely punished in section 6.[356] The offender is mercilessly incarcerated of at least twenty years that may be life imprisonment as long as they live and in extreme instances, they can be sentenced to death.[357] Besides, a fine should also be paid to help the child to be treated and rehabilitated.[358] The provision is that the legislature is guaranteed to give the most severe possible punishment on the crimes that ruin the body and mind of a child, and it is also aimed at restorative justice by paying damages.[359]

[350] *Id.* § 5(j)(ii)–(iii).
[351] *Id.* § 5(n), (p).
[352] *Id.* § 5(s).
[353] *Id.* § 5(l)–(m).
[354] *Indian Penal Code*, supra note 3, § 376(2).
[355] *Protection of Children from Sexual Offences Act*, supra note 23, § 5.
[356] *Protection of Children from Sexual Offences Act*, 2012, § 6 (1).
[357] *Id.* § 6(1).
[358] *Id.* § 6(2)
[359] *Id.* § 33(8).

**Difference from IPC and BNS Rape Laws:**

Section 376AB, 376DA, and 376DB of the IPC and Section 65 and 70 of the BNS of the rape of minor under some circumstances, such as gang rape or causing death, are comparable to this section.[360] Section 6 of POCSO is however different in that it incorporates an element of restoration as it requires fines to be used to recover and support the child. Although the IPC and BNS mainly emphasize on deterrence and retribution, POCSO considers a balanced punishment and rehabilitation option because it appreciates that child-victim healing is just as important as punishing the offender. Further, the gender-neutral nature of POCSO provides that both the child-victims of rape, males and females, are given equal protection under the law, a fact that has yet to be realized when the general rape legislation is applied.

## COMPARATIVE ANALYSIS OF BNS AND POCSO IN RELATION TO AGGRAVATED PENETRATIVE SEXUAL ASSAULT

Section 64 of Bharatiya Nyaya Sanhita (BNS) and Section 3-6 of the Protection of Children from Sexual Offences Act, 2012 (POCSO) address serious sexual violence against minors, although they differ in context, the victim they cover and the punishments imposed.[361] In BNS Section 64, crimes committed by a police officer, public servant, armed forces member, or a person in management or staff of an educational or religious institution are considered aggravated.[362] POCSO extends to any institution providing child services, including care homes and shelters,[363] and recognizes situational aggravations such as communal or sectarian violence.[364] POCSO also explicitly addresses cases where the child is pregnant, has sustained grievous injury, has HIV, or dies from the assault.[365] Regarding punishment, BNS Section 64 prescribes imprisonment of not less than ten years and up to life, plus a fine,[366] whereas POCSO Section 6 prescribes not less than twenty years, life imprisonment, or death in extreme cases.[367] Therefore, POCSO is more child-oriented, broad, and punitive, reflecting its victim-centric approach.

## RELEVANCE OF RAPE LAWS

1. **Security of Female Fundamental Rights:**

[360] *Indian Penal Code*, supra note 3, §§ 376AB, 376DA, 376DB (as amended by *Criminal Law (Amendment) Act*, 2018).
[361] *Bharatiya Nyaya Sanhita*, supra note 4, § 64; *Protection of Children from Sexual Offences Act*, supra note 23, §§ 3, 6.
[362] *Bharatiya Nyaya Sanhita*, No. 45 of 2023, § 64(2)(f), India Code.
[363] *Protection of Children from Sexual Offences Act*, No. 32 of 2012, § 5(o), India Code.
[364] *Id.* § 5(s).
[365] *Id.* § 5(j)(ii)–(iv).
[366] *Bharatiya Nyaya Sanhita*, supra note 1, § 64(1).
[367] *Protection of Children from Sexual Offences Act*, supra note 2, § 6(1).

The laws of rape have a direct relation with the provisions of the basic rights as set out under Articles 14, 15 and 21 of the Constitution that is, the right to equality, non-discrimination and life with dignity. These clauses guarantee protection of women against sexual violence and the culprits are convicted hence strengthening gender justice and the rule of law.

2. **Deterrence Against Sexual Offences:**

Following the Nirbhaya case, stricter penalties were added in the Criminal Law (Amendment) Act, 2013 such as life imprisonment and death penalty in aggravated rape. This was to bring out the deterrent effect, that is, discourage would-be criminals by imposing the cost of crime very high. The definition of rape was also broadened by the law to cover additional acts of sexual assault since no rapist can evade the law because of limited definitions.

3. **Identification of New Forms of Sexual Violence:**

Previously, the definition of rape in Section 375 IPC was narrow and it was not applicable to sexual acts. The law introduced after 2013 acknowledged the digital penetration, oral sex, and object insertion as a form of rape. This was a big step towards identifying the realities of sexual violence whereby the law will cover any act of sexual conduct lacking consent not only penile-vaginal intercourse.

4. **Gender Sensitivity and Victim-Centric Approach:**

The amendment had made the justice system more victim-sensitive, especially for women who are humiliated while being probed and tried. The law now mandates:

- Statements of victims to be recorded by female police officers
- Videoing statements to avoid distortion.
- Medical examination without delay.
- Privacy and anonymity of the victim as per Section 228A IPC.

These are all undertaking to make the quest for justice more humanizing and show respect for victims rather than disrespecting them.

5. **Accountability of Law Enforcement:**

The post-Nirbhaya reforms put in place onerous obligations on police officers. In the event of non-registration or delay in registering of rape complaint, the police officer concerned can be punished under Section 166A IPC. This will ensure that the police acts, responsibly and in a time bound manner for sexual offence acts thereby lessening the possibility of neglect or discrimination.

6. **Special Provisions for Minors under POCSO Act:**

The sexual assault laws are complemented by the POCSO Act, 2012 and together they try to provide more protection to minors who are currently below 18 years of age. It has codified penetrative and non-penetrative sexual assault and prescribes child friendly procedures for reporting, recording of evidence investigation and trial of offenses involving child victims.

**7. Current Legal Status under BNS, 2023:**

The new Bharatiya Nyaya Sanhita (BNS) 2023 has defined rape in Section 63, primarily on the basis of post-Nirbhaya definition with a few explanations. It retains tough penalties including the death penalty in cases of gang rape or if the victim dies, but has clearer provisions for marital rape and separated spouses. The BNS reforms the criminal laws and other related provisions in relation to overtly punitive approach towards sex crimes.

**8. Promoting Social Awareness and Empowerment:**

These laws have not just changed the legal landscape, but also incited social transformation — raising awareness of women's rights, consent and bodily autonomy. They've made it easier for women to report crimes and seek justice, without the shame or reprisals that might otherwise hang overhead.

## JUDICIAL DECISION: (BNS)

**1) Rafiq vs. State of UP[368]**

In the words of Justice Krishna Ilyer in this case, "The assassin kills the body but the rapist kills the soul". Thus, rape can be seen as being a worse offence to mankind than murder. Section 375 is very important as it can give justice to these women whose soul is being robbed by such perpetrators.

**2) Mukesh & Anr. vs Sate for NCT of Delhi & Ors. (Nirbhaya Rape case)[369]**

The case is commonly referred to as the Nirbhaya case. In the present case it was 23-year-old medical student returning back from a movie in bus, accompanied by her friend. While in the bus, she was gang-raped by six monsters who beat her up viciously. Post the rape, she and her friend were thrown out of the bus nude. The girl died while treated in a hospital in Singapore. The Supreme Court gave death sentences to four out of six suspects. While one was found guilty by the Juvenile Justice Panel because he was underage and placed in a reform facility, another took his life prior to the court's decision.

**3) Harpal Singh & others vs State of Himachal Pradesh[370]**

[368] *Rafiq v. State of U.P.*, (1980) SCC (India) (Krishna Iyer, J.).
[369] *Mukesh & Anr. v. State for NCT of Delhi & Ors.*, (2017) 6 SCC 1 (India).
[370] *Harpal Singh & Anr. v. State of Himachal Pradesh*, (1981) 1 SCC 560 (India).

In this case, the prosecutrix who was a girl under 16 years was sent by her mother to visit her ailing aunt in the village. While she was going the accused came to her and told her that her brother was lying sick in the dispensary. She rushed with him, there he along with two others locked her in a room. After that, they committed sexual intercourse with her against her will. She was later rescued by her family who decided to keep quiet. The matter was later on published in a newspaper and the police started the enquiry. The accused held that the girl was used to sexual intercourse and gave consent for the same. The SC found enough evidence which proved that she was under 15 years old during the sexual intercourse and as such her consent was no consent at all. The accused were held liable for rape under section 376 of the IPC.

**4) Tulsidas Kanolkar vs The State of Goa[371]**

In this case, the victim was mentally impaired. The accused took advantage of her mental situation and had sexual intercourse with her. No one was aware of it until the family of the victim found out that she was pregnant. When asked who took advantage of her, she pointed fingers towards the accused. The case was filed against him where he took the plea of consent in the form of submission to the act. It was held that the accused took advantage of the mental retardation and helplessness of the patient. In such a scenario no question of consent arises because a mentally challenged girl cannot give consent. And submission does not imply consent which can also be due to fear or vitiated by duress or impaired due to mental retardation.

**5) Bhupinder Singh vs Union Territory of Chandigarh[372]**

In this case, the accused and the victim worked in the same bank. After some time, they married and started cohabiting in 1990. The victim was pregnant in 1991 and was asked to abort her child. She again became pregnant and during that time she learned from one of her husband's friends that he was already married before marrying her. She tried to contact the accused after this but he was nowhere to be found. She filed a complaint against him. The Punjab & Haryana High Court held the accused liable under various sections of IPC including Section 376 of rape. The women had sexual intercourse with him only due to the reason that she considered him as her husband but in reality, he was not her legal husband.

**6) Priya Patel vs. State of MP (2006)[373]**

In this case, the appellant was the wife of the accused, who had kidnapped and raped a minor girl. When the appellant entered the room, the prosecutrix asked her but she slapped the girl

[371] *Tulsidas Kanolkar v. State of Goa*, (1991) 2 SCC 561 (India).
[372] *Bhupinder Singh v. Union Territory of Chandigarh*, (1994) 1 P&H CR 512 (India).
[373] *Priya Patel v. State of M.P.*, (2006) 7 SCC 123 (India).

and walked out of the room. The wife was then charged for gang rape along with her husband under section 376 (2) (g). The SC of India ruled that according to the definition of rape set under section 375 of the IPC, a woman cannot commit rape. Also, while committing gang rape, the accused should share a common intention to rape the victim, and since the wife only slapped the girl and the statute renders a woman incapable of committing rape, she cannot be convicted under section 376.

## JUDICIAL DECISIONS (POCSO)

### 1) State of Mizoram vs Lalramliana and Anr (2024)[374]

The Gauhati High Court dealt with a crucial issue regarding proof of penetrative sexual assault under the POCSO Act. A 13-year-old girl accused a man of inserting his finger into her vagina while in his custody. The Special Court had acquitted the accused, stating that the medical examination showed no hymenal tear or genital injuries, and thus, penetrative sexual assault under Section 4 of the POCSO Act was not proved. On appeal, Justice Kaushik Goswami set aside the acquittal, observing that Section 3 of the POCSO Act defines penetrative sexual assault in broad terms, and even the slightest penetration "to any extent" is sufficient to constitute the offence.[375] The Court clarified that the rupture of hymen or visible injuries is not a necessary condition for proving penetration.[376] It further held that medical evidence is only corroborative, and the victim's consistent, credible testimony can alone establish guilt. Since the victim's version was reliable and promptly disclosed to her family and teacher, the Court convicted the accused.

### 2) Ram Dass v State (Delhi High Court, 2024)[377]

In this case, Ram Dass got convicted under Section 6 along with Sections 5(m) and 5(n) of the POCSO Act, 2012 after being found guilty of serious sexual abuse against his five-year-old daughter. During the appeal, he argued the girl's statement wasn't trustworthy because someone had coached her to blame him wrongly. Besides that, he challenged if what happened actually matched the law's meaning of "penetrative sexual assault."

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[374] *State of Mizoram v. Lalramliana & Anr.*, Crl. A. No. 9/2020 (Gauhati H.C. Feb. 29, 2024) (Goswami, J.), https://images.assettype.com/barandbench-hindi/2024-04/f53b9e70-17c4-47e0-89f0 5b3f1d63fd06/State_of_Mizoram_v__Lalramliana_and_Anr.pdf

[375] Charge of Penetrative Sexual Assault Can Be Made on Some Degree of Insertion, *SCC Online Blog* (Apr. 17, 2024), https://blog.scconline.gen.in/post/2024/04/17/charge-of-penetrative-sexual-assault-can-be-made-on-some-degree-of-insertion-non-tear-of-hymen-of-no-consequence-gauhc-legal-news/

[376] Gauhati HC: Penetrative Sexual Assault Determined by Insertion, Not Hymen Tear, *LawBeat* (Apr. 2024), https://lawbeat.in/news-updates/gauhati-hc-penetrative-sexual-assault-be-determined-insertion-not-hymen-tear-gauhati-hc

[377] *Ram Dass v. State*, Crl.A. 572/2018 & Crl.M.(Bail) 827/2018 (Del. H.C. Aug. 2, 2018) (Muralidhar & Goel, JJ.), https://www.casemine.com/judgement/in/5b93c47c9eff430e1392228d

The Delhi High Court backed the guilty verdict, showing real awareness through its explanation - since a five-year-old can't remember events exactly like an adult would, small gaps in what she said don't make her account unreliable. Because kids face tough emotional and social challenges when abused at home, the judges stressed that trustworthy child testimony stands strong even without loads of extra proof.

Highlighting how the POCSO Act aims to shield kids, judges decided that just a small degree of penetration counts as serious abuse - narrow legal loopholes letting accused persons slip free were tossed out. The kid's account came across clear, steady, without contradictions, standing strong even when challenged during questioning. Lawyers trying to argue the child was coached failed - the story held up because no proof backed their suspicion, plus the way it was told felt genuine and unforced. After weighing everything, officials confirmed guilt past any real uncertainty, so Ram Dass' sentencing stood unchanged by the higher court.

**3) Manikanta @ Puli vs State upheld of Karnataka (2024)**

In this case the person charged got found guilty of serious sexual harm against a 12-year-old girl under the POCSO law. Evidence showed clear physical abuse fitting the legal definition of penetration; because of this, the lower court handed down punishment as required by law. When appealing, the defence didn't deny everything - instead, they tried weakening the verdict by suggesting some kind of quiet agreement or unspoken openness from the child. The High Court shot down that claim without hesitation. Because of how POCSO works, anyone younger than 18 can't legally agree to sex - full stop. So, pointing to consent, eagerness, knowing each other, or having feelings doesn't matter when deciding guilt. What counts is just the survivor's age; if she's underage, then any hint of agreement gets wiped out by law.

**4) Jitendra Jatav vs State of Madhya Pradesh (2023)[378]**

In this case, the man faced charges under the POCSO Act along with certain sections of the Indian Penal Code after being linked to a sexual connection with a girl younger than 18. Although his side claimed it was mutual involvement, saying she had been romantically tied to him, the court in Madhya Pradesh shot down that reasoning - pointing out that when someone's underage, agreement doesn't count in law. The court pointed out kids can't legally or mentally agree to sex, so any such act with someone under 18 is illegal no matter what kind of bond exists between them. Since proof showed the survivor was underage, judges stressed that child safety laws like POCSO should override stories about being in love. Because of this, the higher

[378] *Jitendra Jatav v. State of Madhya Pradesh*, Crl. A. No. 11320/2022 (Madhya Pradesh H.C. Jan. 13, 2023), https://www.verdictum.in/pdf_upload/case-110-jitendra-jatav-vs-state-of-madhya-pradeshwatermark-1466171.pdf

court kept the guilty verdict, sticking to the rule where guilt doesn't depend on intent when minors are involved. The ruling shows courts won't let feelings or romance weaken legal shields meant for young people, making it plain that protecting children matters more than personal excuses in these crimes.

## DATA STATICS OF RAPE

### 1) Rape cases in 2019:

In 2019, India saw 32,032 reported rape incidents[379] - that's about 88 every day.[380] Rajasthan logged 5,997 such reports, putting it near the top across the country.[381] Of these, 9% involved Dalit women from the state, highlighting how certain communities face greater risks.[382] When looking at age, 18 victims were younger than 6, while 64 were between 6 and 12; besides them, 442 survivors were aged 12 to 16. On top of that, 767 incidents involved girls from 16 to 18, whereas 3,263 victims were between 18 and 30. Those women aged 30 to 45 made up 1,272 reports.[383] Then again, there were 1,019 attempts recorded too across the region.[384] Out of all Rajasthan's cases, 554 survivors belonged to the Scheduled Caste group - showing how social ranking mixes with abuse against women.[385]

### 2) Rape cases in 2020:

According to the NCRB, in 2020, India registered 28,046 cases of rape, that is, there were 77 cases on average daily.[386] The report also noted that 80 murders and 77 rapes were experienced in the country on a daily basis thus showing the severity impregnating violent crimes against women.[387] Rajasthan recorded the highest number in the list again with 5,310 rape cases, and it was the best compared with all the Indian states that recorded the rape cases that year. Among

[379] Nat'l Crime Recs. Bureau (India), *Crime in India 2021: Registered Rape Cases = 31,677* (2022), https://www.ndtv.com/india-news/rajasthan-reported-highest-number-of-rape-cases-in-india-in-2021-3299927.
[380] No Country for Women: India Reported 88 Rape Cases Every Day in 2019, *India Today* (Sept. 30, 2020), https://www.indiatoday.in/diu/story/no-country-for-women-india-reported-88-rape-cases-every-day-in-2019-1727078-2020-09-30
[381] Under 30% Conviction Rate in Rape Cases in India, Says NCRB Data, *New Indian Express* (Oct. 3, 2020) https://www.newindianexpress.com/nation/2020/Oct/03/under-30-per-centconviction-rate-in-rape-cases-in-india-says-ncrb-data-2205090.html
[382] 88 Rapes Every Day in 2019: NCRB Report, *Newsclick* (Oct. 2020), https://www.indiatoday.in/diu/story/no-country-for-women-india-reported-88-rape-cases-every-day-in-2019-1727078-2020-09-30
[383] NCRB Report for 2019: 88 Rapes and 126 Cases of Crime Against Dalits a Day, *Janata Weekly* (Oct. 2020), https://www.newsclick.in/88-rapes-every-day-2019-NCRB-report-conviction-rate-alarmingly-low
[384] https://janataweekly.org/ncrb-report-for-2019-88-rapes-and-126-cases-of-crime-against-dalits-a-day/
[385] NCRB Data: 7% Rise in Crimes Against Women, *Indian Express* (Oct. 2020), https://indianexpress.com/article/india/ncrb-data-7-rise-in-crimes-against-women-6636529/lite/
[386] Average 77 Rape Cases Daily in 2020, *Times of India* (Sept. 2021), https://timesofindia.indiatimes.com/india/average-77-rape-cases-daily-in-2020-crimes-against-women-down-from-2019-ncrb-data/articleshow/86228139.cms
[387] India Records 80 Murders, 77 Rape Cases Daily in 2020, *NDTV* (Sept. 2021), https://www.ndtv.com/india-news/india-records-80-murders-77-rape-cases-daily-in-2020-ncrb-report-2542736

them, 1279 victims were under 18 years of age, suggesting that there were a lot of victims who were children, and 4031 cases had adult women aged over 18 years.[388] These statistics highlight that with the history of the highest rape cases reported in the state, Rajasthan is at the forefront of both the increasing crime rates, as well as the potential of increased reporting measures.

**3) Rape cases in 2021:**

According to the official reports presented in 2021, there were 31,677 rape cases in India and the average number of rape cases was 87 cases per day, as reported in 2021.[389] The state of Rajasthan was once again first in the number of cases reporting 6,337 rapes in the year.[390] The analysis of the numbers reveals that the victim was familiar with the accused in 6,074 cases, which means the alarming prevalence of sexual crimes among people who are familiar to the victim in their circle of friends. Among them, 582 belonged to the family, 1,701 friends or live-in partners or online acquaintances, and only 263 included absolutely loyal offenders.[391] This implies that majority of sexual violence is carried out by individuals that the victim has known, individuals she relies on. Regarding age, the number of victims was 4,885 adults and 1,452 minors, which means that both women and children are vulnerable at all ages.

**4) Rape cases in 2022:**

In 2022, India had 31,516 rape cases, 5,399 cases in Rajasthan and ranked in the top-ranking state by the number of reported rape cases. Bhilwara district of Rajasthan recorded highest cases of 301 and Bharatpur of the state recorded a count of 288 then Udaipur and Alwar recorded 253 and 206 cases respectively.[392] The majority of those charged were individuals the victims knew 576 of them were their family members while 1,493 were their friends, online friends, live-in boyfriends or girlfriends or estranged husbands. The number of cases in which the offender was unknown completely was only 268,[393] which proves the long-standing trend according to which the majority of sexual crimes are perpetrated by people who are a part of the circle of people that the victim trusts. The victims were of the age group 1830 years (3,615

[388] Rajasthan Registered Highest Number of Rape Cases: NCRB, *Hindustan Times* (Oct. 2021), https://www.hindustantimes.com/cities/jaipur-news/rajasthan-registered-highest-number-of-rape-casesncrb-101631697476575.html

[389] National Crime Records Bureau (India), Crime in India 2021: Registered Rape Cases = 31,677 (2022) (via NDTV), https://www.ndtv.com/india-news/rajasthan-reported-highest-number-of-rape-cases-in-india-in-2021-3299927

[390] Press Trust of India, "Rajasthan reported highest number of rape cases in India in 2021", NDTV (Aug. 30, 2022) (6,337 cases in Rajasthan). https://www.ndtv.com/india-news/rajasthan-reported-highest-number-of-rape-cases-in-india-in-2021-3299927

[391] Rajasthan reported highest number of rape cases in 2021: NCRB - The Economic Times

[392] Rajasthan Tops in Rape Cases, Sees Rise in Atrocities Against Women, *Economic Times* (2022).

[393] Rape Cases in Rajasthan: Known Offenders Involved in Majority of Incidents, *Times of India* (2022).

victims), 3045 years (1,506 victims), and 4560 years (287 victims) age respectively.[394] Moreover, 1,053 attempted rape cases were also reported in the state,[395] which again stated the constant risks of women of all ages and social relations.

**5) Rape cases in 2023:**

Rajasthan reported 5,194 cases of rape in 2023,[396] continuing its record of reporting high numbers of sexual offences. A closer look at the victim-accused relationship confirms that 2,152 cases were of friends, live-in partners, or estranged husbands, and 2,444 were by family members or employers, which shows that a vast majority of assaults were at the hands of people in positions of authority or trust. Just 120 cases had entirely unknown perpetrators,[397] confirming the trend that stranger attacks represent an extremely low percentage of overall cases. Distribution by age indicates that 15 victims were below 6 years old, 70 ranged from 6–12 years, 462 were between 12 and 16 years, and 767 were in the 16–18 years category, making the total number of minor victims 1,314. Among adults, there were 3,263 victims who were aged 18–30 years, 1,272 victims in the 30–45 years range, 200 victims who were 45–60 years, and 2 cases among women who were over 60 years,[398] indicating that sexual violence transcends all ages, from infancy to old age.

**6) Rape cases in 2024:**

In 2024, Rajasthan saw a total of 6,504 rape cases,[399] a notable increase over earlier years. Among them, 4,894 were adult women, and 1,610 were minors, which means that approximately one-fourth of the cases involved children under the age of 18.[400] The consistent rise in numbers reflects the persistent problem of sexual violence in the state, with adult women and young girls both being severely exposed to vulnerability across various social and age groups.

## TRENDS AND ANALYSIS OF RAPE CASES IN INDIA (2019–2024)

[394] State-wise and Age-wise Distribution of Rape Victims for 2022, *Ministry of Statistics and Programme Implementation*, Govt. of India (2023).
[395] Rajasthan Logs Most Rape Cases in Country 4th Year in a Row, *Times of India* (Nov. 2023), https://timesofindia.indiatimes.com/city/jaipur/raj-logs-most-rape-cases-in-country-4th-year-in-a-row/amp_articleshow/105739214
[396] Rajasthan Reports Highest Number of Rape and Economic Offence Cases in 2023: NCRB, *Times of India* (Dec. 2023).
[397] Rajasthan Reports Highest Number of Rape and Economic Offence Cases in 2023: NCRB, *Times of India* (Dec. 2023).
[398] NCRB Report: 1314 Minor Girls Raped in Rajasthan, *Dainik Bhaskar* (Dec. 2023).
[399] Crimes Against Women Down, But Rape and POCSO Cases Up, *Indian Express* (Dec. 2023).
[400] POCSO Cases Up 7.12% in 2 Years in State: Report, *Hindustan Times Rajasthan* (Dec. 2023), via *Magzter.com*.

The 2019-2024 data, demonstrates the gradual yet alarming increase in the number of rape cases in India, particularly in Rajasthan, which is among the states with the highest amounts of the data. Rape cases were approximately 32,000 in 2019 with 88 cases on average per day and almost 6,000 rape cases in Rajasthan alone.[401] By 2024, this figure had increased to 6,504 cases in Rajasthan indicating that sexual violence is still a challenge in the state.[402] A closer examination of these statistics reveals that both adult women and minors are affected, as children under eighteen constitute a considerable proportion of victims each year.[403] The worst part is that, in most instances, the victims do not encounter strangers as accused persons but rather a family member, relative, friend, or partner. This trend brings out the extent to which sexual violence is entrenched in trust and acquaintance relations and this makes it even more difficult to allow victims to speak out.

Simultaneously, the number of FIRs (First Information Reports) is also growing steadily over the past years, and this issue can be traced to a favourable development, namely, the extension of the legal concept of rape and making victims aware of their rights.[404] Due to this widened protective system, a large number of survivors who previously did not have the opportunity to pursue justice in non-penetrative or object-based attacks are now able to file rape charges. This legal status, coupled with media attention, awareness, and agitation have helped more victims to come out. Thus, the general spread in the number of reported rape cases is, on the one hand, very alarming; on the other hand, it is an indicator of the enhanced legal consciousness, trust in the victims and the willingness to respond to their complaints.

## REASONS AND BACKLOGS OF RAPE CASES

**Delay in Justice:**

### 1) Unavailability of witness:

Rape cases take a long time to be tried due to the unavailability or unwillingness of key witness in the case. The witnesses can be afraid of being retaliated against by the accused, they can also be socially pressurized, stigmatized, or they may have moved or even died with time. Slowness of issuing summons or non-cooperation of officials further slows down the process. Witness lessness results in adjournments, poor evidence and increases the trauma of the survivor. To curb this, witness protection, in-camera testimony and strict implementation of court summons should be practiced to get justice in time.

[401] Government of India, Ministry of Home Affairs, Lok Sabha Q. No. 2412, *Preamble & Annexures* (Aug. 6, 2024).
[402] Raj Logs Most Rape Cases, *Times of India* (Dec. 5, 2023).
[403] Crimes Against Women Down but Rape, POCSO Cases Up, *Indian Express* (Aug. 24, 2024).
[404] Government of India, Ministry of Women and Child Development, *Reply to Parliamentary Query* (2024).

**2) Hostile Witness:**

There are numerous rape cases in India that have not been completed within the allotted time due to the victim, or even family members of the rape victim becoming hostile during the court hearings. A hostile witness is that witness who contradicts or reneges on the previous statements that he/she made to the police or in the FIR. This causes the prosecution to re-evaluate the evidence, blind cross the witness or find other evidence, which stretches the trial. Causes such as fears of the accused, social pressure, stigma, or threats are some of the factors that lead to hostile witnesses.

**3) Delays in Forensic and Medical Reports:**

This is essential to timely medical evidence. Nevertheless, it may take months or years to prepare a report because of poor infrastructure and personnel in state-operated forensic laboratories, and this significantly dilutes the prosecution.

**4) Investigative Delays:**

Police investigations are not always urgent and competent. The Hindu (2023) analysis shows that more than 60 percent of the rape FIRs are lodged weeks following the offence due to societal stigma and lack of concern by police. Moreover, there are high workloads in forensic laboratories that delay the submission of necessary medical and DNA evidence.

**False Cases:**

**1) Extortion by victim:**

False rape cases are registered in other instances because the victim has been extorted into registering false rape where the complainant manipulates the threat of rape to coerce the accused to give money, property and other favours. The complaint in such cases is not founded on the actual sexual assault but on the basis of coercion or revenge which in most cases can be due to personal differences, relationship or even monetary influence. These cases have been observed by courts to be normally discovered when evidence is found to oppose the allegations made by the complainant, witnesses make conflicting statements, or investigations show that there is a premeditated motive to defraud.

**2) Unsuccessful consensual relationship:**

When a consensual relationship is broken, this is one of the usual causes of falsely reported rape. A romantic or sexual relationship might terminate or experience conflicts, which leads one of the parties to complain to support revenge, anger, or pressure on the other. Most of the times, they are caused by confusion, disagreements based on commitment or denial of marriage or financial assistance following a relationship.

**Under-reporting:**

**1) Literacy:**

One of the causes of underreporting rape in India is low literacy. Women who are less educated are not usually enlightened about the law and the legal process, and as a result, they are reluctant to take an action against the police or through the official platform. Literacy also promotes reliance on the elders in the family who discourage reporting to safeguard social honour. Conversely, women who have access to a computer and can use help lines like 181 and 1091 are more educated and therefore have a higher chance of seeking justice. UN Women India and National Commission for Women reports indicate that in the states where the literacy rate of women is high such as Kerala and Tamil Nadu there are higher rates of reporting, which means that literacy is enabling women to have a voice and seek legal advice.

**2) Family Suppression:**

Family suppression and social stigma are overwhelming factors that lead to underreporting of rape cases in India. Most of the families do not encourage victims to file complaints in order to save their so-called family honour and prevent embarrassment. In chauvinistic or patriarchal societies, the sexuality is associated with the family fame hence raising a voice over sexual violence is usually perceived as a way of causing shame. Families can be afraid of gossiping about it by society, being socially excluded, or even retaliated against by the accused.

**3) Fear of Retaliation:**

It is one of the problems that cause underreporting of rape in India. The victims fear that the accused might threaten, violence, or even harass them especially when it is someone in power or someone familiar. Most are afraid of being outcast, deprived of security or they can be socially humiliated in case they do. Local communities or panchayats can pressurize victims of rape to remain silent in the villages and the fear of job loss or loss of education becomes contributing factors in urban areas. Such fear along with poor witness protection and slow justice delivery causes the survivors to be reluctant to file assaults and as a result numerous crimes are concealed and go unprosecuted.

**4) Fear of political smearing:**

The fear of character assassination is one of the major causes of underreporting rape cases in India. The victim is the one who is always afraid to report as the society has a tendency of condemning and criticising their actions, attire or even relationship with their partners rather than concentrating on the offence. Most of them are afraid of being branded as immoral or being scrutinized in the publicity in the course of inquiries or trials. This culture of victim-

blaming which is supported by the media and social stigma discourages the survivors to seek justice. Fear of losing dignity, marriage opportunities or even social acceptance is a major factor that makes many keep silent hence the underreporting of sexual violence is an issue that is vastly underreported.

**5) Trauma:**

The leading causes of the underreporting of rape cases are trauma and psychological barriers. The survivors are usually deeply shocked, scared, guilty, shameful and feel helpless and it is hard emotionally to discuss the assault. They are also many who acquire post-traumatic stress, depression, or anxiety thus avoiding anything that reminds them about the incident including legal proceedings. Victims can be retraumatized by thinking about telling the response teams many times about the assault, whether to the police or the courts. Their silence is further aggravated by the lack of empathetic support by the authorities and the society. Consequently, psychological distress will become a strong element that will not allow survivors to report rape and obtain justice.

## CRITICISM

**1) Low rate of conviction:**

The high conviction rate in rape is one of the greatest criticisms of the criminal justice system in India. The conviction rate is terribly low despite most of the reported cases and is usually below 30 percent, a figure that is not touching the hearts of the citizens who have no trust in the system that enforces the law and administers justice to offenders. Some of the reasons that lead to this are investigations that are delayed, lack of forensic evidence, uncooperative or missing witnesses, and procedural failures at the trials. It also deters any victim to seek justice due to the long-time taken to conclude cases, and the offenders tend to take advantage of vulnerabilities in the legal system. This conviction rate is extremely low demonstrating that judicial reforms, improved police training, and quicker and more efficient trial procedures are extremely necessary in order to make sure that the victims of such a crime get their justice within a reasonable timeframe, and more importantly it must be just.

**2) Corrupt justice system:**

The significant complaint about the Indian justice system when it comes to rape is seen as corrupt and ineffective and this fact does not help the victims in the country to have trust in the justice system. Lack of speed in the investigations, evidence distortions and unwarranted influence of influential people tend to enable offenders to evade due with ease. Police and prosecutor activity that is influenced by bribery, political interference, and bias are causes of

wrongful dismissals or lighter sentences. Such vices within the system deter victims to report the crime, delay trials, and in some other cases, allow the accused to be acquitted despite very good evidence against them. The outcome is the feeling that justice is discriminatory, slow, and inaccessible, which strengthens the notion held by the people of an ineffective and corrupt legal mechanism when dealing with sexual violence.

**3) Inefficient working of police:**

The biggest criticism raised against the police in rape cases is the fact that they do not operate efficiently and hence this greatly interferes with justice to the victims. Failure to file FIRs promptly, lack of prompt investigation, and poor handling of evidence are some of the usual problems. In many cases, police demonstrate prejudice or the lack of sensitivity towards the survivor and intimidate or harass the victim. In others, the key witnesses are not captured in time and medical examination takes long which undermines the case of the prosecution.

**4) Insufficient victim rehabilitation:**

Lack of adequate victim rehabilitation Another major criticism of Indian rape laws. Legal reform often tends to concentrate on the punishment of offenders, without sufficient attention to survivor's psychological and economic wellbeing. Most victims see little or no assistance with counselling, medical care and financial support and are forced to cope with trauma and stigma by themselves. Government relief schemes are too slow, insufficient or poorly executed to help survivors rebuild their lives. The absence of long-term rehabilitation, safe shelter and help in getting a job makes their case only worse. For its survivors, the trauma persists long after the conviction, revealing that justice on rape cannot be pegged solely on putting convicts behind bars but must also mean rehabilitation and re-integration to society.

**5) Lack of comprehensive sex education:**

A lack of sex education is a major criticism, despite the continued occurrence of rape and sexual violence in India. Lack of adequate education on consent, respect for one's own and others' gender, and healthy relationships is leading to gross misinformation and backward attitudes toward sex. Many young people are raised not knowing where their boundaries begin and end, that their bodies are theirs alone, or the difference between consent and mutual agreement. To be this ignorant is common, it standardizes harassment and victim-blaming. Moreover, schools and families are reluctant to address sex education due to societal stigma and cultural conservatism, which leaves young people exposed to misinformation from friends or online. Preventing sexual violence is unfinished work without a systemized, age-appropriate sex education.

## CONCLUSION

The rape legislation in India is no longer the colonial definition but rather more focused on the victim and inclusive in contemporary legal frameworks namely IPC, POCSO and BNS. However, the longstanding challenges such as the low rates of conviction, investigative failure, sluggish trials, stigma, and poor rehabilitation still hinder justice. To change, it is necessary not only to be stricter in its implementation but also to be empathetic in policing, judicial sensitivity, forensic fortification, extensive sex education, and social consciousness. Women and children need full protection and dignity that will require a comprehensive change in which the law is equal in its advancement with social responsibility and overall accountability.

# LEGAL TERRORISM IN MARITAL DISPUTES: WEAPONIZATION OF SECTION 498A INDIAN PENAL CODE

***Adarsh Kumar[405] and Ishan Chauhan[406]***

## ABSTRACT

*Husband cruelty under section 498A of the IPC (now Section 85 of the BNSS) was enacted to protect married women from cruelty and dowry harassment. However, it has been misused by women a lot, which has resulted in wrongful arrests, social stigma, and mental agony for husbands and their families. There have been several cases in which Supreme Court has acknowledged the rampant misuse of Section 498A, referring to it as a form of legal terrorism. False accusations have not only led to prolonged legal battles but have also driven many men to suicide due to social and psychological pressures. This chapter critically analyses the weaponization of Section 498A and its adverse impact on men and their families. It highlights real-life incidents where men, unable to bear the trauma of false accusations, took their own lives, including the case of Atul Subhash. Cases like these underscores the urgent need for procedural reforms to prevent misuse of the law. The chapter also advocates for making the offence compoundable with judicial oversight, promoting reconciliation, and ensuring that trivial disputes do not escalate into prolonged criminal proceedings. It emphasizes that preventing misuse does not dilute the law's purpose but rather ensures fair and balanced justice. Ultimately, it calls for legislative reforms to prevent Section 498A from becoming an instrument of legal terrorism while safeguarding the rights of both parties.*

**Keyword:** Husband cruelty, legal terrorism, Compoundable offence, Misuse of section 498A, Judicial Oversight and Reform

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## INTRODUCTION

*"By misuse of the provision, a new legal terrorism can be unleashed.*[407] warned the Supreme Court in 2005, emphasizing the potential danger posed by the unchecked misuse of Section 498A. Section 498A of the Indian Penal Code, 1860 (hereinafter referred to as "IPC"), now codified as Section 85 read with Section 86 of the Bharatiya Nyaya Sanhita, 2023 (hereinafter referred to as "BNS"), criminalizes acts of cruelty against women perpetrated by their husbands or the relatives of their husbands. The provision prescribes a punishment of imprisonment for a term which may extend to three years and also imposes a liability to pay a fine. The origin of the provision can be traced back to the recommendations made by the Law Commission, which highlighted the growing instances of dowry-related harassment and domestic violence against married women. In response to these recommendations, the Government introduced the Criminal Law (Second Amendment) Act, 1983,[408] . The object of the Amendment was to provide legal recourse for married women subjected to cruelty within their matrimonial homes and to combat the menace of dowry deaths. The said amendment led to the incorporation of Section 498A in the IPC, thereby criminalizing any willful conduct by the husband or his relatives that was likely to drive a woman to commit suicide or cause her grave physical or mental harm. The provision came into effect on December 25, 1983, and was intended to serve as a deterrent against acts of domestic violence and dowry-related cruelty. The enactment was necessitated due to the alarming surge in reported cases of dowry deaths and domestic violence, which underscored the vulnerability of women within matrimonial relationships.

However, in the subsequent decades, the practical application of the provision has been involved in controversy, with regard to allegations of its misuse. While the provision was envisioned to protect women from cruelty and harassment, it has increasingly been perceived as a potential tool for the harassment of husbands and their families through the lodging of frivolous or false complaints. The adverse consequences of such misuse are starkly evident in instances where husbands, finding themselves entrapped in lengthy and arduous legal proceedings, have resorted to committing suicide. The law, instead of serving as a protective shield, has, in certain cases, transformed into a weapon that strangulates and entraps men in a manner where they perceive death as a more viable escape than enduring prolonged legal battles to prove their innocence. The disproportionate power bestowed by Section 498A, coupled with the uncritical approach of law enforcement authorities, has often rendered men

[407] *Sushil Kumar Sharma v. Union of India*, MANU/SC/0418/2005 (India).
[408] *Criminal Law (Second Amendment) Act*, No. 46 of 1983, *India Code* (1983).

defenseless, compelling them to succumb to extreme measures due to the social stigma and mental anguish inflicted by false allegations. Numerous judicial pronouncements by the Supreme Court and various High Courts have acknowledged the misuse of Section 498A, emphasizing the necessity for judicial prudence and procedural safeguards to prevent undue hardship to the accused.

## LEGISLATIVE INTENT AND SCOPE OF SECTION 498A

Section 498A of the Indian Penal Code was specifically enacted to safeguard women from cruelty perpetrated by their husbands or the relatives of their husbands. The legislative intent behind this provision was to provide a robust legal framework to combat domestic violence and dowry-related abuse, both of which have been pervasive in Indian society. The scope of Section 498A extends beyond physical violence and includes emotional, psychological, and financial abuse, recognizing the multifaceted nature of cruelty faced by married women. However, despite its protective intent, the provision has often been criticized for being misused, with allegations that it is employed as a tool for harassment through the lodging of false complaints. Critics argue that such misuse diminishes the law's credibility; however, these claims often overlook the grim reality that domestic violence and dowry-related abuse continue to persist at alarming levels in India, as reflected in the National Crime Records Bureau data.

The provision has evolved through various cases and precedents, such as in *Shobha Rani v. Madhukar Reddi*[409], where the Court reaffirmed that the demand for dowry itself constitutes cruelty, thereby underlining the significance of stringent legal measures to combat such practices. The court in *Samar Ghosh v. Jaya Ghos*h[410] provided a broader interpretation of mental cruelty, recognizing that emotional neglect, humiliation, and lack of support within a matrimonial relationship could also amount to cruelty. This judgment reinforced the need to protect women from not only physical harm, but also mental agony inflicted within the household. Moreover, in *K. Srinivas Rao v. D.A. Deepa*,[411] the Court acknowledged that filing false criminal complaints could itself amount to mental cruelty, which has often been highlighted in debates concerning the alleged misuse of Section 498A. While these judicial pronouncements have attempted to balance the protection of women with the prevention of misuse, they collectively reaffirm the continuing necessity of Section 498A in addressing domestic violence and dowry harassment. The critical need for Section 498A becomes even more evident when examined in light of real-life cases of cruelty. In *Ram Kishan Jain & Ors*

[409] *Shobha Rani v. Madhukar Reddi*, MANU/SC/0419/1987 (India).
[410] *Samar Ghosh v. Jaya Ghosh*, MANU/SC/1386/2007 (India).
[411] *K. Srinivas Rao v. D.A. Deepa*, MANU/SC/0180/2013 (India).

*v. State of Madhya Pradesh*[412]a woman was given sedatives and later tried to end her life by slitting her veins because she couldn't meet the dowry demands of her husband's family. Similarly, in *Surajmal Banthia & Anr. v. State of West Bengal*[413] the deceased woman was subjected to prolonged ill-treatment, deprived of food, and mentally harassed to the extent that it culminated in her death. Such cases depict the harsh reality of matrimonial cruelty and substantiate the critical need for a stringent provision like Section 498A to deter and penalize such acts.

## LEGAL TERRORISM AND ITS IMPACT

Justice Dr. Arijit Pasayat and Justice H.K. Sema, used the term legal terrorism in the case to show thee gravity the misuse will have if not regulated[414] Further in 2008 the Court in *Chandrabhan v. State*[415]stated that the complained under the provisions are filed under very trivial matters and the ultimate victim of which are husbands and their relatives, *"there is no iota of doubt that most of the complaints are filed in the heat of the moment over trifling fights and ego clashes."* Over the past decades, there have been numerous cases where false complaints have been filed, leading to severe consequences for men and their families. News reports and court judgments have highlighted instances where husbands, unable to bear the pressure of false allegations, have taken extreme steps, including ending their own lives. This misuse has not only caused mental and financial distress to the accused but has also strained family relationships, leaving long-lasting scars.

One such recent incident is that of Atul Subhash, a 34-year-old techie from Bengaluru, who died by suicide on December 9, 2024. In a viral video recorded before his death, he alleged that his wife and her family had filed multiple false cases against him, causing immense mental distress and harassment, which he further detailed in his suicide note[416] This case is not an isolated one; 498a.org, as part of its awareness campaign, has documented over 100 similar stories where innocent men and their families have faced immense suffering due to the misuse of Section 498A[417] These instances reveal how easily a wife's allegations, whether true or false, can completely shatter the lives of her husband and his family, leaving them vulnerable to legal

[412] *Ram Kishan Jain v. State of Madhya Pradesh*, MANU/MP/0200/2000 (India).
[413] *Surajmal Banthia v. State of West Bengal*, MANU/WB/0050/2003 (India).
[414] *Supra* note 2.
[415] *Chandrabhan v. State*, Bail Application No. 1627/2008, order dated Aug. 4, 2008 (India).
[416] Bengaluru Techie's Suicide Case Spurs Supreme Court to Outline Alimony Guidelines: Here's What It Said, *Econ. Times*, https://economictimes.indiatimes.com/news/india/bengaluru-techies-suicide-case-spurs-supreme-court-to-outline-alimony-guidelines-heres-what-it-said/articleshow/116233001.cms (accessed Sept. 23, 2025).

[417] Victim Stories, *498A.org*, https://www.498a.org/victimStories.htm#v1 (accessed Sept. 23, 2025).

persecution and social stigma.

Vizag Chapter Founder B.K. Agarwal said that[418] as per the National Crime Records Bureau data, in year 2019 about 1.18 lakh people committed suicide across the country. Of which almost 75%, over 80,000 people who ended lives were men, while 34,000 (about 25%) were women. He said that 37% of men ended have lives because of matrimonial disputes. Similarly, during the year 2021, about 1.2 lakh men had ended lives across the country. Out of them, around 33% men took the extreme step owing to family disputes and legal pressures.

Recent data resealed by NCRB show that total of 4,45,256 cases of crime against women was registered during 2022, Of which majority of cases under crime against women under IPC were registered under '*Cruelty by Husband or His Relatives'* (31.4%). Total of 140019 cases for Cruelty by Husband or his relatives were registered out of which 7076 case were falsely reported and 8093 were mistake of facts or were of civil dispute (page 231 table 3A.5 of NCRB data). Further the data shoes that only 8307 cases led to conviction, in 35998 cases the accused was acquitted, and 2691 cases were discharged by the court. (page 244 Table 3A.7 of NCRB data).[419] The disproportionately low conviction rate further solidifies the argument that this provision has become a tool of harassment rather than protection in many instances. This data-driven reality underscores the urgent need for judicial reforms and procedural safeguards to prevent Section 498A from becoming a source of legal terrorism.

## JUDICIAL CONDEMNATION OF LEGAL TERRORISM

The apprehension regarding the misuse of Section 498A IPC is not novel and has been raised by the Supreme Court in several landmark judgments. In the case of *Preeti Gupta v. State of Jharkhand*,[420] the Supreme Court expressed deep concern over the rampant misuse of Section 498A IPC, observing that *"exaggerated versions of the incidents are reflected in a large number of complaints,"* resulting in the implication of not only husbands but also their entire families, including distant relatives. Recognizing the disproportionate use of criminal law in matrimonial disputes, the Court explicitly recommended a legislative relook at Section 498A IPC, citing that its unregulated application was causing serious social ramifications and immense harassment to innocent individuals. In its directive, the Court also instructed the Registry to forward a copy of the judgment to the Law Commission and the Union Law

[418] Men Outnumber Women in Suicides in the Country, Say Members of Save Family Harmony, *The Hindu*, https://www.thehindu.com/news/cities/Visakhapatnam/men-outnumber-women-in-suicides-in-the-country-say-members-of-save-family-harmony/article65874890.ece (accessed Sept. 23, 2025).

[419] *Crime in India: NCRB Report 2020, Nat'l Crime Records Bureau*, https://www.ncrb.gov.in/crime-in-india.html (accessed Sept. 23, 2025).

[420] *Preeti Gupta v. State of Jharkhand*, MANU/SC/0592/2010 (India).

Secretary, emphasizing the need for statutory amendments to curb misuse.

Additionally, the Court recognized the importance of pre-trial conciliation in matrimonial disputes and directed the Delhi Legal Services Authority, the National Commission for Women, NGOs, and social workers to establish conciliation desks at Crime Against Women Cells. The Court reiterated that criminal law should not be mechanically triggered without first attempting to resolve the underlying marital discord amicably. This judicial emphasis on conciliation and settlement marked a significant departure from the conventional approach of prompt arrests and prosecutions in Section 498A cases. In a similar vein, the Delhi High Court in *Court on its Own Motion v. CBI*[421] issued comprehensive guidelines to the police and trial courts regarding arrest, bail, and conciliation procedures in Section 498A cases. The High Court instructed that arrests should not be made in a mechanical manner and that the police must adopt a cautious approach when dealing with matrimonial disputes. The judgment also stressed that in the absence of clear and convincing evidence, bail should be granted liberally to prevent unnecessary incarceration of innocent persons.

The Justice Malimath Committee on Reforms of Criminal Justice System,[422] constituted to suggest comprehensive reforms in the criminal justice system, extensively deliberated upon the misuse of Section 498A IPC. The Committee stated:

> *"The harsh law, far from helping the genuine victimized women, has become a source of blackmail and harassment of husbands and their families. There is an urgent need to revisit this provision to prevent its gross misuse."*

Supreme Court has, in a series of recent judgments, also expressed grave concerns over the misuse of Section 498A if IPC, highlighting its propensity to be weaponized in matrimonial disputes. In *Yashodeep Bisanrao Vadode v. State of Maharashtra*[423] the Supreme Court overturned the conviction of a brother-in-law accused under Sections 498A and 34 IPC, noting the absence of any substantive evidence linking him to the alleged acts of cruelty and dowry demands. Recognizing the lack of a direct nexus between the appellant and the allegations, the Court strongly condemned the indiscriminate roping in of family members in matrimonial disputes and reiterated that courts must adopt a cautious approach to avoid inflicting unwarranted legal consequences on innocent individuals. Further in *Payal Sharma v. State of Punjab*[424] where the Supreme Court admonished the High Court for failing to exercise its

[421] *Court on Its Own Motion v. CBI*, 109 DLT 494 (Del. 2003).
[422] *Report of the Committee on Reforms of Criminal Justice System*, Ministry of Home Affairs, Govt. of India, https://www.mha.gov.in/sites/default/files/criminal_justice_system.pdf (accessed Mar. 9, 2025).
[423] *Yashodeep Bisanrao Vadode v. State of Maharashtra*, MANU/SC/1128/2024 (India).
[424] *Payal Sharma v. State of Punjab*, MANU/SC/1250/2024 (India).

inherent power to prevent over-implication of distant relatives in Section 498A cases. The Court clarified that while Section 498A does not explicitly define the term 'relative', its interpretation should adhere to common-sense reasoning, typically restricting its scope to immediate family members. Extending the ambit of Section 498A to distant or uninvolved family members, the Court warned, could dilute the provision's core objective and lead to the victimization of innocent individuals under the pretext of protecting the aggrieved spouse.

In a broader and more assertive commentary, the Supreme Court, in *Achin Gupta v. State of Haryana*,[425] directly called upon the Legislature to reconsider the scope of Section 498A IPC and its corresponding provisions under the BNS, namely Sections 85 and 86, in light of their extensive misuse. The Court highlighted the mechanical registration of FIRs in matrimonial disputes, often initiated to harass the accused husband and his family under the guise of cruelty allegations. It reiterated that trivial matrimonial discord or day-to-day quarrels cannot be classified as cruelty under Section 498A, and the High Courts, under Section 528 BNSS, must exercise their inherent powers to quash such frivolous proceedings when evident misuse is apparent. Further Supreme Court had similar view in *Digambar and Ors. v. The State of Maharashtra and Ors*[426] where the complainant had alleged that her in-laws administered adulterated food, leading to her miscarriage. However, the Court noted that the complaint was lodged two years after the alleged incident, without any supporting medical or documentary evidence. The Court observed that criminal law should not be trivialized as a bargaining tool in matrimonial disputes, as doing so not only compromises the liberty of innocent individuals but also undermines the sanctity of genuine cases of domestic violence.

## PREVENTING MISUSE WITHOUT WEAKENING PROTECTION

There can be some argue that this provision is often exploited for personal vengeance, others contend that such claims are exaggerated and could lead to reforms that weaken protection for genuine victims. The core issue, however, does not lie in the law itself but in its implementation, which is often flawed due to weaknesses in enforcement, legal procedures, and societal norms. Therefore, the need for procedural reforms, rather than dilution of the law, is crucial to strike a balance between protecting the accused and ensuring justice for victims.

The role of law enforcement and investigating agencies is also a major contributing factor to the misuse of Section 498A. Police officers, being the first point of contact in such cases, often arrest the accused solely based on the content of the FIR without conducting a preliminary

[425] *Achin Gupta v. State of Haryana*, MANU/SC/0377/2024 (India).
[426] *Digambar v. State of Maharashtra*, MANU/SC/1402/2024 (India).

investigation to ascertain the legitimacy of the complaint. This practice is mainly driven by the fear of being accused of negligence, external pressures, or sometimes even corruption. Failure to verify the authenticity of allegations has resulted in wrongful arrests, which further fuels the perception of Section 498A being a tool for harassment rather than protection. It is imperative that police officers conduct a preliminary inquiry before making any arrests to ensure that only genuine cases are acted upon. This would not only safeguard innocent individuals from wrongful prosecution but also strengthen the credibility of the law. The provision allows for immediate arrest without the need for any preliminary investigation, which often leads to wrongful detentions and prolonged legal battles for the accused. At the same time, genuine victims often find it difficult to navigate the legal process due to bias within law enforcement and the judiciary. Introducing mandatory preliminary investigations before arrest, as emphasized by the Supreme Court, could effectively balance the interests of both parties.

The Law commission of India in their 243rd Report[427] also talked about the *"Triple Problem"* that have cropped up in the course of implementation of the provision i.e. section 498A and those are

a) The police hastily effectuating the arrest of the husband and his family members, as cited in the FIR, without conducting any prima facie inquiry to ascertain the veracity of the allegations,
b) The prevalent inclination to indiscriminately implicate in-laws and extended family members, irrespective of their place of residence, often influenced by sentiments of hostility, vengeance, or erroneous legal counsel, and
c) The deficiency of a professional, compassionate, and judicious approach on the part of the police in addressing the grievances of women in distress.

## NEED FOR COMPOUNDING OF OFFENCE

In certain offences, the law permits the parties involved to reach a mutual settlement during the pendency of the trial, leading to the discontinuation of further legal proceedings. This legal mechanism is known as *"compounding of offences"*, and the offences that qualify for such resolution are referred to as compoundable offences. This perspective has gained traction even among those who strongly support retaining its non-bailable and cognizable nature. The underlying rationale is that judicial supervision in allowing compounding would strike a balance between preventing misuse of the provision and protecting genuine victims of domestic

[427] *Law Comm'n of India*, 243rd Report on Section 498A of the Indian Penal Code (Aug. 2012), https://cdnbbsr.s3waas.gov.in/s3ca0daec69b5adc880fb464895726dbdf/uploads/2022/08/2022081023.pdf (accessed Sept. 23, 2025).

violence. Certain states, such as Andhra Pradesh[428] have already amended their legal framework to make Section 498A compoundable.

The Supreme Court has also expressed similar views. In the case of *Ramgopal v. State of Madhya Pradesh*[429] the Apex Court recommended that offences under Section 498A IPC should be made compoundable. The Court recognized that in cases arising out of matrimonial discord, continuing criminal prosecution often results in unnecessary harassment and prolonged litigation, affecting both parties adversely. The Law Commission of India, in its 237th Report, unequivocally recommended that Section 498A IPC should be made compoundable with the permission of the court. This stance was consistent with its earlier recommendation in the 154th Report, which also proposed making the offence compoundable. The Committee of Petitions (Rajya Sabha), in its report presented on 7th September 2011, under paragraph 13.2, titled *"Making the offence under Section 498A IPC compoundable"*, echoed similar views. The Committee, while recommending that the offence should continue to remain cognizable and non-bailable, strongly emphasized the need to check the misuse and hardship caused by the provision. The Committee further noted that failure to adopt measures to prevent such misuse may ultimately compel the legislature to dilute the law, which could be detrimental to genuine victims of domestic violence.

## RE-ORIENTING THE APPLICATION OF THE PROVISION

In Conclusion, the misuse of the provision has been judicially recognized by the Supreme Court and various High Courts, as well as acknowledged by the Parliamentary Committee on Petitions. However, the absence of any empirical study establishing the extent of misuse cannot justify the abolition of the provision or diluting its intended purpose. False or exaggerated complaints, often driven by ulterior motives or emotional outbursts, must be effectively addressed to prevent the abuse of the legal process. The stigma of being falsely accused of cruelty, coupled with the threat of immediate arrest, drives many men to extreme distress, resulting in severe mental trauma, social alienation, and in some tragic cases, suicide. Reports have shown that several men, unable to bear the societal backlash and constant harassment, have taken their own lives after being implicated in false dowry or cruelty cases.

[428] *Code of Criminal Procedure (Andhra Pradesh Amendment) Act*, No. 46 of 1987, Acts of Parliament (India).
[429] *Ramgopal v. State of Madhya Pradesh*, SLP (Crl.) No. 6494 of 2010 (India).

# FROM VOLUNTARY TO MANDATORY: CSR AND ESG COMPLIANCE IN INDIAN CORPORATE LAW AND ITS GLOBAL IMPLICATIONS

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## ABSTRACT

*This research aims to critically examine the transition of Corporate Social Responsibility (CSR) in India from a voluntary initiative to a mandatory legal requirement under Section 135 of the Companies Act, 2013, and to analyse the evolving role of Environmental, Social, and Governance (ESG) compliance in corporate governance. The study investigates how statutory obligations have influenced corporate behaviour, compliance quality, and sustainable development outcomes. A comparative legal analysis method is employed, drawing on primary legal texts, regulatory guidelines (such as the SEBI-prescribed Business Responsibility and Sustainability Reporting), and secondary data from corporate disclosures and impact assessments. The paper also examines global CSR and ESG practices in jurisdictions like the European Union, United States, and South Africa to identify convergences and divergences.*

*Key findings indicate that while mandatory CSR provisions have increased corporate contributions to social development, significant challenges persist in terms of strategic alignment, impact measurement, and enforcement. ESG compliance, though increasingly emphasized, lacks a comprehensive legal framework in India. The implications of this research are twofold: first, it offers policy recommendations for strengthening CSR and ESG governance in India; second, it provides a legal roadmap for other emerging economies contemplating similar statutory models. The study concludes that India's experience represents a pioneering yet evolving model that must be continually refined to ensure meaningful corporate accountability and sustainability.*

**Keywords:** Corporate Social Responsibility, ESG Compliance, Companies Act 2013, Corporate Governance, Emerging Economies, Comparative Corporate Law, Business Responsibility, Sustainable Development.

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## INTRODUCTION

Corporate Social Responsibility (CSR) and Environmental, Social, and Governance (ESG) have emerged as vital pillars of responsible business conduct in this era of liberalisation and growing global environmental awareness. This framework ensures that businesses contribute to inclusive and sustainable growth, rather than just economic expansion. It involves initiatives such as education, healthcare, environmental conservation, etc., where businesses assess and take responsibility for their impact on the environment and social welfare[431]. Corporate Social Responsibility (CSR) can be succinctly defined as a company's voluntary efforts and initiatives aimed at fostering social, environmental, and economic sustainability. Various forms of corporate social responsibility (CSR) encompass charity, volunteerism, and the ethical procurement of resources. These programs primarily focus on enhancing the company's societal reputation, fostering trust with stakeholders, and generating a beneficial impact on society[432].

ESG refers to a framework of criteria employed by investors to examine a company's performance regarding environmental, governance, and social issues, hence evaluating its risks and prospects for sustainable long-term growth. Evaluation elements may encompass carbon impact, labour standards, and diversity among employees and board members, etc[433]. ESG expands upon CSR by transcending mere generosity, providing a quantifiable framework that enables investors and customers to comprehend a company's charitable, social, and governance actions. ESG is the measurable result pertaining to a company's comprehensive sustainability performance. It is a standard employed by investors to evaluate a company and ascertain its investment viability[434].

## EVOLUTION OF CSR IN INDIA

Corporate Social Responsibility in India was shaped by familial values, traditions, culture, religion, and industrialization. During the 1900s, industrialist families such as the Tatas, Birla's, Modis, Godrej, Bajaj's, and Singhania's advanced this philosophy by establishing

[431] Shikha Kumari, Exploring the Legal Debate on Corporate Social Responsibility: Mandatory vs Voluntary CSR Approach, *Int'l J. Innovative Rsch. in L.* (Jan. 17, 2025), https://ijirl.com/wp-content/uploads/2025/01/EXPLORING-THE-LEGAL-DEBATE-ON-CORPORATE-SOCIAL-RESPONSIBILITY-MANDATORY-VS-VOLUNTARY-CSR-APPROACH.pdf (accessed July 2, 2025).

[432] Singh U, Corporate Social Responsibility vs ESG, *Manupatra Academy Legal Post*, https://www.manupatracademy.com/LegalPost/Corporate_Social_Responsibility_ESG (accessed July 6, 2025).

[433] *Ibid.*

[434] Shekhawat S.S., ESG & CSR – Two Sides of a Coin, *Times of India Readers' Blog* (Mar. 27, 2023), https://timesofindia.indiatimes.com/readersblog/ethical-encouter/esg-csr-two-sides-of-a-coin-51923/ (accessed July 6, 2025).

philanthropic foundations, educational and healthcare institutions, and trusts for community development. Mahatma Gandhi urged prominent industrialists to allocate their wealth for the welfare of the destitute populations. He presented the notion of trusteeship. The concept of trusteeship facilitated India's socio-economic advancement.[435] Gandhi considered Indian companies and industries as "Temples of Modern India." He convinced industry and corporations to create trusts for colleges, research, and training institutes.[436]

## TRANSITION FROM VOLUNTARY TO MANDATORY CSR

In a worldwide economy where company actions significantly impact social, economic, and environmental spheres, voluntary company Social Responsibility (CSR) has arisen as a flexible strategy driven by ethical principles and corporate self-interest, devoid of legal obligation. This model fosters innovation and autonomy, although it also prompts apprehensions over efficacy and accountability.[437] A contingency approach posits that the efficacy of CSR is contingent upon variables such as industry classification, organizational scale, and socio-political environment. Strategically executed voluntary CSR can improve corporate transparency, stakeholder trust, reputation, customer relations, and investor confidence.[438] Nonetheless, to guarantee equitable conditions and rectify possible deficiencies, government intervention may remain essential, suggesting that voluntary efforts and regulatory frameworks might serve as complementary instruments in advancing corporate responsibility and sustainability.

The obligatory CSR framework legally mandates firms to engage in social and environmental advancement, in contrast to the conventional voluntary model. India, as the first nation to enforce obligatory Corporate Social Responsibility under the Companies Act of 2013[439], requires companies with a net profit of ₹5 crores or a turnover of ₹1,000 crores to allocate a minimum of 2% of their average net earnings[440] towards initiatives like education, rural development, and slum enhancement.

[435] SoulAce, How has CSR evolved in India? *SoulAce*, https://www.soulace.in/how-has-csr-evolved-in-india.php (accessed 8 July 2025).
[436] Sifat Khan & Rajkumari Jain, An Idea Beyond CSR: Trusteeship Theory of Mahatma Gandhi, *J. Emerging Tech. & Innovative Rsch.*, vol. 8, no. 7, at 151–54 (July 2021), https://www.jetir.org/papers/JETIR2107148.pdf (accessed July 8, 2025).
[437] Arshiya Banu & Jyotirmoy Banerjee, Exploring the Legal Debate on Corporate Social Responsibility: Mandatory vs Voluntary CSR Approach, 4 *Int'l J. Innovative Rsch. in L.* 1058, 1065 (2025).
[438] Ameeta Jain, Monica Keneley & Dianne Thomson, Voluntary CSR Disclosure Works! Evidence from Asia Pacific Banks, 11 *Social Responsibility J.* 2 (2015).
[439] *Companies Act*, No. 18 of 2013 (India).
[440] Bhavesh Sarna, Voluntary V/s Mandatory CSR—The Sound of Employees (Master's Thesis, Jyvaskyla Univ. Sch. of Bus. & Econ., Aug. 2016).

The activities, which may be included by the companies in their CSR policies, are listed in Schedule VII of the Act.[441] This legal framework represents an endeavour to guarantee substantial corporate involvement in social welfare. Nevertheless, obstacles, including insufficient accountability, openness, and effective execution, persist. Amidst escalating globalization and economic advancement, there is a heightened necessity for systematic and genuine CSR initiatives that transcend mere corporate image enhancement and prioritize enduring social impact and sustainable development.

## INTRODUCTION OF ESG IN INDIA

ESG (Environmental, Social, Governance) is a comprehensive framework evaluating a company's sustainability across its environmental impact, social responsibility, and governance practices. Indian ESG reporting began with voluntary National Voluntary Guidelines (NVGs) in 2011, followed by SEBI's Business Responsibility Reports (BRR) in 2012, which later evolved into the mandatory Business Responsibility and Sustainability Report (BRSR) framework. Additionally, the Reserve Bank of India (RBI) has promulgated directives regarding green finance and climate risk assessment. ESG disclosures are consistent with international frameworks, including the Global Reporting Initiative (GRI) and the Sustainability Accounting Standards Board (SASB). Enhancing enforcement and standardization is essential for guaranteeing corporate responsibility and sustainable business practices in India.[442] The disclosures as per the BRSR framework were made mandatory for the top 1000 listed companies (by market capitalisation) in India from FY 2022-23, while the disclosures were voluntary for FY 2021-22 for these companies.[443]

## IMPACT OF MANDATORY CSR AND ESG IN INDIA

Since the introduction of mandatory CSR and ESG in India, companies have spent a tremendous amount on the CSR initiative. There was a 16% rise in Corporate Social Responsibility (CSR) expenditure amounting to Rs. 17,967 crores by listed companies in FY 2023-24.[444] A positive correlation can also be seen between CSR spending and the increase in profits of the companies. As per a report of Prime Infobase, the average 3-year net profit of

[441] Comptroller & Auditor Gen. of India, *Corporate Social Responsibility, General Purpose Financial Report*, Report No. 5 (2021).
[442] D.M. Kharola, M.S. Goyal & D.S. Saxena, Mandatory ESG Reporting in India: Legal Obligations and Management Strategies, *J. Marketing & Soc. Rsch.*, vol. 2, no. 2, at 167–77 (2025).
[443] Taxmann, Guide to ESG in India – Features Principles Reporting Requirements (Mar. 6, 2024), https://www.taxmann.com/post/blog/guide-to-esg-in-india (last visited June 13, 2025).
[444] Banikinkar Pattanayak, CSR Spend Trebles in a Decade, Education & Health Get Lion's Share, *Econ. Times* (New Delhi, July 8, 2025), https://economictimes.indiatimes.com/news/company/corporate-trends/csr-spend-trebles-in-a-decade-education-health-get-lions-share/articleshow/122326417.cms (accessed July 12, 2025).

companies listed on NSE has more than doubled from ₹4.18 lakh crore in 2014-15, the first year of this regulation, to ₹9.62 lakh crore in 2023-24.[445]

The impact is not limited only to quantitative change but also has other dimensions too. The Supreme Court of India has, in several landmark judgments, underscored the broader responsibility of corporations toward society and the environment, even though the cases did not directly address CSR under the Companies Act. In cases like Rural Litigation and Entitlement Kendra vs. State of Uttar Pradesh (Dehradun Quarrying Case)[446] and Tata Iron & Steel Co. Ltd. v. State of Bihar[447], the Court emphasized that businesses must operate with a sense of social accountability, thereby reinforcing the spirit of CSR. The SC has not only stated the importance of CSR but has also imposed a fine for non-compliance. In Sterlite Industries (India) Ltd. vs. Union of India[448], the SC court ordered the company to pay a hefty compensation of ₹100 crore for polluting the environment. The judgment highlighted the responsibility of companies to go beyond mere compliance with the law and proactively work to mitigate environmental harm.

The Hon'ble Court in this case, citing M.C. Mehta and Another vs. Union of India and Others[449] stated that "The enterprise must be held to be under an obligation to provide that the hazardous or inherently dangerous activity in which it is engaged must be conducted with the highest standards of safety and if any harm results on account of such activity, the enterprise must be absolutely liable to compensate for such harm and it should be no answer to the enterprise to say that it had taken all reasonable care and that the harm occurred without any negligence on its part. The quantum of compensation must be co-related to the magnitude and capacity of the enterprise because such compensation must have a deterrent effect, and the larger and more prosperous the enterprise, the greater must be the amount of compensation payable by it."[450]

Apart from the judicial decisions, there has also been an increase in the social initiatives related to CSR, making a great impact on society. One such initiative is Project MANSI (Maternal and Newborn Survival Initiative) by TATA Steel Foundation. This project aims to address the

[445] Prime InfoBase, CSR Spend by NSE Listed Companies Jumps 16 Percent to ₹18,000 Crore in 2023–24, *Prime Database Group* (Apr. 2025), http://www.primedatabasegroup.com/newsroom/CSR_SPEND_BY_NSE_LISTED_COMPANIES_JUMPS_16_PER_CENT_TO_18000_CRORE_IN_2023_24_PRIMEINFOBASE.pdf (accessed July 12, 2025).
[446] *Rural Litig. & Entitlement Kendra v. State of Uttar Pradesh*, AIR 1985 SC 652 (India).
[447] *Tata Iron & Steel Co. Ltd. v. State of Bihar*, AIR 1985 SCR 1355 (India).
[448] *Sterlite Indus. (India) Ltd. v. Union of India*, (2013) 4 SCC 575 (India).
[449] *M.C. Mehta v. Union of India, (1987) 1 SCC 395 (India).*
[450] *Ibid.*

problem of maternal and infant mortality in rural India.[451] The project made a huge impact, resulting in a significant reduction in mortality rates. The Infant Mortality Rate dropped from 43.9 per cent in 2015 to 24.8 per cent in 2020.[452] Another initiative is the Project "Nanhi Kali" by Mahindra Group, which aims to enhance educational opportunities for underprivileged girl children in India.[453] More than 1.5 Lakh girl children were supported in 20 districts spread across 7 states in the country.[454]

Such projects are not only limited to Indian companies, but MNCs like Apple are also contributing to CSR. Apple has partnered with the Malala Fund to provide education to girls in countries such as India, Afghanistan, and Pakistan.[455] Talking about its CSR to enhance educational opportunities in India, in FY 2022-23, Apple supported Akanksha Foundation to provide high-quality education to low-income communities. Apple has also been supporting the Akshaya Patra Foundation to ensure nutritious mid-day meals for school children in Puducherry, Telangana, and Karnataka.[456]

## GLOBAL IMPLICATIONS OF CSR AND ESG COMPLIANCE

Corporate Social Responsibility (CSR) and Environmental, Social, and Governance (ESG) compliance have emerged as critical pillars of global business strategy, moving from voluntary corporate gestures to essential operational mandates. At a global scale, the impact of CSR and ESG compliance is far-reaching. Companies are no longer evaluated solely on financial performance but also on their social and environmental footprints. With 90–98% of S&P 500 companies now publishing ESG or sustainability reports, transparency has become a norm rather than an exception.[457] Financially, CSR and ESG practices have proven to be value enhancers. Institutional investors are integrating ESG criteria into decision-making, with ESG

[451] Top CSR Projects Leaving an Impact in India and the World, *CSR J.*, https://thecsrjournal.in/top-csr-projects-impact-india-world/ (accessed July 13, 2025).
[452] Tata Steel, Tata Steel's MANSI Rural Healthcare Programme for Women and Children, *Tata.com Newsroom*, https://www.tata.com/newsroom/community/tata-steel-mansi-rural-healthcare-women-child (accessed July 13, 2025).
[453] K.C. Mahindra Education Trust, Girl Child Education – Project Nanhi Kali, *K.C. Mahindra Education Trust*, https://www.kcmet.org/what-we-do-Girl-Child-Education.aspx (accessed July 13, 2025).
[454] Mahindra Group, Project Nanhi Kali – Empowering Underprivileged Girls with Access to Quality Education, *Mahindra.com Blogs*, https://www.mahindra.com/blogs/project-nanhi-kali-empowering-underprivileged-girls-with-access-to-quality-education (accessed July 13, 2025).
[455] *CSR J.*, *supra* note 22.
[456] Apple India Pvt. Ltd., *Corporate Social Responsibility Annual Report FY 2019–20* (Sept. 2020), https://www.apple.com/in/legal/more-resources/docs/Apple-India-CSR.pdf (accessed July 13, 2025).

[457] KEY ESG, 50 Sustainability Statistics You Need to Know in 2025, https://www.keyesg.com/article/50-esg-statistics-you-need-to-know-in-2024 (accessed July 13, 2025).

investments projected to reach $33.9 trillion by 2026,[458] representing a significant share of global assets under management. Companies with strong ESG performance benefit from higher market value, increased profitability, and outperforming peers by 4.8% annually.

Consumer behaviour has also profoundly shifted. A significant 77% of consumers prefer to buy from companies actively engaged in CSR,[459] And around 88% demonstrate increased loyalty to businesses that advocate for social or environmental issues.[460] For talent acquisition and retention, CSR and ESG practices are paramount. 66% of executives consider employee morale the top benefit of CSR initiatives, and 77% of employees cited a sense of purpose as a factor in choosing their employer. Companies prioritising CSR experience a 35% increase in employee retention over a five-year period. Younger generations, including 94% of Gen Z, expect companies to address social and environmental issues, influencing their career choice.[461]

## CHALLENGES IN CSR AND ESG IMPLEMENTATION

The implementation of CSR and ESG frameworks faces several persistent challenges, both in India and globally. One major hurdle is the lack of standardized reporting mechanisms, which complicates impact assessment and makes it difficult for stakeholders to compare performance across companies or sectors.[462] For CSR in particular, many firms treat compliance as a tick-box exercise, leading to superficial engagement rather than strategic integration, often referred to as "CSR washing".[463] The absence of consistent metrics and third-party verification makes it difficult to distinguish meaningful CSR contributions from those undertaken merely for regulatory compliance.[464]

In the ESG context, data collection and quality remain a critical issue. Many companies lack the internal capacity or expertise to track ESG indicators effectively, especially in complex

[458] PwC, ESG Focused Institutional Investment Seen Soaring 84 Percent to US$33.9 Trillion in 2026, Making Up 21.5 Percent of Assets Under Management, *PwC Newsroom* (London, Oct. 10, 2022), https://www.pwc.com/gx/en/news-room/press-releases/2022/awm-revolution-2022-report.html (accessed July 13, 2025).

[459] Marijn Overvest, Corporate Social Responsibility Statistics 2025 — 65 Key Figures, *Procurement Tactics* (Nov. 14, 2023), https://procurementtactics.com/corporate-social-responsibility-statistics/ (accessed July 13, 2025).

[460] Solitaire Townsend, 88 Percent of Consumers Want You to Help Them Make a Difference, *Forbes* (Nov. 21, 2018), https://www.forbes.com/sites/solitairetownsend/2018/11/21/consumers-want-you-to-help-them-make-a-difference/ (accessed July 13, 2025).

[461] Marijn, *supra* note 30.

[462] Mathews Sumba Mang'unyi & Kimani Chege, Challenges Facing the Implementation of Corporate Social Responsibility Programs in Education Sector: A Survey of Private Primary Schools in Busia County, Kenya, 3(4) *Int'l J. Innovative Rsch. & Dev.* 410 (2014), https://www.ijird.com (accessed July 12, 2025).

[463] Chandan Kumar Roy, Overcoming Challenges in Corporate Social Responsibility (CSR) Implementation, *TechCSR* (Aug. 23, 2024), https://techcsr.com/blog/overcoming-challenges-in-corporate-social-responsibility-csr-implementation (accessed July 13, 2025).

[464] Charity Miles, What Is Social Responsibility? *Charity Miles*, https://charitymiles.org/social-responsibility/ (accessed July 13, 2025).

areas like Scope 3 emissions, human rights impacts, or supply chain ethics.[465] A 2023 EY report noted that over 70% of companies in emerging markets identified ESG data quality and regulatory uncertainty as major barriers to compliance.[466] Additionally, regulatory fragmentation with different jurisdictions applying varying disclosure standards creates compliance burdens for multinational firms.[467]

In India, while CSR spending has increased, challenges remain in aligning CSR projects with business strategy, measuring long-term social impact, and ensuring accountability through audits or public disclosures.[468] Moreover, resource constraints among small and medium enterprises (SMEs) prevent robust ESG integration, even as large firms increasingly respond to investor and regulatory pressure.[469] Finally, there is a shortage of skilled professionals in the CSR and ESG domains, affecting implementation quality across sectors. Addressing these issues requires harmonized global standards, better ESG literacy, and stronger oversight mechanisms.

## SUSTAINABLE TRANSFORMATION: OPPORTUNITIES BEYOND REGULATION

The evolving landscape of CSR and ESG brings numerous opportunities for businesses. Businesses can use these opportunities to their advantage and turn them into their USP (Unique Selling Point). As already discussed, businesses that are actively engaged in CSR and ESG receive a good response from environmentally conscious customers. Moreover, there is also an increase in loyal customers. These mere compliances can turn out to be a marketing tool for the businesses, eventually leading to increased profitability. As sustainability becomes central to stakeholder expectations and investor decision-making, companies that integrate ESG into their business models benefit from improved access to green finance, ESG-linked loans, and increased consumer trust.[470] In India, frameworks such as SEBI's Business Responsibility and

[465] Bedford Consulting, The 5 Main Challenges of ESG Reporting and Best Practice, *Bedford Consulting*, https://bedfordconsulting.com/the-5-main-challenges-of-esg-reporting-and-best-practice/ (accessed July 13, 2025).
[466] EY, As ESG Reporting Becomes Mainstream, Complex Challenges Persist, *EY India*, https://www.ey.com/en_in/insights/climate-change-sustainability-services/as-esg-reporting-becomes-mainstream-complex-challenges-persist (accessed July 13, 2025).
[467] EcoActiveTech, The 5 Main Challenges of ESG Reporting and Best Practices, *EcoActiveTech*, https://ecoactivetech.com/the-5-main-challenges-of-esg-reporting-and-best-practices/ (accessed July 13, 2025).
[468] UNDP Belarus, ESG Challenges and Opportunities, https://www.undp.org/belarus/stories/esg-challenges-opportunities (accessed July 13, 2025).
[469] Lucy Carvalho, Challenges for ESG, *Lok Jack Glob. Sch. of Bus., Univ. of the W. Indies*, https://lokjackgsb.edu.tt/challenges-esg/ (accessed July 13, 2025).
[470] Earth5R, ESG Opportunities for Indian Business Growth, https://earth5r.org/esg-opportunities-for-indian-business-growth/ (accessed July 13, 2025).

Sustainability Reporting (BRSR) and rising green bond markets are encouraging greater ESG transparency.[471]

The Green Bond market is one such rapidly growing area in the field of Green Finance.[472] According to Bloomberg, green bond sales from corporates and governments, which climbed to $575 billion, a step up from 2022 and just beating 2021's $573 billion figure.[473] Not only green bonds, but issuance of social bonds[474] are closely related to it. Its sales in 2023 were about $135 billion.[475] Apart from this, organisations such as the International Bank of Reconstruction & Development (IBRD)[476] are also major contributors to the issuance of sustainability bonds. In fact, the IBRD was responsible for the largest sustainability bonds issued in 2023, at $5 billion.[477] India also has made its debut in Sovereign Green Bonds in the year 2023 with the maiden Sovereign Green Bond (SGrB) auction of Rs. 8,000 crores held in January 2023, got oversubscribed owing to robust demand from various market participants, primarily banks.[478]

Moreover, companies are leveraging CSR not just for compliance but to strengthen community relations, promote employee engagement, and embed ethical supply chain practices, thereby aligning social impact with profitability.[479] Globally, businesses are tapping into new ESG-driven markets through climate innovation, digital ESG platforms, and sustainable product development. For example, IT departments are evolving to integrate sustainability metrics and ethical AI governance, positioning ESG not as a compliance task but as a core operational strategy.[480] This shift has also created new demand for ESG consultancy, auditing, and

[471]EY, Evolving CSR: Integrating Change Management in ESG Strategies, https://www.ey.com/en_lu/insights/sustainability/evolving-csr-integrating-change-management-in-esg-strategies (accessed July 13, 2025).
[472] Dr. Nannette Lindenberg, Definition of Green Finance, *Convention on Biological Diversity* (Apr. 2014), https://www.cbd.int/financial/gcf/definition-greenfinance.pdf (accessed July 13, 2025).
[473] Bloomberg, Green Bonds Reached New Heights in 2023, *Bloomberg Professional* (Apr. 2024), https://www.bloomberg.com/professional/insights/trading/green-bonds-reached-new-heights-in-2023/ (accessed July 13, 2025).
[474] Int'l Cap. Mkt. Ass'n (ICMA), *Social Bond Principles* (June 2020), https://www.icmagroup.org/assets/documents/regulatory/green-bonds/june-2020/social-bond-principlesjune-2020-090620.pdf (accessed July 17, 2025).
[475] Bloomberg, *supra* note 44.
[476]World Bank, International Bank for Reconstruction and Development (IBRD), https://www.worldbank.org/en/who-we-are/ibrd (accessed July 17, 2025).
[477] Bloomberg, *supra* note 44.
[478] Indian Inst. of Banking & Fin., Green Bonds – Role and Scope in India's Financial and Fiscal Landscape, *Bank Quest* (July–Sept. 2023), https://www.iibf.org.in/documents/BankQuest/6.%20.pdf (accessed July 17, 2025)
[479] ESGPro, ESG and Corporate Social Responsibility: A New Business Paradigm, https://esgpro.co.uk/esg-and-corporate-social-responsibility-a-new-business-paradigm/ (accessed July 13, 2025).
[480] TechTarget, 10 Key ESG and Sustainability Trends for Business IT, *TechTarget* (2024), https://www.techtarget.com/searchcio/feature/10-key-ESG-and-sustainability-trends-for-business-IT (accessed July 13, 2025).

compliance software as firms seek to align with stakeholder capitalism.[481] The global ESG market is projected to grow from USD 9.8 billion in 2023 to USD 20.3 billion by 2028, at a CAGR of 15.7 per cent.[482] The ESG consultants in India has accelerated with companies racing to earn a sustainability tag and navigate complex disclosure requirements.[483] The large and mid-sized firms are engaging ESG service providers not only for compliance but also for strategic sustainability transformation.[484]

Globally, the ESG consulting landscape is evolving from reporting assistance to data-driven services, with AI, materiality mapping, and sector-specific benchmarking gaining traction.[485] Investor expectations are also fuelling demand, especially for ESG-aligned data frameworks and climate-risk assessments.[486] In 2024, a UK-based company, Verdantix, estimated that over 40% of ESG consultancy clients are now requesting help with decarbonization strategies and net-zero planning.[487] Moving forward, businesses that approach CSR and ESG as strategic enablers rather than regulatory burdens are likely to lead the way in fostering inclusive growth and environmental resilience.

A multi-pronged policy approach is required to strengthen the CSR and ESG ecosystem in India. The government should introduce a unified regulatory framework that integrates CSR and ESG principles to eliminate overlaps and inconsistencies between existing guidelines issued by regulatory bodies such as the Ministry of Corporate Affairs and SEBI.[488] This would offer businesses a coherent and consistent roadmap for responsible practices and compliance. Mandatory impact assessments for high-value CSR initiatives and ESG disclosures should be institutionalised to ensure that expenditure results in measurable and outcome-oriented

[481] ESGPro, *supra* note 50.
[482] MarketsandMarkets, ESG Advisory Services Market – Global Forecast 2023–2028, *MarketsandMarkets* (2023), https://www.marketsandmarkets.com/Market-Reports/esg-advisory-market-130676561.html (accessed July 13, 2025).
[483] Inductus Group, Consulting in ESG Strategy in 2025 and Beyond, *Inductus* (2024), https://inductusgroup.com/consulting-in-esg-strategy-in-2025-and-beyond/ (accessed July 13, 2025).
[484] ET Bureau, ESG Consultancies on the Rise as Companies Rush to Get Sustainability Tag, *Econ. Times* (June 28, 2024), https://economictimes.indiatimes.com/small-biz/sustainability/esg-consultancies-and-services-on-the-rise-as-companies-rush-to-get-sustainability-tag/articleshow/111101890.cms (accessed July 13, 2025).
[485] KindLink, How the ESG Consultancy Sector Is Evolving, https://www.kindlink.com/news/blog/esg-consulting-how-esg-consultancy-sector-evolving (accessed July 13, 2025).
[486] A-Team Insight, ESG Consultancy Growth Driven by Investor Data Demand, https://a-teaminsight.com/blog/esg-consultancy-growth-driven-by-investor-data-demand/ (accessed July 13, 2025).
[487] Verdantix, The ESG and Sustainability Consulting Market: The Road Ahead, *Verdantix* (2024), https://www.verdantix.com/insights/blog/the-esg-and-sustainability-consulting-market-the-road-ahead (accessed July 13, 2025).
[488] Ministry of Corporate Affairs, *Report of the High-Level Committee on Corporate Social Responsibility 2018* (2019), https://www.mca.gov.in/Ministry/pdf/CSRHLC_13092019.pdf (accessed July 17, 2025).

development aligned with national goals and global benchmarks like the SDGs.[489] Capacity building programs focused on ESG literacy, ethical governance, and sustainability reporting are essential to equip corporates and implementing agencies with the tools needed for effective execution.[490] Incentivising responsible behaviour through tax benefits or preferential treatment in public procurement or green finance could further encourage companies to go beyond minimum compliance.[491] Strengthening public disclosure systems would improve transparency and allow stakeholders, including investors and civil society, to engage meaningfully with corporate sustainability efforts. Aligning ESG and CSR indicators with India's socio-economic priorities while ensuring compatibility with global frameworks like the GRI and UN Global Compact can improve both relevance and global competitiveness.[492] These reforms will help close implementation gaps and foster a culture of genuine corporate responsibility, enabling inclusive growth and environmental sustainability.

## CONCLUSION

The transformation of Corporate Social Responsibility (CSR) from a voluntary initiative to a mandatory statutory obligation under Section 135 of the Companies Act, 2013, has marked a significant shift in India's corporate governance landscape. This legal mandate has institutionalised corporate contributions to societal development, steering businesses towards more structured, accountable, and impactful engagement with social and environmental concerns. The empirical evidence suggests a substantial rise in CSR spending, not only in monetary terms but also in the depth and diversity of initiatives undertaken. These initiatives now span across education, healthcare, skill development, gender equality, rural development, environmental protection, and support for marginalised communities. Judicial pronouncements have further reinforced the ethos of CSR by holding corporations accountable for environmental and social damage, thus signalling the judiciary's commitment to fostering corporate responsibility beyond mere statutory compliance.

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[489] Securities & Exchange Bd. of India, *Business Responsibility and Sustainability Reporting by Listed Entities* (SEBI Circular, 2021), https://www.sebi.gov.in/legal/circulars/apr-2021/business-responsibility-and-sustainability-reporting-by-listed-entities_49721.html (accessed July 17, 2025).

[490] UN Global Compact Network India, Corporate Sustainability in India: An Overview (2020), https://www.globalcompact.in/ (accessed July 17, 2025).

[491] Roy C.K., Overcoming Challenges in Corporate Social Responsibility (CSR) Implementation, *TechCSR* (Aug. 23, 2024), https://techcsr.com/blog/overcoming-challenges-in-corporate-social-responsibility-csr-implementation (accessed July 17, 2025).

[492] Carvalho L., Challenges for ESG, *Lok Jack Glob. Sch. of Bus., Univ. of the W. Indies*, https://lokjackgsb.edu.tt/challenges-esg/

Simultaneously, the emergence of Environmental, Social, and Governance (ESG) frameworks has broadened the scope of corporate accountability. ESG compliance, though currently not uniformly regulated in India, has gained significant momentum due to investor pressure, global best practices, and regulatory developments like SEBI's Business Responsibility and Sustainability Reporting (BRSR) framework. ESG performance is increasingly becoming a determinant of access to capital, investor confidence, brand equity, and long-term business sustainability. The global integration of ESG norms has also triggered a rise in ESG-related consulting services, impact assessment tools, and data analytics, offering new growth avenues for businesses, professionals, and policymakers alike.

However, the path ahead is not without challenges. Issues such as lack of standardised reporting frameworks, inadequate impact assessment mechanisms, regulatory fragmentation, low ESG literacy, and the absence of reliable data continue to hinder the full potential of CSR and ESG frameworks. Addressing these concerns requires harmonisation of reporting standards across sectors, robust monitoring and evaluation systems, institutional capacity-building, stakeholder engagement, and a deeper alignment of sustainability goals with long-term business strategies. India's experience with mandatory CSR and its evolving ESG landscape presents a unique model that other emerging economies can study, customise, and adapt to their own socio-economic contexts. Going forward, CSR and ESG must be seen not just as compliance tools but as integral components of a company's core value system and strategic vision. With the right mix of regulation, innovation, public-private partnerships, and stakeholder participation, these frameworks can effectively drive inclusive growth, environmental resilience, social equity, and global competitiveness.

# FROM VOLUNTARY TO MANDATORY: CSR AND ESG COMPLIANCE IN INDIAN CORPORATE LAW AND ITS GLOBAL IMPLICATIONS

***Abhijeet Panad***[493]

## ABSTRACT

*This research aims to critically examine the transition of Corporate Social Responsibility (CSR) in India from a voluntary initiative to a mandatory legal requirement under Section 135 of the Companies Act, 2013, and to analyse the evolving role of Environmental, Social, and Governance (ESG) compliance in corporate governance. The study investigates how statutory obligations have influenced corporate behaviour, compliance quality, and sustainable development outcomes. A comparative legal analysis method is employed, drawing on primary legal texts, regulatory guidelines (such as the SEBI-prescribed Business Responsibility and Sustainability Reporting), and secondary data from corporate disclosures and impact assessments. The paper also examines global CSR and ESG practices in jurisdictions like the European Union, United States, and South Africa to identify convergences and divergences.*

*Key findings indicate that while mandatory CSR provisions have increased corporate contributions to social development, significant challenges persist in terms of strategic alignment, impact measurement, and enforcement. ESG compliance, though increasingly emphasized, lacks a comprehensive legal framework in India. The implications of this research are twofold: first, it offers policy recommendations for strengthening CSR and ESG governance in India; second, it provides a legal roadmap for other emerging economies contemplating similar statutory models. The study concludes that India's experience represents a pioneering yet evolving model that must be continually refined to ensure meaningful corporate accountability and sustainability.*

**Keywords:** Corporate Social Responsibility, ESG Compliance, Companies Act 2013, Corporate Governance, Emerging Economies, Comparative Corporate Law, Business Responsibility, Sustainable Development.

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## INTRODUCTION

Corporate Social Responsibility (CSR) and Environmental, Social, and Governance (ESG) have emerged as vital pillars of responsible business conduct in this era of liberalisation and growing global environmental awareness. This framework ensures that businesses contribute to inclusive and sustainable growth, rather than just economic expansion. It involves initiatives such as education, healthcare, environmental conservation, etc., where businesses assess and take responsibility for their impact on the environment and social welfare[494]. Corporate Social Responsibility (CSR) can be succinctly defined as a company's voluntary efforts and initiatives aimed at fostering social, environmental, and economic sustainability. Various forms of corporate social responsibility (CSR) encompass charity, volunteerism, and the ethical procurement of resources. These programs primarily focus on enhancing the company's societal reputation, fostering trust with stakeholders, and generating a beneficial impact on society[495].

ESG refers to a framework of criteria employed by investors to examine a company's performance regarding environmental, governance, and social issues, hence evaluating its risks and prospects for sustainable long-term growth. Evaluation elements may encompass carbon impact, labour standards, and diversity among employees and board members, etc[496]. ESG expands upon CSR by transcending mere generosity, providing a quantifiable framework that enables investors and customers to comprehend a company's charitable, social, and governance actions. ESG is the measurable result pertaining to a company's comprehensive sustainability performance. It is a standard employed by investors to evaluate a company and ascertain its investment viability[497].

## EVOLUTION OF CSR IN INDIA

Corporate Social Responsibility in India was shaped by familial values, traditions, culture, religion, and industrialization. During the 1900s, industrialist families such as the Tatas, Birla's, Modis, Godrej, Bajaj's, and Singhania's advanced this philosophy by establishing

[494] Shikha Kumari, Exploring the Legal Debate on Corporate Social Responsibility: Mandatory vs Voluntary CSR Approach, *Int'l J. Innovative Rsch. in L.* (Jan. 17, 2025), https://ijirl.com/wp-content/uploads/2025/01/EXPLORING-THE-LEGAL-DEBATE-ON-CORPORATE-SOCIAL-RESPONSIBILITY-MANDATORY-VS-VOLUNTARY-CSR-APPROACH.pdf (accessed July 2, 2025).

[495] Singh U, Corporate Social Responsibility vs ESG, *Manupatra Academy Legal Post*, https://www.manupatracademy.com/LegalPost/Corporate_Social_Responsibility_ESG (accessed July 6, 2025).

[496] *Ibid.*

[497] Shekhawat S.S., ESG & CSR – Two Sides of a Coin, *Times of India Readers' Blog* (Mar. 27, 2023), https://timesofindia.indiatimes.com/readersblog/ethical-encouter/esg-csr-two-sides-of-a-coin-51923/ (accessed July 6, 2025).

philanthropic foundations, educational and healthcare institutions, and trusts for community development. Mahatma Gandhi urged prominent industrialists to allocate their wealth for the welfare of the destitute populations. He presented the notion of trusteeship. The concept of trusteeship facilitated India's socio-economic advancement.[498] Gandhi considered Indian companies and industries as "Temples of Modern India." He convinced industry and corporations to create trusts for colleges, research, and training institutes.[499]

## TRANSITION FROM VOLUNTARY TO MANDATORY CSR

In a worldwide economy where company actions significantly impact social, economic, and environmental spheres, voluntary company Social Responsibility (CSR) has arisen as a flexible strategy driven by ethical principles and corporate self-interest, devoid of legal obligation. This model fosters innovation and autonomy, although it also prompts apprehensions over efficacy and accountability.[500] A contingency approach posits that the efficacy of CSR is contingent upon variables such as industry classification, organizational scale, and socio-political environment. Strategically executed voluntary CSR can improve corporate transparency, stakeholder trust, reputation, customer relations, and investor confidence.[501] Nonetheless, to guarantee equitable conditions and rectify possible deficiencies, government intervention may remain essential, suggesting that voluntary efforts and regulatory frameworks might serve as complementary instruments in advancing corporate responsibility and sustainability.

The obligatory CSR framework legally mandates firms to engage in social and environmental advancement, in contrast to the conventional voluntary model. India, as the first nation to enforce obligatory Corporate Social Responsibility under the Companies Act of 2013[502], requires companies with a net profit of ₹5 crores or a turnover of ₹1,000 crores to allocate a minimum of 2% of their average net earnings[503] towards initiatives like education, rural development, and slum enhancement.

[498] SoulAce, How has CSR evolved in India? *SoulAce*, https://www.soulace.in/how-has-csr-evolved-in-india.php (accessed 8 July 2025).
[499] Sifat Khan & Rajkumari Jain, An Idea Beyond CSR: Trusteeship Theory of Mahatma Gandhi, *J. Emerging Tech. & Innovative Rsch.*, vol. 8, no. 7, at 151–54 (July 2021), https://www.jetir.org/papers/JETIR2107148.pdf (accessed July 8, 2025).
[500] Arshiya Banu & Jyotirmoy Banerjee, Exploring the Legal Debate on Corporate Social Responsibility: Mandatory vs Voluntary CSR Approach, 4 *Int'l J. Innovative Rsch. in L.* 1058, 1065 (2025).
[501] Ameeta Jain, Monica Keneley & Dianne Thomson, Voluntary CSR Disclosure Works! Evidence from Asia Pacific Banks, 11 *Social Responsibility J.* 2 (2015).
[502] *Companies Act*, No. 18 of 2013 (India).
[503] Bhavesh Sarna, Voluntary V/s Mandatory CSR—The Sound of Employees (Master's Thesis, Jyvaskyla Univ. Sch. of Bus. & Econ., Aug. 2016).

The activities, which may be included by the companies in their CSR policies, are listed in Schedule VII of the Act.[504] This legal framework represents an endeavour to guarantee substantial corporate involvement in social welfare. Nevertheless, obstacles, including insufficient accountability, openness, and effective execution, persist. Amidst escalating globalization and economic advancement, there is a heightened necessity for systematic and genuine CSR initiatives that transcend mere corporate image enhancement and prioritize enduring social impact and sustainable development.

## INTRODUCTION OF ESG IN INDIA

ESG (Environmental, Social, Governance) is a comprehensive framework evaluating a company's sustainability across its environmental impact, social responsibility, and governance practices. Indian ESG reporting began with voluntary National Voluntary Guidelines (NVGs) in 2011, followed by SEBI's Business Responsibility Reports (BRR) in 2012, which later evolved into the mandatory Business Responsibility and Sustainability Report (BRSR) framework. Additionally, the Reserve Bank of India (RBI) has promulgated directives regarding green finance and climate risk assessment. ESG disclosures are consistent with international frameworks, including the Global Reporting Initiative (GRI) and the Sustainability Accounting Standards Board (SASB). Enhancing enforcement and standardization is essential for guaranteeing corporate responsibility and sustainable business practices in India.[505] The disclosures as per the BRSR framework were made mandatory for the top 1000 listed companies (by market capitalisation) in India from FY 2022-23, while the disclosures were voluntary for FY 2021-22 for these companies.[506]

## IMPACT OF MANDATORY CSR AND ESG IN INDIA

Since the introduction of mandatory CSR and ESG in India, companies have spent a tremendous amount on the CSR initiative. There was a 16% rise in Corporate Social Responsibility (CSR) expenditure amounting to Rs. 17,967 crores by listed companies in FY 2023-24.[507] A positive correlation can also be seen between CSR spending and the increase in profits of the companies. As per a report of Prime Infobase, the average 3-year net profit of

[504] Comptroller & Auditor Gen. of India, *Corporate Social Responsibility, General Purpose Financial Report*, Report No. 5 (2021).
[505] D.M. Kharola, M.S. Goyal & D.S. Saxena, Mandatory ESG Reporting in India: Legal Obligations and Management Strategies, *J. Marketing & Soc. Rsch.*, vol. 2, no. 2, at 167–77 (2025).
[506] Taxmann, Guide to ESG in India – Features Principles Reporting Requirements (Mar. 6, 2024), https://www.taxmann.com/post/blog/guide-to-esg-in-india (last visited June 13, 2025).
[507] Banikinkar Pattanayak, CSR Spend Trebles in a Decade, Education & Health Get Lion's Share, *Econ. Times* (New Delhi, July 8, 2025), https://economictimes.indiatimes.com/news/company/corporate-trends/csr-spend-trebles-in-a-decade-education-health-get-lions-share/articleshow/122326417.cms (accessed July 12, 2025).

companies listed on NSE has more than doubled from ₹4.18 lakh crore in 2014-15, the first year of this regulation, to ₹9.62 lakh crore in 2023-24.[508]

The impact is not limited only to quantitative change but also has other dimensions too. The Supreme Court of India has, in several landmark judgments, underscored the broader responsibility of corporations toward society and the environment, even though the cases did not directly address CSR under the Companies Act. In cases like Rural Litigation and Entitlement Kendra vs. State of Uttar Pradesh (Dehradun Quarrying Case)[509] and Tata Iron & Steel Co. Ltd. v. State of Bihar[510], the Court emphasized that businesses must operate with a sense of social accountability, thereby reinforcing the spirit of CSR. The SC has not only stated the importance of CSR but has also imposed a fine for non-compliance. In Sterlite Industries (India) Ltd. vs. Union of India[511], the SC court ordered the company to pay a hefty compensation of ₹100 crore for polluting the environment. The judgment highlighted the responsibility of companies to go beyond mere compliance with the law and proactively work to mitigate environmental harm.

The Hon'ble Court in this case, citing M.C. Mehta and Another vs. Union of India and Others[512] stated that "The enterprise must be held to be under an obligation to provide that the hazardous or inherently dangerous activity in which it is engaged must be conducted with the highest standards of safety and if any harm results on account of such activity, the enterprise must be absolutely liable to compensate for such harm and it should be no answer to the enterprise to say that it had taken all reasonable care and that the harm occurred without any negligence on its part. The quantum of compensation must be co-related to the magnitude and capacity of the enterprise because such compensation must have a deterrent effect, and the larger and more prosperous the enterprise, the greater must be the amount of compensation payable by it."[513]

Apart from the judicial decisions, there has also been an increase in the social initiatives related to CSR, making a great impact on society. One such initiative is Project MANSI (Maternal and Newborn Survival Initiative) by TATA Steel Foundation. This project aims to address the

[508] Prime InfoBase, CSR Spend by NSE Listed Companies Jumps 16 Percent to ₹18,000 Crore in 2023–24, *Prime Database Group* (Apr. 2025), http://www.primedatabasegroup.com/newsroom/CSR_SPEND_BY_NSE_LISTED_COMPANIES_JUMPS_16_PER_CENT_TO_18000_CRORE_IN_2023_24_PRIMEINFOBASE.pdf (accessed July 12, 2025).
[509] *Rural Litig. & Entitlement Kendra v. State of Uttar Pradesh*, AIR 1985 SC 652 (India).
[510] *Tata Iron & Steel Co. Ltd. v. State of Bihar*, AIR 1985 SCR 1355 (India).
[511] *Sterlite Indus. (India) Ltd. v. Union of India*, (2013) 4 SCC 575 (India).
[512] *M.C. Mehta v. Union of India, (1987) 1 SCC 395 (India).*
[513] *Ibid.*

problem of maternal and infant mortality in rural India.[514] The project made a huge impact, resulting in a significant reduction in mortality rates. The Infant Mortality Rate dropped from 43.9 per cent in 2015 to 24.8 per cent in 2020.[515] Another initiative is the Project "Nanhi Kali" by Mahindra Group, which aims to enhance educational opportunities for underprivileged girl children in India.[516] More than 1.5 Lakh girl children were supported in 20 districts spread across 7 states in the country.[517]

Such projects are not only limited to Indian companies, but MNCs like Apple are also contributing to CSR. Apple has partnered with the Malala Fund to provide education to girls in countries such as India, Afghanistan, and Pakistan.[518] Talking about its CSR to enhance educational opportunities in India, in FY 2022-23, Apple supported Akanksha Foundation to provide high-quality education to low-income communities. Apple has also been supporting the Akshaya Patra Foundation to ensure nutritious mid-day meals for school children in Puducherry, Telangana, and Karnataka.[519]

## GLOBAL IMPLICATIONS OF CSR AND ESG COMPLIANCE

Corporate Social Responsibility (CSR) and Environmental, Social, and Governance (ESG) compliance have emerged as critical pillars of global business strategy, moving from voluntary corporate gestures to essential operational mandates. At a global scale, the impact of CSR and ESG compliance is far-reaching. Companies are no longer evaluated solely on financial performance but also on their social and environmental footprints. With 90–98% of S&P 500 companies now publishing ESG or sustainability reports, transparency has become a norm rather than an exception.[520] Financially, CSR and ESG practices have proven to be value enhancers. Institutional investors are integrating ESG criteria into decision-making, with ESG

[514] Top CSR Projects Leaving an Impact in India and the World, *CSR J.*, https://thecsrjournal.in/top-csr-projects-impact-india-world/ (accessed July 13, 2025).
[515] Tata Steel, Tata Steel's MANSI Rural Healthcare Programme for Women and Children, *Tata.com Newsroom*, https://www.tata.com/newsroom/community/tata-steel-mansi-rural-healthcare-women-child (accessed July 13, 2025).
[516] K.C. Mahindra Education Trust, Girl Child Education – Project Nanhi Kali, *K.C. Mahindra Education Trust*, https://www.kcmet.org/what-we-do-Girl-Child-Education.aspx (accessed July 13, 2025).
[517] Mahindra Group, Project Nanhi Kali – Empowering Underprivileged Girls with Access to Quality Education, *Mahindra.com Blogs*, https://www.mahindra.com/blogs/project-nanhi-kali-empowering-underprivileged-girls-with-access-to-quality-education (accessed July 13, 2025).
[518] *CSR J.*, *supra* note 22.
[519] Apple India Pvt. Ltd., *Corporate Social Responsibility Annual Report FY 2019–20* (Sept. 2020), https://www.apple.com/in/legal/more-resources/docs/Apple-India-CSR.pdf (accessed July 13, 2025).

[520] KEY ESG, 50 Sustainability Statistics You Need to Know in 2025, https://www.keyesg.com/article/50-esg-statistics-you-need-to-know-in-2024 (accessed July 13, 2025).

investments projected to reach $33.9 trillion by 2026,[521] representing a significant share of global assets under management. Companies with strong ESG performance benefit from higher market value, increased profitability, and outperforming peers by 4.8% annually.

Consumer behaviour has also profoundly shifted. A significant 77% of consumers prefer to buy from companies actively engaged in CSR,[522] And around 88% demonstrate increased loyalty to businesses that advocate for social or environmental issues.[523] For talent acquisition and retention, CSR and ESG practices are paramount. 66% of executives consider employee morale the top benefit of CSR initiatives, and 77% of employees cited a sense of purpose as a factor in choosing their employer. Companies prioritising CSR experience a 35% increase in employee retention over a five-year period. Younger generations, including 94% of Gen Z, expect companies to address social and environmental issues, influencing their career choice.[524]

## CHALLENGES IN CSR AND ESG IMPLEMENTATION

The implementation of CSR and ESG frameworks faces several persistent challenges, both in India and globally. One major hurdle is the lack of standardized reporting mechanisms, which complicates impact assessment and makes it difficult for stakeholders to compare performance across companies or sectors.[525] For CSR in particular, many firms treat compliance as a tick-box exercise, leading to superficial engagement rather than strategic integration, often referred to as "CSR washing".[526] The absence of consistent metrics and third-party verification makes it difficult to distinguish meaningful CSR contributions from those undertaken merely for regulatory compliance.[527]

In the ESG context, data collection and quality remain a critical issue. Many companies lack the internal capacity or expertise to track ESG indicators effectively, especially in complex

[521] PwC, ESG Focused Institutional Investment Seen Soaring 84 Percent to US$33.9 Trillion in 2026, Making Up 21.5 Percent of Assets Under Management, *PwC Newsroom* (London, Oct. 10, 2022), https://www.pwc.com/gx/en/news-room/press-releases/2022/awm-revolution-2022-report.html (accessed July 13, 2025).

[522] Marijn Overvest, Corporate Social Responsibility Statistics 2025 — 65 Key Figures, *Procurement Tactics* (Nov. 14, 2023), https://procurementtactics.com/corporate-social-responsibility-statistics/ (accessed July 13, 2025).

[523] Solitaire Townsend, 88 Percent of Consumers Want You to Help Them Make a Difference, *Forbes* (Nov. 21, 2018), https://www.forbes.com/sites/solitairetownsend/2018/11/21/consumers-want-you-to-help-them-make-a-difference/ (accessed July 13, 2025).

[524] Marijn, *supra* note 30.

[525] Mathews Sumba Mang'unyi & Kimani Chege, Challenges Facing the Implementation of Corporate Social Responsibility Programs in Education Sector: A Survey of Private Primary Schools in Busia County, Kenya, 3(4) *Int'l J. Innovative Rsch. & Dev*. 410 (2014), https://www.ijird.com (accessed July 12, 2025).

[526] Chandan Kumar Roy, Overcoming Challenges in Corporate Social Responsibility (CSR) Implementation, *TechCSR* (Aug. 23, 2024), https://techcsr.com/blog/overcoming-challenges-in-corporate-social-responsibility-csr-implementation (accessed July 13, 2025).

[527] Charity Miles, What Is Social Responsibility? *Charity Miles*, https://charitymiles.org/social-responsibility/ (accessed July 13, 2025).

areas like Scope 3 emissions, human rights impacts, or supply chain ethics.[528] A 2023 EY report noted that over 70% of companies in emerging markets identified ESG data quality and regulatory uncertainty as major barriers to compliance.[529] Additionally, regulatory fragmentation with different jurisdictions applying varying disclosure standards creates compliance burdens for multinational firms.[530]

In India, while CSR spending has increased, challenges remain in aligning CSR projects with business strategy, measuring long-term social impact, and ensuring accountability through audits or public disclosures.[531] Moreover, resource constraints among small and medium enterprises (SMEs) prevent robust ESG integration, even as large firms increasingly respond to investor and regulatory pressure.[532] Finally, there is a shortage of skilled professionals in the CSR and ESG domains, affecting implementation quality across sectors. Addressing these issues requires harmonized global standards, better ESG literacy, and stronger oversight mechanisms.

## SUSTAINABLE TRANSFORMATION: OPPORTUNITIES BEYOND REGULATION

The evolving landscape of CSR and ESG brings numerous opportunities for businesses. Businesses can use these opportunities to their advantage and turn them into their USP (Unique Selling Point). As already discussed, businesses that are actively engaged in CSR and ESG receive a good response from environmentally conscious customers. Moreover, there is also an increase in loyal customers. These mere compliances can turn out to be a marketing tool for the businesses, eventually leading to increased profitability. As sustainability becomes central to stakeholder expectations and investor decision-making, companies that integrate ESG into their business models benefit from improved access to green finance, ESG-linked loans, and increased consumer trust.[533] In India, frameworks such as SEBI's Business Responsibility and

[528] Bedford Consulting, The 5 Main Challenges of ESG Reporting and Best Practice, *Bedford Consulting*, https://bedfordconsulting.com/the-5-main-challenges-of-esg-reporting-and-best-practice/ (accessed July 13, 2025).
[529] EY, As ESG Reporting Becomes Mainstream, Complex Challenges Persist, *EY India*, https://www.ey.com/en_in/insights/climate-change-sustainability-services/as-esg-reporting-becomes-mainstream-complex-challenges-persist (accessed July 13, 2025).
[530] EcoActiveTech, The 5 Main Challenges of ESG Reporting and Best Practices, *EcoActiveTech*, https://ecoactivetech.com/the-5-main-challenges-of-esg-reporting-and-best-practices/ (accessed July 13, 2025).
[531] UNDP Belarus, ESG Challenges and Opportunities, https://www.undp.org/belarus/stories/esg-challenges-opportunities (accessed July 13, 2025).
[532] Lucy Carvalho, Challenges for ESG, *Lok Jack Glob. Sch. of Bus., Univ. of the W. Indies*, https://lokjackgsb.edu.tt/challenges-esg/ (accessed July 13, 2025).
[533] Earth5R, ESG Opportunities for Indian Business Growth, https://earth5r.org/esg-opportunities-for-indian-business-growth/ (accessed July 13, 2025).

Sustainability Reporting (BRSR) and rising green bond markets are encouraging greater ESG transparency.[534]

The Green Bond market is one such rapidly growing area in the field of Green Finance.[535] According to Bloomberg, green bond sales from corporates and governments, which climbed to $575 billion, a step up from 2022 and just beating 2021's $573 billion figure.[536] Not only green bonds, but issuance of social bonds[537] are closely related to it. Its sales in 2023 were about $135 billion.[538] Apart from this, organisations such as the International Bank of Reconstruction & Development (IBRD)[539] are also major contributors to the issuance of sustainability bonds. In fact, the IBRD was responsible for the largest sustainability bonds issued in 2023, at $5 billion.[540] India also has made its debut in Sovereign Green Bonds in the year 2023 with the maiden Sovereign Green Bond (SGrB) auction of Rs. 8,000 crores held in January 2023, got oversubscribed owing to robust demand from various market participants, primarily banks.[541]

Moreover, companies are leveraging CSR not just for compliance but to strengthen community relations, promote employee engagement, and embed ethical supply chain practices, thereby aligning social impact with profitability.[542] Globally, businesses are tapping into new ESG-driven markets through climate innovation, digital ESG platforms, and sustainable product development. For example, IT departments are evolving to integrate sustainability metrics and ethical AI governance, positioning ESG not as a compliance task but as a core operational strategy.[543] This shift has also created new demand for ESG consultancy, auditing, and

[534]EY, Evolving CSR: Integrating Change Management in ESG Strategies, https://www.ey.com/en_lu/insights/sustainability/evolving-csr-integrating-change-management-in-esg-strategies (accessed July 13, 2025).
[535] Dr. Nannette Lindenberg, Definition of Green Finance, *Convention on Biological Diversity* (Apr. 2014), https://www.cbd.int/financial/gcf/definition-greenfinance.pdf (accessed July 13, 2025).
[536] Bloomberg, Green Bonds Reached New Heights in 2023, *Bloomberg Professional* (Apr. 2024), https://www.bloomberg.com/professional/insights/trading/green-bonds-reached-new-heights-in-2023/ (accessed July 13, 2025).
[537] Int'l Cap. Mkt. Ass'n (ICMA), *Social Bond Principles* (June 2020), https://www.icmagroup.org/assets/documents/regulatory/green-bonds/june-2020/social-bond-principlesjune-2020-090620.pdf (accessed July 17, 2025).
[538] Bloomberg, *supra* note 44.
[539]World Bank, International Bank for Reconstruction and Development (IBRD), https://www.worldbank.org/en/who-we-are/ibrd (accessed July 17, 2025).
[540] Bloomberg, *supra* note 44.
[541] Indian Inst. of Banking & Fin., Green Bonds – Role and Scope in India's Financial and Fiscal Landscape, *Bank Quest* (July–Sept. 2023), https://www.iibf.org.in/documents/BankQuest/6.%20.pdf (accessed July 17, 2025)
[542] ESGPro, ESG and Corporate Social Responsibility: A New Business Paradigm, https://esgpro.co.uk/esg-and-corporate-social-responsibility-a-new-business-paradigm/ (accessed July 13, 2025).
[543] TechTarget, 10 Key ESG and Sustainability Trends for Business IT, *TechTarget* (2024), https://www.techtarget.com/searchcio/feature/10-key-ESG-and-sustainability-trends-for-business-IT (accessed July 13, 2025).

compliance software as firms seek to align with stakeholder capitalism.[544] The global ESG market is projected to grow from USD 9.8 billion in 2023 to USD 20.3 billion by 2028, at a CAGR of 15.7 per cent.[545] The ESG consultants in India has accelerated with companies racing to earn a sustainability tag and navigate complex disclosure requirements.[546] The large and mid-sized firms are engaging ESG service providers not only for compliance but also for strategic sustainability transformation.[547]

Globally, the ESG consulting landscape is evolving from reporting assistance to data-driven services, with AI, materiality mapping, and sector-specific benchmarking gaining traction.[548] Investor expectations are also fuelling demand, especially for ESG-aligned data frameworks and climate-risk assessments.[549] In 2024, a UK-based company, Verdantix, estimated that over 40% of ESG consultancy clients are now requesting help with decarbonization strategies and net-zero planning.[550] Moving forward, businesses that approach CSR and ESG as strategic enablers rather than regulatory burdens are likely to lead the way in fostering inclusive growth and environmental resilience.

A multi-pronged policy approach is required to strengthen the CSR and ESG ecosystem in India. The government should introduce a unified regulatory framework that integrates CSR and ESG principles to eliminate overlaps and inconsistencies between existing guidelines issued by regulatory bodies such as the Ministry of Corporate Affairs and SEBI.[551] This would offer businesses a coherent and consistent roadmap for responsible practices and compliance. Mandatory impact assessments for high-value CSR initiatives and ESG disclosures should be institutionalised to ensure that expenditure results in measurable and outcome-oriented

[544] ESGPro, *supra* note 50.
[545] MarketsandMarkets, ESG Advisory Services Market – Global Forecast 2023–2028, *MarketsandMarkets* (2023), https://www.marketsandmarkets.com/Market-Reports/esg-advisory-market-130676561.html (accessed July 13, 2025).
[546] Inductus Group, Consulting in ESG Strategy in 2025 and Beyond, *Inductus* (2024), https://inductusgroup.com/consulting-in-esg-strategy-in-2025-and-beyond/ (accessed July 13, 2025).
[547] ET Bureau, ESG Consultancies on the Rise as Companies Rush to Get Sustainability Tag, *Econ. Times* (June 28, 2024), https://economictimes.indiatimes.com/small-biz/sustainability/esg-consultancies-and-services-on-the-rise-as-companies-rush-to-get-sustainability-tag/articleshow/111101890.cms (accessed July 13, 2025).
[548] KindLink, How the ESG Consultancy Sector Is Evolving, https://www.kindlink.com/news/blog/esg-consulting-how-esg-consultancy-sector-evolving (accessed July 13, 2025).
[549] A-Team Insight, ESG Consultancy Growth Driven by Investor Data Demand, https://a-teaminsight.com/blog/esg-consultancy-growth-driven-by-investor-data-demand/ (accessed July 13, 2025).
[550] Verdantix, The ESG and Sustainability Consulting Market: The Road Ahead, *Verdantix* (2024), https://www.verdantix.com/insights/blog/the-esg-and-sustainability-consulting-market-the-road-ahead (accessed July 13, 2025).
[551] Ministry of Corporate Affairs, *Report of the High-Level Committee on Corporate Social Responsibility 2018* (2019), https://www.mca.gov.in/Ministry/pdf/CSRHLC_13092019.pdf (accessed July 17, 2025).

development aligned with national goals and global benchmarks like the SDGs.[552] Capacity building programs focused on ESG literacy, ethical governance, and sustainability reporting are essential to equip corporates and implementing agencies with the tools needed for effective execution.[553] Incentivising responsible behaviour through tax benefits or preferential treatment in public procurement or green finance could further encourage companies to go beyond minimum compliance.[554] Strengthening public disclosure systems would improve transparency and allow stakeholders, including investors and civil society, to engage meaningfully with corporate sustainability efforts. Aligning ESG and CSR indicators with India's socio-economic priorities while ensuring compatibility with global frameworks like the GRI and UN Global Compact can improve both relevance and global competitiveness.[555] These reforms will help close implementation gaps and foster a culture of genuine corporate responsibility, enabling inclusive growth and environmental sustainability.

## CONCLUSION

The transformation of Corporate Social Responsibility (CSR) from a voluntary initiative to a mandatory statutory obligation under Section 135 of the Companies Act, 2013, has marked a significant shift in India's corporate governance landscape. This legal mandate has institutionalised corporate contributions to societal development, steering businesses towards more structured, accountable, and impactful engagement with social and environmental concerns. The empirical evidence suggests a substantial rise in CSR spending, not only in monetary terms but also in the depth and diversity of initiatives undertaken. These initiatives now span across education, healthcare, skill development, gender equality, rural development, environmental protection, and support for marginalised communities. Judicial pronouncements have further reinforced the ethos of CSR by holding corporations accountable for environmental and social damage, thus signalling the judiciary's commitment to fostering corporate responsibility beyond mere statutory compliance.

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[552] Securities & Exchange Bd. of India, *Business Responsibility and Sustainability Reporting by Listed Entities* (SEBI Circular, 2021), https://www.sebi.gov.in/legal/circulars/apr-2021/business-responsibility-and-sustainability-reporting-by-listed-entities_49721.html (accessed July 17, 2025).

[553] UN Global Compact Network India, Corporate Sustainability in India: An Overview (2020), https://www.globalcompact.in/ (accessed July 17, 2025).

[554] Roy C.K., Overcoming Challenges in Corporate Social Responsibility (CSR) Implementation, *TechCSR* (Aug. 23, 2024), https://techcsr.com/blog/overcoming-challenges-in-corporate-social-responsibility-csr-implementation (accessed July 17, 2025).

[555] Carvalho L., Challenges for ESG, *Lok Jack Glob. Sch. of Bus., Univ. of the W. Indies*, https://lokjackgsb.edu.tt/challenges-esg/

Simultaneously, the emergence of Environmental, Social, and Governance (ESG) frameworks has broadened the scope of corporate accountability. ESG compliance, though currently not uniformly regulated in India, has gained significant momentum due to investor pressure, global best practices, and regulatory developments like SEBI's Business Responsibility and Sustainability Reporting (BRSR) framework. ESG performance is increasingly becoming a determinant of access to capital, investor confidence, brand equity, and long-term business sustainability. The global integration of ESG norms has also triggered a rise in ESG-related consulting services, impact assessment tools, and data analytics, offering new growth avenues for businesses, professionals, and policymakers alike.

However, the path ahead is not without challenges. Issues such as lack of standardised reporting frameworks, inadequate impact assessment mechanisms, regulatory fragmentation, low ESG literacy, and the absence of reliable data continue to hinder the full potential of CSR and ESG frameworks. Addressing these concerns requires harmonisation of reporting standards across sectors, robust monitoring and evaluation systems, institutional capacity-building, stakeholder engagement, and a deeper alignment of sustainability goals with long-term business strategies. India's experience with mandatory CSR and its evolving ESG landscape presents a unique model that other emerging economies can study, customise, and adapt to their own socio-economic contexts. Going forward, CSR and ESG must be seen not just as compliance tools but as integral components of a company's core value system and strategic vision. With the right mix of regulation, innovation, public-private partnerships, and stakeholder participation, these frameworks can effectively drive inclusive growth, environmental resilience, social equity, and global competitiveness.

# FEDERALISM AND POWER-SHARING: LEGAL PATHWAYS TO PREVENTING INTERNAL CONFLICTS

***Arun Kumar N*** [556]

## ABSTRACT

*In an era marked by deep societal cleavages and increasing political fragmentation, federalism and power-sharing emerge as crucial legal mechanisms for conflict prevention and peacebuilding. This paper interrogates the extent to which federal structures and constitutional power-sharing arrangements can serve as pathways to sustainable peace and justice in divided societies. Drawing on comparative constitutional experiences, the study examines how federalism—by allocating powers across multiple levels of government—can mitigate secessionist tendencies, protect minority rights, and accommodate cultural and linguistic diversity. Case studies of India, Canada, and Switzerland demonstrate how cooperative and asymmetrical models of federalism have fostered stability and inclusivity. Conversely, experiences from Bosnia, Nigeria, and Ethiopia highlight the risks of poorly designed or weakly enforced federal structures, where excessive decentralization or elite capture has intensified conflict rather than resolved it. The paper argues that the effectiveness of federalism and power-sharing depends not merely on constitutional text but also on the strength of rule-of-law institutions, fiscal equity, and mechanisms for dispute resolution. Particular emphasis is placed on the role of international law and peace agreements in embedding federal principles in post-conflict societies, as seen in South Africa's transition and the Dayton framework in Bosnia. Ultimately, the research advances three hypotheses: (i) federalism reduces the likelihood of violent conflict by constitutionally recognizing diversity; (ii) power-sharing without strong institutions risks reinforcing fragmentation; and (iii) hybrid and flexible federal arrangements provide the most sustainable pathway to peace in plural societies. The study concludes that federalism, when properly designed and inclusively implemented, is not simply a governance model but a juridical pathway to global solidarity and sustainable peace.*

**Keywords:** Federalism, Power-Sharing, Conflict Prevention, Rule of Law, Sustainable Peace, Global Solidarity

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## INTRODUCTION

The pursuit of peace and justice remains one of the most enduring challenges of modern governance. In a world marked by fragmentation, ethnic cleavages, and political polarization, the question of how to design legal and institutional frameworks that promote solidarity while preserving diversity is more urgent than ever. Among the various constitutional models developed to address this dilemma, **federalism and power-sharing** stand out as significant pathways that seek to reconcile unity with plurality. By distributing powers among multiple levels of government and embedding mechanisms of inclusivity, these frameworks offer legal instruments that can transform potential fault lines of conflict into avenues of cooperation.

The concept of **federalism** goes beyond a mere territorial division of power. It represents a normative commitment to shared sovereignty, wherein both central and sub-national governments derive authority from the constitution. K.C. Wheare famously defined federal government as one "*where the powers of government are divided between a general government and regional governments, each of which is independent within its own sphere*."[557] Federal systems are particularly attractive in deeply divided societies, as they allow for recognition of diverse linguistic, ethnic, or cultural groups while maintaining the integrity of a single state. Similarly, **power-sharing** mechanisms—whether vertical (between central and regional units) or horizontal (among organs of government or communities)—are designed to prevent the monopolization of power and ensure meaningful participation of minorities and marginalized groups in governance.

The relevance of these arrangements becomes particularly clear in contexts where internal conflicts arise from denial of recognition, inequitable resource distribution, or exclusion from decision-making. In such settings, centralization often breeds resistance, while carefully structured decentralization provides a peaceful alternative to secession or violent confrontation. Comparative constitutional experiences underscore this reality: **India's federal framework** has enabled a vast and diverse country to accommodate regional aspirations, though not without challenges;[558] **Canada's asymmetrical autonomy** for Quebec has sustained national unity amidst strong linguistic divides;[559] and **Switzerland's pluralist federalism** stands as a model of successful accommodation of multiple linguistic and cultural groups.[560]

[557] K.C. Wheare, *Federal Government* 10 (Oxford Univ. Press 1963).
[558] Granville Austin, *The Indian Constitution: Cornerstone of a Nation* 186 (Oxford Univ. Press 1966).
[559] Sujit Choudhry, Managing Linguistic Nationalism Through Constitutional Design: Lessons from Canada, 7 *Int'l J. Const. L.* 573 (2007).
[560] Thomas Fleiner, Swiss Federalism: The Transformation of a Federal Model, 32 *Publius: J. Fed.* 97 (2002).

At the same time, federalism and power-sharing are not panaceas. Poorly designed or weakly enforced systems may exacerbate conflict rather than prevent it. The **ethno-federal models of Nigeria and Ethiopia**, for instance, reveal how overemphasis on ethnic divisions within constitutional structures can entrench separatist tendencies.[561] Likewise, the **Dayton Agreement in Bosnia and Herzegovina**, while hailed as a peace accord, created a rigid consociational model that entrenched ethnic divisions and paralyzed governance. As Arend Lijphart, the leading scholar on consociationalism, cautions: "*Power-sharing is not a guarantee of harmony; it is a framework within which groups can negotiate coexistence.*"[562] These examples demonstrate that the success of federalism lies not merely in constitutional text but in the strength of rule-of-law institutions, equitable fiscal arrangements, and the ability of political actors to engage in cooperative federalism.

This paper explores these tensions and possibilities by investigating the role of federalism and power-sharing as legal tools of conflict prevention and peacebuilding. It advances the argument that federalism, when constitutionally entrenched and coupled with robust institutions, can serve as a juridical pathway to peace in fragmented societies. At the same time, it cautions against rigid or purely ethnic federal models, underscoring the need for hybrid, flexible arrangements that balance autonomy with integration. In the words of Dr. B.R. Ambedkar, the chief architect of the Indian Constitution: "*Democracy in India is only top-dressing on an Indian soil, which is essentially undemocratic.*"[563] His warning remains relevant today, reminding us that legal frameworks must be continuously nurtured by political will and inclusivity. In doing so, the paper situates federalism within the broader discourse of global solidarity, emphasizing its potential to transform division into sustainable peace.

## LITERATURE REVIEW

The literature on federalism and power-sharing is vast, spanning constitutional theory, political science, and conflict-resolution studies. This review situates the current discourse by analysing key thinkers, comparative experiences, and contemporary critiques. It identifies how federalism and power-sharing have been theorized as mechanisms of governance, as instruments of accommodation, and as potential risk factors when misapplied.

### 1. Classical Theories of Federalism

[561] Assefa Fiseha, *Federalism and the Accommodation of Diversity in Ethiopia* (Wolf Legal Publishers 2006).
[562] Arend Lijphart, *Patterns of Democracy: Government Forms and Performance in Thirty-Six Countries* 31 (Yale Univ. Press 1999).
[563] B.R. Ambedkar, *Constituent Assembly Debates*, vol. VII (Nov. 25, 1949) (India).

The foundational scholarship on federalism is often traced to K.C. Wheare, whose work *Federal Government* (1963) defines federalism as a constitutional division of powers between two levels of government, each acting directly on the people within its sphere.[564] Where's emphasis on legal independence shaped early constitutional designs but has been critiqued for being too rigid in contexts where flexibility is essential.

William Riker advanced the theory by linking federalism to bargains between central elites and regional units.[565] Riker's federal bargain theory underscores the political foundations of federalism, suggesting that federal structures are less about legal text and more about power negotiations. Later scholars such as Daniel Elazar emphasized the *covenantal* nature of federalism, describing it as a partnership based on consent and trust.[566]

**2. Power-Sharing and Consociationalism**

Parallel to federalism, literature on power-sharing emerged, particularly in divided societies. Arend Lijphart's seminal theory of **consociational democracy** advocates for grand coalitions, proportional representation, cultural autonomy, and minority vetoes as mechanisms to sustain peace in plural societies.[567] His model, grounded in the Dutch experience, has influenced peace processes worldwide, from Lebanon to Northern Ireland.

Critics, however, argue that consociationalism risks freezing divisions rather than overcoming them. Donald Horowitz, for instance, contends that such systems entrench ethnic identities by institutionalizing group representation, thereby obstructing integration.[568] This debate—between accommodation (Lijphart) and integration (Horowitz)—remains central to discussions of power-sharing.

**3. Comparative Constitutional Experiences**

The literature also draws heavily on comparative federal systems:

- **India**: Scholars such as Granville Austin highlight how the Indian Constitution's "quasi-federal" structure was designed to ensure unity while recognizing diversity.[569] The judiciary, through landmark cases like *S.R. Bommai v. Union of India* (1994), reinforced federalism as part of the basic structure, thereby limiting arbitrary dismissal of state governments.[570]

[564] K.C. Wheare, *Federal Government* 10 (Oxford Univ. Press 1963).
[565] William H. Riker, *Federalism: Origin, Operation, Significance* 12 (Little, Brown & Co. 1964).
[566] Daniel J. Elazar, *Exploring Federalism* (Univ. of Alabama Press 1987).
[567] Arend Lijphart, *Democracy in Plural Societies* (Yale Univ. Press 1977).
[568] Donald L. Horowitz, *Ethnic Groups in Conflict* 601 (Univ. of California Press 1985).
[569] Granville Austin, *The Indian Constitution: Cornerstone of a Nation* (Oxford Univ. Press 1966).
[570] *S.R. Bommai v. Union of India*, AIR 1994 SC 1918 (India).

- **Canada**: Canadian federalism is frequently analysed for its asymmetrical accommodation of Quebec. Sujit Choudhry argues that Canada demonstrates the resilience of flexible arrangements, where granting autonomy strengthens unity.[571]
- **Switzerland**: Literature on Swiss federalism emphasizes its pluralist model, where cantons enjoy high autonomy while maintaining strong cooperative federalism. Thomas Fleiner notes that Switzerland exemplifies successful multicultural governance.[572]
- **Nigeria and Ethiopia**: African ethno-federal models are widely studied for their challenges. Assefa Fiseha's analysis of Ethiopia shows how rigid ethno-federalism facilitated secessionist pressures, culminating in conflict.[573] Similarly, Nigerian federalism, though constitutionally strong, is often undermined by elite capture and central dominance over resources.[574]

**4. Federalism in Post-Conflict Societies**

The design of federal institutions in post-conflict contexts has been the subject of extensive analysis. Brendan O'Leary and John McGarry advocate for federalism as a peacebuilding tool, arguing that it offers institutional safeguards for minorities.[575] The Dayton Peace Agreement in Bosnia and Herzegovina, however, is often cited as a cautionary tale: while it ended war, it entrenched ethnic fragmentation and led to chronic governance paralysis.[576]

South Africa provides a contrasting example, where scholars like Heinz Klug show that constitutional negotiations combined federal principles with strong national institutions to promote reconciliation.[577] This comparative evidence demonstrates that the effectiveness of federalism in conflict prevention depends not only on design but also on enforcement and political culture.

**5. Contemporary Critiques**

Recent scholarship critiques the romanticization of federalism. Michael Burgess notes that federal systems may perpetuate inequality when fiscal arrangements disproportionately benefit

[571] Sujit Choudhry, Managing Linguistic Nationalism Through Constitutional Design: Lessons from Canada, 7 *Int'l J. Const. L.* 573 (2007).
[572] Thomas Fleiner, Swiss Federalism: The Transformation of a Federal Model, 32 *Publius: J. Fed.* 97 (2002).
[573] Assefa Fiseha, *Federalism and the Accommodation of Diversity in Ethiopia* (Wolf Legal Publishers 2006).
[574] Rotimi Suberu, *Federalism and Ethnic Conflict in Nigeria* (U.S. Inst. of Peace 2001).
[575] John McGarry & Brendan O'Leary, *The Politics of Ethnic Conflict Regulation* (Routledge 1993).
[576] David Chandler, *Bosnia: Faking Democracy After Dayton* (Pluto Press 2000).
[577] Heinz Klug, *Constituting Democracy: Law, Globalism and South Africa's Political Reconstruction* (Cambridge Univ. Press 2000).

wealthier regions.[578] Similarly, Cheryl Saunders stresses that federalism must be evaluated not only on constitutional texts but on lived practices of governance.[579]

The literature also engages with the global turn toward hybridity—mixing federal, unitary, and consociational elements. Yash Ghai argues that hybrid constitutional arrangements are often more sustainable in fragile states, as they combine local autonomy with strong central oversight.[580] This hybrid approach reflects the reality that no single model of federalism can be transplanted wholesale into conflict-ridden societies.

## COMPARATIVE CASE-LAW ANALYSIS

The judicial interpretation of federalism and power-sharing has played a decisive role in shaping their success or failure. While constitutional texts provide the formal framework, it is through judicial enforcement and political practice that federal systems evolve. This section undertakes a comparative analysis of select jurisdictions where courts and constitutional arrangements have either strengthened federal resilience (India, Canada, Switzerland) or exacerbated fragility (Ethiopia, Nigeria, Bosnia).

### 1. INDIA: Judicial Safeguards for Federalism

India's federal system has been characterized as "quasi-federal," balancing strong central authority with substantial powers for the states.[581] The Supreme Court of India has been instrumental in protecting this balance. In *State of West Bengal v. Union of India* (1963), the Court rejected the notion that states had sovereignty comparable to the Union, affirming India as an indestructible union of destructible states.[582]

Yet, in *S.R. Bommai v. Union of India* (1994), the Court shifted towards a more balanced interpretation. It curtailed the Union's misuse of Article 356 (President's Rule), holding that federalism forms part of the Constitution's "basic structure" and therefore cannot be arbitrarily undermined.[583] This decision underscored judicial commitment to limiting central dominance, thereby strengthening cooperative federalism. Moreover, in fiscal disputes such as *Union of India v. H.S. Dhillon* (1972), the Court emphasized constitutional text while still preserving the

[578] Michael Burgess, *Comparative Federalism: Theory and Practice* (Routledge 2006).
[579] Cheryl Saunders, The Concept of Cooperative Federalism, *Pub. L. Rev.* 205 (2002).
[580] Yash Ghai, *Autonomy and Ethnicity: Negotiating Competing Claims in Multi-Ethnic States* (Cambridge Univ. Press 2000).
[581] Granville Austin, *The Indian Constitution: Cornerstone of a Nation* (Oxford Univ. Press 1966).
[582] *State of W.B. v. Union of India*, AIR 1963 SC 1241 (India).
[583] *S.R. Bommai v. Union of India*, AIR 1994 SC 1918 (India).

Union's taxation powers, reflecting the delicate balance between central strength and state autonomy.[584]

Thus, Indian case law reflects a gradual move from centralization to recognition of federalism as a constitutional guarantee, helping prevent internal conflicts by respecting state autonomy within a united framework.

**2. CANADA: Asymmetry and Judicial Mediation**

Canadian federalism stands out for its asymmetrical accommodation of Quebec's distinct linguistic and cultural identity. The Supreme Court of Canada has played a pivotal role in mediating unity and diversity.

In the *Reference re Secession of Quebec* (1998), the Court famously ruled that Quebec could not unilaterally secede under Canadian or international law.[585] However, it acknowledged that a clear democratic mandate for secession would impose a duty on all parties to negotiate, blending legal rigidity with political flexibility. This nuanced reasoning demonstrated how judicial interpretation can defuse secessionist conflicts without denying cultural autonomy.

Earlier, in *Reference re Anti-Inflation Act* (1976), the Court upheld federal emergency powers while stressing their exceptional nature, reinforcing the principle of balance between federal and provincial competences.[586] Similarly, cases on linguistic rights, such as *Ford v. Quebec* (1988), confirmed that federalism is not merely territorial but also cultural, protecting minority rights through constitutional adjudication.[587]

Canadian jurisprudence illustrates how courts can sustain federalism by legitimizing asymmetry while binding diverse regions into a coherent constitutional order.

**3. SWITZERLAND: Federalism by Consensus**

Switzerland's federalism is less litigation-driven and more consensus-based, but judicial practice still reinforces cantonal autonomy. The Swiss Federal Tribunal has consistently safeguarded cantonal powers within the federal framework. For example, in cases concerning fiscal allocation and educational autonomy, the Tribunal has emphasized subsidiarity, ensuring that local matters remain under cantonal jurisdiction unless explicitly assigned to the Confederation.[588]

[584] *Union of India v. H.S. Dhillon*, AIR 1972 SC 1061 (India).
[585] *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 (Can.).
[586] *Reference re Anti-Inflation Act*, [1976] 2 S.C.R. 373 (Can.).
[587] *Ford v. Quebec (Att'y Gen.)*, [1988] 2 S.C.R. 712 (Can.).
[588] Thomas Fleiner, Swiss Federalism: The Transformation of a Federal Model, 32 *Publius* 97 (2002).

Switzerland's success lies not only in judicial interpretation but also in its political culture of direct democracy and consensus-building. Constitutional referenda at both federal and cantonal levels ensure that federalism is lived rather than merely adjudicated.[589] This demonstrates that judicial enforcement, when combined with participatory structures, strengthens federalism as a peace mechanism in diverse societies.

**4. ETHIOPIA: Ethno-Federalism and Secession**

Ethiopia represents a cautionary tale of federalism gone wrong. Its 1995 Constitution established an explicitly ethno-federal model, granting "nations, nationalities, and peoples" the right to secede (Article 39).[590] Unlike India or Canada, where courts mediated secessionist claims, Ethiopia's legal text created a constitutional entitlement to fragmentation.

Judicial institutions, including the House of Federation (the constitutional interpreter), lacked independence and were heavily politicized.[591] As a result, when Tigray invoked its right to secession in 2020, there was no credible legal mechanism to mediate the dispute, leading directly to armed conflict. Ethiopia illustrates how constitutionalizing ethnicity without robust institutions and judicial safeguards can accelerate disintegration rather than prevent conflict.

**5. NIGERIA: Centralization and Elite Capture**

Nigeria's federal constitution appears strong on paper, granting extensive powers to states. However, in practice, federalism has been hollowed out by central dominance and judicial weakness.

In cases concerning resource control, such as *Attorney General of the Federation v. Attorney General of Abia State* (2002), the Supreme Court of Nigeria upheld the federal government's control over offshore resources, limiting states' fiscal autonomy.[592] This ruling reinforced perceptions of unfair centralization, especially in oil-producing regions, fuelling resentment and insurgency in the Niger Delta.

Moreover, frequent military interventions in politics weakened judicial independence, leaving courts unable to protect federalism against executive overreach.[593] Nigeria's example highlights how the absence of credible judicial guardianship can turn federalism into a façade, exacerbating rather than mitigating internal conflicts.

**6. BOSNIA AND HERZEGOVINA: Entrenched Division Under Dayton**

[589] Vicki C. Jackson, Comparative Constitutional Federalism and Democracy, 2 *Int'l J. Const. L.* 91 (2001).
[590] *Constitution of the Federal Democratic Republic of Ethiopia*, art. 39 (1995).
[591] Assefa Fiseha, *Federalism and the Accommodation of Diversity in Ethiopia* (2006).
[592] *Att'y Gen. of the Fed'n v. Att'y Gen. of Abia State*, [2002] NGSC 4 (Nigeria).
[593] Rotimi Suberu, *Federalism and Ethnic Conflict in Nigeria* (2001).

The Dayton Peace Agreement (1995) established Bosnia and Herzegovina as a consociational federation, dividing power between two entities—the Federation of Bosnia and Herzegovina and Republika Srpska. While Dayton ended war, its rigid ethnic federalism institutionalized division.

The Constitutional Court of Bosnia and Herzegovina, while empowered to interpret the Constitution, has often struggled with political deadlock. In *Constituent Peoples' Case* (2000), the Court attempted to strengthen equality among ethnic groups, but implementation was obstructed by political elites entrenched in the Dayton structure.[594] International oversight by the Office of the High Representative further undermined local ownership, creating a system of dependency rather than genuine federalism. Bosnia demonstrates that federalism without political culture of cooperation and strong judicial enforcement risks entrenching fragmentation, perpetuating conflict in frozen form.

These comparative case studies reveal that federalism and power-sharing succeed when courts act as impartial guardians of constitutional balance (India, Canada, Switzerland) and fail when judicial institutions are weak or political elites exploit federal structures (Ethiopia, Nigeria, Bosnia). The key lesson is that federalism is not merely a constitutional blueprint but a lived reality, sustained through robust institutions, judicial enforcement, and political commitment to solidarity.



## FEDERALISM AND POWER-SHARING- AN ANALYSIS

The doctrines surrounding federalism and power-sharing reveal a persistent tension: they are simultaneously celebrated as mechanisms for unity in diversity and criticized as potential accelerants of fragmentation. This section undertakes a doctrinal exploration of when federalism succeeds, when it fails, and what safeguards are normatively necessary for sustainable peace.

### 1. Federalism as a Normative Doctrine of Unity in Diversity

At its core, federalism is grounded in the principle of **unity in diversity**. Unlike unitary systems that prioritize homogeneity, federal systems constitutionally entrench diversity by distributing power. Where's classical doctrine emphasized legal independence of federal and state governments.[595] Yet, modern scholars reinterpret federalism less as a rigid legal division and more as a flexible doctrine designed to recognize difference while maintaining integration.

[594] Constituent Peoples' Case, U-5/98 (Bosn. Const. Ct. 2000).
[595] K.C. Wheare, *Federal Government* (Oxford Univ. Press 1963).

The "basic structure doctrine" in India exemplifies this normative elevation. By holding federalism as part of the immutable constitutional core, the judiciary transformed it into a safeguard against majoritarian overreach.[596] Similarly, Canadian jurisprudence on secession reframes federalism as a living principle—flexible enough to accommodate diversity while preventing disintegration.[597] These examples highlight that federalism is not simply an allocation of powers but a doctrine of constitutional morality.

**2. The Doctrine of Power-Sharing and its Limits**

Power-sharing doctrines, particularly consociationalism, are premised on the recognition that deeply divided societies require structured inclusivity. Lijphart's four pillars—grand coalitions, proportionality, cultural autonomy, and minority veto—provide doctrinal tools to prevent domination by any single group.[598]

However, critiques reveal doctrinal weaknesses. Horowitz argues that such arrangements ossify divisions, creating incentives for elites to mobilize identity politics perpetually.[599] The Dayton model in Bosnia is a case in point: rather than transcending ethnic divides, its rigid consociational provisions institutionalized them.[600] Thus, while power-sharing as a doctrine is essential in fragile contexts, it must remain dynamic to avoid entrenchment of fragmentation.

**3. Doctrinal Failures: When Federalism Exacerbates Conflict**

The failures of Ethiopia and Nigeria demonstrate the doctrinal risks of federalism:

- **Over-constitutionalizing of identity:** Ethiopia's Article 39, granting explicit secession rights, turned federalism into a legal pathway to disintegration.[601]
- **Central dominance without judicial protection:** Nigeria's federalism failed doctrinally because courts were unwilling or unable to safeguard state autonomy against elite capture.[602]

These failures underscore that federalism, if rigid or politically manipulated, can generate centrifugal rather than centripetal forces.

**4. Safeguards for Successful Federalism**

Doctrinal analysis suggests three essential safeguards for federalism to succeed in conflict prevention:

[596] *S.R. Bommai v. Union of India*, AIR 1994 SC 1918 (India).
[597] *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 (Can.).
[598] Arend Lijphart, *Democracy in Plural Societies* (Yale Univ. Press 1977).
[599] Donald L. Horowitz, *Ethnic Groups in Conflict* 601 (Univ. of California Press 1985).
[600] David Chandler, *Bosnia: Faking Democracy After Dayton* (Pluto Press 2000).
[601] *Constitution of the Federal Democratic Republic of Ethiopia*, art. 39 (1995).
[602] *Att'y Gen. of the Fed'n v. Att'y Gen. of Abia State*, [2002] NGSC 4 (Nigeria).

**(i) Judicial Guardianship:** Courts must act as impartial referees. India's *Bommai* case and Canada's *Secession Reference* illustrate how judicial doctrines can mediate unity and diversity. Without such guardianship, as Ethiopia shows, federal provisions may become destabilizing.

**(ii) Fiscal Federalism:** Equitable distribution of resources is a doctrinal necessity. Michael Burgess highlights that fiscal asymmetry often undermines federal bargains, leading to resentment.[603] Mechanisms like India's Finance Commission or Canada's equalization payments institutionalize solidarity, making federalism materially meaningful.

**(iii) Cooperative Federalism:** Modern doctrine stresses cooperation over competition. Cheryl Saunders argues that cooperative federalism transforms federalism from a zero-sum allocation into a partnership, preventing constitutional deadlock.[604] Switzerland's success demonstrates the power of cooperative mechanisms, such as inter-cantonal councils and referenda.

**5. Normative Critique: Federalism as Both Remedy and Risk**

Doctrinally, federalism is neither inherently stabilizing nor destabilizing—it depends on political context and institutional design. Critics note three risks:

- **Fragmentation Risk:** Overemphasis on ethno-territorial autonomy can embolden secessionist movements.[605]
- **Centralization Risk:** Strong central dominance, unchecked by courts, reduces federalism to symbolic status, fuelling discontent (Nigeria).[606]
- **Elite Capture:** Federal bargains may serve political elites rather than communities, turning federalism into a tool for power consolidation.[607]

Normatively, federalism succeeds when it institutionalizes **inclusive solidarity**, not when it rigidly divides or centralizes power.

**6. Towards a Hybrid Doctrinal Model**

Recent scholarship advocates for **hybrid models** that blend federal, unitary, and consociationalism features. Yash Ghai suggests that hybrid systems offer flexibility necessary for fragile states, combining autonomy with national oversight.[608] This doctrinal innovation allows federalism to evolve beyond binary classifications, tailoring arrangements to local contexts.

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[603] Michael Burgess, *Comparative Federalism: Theory and Practice* (Routledge 2006).
[604] Cheryl Saunders, The Concept of Cooperative Federalism, *Pub. L. Rev.* 205 (2002).
[605] Assefa Fiseha, *Federalism and the Accommodation of Diversity in Ethiopia* (Wolf Legal Publishers 2006).
[606] Rotimi Suberu, *Federalism and Ethnic Conflict in Nigeria* (U.S. Inst. of Peace 2001).
[607] Brendan O'Leary, *Federalism, Secession, and the Future of Ethnic Conflicts* (Univ. of Pennsylvania 2001).
[608] Yash Ghai, *Autonomy and Ethnicity: Negotiating Competing Claims in Multi-Ethnic States* (Cambridge Univ. Press 2000).

A hybrid model is normatively justified on three grounds:

- It reflects the **plural realities** of societies rather than imposing rigid models.
- It creates **institutional safety nets**, ensuring that neither central dominance nor fragmentation overwhelms the system.
- It emphasizes **solidarity as a constitutional value**, aligning with global aspirations of peace and justice.

Doctrinal analysis demonstrates that federalism and power-sharing are neither inherently virtuous nor inherently flawed. Their success depends on judicial guardianship, equitable fiscal design, cooperative mechanisms, and hybrid flexibility. Ultimately, federalism must be understood as a constitutional doctrine of solidarity—capable of transforming diversity from a source of conflict into a foundation of sustainable peace.

## ANALYSIS AND RECOMMENDATIONS

The comparative and doctrinal survey reveals that federalism and power-sharing are double-edged instruments. When effectively designed and implemented, they foster inclusivity, mitigate secessionist tendencies, and provide institutional frameworks for peace. When poorly constructed or politically manipulated, they intensify fragmentation and conflict. This section analyses the structural weaknesses that undermine federalism and power-sharing and proposes reforms to strengthen them as legal pathways toward sustainable peace and justice.

### 1. Reaffirming Judicial Guardianship

Analysis across jurisdictions demonstrates that courts are the backbone of functional federalism. In India, *S.R. Bommai* restrained arbitrary dismissals of state governments, while in Canada, the *Secession Reference* balanced legal principles with democratic legitimacy.[609] By contrast, Ethiopia's politicized House of Federation and Nigeria's deferential Supreme Court illustrate how judicial passivity undermines federal integrity.

**Recommendation:** Strengthen judicial independence and empower constitutional courts to act as neutral guardians of federal bargains. This includes:

- Entrenching federalism and power-sharing as non-amendable constitutional principles (as India has done).
- Establishing clear dispute-resolution procedures, such as Germany's Federal Constitutional Court model, which has peacefully mediated federal-state conflicts.[610]

[609] *S.R. Bommai v. Union of India*, AIR 1994 SC 1918 (India); *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 (Can.).
[610] Donald P. Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany* (Duke Univ. Press 1997).

- Building capacity for judicial reasoning that blends legal certainty with political pragmatism, thereby preventing secessionist crises from escalating into violence.

**2. Designing Equitable Fiscal Federalism**

Fiscal disputes lie at the heart of federal tensions. Nigerian states' resentment over central control of oil revenues exemplifies how fiscal inequities fuel insurgency.[611] Conversely, Canada's equalization payments and India's Finance Commission demonstrate how redistribution can institutionalize solidarity.[612]

**Recommendation:** Create robust fiscal federalism mechanisms that ensure:

- **Vertical equity** (fair division between central and sub-national units).
- **Horizontal equity** (fairness across sub-national units).
- **Transparency and accountability** in revenue sharing, monitored by independent commissions.

Reform must also address natural resource governance. As the Niger Delta crisis shows, excluding local communities from resource benefits delegitimizes federalism. Embedding revenue-sharing formulas in constitutional text—subject to judicial review—ensures predictability and fairness.

**3. Building Cooperative Federalism Institutions**

Competitive federalism often produces paralysis and conflict. Switzerland's success lies in institutionalized cooperation through inter-cantonal councils and referenda, which cultivate solidarity.[613] India's Inter-State Council, though underutilized, demonstrates the potential for dialogue-driven conflict management.

**Recommendation:** Institutionalize cooperative mechanisms such as:

- Regular inter-governmental councils for negotiation.
- Mandatory consultation processes on legislation affecting state powers.
- Joint committees for fiscal, environmental, and minority-rights issues.

Embedding cooperation prevents federalism from becoming a zero-sum struggle and transforms it into a partnership.

**4. Avoiding Ethnic Over-Constitutionalising**

[611] *Att'y Gen. of the Fed'n v. Att'y Gen. of Abia State*, [2002] NGSC 4 (Nigeria).

[612] Sujit Choudhry, Managing Linguistic Nationalism Through Constitutional Design: Lessons from Canada, 7 *Int'l J. Const. L.* 573 (2007).

[613] Thomas Fleiner, Swiss Federalism: The Transformation of a Federal Model, 32 *Publius* 97 (2002).

Ethiopia's constitutional right to secession epitomizes the dangers of over-constitutionalizing ethnic identity.[614] Rather than fostering inclusion, such provisions provide legal pathways to fragmentation. By contrast, Canada's secession jurisprudence illustrates the merit of **conditional flexibility**—recognizing group aspirations while binding them within a framework of negotiation.[615]

**Recommendation:** Draft constitutional provisions that:

- Guarantee cultural autonomy and minority rights without granting absolute secession rights.
- Establish negotiation mechanisms for identity-based grievances.
- Emphasize shared sovereignty and mutual dependence rather than absolute autonomy.

This balance ensures recognition without legitimizing disintegration.

**5. Integrating Power-Sharing with Federalism**

Power-sharing and federalism are often treated separately, yet their integration enhances stability. For instance, Belgium combines federalism with consociationalism principles, creating layered inclusivity.[616] Bosnia's failure stems from over-reliance on rigid consociationalism without effective federal cooperation.[617]

**Recommendation:** Adopt hybrid constitutional models that integrate:

- Territorial autonomy (federalism).
- Group inclusion in decision-making (consociationalism).
- Strong dispute-resolution institutions.

This integrated model mitigates risks of exclusion and entrenched division, allowing federalism to evolve into a peace framework.

**6. Embedding Federalism in Democratic Culture**

The comparative study shows that no legal framework succeeds without supportive political culture. Swiss federalism thrives because consensus and compromise are embedded in political practice. Conversely, Bosnia illustrates how elite intransigence can paralyze even well-designed institutions.

**Recommendation:** Promote federal culture through:

- Civic education emphasizing solidarity and pluralism.

[614] *Constitution of the Federal Democratic Republic of Ethiopia*, art. 39 (1995).
[615] *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 (Can.).
[616] Kris Deschouwer, *The Politics of Belgium: Governing a Divided Society* (Palgrave 2012).
[617] David Chandler, *Bosnia: Faking Democracy After Dayton* (Pluto Press 2000).

- Electoral systems encouraging coalition-building (e.g., proportional representation with integrative features).
- Grassroots participation in federal decision-making, thereby democratizing federal bargains.

Federalism must become a lived experience, not just a legal design.

**7. Global And Regional Support for Federal Experiments**

Federalism in fragile states often requires international scaffolding. In South Africa, international actors supported inclusive constitutional negotiations, while in Bosnia, external imposition undermined legitimacy.[618]

**Recommendation:** International organizations should:

- Support federal design through technical expertise.
- Provide transitional guarantees (such as fiscal support).
- Avoid excessive external control that erodes local ownership.

The balance lies in enabling domestic actors to shape their federal arrangements while providing external guardrails for peace. The analysis underscores that federalism and power-sharing succeed when embedded within judicial guardianship, equitable fiscal systems, cooperative institutions, and hybrid inclusivity. They fail when designed rigidly, manipulated by elites, or unsupported by democratic culture. For fragmented societies, federalism must be reimagined not merely as a structural division of powers but as a constitutional doctrine of solidarity. By grounding federal bargains in inclusivity, cooperation, and fairness, states can transform potential conflict into sustainable peace.

## CONCLUSION

The pursuit of sustainable peace in fragmented societies is inseparable from the design and implementation of constitutional frameworks that balance diversity with unity. Federalism and power-sharing, as demonstrated through comparative experiences, emerge not merely as technical arrangements but as **normative projects of solidarity**. They create institutional spaces for recognition, participation, and accommodation—values indispensable to the prevention of conflict and the nurturing of justice. Yet, their success depends on more than the ink of constitutional text; it requires the cultivation of political will, judicial vigilance, and civic culture.

[618] Heinz Klug, *Constituting Democracy: Law, Globalism and South Africa's Political Reconstruction* (Cambridge Univ. Press 2000).

The comparative study affirms that **judicial guardianship** is the cornerstone of effective federalism. Courts act as mediators when federal bargains are tested by crises. In India, the *S.R. Bommai* ruling preserved federal integrity by curbing arbitrary dismissals of state governments.[619] In Canada, the *Secession Reference* illustrated how judicial reasoning can uphold constitutional principles while addressing democratic aspirations.[620] Conversely, Ethiopia and Nigeria reveal the perils of judicial passivity, where constitutional texts were unable to restrain political opportunism. Thus, the constitutional court is not merely an arbiter of disputes but a guardian of solidarity.

Equally significant is the architecture of **fiscal federalism**. Federal systems falter when resource distribution is inequitable. The Niger Delta crisis in Nigeria, fueled by grievances over oil revenues, is emblematic of this tension.[621] By contrast, Canada's equalization payments demonstrate how financial redistribution can transform potential resentment into institutionalized solidarity.[622] Fiscal federalism, therefore, is not only an economic necessity but also a peace-building tool. Embedding equitable sharing mechanisms into constitutional design safeguards unity while respecting regional needs.

The study further underscores the importance of **cooperative institutions**. Federalism is not sustainable if reduced to rigid territorial divisions; it must be animated by continuous dialogue. Switzerland exemplifies how referenda and inter-cantonal councils entrench a culture of negotiation.[623] India's Inter-State Council, though underutilized, highlights the potential of consultative bodies to pre-empt conflict. Institutionalized cooperation transforms federalism from a competitive contest into a collaborative partnership.

Another critical lesson lies in the **management of identity politics**. Ethiopia's right-to-secession provision reflects how over-constitutionalizing of ethnic autonomy can destabilize unity.[624] By contrast, Canada's conditional flexibility toward Quebec—acknowledging aspirations while binding them within a legal framework—demonstrates how recognition can coexist with integrity.[625]The principle here is clear: constitutions must protect cultural and

[619] *S.R. Bommai v. Union of India*, AIR 1994 SC 1918 (India).
[620] *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 (Can.).
[621] *Att'y Gen. of the Fed'n v. Att'y Gen. of Abia State*, [2002] NGSC 4 (Nigeria).
[622] Sujit Choudhry, Managing Linguistic Nationalism Through Constitutional Design: Lessons from Canada, 7 *Int'l J. Const. L.* 573 (2007).
[623] Thomas Fleiner, Swiss Federalism: The Transformation of a Federal Model, 32 *Publius* 97 (2002).
[624] *Constitution of the Federal Democratic Republic of Ethiopia*, art. 39 (1995).
[625] *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 (Can.).

linguistic autonomy but stop short of offering secession as a routine solution. This ensures that diversity is celebrated without legitimizing disintegration.

The integration of **power-sharing with federalism** also emerges as a key to stability. Belgium demonstrates that layered inclusivity—territorial federalism combined with consociational guarantees—can sustain unity amidst sharp divides.[626] Bosnia, however, reveals the risks of excessive rigidity, where consociational federalism froze ethnic divisions rather than healing them.[627] The future of peace-building lies in hybrid models that embed inclusivity within flexible federal designs, capable of adapting to changing political realities.

Finally, the research highlights that federalism cannot succeed without a **supportive democratic culture**. Institutions alone are insufficient if political actors lack the commitment to compromise. Switzerland's consensus-driven politics sustain its pluralist federalism, while Bosnia's elite intransigence has paralyzed governance. This finding validates B.R. Ambedkar's caution that democracy is fragile without a cultural foundation of inclusivity and respect.[628] Therefore, civic education, participatory institutions, and electoral systems that encourage coalition-building must complement constitutional text.

Looking ahead, federalism and power-sharing must be understood as **dynamic frameworks** rather than static solutions. The constitutional design should be adaptable, responsive to new challenges, and supported by robust institutions. In a global order marked by rising populism, ethno-nationalism, and inequality, these frameworks are vital not only for divided states but also for strengthening solidarity within established democracies. Moreover, the international community has a role to play: supporting federal experiments with technical expertise and transitional guarantees while respecting local ownership of constitutional bargains.

In conclusion, federalism and power-sharing embody the possibility of transforming diversity into a source of strength rather than division. They create legal and institutional structures that do not eliminate conflict but **channel it into peaceful negotiation**. The comparative evidence makes one truth unmistakable: federalism is not merely about the division of powers but about the construction of solidarity. When nurtured by judicial integrity, fiscal fairness, cooperative institutions, and democratic culture, federalism becomes not just a constitutional mechanism but a **pathway to sustainable peace and justice**.

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[626] Kris Deschouwer, *The Politics of Belgium: Governing a Divided Society* (Palgrave 2012).
[627] David Chandler, *Bosnia: Faking Democracy After Dayton* (Pluto Press 2000).
[628] B.R. Ambedkar, *Constituent Assembly Debates*, vol. XI (Nov. 25, 1949) (India).

# A STUDY ON THE MISUSE OF LOOPHOLE IN THE CHILD LABOUR (PROHIBITION AND REGULATION) ACT, 1986

***Nidharshanaa G***[629]

## ABSTRACT

*Child Labour is a menace that denies the child his fundamental rights, to dignified life and protection from forced and bondage labour. The role of Trade union is expected to be at the forefront to curb this evil, in turn they only aim to regularize the child labour and the conditions under which they work. The estimates of child labour are still high, but the statistics does not include girl children who work in the household sectors, who are invisible in nature. The Child Labour (Prohibition and Regulation) Act, 1986 is not making a complete ban on child labour rather it is regularizing child labour and the many International Conventions are also in favour of regularization rather than prohibition. The major loophole that the Act poses i.e. Traditional knowledge or family business is highly misused by the employers to increase the child labour and they also give poverty and voluntariness of the children and their family a reason for employing them. This paper aims to deal with the menace faced by the children, the loophole of family business and their misuse by the employer and the role of Trade Union.*

**Keywords:** Child Labour, Family Business, Consumer role, Invisible Labour

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## INTRODUCTION

Child labour is a work that deprives a child his /her childhood that is sought to be protected in the Article 39(e) and (f) of the Indian Constitution. There are enormous factors that contribute to child labour, the predominant factor at face is poverty. But poverty is stated to include people who could not afford to meet their basic necessity, and lack ability to meet the meagre standard of living. As per 2011 census there were 259.6 million children working between the age of 5 -14 years. Among the children age group 5-17 years 9% boys and 7% are girls. The number may not be the same had the count is deeply included the domestic work carried by young girl children. Harbajans Committee report that deals with the exploitation and ill conditions of child labour was not published, according to some officials it throws a bad light on lacking enforcement mechanism in child labour prevention and regulation Act, but publishing the report after it is addressed makes the report meaningless. Kothari took efforts to publish the report.

**Role of Trade Union:**

The role of Trade union in curbing the menace of child labour is a big question. The trade union is concerned with the wages the adult labour gets but not with children working in non-hazardous industries. Even Article 23 of the Constitution prohibits children working in hazardous industries and not a blanket ban on child labour. When literally interpreted the prohibition is aimed only against hazardous works. Sardar Bhopinder Singh Man in the constituent assembly debate stated that Article 23 is inserted so that no person shall be made to work against their will. But the children born to labours are refused any choice and they are forced to work and continue the work as their parents do. It also aims to ensure labours be paid adequate wages, but the major reason why children are employed is because they are paid half or quarter the wages an adult labour is paid. Usually in tea factories, those women who pluck leaves are allowed to have children tied to them, as they see their mother plucking leaves, they tend to help them mother that adds up the leaves plucked, and only where the child reaches twelve years, they are given separate basket. The major reason children are preferred is that they cannot form trade union and they don't go for strike like adults do. The existing trade union is also concerned with the working conditions of children but not with children being labours. They don't want to ban child labour, which is considered to be a source of income to the family. Shri T.T. Krishnamachari was of the view that certain forms of abuses are existing but that may in future be dealt more effectively by legislature that is particularly dedicated for the same, but matters listed in Article 23 ought to be dealt explicitly by the Constitution. This

view is true, had the Constitution prohibited child labour completely it could have been dealt with iron hands and by the 75th year after coming up with Constitution the Country is struggling with the same problem. Section 21 of the Trade union Act, allows members to be fifteen years of age but they cannot hold office bearers post. This section 21 allows child labour directly. In order to be member a person ought to be fifteen years. A child means any person below the age of 18 years, but the Act allows 15 years child to work in the industry. When there was a case filed for recognition of trade union comprising children the court rejected recognition as any person below 15 years cannot start Trade Union.

**Issues:**

1. Whether the Trade Union Act, that allows children below 18 years and above 15 years to be a member of the Trade Union, is valid
2. Whether the child labour prohibition Act was right in excluding family business

## EFFORTS OF ILO IN COMBATING THE EVIL OF CHILD LABOUR

International Labour Organization:

The ILO was part xiii of 1919 Versailles Peace Treaty, within the framework of League of Nations, adopted nine labour clauses for regulating labour conditions, as special and significant for the organization. Though on the outset they seem to aim abolition the clause never had any part that deal with the abolition rather they aim for minimum age for admission to work in industry and commerce, which was set as 14 years. Our government has also made compulsory education till 14 years, after 14 years it is not compulsory to educate a child, but the child will be considered a literate as they know to read and write. World War 1 played a significant role in pushing child labour to a high level as the soldiers were feared to go to labour works and lacing of soldiers to fight and that eventually lead to the regularization of children and women working condition.

There is an old belief that certain traditional craft related industries cannot run further if the children are not thought the tradition and sent to school. The reality being that the children now can learn any craft by paying or through training programme initiated by the Government. In 1986 the UP Government contended that the nimble fingers are capable of producing more effective goods than adults, this exception was accepted for a long period. But this is no longer justified. The employers at times accept there is child labour but they point the poverty of the child the reason for its employment and it being voluntary, they do not have any role in employing them, but are doing for the welfare of the children. Even the parents of the children are of the similar view that the child would do the same work (bangle making, pottery or carpet

making) so there is no point in educating them. If they are not taught the skills at the young age, they may find it very hard to learn it in the later part of life. There are many adults who have no job and many children who work and earn.

The committee was of the opinion that it is unavoidable for the children to work under certain social, economic circumstances, and until the situation changes mere ban on child labour would do more harm than good (ILO, 1945a3).

The Employment of Children Act, 1938 was the first legislation that dealt with child labour. This was later adopted in the 1987 Act, however it also exempted family run workshops. The 1987 Act prohibits the employment of children in certain occupations, it was criticised as the Act that legalised child labour. The new Act has no explicit mention of the employment, but the Act only prohibits children in certain hazardous occupations. There were serious of Act that extended protection to children[630]

**WORST FORMS OF CHILD LABOUR CONVENTION, 1999(NO. 182)**

This convention states child means any person below 18 years. It mainly focuses to eliminate the evil of worst form of child labour, which includes all forms of practices of slavery and similar to it, like sale, trafficking, bondage and serfdom and forced or compulsory labour for use in armed conflict[631]. India had ratified this convention in 2017 and Child Labour (Prohibition and Prevention) Amendment Act, 2016 was enacted.

**Minimum Wage Convention:**

As per the minimum wage convention the state parties ought to fix minimum age for working and India is also a party to the convention. Indian Minister of Labour Mr. Bandaru Dttatreya stated that the two ILO Convention reaffirmed the nation's commitment towards child labour free society. The objective and notable measure undertaken by the Government towards the establishment of Child Labour (Prohibition and Regulation) Act, 1986, came into effect on 2016. This amendment prohibits children working below 14 years, and below 18 years in hazardous occupation and processes. India has also ratified the Forced Labour Convention No. 29 (1930)[632], which prohibits use of forced labour. Above all this convention backs he root for introducing the abolition of child labour, during the inter-war period. Minimum age convention sets 15 as the age for working in the industries, no wonder why section 21 of the Trade Union

[630] *Plantations Labour Act*, No. 69 of 1951, § 24, India Code; *Mines Act*, No. 35 of 1952, § 45, India Code; *Factories Act*, No. 63 of 1948, § 71, India Code; *Beedi and Cigar Workers (Conditions of Employment) Act*, No. 32 of 1966, § 24, India Code.

[631] Worst Forms of Child Labour Convention, art. 3(a), June 17, 1999, ILO No. 182, https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C182.

[632] *Forced Labour Convention*, June 28, 1930, ILO No. 29, https://normlex.ilo.org/dyn/nrmlx_en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C029.

Act fixes 15 as the minimum age to be a member of the Trade Union. Children between 13-15 years are allowed to do some light work. However, they fix 18 years to work in hazardous industries.

A. Sen (2000) describes child labour as a prison that deprives a child of its rights and freedom, growth and development of the child. 1990 World Summit had a great emphasis on the rights of the children and inspired by which, Germany had contributed for the International Programme on the Elimination of Child Labour (IPEC) of the ILC IN 1992.[633]

The reason for child labour according to the 1979 report[634] there are two reasons are economic and administrative. The poverty of the family is the economic reason and though there are laws that intend to govern child labour, but there is a lack of effective implementation. Social reforms ought to practical and they are mere useless had it been only in paper.

**Gurupadswamy Committee[635]:**

The first committee that was framed to study the problems of child labour in 1979. The committee came up with many recommendations, but they were firm in the stand that child labour can never be abolished unless there is poverty, so they prohibited child labour in certain works and other establishment they aim to regulate the working condition. The committee recommended imprisonment as the only punishment if the offence of employing children continues.

## THE INVISIBLE CHILD LABOUR

There are records of children below the age of fifteen working in industries but there is no record of female children who work in fields, household or in any other establishment helping the family. They are the invisible workers. A study published shows that there is a huge share of work contributed by women that is unpaid and is never a part of the employment statistics. The major two categories of work include family business or work and household both which is unpaid. There are blurring boundaries between women working in household and women domestic responsibility[636].

There has a structural shift in the past decade that led men finding jobs in urban areas leaving agriculture primarily to women. Women role has been increased by 135% and out of which

[633] International Labour Organization, *Launch of the International Programme on the Elimination of Child Labour*, https://webapps.ilo.org/static/english/lib/century/content/1992.htm (last visited Oct. 27, 2025).
[634] Ministry of Labour, *Report of the Committee on Child Labour* (Gov't of India 1979).
[635] Apurva Pathak, An Insight into Child Labour in the Light of Gurupadaswamy Committee Report, *Int'l J. Res. Humanities & Soc. Sci.*, vol. 2, issue 9 (2014), https://www.raijmr.com/ijrhs/wp-content/uploads/2017/11/IJRHS_2014_vol02_issue_09_09.pdf.
[636] *A Nine-Year-Old Bonded Labourer, The Hindu* (India), May 31, 2025, https://www.thehindu.com/news/national/andhra-pradesh/a-nine-year-old-bonded-labourer/article69638489.ece.

42% are sector workforce. Two of three women are in agriculture sector. One out of three workers are unpaid. In Uttar Pradesh and Bihar 80% of the population are in agriculture sector and 40% are unpaid[637].

There were enormous studies untaken by many scholars that reveal the dark about child labour. There is no single person imprisoned for the labour offences, though there is imprisonment provision that is added, the court usually resort to charging fine which is again very minimal in nature. The offenders usually pay the trivial amount that is nothing compared to the profit that the employers make by employing the children. Even many Governmental officers were of the view not to ban the child labour as that would severely affect the financial stability of the family. According to the child family the children cannot find job after fifteen years do, they have to be trained from a very young age. It is merely useless for the children to be educated as they tend to work on the same cottage or carpet industry on attaining fifteen years. There are families that are not so poor to send children to work still choose to send them to work as they would earn more than what is actually earned.

## CONCLUSION

There are many ways in which child labour can be curbed. It can even start from the consumers; they can go for consumer boycott as that happened in 1995[638]. There is no one straight jacket formula for eradication of child labour. There are many prominent parties involved in the local and international NGOs involved in advocating for the eradication of child labour, their outlook differs substantially. The abolitionist wanted immediate and complete eradication but the gradualist wanted a step-to-step approach. The employer's organizations played a crucial role on raising political awareness among people and mobilizing them against child labour. It has been used as a strategy to fill the columns of corporate social responsibility. Abolishing child labour is advocated as a primary goal. The children are immature by nature, which lends a reason for treating them differently, and a need for special law. If an adult is going to work on his own accord, then it can't be questioned, but a child is going to work, the one to the questioned is the parents. The children who work as labours are denied their right to choose education even if they intend to study.

Children who never went to school find it hard to join in the later part of life, so Naik in his study had suggested flexible schooling system. If a child is not given such flexible system, they

[637] *More Women Join the Labour Force, but Are They Really Employed? Civilsdaily*, Oct. 1, 2025, https://www.civilsdaily.com/news/more-women-join-the-labour-force-but-are-they-really-employed/.

[638] U.S. Consumer Boycott of Bangladesh Garments, 1995, leading to Memorandum of Understanding between Bangladesh Government and U.S. Embassy. See generally UNICEF, *The State of the World's Children 1997*.

may end up a school dropout. There is a need for special classes organized mainly for such children. School must be flexible to adjust as to harvest and sowing time to enable children working in agriculture find it adoptive to study and work. Poor families are first concerned with surviving, so they least bother sending their children to school. The children and their family easily get lured because of the middleman who lure them better life. Though the prohibits the child from working more than six hours, and compulsory leave for one day, still the children in some industries were made to work for sixteen hours, and in some places, they work till they are allowed to sleep as the place of work is not different from place of residence. The real reason for child labour is for saving the wage cost involved and to make more profit out of the manufacturing. Children never grumble over the working condition; they never form trade unions to raise questions and know nothing about collective bargaining. It all rests with the question, who is guilty? And the employer never takes the blame, but point towards the government for its inefficiency to implement the laws. But the law is however is not prohibiting child labour completely. The concept of universal education is aimed to curb the menace of child labour. It is also a reason for unemployment, as the children are considered to be cheapest labour force, children will take up the place of an adult, and population increases when parents believe in the concept of nimble fingers.

There may be many political activities undertaken but all would be futile had the people are not made vigilant about the evils of child labour. The recent death of young child who was given as a bonded labour[639] the mother of the deceased stated that she is not aware that bonded labour is prohibited in India. Legislations can also make key change in the abolition[640], though India has legislation there are ample number of loopholes that are utilized in a wrong way by the employers to exploit the children. Just because the parents of the children are poor, will it be right to allow children work below the age of 14 years, gone are those days where child labour was justified to help the family fill the gap that the poor parents could not. According to some study children participation was more before the industrial revolution. Milton Freidman claims that the child labour has reduced after industrialization. Many children who worked in farm were moved to the industrial employment. But they didn't take into account of the household works or the increase in young girls working in household, minors working in urban non-hazardous industries. The concept of traditional knowledge was misused by the employers

[639] *PressReader, The Hindu – Erode Edition*, Sept. 30, 2025, https://www.pressreader.com/india/the-hindu-erode-9WW6/20250930/281762750435243.

[640] *Child Labor Deterrence Act*, S. 706, 103d Cong. (1993) (Harkin's Bill); *Belgian Penal Code*, art. 433quinquies (criminalizing violations of minimum wage and child labour standards).

to a great extent. The Act intends in reality to regulate the working conditions of children than to ban child labour. The Act intends to regulate to working conditions of children below eighteen but above fourteen years. Though there are many acts that deal with child labour, none of the Acts explicitly prohibits children and not lays complete ban on child labour.

Right to life is not confined to mere animal existence it includes right to live with dignity. Every child born to the poor parent is denied any fundamental rights that are guaranteed by the Constitution and are born to this world bonded and unfree. There is a need for awareness among the peasant who works on a daily wage and are illiterate about the prohibition of child labour. Though there are many schemes present that aim to rehabilitate children and provides means of livelihood by many schemes including MGNREGA. These schemes ensure the economic necessity doesn't force a child to take up any work that doesn't suit their age or gender. There are people even in 2025 unaware that child labour or bonded labour is prohibited by statutes. The employer or contractor who engages children in work must be punished stringently and be given imprisonment. The fine amount should be enhanced and be used for the rehabilitation of the child. Child labour is an evil that not only denies the children their right to get education but also increases poverty which forces a child labour to grow as a labour and affects the national economy and the progress as a whole.

# ACTIONS OF ASSAM GOVERNMENT FOR MAINTAINING ENVIRONMENTAL SUSTAINABILITY: A CRITICAL STUDY (2020-2024)

***Nilakshi Bhuyan***[641]

## ABSTRACT

*This paper is about to the study of policies of Assam government for the maintenance of environmental sustainability from 2020-2024. Balancing development with environmental sustainability is a significant challenge for a state in nowadays. Challenges towards the environment represents the challenges to our natural resources which focuses upon balance regarding the relationship between the human being, animals and our surrounding natural environment. The Assam state is now facing certain major challenges regarding its natural environment. To overcome those challenges, the awareness of citizens and the accountability of the concerned state government to implement properly of the major policies are very necessary. The major objective of this paper is to examine the policies of Assam government for environmental conservation within the last 5 years. These will include the budgetary provisions and the laws of the state government in response to the emerging environmental issues. Moreover, this paper will also investigate the success and failure of the concerned state government for the department of Environmental and Forest. The state government has created this particular department to take a special care for our surrounding environment and to improve the environment along with conserving the priceless biodiversity of the state. In this paper, analytical method will be adopted to examine the budgetary provisions and the actions of state government for the department of Environment and Forest.*

**Keywords:** *budget, challenge, conservation, environment*, *sustainability*

[641] Nilakshi Bhuyan, *Assam University, Silchar.*

## INTRODUCTION

Environment is the most precious natural resource and we all know that we cannot live without a sound and healthy environment. But now, our natural environment is not in an original position. Environmental issues are rising day by day not only at the regional or national level, but also at the global level. If any appropriate step will not be taken by the government, then our natural environment will lose its sustainability in the near future. Now, the maintenance of the sustainability of environment becomes very necessary. Government of every country have a financial accountability for the conservation of country's natural resources and to maintain its sustainability. Like other northeastern states, the potentiality, possibility and prosperity of Assam can be denied. The resources of Assam have the full potentiality for economic growth for the entire country. By keeping the aim of development, a number of infrastructure projects are implemented in the state by the concerned government. But there should be the scope in the context of the planning, policy making and implementation ideologies of national and sub-national governances for the environmental protection which will keep the balance between the developmental projects and the green cover. It helps in optimizing the financial allocations to developmental activities with environmental concerns. With the intent to foster a sustainable society, the global governance started transitioning from the Millennium Development Goals to the Sustainable Development Goals in post 2015. In this context, government budget is very helpful which can establish a balance between the developmental activities and the protection of the state's natural environment. Most of the public policies are based on government budget which indicates the development prospects of a country. The term 'Budget' is derived from the French word 'baguette' which means 'little bag', or a container of documents and accounts. The term 'Budget' is used in monetary context which is a formal plan of action. The financial allocation of government in the form of budget should be such that it can secure the country's natural resources in a most appropriate way. The major objectives of this research paper are to find out Assam government's budgetary allocation for the maintenance of environmental sustainability and to examine the impact of policies of Assam budget for the protection of environment. In this research study, secondary data are helpful. In this context, book, journal, newspaper and internet are used.

## STATEMENT OF THE PROBLEM

Balancing development with environmental sustainability is a significant challenge for Assam. Like other states of North East India, Assam is faced with many environmental issues like deforestation, climate change, global warming, man- animal conflict, decreasing the forest

area, cutting a lot of trees etc. Moreover, weak enforcement of environmental laws and policies of the respective state government exacerbates these environmental issues. In Assam, there seems to be a significant lack of a balanced approach towards natural assets and development. Several water-bodies of the state suffer from poor maintenance and heavy pollution due to inadequate solid waste management. The state's renowned National Park- Kaziranga National Park has witnessed a shrinking grassland area due to the construction of hotels, resorts and infrastructure for tourism. This has caused a loss of biodiversity while commercializing the land. Furthermore, the conversion of wetlands for urban development and infrastructure projects have harmed aquatic ecosystems and affected migratory bird movements. Construction projects have also fragmented elephant habitats and disrupted their movements which lead to human- elephant conflicts. Guwahati's rapid expansion has led to encroachment into the hills, causing several environmental hazards such as flash floods. The consequences of development projects undertaken without considering natural resources have always been devastating. Therefore, to mitigate these impacts, it is essential to strike a balance between development and conservation.

All these environmental problems have raised the voice for a well-balanced budget which can handle these issues wisely. A balanced budget will also ensure sustainability of environment in future.

## BASIC LEGAL FRAMEWORK FOR SUSTAINABLE ENVIRONMENT

**Efforts at the international level:**

Stockholm Conference of 1972 was the official programmes in response to the growth of the global environmental movement. It was the first conference of environment at the global level in the context of political, social and economic problems of the global environment whose main purpose is to take corrective measures. After this conference, in 1992 Rio De Janeiro has conducted a conference for environmental protection which was also known as Earth Summit. This conference gave birth to the Kyoto Protocol which has handled the issues between global environmental management and the national needs of economic development of individual countries. The outcomes of Rio Conference are- The Framework Convention on Climate Change, The Convention on Biological Diversity, Agenda 21 and The Forest Principle. Another important convention of UN relating to reduce greenhouse gas emission was United Nations Framework Convention on Climate Change (UNFCCC). This convention was adopted in 1992. This convention was convened by Rio de Janeiro in Brazil in 1992. This convention focuses upon the rising of greenhouse gases. Rising the temperature of the planet is caused by

increasing the amount of greenhouse gases in the atmosphere. Therefore, the major purpose UNFCCC was to reduce the amount of greenhouse gases in the atmosphere. Montreal Protocol was signed in 1987. The main aim of this protocol is the regulation of the depletion of ozone layer. It is the main focus area of this protocol to protect the ozone layer from the harmful ultraviolet radiation of the sun from reaching the earth. Another protocol relating to environment was Kyoto Protocol which was established in 1997. The core areas of this protocol were to limit the greenhouse gas emissions by the industrialised states. The major commitment of Kyoto Protocol was to make the duty of the nation states to commit themselves to the reduction of the emissions of carbon dioxide and other greenhouse gases of the nation states. This protocol has divided the states into two categories- Annex 1 and Annex 2 where Annex 1 means developed countries and Annex 2 means developing countries. The major commitment of this protocol was to maintain a balance between the developed and developing countries regarding the emission of greenhouse gases. This agreement provides necessary measures regarding the reduction of greenhouse gas emissions between the developed and developing countries.

Among the 17 Sustainable Development Goals, goal no. 13, 14, 15 deals with environment related areas. Goal no. 13 deals with the actions and adopt capacity measures to combat climate change and other natural disasters in all countries. Goal no. 14 emphasis upon the conservation of ocean, sea and marine resources for sustainable development and the appropriate measures to maintain sustainable development and ecosystem of these areas. Goal no. 15 deals with the sustainable management of forests, terrestrial ecosystems, combat desertification, protection of biodiversity and prevention of land degradation.

Goal 7 of Millennium Development Goals (MDG), 2000 of United Nations General Assembly concentrates on sustainability of environment. This goal stresses upon to the application of the principles of sustainable development into country policies and programmes and to prevent the loss of natural resources. Other included topics of this goal are- reduction of biodiversity loss, easily accessibility of safe drinking water and to ensure basic sanitation.

**Efforts by the Indian Government:**

Conservation of natural resources and environmental protection emerged as a national priority in India after the Prime Minister Indira Gandhi participated in the Stockholm Conference on Human Environment, 1972. Legislation, policies and programmes particularly since 1980 evolved to gear the state to the task of environment. To ensure and protection of the health of citizens and to give an effort to improve the environment and also to safeguard the forests and

wildlife of the country, the Department of Environment was established in 1980 to help to ensure a clean and healthy environment for the country. It was upgraded to become the Ministry of Environment and Forests in 1985. It is the primary agency in the administrative structure of the government for the planning, promotion, coordination and overseeing the implementation of environmental and forestry programmes. The ministry is also the nodal agency in the country for the United Nations Environment Programme. The ministry works toward conservation and survey of flora, fauna, forests and wildlife, prevention and control of pollution, afforestation and regeneration of degraded areas and protection of environment in the framework of legislations.

India is the first country in the world to have made provisions for the protection and conservation of environment in its constitution. On 5th June, 1972, the concept of 'environment' was first discussed as an item of international agenda in the U.N. Conference of human environment in Stockholm and thereafter 5th June is celebrated all over the world as World Environment Day. Soon after the Stockholm Conference, our country took substantive legislative steps for environmental protection. Among them, the most prominent are- Wildlife Protection Act, 1972, The Water Prevention and Control of Pollution Act, 1974, The Forest Conservation Act, 1980, Air Prevention and Control of Pollution Act, 1981 and The Environment Protection Act, 1986.

Moreover, India has taken a lead in giving a constitutional status to environmental protection. Part IV of the Indian Constitution states that the state shall endeavour to protect and improve the environment by safeguarding the forests and wild life of the country. Article 51 A of the Fundamental Duties prescribes "it shall be the duty of every citizen of India to protect and improve the natural environment including forests, lakes, rivers and wild life and to have compassion for living creatures". Article 48 A of Indian Constitution also states that this is the duty of the state to protect and improve the environment and to safeguard the forests and wildlife of the country. 'Forest' is included as a subject in the concurrent list of the constitution which is included in article 246 of Indian constitution. In the concurrent list, both the central as well as the state governments can take up initiatives and both have the authority to form rules and regulations.

## ASSAM GOVERNMENT'S EFFORT FOR THE CONSERVATION OF ENVIRONMENT

Major institutions, laws, regulations and acts of Assam government relating to environment are-

a. **Pollution Control Board, Assam (PCBA)-** Pollution Control Board was established in Assam on 2nd June, 1975 under the provision of section 4 of the Water (Prevention & Control of Pollution) Act 1974 as an autonomous statutory organization with a view to protecting and controlling the pollution of water and air in the State of Assam. The major functions of PCBA are- to advice the state government on any matter concerning environmental pollution, sitting industries etc., including continuous monitoring of pollution status of the industrial and other sources. This board can collect and disseminate data and information on pollution and environmental problems and preparation of reports thereon, PCBA has comprehensive programme on Water and Air Pollution Control and Execution thereon in line with Pollution Control Laws, Guidelines, and Regulations of the country, PCBA also collaborates with the Programmes of the Central Pollution Control Board, Ministry of Environment, Forest and Climate Change, state government, NGOs and other organizations relating to pollution control and environment and organize Mass Education Programmes. PCBA has implemented various National flagship programmes for the elimination of Single Use Plastic (SUP) and to prevent plastic pollution.
b. **Environment Protection Act, 1986**- Like the central government, Assam government have also made this act applicable in Assam. For enforcing the provisions of this act in Assam, the Assam Pollution Control Board is responsible. According to this act, Assam government will take appropriate measures to protect and improve the environment including control of pollution and regulating hazardous substances within the state.
c. **The Manufacture, Use, Import, Export and Storage of Hazardous Micro-organism Genetically Engineered Organisms or Cells Rules, 1989-** To ban and to restrict the import, export, transport, manufacture, process, use or sell of any hazardous microorganisms or genetically engineered organisms or cells without prior approval from the Genetic Engineering Appraisal Committee, the act was formulated and implemented accordingly.
d. **The Chemical Accidents (Emergency Planning, Preparedness and Response) Rules, 1996-** This law was implemented under the Environment Protection Act, 1986. This law has outlined guidelines for managing and responding to chemical accidents at industrial facilities, including the formation of crisis group at the central, state and district levels to coordinate emergency response plans.

e. **Water (Prevention and Control of Pollution, Assam) Rules, 1977-** To control the pollutants which can pollute water and to collect levy cess on water which are consumed by persons carrying on certain industries and by local authorities, this act was passed.

f. **Assam Forest Policy, 2004-** To main a sustainable forest cover, Assam Forest Policy was enacted in 2004. To maintain stability of the environment through preservation, restoration of ecological balance and conserving natural heritage of the state, this act has provided certain major provisions.

g. **Water (Prevention and Control of Pollution) (Assam) (Amendment) Rules, 2022-** This law aims at the control of water pollution within the state. Within this law, the state government will concern itself with local water pollution concerns. This law includes certain new terms like "idol", "synthetic paint", "remnants" etc.

h. **Agroforestry Policy, 2024-** The Assam Cabinet approved the state's Agroforestry Policy 2024 as a landmark move aimed at boosting environmental sustainability and enhancing rural prosperity.[642]

## ROLE OF ASSAM BUDGET FOR ENVIRONMENTAL CONSERVATION

Budget is an annual financial statement which is prepared at the national or at the state level. Like the union ministry of Indian government, Assam government also have a separate department of environment namely Department of Environment and Forest. Government budget of Assam annually provides financial allocation for this department like other departments of Assam government. But this financial investment of Assam government and its policies are not sufficient due to which Assam is facing lots of challenges in regard to the protection of its natural environment.

In the 2020- 21 Assam budget, the major focussed areas were to strive to shore up the revenue collection while ensuring protection to the natural flora and fauna. The concerned ministry intended to undertake certain initiatives to further streamline the revenue collection from the Department.

In the Assam budget 2021-22, the main focussed area was- to provide a Frontline Staff in protected areas with an allowance of Rs. 2000 per month and to raise the number of third battalion of Assam Forest Protection for protection of forests located in inter- state border areas. Moreover, a decision was taken in this budget session to prepare three- year master plan for greening Greater Guwahati. In this budget, a total of Rs. 730.12 crore was allocated for the Department of Environment and Forest.

[642] E-Governance Portal, *Elets Online*, http://egov.eletsonline.com (last visited Nov. 16, 2025).

In the 2022- 23 budget, certain initiatives were planned to take by the Finance Minister of Assam. These were- to undertake a three-year master plan for greening Greater Guwahati, to free the hills and forest areas of Guwahati from illegal encroachments, mitigation of the man-animal conflict etc. To mitigate the man- animal conflict, one of the notable measures was the activation of Anti Depredation Squads and a system for coordination with other stakeholder departments like Railways, Power etc has been put in place.

In the Assam budget 2023-24, the main resolution was the addition of a new concept namely "Green Budget". The concept of green budget was formally announced in this financial year. With the introduction of Green Budget, the policies and activities of almost all the administrative departments will be checked about their impacts upon environment. the government's main motive is to build a state that is safe, sustainable and resilient for years to come. By observing the rise of certain environmental issues in Assam and to address the increasing growth of urbanization, industrial growth, negative environmental externalities and pollution, "Green Budget" was initiated towards mainstreaming environmental concerns of the state. In this financial year, another was taken to monitor the encroachment activities through the use of satellite imagery and drone photography. Moreover, planed was made to set up a modern zoological rescue and rehabilitation facility in Kaziranga National Park.

Though these resolutions are taken by the Assam government through their budget within these specific terms, but these are not enough to tackle our environmental issues. According to the recently released report of 'India State of Forest Report 2023 (ISFR 2023)', Assam recorded a forest cover loss of 83.92 sq. km between 2021 and 2023. Between 2021 and 2023, the forest cover inside 'recorded forest area' was decreased by 86.66 sq. km in the state. The eight Northeastern states recorded a total forest cover loss of 327.30 sq. km during the period. In this period, the 'recorded forest area' in Assam has degraded to 1,699 sq. km area.[643]. Another most pressing conservation crisis in the state is the human- elephant conflict which has shown no signs of abatement over the years. According to official data, the five-year period from 2019-20 to 2023-24 has witnessed the death of 383 people in the state against an elephant fatality of 92. The break-up of the elephant deaths includes electrocution, train-hit, poisoning and poaching with the corresponding figures being 55, 24, 10 and 3. While Assam happens to be among the few remaining strongholds of the Asian elephant, the prevailing scenario bodes ill for the long- term conservation prospects of the pachyderm. Essentially a man- made crisis, the conflict is largely attributable to unabated loss of forest cover and elephant habitat and

[643] State Forest Cover Down, *The Assam Tribune*, vol. 86, no. 347, Dec. 2024, at 1.

migratory routes connecting different forests. This has habituated the elephants into making raids on cropland and human habitations in search of food and space, resulting in an inevitable conflict. Elephants are long ranging animals that require large space as well as contiguity among different forest belts to facilitate their unhindered movement. Unfortunately, mushrooming settlements and indiscriminate commercial and industrial activities have been allowed to erode prime elephant habitats and corridors, compelling the animals to come into conflict with humans who stand in their path. In the latest such instance, the Assam Government itself has shockingly cleared the decks for the construction of high- end hotels on a well- known elephant territory near Kaziranga National Park[644]. As per the latest report of 2024, there is a marginal increase of the state's elephant population in the past seven years, with a total count of 5,828 elephants. The latest survey covered 43 forest divisions, five elephant reserves, nine elephant ranges and 26 protected areas including national parks and wildlife sanctuaries. While the state's elephant population, which was 5,524 in 1993 had kept declining to 5,312 in 1997 and 5,246 in 2002- the trend has since maintained an upward trend with 5,281 in 2008, 5,620 in 2011, 5,719 in 2017 and 5,828 in 2024. The stable elephant population is undoubtedly, welcome news for conservation but at the same time, shrinking space for the pachyderms has put disturbing questions for their long- term well- being. A most significant finding of the elephant estimation exercise concerns their large presence outside national parks and sanctuaries with 82 percent of the total population residing within the five Elephant Reserves, underlying their critical role in conservation. This is not surprisingly given that long ranging animals like elephants need a lot of space to meet their requirements for food and space. In Assam, protected areas constitute a minuscule portion of the state's total forest area and it is high time the government took a decisive step towards upgrading some more reserve forests, especially those falling in elephant reserves, into sanctuaries and national parks. Such a step in fact is the surest way to ensure the long- term protection of some wildlife habitats and meet the goals of long- term conservation. Another imperative is to reclaim lost elephant corridors as well as habitats to the extent possible, which can go a long way in easing the human- elephant conflict. According to the official data, the five-year period from 2019-20 to 2023-24 has witnessed the death of 383 people in state against an elephant fatality of 92. The break- up of the elephant deaths includes electrocution, train-hit, poisoning and poaching with the corresponding figures being 55, 24, 10 and 3. While Assam happens to be among the few remaining strongholds of the Asian elephant, the prevailing scenario bodes ill for the long- term

[644] Escalating Conflict, *The Assam Tribune*, vol. 86, no. 351, Dec. 2024, at 6

conservation prospects of the pachyderms. Essentially, a man- made crisis, the man- elephant conflict is largely attributable is the unabated loss of forest cover and elephant with little intervention forthcoming from the government authorities to ensure adequate protection of elephant habitat and migratory routes connecting different forests[645].

Various environmental issues are happening inside Kaziranga National Park which causes threating to the biodiversity and wild life of the national park. This UNESCO world heritage site is considered as an embodiment of biodiversity and ecosystem services and also inscribed for being the world's major stronghold of the Indian one- horned rhino, currently with a species strength of two- thirds of the global rhino population. Severely affected by fluvial processes and bank erosion, coupled with negative anthropogenic interventions, Kaziranga National Park has suffered from deaths of numerous wildlife species, destruction of ecosystems and discontinuity in ecological successions. As such, the conservation process of this national park hovers around strictly protecting its biodiversity and negating human interventions. It is no secret that poaching of rhino horns has been notoriously active in and around the park and efforts to contain it have faced dead- ends. The strict conservation process has now and then devoid fringe communities of their livelihood as well as their traditional lands, subsequently resulting in clashes among park authorities and local people. The lone Ramsar Site of Assam Deepor Beel is also facing numerous environmental issues. It is now polluted by the wastage of urban areas. It has become a dumping site. This site has also faced a huge biodiversity loss. The Asian Water Bird Census recorded 12,245 birds of 105 species at Deepor Beel. The census was organized by the Guwahati Wildlife Division using the visual encounter survey methodology. The number of birds was relatively less in the latest count (January, 2025). However, a single year count cannot give a clear picture of the number of birds dwindling in the Ramsar Site. However, those who participated in the census admitted that haphazard disposal of waste and picnic litter is impacting the wetland severely. In January 2023, over 26,000 birds of 97 species were recorded in a count at the wetland organized by the Guwahati Wildlife Division[646].

Thus, it is reflected from these above-mentioned issues that in every year, Assam government have allocated money through budget for the department of environment and forest and they take measures for environmental protection. But these policies are implemented wisely due to which environmental problems are not settled in a fair manner.

[645] Elephant Census, *The Assam Tribune*, vol. 87, no. 4, Jan. 2025, at 6.

[646] Over 12,000 Birds Recorded at Deepor Beel, *The Assam Tribune*, vol. 87, no. 11, Jan. 2025, at 1–2.

## FINDINGS AND CONCLUSION

1. From this study, it was found that though the Assam budget has taken various policies to deal with environmental issues, but these are not satisfactory, which are cleared from the official report of Union Ministry of Environment, Forest and Climate Change.
2. We are only the part of this vast ecosystem. But we are not the whole part of this ecosystem. Like us, animals and other living beings also have the right to live in a healthy environment. Right to get a healthy environment is our third generation of human right.
3. Government should maintain a balance between the developmental activities and the protection of environment. The construction activities of the government should not destroy the original habitat of the wild animals.
4. There should be a balance between the allocation and implementation of budgetary policies of the respective state government. The respective state government should supervise the functions and policies of the concerned ministry of the state government to tackle the environmental issues.

For the betterment of human's existence and for the preservation of nature, the cooperation of common citizens and the respective environment is very necessary. The human being of the whole world will have to join hands by sacrificing selfish motive and narrow thinking and towards a more liberal and environment- friendly development. Moreover, the pollution of urban environment should be more focussed because urbanization and population explosion has stressed heavily upon the environment of the urban areas. The anthropogenic activities of the human being in the urban areas are more responsible for the destruction of the environment. Therefore, the major requirement is to check the applicability of the present laws and policies and make changes of certain provisions of the present laws to make these suitable to govern the present scenario of environmental protection and ecological conservation. Another major initiative should include is the strict monitoring of the governmental activities from the grassroots level to up level. Afforestation around the countryside and in urban areas is the best way to conserve and maintain ecological balance. Accountability at the ground level to the governmental level can make a gradual improvement to our overall green cover.

# NAVIGATING INTERSECTIONALITY IN SPORTS LAW- A COMPARATIVE STUDY OF THE LEGAL TENSIONS BETWEEN CISGENDER AND TRANSGENDER WOMEN'S RIGHTS

***Mohd Asad[647] and Ariba Arif[648]***

## ABSTRACT

*The evolving legal tensions between cisgender and transgender women's rights within the realm of sports law has been explored in this study, through the lens of intersectionality. As global sports institutions attempt to balance fairness and inclusivity, legal frameworks often struggle to keep pace with complex gender dynamics in the real world. Beginning with an overview of the contentions, the research examines historical participation, landmark cases, and ongoing controversies highlighting the conflict between gender identity and athletic regulation. A comparative analysis of national and international sports laws reveals fragmented and inconsistent approaches, exposing challenges in defining eligibility and protecting rights. By investigating key frameworks and analysing real-world legal disputes, this project identifies the need for coherent, rights-based, and scientifically informed policies whereby, contributing to the development of equitable legal standards that respect both competitive fairness and gender diversity in sport.*

**Keywords:** Intersectionality, Transgender, Cisgender, Sports Law, Gender Inclusion.

[647] Mohd Asad, *Jamia Millia Islamia, New Delhi*.
[648] Ariba Arif, *Jamia Millia Islamia, New Delhi*.

## INTRODUCTION

Athletic games to e-sports, a significant transformation has evolved in the sports industry leading to new legal frameworks, which is collectively known as sports law, serving as a broader umbrella for various types of sports including traditional physical sports and the emerging digital competitions.[649] It encompasses issues such as player contracts, intellectual property, gender inclusion, doping regulations, and dispute resolution, reflecting the growing complexity and diversity of the modern sports landscape.[650]

Historically, sports were predominantly a male domain, with minimal to no involvement of women and girls. The earliest non-official reference to female participation in physical activity dates back over three millennia. Around 800 B.C., the Greek poet Homer described Princess Nausicaa playing ball with her handmaidens on the island of Scheria, noting:

*"When she and her handmaids were satisfied with their delightful food, each set aside the veil she wore: the young girls now played ball; and as they tossed the ball…"*[651]

Despite such early literary references, formal opportunities for women in competitive sports remained scarce for centuries until the passage of **Title IX** in 1972 in U.S., wherein women gained legal recognition to participate in sports on equal terms with men, which was mainly due to social reforms and rise of feminism that paved the way for gender equality in athletics.[652]

Women not only struggled for recognition in society but also faced significant barriers in gaining access to sports, the physical activities were largely recreational, informal, and noncompetitive until the late 19th or the early 20th century, women began to establish their own athletic clubs and engaging in organized sports alongside societal resistance and institutional efforts to limit their involvement in competitive athletics.[653]

Another class of persons who faced the same discrimination in the society are the transgender, individuals whose gender identity does not correspond with the sex assigned to them at birth, were formally recognized as a distinct gender category, often referred to as the "third gender".[654] While such individuals have existed in societies throughout history but it was only

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[649] Timothy Davis, What Is Sports Law? 11 *Marq. Sports L. Rev.* 211 (2001), https://scholarship.law.marquette.edu/sportslaw/vol11/iss2/7.

[650] Id.

[651] Linda J. Borish, A History of Women in Sport Prior to Title IX, *The Sport Journal*, https://thesportjournal.org/article/a-history-of-women-in-sport-prior-to-title-ix/ (last visited July 18, 2025).

[652] U.S. Dep't of Educ., *Title IX and Sex Discrimination*, https://www.ed.gov/laws-and-policy/civil-rights-laws/title-ix-and-sex-discrimination (last visited July 18, 2025).

[653] Davis, supra note 3.

[654] *Nat'l Legal Servs. Auth. v. Union of India*, AIR 2014 SC 1863 (India); *R. v. Keegstra*, [1990] 3 S.C.R. 697 (Can.); *Bostock v. Clayton County*, 590 U.S. 644 (2020).

in recent times that their identity was acknowledged on equal footing with those of men and women.

The recent debate surrounding the rights of transgender individuals has brought greater attention to the discrimination they have historically faced in society thereby to eliminate such discrimination, both states and international organizations have taken steps to formally recognize and protect transgender identities.[655] However, their inclusion within sports industry have placed them in the same category as cisgender women which has led to a growing conflict over rights and fairness between cisgender and transgender athletes, a tension particularly visible in the legal and regulatory frameworks governing sports. [656]

## UNDERSTANDING THE TENSION BETWEEN CISGENDER AND TRANSGENDER INDIVIDUALS IN SPORTS LAW

Participation in sports became a later step in the broader struggle for gender recognition, which first focused on affirming the rights and visibility of women and girls, followed by that of transgender individuals. Deep-rooted stereotypes viewed women limited to domestic roles and men as family heads, restricted their opportunities, making transgender inclusion even less likely. However, ongoing advocacy from both cisgender and transgender communities eventually sparked a movement for equality and full participation in all areas, including sports.

### 1. Historical Barriers and Progress: A Cisgender Perspective

The rise of feminism, particularly during the broader social reform efforts of the Civil Rights Movement, played a crucial role in advancing the fight for gender equality, during the late 1960s and early 1970s, women's advocacy groups increasingly focused on the need for federal legislation to eliminate sex-based discrimination, particularly in education and sports.[657] Women were given the opportunity to participate in sports, but in a very limited sense as the organizations like the Amateur Athletic Union (AAU) criticized women's inclusion, claiming that women's sports should focus on recreation rather than competition or financial reward.[658] Despite such barriers, progresses were made, first women to be allowed to compete in tennis

[655] U.N. Dev. Programme, *Discussion Paper: Transgender Health and Human Rights* (Dec. 2013), https://www.undp.org/sites/g/files/zskgke326/files/publications/Trans%20Health%20&%20Human%20Rights.pdf.

[656] D.J. Oberlin, Sex Differences and Athletic Performance: Where Do Trans Individuals Fit into Sports and Athletics Based on Current Research? *Front. Sports Act. Living*, Oct. 27, 2023, at 1224476, https://doi.org/10.3389/fspor.2023.1224476.

[657] Sarah Pruitt, How Title IX Transformed Women's Sports, History.com (June 23, 2022), https://www.history.com/articles/title-nine-womens-sports.

[658] Katrina Karkazis et al., Out of Bounds? A Critique of the New Policies on Hyperandrogenism in Elite Female Athletes, 12 *Am. J. Bioeth.* 3 (2012), https://doi.org/10.1080/15265161.2012.680533.

in Wimbledon in 1884, but the struggle for inclusion persisted and racial discrimination further hindered progress, prohibiting Black women from competing in major tennis tournaments like Wimbledon until 1951.[659]

In response to these challenges, the United States enacted Title IX of the Education Amendments of 1972 to prohibit sex-based discrimination in education programs and activities receiving federal funding. It mandates federally funded institutions to ensure equal participation for women in all levels of sports, promoting inclusivity and equity.[660]

Examining the historical status of women in India reveals a dynamic journey of empowerment and struggle. During the Rig Vedic period, women enjoyed equal status with men, including the right to education and even weapon training. A similar spirit of strength but in a more limited form was seen during the Mughal period, exemplified by iconic figures like Rani Lakshmi Bai. Efforts to reduce gender inequality in education, employment, and property rights began under British rule, driven by reformers challenging stigma and patriarchy.[661] Following independence, the Indian government implemented legal, social, and economic reforms to improve the status of women, which had led to increased female participation in sports, although a significant gender gap remained.[662]

Furthermore, the path to gender equality in the Olympic Games has been a long and evolving journey as evident in the Paris 1900 Olympic Games where women made their debut, competing in just five events: tennis, sailing, croquet, equestrian, and golf, mere 22 women participated, accounting for only 2.2% of the total 997 competitors. [663] But in time, the International Olympic Committee (IOC) has increasingly prioritized gender equality, leading efforts both on and off the field. The representation of women at the Olympics has steadily grown, from 34% at the Atlanta 1996 Games to a historic 48% at the Paris 2024 Olympic Games achieving full gender equality.[664]

[659] Am. Pub. Univ. Sys., Is There Gender Discrimination in Sports? How to Fix It, https://www.apu.apus.edu/area-of-study/nursing-and-health-sciences/resources/is-there-gender-discrimination-in-sports/ (last visited July 19, 2025).

[660] Borish, supra note 5.

[661] Baydahi Roy, Women's Empowerment in India, from Ancient Period to Modern Time Period, *Times of India Readers' Blog*, https://timesofindia.indiatimes.com/readersblog/scatteredthoughts/womens-empowerment-in-india-from-ancient-period-to-modern-time-period-46689/ (last visited July 19, 2025).

[662] Prof. Gautam Shahuraje Jadhav, Indian Sports: Contribution of Women, *J. Emerging Techs. & Innovative Res.*, https://www.jetir.org/papers/JETIR1804412.pdf (last visited July 23, 2025).

[663] Int'l Olympic Comm., Gender Equality Through Time, https://www.olympics.com/ioc/gender-equality/gender-equality-through-time (last visited July 19, 2025).

[664] Id.

## 2. Historical Barriers and Progress: A Transgender Perspective

Transgender individuals have existed across all societies, cultures, and classes throughout history, individuals whose gender identity not aligned with the sex they were assigned at birth, rather it is typically based on physical appearance wherein Gender identity refers to a person's internal sense of self, be it male, female, a blend of both, or neither.[665] Howsoever, recognition of their rights has recently begun to gain attention in the modern era. Despite the little progress of recognition in society, transgender people often lack legal protections and continue to face widespread stigma, transphobia, discrimination, and violence due to their gender identity.

The Supreme Court of India had upheld the right of every individual to self-identify their gender in the landmark case of National Legal Services Authority (NALSA) v. Union of India[666] where it further recognized that hijras and eunuchs could legally identify as a "third gender," affirming their constitutional rights to equality, non-discrimination, and dignity. Importantly, the Court clarified that gender identity is not determined by biological or physical attributes but is instead based on an individual's internal, deeply felt sense of their own gender marking a significant step toward inclusivity and acknowledgment of importance of personal identity while it paved the way for greater legal and social recognition of transgender individuals in India.

To promote the inclusion of transgender athletes, the International Olympic Committee (IOC) introduced a policy in 2003, a Stockholm Consensus wherein the transgender athletes were permitted to compete if they had completed full medical transition, which included undergoing gender-confirming surgery, obtaining legal recognition of their gender, and receiving a minimum of two years of hormone therapy. [667]

Marking a major move toward inclusivity and acknowledgment of gender diversity in international sports, the IOC updated its policy in 2015 by eliminating the surgery requirement and focusing on hormone levels whereby transgender women were allowed to compete in the female category if their testosterone levels had been below a specified limit (10 nmol/L) for at least 12 months, while transgender men could compete in the male category without restrictions.[668]

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[665] Nat'l Legal Servs. Auth., supra note 8.

[666] AIR 2014 SC 1863.

[667] Int'l Olympic Comm., IOC Approves Consensus with Regard to Athletes Who Have Changed Sex, https://www.olympics.com/ioc/news/ioc-approves-consensus-with-regard-to-athletes-who-have-changed-sex-1 (last visited July 19, 2025).

[668] Int'l Olympic Comm., IOC Consensus Meeting on Sex Reassignment and Hyperandrogenism,

Key milestones include Keelin Godsey's Olympic Trials appearances (2008, 2012), Chris Mosier becoming the first transgender man to compete under the new policy (2016), and Ness Murby becoming the first openly trans Paralympian. Tokyo 2020 saw four openly transgender or nonbinary athletes, and Paris 2024 featured three, reflecting increasing inclusion and visibility in international sports.[669]

## KEY CASES AND ONGOING DEBATES OVER RIGHTS IN SPORTS

a. *Hannah Mouncey and the Debate on Transgender Inclusion in Sport*:[670] In 2017, Hannah Mouncey was ruled to be ineligible for the Australia Football League Women (AFLW draft) due to her gender identity prompting debate as to no clear policy on transgender inclusion existed.

b. *Discrimination faced by Transgender in Australia*:[671] Greenhill Football Club trains at a facility owned by Westacre, provided access to the men's change-room, despite repeated requests to unlock the women's change-room for transgender. This policy disproportionately affects transgender and non-binary players who prefer to use facilities that align with their gender identity, forcing them to change at home or in the carpark.

c. *FINA's Gender Inclusion Policy and Human Rights Concerns*:[672] Critics claim FINA's (Federation Internationale de Natation) blanket exclusion lacks proportionality, denies transgender athletes' equal opportunity, and may violate international human and children's rights by failing to accommodate diverse gender identities in sport.

d. *Impact of Trump's Executive Orders on Transgender Americans*: The Trump administration 'executive orders'[673] targeting transgender and non-binary individuals, restricted the access to accurate federal identity documents, threatened hospitals over gender-affirming care, and erased transgender history from federal websites, aligning with Trump's promise to

https://stillmed.olympic.org/Documents/Commissions_PDFfiles/Medical_commission/2015_11_ioc_consensus_meeting_on_sex_reassignment_and_hyperandrogenism-en.pdf (last visited July 19, 2025).

[669] Id.

[670] Priya Sharma, Understanding the Impact of Gender Equality Policies on Women's Participation in Sports: A Comparative Study of India and the United States, *Sport in Society*, https://www.tandfonline.com/doi/full (last visited July 19, 2025).

[671] Austl. Hum. Rts. Comm'n, *Guidelines for the Inclusion of Transgender and Gender-Diverse People in Sport*, https://humanrights.gov.au/sites/default/files/document/publication/ahrc_transgender_and_gender_diverse_guidelines_2019.pdf (last visited July 19, 2025).

[672] Daniela Heerdt, Transgender Women Athlete Exclusion in Disguise: Assessing FINA's 'Gender Inclusion Policy' Under International Human Rights Law, *Verfassungsblog*, https://verfassungsblog.de/transgender-women-athlete-exclusion-in-disguise/ (last visited July 19, 2025).

[673] Exec. Order No. 14168, 90 Fed. Reg. 8615 (Jan. 30, 2025).

recognize only "two genders" from his first day in office. [674] But in a recent legal development, a federal district court blocked the administration's ban on transgender individuals serving in the U.S. Armed Forces, marking the third court to do so and extending the injunction to all affected service members, including those abroad. [675] Building on these restrictive measures, Trump signed an executive order banning transgender athletes from competing in women's sports, from elementary school to college. This move to limit transgender rights has become a key issue, with individuals like 34-year-old Moore, a community athlete, fearing that they might lose the right to participate in sports.[676]

e. *The Santhi Soundarajan Case in India*:[677] Santhi Soundarajan, a talented athlete from Tamil Nadu, faced a devastating setback at the 2006 Asian Games in Doha, Qatar. After winning a silver medal in the women's 800-meter race, her achievement was overshadowed as it was revoked due to her failure in a sex verification test which was meant to confirm her eligibility for the women's category, concluded that she lacked typical female sexual characteristics. As a result, she was disqualified and stripped of her medal without providing proper course to defend her.

These examples highlight the urgent need for sports organizations and governments to implement transparent, evidence-based, and inclusive policies that ensure fair treatment and uphold the dignity and rights of all athletes, regardless of gender identity.

## A COMPARATIVE STUDY OF THE RULES AND REGULATIONS GOVERNING SPORTS LAW WITH RESPECT TO CISGENDER AND TRANSGENDER ATHLETES

A complex web of legal frameworks and regulatory approaches has emerged, providing a comprehensive exploration of the rules and regulations governing the participation of cisgender and transgender athletes in competitive sports.

### 1. Exploring The Legal Framework for Cisgender and Transgender Athletes

[674] Orion Rummler & Kate Sosin, Trump's Anti-Trans Executive Orders: What They Are and Where They Stand, *The 19th News*, https://19thnews.org/2025/03/trump-anti-trans-executive-orders/ (last visited July 20, 2025).
[675] *Shilling v. Trump*, No. 25-2039 (9th Cir.).
[676] Marnie Vinall, Trans Aussie Rules Player 'Terrified' Her Right to Play Could Be Taken Away, *ABC News*, https://www.abc.net.au/news/2025-03-18/taylah-moore-trans-aussie-rules-player-victoria/105051884 (last visited July 20, 2025).
[677] Sudeshna Mukherjee, The Curious Case of Shanthi: The Issue of Transgender in Indian Sports, *Rupkatha J. Interdisciplinary Stud. Humanities*, vol. VI, no. 3 (2014), https://rupkatha.com/V6/n3/11_Curious_Case_of_Shanthi.pdf (last visited July 20, 2025).

**a.** *The Right to Sport and the IOC's Commitment to Inclusion***:** Every individual must have access to participate in sport without discrimination of any kind, in accordance with internationally recognized human rights and within the scope of the Olympic Movement as the Olympic spirit calls for mutual understanding, underpinned by friendship, solidarity, and fair play. [678]

The International Olympic Committee (IOC), a not-for-profit organization established in 1894, introduced the *Framework on Fairness, Inclusion and Non-Discrimination on the Basis of Gender Identity and Sex Variations* in 2021, replacing the 2015 Consensus Statement as part of its Olympic Agenda 2020+5, adopts a rights-based and evidence-informed approach to eligibility in sex-segregated sport providing for ten guiding principles: inclusion, prevention of harm, non-discrimination, fairness, no presumption of advantage, evidence-based approach, primacy of health and bodily autonomy, stakeholder-centred approach, right to privacy, and periodic reviews.[679]

**b.** *Transgender Guidelines*[680]**:** Since the 2003 Stockholm Consensus on Sex Reassignment in Sports, initially required transgender women to undergo surgical procedures, including gonadectomy, and observe a two-year waiting period before becoming eligible to compete in women's sports.[681] However, the IOC's 2015 updated the guidelines by removing the surgery requirement but other conditions are evaluated on a case-by-case basis to ensure fairness and inclusion.[682] These guidelines include:

1. Individuals who transition from female to male are eligible to compete in the male category without restriction.

2. Individuals who transition from male to female are eligible to compete in the female category under the following conditions:

a. The athlete must declare that her gender identity is female, and this declaration cannot be changed for sporting purposes for a minimum of four years.

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[678] *Olympic Charter*, Fundamental Principles of Olympism, Principle 4 (Int'l Olympic Comm. 2023).

[679] Int'l Olympic Comm., IOC Framework on Fairness, Inclusion and Non-Discrimination on the Basis of Gender Identity and Sex Variations, https://stillmed.olympics.com/media/Documents/Beyond-the-Games/Human-Rights/IOC-Framework-Fairness-Inclusion-Non-discrimination-2021.pdf (last visited July 20, 2025).

[680] Int'l Olympic Comm., supra note 19.

[681] Int'l Olympic Comm., IOC Approves Consensus with Regard to Athletes Who Have Changed Sex, https://www.olympics.com/ioc/news/ioc-approves-consensus-with-regard-to-athletes-who-have-changed-sex (last visited July 21, 2025).

[682] Associated Press, IOC Rules Transgender Athletes Can Take Part in Olympics Without Surgery, *The Guardian*,https://www.theguardian.com/sport/2016/jan/25/ioc-rules-transgender-athletes-can-take-part-in-olympics-without-surgery (last visited July 21, 2025).

b. The athlete must demonstrate that her total testosterone level in serum has been below 10 nmol/L for at least 12 months prior to her first competition. (Any longer period will be determined based on a confidential case-by-case evaluation, considering whether 12 months is sufficient to minimize any competitive advantage in women's competition).

c. The athlete's total testosterone level in serum must remain below 10 nmol/L throughout the period of eligibility to compete in the female category.

d. Compliance with these conditions may be monitored through testing. In cases of non-compliance, the athlete's eligibility for female competition will be suspended for 12 months. It is to be noted that the International Olympic Committee (IOC) does not directly govern all sports worldwide, it plays a pivotal role in overseeing the Olympic Movement and ensuring the regular organization of the Olympic Games.683

1. **A Comparative Analysis of Sports Policies and Law for Cisgender and Transgender Athletes Around the Globe**

In examining the legal frameworks and sports policies related to cisgender and transgender athletes, it is important to consider the perspectives and regulations from different countries such as British law which establishes a key legal framework., the Gender Recognition Act of 2004, granting individuals a Gender Recognition Certificate (GRC), which is a legal recognition in their acquired gender "for all purposes," though it includes certain exceptions. However, there is ongoing legal uncertainty about how this interacts with the Equality Act 2010, particularly regarding the definitions of "man, woman and sex"684 which was later resolved by the Supreme Court in the case of Women Scotland Ltd v. The Scottish Ministers,685 where the Court unanimously upheld the appeal, determining that the terms "man," "woman," and "sex" in the Equality Act 2010 refer to biological sex.

The ruling clarified the legality of women's sports but simultaneously created a barrier through Section 195 of the Equality Act 2010, as sex-based distinctions in sports was allowed where physical strength, stamina, or physique may provide one sex with an advantage. However, the

683 Int'l Olympic Comm., Recognized International Federations, https://www.olympics.com/ioc/recognised-international-federations (last visited July 23, 2025).

684 McAnena & Cunningham, Comment: McAnena & Cunningham, 7–14 April 2023, *Legal World*, *New Law J.*, https://www.outertemple.com/wp-content/uploads/2023/06/Comment-McAnena-Cunningham_7-14-April_1.pdf (last visited July 23, 2025).

685 2025 UKSC 16.

ruling may exclude transgender women by defining gender strictly by biological sex, limiting their participation and creating barriers to inclusion based on gender identity.

While in U.S., the Trump's policy of excluding transgender from public offices have resulted in issuance of Executive Order 14168 "Defending Women from Gender Ideology Extremism and Restoring Biological Truth to the Federal Government" (the EO),686 which has set-forth a new policy to rescind federal funding from educational programs that allowed transgender women and girls to compete on female teams and oppose transgender women's and girls' participation in female sports more broadly.

Following the orders, the U.S. Department of Education began reviewing athletics policies at universities and athletic associations but local resistance emerged most notably on February 11, 2025, when Worcester, Massachusetts, declared itself a transgender sanctuary city, vowing to protect transgender rights.[687] Legal challenges emerged as on February 12, 2025, two transgender high school students in New Hampshire filed a lawsuit, Tirrell v. Edelblut,[688] against the Trump administration, arguing that "Executive Orders 14168 and 14201"[689] discriminate against transgender individuals, violating both the Constitution and Title IX. This lawsuit is expected to invoke the U.S. Supreme Court's ruling in Bostock v. Clayton County,[690] which held that discrimination based on gender identity constitutes sex-based discrimination under Title VII.

In contrast to U.K. and U.S., the legal and policy landscape regarding transgender athletes is still fluid in India. While the Transgender Persons (Protection of Rights) Act 2019 recognizes transgender individuals, it does not provide clear guidelines for their participation in sports. The Sports Authority of India has yet to implement consistent policies, leaving decisions to individual sports organizations. But the Courts in India have recognized the equal rights of transgender individuals to participate in sports ruling that in the absence of a separate category for transgender persons, the petitioner, identifying as a woman, must be allowed to compete in the female category. [691]

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[686] Sharma, supra note 24.

[687] Lara A. Flath & Amy Van Gelder, Ban on Transgender Women from Female Sports Is Challenged in Court, *Skadden, Arps, Slate, Meagher & Flom LLP*, https://www.skadden.com/insights/publications/2025/02/ban-on-transgender-women-from-female-sports-is-challenged-in-court (last visited July 21, 2025).

[688] *1:24-cv-00251* (D.N.H.).

[689] Exec. Order No. 14201, *Keeping Men Out of Women's Sports*, 90 Fed. Reg. 9279 (Feb. 11, 2025), https://www.presidency.ucsb.edu/documents/executive-order-14201-

[690] 140 S. Ct. 1731 (2020).

[691] Anamika v. State of Kerala, MANU/KE/2684/2022 (India).

## LEGAL CHALLENGES FOR CISGENDER AND TRANSGENDER ATHLETES IN SPORTS

The legal challenges faced by transgender athletes, as discussed in the above chapters, can be summarized as follows:

a. **Ambiguity in Gender Definitions**: The legal ambiguity surrounding the definitions of "man," "woman," and "sex" in various legal frameworks creates challenges for transgender athletes. Rulings that define these terms strictly based on biological sex potentially exclude transgender women from competing in female sports.

b. **Lack of Uniform Policies:** The absence of clear and consistent national policies regarding the participation of transgender athletes in sports leaves them vulnerable in many regions.

c. **Legal Discrimination Against Transgender Athletes**: The rigid legal frameworks that base eligibility for female sports on biological sex rather than gender identity (as seen in both the UK and the U.S.) can result in discrimination.

d. **Legal Uncertainty in Policy**: The varying testosterone level requirements set by different sports organizations create legal uncertainty for transgender athletes.

## CONCLUSION AND WAY FORWARD

The landscape of sports law has evolved significantly, reflecting broader societal conversations around gender, identity, equality, and fairness. From traditional athletic contests to the digital revolution, the expansion has brought forth a complex legal question, particularly surrounding gender inclusion. Initially, the fight centred on cisgender women, but they overcame entrenched societal and institutional barriers securing equal participation in sports. Then the formal recognition of transgender individuals introduced debate, especially in sex-segregated competitions, raising questions about fairness, physical advantage, bodily autonomy, and the protection of existing rights. While efforts to foster inclusion have gained momentum still practical implementation remains inconsistent and, at times, discriminatory. Across jurisdictions, from the UK, US and India, a comparative analysis reveals a fragmented and often conflicting legal landscape. Policies differ widely between countries and sports federations, and even within international frameworks, such as the IOC's 2021 Framework on Fairness, Inclusion and Non-Discrimination, the guidance remains non-binding. Despite its progressive intent, the framework's non-binding nature and sport-specific application has left many transgender athletes to face ongoing legal and procedural uncertainty.

Truly equitable participation cannot be achieved through isolated efforts; it requires a global, collaborative, and interdisciplinary response. Governing bodies, national legislatures, sports federations, and civil society must work together to create laws and policies that respect human rights while ensuring fair competition. The future of sports must embrace fairness and inclusivity not as conflicting ideals, but as complementary principles that strengthen one another. To achieve this, there is an urgent need for clear, consistent, and unified regulations that ensure equal and equitable opportunities for all athletes, regardless of their gender identity.

# ARTIFICIAL INTELLIGENCE IN MODERN JUSTICE SYSTEMS

***Amar Singh***[692]

## ABSTRACT

*In the digital era, technological innovation and its usage has increased criminal activities. It remains a major challenge for police, court, correction and law enforcement agencies to determine the crime and criminal involved. The modern judicial system of the country is working in close coordination with police, law-enforcing agencies, attorney, and the authorities following the procedures using advance technology to advance access to justice for all. Its main role is to prevent crime, protect the innocent, investigate cybercrime and punish the guilty (criminal). The technology has also provided a major edge in detection to apprehension that can improve accuracy in investigations and policing too through forensic solutions. It helps people to seek and obtain redress through formal and informal institutions. Further, technologies can advance access to justice by creating more streamlined and accessible processes. The Emerging Technologies such as Artificial Intelligence (AI) is transforming modern criminal justice, aiding in decision-making and crime prevention and being used by the law enforcement agencies (Organizations, legal offices, and defence providers) around the globe. With the assistance of AI, real-time statistics can be obtained and that may help authorities respond quickly to criminal activities. AI is impacting language processing by enabling various advancements like machine translation, chat bots, and personalized learning tools, preserving rare languages and understanding nuanced language variations. This paper explores the application of AI in language processing and forensic tools that are used by the various law enforcement agencies and modern criminal justice system.*

**Keywords**: Crime, Criminal, Forensic, Natural Language Processing, Justice system, Digital

[692] Amar Singh, *Osmania University*.

## INTRODUCTION

The term “Technology” widely known, as sophisticated machines performing so many routine task and complicated task rapidly, effectively and efficiently, with and without the involvement of human (Moriarty, 2017). In the era of digital transformation, the technology is involved in every aspect of life. The use of technology has become important part of law enforcement and has brought major changes in various aspects of life, including the legal system. Emerging Technology and innovation have open up new opportunities in accessing, analysing, and processing information in law enforcement. The interplay between law and technology can result in better crime detection and justice delivery. In the age of intelligence, the Justice System is no exception to it. (University., 2023).

Globally, the crime rates are increasing day by day as the technology is evolving. The modern offenders are using intelligent technologies to commit sophisticated crimes (including cybercrime) and evade detection. As the intelligent technologies are evolving, the prevention and detection of crime with apprehension of criminals becoming a major challenge for Justice System in most of the countries. It may be due to traditional way of investigation or resistant towards the adoption of emerging technology. The use of intelligent technologies by criminals has brought sophistication in crimes and has given it strength to global nature. The Justice System (JS) left with no option other than improving their capabilities to combat the menace of sophisticated crime vis-à-vis using enhanced abilities and making the investigation more efficient.

There is a need of Robust Legal Technology (RLT) (Mishra P. K., 2024) that should bring efficiency and effectiveness at each stage (cops, crime/criminal, court, correction) of JS, in order to tackle the crime and capture the criminals within no time. The RLT should be such that the law enforcement and various agent of the JS should use new and existing tools and apply techniques in tricky and ingenious ways to the conduct of crime, the crime prevention and control operations of the police, the judicial processing functions of the courts and the warehousing, rehabilitation, and monitoring functions of corrections systems. The robustness of legal technology can achieve by the use of Emerging Technologies such as Artificial Intelligence and its integration with other technologies.

As the technology evolves, the Modern justice system needs to be renovated by incorporating the advanced technology for efficiency and transparency. The primary actors in justice system – the criminals, the people who measure and analyse crime, the police, judges, prosecutors, defence attorneys and corrections officers - are all interested in using information technologies

such as Artificial Intelligence and other technological form (example: Electronic databases, surveillance systems, pharmaceuticals, explosives, weaponry) to achieve their various objectives. (Moriarty, 2017). AI[693] is a relatively fast-growing technology, mostly characterized by a certain degree of coherence persisting over time and with the potential to exert a considerable impact on the socio-economic domain(s), which observed in terms of the composition of actors, institutions and patterns of interactions among those, along with the associated knowledge production processes. It has most prominent impact, however, lies in the future and so in the emergence phase is still somewhat uncertain and ambiguous (Daniele Rotolo, 2015) that also raises ethical and legal concerns.

## ARTIFICIAL INTELLIGENCE IN MODERN JUSTICE SYSTEM

Artificial Intelligence (AI) refers to the simulation of human intelligence in machines that are programmed to think and act like humans. It involves the use of algorithms and computer programs to perform tasks that typically require human intelligence, such as visual perception, speech recognition, decision-making, and language translation and processing, among others (Agarwal, 2013).

AI is transforming criminal justice, aiding in decision-making, predictive policing in crime prevention and legal research. It used by the law enforcement agencies (Organizations, legal offices, and defence providers) around the globe in different ways: to assist the human in difficult task, improve human capabilities and replace humans with fully automated processes and robots. (Nicole Ezeh, 2025). With the assistance of AI, real-time statistics obtained from various sources (surveillance cameras, social media, and crime reports) and that may help authorities respond quickly to criminal activities.

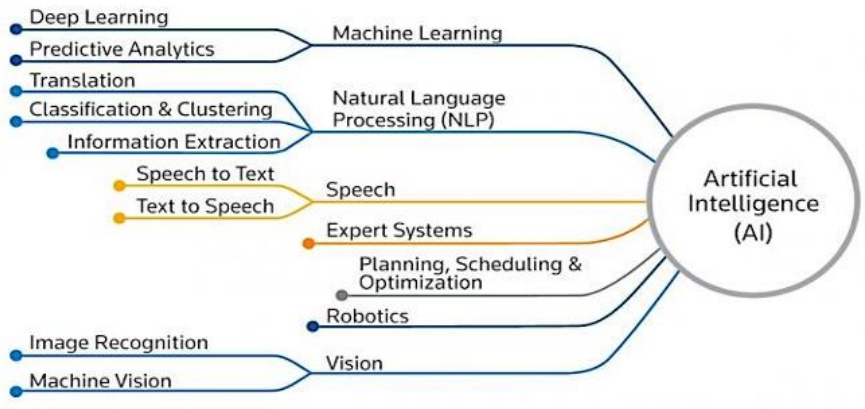
AI is capable to assist the crime laboraties for complex DNA mixture analysis, digital evidence analysis,image analysis that help law enforcement with situational awareness. If technology such as robotics and drones are included in public safety system with AI, it can help society and law enforcement agencies for a safe alternative. Integration of AI with computer-aided response and live public safety video enterprises can help law enforcement respond to incidents, prevent threats, stage interventions, divert resources, and investigate and analyze criminal activity. AI powered Speech recognition system is rapidly transforming the law enforcement due to the usage of AI-algorithms that converts the spoken words into machine

[693] Timothy Havens, Associate Professor of Computer Systems, Michigan Technological University, quoted in *Artificial Intelligence (AI) vs. Machine Learning (ML): 8 Common Misunderstandings, The Enterprisers Project* (May 19, 2020), https://blogs.mtu.edu/computing/2020/05/19/tim-havens-quote-in-enterprisers-project/.

readeable form.It can play a crucial role in preventing and solving crimes, including terrorist acts.

According to the Future of Professionals Report 2024 by the Thomson Reuters Institute, 79% of law firm respondents anticipate that AI will have a high or transformational impact on their work within the next five years, while 42% believe that AI's transformational potential has surged. According to the reports by the Federal bureau of investigation, the crime rates have dropped by 3.3 % and 6.3 % co-in the USA.

Various law enforcement agencies are using AI for anticipating, investigating, detecting, and preventing crime evidence, predictive policing (Veritone). The prosecution uses AI for Evidence analysis, case management, and sentencing. The Judiciary uses AI for Case Management, Risk Assessment, Virtual Courtrooms and Other areas: Forensic Science (DNA Analysis), Combating Cybercrime, Monitoring Online Platforms, whereas Natural Language Processing (sub field of AI) is used by both Lawyers and Clients to streamline legal research, Law Enforcement Agencies




Source: (Pickell, 2025)

**Figure 1. Artificial Intelligence and its Sub-field**

## NATURAL LANGUAGE PROCESSING (NLP)

In recent years, advancements in Natural Language Processing (NLP) have significantly impacted the legal domain by simplifying complex tasks, such as Legal Document Summarization (LDS)[694], Legal Argument Mining (LAM)[695] enhancing legal text

[694] Isabel Gallegos & Kaylee George, *The Right to Remain Plain: Summarization and Simplification of Legal Documents*, Stanford University CS224N Project Report (2022), https://web.stanford.edu/class/archive/cs/cs224n/cs224n.1224/reports/custom_116652906.pdf.

[695] Ivan Habernal et al., Mining Legal Arguments in Court Decisions, 32 *Artif. Intell. & L.* 1 (2024), https://link.springer.com/article/10.1007/s10506-023-09361-y.

comprehension for laypersons, and improving Legal Question Answering (LQA)[696] and Legal Judgement Prediction (LJP). (FARID ARIAI and GIANLUCA DEMARTINI, March 2025)

In general, NLP is the application of AI on human linguistics. NLP is a subset of AI. It's the branch of AI that permits computers to understand, interpret, and manipulate human language. NLP makes possible for humans to talk to machines. NLP itself has a number of subsets, including natural language understanding (NLU), which refers to machine reading comprehension, and natural language generation (NLG), which can transform data into human words. NLP makes it possible for computers to extract keywords and phrases, understand the intent of language, translate that to another language, or generate a response. (Overby, 2020). Some of the examples include Google's predictive search suggestions, spell checkers and voice recognition. NLP is a bright industry, expected to grow $27.6 billion by 2026 and projected to reach US$ 3081.5 million by 2028, from US$ 843 million in 2021, at a CAGR of 20.1% during 2022-2028. (Reports, Jul 09, 2020). NLP is serving as a vital tool for expediting judicial proceedings in the legal domain (Raphael Souza de Oliveira, 2025). Some of the ways NLP can help both Lawyers and Clients (Flynn, 2021) are

a) *Improve legal research:* Rigorous research is essential for all legal processes, but it takes a long time for settling a personal injury claim, that discourages the clients. NLP-powered legal search engines can shorten the legal research processes, where it translates the plain language into "legalese"697. Advanced NLP programs not only search for specific keywords but also search for concepts, analyse a case study or document and suggest other similar cases for lawyers to review, to search and find faster what they need.
b) *Drafting and analysing lawful (legal) documents*: NLP can help buy lawyers avoid mistakes, word choice, syntax that creates unintentional vagueness in a contract or legal document, while drafting documents. It can help lawyers to protect their client's reputation.
c) *Automating Routine documentation and drafting work*: As per the legal trend report, majority of the legal clients expect the lawyer to be available outside of business hours and expect the result with in less time. So, the lawyer tries to automate the drafting process to reduce stress, save time, have considerable relief from client. Some NLP-based automation

[696] Jens Frankenreiter & Julian Nyarko, Natural Language Processing in Legal Tech, in *Legal Tech and the Future of Civil Justice* 63 (David Freeman Engstrom ed., Cambridge Univ. Press 2023), https://www.cambridge.org/core/books/legal-tech-and-the-future-of-civil-justice/natural-language-processing-in-legal-tech/963F237942CA584BA07791DB6DFAF3EA.

[697] Legalese: Meaning and Clear Definition, *LegalTerms.net* (2025), https://legalterms.net/what-is-legal-legalese/.

tools draft basic versions of contracts, can organize and file documents automatically based on the language.

d) *Predicting Rulings and prediction model*: Advanced NLP program uses an algorithm that can analyse past case studies, builds predictive models to predict how a court may rule in proceeding. These models can help lawyer to frame a more effective argument. A 2025 study created an NLP model that could predict 98% accuracy with rich and high-quality word characteristics for the prediction of text nature (Khan, 2025).

Despite NLP's potential and growing uses in law, there are some challenges that are listed below.

a. NLP has limited understanding of context and meanings, nuance of the human language leading to unidentified sarcasm and idioms. This causes errors, inaccuracies, or irrelevance
b. NLP can analyse data and provide insights, but it lacks ethical reasoning and emotional intelligence required for certain legal situation and cases.
c. NLP systems are limited to existing legal precedent. It cannot understand the law in the way humans do, as they operate on patterns and information present in their training data and are not adapt to emerging legal concepts or rapidly evolving areas of law.
d. The information used to train an NLP model may contain skewed, unfair, or unrepresentative patterns often reflecting existing prejudices or systemic inequalities in society. Biased NLP systems can aid unfair outcomes, affecting decisions related to legal advice, contract reviews. Legal professional should remain attentive in identifying and mitigating these biases.
e. Security and privacy concerns arise, as most of the legal documents always contain high confidential details about individuals, organizations, and legal matters. Legal professionals should be caution about the storage and handling of sensitive information, while using NLP tools to prevent unlawful access or data leaks.

The best NLP tools for legal research are LEGALFLY, Lex Machina, Case Text, Paxton AI, Blue J Legal, Harvey AI, Westlaw, Bloomberg Law (MacSweeney, 2024).

## AI AND FORENSIC SCIENCE

Forensic science is the use of scientific methods or expertise to investigate crimes or examine evidence that might be presented in a court of law (NIST). It comprises diverse field of discipline ranging from finger print and DNA analysis to anthropology and wildlife forensics. It plays a major role in judicial process, civil and criminal investigation. Forensic scientists make use of tools and techniques to interpret crime scene evidence for investigations.

Forensic science has changed the world of justice by incorporating the modern technology. It's helping the lawyer to argue on charge

a. through Interpretation of medico-legal case (MLC) report, Postmortem reports, cross examination of witness through Forensic Experts, Medical Experts, Doctors,
b. by converting the technical terms to interpret the Forensic evidences
c. by connecting the Interpretation of Forensic evidences with the provisions of Law

## I. The role of AI in Forensic Science

The AI has emerged the powerful tool in Forensic Science that is processing sophisticated data, analysing crime scene, interpreting DNA and electronically stored data (digital forensic). Over the years, AI has proven to be most important technology in the analysis of evidence. It is contributing to forensic science through its accuracy and object-based data analysis when compared to traditional methods that are based on subjective interpretations and inconsistency. Some of the areas where AI use (P., 2024 Sep) are

a. AI in Crime Scene Investigation and Reconstruction
    - AI-Powered Crime Scene Analysis and Data Integration
    - 3D Crime Scene Modelling and Virtual Reconstruction
b. AI in Forensic DNA Analysis
    - AI Algorithms for Complex DNA Mixture Interpretation
    - AI and Next-Generation Sequencing (NGS) in Forensics
c. AI in Digital Forensics and Cybercrime Investigations
    - Automated Analysis of Digital Evidence
    - AI in Image and Video Forensics
d. AI and Block chain Technology in Digital Forensic Evidence Authentication
e. AI in Forensic Pattern Recognition and Image Analysis
    - AI in Fingerprint Analysis
    - AI in Bloodstain Pattern Analysis (BPA)
    - AI in Tool mark and Firearm Identification
f. AI in Forensic Toxicology and Drug Identification
    - AI in Toxicological Data Analysis
    - AI in Detecting Novel Psychoactive Substances (NPS)
g. AI in Voice and Audio Forensics
    - AI in Speaker Identification and Voice Biometrics
    - AI in Audio Enhancement and Noise Reduction

h. AI in Forensic Document and Handwriting Analysis
    - Handwriting and Signature Verification with AI
    - AI in Document Forgery Detection

## II. AI-Powered Forensic Tools

AI-powered forensic tools are transforming investigations by using natural language processing, machine learning, deep learning to analyse datasets, identify patterns and detect irregularities that cannot be found by traditional methods. These tools are used across multiple forensic disciplines such as

a. *Digital forensics*: Digital forensics compromise collecting, analysing, and preserving electronic evidence for criminal investigations, cyber security incidents, and legal proceedings. AI is revolutionizing digital forensics by through Automated Data Analysis and processing, malware and cyber-attack detection, Image Forensics and Deep fake, rapid evidence analysis, predictive analytics for Crime Prevention and detection, Facial and Biometric Recognition, automating forensic investigations, Speech and Text Analysis, digital evidence reconstruction and Incident response, improving pattern recognition, automatic data analysis and enhancing cyber security threat detection

   AI-powered forensic tools use predictive analytics, including natural language processing (NLP), machine learning, and deep learning to process huge amounts of digital evidence (emails, logs, metadata, network traffic and multimedia files). Some of AI powered digital forensics tools are Magnet AXIOM, Cellebrite Pathfinder, Blacklight (by Black Bag.

b. *Video and image analysis*: It is used to examine various crimes such as fraud, child pornography, and terrorism. It can play a critical role in verifying the authenticity of digital media used in social media posts and online news stories, voice recognition. Some of AI powered video and image analysis tools are Amped FIVE, Truepic, Clearview AI

c. *Voice and Audio Forensics*: It aids in speaker identification, voice cloning detection, and audio enhancement. Some of AI powered voice and audio Forensics tools are Pindrop, Veritone, and Resemble Detect.

d. *Document analysis*: It is used to detect forgery, plagiarism, or authorship attribution. Some of the AI powered document analysis tools are CopyLeaks or Turnitin, Authorship Attribution AI, Forensic Linguistics AI.

e. *Predictive Policing and Crime Pattern Analysis*: IT analyse crime data to predict potential threats or criminal activity hotspots. PredPol, ShotSpotter, HunchLab are some of the predictive policing and crime pattern analysis tools used.

f. *Crime scene reconstruction*: It helps simulate crime scenes based on data inputs such as photos, measurements, or 3D scans. FARO Zone 3D and VTO (Virtual Training Officer) are tools used for crime scene reconstruction.

## CONCLUSION

AI is revolutionizing the modern justice from crime investigation to court proceeding. Law enforcement agencies are using AI for anticipating, investigating, detecting, and preventing crime evidence, predictive policing, evidence analysis, Forensic Science (DNA Analysis), Combating Cybercrime, and Monitoring Online Platforms. The Court are also using AI for case management, sentencing, Case Management, Risk Assessment, Virtual Courtrooms. AI-driven risk assessment tools used to estimate the chances of recidivism and data-driven approaches for sentencing the offender. (Chaturvedi, Emerging Technology Trends And Its Effect On Criminal Justice System, 2025). However, there are ethical issues and concerns about bias in AI algorithms, admissibility in court, deepfake manipulation, privacy violations, and lack of accountability in AI systems that need to be address.

However, to strike a balance between AI revolution and risk, forensic experts must implement ethical AI practices, transparency, and integrate AI as a tool for enlarging human expertise rather than replacing humans.

# RESTORATIVE JUSTICE

***Sneha Jaiswal***[698]

## ABSTRACT

*Restorative justice is a paradigm shift in criminal justice system because it does not focus on punishment as a means to deal with it, but instead on processes that focus on healing, accountability, and community participation. In contrast to the word restorative justice does not emphasize punishment, as opposed to the traditional retributive models, crime is viewed as a breach of the relationships, where the harm is aimed to be restored to the victims, offenders and the communities. The focus of this approach is dialogue, restitution, and reintegration which strives to tackle the underlying causes of criminal behaviour as well as empowering the victims.*

*This paper discusses the basics of justice, giving a description of the different forms of justice, such as retributive, distributive, procedural, and restorative. We explore the concept of restorative justice, a process that entails such procedures and activities as mediation between the victim and the offender, and family group conferences, aimed at developing a sense of empathy and reconciliation. Its historical roots can be traced to pre-colonial activities in societies like the Maori in New Zealand and Native American tribes and turned into modern models as early as the 1970s by the first advocates like Howard Zehr and Albert Eglash.*

*Through how restorative justice has impacted on the law-making systems around the world. In the West, it has influenced legislation in such countries as Canada, the United States or New Zealand, and has included aspects therein, including Canada in its Youth Criminal Justice Act and New Zealand in its Family Group Conferences section of the Children, Young Persons and their Families Act 1989. Although the system is still predominantly retributive in India, the principles of restorative justice are reflected in the Code of Criminal Procedure in Section 265A CrPC in the concept of plea bargaining and in the concept of victim compensation in Section 357A CrPC, and there is increasing judicial support in favour of its application.*

*This discussion finds that restorative justice would be a humanistic alternative to traditional systems, and the recidivism would be minimized, and the harmony in the society would be enhanced. Nevertheless, must be introduced culturally to enable its use with the aid of strong legislation and without abuse and violations. Restorative practices can transform the justice*

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*system and bring it back to be more inclusive and effective, which in the end is a positive outcome to both victims, offenders and communities.*

**Keywords**: Repairing harm, Revival of respect and dignity, Collaborative resolution, Responsibility and accountability, Victim empowerment and offender empowerment, Relationship restorative, Reconciliation, Human rights sensitivity, Humanistic and holistic justice.

## INTRODUCTION

To begin with, I would like to mention that in a way justice is the notion that individuals deserve to be treated justly and earn what they rightfully deserve. It has nothing to do with being prejudiced or biased but ensuring that the law (or anything the law has declared as morally right) was applied equally to all the people. You may perceive it differently- legal justice whereby the law is applied equally, distributive justice whereby the allocation of resources is performed in a fair manner, retributive justice whereby improper actions of the bad person are punished in an appropriate manner and restorative justice whereby the bad person is given a chance to make the evil right.

In a more philosophical aspect, justice is the balancing act of last resort, of the individual right in relation to the general welfare of society. Plato and other ancient philosophers observed a different way of thinking; along the line, justice was a form of harmony, in which each one remained within his or her station, and each received what is due, making a contribution out of their quaint. Today, we observe progress in terms of social justice whereby each individual is granted equal rights and fair treatment in line with the present time human rights agenda

In short, justice is about being fair, treating people fairly, abiding by the law, and the ethical aspect of justice which is to offer a human being what is rightfully his. It is both a massive ideal concept and an actual goal to be accomplished by the law systems and societies, everywhere in the world.

### Types of Justice

Justice may broadly be classified into four different types namely: retributive, distributive, procedural and restorative. Both of the types look at the various aspects of resolving conflicts and fairness.

Retributive justice is concentrated on punishment as a reaction to wrong. It is based on the premise that; offenders have to compensate their offenses either by imprisonment or fine towards their wrongdoing depending on the severity of the offense. This model is based on the

theory of an eye of an eye with the objective of deterrence and satisfaction of demands of society to be accountable. As an example, in most legal regimes murder will mean life imprisonment or death to commensurate the damage.

Distributive justice is about equal distribution of resources and benefits in the society. It has to do with the division of goods, opportunities, and burdens based on equity with the priority given to the need, merit, and/or equality. John Rawls in theory of justice as fairness has been an example of this in that we should ensure that the arrangements into which we are bound serve to the advantage of the least privileged.

Procedural justice focuses on the decency of mechanisms that are employed to either end a dispute or distribute the resources. It also works by ensuring that: the decision arrived at is based on transparent and nonbiased means where all parties are heard. When processes are accepted as fair, individuals will accept the results, even in case they are bad.

Restorative justice, which is the centre of this article, puts consideration on the concept of repair instead of punishing. The concept does not only consider crime as a reward of law but rather as a restore manifestation of damage to individuals and relationships aiming at a recovery through dialogue and reconciliation.

Restorative justice is a method in which the stress is laid on reparation of the damage committed by a crime rather than punitive treatment. The system entails uniting the victims, the offenders, and the community members to enable them to discuss the causes of the crime and seek options of reconciliation. "According to the definition in use internationally, it is explained as a process through which stakeholders to a particular offense collaboratively determine how to respond to the consequences of the offense and its future implications to occurrence or non-occurrence respectively to those concerned no matter their intentions or actions".[699] The premise of this model is that social conditions and broken relationships are the cause of crime and that participants need a flexible, participatory response to fulfil the needs of the participants.

The most important are the perception of each crime as a crime against people and relationships, focus on the victims and communities in decision-making, and hold offenders to account by imposing such measures as restitution or community service. Contrary to retributive systems with emphasis on guilt and pain, the success of restorative justice is more often evaluated by the extent in which the damage and relationships are recreated. It enables the victim, provides an avenue through which the offenders can be held responsible in manners that matter and engages the community in the prevention and support.

[699] Howard Zehr, *The Little Book of Restorative Justice* 37 (Good Books 2015).

**There are several DESTs of Restorative Justice:**

Restorative justice has a host of practices, with each context-specific:

1. Victim-Offender Mediation: A facilitated two-person conference between the victim and the offender in which they discuss outcome of the crime and come up with restitution as an apology or restitution.

2. Family Group Conferencing: Practical In this model, the juvenile court, the offender and the community help in the development of a plan of accountability and support, which is known commonly in youth justice systems, such as that in New Zealand and other legal systems.

3. Circles (Sentencing and/or Peace-making Circles): This is pre-from sparked of indigenous traditions, and in a broader context of the stakeholders, applied in a format of a talking-circle to discuss harm and encourage healing.

## HISTORICAL CONTEXT

Community Reparative Boards members convene into panels that hear cases and prescribe restorative actions, which emphasize reintegration. Such varieties are focused on encounter (dialogue), repair (restitution), and transformation (long-term change) and, thus, restorative justice can be used in many cultural and legal contexts recommendation was made to the manager to supply him with a deeper report on the financial analyst's calculation and the methods applied to formulate it. It was advised to the manager to provide him with a more detailed account of how the financial analyst made his calculation and the procedures used to make the calculation.

Restorative justice began nearly fifty years ago in the group research conducted by Professor Neil Braithwaite at the Faculty of Law in London, UK. Restorative justice has much older roots, and the concept of restorative justice belongs to antiquity and aboriginal traditions before the formalization of the concept in the legal field. Although the term "restorative justice" developed in the middle of the 20th century, its concepts find reflections in the practices across the various cultures where the emphasis was made on healing the community, rather than punishing a person according to state regulations.

Forms of restorative justice have been observed among indigenous people across the world over centuries-long. In their case, Maori people of New Zealand employed a system called Utu, which ensured the social stability by means of restitution and reconciliation, keeping persons and the integrity of the group safe. Likewise, the Native American tribes in North America also used peace making circle, the community members explaining their harms in front of their peers and mending their relationships. Sin in most African and Asian cultures was regarded as

a social problem, collectively everyone was to remedy the wrongdoer instead of isolating him or her.

The colonial authorities usually suppressed these practices, imposing retributive state centred systems. One of the prominent actors in the field, Howard Zehr observes pre-colonial justice to have been interpersonal and restitutive; in comparison with the formal legal structures that have materialized with nation-states. This transition of the community justice to the legal justice consolidated power and substituted the idea of negotiations with the concept of punishment.

Contemporary conception of restorative justice started to form in 1970s. The term was coined by Albert Eglash in 1977 in contrast to the retributive (punishment-based) and distributive (therapy-based) justice, focusing on restitution involving the input of both victims and offenders. In his article, Nils Christie 1977, titled Conflicts as Property, he argued that a state is not the owner of conflicts, therefore, communities' own conflict and that it is time to give them back out there.

During the 1980s and the 1990s, restorative justice was experimented in both North America and Europe. The concepts of victim-offender reconciliation programmes used by Canada and replenishment of Maori practices by the New Zealand in young justice initiatives were milestones. In the late 1990s, it was being spread in the world by the organization United Nations Office on Drugs and Crime so sensitive to all natures which acknowledged the origins of this drug within the traditions of communities. Restorative justice is currently viewed as a confirmation of history-repressed values of the indigenous and provides an addition to the retribution framework that predominates in Western systems. Its development is related to the combination of ancient wisdom and modern requirements and how to overcome the constraints of punitive justice in the more and more interconnected world.

Historical background of restorative justice in the medieval and modern period indicates that there existed a shift in the community-based and victim-based system of resolving conflicts to a centralized state-controlled system of justice with the modern period witnessing a rekindled and formalization of the restorative practices that were motivated by the dissatisfaction with the traditional justice systems of punishment.

**Medieval Period Context**

Restorative justice formed a significant component of the legal process during the medieval period especially in Anglo- Saxon England (5 th century to the Norman Conquest of 1066). Justice was typically victim-oriented and culminated when settling lawsuits through material

compensation and swearing of oaths. Based on what I recorded, it appears that so much so that this system was frequently referred to as feud centred, and with an injury done to an individual or a relative, had to be returned in kind unless a negotiated amendment was achieved. The system was a balance between reparation and deterrence, and the status was another determinant of those benefiting or those who suffer in this context. This is not unfamiliar to us in our lectured sources on the social functions of early law.

These practices were gradually encroached by monarchical authority that regulated and restricted feuds, proclaimed royal peace, and redistributed compensation to the ruler. The readings describe how it played a catalyst towards transitioning the conception of victim and the concept of justice based on kinship to that of the state. Yet, during the medieval period, the work concerning the reviving practices following the settlement and peaceful relations retain the strong undertones of the resources connected with the partnership of forces and the notions of good and evil instead of autonomous ideas of kindness and forgiveness promoted in the present era.

**Modern Period Context**

Restorative justice resurfaced in the modern period and from the 1970s onwards as a formal challenge to the traditional criminal justice system as a system that focused on punishment and retribution. As the literature, particularly the North American case studies and the indigenous justice principles, demonstrates, modern restorative justice evolved majorly in North America and subsequently in the entire world under the influence of the principles of indigenous justice, as well as, the experiment of trials with the programs of victim-offender reconciliation.

During this timeframe, relations destroyed by crime are to be rebuilt which encompass conversation among the victims, the offenders and the community agents. It is based on accountability, healing, and reintegration rather than the previous perception of crime as a crime against the state, and that crime damages people and relationships. The contemporary restorative justice movement is regarded as a reaction to the shortcomings of punitive justice that emphasized rehabilitation and victimisation contentment combined with minimized recidivism

Overall, a revitalizing force of the kinship and feud traditions, which was gradually supplanted by the state in the medieval period, is being consciously recovered and reused in modern criminal justice to deal with the more societal and emotional consequences of crime.

## LEGISLATIVE FRAMEWORK: INDIAN AND WESTERN LAW

Restorative justice had a profound impact on the legal frameworks such that retributive models have on a global scale been overshadowed by the soft aspects of healing and making peace as an element of restorative justice. Although its acceptance is mixed, its influence on the laws in Western and Indian arenas has manifested itself through mediation, compensation and community participation provisions.

**Western Laws:**

Restorative justice has come to be adopted in statutes in Western became jurisdictions, including on juvenile and minor cases, influenced by indigenous trends.

Family group conferencing in New Zealand was formalised under the Children, Young Persons and their Families Act 1989,[700] an Act following Maori customs as a form of restorative justice. According to this act, youth offenders are compelled to hold conferences, which include parents and victims in developing reintegration plans, which minimize the court interference and recidivism.

Youth Criminal Justice Act of Stemwork, 2002[701] in Canada focuses more on restorative principles such that extrajudicial options such as community service and mediation are given in the Sections 4 and 5. It relies on accountability and rehabilitation that reflects the practices of the indigenous circles.

The United States has different states that have implemented the restorative aspects. Minnesota Restorative Justice Act[702] (Minnesota Statutes Section 611A.775) is one example of an Act that grants victim-offender conversations and compensatory plans. The federal Juvenile Justice and Delinquency Prevention Act[703] promotes correctional aimed restoration programs, but it is state-propeced.

The European Union facilitates restorative justice to victims by providing prescribed restorative processes such as mediation by authorising restorative process others (member states) under the Victims' rights Directive 2012/29/EU (Article 12),[704] which stipulates that the victim give his or her consent and safe environment.

Such laws are restorative in nature by emphasizing, healing laceration, needs of the victims, and reintegration of offenders, frequently referring to tenets of UN Basic Principles on Restorative Justice (2002).

[700] *Children, Young Persons and Their Families Act* 1989 (N.Z.).
[701] *Youth Criminal Justice Act*, S.C. 2002, c. 1 (Can.).
[702] *Minn. Stat. § 611A.775* (2023) (Restorative Justice Act).
[703] *Juvenile Justice and Delinquency Prevention Act*, 34 U.S.C. §§ 11101–11103 (2023).
[704] Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 Establishing Minimum Standards on the Rights, Support and Protection of Victims of Crime, art. 12, 2012 O.J. (L 315) 57.

**Indian Laws:**

Legal system in India is to a great extent based on the retributive approach and deals with the laws introduced during the period of colonization such as the Indian Penal Code (IPC) 1860 and the Code of Criminal Procedure (CrPC) 1973. Nonetheless, it is also apparent that restorative justice has taken effect especially in the provisions regarding victims and judicial interpretations.

In Chapter XXIA of the CrPC (Sections 265A to 265L) having been introduced in 2005, plea bargaining has provided opportunity to all defaulting offenders to come in with cutting-edge reduced sentences, sometimes with compensation to the victims. This is similar to restorative reparation but it only applies in the offenses that have a maximum of seven years imprisonment.

Under Section 357A CrPC, the states are required to provide victim compensation schemes, which facilitates financial compensation to repair harm, which is compatible with restorative concept of restitution.

Protection of Children Sexual Offences Protection of children sexual offences (POCSO) Act 2012[705] (in force), contains ingredients to think restoratively in Section 33 giving child victims a chance to take part sensitively in proceedings, and through Section 19 rehabilitation.

Juvenile Justice (Care and Protection of Children) Act 2015[706] delineates that it strongly encourages restorative methods of dealing with juveniles such as counselling as well as community service under Section 18, guided by the international models.

The Supreme Court is judicially seen to have supported restorative justice in such cases as matrimonial battles under Section 482 CrPC, termination of proceedings due to a mutual settlement.

These provisions are not completely codified; however, these provisions are based on the influence of restorative theory in promoting balance between punishment and healing. Cultural resistance, inconsistent application and occasionally, lack of awareness are all difficult but expanding awareness indicates a possibility of wider integration.

**JUDGEMENTS AND CASE LAWS**

Restorative justice has been cited in court rulings both in England and in India, where the Supreme Court has been striking a balance between retributive and restorative aspects. Presidentiable cases are analysed in this section with footnotes to Supreme Court Citations (SCC).

[705] *Protection of Children from Sexual Offences Act*, No. 32 of 2012, India Code.
[706] *Juvenile Justice (Care and Protection of Children) Act*, No. 2 of 2016, India Code.

In the case of Firoz vs. State of Madhya Pradesh 7 SCC 443 2022,[707] death was overruled by the Supreme Court and commuted to serve a term of 20 years imprisonment against a heinous crime of rape and the subsequent murder of a minor. It was noted by the bench, headed by Justice U.U. Lalit, that restorative justice gives parole to offenders who, once penalty is over, can emerge as socially responsible citizens stressing rehabilitation over extended imprisonment. Such a decision pointed to a necessity to balance between retributive justice and the restoration opportunities, adding that maximum punishment is not the sole means of ensuring that the psyche will be mended.

The Court in the case of State of UP vs. Sanjay Kumar (2012) 8 SCC 537,[708] gave emphasis to personalised sentencing with an added touch of restorative justice such as proportionality and the needs of the victims. It noted that unnecessary sympathy is a way of sabotaging people and justice can heal the situation of offenders and their victimization, leading to discretion on punishment.

In Gian Singh vs. State of Punjab (2012) 10 SCC 303,[709] the Supreme Court struck down criminal prosecution in compoundable offences, on mutual settlement, just like the restorative mediation. It was observed that, such resolutions heal relationships and help the judiciary to relieve congestion, as long as they do not concern heinous crimes.

The mitigating factors which had been raised by Bachan Singh were reiterated in Shatrughna Baban Meshram vs. State of Maharashtra (2021) at 1 SCC 596,[710] which promoted restorative factors in a death penalty case. The Court noted that socio-economic reasons should be handled with leniency in line with restorative conceptual perspectives of crime as a social process induced.

Sunil Batra v. Delhi Administration (AIR 1978 SC 179): Referring to this principle as a fundamental usage of restorative justice in Indian judiciary, Justice Krishna Iyer stressed on retributive policy must pay way to reformative option and consideration including rehabilitation and benign treatment of prisoners.

Rattan Singh v. State of Punjab: The Court emphasized the necessity for victim restitution and pointed out shortcomings in Indian criminal law pertaining to victim rights and that restorative justice techniques should be resorted to.

Western cases such as the Canada case,

[707] *Firoz v. State of Madhya Pradesh*, (2022) 7 SCC 443 (India).
[708] *State of Uttar Pradesh v. Sanjay Kumar*, (2012) 8 SCC 537 (India).
[709] *Gian Singh v. State of Punjab*, (2012) 10 SCC 303 (India).
[710] *Baban Meshram v. State of Maharashtra*, (2021) 1 SCC 596 (India).

Canada - R. v. Gladue were able to affect the discourse globally by enforcing a restorative option to sentencing coupled with taking into account the indigenous backgrounds.

United States – A couple of states (Vermont, California) have incorporated restorative justice in juvenile and Balanced Restorative Justice Initiatives 189 adult sentencing and mob's atrial systems, reducing the role of the victim, local involvement, and the offender answerable before a panel, by mediation, and through community correctional work.

European Union and UK: Restorative justice is becoming more and more a program in Europe with various programs that focus on mediation, victim-defendant discussions, community restorative programs as another/additional forms of criminal proceedings.

These determinations serve as an example of the shifting nature of restorative justice, whereby SC observations suggest that restorative justice can be utilized in humanizing the system and in the process making the system accountable.

According to the observations of a number of SCC volumes, restorative justice is compatible with Indian law.

**How courts frame RJ in opinions – recurring legal themes**

1. Victim-focused remedies - courts resume to compensating victims, providing and granting timely interim relief, and provision of non-monetary support. That is, they continue to elevate the dignity and the needs of the victim to the heart of the justice system (consider the take of Rudul Sah and Bodhisattva).

2. Reformation & rehabilitation as sentencing objectives - even with the more serious offences, the same-time treatment is getting some encouraging pushes, with judges of offenders doing their summative consideration with reference to reformation and long-term integration of the offender. In fact, the news reports on a small number of commutation cases in which that has been the special attention

3. Cultural/contextual sentencing Databases show that Gladue in Canada formally incorporated cultural analysis into the sentencing of indigenous offenders, and this practice has become a standard in what we are now required to think of as compulsory restorative action.

**Practical comparison – Indian and western practice**

Statutory incorporation: New Zealand and youth law Nailed down restorative justice in fact the Gladue principles and youth law in New Zealand have been given a good legal foundation. It is more fragmented and the UK has statutory provisions as well as national pilots underway. Still the Indian practice is rather case-based and scattered - courts largely award money or make an indication but there is no robust legislation on RJ.

Domain: The FGC model in New Zealand is a sequential, comprehensive youth process. The Gladue in Canada is applied in the sentencing scenario of Indigenous offenders. RJ in India does not appear as a system, primarily as victim compensation or rare community sentencing recommendations.

Judicial language: Western judgements often describe RJ as an analytical, nearly indispensable element of the analysis. The proposed RJ remedies are given by Indian courts are a court quid pro quo remedies, which do not fall under the product of courts.

## CONCLUSION

Restorative justice comes out as a more attractive alternative to powerful system of punishments that encourage healing and responsibilities that retributive models have mostly neglected. It reverses the use of prohibition to fight illicit beer by invoking ancient indigenous forebears to contemporary practice by engaging the offender in the process of transforming the penalty into harming and repairing relationships, which is crime it treats as an offense to relationships.

Its impact on law, in the case of the conferencing models in New Zealand, or in the compensation schemes in India of victim compensation, reflect the flexibility in cross-cultural contexts. Even a hearing in a Supreme Court that is judicially endorsed is a pointer of the move towards balanced justice where punishment is balanced with rehabilitation.

Restorative justice is an important paradigm shift to modern-day criminal jurisprudence, presenting an alternative to the retributive paradigm that prevailed over the history of modern laws. The model can result in acceptance of the victim, punishment aimed at recovery of the criminal and social integration through the participants coming to restorative justice which has been shown to increase satisfaction of the victims, increase the likelihood of the convicted criminal reforming as well as lead to the build-up of social group capital hence compensating the drawbacks of punitive models of justice.

The experience of other jurisdictions, such as Canada and New Zealand, demonstrates that restorative mechanisms can and should be institutionalised in legal texts, including statutes and rules, and by judicial declaration, the early signs of this appear in India under institutional legislation such as Sections 265A and 357A of the Code of Criminal Procedure, 1973, and in an emerging common language of the law, as felt in Mohd. Firoz v. State of Madhya Pradesh (2022). This climate affirms that the increased role of restorative practices in the wider criminal system is being embraced in a slow but steady manner, especially with considerable hesitation.

Yet to make restorative justice an effective operationalised concept there must be a cultural contextualisation, backed by elaborate legal changes, and protection against any likelihood of abuse or coercion and most importantly bringing communities, civil society, and justice institutions on board with helping to create the culture of empathy and poor reconciliation of the past.

Finally restorative justice does not ultimately aim to replace the conventional system with an alternative one but aims at complementing the current system by humanising its processes of justice and ensuring justice is more concerned with restorative than retributive. When adopted with care and diligence, it can change criminal justice into a more accommodative, human, and a more efficacious process, a system that will gain the interests of victims, offenders, and the society broadly.

## SUGGESTIONS

**1. Policy Integration**

To legally embed the concept of restorative justice into their laws, governments must formally make it a policy of supplementation to the existing criminal justice regime, not substitution. Establish specific criteria used when it is applied (i.e. minor offenses, youth offending, community disputes and a couple of serious offenses where the victim agreed to it).

**2. Capacity Building**

Train judges, attorneys, police, social workers, and restorative practice mediators. Establish specially-designated restorative justice facilities within the community to hold remedial justice talks between victims and the offenders.

**3. Victim Support**

Provide psychological, emotional, and financial support to victims during the procedure. Participation should be voluntary with the victims having the right to withdraw at any time.

**4. Community Involvement**

Increase the participation of community leaders, schools, and other local organizations in restorative efforts. Carry out sensitization of the population to reduce stigmatization of criminals and reconciliation.

**5. Diversity in Schools and Workplaces:**

Restorative justice can overcome bullying violence and discrimination by resolving school and workplace disputes. Create restorative circles and peer mediation to impart skills of empathy and resolution of conflicts at an early age.

**6. Monitoring and Evaluation:**

Establish objective measures (recidivism rates, victim satisfaction, trust in the community) to understand effectiveness. Conduct periodic reviews and modify programs to align with culture, social and law aspects.

**7. Reinstatement of Justice on Severe Crimes.**

Restorative approaches can be also adapted to both serious violence cases provided victims agree to it, although with a substantial number of precautions, as they are more sophisticated. Such programs must be based on telling the truth, recognizing damage and long-term healing to the victims and communities.

# BEYOND 'AN EYE FOR AN EYE': RETHINKING PENAL LIABILITY TODAY

***Triyambika Singh***[711]

## ABSTRACT

*Charting the history of penal liability from divine and monarchical punishment to modern constitutional systems, this paper explores how criminal law today balances punishment, guilt, and social protection. It discusses classical doctrine—retribution, deterrence, prevention, and reform—and demonstrates how modern doctrine unites these goals within guarantees like mens rea, proportionality, and due process. Highlighting the move away from spectacle and retribution towards proportionate, rights-informed sanctions, the article examines India's turn to reform, with special reference to probation, open prisons, vocational training, community service, and restorative justice that place rehabilitation and victim compensation in the centre. The article debates the growing significance of proportionality in sentencing and safeguarding against the risk of wrongful conviction. The research identifies emergent issues—cybercrime, corporate and environmental crimes, terrorism, and strict or vicarious liability—that make the traditional culpability model complex and require adaptation of doctrine and legislation. Contending for a pluralist penal architecture, the article argues that successful criminal justice requires a balance among deterrence, incapacitation, retributive desert, and possibilities of reintegration and respect for constitutional protections of dignity and equality. Based on doctrinal analysis of statutes, Supreme Court jurisprudence, and comparative practices, the paper suggests concrete reforms in sentencing calibration, restorative mechanisms, and regulatory accountability to improve fairness and effectiveness. In conclusion, the paper declares that contemporary penal liability is not just revenge but a normative tool that has to constantly adapt in order to maintain justice, defend rights, and uphold social order.*

**Keywords** – Penal Liability, Punishment, Justice, Reformation, Criminal Liability

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## INTRODUCTION

Crime is as old as human civilization. *"Crime is an action or omission which constitutes an offence and is punishable by law.* [712]*"* Whenever people came together to form communities, rules were created to guide their behaviour, and violations of these rules led to punishments. The idea of being responsible for one's actions has always been essential to how society works. In the early days, punishment was often severe, random, and based on divine or personal revenge. *"Punishment is a suffering, pain, or loss that serves as retribution in a penalty inflicted on an offender for committing an offence.*[713]*" "An illegal act or crime is an Offence."* Ancient texts like the '*Bible*' and the '*Manusmriti*' linked wrongdoing to sin, imposing penalties in the name of divine justice. Monarchs and kings carried out punishments to show their authority, and justice often took the shape of vengeance, captured by the saying "*an eye for an eye*." However, as civilised societies evolved and organized states and codified laws developed, the idea of justice through punishment changed from *retribution* to *reformation*. Retribution involves causing suffering to the wrongdoer based on the offence whereas reformation focuses on helping the offender change and reintegrate into society.

Penal Liability in its modern sense reflects the authority of the State to punish those who break established laws. It aims to strike a balance between deterring wrongful acts and ensuring fair treatment in punishment. At its heart, penal liability seeks to identify responsibility for crime by looking at two key elements: the external actions of a person, known as *'actus reus'*, and their internal mindset, or *'mens rea'*. The combination of these two aspects forms the basis for criminal liability.[714] Without these elements, the pursuit of justice risks becoming unjust and tyrannical.

The importance of penal liability lies not only in keeping social order but also in protecting individual rights. While society needs to be safeguarded from violence, fraud, and disorder, individuals accused of crimes also have rights against wrongful punishment. This judicial system makes penal liability a vital aspect of criminal law. Over the centuries, different theories, such as retributive, deterrent, preventive, and reformative approaches, have tried to explain punishment. They reflect changing views on crime and justice. *Retribution focuses on inflicting punishment on offenders. Deterrence aims to instil fear to stop others from committing crimes. Preventive measures sought to prevent offenders from repeating their*

[712] Crime, *Cambridge Dictionary*, https://dictionary.cambridge.org/dictionary/english/crime (last visited Sept. 17, 2025).
[713] Punishment, *Merriam-Webster.com Dictionary*, https://www.merriam-webster.com/dictionary/punishment (last visited Sept. 17, 2025).
[714] Ted Honderich, *Punishment: The Supposed Justifications Revisited* 4 (Pluto Press 2006).

*actions. The reformative approach aims to transform offenders into responsible members of society*. In today's world, new challenges like corporate liability, cybercrime, environmental offenses, and strict liability principles have broadened the scope of penal liability beyond its traditional limits.

Studying penal liability is not just an academic exercise. It has practical importance. In an era of globalization, fast technological advancement, and changing social values, criminal law must constantly adapt. Courts and lawmakers have already expanded established principles to tackle issues like cybercrime, corporate liability, and environmental offenses while ensuring that fairness and justice are upheld. Today, punishment aims not only to keep order and security but also to protect victims' rights, deter potential offenders, and rehabilitate those who have done wrong, thereby fulfilling its intended purposes in a comprehensive manner.

## NEED FOR PUNISHMENT

The emergence of the State marked a decisive turning point in the history of human society. In primitive times, man lived in scattered groups governed by customs and necessities. As societies expanded, the need for organization and order became clear, leading to the idea of the State. *"In his work Leviathan, Thomas Hobbes described the state as a social contract where individuals consent to surrender some of their freedoms to a sovereign authority in exchange for security and order*." The State introduced the rule of law, which aimed to regulate behaviour, settle disputes, maintain stability and aimed to establish a sophisticated criminal justice system. However, progress also brought challenges. With the evolution of human beings, qualities like selfishness, greed, and violence began to disrupt societal harmony. Crime emerged as a natural result of human flaws, and punishment became the State's most effective tool to manage offenders, deter similar actions, and protect the delicate fabric of community life. Therefore, penal liability became an essential part of law and governance.

**Evolution of Punishment:**

In its earliest expressions, punishment was deeply entwined with religion. Ancient scriptures portrayed crime not merely as an act against society but as an offence against divine authority. The *Manusmriti* outlined specific penalties or punishment namely *Danda*[715] for moral and social violations, often justified on religious grounds to maintain cosmic order. Likewise, the *Old Testament's* principle of *Lex Talionis*, meaning "*an eye for an eye, a tooth for a tooth,*[716]" illustrated God's endorsement of retribution. The *Quran* also included the concept of divine

[715] *Manusmriti*, verse 7.14.
[716] *Exodus* 21:23–25 (New King James Version).

justice through *qisas*[717], which refers to retribution, and *diyat*[718], meaning compensation. These religious scriptures indicated that punishment was more than a means of social control; it was a moral obligation, divinely required to curb human evil and uphold righteousness.

Primitive societies, however, often depended on more brutal forms of justice. In tribal groups, blood feuds and revenge killings were widespread. Wrongdoing was viewed as personal harm needing retaliation by the victim's family rather than as a societal crime. Justice in these contexts was communal and violent, with cycles of revenge leading to ongoing conflict. Over time, these feuds were ritualized into tribal justice practices, where compensation or symbolic punishments took the place of bloodshed. Yet, the idea of divine punishment prevailed misfortunes like famine, disease, or disasters were seen as retribution from supernatural forces for the community's sins.

The rise of monarchies changed the nature of punishment, turning it into a display of royal power. Kings and emperors often thought that instilling fear was the best way to prevent wrongdoing. Harsh corporal punishments, mutilations[719], and public executions became standard; these actions not only punished wrongdoers but also demonstrated the ruler's absolute authority. Historical records highlight the extreme cruelty of certain monarchs, such as Vlad the Impaler of Wallachia, known for impaling his foes, and Roman Emperor Nero, who subjected Christians to brutal tortures. Some Indian rulers resorted to dismemberment or death by elephants as capital punishment. These harsh acts reinforced the idea that punishment was about both deterrence and political control, as much as it was about justice.

Gradually, however, the arbitrariness of monarchical punishment gave way to more structured and organized systems of justice. As States became more structured, laws began to be written down, and punishment was formalized within legal systems. The *Hammurabi Code of Babylon*, one of the first written laws, assigned specific penalties for various crimes. Later, Roman law introduced systematic legal principles that shaped much of Europe. In India, texts like the *Arthashastra* stressed the king's responsibility to maintain law and order through fair punishments. Over the centuries, this process of codification shifted punishment from revenge-seeking and spectacle to predictability and proportion. By formalizing justice, the State aimed

[717] Qisas, in Islamic Law, refers to retaliatory punishment for murder or bodily harm. See *The Qur'an,* Surah Al-Baqarah 2:178.

[718] Diyat, in Islamic Law, refers to monetary compensation paid to the victim's heirs. See *The Qur'an,* Surah Al-Nisa 4:92.

[719] Mutilation, *Cambridge Dictionary*, https://dictionary.cambridge.org/dictionary/english/mutilation (last visited Sept. 17, 2025).

to replace personal vendettas with public order, laying the groundwork for modern penal systems.

The evolution of punishment shows the larger journey of civilization. It has shifted from divine and personal retribution to royal authority, and finally to the organized management of justice by the State. What started as a tool for survival in primitive societies has changed over time into an essential part of law and governance, where retribution, deterrence, and fairness are firmly embedded as guiding principles of justice.

## THEORIES OF PUNISHMENT

Having traced the history of punishment from divine authority to established legal systems, it is important to understand the principles guiding its use in today's legal environment. Punishment is not an arbitrary reaction; it relies on well-defined theories that explain its purpose and reasoning. Jurists and courts have time and again recognised that punishment has several goals: to repay the offender, to discourage future crimes, to prevent repetition of offenses, and to reform the wrongdoer. The main theories of punishment can be classified as Retributive, Deterrent, Preventive, and Reformative. Each of these theories represent a different view of justice, collectively shaping the basis of criminal law.[720]

### Retributive Theory

The retributive theory is the oldest and most instinctive justification for punishment. It is grounded in the moral principle that wrongdoing must be repaid with suffering. This view holds that punishment is not just a way to reform the offender or deter others. Instead, it is a necessary response to the wrong committed i.e. a means of restoring the moral balance upset by crime.

At its core, the retributive theory argues that justice requires reciprocity; when someone infringes on the rights of others, they should face consequences that match their actions[721]. Crime creates a moral debt, and punishment serves as repayment for that debt. Lex Talionis is a Latin term, that means "*the law of retaliation*". It embodies the principle of proportional retribution. This idea is best illustrated by the phrase "an eye for an eye, a tooth for a tooth."[722] The concept holds that the punishment for a wrongdoing should match the harm done. This ensures that the penalty corresponds to the offense in a similar way.

Retribution does not have to involve cruelty or revenge. It focuses on fairness and matching the punishment to the crime. The offender is punished not because of anger or emotion but because they deserve it. The level of punishment must reflect the seriousness of the offense,

[720] David Boonin, *The Problem of Punishment* 41–52 (Cambridge Univ. Press 2008).
[721] Leo Zaibert, *Punishment and Retribution* (Routledge 2016).
[722] R.A. Duff, Penance, Punishment and the Limits of Community, 5 *Punishment & Soc'y* 295, 295–312 (2003).

avoiding both excessive harshness and unnecessary leniency. Therefore, the retributive theory sees punishment as an end in itself. It is a moral requirement that restores order by ensuring each wrongdoer receives their due, regardless of future effects on society or the offender.

**Deterrent Theory:**

In this theory of punishment, the term '*Deter'* means to *'abstain or prevent from doing any wrongful act'*. The deterrent theory views punishment primarily as a means of preventing crime. This approach suggests that human behaviour is shaped by rational thinking. Before acting, people weigh the benefits of wrongdoing against the possible consequences. If the consequences are severe enough, the risk of punishment will outweigh the gain from crime.

The preventive idea of punishment is another name for this type of philosophy. The deterrent idea was first promoted by Cesare Beccaria, Jeremy Bentham, and Thomas Hobbes. The idea behind deterrence dates back at least 2400 years.[723] "*No one punishes the evil-doer under the notion, or for the reason, that he has done wrong, – only the unreasonable fury of a beast acts in that manner*," argues Plato, establishing what can be called the "classical" view of deterrence. However, the person who wants to administer just punishment does not seek revenge for an unforgivable act from the past; rather, he considers the future and wants to prevent the person receiving the punishment and the one seeing it from committing the same crime in the future.

Deterrence works on two levels. General deterrence aims to discourage society as a whole by setting an example of offenders. State gives an exemplary punishment to the wrongdoer to alarm the other people of the State to avoid committing a crime. The punishment of one person serves as a warning to everyone[724]. Specific deterrence, however, focuses on the individual offender. It seeks to prevent that person from committing further crimes by instilling fear of more punishment. This theory does not see punishment as moral revenge but as a necessary action. Its reasoning is straightforward: crime decreases because potential offenders are held back by fear. The certainty, speed, and severity of punishment are vital for deterrence to work. In essence, the deterrent theory views punishment not as an end in itself but as a means to achieve social order, using fear as the instrument to regulate human conduct. As the goal of the deterrent theory of punishment is to frighten, it does not emphasise improving the offender. In the same way, it does not attend the retribution. It only concentrates on the anticipation of the crime.

[723] M. Materni, Criminal Punishment and the Pursuit of Justice, 126 *Harv. L. Rev.* 2320 (2013).
[724] Thom Brooks, *Punishment: A Critical Introduction* (2d ed. Routledge 2021).

**Preventive Theory:**

The preventive theory views punishment as a way to protect society by making sure the offender cannot repeat the crime. Its main focus is on restraint rather than on revenge or fear. This theory does not emphasize moral entitlement or psychological intimidation. Instead, it aims for practical protection through direct incapacitation. "*Rebuke the beasts that dwell among the reeds, the herd of bulls with the calves of the peoples" (Ps 68:30)*.

The reasoning is straightforward: a person in prison cannot commit crimes outside; someone who has certain rights taken away cannot misuse them; and a person who is executed cannot pose any further threat. Here, punishment looks forward. It aims to prevent future harm.

The preventive approach includes both permanent incapacitation and temporary restraint. Permanent incapacitation involves capital punishment or life imprisonment, removing the offender from society entirely. Temporary restraint includes prison time, fines, or liberty restrictions. These measures limit the offender's ability to cause harm while allowing for eventual reintegration.

Unlike deterrence, which relies on the idea that fear drives behaviour, the preventive theory provides certainty. As long as the offender is restrained, society remains safe. Its foundation lies in security and order, not in moral compensation or psychological reasoning.

Therefore, the preventive theory positions punishment as a protective measure for society. It ensures stability and safety by neutralizing offenders' ability to commit further crimes, either temporarily or permanently.

**Reformative Theory**:

The Reformative Theory represents the most progressive approach to punishment, emphasizing the rehabilitation and moral renewal of the offender rather than inflicting pain or fear. Unlike retributive or deterrent systems, which primarily focus on the act committed or the fear of consequences, this theory directs attention towards the individual who has committed the crime. It is based on the belief that criminal behaviour often arises out of circumstances, social conditions, or psychological influences that can be corrected. Therefore, punishment, according to this view, must aim at transforming the wrongdoer into a law-abiding and constructive member of society. *"Ye have heard that it hath been said, 'An eye for an eye, and a tooth for a tooth.' But I say unto you that ye resist not evil, but whosoever shall smite thee on thy right cheek, turn to him the other also" (Mt 5:38).*

Although its widespread acceptance is relatively recent, the roots of the reformative approach are not entirely new. Thinkers such as *John Howard (1726–1790)* and *Jeremy Bentham (1748–*

*1832)* played a decisive role in initiating reforms within the prison system. They criticized the older punitive methods for being excessively harsh and counterproductive and instead argued that institutions of punishment could be structured to educate and rehabilitate offenders. Bentham, a utilitarian philosopher, even proposed the design of the *Panopticon*, a model prison in the eighteenth century which aimed at discipline, observation, and gradual reformation of inmates.[725]

The central claim of this theory is that offenders should not be permanently alienated from society. Once corrected, they ought to be reintegrated as useful citizens.[726] The reformative model treats the offender not as an enemy but as a patient in need of treatment, and society has a duty to provide conditions in which reformation is possible. Education, vocational training, psychological counselling, and moral guidance are seen as legitimate tools of punishment under this theory.

The rise of the reformative approach also reflects the limitations of earlier models. Retributive punishments often perpetuated cycles of vengeance, while deterrence through fear failed to address the underlying causes of crime. The inability of these approaches to substantially reduce crime or prevent habitual offending gave space for reformative ideals to take prominence. By emphasizing rehabilitation, this theory envisions punishment not merely as a reaction to crime but as a positive social measure for creating safer and more harmonious communities.

## MODERN APPROACH TO PENAL LIABILITY

The contemporary view of penal liability breaks from the strict, one-dimensional punishment theories of the past. While traditional theories that are retributive, deterrent, preventive, and reformative, laid the foundation for society's response to crime, modern law goes further. It explores not just how offenders should be punished, but also how responsible they are and what principles should guide the punishment. Today, criminal law acknowledges that punishment must achieve several goals at once: providing justice for the victim, rehabilitating the offender, deterring others, and maintaining public order.[727] Additionally, modern legal systems must respond to new types of crime, like cyber offenses, terrorism, and corporate liability. These require more nuanced solutions than traditional methods offer. This approach is based on

[725] Jacques-Alain Miller & Richard Miller, Jeremy Bentham's Panoptic Device, 41 *October* 3 (1987), https://doi.org/10.2307/778327.
[726] Materni, supra note 13.
[727] Terance D. Miethe & Hong Lu, *Punishment: A Comparative Historical Perspective* (Cambridge Univ. Press 2005).

constitutional values, human rights, and the understanding that justice must balance the needs of individuals, victims, and society as a whole.

**Reformative Justice in Modern India:**

India's criminal justice system has historically been influenced by retributive and deterrent models. However, it now embraces reformative ideals as part of its legal philosophy. This change is clear in sentencing practices that focus on rehabilitation in addition to punishment. Probation laws, open prisons, vocational training in correctional homes, and community service under the Bharatiya Nyaya Sanhita show this shift. The core idea is that no criminal is beyond redemption. Instead, the justice system should create paths for re-integration into society.[728] Indian courts have also highlighted reformative justice, especially in cases with young offenders, first-time convicts, or crimes motivated by social or economic pressures. The Supreme Court has consistently stated that punishment must match the crime's severity and consider the offender's chances for reformation.

**Measure of Liability and Question of Culpability:**

When determining culpability, modern penal law places a strong emphasis on mens rea, or the mental component of crime. According to modern legal theory, guilt necessitates both intention and action, in contrast to previous models when punishment was frequently meted out for the mere act, or actus reus. People are only punished when they are morally at blame, thanks to the concept of culpability. Accidental harm is treated differently than intentional harm, for example, in accordance with the idea that the severity of the penalty should correspond to the level of fault. This thorough assessment of responsibility protects people from unjust punishments and avoids overcriminalization. It also explains the growing acceptance of defences that might reduce or eliminate liability where culpability is weak, such as necessity, mistake of fact, or insanity.

**Proportionality in Sentencing:**

A cornerstone of the modern approach is the principle of proportionality. Punishment should match the seriousness of the crime and the level of blame of the offender. Unfair or overly harsh penalties are viewed as breaches of constitutional rights under Articles 14 and 21. Indian courts have repeatedly upheld proportionality by overturning punishments that are "*shocking to the conscience*" or "*grossly disproportionate*."[729] This principle ensures that sentencing is not about revenge but rather a measured approach focused on justice. It also reflects the

[728] S. Padhee, Theories of Punishment All Over the World, 5 *Res. J. Human. & Soc. Sci.* 163, 163–65 (2014).
[729] S. Mishra, *Mandatory Minimum Sentencing and Judicial Discretion: A Global Perspective* (Cambridge Univ. Press 2018).

increasing impact of international human rights standards, which warn against punishments that are cruel, inhuman, or degrading.[730]

**Blackstone's Ratio and Safeguards against Wrongful Conviction**:

Modern criminal law highlights the need to protect the innocent. The well-known saying of *William Blackstone*, *"It is better that ten guilty persons escape than that one innocent suffer,"* remains a guide for today's criminal justice system. This principle emphasizes the need for safeguards during investigation, trial, and sentencing to reduce wrongful convictions, even if it means that some guilty individuals may evade punishment. Indian courts have supported this standard by requiring proof beyond a reasonable doubt, upholding the presumption of innocence, and implementing strict rules for evidence. The aim is not just to punish offenders but to make sure that any punishment is morally and legally justified.[731]

**Victim-Centric and Restorative Dimension**

Another significant shift in the modern approach is the recognition of the victim's role in the justice process. Unlike traditional models that saw crime only as an offence against the State, modern penal liability frameworks recognize the harm to victims and communities. Restorative justice initiatives, such as victim compensation schemes, plea bargaining, and community service, aim to repair harm rather than just punish offenders.[732] This victim-focused approach supports reformative justice by promoting reconciliation, healing, and social harmony.

## CONCLUSION

The development of human civilization is reflected in the history of criminal culpability. Tribal revenge and divine retribution were the first, followed by structured theories of punishment and, ultimately, the intricate institutions of modern criminal justice. Originally, punishment served as a means of control and survival. It has since developed into a framework that emphasizes human rights and the constitution in order to strike a balance between social safety, justice, and equity. The evolution of criminal liability demonstrates how the law adapts to changing societal issues, political structures, and moral standards.

The idea that crime disturbs social order as well as individual lives lies at the heart of penal responsibility. Because they were influenced by religious writings like the Bible, the Quran, and the Manusmriti, early societies frequently associated sin with transgression and saw

[730] V Kumar, Mandatory Minimum Sentencing and Its Impact on Judicial Discretion in India, 58 *J. Crim. L. & Criminology* 215, 215–31 (2020).
[731] Piotr Bystranowski & I.R. Hannikainen, Justice Before Expediency: Robust Intuitive Concern for Rights Protection in Criminalization Decisions, 15 *Rev. Phil. & Psych.* 253, 253–75 (2024).
[732] Gaurav Kumar, Victimology: Victim Compensation Scheme as Restorative Justice, 6 *Int'l J.L. Mgmt. & Human.* 1220, 1220–32 (2023), https://doij.org/10.10000/IJLMH.114486.

retribution as an expression of God's will. Public executions and corporal punishment were more about terror than true justice since monarchs and emperors used punishment to demonstrate their power and instil fear. But as a result of innovations like the Arthashastra, Roman law, and the Hammurabi Code, the concept of punishment started to depend on logic, coherence, and proportionality. This shift opened the door for traditional notions of punishment, which continue to influence our criminal justice system today.

The moral idea of desert is conveyed by retribution, which holds that since justice requires reciprocity, the criminal must suffer. The goal of deterrence is to change behaviour by instilling fear of the consequences. The focus of preventive strategies is on holding criminals accountable in order to safeguard society. The goal of reformative justice is to change criminals into law-abiding citizens by promoting healing as opposed to punishment. Since crime is a dynamic problem, each model captures the particular demands of its era, but none can be used in isolation. It is impacted by societal institutions, human behaviour, and technology advancements that constantly push the limits of the law.

A more contemporary view of penal liability is the result of this understanding. Today, punishment is seen as a careful evaluation of a number of criteria rather than a straightforward response. These days, the law considers what safeguards should be in place, how much punishment is reasonable, and why it is necessary. In order to ensure that punishment is only meted out to those who are genuinely morally guilty, the measure of culpability takes into account both the act (actus reus) and the person's thought (mens rea). By avoiding undue harshness or softness, the proportionality principle guarantees that penalties are just. Blackstone's well-known quote, "better that ten guilty persons escape than one innocent suffers," serves as a vital reminder that establishing guilt beyond a reasonable doubt is necessary for penal liability to be legitimate.

In India, the modern approach has a reformative emphasis. Courts and lawmakers acknowledge that punishment should consider the offender’s potential for rehabilitation. Options like *probation, open prisons, vocational training*, and *community service* reflect the belief that everyone has a chance for redemption. The Supreme Court has stressed that young or first-time offenders should receive opportunities for change rather than be trapped in cycles of imprisonment. This view aligns with constitutional guarantees under *Articles 14* and *21*, which uphold fairness, equality, and the protection of life and liberty, even for those charged with crimes.

At the same time, India is moving toward a victim-centric model. Earlier legal systems viewed crime as solely an offense against the State, often ignoring the victim's perspective. However, restorative justice initiatives—such as *victim compensation programs, plea bargaining, and community solutions* which recognize the importance of healing and reconciliation alongside deterrence and punishment. Victimology has become a significant complement to reformative justice, ensuring that justice involves repairing harm to victims and society. This focus is especially relevant in India, where socio-economic disparities can leave victims vulnerable and dependent on State acknowledgment of their suffering.

Globally, penal liability is being reimagined through a human rights framework. Harsh punishments from the medieval era are increasingly seen as incompatible with constitutional values and international standards. Proportionality, dignity, and fairness now guide legal norms, impacting domestic systems, including India's. The modern criminal justice framework thus combines traditional theories, constitutional protections, and international principles into a complex approach.

Nonetheless, challenges in penal liability are significant. The rise of cybercrime, corporate offenses, environmental violations, and terrorism stretches the limits of traditional models. Concepts like strict liability and vicarious responsibility complicate the link between culpability and punishment, sometimes punishing individuals without intent or negligence. Striking a balance between these challenges and fairness will test the adaptability of criminal law. The debate between deterrence and reformation is ongoing, as society weighs the need for safety against opportunities for redemption.

What is clear is that penal liability cannot be seen as mere vengeance or fear based. It is a rational, fair, and humane response rooted in the constitutional promise of justice. It respects victims' rights without dehumanizing offenders, protects society while respecting liberty, and punishes wrongdoing while keeping the door open for reform. In this way, modern penal liability reflects both continuity and change: it maintains its goal of upholding order while evolving in methods, focuses, and safeguards. Ultimately, the true measure of penal liability is not just whether it punishes crime, but if it promotes justice in a full sense. Justice is not achieved simply by punishing the guilty; it is realized when punishment demonstrates fairness, proportionality, respect for human dignity, and the potential for reintegration. The modern approach, especially as seen in India, illustrates a legal system striving for this balance. It acknowledges that while crime might never be completely eliminated, injustices can be reduced if the law remains steadfast in its principles and flexible in its application.

In conclusion, the evolution of penal liability from its early beginnings to its contemporary developments shows a path toward greater humanity in law. While classical theories laid important groundwork, the modern approach integrates them into a complete framework grounded in constitutional morality, human rights, and social justice. This blend ensures that penal liability does not remain an outmoded tool of power or retribution but transforms into a means of fairness, reform, and reconciliation for both individuals and society in the pursuit of genuine justice.

# THE FEMINIST GAZE ON JUSTICE: REIMAGINING PATRIARCHY AND VICTIMHOOD WITH INDIAN CRIMINAL LAW

***Shreya Shukla***[733]

## ABSTRACT

*This research paper questions the intersection of patriarchal jurisprudence, law, and victimhood from the vantage point of critical feminist victimology, specifically in reference to the Indian criminal justice system. In spite of progressive legislation like the Domestic Violence Act, 2005, Criminal Law Amendment Act, 2013, and POSH Act, 2013, gendered criminalization takes place, unmasking structural injustices and institutionalized discrimination. The problem of research pursued in this paper is that paradox wherein Indian criminal law, in apparent protection, tends to reproduce power structures and secondary victimization. Based on feminist legal theory and evolving field of victimology, this study analyzes how the law produces the "ideal victim," excludes intersectional oppressions, and silences oppressed groups such as Dalit and Adivasi women, LGBTQ+ persons, and socio-economically oppressed survivors. Applying a comparative, doctrinal, and interdisciplinary framework, the paper situates Indian experiences in global discussions about feminist criminology, restorative and reparative justice, and comparative victimology. It ultimately puts forward a victim-oriented model of legal reforms and gender-sensitive jurisprudence with vistas for socio-legal reforms that render justice more inclusive, fair, and transformative.*

**Keywords:** Feminist victimology, Patriarchal jurisprudence, Indian criminal law, Intersectionality, Secondary victimization.

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## INTRODUCTION: LAW, PATRIARCHY, AND POLITICS OF VICTIMHOOD

The controversial idea of legal neutrality in the Indian context re-emerges as a nagging challenge to feminist jurisprudence, inviting a critical investigation into the mechanisms through which law in principle universal and objective functions to reiterate and reinforce prevailing patriarchal power discourses. The Indian legal system, both in its doctrinal structure and its institutional legislations, consistently operates as an extension of entrenched male privilege, hiding the hierarchical dynamics of society beneath the cover of justice. Along the line of this fault line between constitutional ideals and day-to-day realities, law is rewritten not just as a shield but as a subtle site of struggle, regulating surveillance, disciplining, and excluding women and marginalized identities.

Deep structural protections written into the Constitution equality, non-discrimination, and the assurance of substantive justice are continually subverted by the lived realities of those who experience gendered and intersectional violence. The visibility of women, Dalits, Adivasis, LGBTQ+ individuals, and subaltern groups as legal subjects continues to be sporadically present, realized in large part through their experience of harm and exclusion. Instead of offering clear protection, criminal law emerges as a means of institutionalizing masculine assumptions, solidifying strict forms of social morality, and routinely silencing margin speakers. Such victimization patterns complicate any easy image of law as a benign mediator and bring to the fore its status as an apparatus of social ordering, easily capable of reiterating entrenched biases in a variety of domains of individual and collective life.

Patriarchy's endurance goes beyond cultural sediment or historical contingency; it is imbedded deeply in the structural morphology of the family, community, religious doctrine, and the machinery of the state. Colonial heritage in codifying family and criminal law provided the scaffolding for male dominance over marriage, inheritance, guardianship, and sexuality. Postcolonial reforms, even in the garb of liberal rhetoric, have repeatedly failed to shake up these male-authored moral standards, instead yielding a repetitive divergence between constitutional ethos and legislative or judicial practice. In doing so, the complexities and contradictions of constitutional promises are laid bare, demonstrating their usually limited extent in charting the everyday practice of citizens.

The terrain of legislative intervention marked by legislations like the Protection of Women from Domestic Violence Act,[734] the Criminal Law (Amendment) Act [735] sparked by the

[734] *Protection of Women from Domestic Violence Act*, No. 43 of 2005, § 3, India Code.
[735] *Criminal Law (Amendment) Act*, No. 13 of 2013, India Code.

Nirbhaya case, and the Sexual Harassment of Women at Workplace Act [736]reflects substantial statutory growth in terms of the acknowledgment and preservation of gendered rights. However, repeated cycles of gendered victimization, adversarial policing, and stigmatizing court cultures highlight the irony that legal reform, as much as it promises, is often short of adequate to disassemble the infrastructures supporting patriarchal dominance. Rape and sexual violence survivors experience long, intrusive, and humiliating processes, whereas domestic abuse victims are paralyzed by financial dependency, institutional resistance, and social silence. The informal sector workers face daunting obstacles to protection in work, and the sudden presence of digital modalities of harm reveals legislative inflexibility. Criminal law, therefore, in its striving to attach justice, habitually reinscribes gender hierarchies and triggers secondary victimization, mapping the field of theoretical investigation and practical challenge. Violence against gender whether it materializes as rape, abuse at the intimate partner level, or otherwise is likewise viewed as a sequence of singular aberrations and, therefore, hides the structural foundations of patriarchy that give rise to such violence. This explanation silences survivors' collective accounts, makes violence normative, and further deepens institutional complicity. In addition, legal reform gives precedence to mechanistic dimensions of crime, including corporeal violence, but fails to address the psychological trauma and emotional residuum that victims experience. Such gaps reflect dominant patriarchal ideologies that prefer visible harm over lived realities and compel law to continue its complicity in policing over healing.

In reaching legal institutions, survivors commonly are met with procedural hostility and gender bias, as well as inertia. Police officials will trivialize complaints, pressure victims to compromise in the name of family honour refuse First Information Report registration making justice a remote and often unrealizable goal. Judicial process, with its dependence on protracted cross-examinations and gendered victimization adds to the attrition, often subjecting the survivors to repeated trauma. The unspoken convergence of local traditions and family codes with state machinery intensifies such inertia, underlining the belief that harm particularly within intimate or communal contexts must be exempted from public scrutiny or intervention. There lies a deep paradox in the cultural construction of victimhood itself. Public outrage and activism are purposefully mobilized on behalf of those cases that cut across prevalent class, caste, and urban sensibilities, whereas violence against Dalit, Adivasi, LGBTQ+, and other

[736] *Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act*, No. 14 of 2013, § 4(1), India Code.

multiply oppressed survivors is largely not seen, sometimes decried, or folded under larger communal honour agendas. Underlying this structure is the honour-and-shame ideology that makes women vulnerable not only as prime victims of violence but also burdened as unintentional custodians of family honour.

**1. Methodological Orientation**

This requirement of addressing these complex dynamics calls for a strong and multidimensional methodological engagement. This study traverses the doctrinal analysis of statutory laws, constitutional directives, and iconic judicial precedents that cumulatively define the outlines of victimhood in Indian criminal law. The examination gives precedence to close examination of the Indian Penal Code[737], the Code of Criminal Procedure[738], and seminal amendments triggered by landmark events like the Nirbhaya case, acknowledging their joint significance in marking the legal boundaries within which gender justice is fought over.

Going beyond the Indian jurisdiction, the comparative aspect complements lessons learned from other jurisdictions around the world. South Africa's gender-responsive constitutional reforms and criminal justice innovations, and the United States' experience with feminist criminology, rape shield laws, and victim advocacy, are instructive models shedding light on the promise and danger of reform. This dialogic interaction forces greater sensitivity to the risks and redemptive power inherent in legislative and judicial interventions, representing the imperative of cross-jurisdictional dialogue in shaping productive approaches to meaningful justice.

From an interdisciplinary perspective, the study places legal provisions in a broad landscape of sociology, criminology, feminist theory, and victimology. This framework transforms statutory interpretation from a standalone legal process into an interactive encounter with social practice, institutional culture, and the production of knowledge. Empirical evidence from NCRB crime data, Law Commission reports, and rights-based organizations' analytical inputs underpins the analysis with the local detail of systemic victimization and institutional attrition.

**2. Scope and Critical Focus**

The research restricts its analytic lens to the crossing point of patriarchy, victimization, and criminal law, examining modes of harm such as rape, domestic violence[739], sexual

[737] *Indian Penal Code*, §§ 354A–D, No. 45 of 1860, India Code.
[738] *Code of Criminal Procedure*, § 164A, No. 2 of 1974, India Code.
[739] *Protection of Women from Domestic Violence Act*, No. 43 of 2005, India Code.

harassment[740], trafficking, acid attacks, and cybercrimes. Although women's lives constitute the primary focus of study, the study places intersectionality at the centre highlighting the intersecting vulnerabilities Dalit and Adivasi women, LGBTQ+ individuals, and socio-economically marginalized survivors experience. Marginality is therefore imagined not as a monolithic status, but as a multi-axis matrix where gender, caste, class, sexuality, and communal identities intersect to create multiple patterns of harm and exclusion. Building on secondary materials case law, legislative records, empirical studies, and critical scholarship the dissertation weaves together a synoptic critique of the criminal justice system's failures, silences, and the fragile avenues toward effective reform.

### 3. Synoptic Framing

Placing the research at the intersection of law's avowed neutrality and its performative entwinement with patriarchal power gives rise to a sophisticated theoretical and practical path. Methodological pluralism and analytical intersectionality informing the study seek to enlarge feminist legal thought and broaden the scope of legislative and institutional possibility. Ultimately, the hope is to produce policy and conceptual insights that have the capacity to shape transformative praxis within Indian criminal justice, furthering the quest for real gender equality and effective social transformation.

## THEORETICAL FOUNDATIONS AND HISTORICAL CONTEXT

### 1. Revealing Feminist Victimology: From Marginality to Method

Victimology as a scholarly field of study developed in the post-Second World War period, pushing criminology beyond its sole interest in offenders into an awareness of victims' place in the criminal process. Early researchers like Hans von Hentig [741](The Criminal and His Victim, 1948) and Benjamin Mendelsohn[742]established typologies to categorize victims and examine the victim–offender dyad with a focus on individual responsibility. Nils Christie's[743](1986) "ideal victim" theory further shaped early discussions, stating that social sympathy is given to predominantly those who are considered weak, innocent, and respectable. Though foundational, such frameworks were criticized on their moralism and failure to place victimization in a larger structural context of inequalities, especially those regarding gender, caste, class, and social power.

[740] *Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act*, No. 14 of 2013, India Code.
[741] Hans von Hentig, *The Criminal and His Victim* 102–08 (Yale Univ. Press 1948).
[742] Benjamin Mendelsohn, Crime and the Victim, 1 *J. Crim. L. & Criminology* 244 (1950).
[743] Nils Christie, The Ideal Victim, 11 *Soc. Probs.* 447 (1964).

The limitations of classical victimology had given way to the emergence of critical victimology in the 1980s, which questioned the state, law, and social institutions' contribution to the manufacture and handling of victimhood. Through the foregrounding of systemic disparities in recognition, protection, and redress, critical victimology expanded the discipline to cover structural and sociocultural causes of harm. However, women's own experiences were often relegated, symptomatic of the androcentric biases inherent in mainstream criminological explanations.

Feminist victimology was a response, bringing women's experiences to the centre and putting patriarchy in the forefront as both cause and agent of victimization. Feminist victimology negated the "neutral victim," showing how supposedly objective legal and social structures tended to erase the lived experience of women. Gendered violence such as sexual assault, domestic violence, dowry crimes, trafficking, and acid attacks were not stand-alone events but part of a system of manifestations of patriarchal power.

Intersectionality, coined by Kimberlé Crenshaw (1989), [744]emerged as a mainstay of feminist victimology. It explores how intersecting axes of identity gender, caste, class, religion, and sexuality—create compounded dangers. Dalit women in India experience sexual violence as a confluence of caste and gender oppression, migrant and informal-sector women experience class-specific danger, and Muslim women have been targeted in communal violence, including during the Gujarat riots of 2002, where sexual assault was a tool of political domination. Queer women, made legally invisible until Navtej Singh Johar v. Union of India (2018), were also denied acknowledgment of harm and justice. Intersectional analysis highlights that victimhood is stratified: the "universal woman victim" is a legal fiction, and harms are experienced in varying ways across different social and cultural contexts.

Feminist victimology also highlights survivors' agency and resilience. Women are not passive victims but active agents who challenge patriarchal authority and create their own justice demands. Legal recourse to victimhood, in the form of instruments like the Code of Criminal Procedure (Amendment) Act, 2009, giving participatory rights, and the Criminal Law (Amendment) Act, 2013, expanding definitions of sexual crimes, formalizes victimhood. Yet, the law tends to impose constricted expectations of "authentic" victim behaviour modesty, submission, and purity emphasizing conflict between legal acknowledgment and lived reality. NCRB reports of 2022 indicate more than 31,000 rapes and over 428,000 crimes against

[744] Kimberlé Crenshaw, Demarginalizing the Intersection of Race and Sex, 1989 *U. Chi. Legal F.* 139.

women, marking both the extent of systemic gendered violence as well as the limits of legal frameworks.[745]

Hence, feminist victimology places victimhood in the web of social inequalities but promotes frameworks that highlight marginalized voices, acknowledge multiplicity of experience, and centre survivors' agency. It is the theoretical basis for comprehending the interstices of law, patriarchy, and structural violence in India.

**2. Patriarchy Embedded in Indian Criminal Law**

The Indian criminal justice system has a patriarchal ethos, traceable to colonial legal codification. The Indian Penal Code (IPC, 1860), the Criminal Procedure Code (CrPC), and the Indian Evidence Act (1872) were formulated under Victorian moral codes emphasizing male dominance, female modesty, and family prestige at the expense of women's autonomy. Sexual offence provisions constructed women as dependents whose protection was for the interests of the family or society rather than acknowledging their independent legal personhood. The marital rape exception under Section 375 IPC, retained even post the Criminal Law (Amendment) Act, 2013[746], is a prime example of the long-lasting legacy of colonial patriarchy that makes a wife's consent implicit in her husband's conjugal rights.

Reforms that followed independence failed to abolish these patriarchal institutions to a large extent. Substantial provisions like Sections 375 and 497 IPC showed gendered asymmetries: marital rape was not recognized save in the case of minor wives (Independent Thought v. Union of India, 2017)[747], and adultery criminalized the infringement only of a husband's proprietary rights (Joseph Shine v. Union of India, 2018)[748]. The Evidence Act (1872) traditionally permitted inquiry into survivors' sexual history under Section 155(4), a provision invalidated in State of Punjab v. Gurmit Singh (1996)[749]. These instances highlight the ongoing compatibility of substantive law with patriarchal norms.

Procedural and evidentiary burdens further institutionalize gendered disadvantage. Even with mandatory FIR registration put in place in Lalita Kumari v. Government of Uttar Pradesh (2013), survivors tend to experience police opposition and societal pressure to retract complaints. Evidentiary standards, built on physical resistance or "consent" myths, have traditionally worked in favour of perpetrators. In the Tukaram v. State of Maharashtra (1979,

[745] Nat'l Crime Recs. Bureau, *Crime in India 2022: Statistics* (Ministry of Home Affairs, Gov't of India 2023).
[746] *Criminal Law (Amendment) Act*, No. 13 of 2013, India Code.
[747] *Independent Thought v. Union of India*, (2017) 10 SCC 800 (India).
[748] *Joseph Shine v. Union of India*, (2018) 2 SCC 716 (India).
[749] *State of Punjab v. Gurmit Singh*, (1996) 2 SCC 384 (India).

Mathura rape case),[750] acquittals were based on victim non-resistance assumptions, demonstrating structural bias. Courtroom procedures, such as cross-examinations and aggressive encounters, continue secondary victimization, but reforms like Rajalakshmi v. State of Tamil Nadu (2022) place importance on survivor dignity in POCSO hearings.

Institutionalized silencing is in operation across several areas: police, courts, and medical practice regularly institutionalize victim-blaming. Gender-neutral law, like Section 354A IPC dealing with sexual harassment, in theory safeguards all genders but only impacts women disproportionately, showing how "neutrality" conceals structural inequality. Likewise, domestic violence laws—civil protection under the Protection of Women from Domestic Violence Act, 2005—deal with specific abuses, but criminal provisions in Section 498A IPC are still only narrowly geared toward dowry-related cruelty.

Judicial practice shows both progressive and conservative trends. Landmark decisions, such as Vishaka v. State of Rajasthan (1997)[751], recognized sexual harassment as a violation of Article 21, and Rupali Devi v. State of Uttar Pradesh (2019) extended domestic violence complaint jurisdiction. However, victim credibility and morality stereotypes in trial courts prove that institutionalized patriarchal norms still shape procedural and evidentiary decision-making.

Legislative reforms respond to public outcry but often fail to challenge entrenched familial and social hierarchies. The Criminal Law (Amendment) Act, 2013, enacted after the *Nirbhaya* case, broadened the ambit of sexual offences and increased penalties, yet marital rape remains exempt. NCRB data for 2022-31,000 rapes and over 428,000 crimes against women highlight both the persistence of violence and the inadequacy of legal safeguards.[752]

## LEGISLATIVE FRAMEWORK AND GENDERED VIOLENCE

### 1. Mapping Statutory Responses

The statutory framework dealing with gendered violence in India mirrors progressive intention along with continuing lacunae. The Protection of Women from Domestic Violence Act, 2005 (DV Act)[753] was legislated to secure women from physical, emotional, economic, and sexual abuse at domestic sites. Though path-breaking in its ambition, the Act is plagued by systemic deficiencies, such as the absence of strong implementation mechanisms, inadequate rural and semi-urban outreach, and socio-economic barriers to access to legal relief. Police officials often

[750] *Tukaram v. State of Maharashtra*, (1979) 2 SCC 203 (India).
[751] *Vishaka v. State of Rajasthan*, (1997) 6 SCC 241 (India).
[752] Nat'l Crime Recs. Bureau, *Crime in India 2022: Statistics* (Ministry of Home Affairs, Gov't of India 2023).
[753] *Protection of Women from Domestic Violence Act*, No. 43 of 2005, §§ 2–31, India Code.

inadequately familiarize themselves with the provisions of the Act, allowing for procedural lapses and negligible redressal, thus diluting its potential for change.

The Criminal Law (Amendment) Act, 2013,[754] enacted after the heinous Nirbhaya gang rape[755], is a paradigm of change in sexual offence codification. This amendment extended the penal law definition of rape to encompass non-penile penetrative sexual assault, imposed stricter punishment for aggravated sexual assault, and criminalized stalking, voyeurism, and acid attacks. While it is revolutionary in spirit, the law still has glaring omissions, particularly the omission of marital rape with the exception of where the wife is under eighteen years of age, mirroring continued adherence to patriarchal sensibilities that interpret marriage as a zone of untroubled male dominance.

The Sexual Harassment of Women at Workplace (POSH) Act, 2013[756] aimed to institutionalize workplace protection in the form of internal complaints committees and obligatory grievance redressal. As commendable as it is, its effectiveness remains limited: informal and unorganized sector women, who account for a substantial percentage of India's workers, remain mostly exposed, and enforcement frequently breaks down on account of unawareness and stigma.

New areas of law, including cyber law and anti-trafficking laws, indicate further challenges. The striking down of Section 66A of the IT Act [757]in Shreya Singhal v. Union of India (2015) [758] exposed regulatory loopholes in handling online misogyny, harassment, and digital abuse. Meanwhile, trafficking legislation under the Immoral Traffic (Prevention) Act, 1956 [759]illustrates systemic insufficiency, where survivors are criminalized, and exploitative structures are not adequately addressed, and thus this tension between criminal law and human rights paradigms.

**2. Cartographies of Gendered Violence**

The cartography of gendered violence in India is not sporadic and isolated but forms part of a systemic continuum across physical, domestic, institutional, and digital spaces. Rape and sexual assault continue to be the most visible but under-prosecuted manifestations of patriarchal supremacy. NCRB 2022 statistics reported 31,516 rapes, along with more than 64,000 attempts at sexual assault, but the conviction rate remained at 27.2%, which reflects

[754] *Criminal Law (Amendment) Act*, No. 13 of 2013, §§ 375–376D, India Code.
[755] *Mukesh v. State (NCT of Delhi)*, (2013) 6 SCC 1 (India) (Nirbhaya case).
[756] *Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act*, No. 14 of 2013, §§ 3–10, India Code.
[757] *Information Technology Act*, § 66A, No. 21 of 2000, India Code.
[758] *Shreya Singhal v. Union of India*, (2015) 5 SCC 1 (India).
[759] *Immoral Traffic (Prevention) Act*, No. 104 of 1956, §§ 3–15, India Code.

structural attrition on investigating and prosecution levels. Landmark judgments, like Mukesh & Anr. v. State (NCT of Delhi), 2013 (Nirbhaya case), sparked legislative extension but were unable to minimize recurrence, highlighting that statutory reform has its limitations.

Domestic violence functions in more hidden spaces but is just as insidious. NFHS-5 (2019–21) records 29.3% of ever-married women having faced spousal violence, while NCRB 2022 records only 110,511 Section 498A cases, convictions having fallen to 14.5%. Such inconsistencies reflect the deeply ingrained silencing of abuse in familial and community systems. While the DV Act allows for civil redressal, enforcement continues to be restricted by institutional inertia, social stigma, and limited access to legal representation, especially in marginalized rural society.

Trafficking illustrates systemic exploitation, the result of intersectional vulnerabilities of caste, class, and migration status. NCRB 2022 identified 6,532 cases of human trafficking, but researchers contend that definitional vagueness and police complicity hide the actual size of exploitation. Supreme Court interventions like Bachpan Bachao Andolan v. Union [760]of India (2011) called for structural change, but prosecutions are thin on the ground, and survivors remain doubly victimized by exploiters and criminal justice systems.

Acid attacks represent patriarchal vengeance against independence and resistance. NCRB 2022 records 102 reported cases, yet underreporting on account of fear, stigma, and poor enforcement distorts real prevalence. Laxmi v. Union of India (2014) [761]ordered regulation of the sale of acid, free medical attention, and compensation schemes; yet repeated attacks indicate systemic failures in deterrence and rehabilitation, rendering survivors economically and socially ostracized.

Cyber violence is a new frontier, merging gendered, caste-defined, and religious biases with technology platforms. NCRB 2022 records 10,730 cyber-crime against women in the form of harassment, stalking, and non-consensual sharing of intimate material. Shreya Singhal (2015) was a constitutional success against excessive criminalization, but the absence of effective legal protection makes women, particularly from marginalized groups, susceptible to cyber misogyny and cyber-feminicide.

### 3. Secondary Victimization

Secondary victimization is a process of retraumatizing survivors by state institutions, which are in theory set up to safeguard them. Police hostility is still a common obstacle: survivors are

[760] *Bachpan Bachao Andolan v. Union of India*, (2011) 8 SCC 50 (India).

[761] *Laxmi v. Union of India*, W.P. (C) No. 382 of 2013 (Del. High Ct. 2014) (India).

often forced into compromise, refused FIR registration, or humiliated for moral turpitude, all demonstrating deep-rooted patriarchal bias. The case of Hathras (2020) forcefully illustrates the confluence of caste and gender in secondary victimization, where procedural neglect, deprivation of decent last rites, and institutional silencing compounded the trauma experienced by the survivor and her family.

Courtroom practices worsen these ills. Survivors are subjected to degrading cross-examinations, character assassination, and excessive delays, undermining both dignity and access to justice. While reforms like in-camera trials under Section 327(2) CrPC and bans on intrusive procedures (Lillu v. State of Haryana, 2013) are intended to protect victims, their unequal application establishes the resilience of institutional patriarchy.

Institutional complicity is evident not just in procedural omission but also in cultural prejudices that disempower survivor accounts. Judicial constructions of chastity, morality, and resistance reinforce stereotypes, reinscribing systemic subordination even within seemingly objective judicial traditions. Secondary victimization therefore functions as a structural process that maintains cycles of harm, discourages reporting, and reinforces patriarchal control.

**4. Comparative Global Perspectives**

Globally, restorative and victim-sensitive models provide valuable lessons. South Africa's Truth and Reconciliation model is a paradigm of restorative justice with a focus on rehabilitation and survivor empowerment, as well as accountability. In the US, rape shield laws and special victim advocates in criminal justice systems give primacy to protection of testimony and reduce secondary trauma, demonstrating procedural sensitivity lacking in much of India.

Cross-jurisdictional learning can guide Indian jurisprudence, suggesting ways to balance due process and survivor dignity. These involve incorporating psychosocial support, gender-sensitivity training of law enforcement and judiciary, and inculcating victim-centred procedures into legislative and administrative protocols. Though incremental reforms in India have occurred, comparative learning indicates the necessity for a holistic integration of prevention, protection, and participatory justice.

## JUDICIAL REVIEW: COURTS, CASES, AND CONTESTATIONS

The court performs the dual role of arbiter and builder of social norms, exercising enormous power to uphold or overturn entrenched patriarchal hierarchies. Judicial decisions in India on sexual violence, domestic violence, workplace harassment, and reproductive choice reveal the intricate dynamics between law, social hierarchies, and gendered power relations. Courts are

seldom neutral agents; their decision-making is often reflective of dominant moral codes, institutional prejudices, and cultural ordering, significantly impacting survivors' lived experiences. Feminist legal thought emphasizes that adjudication can reinforce secondary victimization or serve as a tool of normative change and survivor-focused justice.

**1. Key Jurisprudence Framing Gendered Victimhood**

A series of landmark decisions has framed the boundaries of gendered victimhood, uncovered systemic injustices while begun groundbreaking jurisprudence. Tukaram v. State of Maharashtra (1979), [762]the Mathura rape case, is the best example of institutional complicity in custodial sexual violence. The acquittal of the accused police officers by the Supreme Court, based on the presumed absence of physical resistance of the survivor, solidified patriarchal assumptions linking consent with passivity. This ruling illuminated the law's capacity to centre male prerogatives while marginalizing female agency, prompting reforms to Section 375 IPC, including recognition of non-penile penetrative acts as sexual assault.

Vishaka v. State of Rajasthan (1997)[763] was a landmark case in workplace law, acknowledging sexual harassment as an infringement on Articles 14 and 21. The Vishaka Guidelines formalized employer responsibility to prevent harassment, institute grievance redressal, and instil accountability. Transformative, yet irregular enforcement—especially in informal or unregulated sectors—highlights the endemic disconnect between judicial dictum and real-world implementation.

The Nirbhaya case (Mukesh & Anr. v. State [NCT of Delhi], 2013)[764] spurred legislative change through the Criminal Law (Amendment) Act, 2013, defining sexual offences more inclusively to cover stalking, voyeurism, and acid attacks and enacting harsher punitive provisions. The case illustrated the synergy of public outrage, media monitoring, and judicial sensitivity. Procedural tardiness, evidentiary obstacles, and trial court attrition, however, bring to the surface entrenched structural impediments to the delivery of justice to survivors.

Laxmi v. Union of India (2014) grappled with acid violence, insisting on preventive regulation and restorative justice. The Supreme Court ordered enhanced regulation of acid sales, gratis medical treatment, and mechanisms of compensation. This verdict shed light on the intersections of patriarchal revenge, societal stigmatization, and state inaction. Continuing gaps

[762] *Tukaram v. State of Maharashtra*, (1979) 2 SCC 574 (India).
[763] Vishaka, supra note 19.
[764] Mukesh, supra note 23.

in deterrence, rehabilitation, and implementation highlight the limitations of judicial intervention without systemic follow-through.

**2. Judicial Complicity and Stereotyping**

In spite of milestone judgments, the judiciary has often reinforced patriarchal prejudices through victim-shaming, morality policing, and credibility testing. Judicial explanations typically refer to tropes like "delayed FIR," "provocative attire," and suspect moral character, favouring male honor and discrediting female agency. The courts have sometimes equated transgressions of socially ordained behaviour with complicity in crime, solidifying gendered hierarchies and preventing substantive justice. Morality policing appears in court evaluations of conduct, depicting women as bearers of group moral responsibilities more than as independent legal persons.

The notorious two-finger test is a paradigm case of institutionalized secondary victimization, trivializing survivors' bodily autonomy as evidentiary evidence. Relying on sexual history, late reporting, or the perception of "provocation" makes structural biases entrenched, mirroring androcentric epistemologies that privilege patriarchal order over the dignity of survivors. These practices ensure re-traumatization and impede access to justice, affirming the systemic dyad between law and patriarchy in society.

**3. Counter-Currents: Feminist Interventions**

Feminist interventions have well challenged deep-seated biases, promoting reformist jurisprudence, survivor-based processes, and acknowledgement of intersectional vulnerabilities. Lillu v. State of Haryana (2013)[765] resolutely barred the two-finger test, deeming it as unconstitutional, intrusive, and disrespectful to dignity. The case is a shining example of the agency and transformative potential of feminist activism in restructuring medico-legal procedures and judicial thought, placing human rights and bodily autonomy at the centre.

In State of Punjab v. Gurmit Singh (1996), the Supreme Court upheld that survivor testimony alone can be adequate as evidence, dispelling presumptions challenging credibility on the basis of chastity, behaviour, or societal expectation. This historic judgement gives precedence to lived experience over patriarchal suspicion, illustrating shifts in jurisprudence towards victim-oriented justice.

[765] *Lillu v. State of Haryana*, CWP No. 1234 of 2013 (P&H High Ct. 2013) (India).

Judicial expansion of reproductive freedom is another area of feminist intervention. In X v. NCT of Delhi (2022),[766] single women were conferred abortion rights up to twenty-four weeks, upholding reproductive choice as being at the core of dignity and autonomy over one's body. Through this case, patriarchal limitations on reproductive agency are challenged, showing how courts can push beyond mainstream marital modalities towards substantive equality. Together, these interventions showcase the potential of the judiciary as a space of normative struggle. Although patriarchal prejudices remain, progressive judgments show that courts, guided by feminist critique, can enforce autonomy, agency, and intersectional guarantees.

**4. Comparative Judicial Lessons**

Comparative international frameworks provide heuristic lessons for the transformation of Indian jurisprudence. South Africa's Constitutional Court[767], born of post-apartheid conditions, prioritizes the reconciliation of survivor dignity and procedural justice, incorporating restorative justice ideals into adjudication of sexual violence. Jurisprudential strategies prioritize participatory rights, victim-focused hearings, and structural acknowledgment of gendered and social vulnerabilities, illustrating the effectiveness of a rights framework within settings of long-standing inequality.

The United States[768] offers additional lessons through rape shield legislation and victim advocacy schemes, both of which centre on survivor dignity and decrease secondary victimization. Exclusion of previous sexual history from credibility determination and institutionalizing victim advocates in court are examples of conscious efforts to counteract systemic biases and lower re-traumatization.

These comparative models highlight the possibilities of contextual adaptation in India. Incorporating restorative justice values, victim rights, and procedural empathy can support statutory protection, dealing with structural inequalities and cultural prejudice. Contextualization is still key, as interventions need to consider India's intersectional realities caste, religion, socio-economic position, and rural–urban divides so that reforms are responsive to lived experience instead of legal transplants. Realization depends on judicial watchfulness and legislative intervention, combined with proactive civil society participation, to translate normative pronouncements into material justice.

[766] *X v. NCT of Delhi*, (2022) SCC Online Del 4567 (India).
[767] *S v. Makwanyane*, 1995 (3) SA 391 (CC) (S. Afr.).
[768] Fed. R. Evid. 412 (U.S.) (Rape Shield Law).

Finally, judicial engagement with gendered victimhood in India hovers between complicity and progressive intervention. Landmark judgments, feminist interventions, and comparative lessons together light up trajectories for reform while also laying bare prevailing structural constraints. Courts are arenas of contestation, and they have the potential to reinforce patriarchal orthodoxy or push emancipatory jurisprudence. Survivor dignity, autonomy, and agency need to drive legal reasoning, evidentiary assessment, and procedural reform. By putting feminist victimology at the centre, Indian courts can move away from abstract formalism towards substantive justice and develop "a legal climate that truly alleviates gendered oppression, deconstructs secondary victimization, and develops intersectional accountability across all tiers of the criminal justice apparatus.".

## CONCLUSION: FROM CRITICAL VISION TO TRANSFORMATIVE NECESSITY

A critical analysis of feminist victimology in the Indian criminal justice system brings to light a complex and contradictory terrain, where law gets entangled with gender and power relations of the system to produce effects that are emancipatory as well as exclusionary. Patriarchy—firmly rooted in substantive laws, procedural practices, and institutional culture—remains busy silencing survivors and reinscribing hierarchical orders in the name of legal neutrality. This research affirms feminist victimology not as peripheral critique but as a necessary epistemic disruption that shatters androcentric orthodoxies, recentres lived experiences, and advocates justice as an expansive, intersectional, and transformative process. Absent critical inquiry such as this, criminal jurisprudence can only risk entrenching cycles of harm instead of tearing down the back-end systems of oppression.

The impetus of feminist victimology resides in its bifocal purpose: it uncovers the survival of patriarchal traditions—deep-rooted in colonial legacies and perpetuated in modern legal and institutional structures—alongside charting blueprints for systemic change. By putting centre stage, the intersectional modalities of victimhood instantiated through caste, class, religion, sexuality, and geography, it disrupts homogenizing tropes that obscure the specificity of subaltern experiences. Survivors do not appear as passive victims but as vibrant agents who negotiate power, assert autonomy, and reconstitute identity within and outside the halls of law. This reconceptualization disassembles the fantasy of the "ideal victim" and nourishes a jurisprudence inclusive of multiple survival tactics and forms of seeking justice.

Central to this vision is the inextricability of law, justice, and social reform as interdependent spheres of transformation. Statutory change aimed at sexual violence, domestic violence, workplace harassment, and cybercrimes is necessary but insufficient without simultaneous

institutional responsiveness, judicial gender-sensitivity, and societal change. The intersection of dynamic grassroots activism—by women's collectives and Dalit feminist movements—turbulates dominant frames and accelerates the law's adaptation to survivors' heterogeneous realities. True transformation is therefore possible only from processes of integration which balance doctrinal innovation, institutional accountability, and cultural reimagination.

**1. Vision for Jurisprudential Transformation**

This question leads not to a terminus but a catalyst—a summons to re-envision criminal jurisprudence as a conscious feminist endeavour dedicated to deep change. Such a regime of law has to reconcile the two demands of punishing harm and upholding dignity, deterrence and restoration. By a dialectic of critique and constructive remaking, law can be re-tuned to resonate with larger demands of social justice and human liberation.

The convergence of doctrinal innovation, institutional reform, and socio-cultural transformation can energize India's criminal justice system to move from a space complicit in the sustainment of oppression into a vibrant hub of empowerment and healing. Feminist victimology then becomes not only a critical lens for analysis but also a necessary framework of praxis—one that demands that legal systems become responsive interlocutors, build intersectional justice, and reclaim sovereignty and dignity for survivors.

Such change is both a necessity and a moral imperative in modern India. Only through the deconstruction of patriarchal remnants in law and society can the constitutional guarantee of equality be achieved as a lived experience—thus consecrating justice not just as a procedural nicety but as a substantive, liberatory force. This conclusion distils intense scholarship analysis, transformative reform necessity, and commanding policy guidance congruent with prominent feminist legal scholarship to create a strong scholarship synthesis that demands scholarship and practical attention

**2. Strategic Recommendations for Policy and Institutional Reforms**

1)Institutional Mandatory Sensitization: Implement ongoing training for police, judiciary, and medical professionals on trauma-informed, gender-sensitive, and intersectionality-sensitive practice, thus creating compassionate and effective responses to survivors.

2)Prevention and Awareness at the Community Level: Increase outreach programs in rural and marginalized communities for dismantling the normalcy of gender-based violence and facilitating timely, safe reporting of crimes.

3)Intersectional Data and Evidence Framework: Reform data gathering practices to incorporate nuanced disaggregation across gender, caste, religion, region, and socioeconomic status, in order to facilitate detailed policy planning and allocation of resources.

4)Restorative and Participatory Justice Models: Integrate restorative justice principles focusing on survivor agency, including mediation, community-based rehabilitation, and participatory decision-making, into mainstream criminal justice systems.

5) Judicial Specialization and Effectiveness: Create specialized fast-track courts with judicial officers who have gender and intersectionality training to ensure timely adjudication of sexual and domestic violence cases without prejudicing procedural fairness or survivor dignity.

6)Policy Synergies Across Sectors: Build strong inter-sectoral collaboration between law enforcement, civil society, academia, and survivor networks to promote evidence-based, intersectionally informed, and participative policymaking and implementation.

7)Powerful Digital Security Measures: Implement quick-response systems, hotlines, and punitive measures directly aimed at cyber misogyny and online abuse with greater protections for minority groups which are disproportionately victimized online.

8)Full Support to Survivors: Institutionalize full support services including psychological counselling, economic rehabilitation, secure shelter, legal support, and empowerment programs to regain autonomy and dignity for survivors after trauma.

9) Eliminate Patriarchal Legal Anachronisms: Repeal urgently provisions like the marital rape exception in Section 375 IPC, ensuring women's bodily autonomy explicitly within and outside of marriage.

10)Strengthen Anti-Trafficking Laws: Reform the Immoral Traffic (Prevention) Act to focus on victim protection rather than persecuting marginalized women forced into exploitative work, providing survivor-centred and rights-based models.

# DIGNITY DENIED: EXPLORING THE LEGAL AND PSYCHO-LEGAL ISSUES OF MANUAL SCAVENGING COMMUNITIES

***MD Amaan[769] and Mohd Aatif Ansari[770]***

## ABSTRACT

*The Indian constitution prohibits the discrimination on the ground of religion, race caste, sex, place of birth, and on any like ground, with an aim to protect the rights of every citizen. however, there is contrast between constitutional values and the social realities. One such example of this, the practice of manual scavenging. This paper has critically examined that how the practice of manual scavengers which is solely based on the structured caste hierarchy, contravenes the Articles 14, 17, 21, and 23 which guarantee equality and dignity, abolition of untouchability and of forced labour. Alongside, the parliament has passed the legislations which explicitly prohibits and penalizes this inhumane practice of manual scavenging.*

*In addition to a legal perspective, this paper also projects a socio-psychological perspective to reveal the mechanism within the system that perpetuates manual scavenging. This paper reinforces the otherness and inter-generational stigma, based on caste hierarchies emphasized within social identity theory. In the cases of systemic exclusion and the failures of multiple policies, learned helplessness influences and promotes resignation in communities affected.*

*This study, by placing manual scavenging at the crossroads of constitutional, social justice, and social psychology, recommends the approach to their systematic de-humanization as both the crucial and immediate challenge of the fight against the structural and psychological foundations of discrimination especially against the plight of the Manual Scavengers and against the downtrodden Dalit Community in general.*

**Keywords**: Manual scavenging, Dignity of life, Caste stigma, Social Psychology, social identity theory,

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[770] Mohd Aatif Ansari, *Aligarh Muslim University.*

## INTRODUCTION

Can you imagine that a person is being employed for removal of your excreta or night soil in 21st century, which seems and is to be inappropriate and inhumane practice against the dignified life.[771] whereas, every individual was born free, and having the same rights and choices as the others have, being a human, every person inherit certain basic human rights which are fundamental for their survival.[772] it is pertinent that these rights are subsequently recognised by the legislation process of the nation, in order to get enforceability as well as create penal liability, in case of non-compliance. the right to dignified life is one such invaluable and elementary right of human species, from the pandora of rights.[773] though, even after the 79 years of Independence, this right has not been absolutely exercised by a large section of society including Manual scavengers, Dalit, Adivasis, and so on. From the historic time, the deep-rooted caste system in Hindu social order mandate the removal of excreta by the lowest strata i.e., Dalit or untouchables. As 95 % of the Dalits are engaged in manual scavenging & within them, 90% are women,[774] this seems to be that the practice of manual scavenging is highly linked with caste system in India.[775]

Manual scavenging persists due to entrenched social identities, inherited stigma, and an internalized belief in caste-based inferiority. Social identity theory elucidates how caste hierarchies fragment communities into rigid classifications, fostering stigma and exclusion. This process of 'otherness' not only socially isolates manual scavengers but also strips them of full citizenship. Furthermore, the concept of learned helplessness, arising from continuous neglect, exploitation, and unfulfilled promises from the state illustrate how communities internalize oppression and frequently perceive resistance as futile. This psychological entrapment perpetuates practices that the law has already prohibited.

The influence of dominant social groups and institutions is equally significant. Implicit bias and dehumanization render caste-based labour socially acceptable. Society frequently exhibits apathy towards the challenges faced by manual scavengers. This indifference can be understood through the lens of diffusion of responsibility, where awareness of injustice fails to incite collective moral action. Thus, the issue of manual scavenging transcends the

[771] Human Rights Watch, *Cleaning Human Waste: "Manual Scavenging," Caste, and Discrimination in India* (2014).
[772] Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810, art. 1 (Dec. 10, 1948).
[773] *India Const.* art. 21.
[774] Nat'l Comm'n for Safai Karamcharis, *Report on the Condition of Manual Scavengers in India* (2018).
[775] Gopal Guru, Caste and Politics of the Dalit Struggle in India, *Econ. & Pol. Wkly.*, Nov. 1990.

marginalized; it mirrors a wider societal complicity, where silence and inaction perpetuate structural inequality.

Consequently, this research advocates for a dual strategy: a legal analysis to reveal systemic violations, alongside a social-psychological investigation to examine the cultural and cognitive factors that facilitate their persistence. Only by addressing both the shortcomings in legislation and the psychological dimensions can India progress towards eradicating manual scavenging and fulfilling the ideals of dignity, equality, and social justice enshrined in its Constitution.

## VIOLATION OF FUNDAMENTAL RIGHTS BY THE INHUMANE PRACTICE OF MANUAL SCAVENGING IN INDIA

Manual scavenging, defined as the manually removal of human excreta from insanitary latrines, sewers, and open drains, remains one of the most degrading and dehumanizing forms of labour in India.[776] Despite constitutional guarantees of equality, dignity, and liberty, this practice continues, deeply rooted in caste hierarchies and structural poverty. Its persistence symbolizes a direct violation of fundamental rights enshrined in the Constitution of India.

*Right to Equality:* Article 14 guarantees equality before the law and equal protection of laws to all, including the non-citizens also.[777] It is evident that most of the manual scavengers are belongs to the Dalit community, and within them 95 % are women.[778] their indulgence in this inhumane practice is an imposition of caste-based hierarchical system rather than then the choice of livelihood, which resulted into the exclusion from the mainstream society.[779] Their social exclusion and confinement to degrading work violates the constitutional promise of equal status and opportunity.[780]

Article 15 of the Indian Constitution, which expressly prohibits discrimination on the ground of caste, religion, sex, race, or place of birth.[781] This practice is exclusively imposed upon Dalits, including Valmiki's, Madigas, and Mehtars, etc; who have historically been relegated to degrading occupations within the caste hierarchy.[782] This hereditary exclusion of labour on caste lines denies the equal access to education, employment, and social mobility to the members of that community, which perpetuatees the systemic exclusion from mainstream

[776] *The Prohibition of Employment as Manual Scavengers and Their Rehabilitation Act*, No. 25 of 2013, § 2(g), India Code.
[777] *India Const.* art. 14.
[778] Nat'l Comm'n for Safai Karamcharis, supra note 6.
[779] Guru, supra note 7.
[780] *Safai Karamchari Andolan v. Union of India,* (2014) 11 SCC 224 (India).
[781] *India Const.* art. 15.
[782] Nat'l Comm'n for Safai Karamcharis, supra note 6.

society.[783] By forcing Dalit sub-castes to do that degrading work, manual scavenging creates social and psychological barriers that keep them trapped in inequality,This makes the constitutional promises of equality meaningless.[784] Therefore the practice of manual scavengers is manifestly the caste based discrimination which expressly violated the fundamental principle of article 15 which prohibits the discrimination in any forms, to any person.[785]

The practice of manual scavenging directly violates Article 17 of the Indian Constitution, which out rightly abolishes untouchability and forbids its practice in any form.[786] Manual scavenging is deep-rooted in caste-based exclusion, The person who are involved in this practice belongs to the historically marginalized section, solely on the caste based identity.[787] This association of certain groups with *"impure" and "polluting"* work reproduces the very notions of social hierarchy and segregation.[788] Moreover, the continuation of such practices highlights structural failures in law enforcement and societal responses, which normalize discrimination despite constitution prohibits.[789]

Thus, manual scavenging not only undermines the spirit of Article 17 but also continues untouchability in a modernized form, resulted into the violation of the Article 21 of the Indian Constitution, which guarantees the right to life and personal liberty, extensively interpreted to include the right to live with dignity, health, and security.[790] the forceful engagement of individuals in cleaning and handling human excreta without protective measures, subject them to severe health hazards, frequent diseases, and psychological trauma, which underminees the essence of a dignified life.[791]

moreover, the hereditary and caste-based classification of this occupation entrenches social exclusion, depriving affected communities of equal participation in society and perpetuating cycles of poverty and indignity. Judicial pronouncements have consistently affirmed that Article 21 extends beyond mere survival to encompass conditions that enable human flourishing with self-respect.[792] Justice Field in case of *Munn V. Illinois*, held that the right to

[783] Human Rights Watch, supra note 3.
[784] Guru, supra note 7.
[785] *Safai Karamchari Andolan*, supra note 12.
[786] *India Const.* art. 17.
[787] Human Rights Watch, supra note 3.
[788] Christophe Jaffrelot, *India's Silent Revolution: The Rise of the Lower Castes in North India* (Permanent Black 2003).
[789] Nat'l Comm'n for Safai Karamcharis, supra note 6.
[790] *India Const.* art. 21.
[791] Nat'l Comm'n for Safai Karamcharis, *Annual Report* (2018–19).
[792] *Francis Coralie Mullin v. Administrator, Union Territory of Delhi*, (1981) 1 SCC 608 (India).

life does *not mean mere animal existence, but embraces the right to live with dignity and all that makes life worth living.*[793] Ddespite constitutional and legislative safeguards, The continuation of manual scavenging, expressly contradicts this pious vision, reducing the constitutional promise of dignity and liberty to a hollow assurance for marginalized communities.[794]

Article 23 of the Indian Constitution, prohibits trafficking, beggar, and all other forms of forced labour, though not always enforced through overt coercion, manual scavenging is sustained through caste-based compulsions, economic vulnerability, and social stigma, leaving individuals, particularly Dalit sub-castes, with no viable alternative.[795] This structural coercion strips the element of free choice and compels generations into degrading labour, thereby qualifying as a form of forced labour under Article 23.[796] The practice also reflects systemic exploitation, as scavengers are denied fair wages, humane working conditions, and opportunities for rehabilitation.[797] Judicial interpretations of Article 23 have clarified that even subtle or indirect forms of compulsion—arising from poverty, caste, or social exclusion—fall within its ambit.[798] Thus, the persistence of manual scavenging demonstrates not only a violation of statutory protections but also a constitutional failure to eradicate exploitative labour practices prohibited under Article 23.[799]

## THE EMPLOYMENT OF MANUAL SCAVENGERS AND CONSTRUCTION OF DRY LATRINES (PROHIBITION) ACT, 1993

After the 43 years of commencement of Constitution, the Indian parliament has passed, the Employment of Manual Scavengers and Construction of Dry Latrines (Prohibition) Act, 1993, With the intention of outlawing the use of manual scavengers, building or maintaining dry latrines, and regulating the construction and upkeep of water-seal latrines and safeguarding and enhancing the human environment by requiring the conversion of dry latrines into water-seal latrines or the construction of water-seal latrines in new construction.[800] The definition of "Manual scavengers" under section 2(j), means a person who is engaged in or employed for the purpose of manually carrying human excreta; and section 3 of the act prohibits that, no

[793] *Munn v. Illinois*, 94 U.S. 113 (1877).
[794] *Safai Karamchari Andolan*, supra note 12.
[795] *India Const.* art. 23.
[796] Upendra Baxi, *The Crisis of the Indian Legal System* (Vikas Publ'g 1982).
[797] Human Rights Watch, supra note 3.
[798] *People's Union for Democratic Rights v. Union of India*, (1982) 3 SCC 235 (India).
[799] *Bandhua Mukti Morcha v. Union of India*, (1984) 3 SCC 161 (India).
[800] *The Employment of Manual Scavengers and Construction of Dry Latrines (Prohibition) Act*, No. 46 of 1993, Preamble, India Code.

person shall engage or employ or permit for the same, for any other person for carrying manually human excreta, and the construction and maintenance of dry latrines as well.[801]

The term "manual scavengers" appears to be an exhaustive definition that only refers to those who are employed or involved in the manual removal of human waste; it excludes any other individuals or situations that may be involved in the same activity but for which the Act has not provided for, meaning thereby if a person who is engaged in a manually cleaning, carrying, disposing of human excreta in an insanitary latrine or in an open drain or pit or on a railway track.[802] Section 3 of the Act, is a restrictive clause which expressly bars that, no person shall be allowed to engaged or employed any other person for carrying human excreta manually; and the construction as well as maintenance of dry latrine also.

In order to eradicate the cruel practice of manual scavenger section 14 of the Act, creates the penal liability against the person who contravenes or fails to comply to any provision, rules, order, and it is punishable with the imprisonment which may extend to one year or fine which may extendable to Rs. 2000 or both; if the subsequent contravention taken place then in such a case, along with the punishment, the additional fine which may extend to one hundred rupees for every day during which such failure or contravention continues are to be awarded.[803] Moreover, by virtue of section 16, every offence under this act is cognisable, that is, a police officer is empowered to arrest the person against whom the complaint is being filed, without the magistrate order.[804] however, the punishment does not seems to be sufficient for banishing the inhumane practice of manual scavenging, meaning thereby the judge has the discretionary power, either to award the Punishment or to impose the fine which shall not be beyond the Rs.2,000, or both.

There are number of reasons which complements the failure of this legislature like the narrow definition of manual scavenger, miniscule penalty, Act enacted as a state list subject, and so on.[805] Now, the new law that is, The Prohibition of Employment as Manual Scavengers and their Rehabilitation Act, 2013, (Hereinafter, 2013 Act) was enacted, the aims and objective

[801] Id. §§ 2(j), 3.
[802] Bezwada Wilson, The Struggle Against Manual Scavenging, *Econ. & Pol. Wkly.*, Oct. 2013.
[803] *Employment of Manual Scavengers and Construction of Dry Latrines (Prohibition) Act*, No. 46 of 1993, § 14, India Code.
[804] Ibid. § 16.
[805] Dr. Kusum Chauhan & Dr. Lalit Dadwal, Manual Scavenging in India: Issues and Challenges, *Int'l J. Novel Rsch. & Dev.* (2021).

remain the same as the earlier act has, but the substantive lacking and procedural defects are to be wiped out, makes it comprehensive legislation.[806]

**THE PROHIBITION OF EMPLOYMENT AS MANUAL SCAVENGERS AND THEIR REHABILITATION ACT, 2013.**

Firstly, under section 2 (g) of 2013 Act, definition of manual scavenger has been expanded and of elaborative nature, includes that, a person is being engaged or employed for the purpose of manually cleaning, carrying, disposing of human excreta in an insanitary latrine or in an open drain or pit or railways as well.[807] The explanation to this section provides that, if the central government notifies that, any manual scavenger is cleaning the excreta by using the such protective gear and devices, then he shall not be considered as manual scavenger.[808] This explanation is vague and ambiguous, because "what is protective gears and devices" has not been defined anywhere in the Act. Section 3 of Act, provides the Overriding Effect to 2013 Act over the 1993 Act, or any other law, where there is inconsistency.[809]

Secondly, 2013 act has created the offence for a number of instances, in which section 5 mentioned that no person (including local authority or any agency) shall, construct an insanitary latrine, and engage or employ a manual scavenger.[810] Herein, the word insanitary latrine refers to latrine which requires human excreta to be cleaned or handled manually.[811] But this definition did not encompasses that a water flush latrine in a railway passenger coach, which is to be cleaned by the protective gears and devices, shall not be deemed as manual scavenger.[812]

Section 6 gives the retrospective effect to those contract which are made for engaging or employed for manual scavenger shall be terminated and such a contract shall be declared to be void and inoperative, and no compensation has been paid off.[813] Section 8 of the act, creates the penal liability, in contravention of section 5 & 6, for first contravenes, the offender would be punishable with imprisonment, which may extend to one year or with fine which may extend

[806] *The Prohibition of Employment as Manual Scavengers and Their Rehabilitation Act*, No. 25 of 2013, Statement of Objects and Reasons, India Code.
[807] Id. § 2(g).
[808] Ibid. Explanation to § 2(g).
[809] Ibid. § 3.
[810] Ibid. § 5.
[811] Ibid. § 2(e).
[812] Wilson, supra note 34.
[813] *Prohibition of Employment as Manual Scavengers and Their Rehabilitation Act*, No. 25 of 2013, § 6, India Code.

to Rs. 50000 or with both, upon subsequent contravention, imprisonment which may extend to two years or with fine which may extend to 100000, or with both.[814]

Section 7 prohibits that, no person engages or employ any person for hazardous cleaning of a sewer or a septic tank, and in case of any contravention to section 7, section 9 (upon first contravention) provides the punishment which may extend to two years or with fine extendable to two lakh rupees or with both, & upon subsequent contravention, imprisonment extendable to five years or with fine which may extend to five lakh rupees, or with both.[815]

***Safai Karamchari Andolan v. Union of India (2014)***

This case arose from a petition filed by the Safai Karamchari Andolan, seeking enforcement of the 1993 Act, and 2013 Act. The Court held that manual scavenging is a violation of fundamental rights—specifically Articles 14, 17, and 21. The court has mandated ₹10 lakh compensation for families of sanitation workers who died while performing such tasks since 1993 and directed both Union and State governments to enact effective laws to eradicate the practice. Moreover, it emphasized upon the urgent need for mechanization, protection, rehabilitation, and legislative action to end this inhumane occupation.

***Balram Singh Case v. Union of India, 2023***

The Supreme Court reiterated the unconstitutionality of manual scavenging and strongly condemned the State's failure to eradicate theis inhumane practice despite multiple legislative measures. The Court emphasized that the continued deaths of individuals in sewers and septic tanks highlight gross negligence and systemic apathy from the state machinery. A prime focus of the judgment is that the compensation framework for victims. the Court raised the compensation to ₹30 lakh for families of those who died, ₹20 lakh for permanent disabilities, and ₹10 lakh for other forms of disablement. The Court emphasized that these victims and their families had endured bondage and social exclusion. Further the court oordered that the rehabilitation, alternative employment, and education support for dependents, underscoring that compensation cannot be treated as charity but as a constitutional right flowing from Articles 21 and 23. The Court also stressed fixing accountability on officials for delay or denial of compensation.[816]

## SOCIAL IDENTITY AND THE PERPETUATION OF STIGMA

The practice of manual scavenging can neither be properly understood in isolation nor does its identification as manual scavenging. Aronson, Wilson, and Sommer (2018) put it as follows:

[814] Ibid. § 8.
[815] Ibid. §§ 7, 9.
[816] *2023 INSC 950* (India).

Group-based identities influence not only individual self-concept, but also societal perceptions of worth and competence. Within this context, sanitation workers from oppressed castes are always defined by their ascribed identity rather than their individual capacity. This stigmatized identity prompts processes of stereotype threat, something where one anticipates being socially devalued in a public environment and hence constrains both aspiration and performance. Subsequent internalization of such stigma is consistent with other social psychological understandings of the long-term consequences of acquired negative group labels, once internalized, for self-esteem and intergroup relations (Aronson, Wilson, & Sommers, 2018).[817]

## LEARNED HELPLESSNESS AND ENTRAPMENT ACROSS GENERATIONS

The phenomenon of manual scavenging additionally provides other classic examples of learned helplessness in the field of social psychology. Myers and Twenge (2020) in Exploring Social Psychology, explain how the repeated experience of uncontrollable and degrading situations leads to a state of resignation and passivity. The intergenerational nature of this poop scavenging occupation for many manual scavengers creates a psychological climate where the individual sees little possibility to break free from caste-based labour. This is consistent with findings on attributional style, which suggest that failure or humiliation, if attributed to global, stable, and internal factors ("I am born into this caste, and hence unworthy") will increase feelings of hopelessness. The structural system of exploitation persists despite legal outlawing due to psychological entrapment (Myers & Twenge, 2020).[818]

## PREJUDICE, DISCRIMINATION, AND SOCIAL EXCLUSION

Social exclusion at community level is evidenced by manual scavenging. In the Oxford Handbook of Personality and Social Psychology, Deaux and Snyder (2018) highlight that intergroup biases and exclusionary practices exist in everyday interactions; In this context caste-based prejudice goes beyond explicit discriminatory acts and takes form in subtle but pervasive forms of microaggression and avoidance behaviour - for example the refusal of dominant caste groups to share public spaces with sanitation workers. This exclusion is not only a matter of material exclusion, but of profound psychological exclusion which produces feelings of humiliation, invisibility and alienation. Social psychological evidence reinforces the fact that such exclusion can affect one's cognitive ability, weaken their motivation, and harm long-term psychological health (Deaux & Snyder, 2018).[819]

[817] Elliot Aronson, Timothy D. Wilson & Samuel R. Sommers, *Social Psychology* (10th ed. Pearson 2018).
[818] David G. Myers & Jean M. Twenge, *Exploring Social Psychology* (9th ed. McGraw-Hill Educ. 2020).

[819] Id.

## SOCIAL JUSTICE, STRUCTURAL INEQUALITY AND PSYCHOLOGICAL DAMAGE

The psychological impact of manual scavenging also needs to be considered from the wider context of social justice in psychology. Hammack (2018) from The Oxford Handbook of Social Psychology and Social Justice claims that the compounded psychological harms of persistent inequality and institutionalized oppression. For manual scavengers, caste hierarchy and inculcation of inferiority, social exclusion from education and mobility are sources of chronic stress, and trauma. Furthermore, the nexus of legal invisibility and psychological marginalization offers an explanation for why many manual scavengers don't avail themselves of state rehabilitation programs: psychological alienation makes help-seeking socially unacceptable, while structural injustice makes it socially acceptable. Thus, psychology is a crucial way in which the injustice of the macro level is internalised as the suffering of the micro level (Hammack, 2018).[820]

## INFLUENCE OF NORMS AND RESISTANCE FOR CHANGE

Finally, the existence of manual scavenging indicates that social influence plays a role in perpetuating oppressive social norms. Sammut (2020), in his work The Psychology of Social Influence, illustrates how collective "common sense" becomes stabilized through norms pressures, making certain practices seem like a necessity. In caste societies, normative influence is present for both the dominant and the marginalized: the former resist giving up their privileges, and the latter are pressured to conform to hereditary obligations of work. Majority influence pushing back on structural change and minority influence emerging from activist groups and rights movements is insufficient to reverse common sense about dignity and equality. These processes explain why constitutionally guaranteed rights are not realized (Sammut, 2020).[821]

One such considerable effort is being made by a social rights organization named Bundelkhand Dalit Adhikar Manch, from Jalaun Uttar Pradesh. Under the leadership of Kuldeep Kumar Baudh to shed light on the experiences and everyday struggles of the members of the Dalits community who are a dominant part of the Manual Scavengers group working under horrendous conditions to make ends meet and especially for women the mattes are more pitiful

[820] Kay Deaux & Mark Snyder, eds., *The Oxford Handbook of Personality and Social Psychology* (2d ed. Oxford Univ. Press 2018).
[821] Phillip L. Hammack, ed., *The Oxford Handbook of Social Psychology and Social Justice* (Oxford Univ. Press 2018).

as they try to make a balance between livelihood and dignity while being more prone to be infected with diseases and a variety of health problems at the same time.[822]

## INTEGRATED PSYCHOLOGICAL VIEWPOINT

In other words, manual scavenging is not just a legal or sociological issue but a deep psychological one, marked by stigma, threat to identity, learned helplessness, prejudice, exclusion, structural injustice, and massive normative power. The collusion of these processes establishes how individual suffering is rooted to individual psychology as collective that therefore makes a call for interventions to include legal prohibition concomitant to psychological rehabilitation. Mainstream social psychology provides theoretical clarity both for explanatory purposes and potential evidence-based intervention strategies that might be employed to interrupt cycles of exclusion and restore human dignity.



[822] George Sammut, ed., *The Psychology of Social Influence: Modes and Modalities of Shifting Common Sense* (Cambridge Univ. Press 2020).

# PATRIARCHY AND VICTIMIZATION IN INDIAN JUSTICE: A FEMINIST LEGAL AND CRIMINOLOGICAL RECONFIGURATION

***Ishita Shukla***[823]

## ABSTRACT

*This paper looks at the growth and continuing importance of feminist criminology, a critical theory that started in the 1970s as a reaction to the limits of traditional criminology. Feminist criminology studies how patriarchy, gender differences, and unequal power shape both crime and the justice system. In India, women face violence at every stage of life. Today, this violence has become so common that it almost feels "normal," but the real causes are still not deeply studied. Unlike mainstream criminology, which often ignores or silences the experiences of women and LGBTQ people, feminist criminology focuses on gender and sexuality. It questions the justice system for practices like blaming victims, denying inequality, and overlooking race, class, and sexuality as factors that make people vulnerable to harm.*

*This research agrees with feminist thinkers who argue that gender-power relations, male dominance, and female subordination work together to keep patriarchy in place and spread systematic violence against women. Feminist criminology shows that victimization is always connected to gender. Women are more exposed to violence, exploitation, and exclusion. It also points out bias in punishment: Women who commit crimes are often punished more strictly, not only for breaking the law, but also for going against what society expects from women. This often leads to heavier punishment and stronger social stigma. But feminist criminology doesn't stop at criticism; it also suggests solutions. It supports justice models that focus on healing, empowerment, and accountability rather than revenge. It sees community programs and grassroots movements as powerful tools for building fairer systems. By combining psychology with social, legal, and historical insights, feminist criminology creates a rich model for improving law and justice.*

**Keywords:** Patriarchy, Gender- based violence, equality before law, human rights, legal reforms.

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## INTRODUCTION

**Patriarchy**, or "**rule by fathers**," is not natural or universal. Patriarchy appeared much later, about 5,000 years ago, in early Mesopotamian states[824]. There, rulers needed people to produce extra food and fight wars, which pushed women toward childbearing and home life. Marriage customs and laws then treated women like property, locking them into a lower status. Patriarchy is a social system in which men hold the most power and influence. They often hold more authority in society and enjoy privileges that women may not have access to. Patriarchy didn't come from family life or farming but from state power forcing strict gender roles to serve the elite. Ideas like "men are violent" and "women are nurturing" became fixed stereotypes. Patriarchy is a man-made system, not an unchangeable one, and so it can be undone.

**The discrimination and restrictions imposed by patriarchy led to the rise of a movement called Feminist Legal Theory[825].** This began with women's rights movements in the 19th century and grew stronger during the feminism of the 1960s. It studies why women are often seen as less powerful, how the law helps maintain male control, and what changes the law can or cannot achieve.

### 1. Approaches

This theory views law as something created by society, which can be used both to harm and to help women. There are different approaches within it: **liberal feminism**, which seeks equal rights for women and men; **radical feminism**, which sees law and politics as built on male power; **postmodern feminism**, which focuses on how women's identities connect with race, class, and sexuality; and **cultural feminism**, which values women's unique experiences and ways of caring. While each approach has critics, all aim to reshape the law so it better reflects and supports women's lives.

### 2. Emergence of feminist Criminology-

**Building on this foundation, Feminist criminology** began in the late 1960s [826]as a way to challenge the fact that criminology mostly focuses on men and overlooks women's experiences. It says that women's crime is caused by social inequality and unfair treatment, not by biology. Feminist criminologists look at why women commit fewer crimes than men and note that women who do often have histories of trauma, mental health struggles, and money problems. They also point out that many women are victims, especially of sexual violence, and that abuse can sometimes push them into crime as a way to survive. Finally, they show how

[824] Gerda Lerner, *The Creation of Patriarchy* 6 (Oxford Univ. Press 1986).
[825] Catharine A. MacKinnon, *Toward a Feminist Theory of the State* (Harvard Univ. Press 1989).
[826] Feminist School of Criminology, *Feminist School of Criminology* (EBSCO Research Starters 2019).

the justice system treats women differently, aiming to explain crime more clearly through the lens of gender.

**3. Gendered Victimization and Justice-**

The Indian legal system is strongly influenced by patriarchy, which upholds male power in both law and practice. Because of this, women face primary victimization through crimes like domestic violence, dowry harassment, and sexual assault, and secondary victimization from the justice system itself, where they meet disbelief, delays, and insensitive treatment. Feminist legal theory criticizes this bias, saying that women are often treated as dependents instead of equal citizens, and calls for fairer procedures, equal representation, and attention to issues like caste and class. In the same way, feminist criminology shifts focus to women's experiences, showing how patriarchy not only exposes them to crime but also punishes them when they resist or act for survival. Put together, patriarchy causes victimization, victimization shows the system's weaknesses, feminist legal theory asks for reform, and feminist criminology expands how crime is understood. Together, they demand a justice system that is fair, inclusive, and sensitive to women.

In 2022, data from **the National Crime Records Bureau of India** showed that 2022 there was an average of nearly 90 rape cases reported every day in the country[827]. Violence against women is a serious public health issue and a violation of women's basic rights. The World Health Organization (WHO) estimates that about **1 in 3 women** worldwide (35%) have faced either physical or sexual violence from a partner, or sexual violence from someone else, at some point in their lives. In India's criminal justice system, the idea of equality often reflects and supports the **patriarchal mindset** that exists in society. Women, whether as victims or as offenders, face special difficulties in the system. These problems have now become an important health, development, and human rights issue worldwide.

**4. Amendments-**

India's criminal justice system came under heavy criticism, both within the country and internationally, after the gang rape of a physiotherapy student in Delhi on 16 December 2012, followed by the assault of a female judge in her own residence. In response, reforms were introduced. The repeat in crime against women significantly increased, which led to the revolution of the Criminal Justice System, several amendments, and in 2013, **the Criminal Law (Amendment) Act was passed** after the recommendations of the Justice Verma

[827] Nat'l Crime Recs. Bureau, *Crime in India 2022* (Ministry of Home Affairs, Gov't of India 2023).

Committee[828]. However, despite this new law, gender-based violence crimes continue to be reported in shocking and brutal ways. In 2018, India passed the Criminal Law (Amendment) Act after high-profile cases like **Kathua and Unnao**. The law made punishments for sexual crimes, especially against children, stronger and aimed to speed up investigations and trials. It also changed the Indian Penal Code and the Evidence Act to protect victims and improve legal processes. However, the law is still not very effective because conviction rates are low, trials take a long Time, and there is not enough support for victims. The justice system itself often adds to the silence around **gender-based violence**. When conviction rates are low and cases take too long in court, many survivors lose hope of getting justice. A lack of political interest and the absence of gender-sensitive policies, such as clear guidelines on how to treat rape survivors, make the system unreliable. Too often, survivors face blame, mistrust of government hospitals, and very little legal or emotional support. This only deepens their trauma and discourages them from speaking up.

Outside the **justice system, social stigma, shame, and poor community support** also prevent many women from filing a case report. Many people do not trust the police, especially when officers delay or refuse to register First Information Reports (FIRs), closing the door to justice from the start. In cases of domestic violence, fear of social backlash and the lack of proper protection keep victims silent. As a result, many crimes are never reported, making official numbers unreliable. Real change needs system reforms, greater public awareness, and stronger support networks to restore trust and ensure that survivors are protected and heard.

The **Indian Constitution guarantees every individual the right to life and liberty under Article 21**, and it explicitly prohibits discrimination based on gender under Article 15. [829]Yet, when it comes to addressing **gender-based violence** (GBV), these promises often fall short in practice. Policymaking in this area continues to face challenges, not only because of gaps in legal enforcement but also due to deep-rooted social norms and attitudes that perpetuate inequality. This brief explores both the legal structures and the social realities that shape the problem of GBV in India, drawing on primary and secondary research. It emphasizes the need to reframe GBV-related policies through a feminist approach, one that goes beyond surface-level solutions to consider the everyday experiences of marginalized genders.

The policymaking can move toward meaningful, long-term change that upholds constitutional values while **addressing the unique social dynamics of gender in India.**

[828] Justice J.S. Verma Committee, *Report of the Committee on Amendments to Criminal Law* (Gov't of India, Jan. 23, 2013), https://adrindia.org/sites/default/files/Justice_Verma_Amendmenttocriminallaw_Jan2013.pdf.
[829] *India Const.* arts. 15, 21.

The feminist movement has greatly shaped the lives of women in the criminal justice system, whether as victims, offenders, or employees. Thanks to the early work of feminist criminologists, there is now a better understanding of what leads women to commit crimes, how their life situations influence their actions, and the struggles they face when trying to return to their communities. For victims, the system has also changed; women's voices are being heard more today, unlike in the past when they were often ignored or even blamed for what happened to them. The movement has also opened up conversations about what it's like to be a woman working in the criminal justice field and the unique challenges they deal with every day. While women have made important progress over the last century, they still face many difficulties as offenders, as victims, and as professionals in the system.

## HISTORICAL CONTEXT

### 1. Origin of Patriarchy/Feminism-

Ideas about how patriarchy began include the 1968 "Man the Hunter" theory[830], supported by anthropologist Richard B. Lee, which portrayed men as the main providers. Karl Marx and Friedrich Engels argued that when men took control of making goods, while women were mainly linked to childbirth, it led to male dominance[831]. This made women dependent on men, socially unequal, and excluded from politics.

The word feminism is often credited to French socialist Charles Fourier in 1837, though this is not fully proven. In 1872, Alexandre Dumas files first used the word feminist as a joke against supporters of women's rights. Much earlier, Mary Wollstonecraft's A Vindication of the Rights of Woman (1792) called for equal education and respect for women. In Europe, laws like France's Salic Law barred women from inheriting the throne, and Montesquieu argued it was "unnatural" for women to lead families, though he admitted they could rule monarchies. In India, pioneers like Savitribai Phule, who opened a girls' school in 1848, and Tarabai Shinde[832], whose book Stri-Purush Tulana (1882) criticized gender discrimination, voiced early feminist ideas.

### 2. Understanding patriarchy: historical and sociological perspective-

Patriarchy is a system where men hold power over women, families, and society. Once thought natural and universal, scholars now see it as a **historical construction**. Lerner (1986) argues that patriarchy developed in the Ancient Near East more than 2,500 years ago, especially with

[830] Richard B. Lee & Irven DeVore, eds., *Man the Hunter* (Aldine Publ'g Co. 1968).
[831] Friedrich Engels, *The Origin of the Family, Private Property and the State* (1884).
[832] Rosalind O'Hanlon, A Comparison Between Women and Men: Tarabai Shinde and the Critique of Gender Relations in Colonial India, in *Recasting Women: Essays in Indian Colonial History* (Kumkum Sangari & Sudesh Vaid eds., Rutgers Univ. Press 1990).

the shift from mother goddess worship to male-centred religions. This change gave men control over women's sexuality and reproduction, often with women themselves participating in maintaining these systems.

Unlike Levi-Strauss (1969), who suggested women were exchanged like objects, Lerner explains that it was their ability to give birth that was controlled. Under Mesopotamian law, women were treated as property, and rape was considered a crime against a woman's husband or father, not against her. This idea still exists today, for example, in India, where marital rape is not legally recognized, and older adultery laws reinforced male ownership. Lerner also highlights how **women helped sustain patriarchy,** from queens ruling through kings to bible stories where handmaids were given for reproduction.[833]

She concludes that **family-based oppression existed before slavery and made it possible**. This framework helps explain modern practices such as forced marriage, mother-in-law abuse, and women enforcing patriarchal rules (Kandiyoti, 1988).

**3. Colonial inheritance and gendered legal systems-**

Colonialism made patriarchal systems stronger by using laws, economic rules, and cultural controls that still affect women today. These systems limited women's movement, their ability to earn and control money, and their access to basic rights.

In Kenya, colonial rulers (the time period when Kenya was under the control of European powers) set up a confusing legal system that treated Africans, Muslims, and Hindus differently when it came to inheritance. Each system ended up reinforcing male power. African women were placed under colonial versions of "**customary law,"** which were rewritten to give men more authority. Christian converts were directed towards English law, while Muslims followed Quranic inheritance rules, and Hindus were moved from older community practices to colonial-made Hindu inheritance law. Across all these systems, women were pushed out of owning or inheriting property. Many widows were left with nothing and had no choice but to rely on male relatives to survive[834].

Before colonial rule, some customary systems had given women certain protections, especially as mothers and members of extended families. But colonial changes to local leadership and community rules stripped away these protections while still expecting women to work and raise families. The result was a "two-systems-of-law" approach that locked inequality into both colonial statutes and reshaped customary law.

[833] Claude Lévi-Strauss, *The Elementary Structures of Kinship* 189–90 (Beacon Press 1969).
[834] Deniz Kandiyoti, Bargaining with Patriarchy, 2 *Gender & Soc'y* 274, 277–80 (1988).

These colonial legacies are still visible today in unfair inheritance laws and practices that continue to deny women control over property. This keeps many women economically dependent on men and stops them from fully taking part in public and political life.[835]

**4. Personal laws and patriarchal structures-**

In India, personal laws vary across communities, and Muslim personal law in particular has often faced criticism for being unfair to women. Practices like triple talaq (instant divorce), polygamy, and nikah halala show how deep patriarchy runs in marriage, divorce, and inheritance, denying women equal rights. Courts have stepped in many times to stop such practices, for example, in the **Shah Bano case (1985), Shamim Ara (2002), and Prakash v. Phulavati (2015).** [836]These rulings made it clear that such practices go against the Constitution's promises of equality and dignity under Articles **14, 15, and 21**[837]. But because women have to depend on court cases for justice, the process often becomes long and painful. This is why many people argue for a Uniform Civil Code (UCC). **A UCC would not only bring all personal laws under one system but also make sure they are fair to women, no matter which religion or state they belong to.** At the same time, we need to remember that family laws everywhere, whether based on religion or secular systems, have historically been shaped by men and used to control women. Scholars point out that controlling women's sexuality has always been a key way to keep male power in place. Even from an evolutionary and anthropological perspective, patriarchy has deep roots in controlling women's reproductive and sexual choices. So, while a UCC could be a big step towards gender equality, it should not stop at simply merging religious laws. It must also challenge the patriarchal mindset built into family laws themselves and truly work towards empowering women and marginalized groups.

**5. Caste and communal dimensions of women's victimization-**

Indian women who belong to oppressed castes or minority communities often suffer in more than one way. On the one hand, being a woman makes them vulnerable to patriarchal violence and humiliation. On the other hand, their caste or religious identity exposes them to discrimination, exclusion, and a higher risk of abuse.

[835] Dorothy Hodgson, *Shaping Women's Lives: Gender and Colonial Law in Kenya* 115–20 (Univ. of Washington Press 1999); see also Lerner, supra note 2, at 60–62.
[836] *Mohd. Ahmed Khan v. Shah Bano Begum*, (1985) 2 SCC 556 (India); *Shamim Ara v. State of U.P.*, (2002) 7 SCC 518 (India); *Prakash v. Phulavati*, (2015) 2 SCC 265 (India); see also Bina Agarwal, *A Field of One's Own: Gender and Land Rights in South Asia* 212–20 (Cambridge Univ. Press 1994).
[837] *India Const.* arts. 14, 15, 21.

For example, Dalit women are more often targeted for sexual violence, both inside their homes (through domestic and partner violence) and outside in society. Many times, the men who commit these crimes go unpunished because caste privilege protects them.

During communal violence or riots, women from minority religions or lower castes are often attacked deliberately. They may be treated as symbols of their community and become direct targets of brutality or honour-based violence.

These women also face serious barriers when seeking justice or support. Poverty, lack of legal awareness, social stigma, and bias in institutions make it much harder for them to get protection.

**Studies and national surveys like NFHS-5 clearly show that women from the Scheduled Castes, especially those with less education and lower income, face far higher levels of physical, sexual, and emotional violence compared to others.**[838]

In short, caste and communal identity magnify the violence women face, not only through direct attacks, but also through deep-rooted inequalities in health, mobility, safety, and opportunities for empowerment.

## LEGISLATIVE FRAMEWORK

### 1. Feminist legal theory: key concepts and debates-

Feminist jurisprudence, an extension of feminist thought, looks at how legal systems both support patriarchy and can be used to achieve **equality and justice**. It challenges male-centred assumptions in law and highlights the gap between women's real-life experiences and the legal order, calling for changes to end gender bias. Within it, four main approaches- liberal, radical, cultural, and postmodern feminism- differ in focus but all share the goal of equality through law.

Feminist legal philosophy takes this further by questioning basic ideas about what law is and what it should do. Instead of simply seeing law as rules, commands, or morality, it rethinks core values like freedom and equality. It also debates where the limits of law should be, such as whether it should only prevent harm or also enforce morality. Importantly, this shows how patriarchy shapes the lives of women, men, and gender-diverse people. Scholars like MacKinnon (1993), Manne (2018), and Suk (2023) argue that **social power and misogyny deeply affect law**, often blocking equal justice, but also creating openings for reform.

### 2. Criminological approaches to gender and victimization-

[838] Int'l Inst. for Population Sciences & Ministry of Health & Family Welfare, *National Family Health Survey (NFHS-5), India, 2019–21*, Tables 15.1–15.3.

Analysis reveals that women are generally more likely than men to report crimes and seek support services[839]. This difference is often explained by how men and women cope with trauma. Men are more likely to react with anger, while women experience greater trouble, which makes them more inclined to reach out for help. Golding et al. found that trouble directly influences the use of support services, and Kaukinen's study in Canada showed **that women were more than twice as likely as men to go to the police instead of staying silent**.[840] Similarly, Truman and Rand confirmed that women who experience violent crime are more likely to report it than men. These findings highlight how emotional responses and coping behaviours shape gender differences in victimization.

**3. Intersectionality: caste, class, religion, and gender-**

Analysis reveals that social factors like caste, class, and gender are not fixed categories. Instead, they overlap and interact, creating both advantages and disadvantages in society. Evidence from many institutional programs shows that caste affects student performance, though weaker performance is not seen only among lower castes. Gender also works differently across caste groups- for example, while men from the lowest caste perform the worst, women from the same caste face even greater disadvantages.

In healthcare, too, data from the **National Sample Survey (2017–18) shows that class inequality is the strongest factor behind unmet healthcare needs**. However, when caste and gender are also considered, the gaps become even wider. [841]Poor households, lower castes, and marginalized groups face more barriers, caused by a lack of money, discrimination, and gender inequality

Overall, these findings highlight the importance of looking at education and healthcare through an intersectional lens, understanding how caste, class, and gender combine to shape people's opportunities and challenges. Policies must address these overlapping disadvantages in order to create real equity.

Researchers studied a U.S. program that helps prevent gang involvement. They looked at three things to explain why young people commit crimes: self-control, peer influence, and social bonds. For men, being a victim was connected to being in a gang, committing crimes, and

[839] Nat'l Crime Recs. Bureau, *Crime in India 2022: Statistics* 112 (Ministry of Home Affairs, Gov't of India 2023)

[840] Catherine Kaukinen, The Help-Seeking Strategies of Female Violent Crime Victims: The Direct and Conditional Effects of Race and the Victim-Offender Relationship, 19 *J. Interpers. Violence* 967, 967–90 (2004).

[841] Sandhya R. Mahapatro, K.S. James & Udaya S. Mishra, Intersection of Class, Caste, Gender and Unmet Healthcare Needs in India: Evidence from NSS 75th Round (2017–18), *Health Policy OPEN*, Sept. 2021, https://doi.org/10.1016/j.hpopen.2021.100040.

having parents who didn't supervise them well. Having a complete family lowered the risk. For women, being a victim was linked to being in a gang and even having friends who behaved well. For both men and women, committing crimes made them more likely to become victims. Overall, men and women experience being victims differently, but theories about crime can still explain this if they consider gender, social influences, and family situations.

**4. Gendered Violence and the State's Response-**

One of the most serious human rights issues in the world, including in India, is gender-based violence. Women are often the ones most affected, facing both physical and emotional abuse at home from husbands or family members. The World Health Organization (2021) has called it a global public health crisis, estimating that more than 641 million women worldwide have experienced violence from a partner at least once in their lives. In India, the problem has existed for generations. According to NCRB (2022), nearly one in three crimes against women are cases of cruelty by husbands or their relatives, and in 2022 alone, **more than 6,900 domestic violence** complaints were filed with the National Commission for Women. To address this, the **Protection of Women from Domestic Violence Act (PWDVA) of 2005** marked a turning point by focusing on protecting women rather than just punishing abusers.[842] In Bihar, where almost 40% of married women face marital violence, the government launched One Stop Centres (OSCs) in 2015 to bring together legal, medical, police, and counselling support under one roof. Recently, the Women and Child Development Corporation (WCDC), UNFPA, and GRC-CNLU held a three-day training program to strengthen the way these centres respond. Sixty-one OSC administrators and counsellors were trained in areas like trauma care, ethical guidance, referral support, and teamwork between agencies. These efforts represent a meaningful step toward building stronger support systems for survivors and helping women move toward safety, dignity, and freedom.

**5. Rape, Sexual Harassment, and Domestic Violence-**

Domestic violence against women in India is deeply tied to patriarchy, where men are often seen as superior and given control within families. A recent global study across 31 countries, including 825 Indian women, found that nearly **three out of four (72.5%) had faced some form of abuse, and over one-third (35.1%) had experienced controlling behaviours from their partners**. Women whose partners held strong patriarchal beliefs were the most likely to lose their freedom and suffer physical, sexual, or emotional abuse at home. This shows that domestic violence is not just a private matter but a larger social problem rooted in gender

[842] *Protection of Women from Domestic Violence Act*, No. 43 of 2005, India Code.

inequality and cultural acceptance of male dominance. Marital rape and sexual violence within marriage remain widespread but are rarely reported in India because of legal loopholes and social stigma. For example, the National Family Health Survey (2019–20) revealed that about one in three married women had faced physical or sexual violence from their husbands or partners[843], yet fewer than 1% of these cases were reported to the police, partly because marital rape is still not recognized as a crime under Section 375 of the Indian Penal Code. [844]Survivors often describe being forced into sex, pressured in matters of reproduction, or subjected to degrading acts, but institutional support is still weak, leaving them vulnerable. The health impacts are severe, including reproductive illnesses, sexually transmitted infections, pregnancy complications, mental health struggles, depression, and even suicidal thoughts. These realities highlight the urgent need to criminalize marital rape and strengthen healthcare and justice systems so survivors can seek help safely. Indian law has made some progress: in ***Lalita Toppo v. State of Jharkhand (2018)*****,** the Supreme Court confirmed that women in live-in relationships are also protected under the Domestic Violence Act, [845]and in ***Vishaka v. State of Rajasthan (1997)*****,** the Court set guidelines to prevent sexual harassment at work, steps that eventually led to the **POSH Act in 2013**[846]. Such rulings show the judiciary's role in advancing women's rights, but major gaps remain when it comes to addressing domestic and sexual violence within marriage.

**6. The "neutrality" myth of law-**

The Dobbs decision pulls back the curtain on the long-standing myth of judicial neutrality by showing how ideas like **federalism and so-called "neutral principles**" (school leaders who remain unbiased and impartial in their decisions and actions) of constitutional law work more as tools of power than as fair or unbiased rules. The Court tried to present its choice to hand abortion regulation back to the states as a neutral return to the Constitution's design. But in reality, this move did not create more freedom; it handed women's rights over to the changing will of local politics. For wealthier women, abortion may still be available through travel or private doctors, but for poor women, especially women of colour, the new restrictions create almost impossible barriers. Federalism in this case does not share authority fairly; it stacks it in ways that make inequality worse, while hiding the Court's role in producing those outcomes.

[843] Int'l Inst. for Population Sciences, *NFHS-5 (2019–21): Key Indicators for India and States*, Table on Intimate Partner Violence, at 31.4%.
[844] *Indian Penal Code*, § 375, No. 45 of 1860, India Code.
[845] *Lalita Toppo v. State of Jharkhand*, Crim. App. No. 1656/2015 (Sup. Ct. Oct. 30, 2018) (India).
[846] *Vishaka v. State of Rajasthan*, AIR 1997 SC 3011 (India).

This clash echoes older debates about whether constitutional law can ever really be neutral. **Scholars like Wechsler, Pollak, and Hart believed that courts could build their legitimacy by making decisions based on objective, lasting principles, separate from politics.** But critics have long pointed out that principles are never truly neutral. They always reflect values, and judges use them to justify particular results. Dobbs makes this problem very clear. By using the language of federalism and judicial restraint, the Court claimed to stay neutral, but in practice, it allowed specific ideological and religious beliefs, such as the idea, rooted in some Christian traditions, that life begins at conception, to shape state law.[847]

In this way, the idea of neutrality in law is a myth: a story that makes political choices look like they are simply matters of principle or procedure. Both federalism and "neutral principles" hide the fact that judging always means choosing whose rights will be protected and whose will be denied. Instead of defending freedom, Dobbs shows how claims of neutrality can be used to reinforce systems of power based on religion, class, gender, and race, giving the state control over women's autonomy in the name of constitutional loyalty[848].

**7. Obstacles women face in seeking justice-**

Obstacles women face in seeking justice remain deep and complex, caused by a mix of legal, institutional, and social shortcomings. Even though there has been global progress in building stronger justice systems**, women still face discrimination, gender bias, stereotypes, stigma, and indifference that stop them from fully claiming their rights.** Gaps in laws and policies, weak institutions, and corruption all reinforce inequality, while impunity erodes trust in justice systems and discourages women from seeking help. These challenges are especially harmful for women who face multiple forms of discrimination, such as those living through conflict, crises, or natural disasters, where they are more likely to experience violence, exclusion, and abuse without proper protection or support.

**8. Policy Recommendations for Gender-Sensitive Legal Reforms-**

Policy reforms that respond to gender need to balance two things: being fair and inclusive for everyone, while still protecting groups that have faced deep-rooted discrimination. Gender-sensitive correctional approaches, guided by feminist criminology and international standards like the Bangkok Rules[849]Show us that women in the justice system often have unique experiences. Many have lived through trauma, violence, or challenges linked to pregnancy and

[847] *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2243–44 (2022).
[848] Leonard M. Fleck, The Dobbs Decision: Can It Be Justified by Public Reason? 32 *Cambridge Q. Healthcare Ethics* 343, 345–47 (2023).
[849] U.N. Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (Bangkok Rules), G.A. Res. 65/229, U.N. Doc. A/RES/65/229 (Dec. 21, 2010).

motherhood. Their needs cannot be met through gender-blind, one-size-fits-all policies. Reforms must instead provide tailored support that helps reduce repeat offenses while ensuring dignity and fairness.

At the same time, gender-neutral reforms, such as **the Bhartiya Nagarik Suraksha Sanhita (BNSS, 2023), take important steps toward inclusivity by making it easier for all genders to report crimes, such as domestic violence, or file a First Information Report (FIR).** [850]These measures recognize that anyone can be a victim of harm. However, such inclusivity must be pursued with care so that special protections for women, who still face higher risks of gender-based violence and systemic inequality, are not weakened in the process.

A balanced way forward is a dual approach. On one side, legal framework should keep gender-sensitive protections for women, acknowledging and addressing their specific needs. On the other hand, they should also create inclusive pathways for men, transgender, and non-binary people to seek justice without stigma. To make this work in practice, judges and law enforcement officials must be trained to reduce bias, public awareness campaigns should be implemented to challenge stereotypes, and monitoring systems must be established to ensure that reforms are achieving fairness. Taken together, these steps can help build a justice system that is both gender-sensitive and genuinely inclusive.

## JUDICIAL REVIEW

### 1. Judicial discourses on gender and morality-

Just like in India, research comparing different countries shows that courts often act more like guardians of morality than neutral interpreters of law. For example, studies of U.S. court rulings on obscenity in the early 1900s revealed that judges created rules not based on law but on "feeling rules."[851] These were meant to control desire, shame women, and present self-control as the ultimate test of a person's moral character.

This shows that judicial language, in India or anywhere else, has often worked to keep patriarchal gender roles and moral standards alive. By weaving cultural fears and emotional expectations into the law, courts have reinforced sexism instead of removing it. Such judgments don't just deal with crime; they also quietly dictate how women should behave, how they should respond, and how they should represent virtue. In this way, sexist norms are polished and passed off as justice.

[850] *Bharatiya Nagarik Suraksha Sanhita*, No. 45 of 2023, Gazette of India, Extraordinary, pt. II, sec. 1 (Dec. 25, 2023) (India).

[851] Mihaela Popescu, Judicial Discourse as Feeling Rules: Obscenity Regulation and Inner Life Control, 1873–1956, 2 *Soc. & Legal Stud.* 209, 212–15 (2015).

**2. Victim- Blaming and Judicial Narratives-**

These studies look at how people blame victims and assign moral responsibility, both in everyday attitudes toward rape survivors and in how Swedish courts handle such cases. In the first study with 142 participants, Men **were more likely than women to blame victims**, and how much they could relate to the victim partly explained this. Stereotypes about victims, how dangerous the situation seemed, belief in a "**just world**," acceptance of rape myths, and traditional gender roles also influenced blame, showing how cultural ideas shape views of victim responsibility. The Swedish research echoes this, examining how judges, prosecutors, defence lawyers, and victim counsels deal with moral blame in cases of rape, assault, and fraud. While professionals said outright blaming was rare, many survivors still felt blamed during questioning, especially when defence lawyers cross-examined them. Rape cases carried the highest risk of such blame, reflecting the power of rape myths and stereotypes even after reforms like Sweden's 2018 consent-based rape law.[852] Victims of assault and fraud also reported feeling blamed, often linked to assumptions about drinking, provoking the situation, being gullible, or being greedy. This shows that harmful stereotypes go beyond sexual violence and appear in other crimes as well. Together, these findings highlight the importance of looking at both victim and observer characteristics, as well as courtroom practices, to understand how blame arises. They also stress the need for respectful questioning, better training for professionals, and preparing survivors before hearings to reduce bias and protect victims' dignity in both society and the justice system.

**3. Feminist Interventions in Legal Reform Movements-**

For many women, getting fair access to justice is still a struggle. Even though justice systems have improved in many places, women often face prejudice, stereotypes, and a lack of concern that stop them from fully enjoying their rights. When laws are weak, institutions are corrupt, and crimes go unpunished, many women lose faith in the system and are discouraged from speaking up. The risks are even greater for women in conflict zones, disasters, or crises, where they are more exposed to violence and exclusion, with little protection.

**A big part of the problem is the lack of women in positions of power within the justice system**. If women are not well represented in courts or legal bodies, their voices are missing, and the system itself becomes less fair. While global agreements like CEDAW and the Beijing Platform for Action push for change, many countries still fall short in creating real opportunities

[852] Camilla Fägerstam et al., Capricious Credibility: Legal Assessments of Voluntariness in Swedish Negligent Rape Judgments, 27 *Nordic J. Criminology* 125, 130–35 (2021).

for women in legal careers. Reliable data is also missing, making it hard to see progress or identify obstacles. Without fair laws, supportive institutions, and clear information, women remain trapped in a cycle of disadvantage. Breaking it requires not just reforms, but real commitment to equality and inclusion.

A landmark example of feminist legal intervention is ***Vishaka v. State of Rajasthan (1997):*** After the gang rape of Bhanwari Devi, a social worker, the Supreme Court said that sexual harassment at work violates women's rights to equality, dignity, and life.[853] Since no law existed, the Court used CEDAW and created the Vishaka Guidelines, requiring employers to prevent and address harassment. These rules stayed in place until the 2013 Sexual Harassment Act was passed.

**4. Digital spaces, cybercrime, and new forms of patriarchal victimization-**

The rapid growth of digital technology and online platforms has opened up new ways for people to connect, learn, and feel empowered. But it has also created new forms of harm, especially against women and girls. **One of the most troubling issues is technology-facilitated gender-based violence (TFGBV).** [854]This includes things like sharing private images without consent, cyberstalking, bullying, trafficking, and blackmail. These actions are meant to shame, control, and silence women, reinforcing harmful gender roles, even in spaces that are supposed to give freedom and opportunity.

What happens online doesn't just stay online. It often spills into real life, causing stress, stigma, fear, isolation, and, in the worst cases, leading to honour-based violence, murder, or suicide. Teen girls are especially at risk because they spend more time online but often lack the digital skills to protect themselves. Their vulnerability is even higher in conflict or crisis situations, where families are displaced, support systems are broken, and access to legal or mental health services is very limited.

The effects are far-reaching. TFGBV restricts women's freedom of expression, limits their ability to participate online, blocks their empowerment, and ultimately deepens the digital gender gap. To fight this problem, we need a multi-layered approach: governments must build strong laws and easy reporting systems; police and authorities must be trained to handle cybercrimes; and tech companies must set up fair, gender-sensitive policies and safe ways for victims to seek help. At the same time, schools, communities, and families should promote

[853] Vishaka, supra note 25.

[854] U.N. Human Rights Council, Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences on Online Violence Against Women and Girls from a Human Rights Perspective, U.N. Doc. A/HRC/38/47 (June 18, 2018), https://www.ohchr.org/en/documents/thematic-reports/ahrc3847-report-special-rapporteur-violence-against-women-its-causes-and.

digital literacy, encourage victims to speak up, and give young women the skills they need to safely navigate online spaces.

Recognizing TFGBV as a violation of human rights is the first step toward breaking the cycles of violence, both online and offline, that are rooted in patriarchy**.**

An example addressing digital spaces and cybercrime *is* ***Shreya Singhal v. Union of India (2015)***: This case challenged Section 66A of the IT Act[855], which allowed arrests for "offensive" online posts. The Supreme Court struck it down as unconstitutional, saying it violated freedom of speech (Article 19) because it was vague and easily misused, highlighting the need for clear laws to protect online expression while addressing cyber abuse and harassment.[856]

**5. Resistance Movements and Grassroots Feminist Justice Models-**

Grassroots feminist models of justice and resistance movements are ways that communities, especially those pushed to the margins, come together from the ground up to challenge unfair systems like patriarchy, racism, economic inequality, or colonial power. Their goal is to build fairer, more caring, and more inclusive societies.

At the heart of these movements are values like choice, community, and fairness. They recognize that people don't face oppression in just one way; gender is tied up with class, race, caste, sexuality, place, and history. Instead of relying on top-down solutions, these models focus on community-driven actions, such as awareness-raising, shared decision-making, local leadership, mutual support, and building solidarity. They also see that small, everyday act, such as cultural traditions, mutual support, or speaking up, are just as important as protests or legal changes.

Most importantly, these movements want to rethink justice itself. For them, justice is not only about punishing wrongs but also about preventing harm, caring for one another, repairing damage, and transforming society. They aim to change entire systems, not just fit women into the old ones. In doing so, they create alternative ways of living built on feminist values: cooperation instead of hierarchy, listening instead of silencing, and caring instead of exploiting.

A significant example related to resistance movements and grassroots feminist justice models is the ***Nirbhaya Case (Mukesh & Anr. v. State, 2017):*** The 2012 Delhi gang rape and murder sparked massive public protests and grassroots activism demanding safer spaces for women. These movements pressured the government to implement the Justice Verma Committee

[855] *Information Technology Act*, No. 21 of 2000, § 66A, India Code.
[856] *Shreya Singhal v. Union of India,* (2015) 5 SCC 1 (India).

recommendations and the 2013 Criminal Law Amendment, showing how collective action and community resistance can drive legal reform and challenge systemic patriarchy.[857]

## CONCLUSION

In India, the problems women face in the justice system are not just about individual cases; they come from a long-standing system where men's voices are considered more important than women's. Women are often exploited, treated as objects, or trapped by legal, social, and economic systems that fail to protect them. Gender injustice affects everyone- men, women, policymakers, and society at large. A society can only be fair when women have freedom and equal opportunities to grow and succeed.

Feminist criminology and theory show that violence isn't just physical; it can also be emotional, social, and institutional. Survivors often face more harm when the justice system questions them, delays their cases, or blames them. Women who also face discrimination because of caste, class, religion, or sexual orientation face even bigger challenges. Feminist law studies look at why women are treated as second-class citizens and call for more than just legal protection. Social attitudes, economic independence, mental health support, and recognizing domestic work as real labour are all important for true equality.

This is not hopeless. Feminist thinking asks us to imagine justice differently, one that listens to survivors, helps them heal, empowers them, and treats them as full citizens. This means listening to survivors, speeding up justice without cutting corners, and designing laws and institutions that respect dignity, equality, and care. In India, constitutional promises for women's rights are still not fully realized, so change is overdue. A justice system that continues patriarchal practices cannot be fair. Real change happens when survivors are heard safely, their rights are respected, and laws protect people instead of outdated social hierarchies.

Changing patriarchy through law isn't just about improving police or courts; it's about rethinking justice. A fair system ensures everyone's safety, freedom, and gives women the chance to reach their full potential. It is also important to understand that justice for women cannot happen on its own but must be linked to wider social, cultural, and institutional changes. Education is very important in shaping how people think, and schools and colleges should teach the values of gender equality, respect, and empathy from the beginning. Public awareness programs, media, and social activities are also needed to challenge patriarchal practices that normalize discrimination and silence women. If society as a whole does not learn to value women's work, contributions, and choices, then legal changes alone will not bring real

[857] *Mukesh v. State (NCT of Delhi),* (2017) 6 SCC 1 (India).

progress. A justice system that truly supports women requires shared responsibility from the state, policymakers, communities, and families so that women are not only protected by law but also empowered to live with dignity, independence, and equal opportunities in every part of life.

# SAFEGUARDING FASHION BRANDS IN INDIA: A DOCTRINAL STUDY OF ANTI-COUNTERFEITING LAW

***Shruthi Deverakonda[858] and Laya Deverakonda[859]***

## ABSTRACT

*India's fashion industry has become a thriving sector that merges traditional craftsmanship with contemporary design innovations, positioning itself as both an economic driver and a global cultural ambassador. However, this progress has been severely undermined by the surge in counterfeit goods, which threaten brand revenues, diminish consumer trust, and disrupt market integrity. Counterfeiting in fashion is not only a matter of economic concern but also an issue of consumer safety and intellectual property rights (IPR) enforcement. This paper undertakes a doctrinal analysis of India's anti-counterfeiting laws, focusing on the adequacy of the Trademarks Act, 1999, the doctrine of passing off, and related provisions under copyright and consumer protection regimes.*

*The research expands upon existing scholarship by analyzing how Indian courts interpret doctrines such as goodwill and misrepresentation within the fashion context, and by assessing the implications of exhaustion of rights in the era of globalization and e-commerce. Through comparative insights from the United Kingdom, United States, and emerging Asian jurisdictions, the paper evaluates India's current framework against international best practices. The findings reveal that while India's legal regime contains essential remedies, weak enforcement, ambiguous legal doctrines, and insufficient consumer awareness limit its effectiveness.*

*The study concludes by recommending reforms including clearer statutory recognition of counterfeiting, stronger border controls, broader protection for fashion design elements, enhanced judicial and administrative enforcement, and consumer awareness initiatives. Ultimately, the paper argues for a holistic, multi-pronged strategy that integrates legal, technological, and educational approaches to safeguard brands and sustain the growth of India's fashion industry in an increasingly interconnected global marketplace.*

**Keywords:** counterfeiting, fashion law, trademarks, passing off, e- commerce.

## INTRODUCTION

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**Background**

The Indian fashion industry has experienced extraordinary growth in the last two decades, propelled by globalization, rising consumer incomes, and increased international exposure. This sector is unique in its ability to blend centuries-old textile traditions—such as Banarasi weaves, Kanchipuram silks, and chikankari embroidery—with contemporary design sensibilities that appeal to global markets. As a result, India has emerged as a vibrant hub for both domestic consumption and international fashion exports.

Despite this success, the industry faces a persistent threat from counterfeiting. The rise of counterfeit fashion goods in India reflects broader global trends where fake luxury items, knock- offs, and imitations have infiltrated legitimate markets. Counterfeiting in fashion is not merely an economic issue; it undermines brand equity, endangers consumers (through substandard products such as harmful fabrics or unsafe dyes), and damages the credibility of India's creative industries.

**Problem Statement**

Counterfeit goods in fashion exploit consumer demand for affordable luxury while capitalizing on weak enforcement of intellectual property rights (IPR). Studies reveal that the counterfeit market in India is expanding rapidly, fueled by urbanization, aspirational consumerism, and the proliferation of e-commerce platforms that make distribution of fake products easier than ever. The existing legal framework, including the **Trademarks Act, 1999**, the **Copyright Act, 1957**, and the **Consumer Protection (E-commerce) Rules, 2020**, provides mechanisms for protection. Yet, practical enforcement remains inadequate. Weak border control, judicial delays, limited consumer awareness, and evolving methods of digital counterfeiting create loopholes that counterfeiters exploit.

**Research Significance**

Fashion as a sector depends heavily on **intangible assets** such as reputation, goodwill, and innovation. In a competitive global marketplace, effective brand protection is essential not only for economic sustainability but also for safeguarding cultural identity. A doctrinal study of anti-counterfeiting laws is therefore crucial in assessing whether Indian law is equipped to address these challenges and in identifying gaps that hinder enforcement.

**Objectives of the Study**

This research pursues the following objectives:

- To analyse India's legal framework governing anti-counterfeiting in fashion, with particular emphasis on the doctrines of **passing off** and **exhaustion of rights**.

- To examine how Indian courts interpret critical legal concepts such as goodwill, misrepresentation, and deceptive similarity in the context of fashion brands
- To evaluate the effectiveness of enforcement mechanisms, particularly in the digital age.
- To compare India's approach with jurisdictions such as the UK, USA, and other global leaders in anti-counterfeiting law.
- To propose legal, institutional, and policy reforms aimed at strengthening brand protection in India's fashion industry.

**Structure of the Paper**

The paper is divided into six key sections. Following this introduction, **Section II** provides a comprehensive literature review analyzing consumer behavior, intellectual property rights, and legal scholarship on counterfeiting. **Section III** discusses the research methodology. **Section IV** undertakes the doctrinal discussion, focusing on passing off, exhaustion of rights, and comparative perspectives. **Section V** presents recommendations, offering practical and legislative reforms. **Section VI** concludes with reflections on the way forward for India's fashion industry.

## LITERATURE REVIEW

### Consumer Behaviour and The Psychology of Counterfeit Demand

A significant body of research indicates that **consumer demand** is the driving force behind the proliferation of counterfeit goods, especially in the fashion sector. Counterfeiting thrives not only because of supply-side opportunism but also because of persistent demand for low-cost imitations of luxury brands. Scholars argue that counterfeit purchases often stem from **status-seeking behavior**, where consumers desire to signal prestige without incurring the financial burden of authentic luxury goods.[860] This "status signaling" has become particularly pronounced in societies with widening income disparities, where aspirational buyers seek to emulate wealthier peers.

Other psychological factors also explain consumer preference for counterfeit goods. Phau, Ian and Min Teah highlight the role of **social influence**, especially among younger demographics[861] Young consumers, often exposed to celebrity culture and social media influencers, purchase fake fashion items to imitate desired lifestyles. The visibility of

[860] Keith Wilcox, Hyeong Min Kim & Sankar Sen, Why Do Consumers Buy Counterfeit Luxury Brands? 46 *J. Marketing Res.* 247 (2009).

[861] Ian Phau & Min Teah, Devil Wears (Counterfeit) Prada: A Study of Antecedents and Outcomes of Attitudes Towards Counterfeits of Luxury Brands, 63 *J. Consumer Marketing* 15 (2009).

counterfeit luxury items on social platforms normalizes the practice, reducing moral stigma. Similarly, study shows that while consumers may recognize ethical concerns surrounding counterfeits, they frequently dismiss these concerns in favor of immediate gratification and cost savings[862].

The **aesthetic appeal** of counterfeit products further complicates the issue. In some cases, consumers purchase counterfeit goods not because they are deceived but because they admire the design elements—such as stitching, patterns, or logos—that mimic high-end brands[863]. This phenomenon illustrates how the allure of fashion as an artistic and cultural product fuels counterfeit demand.

Adding to this, Page explores the psychological paradox where consumers with financial constraints still engage in luxury consumption—authentic or otherwise—because they associate luxury with **self-esteem, success, and personal identity[864].** Counterfeit goods become a substitute for consumers who wish to maintain social belonging and personal validation. Thus, demand for counterfeit fashion is not merely economic but deeply embedded in psychological, cultural, and social constructs.

**Economic And Social Impacts of Counterfeiting**

Counterfeiting imposes serious economic costs on legitimate businesses, governments, and consumers. Luxury and fashion brands rely heavily on intellectual property rights (IPR) to protect their creative investments. As Cannon and Rucker observe, counterfeiting erodes exclusivity, which is the essence of luxury[865] When counterfeit goods flood the market, the value of originality diminishes, leading to reduced brand loyalty and declining revenues for genuine businesses.

At the macroeconomic level, counterfeiting undermines **tax revenues** and contributes to the informal economy, depriving governments of legitimate income. It also fuels organized crime, as counterfeit distribution networks are often linked to smuggling, money laundering, and other illicit activities. The Organisation for Economic Co-operation and Development (OECD) estimates that counterfeit and pirated goods account for over **3% of global trade**,

[862] Ellen Murphy Aycock, Ethics and Aesthetics: Consumer Choices in Counterfeit Fashion, 12 *Int'l J. Consumer Stud.* 201 (2019).
[863] Phau & Teah, supra note 4.
[864] Lucy Page, The Psychology of Luxury: Status Signaling and Counterfeit Demand, 28 *J. Consumer Behav.* 102 (2023).
[865] Christopher Cannon & Derek Rucker, Losing the Lustre: How Counterfeits Erode Luxury Brand Value, 41 *J. Consumer Res.* 119 (2019).

with fashion products being among the most counterfeited categories[866]

From a **social perspective**, counterfeit fashion poses risks to consumer safety. Substandard fabrics, toxic dyes, and poor-quality stitching not only reduce product durability but also create health hazards. For instance, fake leather goods may contain harmful levels of chromium, while counterfeit cosmetics often contain unregulated chemicals. The damage extends beyond health, the normalization of counterfeiting fosters **tolerance of unlawful behavior**, weakening societal respect for intellectual property[867].

Moreover, counterfeiting discourages **innovation**. Designers who see their work immediately replicated in counterfeit markets lose incentive to invest in creativity. This chilling effect on innovation is particularly damaging in fashion, where constant reinvention is crucial to brand survival.

**Intellectual Property Doctrines and Legal Scholarship**

Academic literature has paid particular attention to the **intersection of intellectual property law and fashion**. Unlike pharmaceuticals or technology, where patents play a dominant role, fashion law is heavily reliant on **trademarks, copyrights, and passing off**.

- **Trademarks:** Trademarks protect brand identifiers such as names, logos, and trade dress. The **Trademarks Act, 1999** in India recognizes infringement where marks are identical or deceptively similar. Scholars argue, however, that the Act's enforcement mechanisms remain underutilized due to judicial delays and lack of specialized training among enforcement officers.[868]
- **Passing Off:** The doctrine of passing off is critical for fashion brands, especially those with unregistered marks[869]. Courts must assess *goodwill* and *misrepresentation*, concepts that are difficult to establish in the fast-paced fashion industry where trends change rapidly. Case law illustrates both the potential and limitations of passing off actions in fashion disputes.
- **Exhaustion of Rights:** The **doctrine of exhaustion**, which limits trademark control after the first sale, has been debated extensively in Indian and international literature. While it promotes free trade, it also complicates enforcement against parallel imports,

[866] Organisation for Economic Co-operation and Development (OECD), *Trade in Counterfeit and Pirated Goods: Mapping the Economic Impact* (2019).
[867] Cannon & Rucker, supra note 8.
[868] Federation of Indian Chambers of Commerce and Industry (FICCI), *Invisible Enemy: A Study of Counterfeit and Smuggled Goods in India* (2021).
[869] Rajiv Malhotra & Ananya Gupta, Passing Off in Indian Fashion Law: Protecting Unregistered Marks, 34 *Nat'l L. Sch. India Rev.* 89 (2019).

which counterfeiters exploit[870].

- **Copyright:** Indian copyright law protects "artistic works" but does not extend adequately to functional clothing designs. Scholars argue that introducing a **"conceptual separability" test**—as in the U.S. case *Star Athletica v. Varsity Brands*—could significantly improve design protection in India[871].

Overall, doctrinal scholarship underscores the need for more tailored legal instruments for fashion, which currently remains under-protected compared to other industries.

**Comparative Literature Across Jurisdictions**

The comparative dimension of anti-counterfeiting law has been widely studied. Literature reveals that jurisdictions with robust enforcement—such as the United Kingdom and the United States— demonstrate greater deterrence against counterfeiting.

- **United Kingdom:** Scholars note that the UK's **Trade Marks Act, 1994** criminalizes counterfeiting more explicitly than India's 1999 Act[872]. Additionally, border enforcement rules empower customs officers to seize counterfeit goods, an area where India struggles due to resource constraints.
- **United States:** The U.S. framework combines civil and criminal remedies under the **Lanham Act**, with severe penalties including imprisonment and asset forfeiture. Public awareness campaigns also play a critical role[873]. Furthermore, copyright law's "conceptual separability" principle allows for more comprehensive protection of fashion designs.
- **European Union:** EU literature emphasizes the role of the **EUIPO** and customs cooperation across member states. A 2020 EUIPO study revealed that counterfeit clothing and footwear account for **over €26 billion in lost sales annually**, highlighting the scale of the problem[874].
- **China:** While often criticized as a hub for counterfeit manufacturing, China has undertaken significant reforms, particularly through specialized IP courts. Scholars debate whether these reforms are motivated by international pressure or domestic

[870] Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299.
[871] *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 580 U.S. 405 (2017).
[872] *Trade Marks Act* 1994, c. 26 (UK).
[873] *Lanham Act*, 15 U.S.C. §§ 1051–1141n (1946).
[874] European Union Intellectual Property Office (EUIPO), *Intellectual Property Rights Infringement: Clothing, Footwear and Accessories Sector* (2020).

industrial policy[875].

- **ASEAN Jurisdictions:** Countries such as Singapore and Malaysia have introduced stricter IP enforcement, partly to position themselves as global fashion hubs. Comparative literature highlights the importance of regional cooperation in tackling cross-border counterfeit flows[876].

**Emerging Themes in Literature**

Across these diverse perspectives, several themes emerge:

- Counterfeiting is both a **legal and socio-cultural phenomenon**, shaped by consumer psychology, economic incentives, and enforcement gaps.
- **Doctrinal gaps** in Indian IP law, especially regarding design protection and exhaustion of rights, leave fashion brands vulnerable.
- Comparative studies show that countries with **criminal liability, strong border enforcement, and consumer education** achieve greater success in reducing counterfeit trade.
- The rapid growth of **e-commerce** introduces new challenges that traditional legal frameworks struggle to address, requiring innovative regulatory solutions.

## RESEARCH METHODOLOGY

**Research Approach**

This study adopts a **doctrinal research methodology**, which is widely used in legal scholarship to examine statutes, case law, judicial interpretations, and scholarly writings. Unlike empirical research that collects primary data through surveys or interviews, doctrinal research relies on **secondary sources of law**—legislation, judgments, commentaries, and international treaties. The choice of this method stems from the fact that counterfeiting in the fashion industry is primarily a **legal problem** rooted in the adequacy and enforcement of intellectual property rights (IPR).

By focusing on legal doctrines, this study aims to clarify whether existing provisions in India— such as the **Trademarks Act, 1999**, the **Copyright Act, 1957**, and related consumer protection and customs laws—are sufficiently robust to combat counterfeiting in the fashion sector. At the same time, doctrinal analysis helps identify **gaps and ambiguities** in the legal framework that undermine enforcement.

[875] World Intellectual Property Organization (WIPO), *Enforcement of Intellectual Property Rights: WIPO Advisory Committee Reports.*
[876] Interpol, *Illicit Trade Report* (2020).

**Objectives Of the Methodology**

The methodology seeks to achieve the following objectives:

- **Examine key doctrines** such as passing off, misrepresentation, and exhaustion of rights in the context of counterfeit fashion goods.
- **Analyse judicial interpretations** by Indian courts, with reference to landmark cases involving trademark and design protection in fashion.
- **Compare India's legal framework** with jurisdictions like the UK, USA, EU, and China to understand best practices.
- **Evaluate enforcement challenges**, including border control, judicial capacity, and e- commerce regulation.
- **Propose doctrinal and policy reforms** tailored to India's unique socio-economic and cultural context.

**Scope Of Research**

The scope of this study is deliberately **interdisciplinary within law** but bounded by its focus on the fashion industry. It includes:

- **Statutory Analysis:** A close reading of relevant statutes, including the Trademarks Act, 1999; Copyright Act, 1957; Designs Act, 2000; and the Consumer Protection (E-Commerce) Rules, 2020.
- **Case Law Review:** Landmark judgments such as *Louis Vuitton Malletier v. Atul Jaggi*[877], *Kapil Wadhwa v. Samsung Electronics*[878], and others that illuminate judicial approaches to brand protection.
- **International Treaties:** TRIPS Agreement provisions, especially Article 6 on exhaustion of rights, and WIPO frameworks on IP protection.
- **Comparative Jurisdictions:** Doctrinal analysis of the UK's Trade Marks Act, 1994; the U.S. Lanham Act; EUIPO regulations; and reforms in Asian jurisdictions.
- **Scholarly Writings:** Peer-reviewed journals, law review articles, and policy reports that provide doctrinal and policy perspectives.

The research does not conduct consumer surveys or empirical interviews, but it incorporates **secondary empirical data** such as OECD reports, EUIPO studies, and consumer behavior research to contextualize the legal analysis.

[877] *Louis Vuitton Malletier v. Atul Jaggi*, 2009 (40) PTC 689 (Del. HC) (India).
[878] *Kapil Wadhwa v. Samsung Elecs. Co.*, 2012 (50) PTC 501 (Del. HC) (India).

**Research Design**

The design of this study is **analytical and comparative**, combining three dimensions:

i. **Doctrinal Analysis:** Examining statutes and case law within India's legal system to assess the adequacy of protections against counterfeiting.

ii. **Comparative Perspective:** Juxtaposing India's doctrines with those of advanced jurisdictions to highlight strengths and weaknesses.

iii. **Critical Evaluation:** Identifying enforcement gaps, institutional weaknesses, and socio-cultural factors that complicate legal protection.

This three-dimensional design ensures that the research does not remain purely descriptive but develops **normative arguments** for reform.

**Sources Of Data**

The sources of data are primarily **secondary** and include:

i. **Primary Legal Sources**:
   - Indian statutes (Trademarks Act, Copyright Act, Designs Act, Consumer Protection Act).
   - Judicial decisions of Indian courts.
   - International treaties (TRIPS, WIPO agreements).

ii. **Secondary Legal Sources**:
   - Commentaries on Indian IP law.
   - Law review articles on counterfeiting and fashion law.
   - Reports by WIPO, OECD, EUIPO, and industry associations such as FICCI.

iii. **Comparative Sources**:
   - UK Trade Marks Act, 1994, and related judicial decisions.
   - U.S. Lanham Act, case law such as *Star Athletica v. Varsity Brands*.
   - EU directives and enforcement mechanisms.
   - Reforms in Asian jurisdictions (China's specialized IP courts, Singapore's strict customs laws).

By triangulating these diverse sources, the study ensures **depth, accuracy, and cross- jurisdictional validity**.

**Research Questions Revisited**

The research is guided by the following central questions:

- To what extent do India's legal doctrines support fashion brands in protecting their intellectual property rights against counterfeit goods?

- What doctrinal gaps exist in India's anti-counterfeiting framework, especially in relation to passing off, exhaustion of rights, and design protection?
- How does India's approach compare with jurisdictions that have stronger enforcement mechanisms?
- What reforms are necessary to strengthen India's legal and institutional framework to address the counterfeit fashion trade effectively?

**Limitations Of the Methodology**

Every research method has limitations, and this study acknowledges the following:

- **Non-empirical Nature:** As doctrinal research, the study does not involve interviews or field surveys of consumers, enforcement officials, or brand owners. While this allows for focused legal analysis, it limits the ability to capture real-world enforcement dynamics.
- **Case Law Constraints:** Indian jurisprudence on fashion counterfeiting is relatively limited compared to Western jurisdictions, which restricts the number of precedents available for analysis.
- **Dynamic E-commerce Environment:** The rapid evolution of digital marketplaces makes it difficult for doctrinal research to fully capture new forms of online counterfeiting such as crypto-based transactions or dark web sales.
- **Comparative Challenges:** While comparisons with foreign jurisdictions provide valuable insights, socio-economic differences limit the extent to which these models can be directly transplanted into India.

Acknowledging these limitations ensures transparency and contextual accuracy in interpreting findings.

**Rationale For Doctrinal Methodology**

The choice of a doctrinal approach is deliberate for several reasons:

- **Legal Nature of Counterfeiting:** Counterfeiting is first and foremost a **violation of intellectual property rights**. Its regulation and enforcement are defined by legal doctrines and statutory provisions.
- **Doctrinal Gaps in India:** Existing literature reveals insufficient exploration of how doctrines like passing off and exhaustion of rights operate in practice within India's fashion industry.
- **Need for Normative Reform:** By analysing doctrinal adequacy, this methodology allows the research to propose **normative reforms**—legislative amendments, stronger

enforcement mechanisms, and judicial interpretations—that can better address the problem.

**Contribution Of Methodology**

This methodological framework enables the study to contribute to three areas:

- **Doctrinal Scholarship:** Expands the academic literature on intellectual property law in India by applying doctrines to the unique challenges of the fashion industry.
- **Comparative Law:** Provides insights into how India can adapt international best practices while preserving its socio-economic context.
- **Policy Development:** Offers practical recommendations for policymakers, industry stakeholders, and enforcement agencies to develop a holistic anti-counterfeiting strategy.

## DISCUSSION

### The Doctrine of Passing Off in The Fashion Industry

- *Conceptual Foundations of Passing Off*

The doctrine of **passing off** originates in common law as a remedy against unfair competition. Its essence lies in preventing one party from misrepresenting its goods or services as those of another, thereby protecting the **goodwill** associated with a brand. In India, passing off remains relevant under both common law and the **Trademarks Act, 1999**, which recognizes passing off actions alongside statutory infringement claims.

Passing off is particularly important for fashion because many emerging brands do not register all elements of their brand identity—such as trade dress, logos, or design features—leaving them

reliant on common law remedies. In the absence of statutory registration, passing off ensures that the **value of reputation and distinctiveness** can still be safeguarded.

- ***Judicial Interpretation in India***

Indian courts have historically been receptive to passing off claims, though their interpretation varies. In *Colgate Palmolive v. Anchor Health and Beauty Care*, the Delhi High Court recognized that trade dress—colors, packaging, and overall presentation—could constitute protectable elements, emphasizing the importance of **visual similarity** in consumer perception[879].

In the fashion context, *Louis Vuitton Malletier v. Atul Jaggi* (2009) is a significant case

[879] *Colgate Palmolive Co. v. Anchor Health & Beauty Care Pvt. Ltd.*, 2003 (27) PTC 478 (Del. HC) (India).

where the Delhi High Court restrained counterfeiters from using identical marks[880]. The judgment affirmed that the doctrine of passing off extends to **luxury fashion goods**, protecting brand reputation from dilution through imitation.

○ ***Challenges in Proving Goodwill***

The first element of passing off is **goodwill**, defined as the reputation a brand holds in the minds of consumers. For established fashion houses like Louis Vuitton or Gucci, goodwill is readily demonstrable. However, for smaller or regional Indian fashion brands, proving goodwill is more difficult.

- **Geographic limitations**: A brand popular in one region may lack national recognition, weakening its case.
- **Digital complexities**: Online-only brands face challenges proving widespread consumer association, as website traffic or social media following may not be considered sufficient evidence by courts.
- **Temporal constraints**: Emerging brands may not have operated long enough to establish durable goodwill.

The threshold for proving goodwill is therefore disproportionately burdensome for **new entrants and smaller designers**, leaving them vulnerable to counterfeit exploitation.

○ ***Misrepresentation in the Fashion Context***

The second element is **misrepresentation**. In theory, misrepresentation occurs when a defendant presents their goods as those of the plaintiff. However, in practice, counterfeiters rarely replicate products identically. Instead, they alter logos, patterns, or brand names slightly (e.g., "Adibas" instead of Adidas). These **subtle deviations** make it harder for courts to find direct misrepresentation.

Moreover, the **pricing gap** complicates the issue. Some consumers knowingly purchase fakes, fully aware they are not genuine. In such cases, courts must grapple with whether misrepresentation has occurred if consumers themselves are not deceived. Indian jurisprudence remains unsettled on this point, leaving a doctrinal gap.

○ ***Implications for Fashion Brands***

Passing off provides protection but is limited by evidentiary hurdles. While established luxury houses succeed in asserting goodwill, **emerging Indian designers struggle to meet the threshold**, creating an uneven landscape where counterfeiting disproportionately harms those least able to defend themselves.

[880] *Louis Vuitton Malletier v. Atul Jaggi*, supra note 20.

**Exhaustion Of Rights and Parallel Imports**

*i. The Exhaustion Doctrine Explained*

The **doctrine of exhaustion**, also known as the "first sale doctrine," limits the control of intellectual property owners after the first legitimate sale of a product. Once goods enter the market with the authorization of the rights holder, the IP owner cannot prevent their resale. This principle supports free trade and prevents perpetual monopolies, but it complicates **anti-counterfeiting enforcement**, especially in fashion.

***ii. Indian Jurisprudence***

In *Kapil Wadhwa v. Samsung Electronics*, the Delhi High Court ruled that parallel imports of Samsung printers did not infringe trademarks, provided the goods were unaltered[881]. The case confirmed the principle of **international exhaustion**—once a product is sold anywhere with the
rights holder's consent, the trademark rights are considered exhausted.

While this interpretation promotes consumer access to cheaper goods, it also opens the door for counterfeiters to **misrepresent counterfeit imports as parallel imports**, exploiting enforcement gaps at borders. Customs authorities often lack the technical expertise to distinguish genuine parallel imports from counterfeits.

***iii. Global Debates under TRIPS***

Article 6 of the **TRIPS Agreement** leaves exhaustion of rights to national discretion, resulting in varying practices:

- **National exhaustion** (e.g., USA): Rights are exhausted only within the domestic market.
- **Regional exhaustion** (e.g., EU/UK): Rights are exhausted within the regional bloc.
- **International exhaustion** (e.g., India, post-Wadhwa): Rights are exhausted globally.

Scholars argue that India's preference for international exhaustion reflects a consumer-welfare approach but undermines brand protection[882]. For fashion, where branding is central, international exhaustion significantly weakens enforcement.

***iv. Implications for Fashion Brands***

Parallel imports blur the line between legitimate resale and counterfeit infiltration. Without stronger **customs mechanisms** and clearer statutory provisions, counterfeiters can exploit exhaustion principles to legitimize their goods. For fashion brands, this creates an uneven

[881] *Kapil Wadhwa v. Samsung Elecs. Co.*, supra note 21.

[882] Id.

playing field, diluting exclusivity and undermining investment in innovation.

## COPYRIGHT LOOPHOLES AND FASHION DESIGN PROTECTION

### 1- Current Position in India

Indian copyright law, governed by the **Copyright Act, 1957**, protects "artistic works" but does not extend to functional clothing designs. Section 15 excludes designs capable of being registered under the **Designs Act, 2000** once reproduced more than fifty times[883]. This creates a **protection gap** for fashion, where designs often straddle the line between artistic and functional.

### 2- Comparative Perspective

In the United States, the **Star Athletica v. Varsity Brands** case introduced the principle of **conceptual separability**, allowing decorative elements of clothing (e.g., chevron stripes on cheerleading uniforms) to be protected under copyright if they can be separated from the garment's utilitarian purpose[884]. Scholars argue that adopting a similar standard in India could significantly enhance design protection.

The **European Union** provides protection under unregistered Community design rights, which safeguard designs for three years without formal registration[885]. This system offers practical protection for fashion, where trends change rapidly.

### 3- Implications for India

The absence of adequate design protection in India leaves fashion brands vulnerable to imitation. Counterfeiters exploit this gap by replicating garments with minor variations, avoiding liability under both copyright and design law. A more **flexible doctrinal approach**, recognizing the artistic value of fashion designs, is necessary to close this loophole.

## COMPARATIVE PERSPECTIVES

### United Kingdom

The UK's Trade Marks Act, 1994 explicitly criminalizes counterfeiting, allowing for imprisonment and fines. Customs authorities are empowered to seize suspected counterfeit goods under border enforcement regulations[886]. This proactive stance contrasts with India's Trademarks Act, 1999, where criminal penalties exist but are inconsistently enforced.

### United States

[883] *The Copyright Act*, No. 14 of 1957, INDIA CODE.
[884] *Star Athletica*, supra note 14.
[885] Council Regulation 6/2002, on Community Designs, 2002 O.J. (L 3) 1.
[886] *Trade Marks Act* 1994, c. 26 (UK).

The Lanham Act provides both civil and criminal remedies, including asset forfeiture. Public awareness campaigns—such as those run by the U.S. Customs and Border Protection—highlight the dangers of counterfeit goods[887]. The U.S. system emphasizes deterrence through harsh penalties, a model that India could adapt by strengthening sentencing guidelines.

**European Union**

The EU's enforcement relies heavily on **customs cooperation**. EUIPO data shows that counterfeit clothing and footwear cause billions in annual losses[888]. Importantly, the EU protects **unregistered designs**, giving fast-moving industries like fashion stronger safeguards.

**China**

Despite its reputation as a major source of counterfeits, China has invested in **specialized IP courts** and harsher penalties for repeat offenders[889]. However, scholars debate whether enforcement is consistent or primarily symbolic. Nonetheless, China's institutional investment offers lessons for India, particularly the value of specialized IP benches.

**ASEAN Jurisdictions**

Countries like Singapore and Malaysia enforce stricter border controls and have invested in **regional cooperation** against counterfeit trade[890]. For India, regional collaboration within SAARC or BIMSTEC could strengthen enforcement against cross-border counterfeit flows.

## EMERGING CHALLENGES: E-COMMERCE AND DIGITAL COUNTERFEITING

*1- Online Marketplaces as Hotspots*

With the growth of e-commerce, counterfeit sales have shifted from street markets to online platforms. Studies reveal that a significant share of counterfeit fashion is sold through platforms like Amazon, Flipkart, and social media marketplaces[891].

*2- Enforcement Difficulties*

Online counterfeiting presents unique challenges:

- **Anonymity of sellers** makes prosecution difficult.
- **Volume of listings** overwhelms brand enforcement teams.

[887] *Lanham Act*, 15 U.S.C. §§ 1051–1141n (1946); U.S. Customs & Border Protection, *Intellectual Property Rights Seizure Statistics* (2021).
[888] EUIPO, supra note 17.
[889] OECD, supra note 9.
[890] Interpol, supra note 19.
[891] FICCI, supra note 11.

- **Jurisdictional complexities** arise when sellers, buyers, and servers are located in different countries.

*3- Regulatory Responses*

India introduced the **Consumer Protection (E-Commerce) Rules, 2020**, requiring platforms to provide accurate product information and disclose seller details[892]. However, enforcement remains patchy, and platforms often evade accountability.

## SYNTHESIS OF FINDINGS

From the analysis above, several key findings emerge:

1- **Passing off** provides essential protection but remains evidentially burdensome for small and emerging brands.

2- **Exhaustion of rights** under Indian law favours consumers but undermines brand exclusivity, creating loopholes exploited by counterfeiters.

3- **Copyright law** fails to adequately protect fashion designs, leaving India behind jurisdictions like the U.S. and EU.

4- **Comparative jurisdictions** demonstrate that criminal liability, strong border enforcement, and consumer education are critical to effective anti-counterfeiting regimes. The **digital economy** introduces new challenges that require updated legal and regulatory strategies.

## RECOMMENDATIONS

Counterfeiting in the fashion industry is a multi-dimensional challenge, requiring reforms that extend beyond doctrinal clarification. Based on the doctrinal, comparative, and critical analysis presented in Section IV, this paper recommends a comprehensive anti-counterfeiting strategy for India that integrates legal reform, institutional strengthening, technological innovation, and consumer engagement.

Legislative Reforms

*1- Explicit Recognition of Counterfeiting in the Trademarks Act, 1999*

While the **Trademarks Act, 1999** criminalizes infringement, it does not provide a clear statutory

definition of "counterfeiting." Introducing a **separate, explicit offense** would:

- Distinguish counterfeiting from ordinary infringement.
- Allow for enhanced penalties, particularly in cases of large-scale or repeat violations.

[892] *Consumer Protection (E-Commerce) Rules*, 2020, Gazette of India, G.S.R. 462(E).

- Signal to courts and enforcement agencies that counterfeiting is a grave economic and social crime, not merely a private dispute.

***2- Strengthening Design Protection***

The **Copyright Act, 1957** and **Designs Act, 2000** create overlapping but inadequate protection for fashion designs. Reforms could include:

- Adopting a **"conceptual separability" test**, similar to the U.S. *Star Athletica* doctrine, to protect decorative aspects of clothing.
- Introducing **short-term unregistered design rights** (3–5 years), as in the European Union, to safeguard fast-changing fashion trends without imposing registration burdens.
- Clarifying Section 15 of the Copyright Act to ensure that artistic elements of fashion retain protection even when mass-produced.

***3- Revisiting Exhaustion of Rights***

India's current preference for **international exhaustion** under *Kapil Wadhwa v. Samsung Electronics*[893] facilitates consumer access but weakens brand control. Legislative clarification is necessary to:

- Adopt a **national or regional exhaustion model**, balancing consumer welfare with brand protection.
- Provide **statutory guidance to customs authorities** to distinguish genuine parallel imports from counterfeit goods.

***4- Harmonization with International Standards***

India is a member of WTO and WIPO, but domestic law lags behind international best practices. Incorporating elements of the EUIPO's enforcement model or the U.S. Lanham Act could help modernize India's anti-counterfeiting regime.

## JUDICIAL AND DOCTRINAL REFORMS

### Specialized IP Benches and Fast-Track Courts

Judicial delays undermine enforcement. Establishing specialized IP benches in High Courts or creating fast-track courts for counterfeiting disputes would:

- Provide quicker relief to brand owners.
- Develop judicial expertise in fashion-specific IPR issues.
- Encourage consistent interpretation of doctrines like goodwill, misrepresentation,

[893] *Kapil Wadhwa v. Samsung Elecs. Co.*, supra note 21.

and deceptive similarity.

Lowering Evidentiary Burdens for Emerging Brands

Current jurisprudence requires extensive proof of goodwill, disadvantaging smaller designers. Courts should adopt a **flexible standard**, recognizing indicators such as:

- Online presence and social media following.
- Media coverage or participation in fashion weeks.
- Customer testimonials and local recognition.

This would democratize access to passing off remedies and protect India's growing base of independent designers.

**i. Strengthening Remedies**

Courts should expand beyond injunctions to grant:

- Punitive damages against counterfeiters.
- Account of profits to disgorge unlawful gains.
- Exemplary costs to deter frivolous defences.

## INSTITUTIONAL AND ENFORCEMENT REFORMS

**1- Customs and Border Protection**

Border enforcement is India's weakest link. Recommendations include:

- Creating a **specialized IPR cell within customs**, staffed by experts trained in distinguishing genuine from counterfeit fashion goods.
- Developing **brand–customs partnerships**, where rights holders share databases of product identifiers with customs officers.
- Introducing **risk-based profiling systems** to flag suspicious consignments based on trade routes, volume, and importer history.

2- Police and Investigative Agencies

- Counterfeiting is often treated as a civil wrong, leading to lackluster enforcement. Training modules should be developed to:
- Educate police officers on recognizing counterfeit fashion goods.
- Clarify that counterfeiting is a **criminal offense** with serious economic and social harms.
- Encourage coordinated raids with brand owners and investigative agencies.

3- Public Prosecutors and Judicial Officers

Workshops and continuing legal education programs can sensitize judicial officers and prosecutors to the complexities of counterfeit fashion litigation, ensuring consistent and

informed decision- making.

## TECHNOLOGICAL INTERVENTIONS

**1- Digital Tracking Systems-** Brands and regulators can deploy technologies such as:

- Blockchain-based authentication, where each genuine product is tagged with a verifiable digital certificate.
- QR code and NFC tags embedded in clothing labels to allow consumers to instantly verify authenticity.
- AI-driven monitoring tools that scan e-commerce platforms for counterfeit listings.

**2- Platform Accountability**- E-commerce platforms should be legally required to:

- Proactively monitor and remove counterfeit listings.
- Disclose seller details to both consumers and enforcement agencies.
- Provide a **"verified authenticity" badge** for products sourced directly from brand owners.

The **Consumer Protection (E-Commerce) Rules, 2020** already impose some obligations, but stronger penalties for non-compliance are necessary.

**3- Collaborative Databases**

India could establish a **national counterfeit monitoring system**, pooling information from brands, enforcement agencies, and consumers. This would improve intelligence-sharing and support targeted interventions.

## CONSUMER AWARENESS AND SOCIAL RESPONSIBILITY

**1. Public Awareness Campaigns**

Counterfeiting thrives because consumers underestimate its harms. Government agencies, industry associations, and fashion councils should launch campaigns emphasizing that counterfeit goods:

- Endanger consumer health and safety.
- Fund organized crime networks.
- Undermine local designers and artisans.

**2. Educational Interventions**

Incorporating IPR awareness into school and university curricula can create long-term cultural respect for intellectual property. Fashion schools, in particular, should educate students about the legal dimensions of design protection.

**3. Incentivizing Ethical Consumption**

Brands can adopt positive reinforcement strategies, such as:

- Rewarding consumers who report counterfeit sellers.
- Offering discounts or loyalty points for recycling counterfeit items surrendered to brand outlets.
- Promoting sustainable, ethically produced fashion as alternatives to cheap counterfeits.

## INTERNATIONAL AND REGIONAL COOPERATION

**1- Bilateral and Multilateral Engagement-** India should strengthen its participation in:

- WIPO's Advisory Committee on Enforcement, sharing best practices and accessing global resources.
- OECD and Interpol initiatives against transnational counterfeiting.
- Regional cooperation within SAARC and BIMSTEC, focusing on cross-border counterfeit flows from neighbouring countries.

**2- Learning from Comparative Models**

India can adapt lessons from:

- The EU's unregistered design rights, providing flexible protection for short-lived fashion trends.
- The U.S. punitive damages regime, which deters counterfeiters through severe financial consequences.
- China's specialized IP courts, which, despite criticisms, show the effectiveness of institutional specialization.

## A MULTI-PRONGED STRATEGY FOR INDIA

The fight against counterfeit fashion cannot be won through legislation alone. A successful anti- counterfeiting regime must combine:

1- **Clear laws** that define counterfeiting and provide tailored remedies.

2- **Efficient courts and enforcement agencies** equipped with the expertise and resources to act swiftly.

3- **Technological innovations** that empower both regulators and consumers to distinguish genuine from fake.

4- **Public engagement**, ensuring that consumers understand the harms of counterfeiting and make informed choices.

5- **International cooperation**, recognizing that counterfeiting is a global trade issue that transcends borders.

## CONCLUSION

The Indian fashion industry stands at a crossroads. On one hand, it is a thriving sector that blends cultural heritage with modern innovation, contributing significantly to both domestic growth and global recognition. On the other hand, it is deeply vulnerable to the rising tide of counterfeit goods, which threaten not only the economic sustainability of brands but also the integrity of India's creative ecosystem.

This paper has sought to address this tension through a **doctrinal and comparative analysis of anti-counterfeiting law in India**, focusing on the adequacy of existing legal doctrines, the gaps in enforcement, and the lessons to be drawn from international best practices. The findings reveal both strengths and weaknesses in the current system, underscoring the urgent need for reform.

**Key Doctrinal Insights**

The analysis of **passing off** demonstrates that while the doctrine remains a vital common law remedy for unregistered marks, it disproportionately favors well-established brands. Smaller and emerging designers, who lack extensive consumer recognition, struggle to prove goodwill and misrepresentation, leaving them unprotected against counterfeiters. This imbalance undermines innovation and discourages entrepreneurship in the Indian fashion sector.

The doctrine of **exhaustion of rights** further complicates brand protection. India's embrace of international exhaustion, following the *Kapil Wadhwa v. Samsung Electronics*[894] decision, prioritizes consumer access to cheaper goods but weakens brand exclusivity. Parallel imports, often indistinguishable from counterfeits at the border, blur the line between legitimate and illegitimate trade. Without stronger customs mechanisms and legislative clarity, counterfeiters will continue to exploit these ambiguities.

In the realm of **copyright and design protection**, the gaps are particularly glaring. Section 15 of the Copyright Act, 1957, effectively excludes fashion designs from copyright protection once mass-produced, while the Designs Act, 2000, imposes registration burdens ill-suited to fast- moving fashion cycles. Comparative jurisdictions, such as the United States with its *Star Athletica*[895] ruling and the European Union with its unregistered design rights, demonstrate more adaptive frameworks. India's failure to provide equivalent protection leaves its designers exposed to imitation and discourages long-term investment

[894] Id.
[895] *Star Athletica*, supra note 14.

in creativity.

**Enforcement And Institutional Weaknesses**

Doctrinal protections are only as strong as their enforcement. The Indian enforcement landscape is marred by judicial delays, limited border control, inadequate police training, and inconsistent penalties. Counterfeiting is too often treated as a minor civil dispute rather than a serious criminal offense with significant social and economic harms. The challenge is compounded by the rise of **e-commerce and digital platforms**, which provide counterfeiters with new avenues to reach consumers anonymously and at scale. While the Consumer Protection (E-Commerce) Rules, 2020, impose some obligations on online platforms, weak compliance and limited penalties reduce their effectiveness. Without stronger regulatory oversight and technological solutions, digital counterfeiting will continue to outpace traditional enforcement mechanisms.

**Comparative Lessons**

The comparative analysis highlights valuable lessons for India:

- The **United Kingdom** criminalizes counterfeiting explicitly and empowers customs authorities with broad seizure powers.
- The **United States** enforces severe civil and criminal penalties under the Lanham Act, reinforced by strong consumer awareness campaigns.
- The **European Union** combines customs cooperation with flexible design rights tailored to fast-changing industries like fashion.
- **China**—despite its reputation as a counterfeiting hub—has demonstrated the potential of specialized IP courts in strengthening enforcement.

These jurisdictions show that successful anti-counterfeiting regimes require a multi-pronged approach, integrating doctrinal clarity, institutional specialization, and consumer engagement.

**Towards A Holistic Indian Strategy**

The recommendations advanced in this paper collectively form a blueprint for reform:

1- **Legislative Reforms**: Explicit recognition of counterfeiting as a distinct offense, stronger design protection, recalibration of exhaustion rules, and harmonization with international best practices.

2- **Judicial Innovations**: Specialized IP benches, flexible evidentiary standards for goodwill, and expanded remedies including punitive damages and account of profits.

3- **Institutional Strengthening**: Enhanced customs capacity, better-trained police forces, and continuous judicial education on counterfeit litigation.

4- **Technological Integration**: Deployment of blockchain, QR codes, and AI-driven monitoring systems, coupled with stricter obligations for e-commerce platforms.

5- **Consumer Awareness**: Campaigns to highlight the dangers of counterfeiting, educational initiatives to foster respect for IPR, and incentives for ethical consumption.

6- **International Cooperation**: Active participation in WIPO, OECD, and regional platforms to strengthen cross-border enforcement and intelligence-sharing.

By pursuing these reforms, India can transition from a reactive system that struggles against counterfeiters to a **proactive, deterrence-based framework** that protects both consumers and creators.

**Broader Implications**

The stakes of this debate extend beyond legal technicalities. Counterfeiting undermines not only brand revenues but also cultural heritage. India's fashion industry draws heavily on artisanal crafts and traditional textiles. When these are counterfeited, it is not just a matter of lost sales but of eroded cultural identity. Effective legal protection is thus essential to preserving India's intangible heritage and ensuring that artisans and designers receive fair recognition for their contributions.

Moreover, counterfeiting has implications for public health, consumer safety, and organized crime. Fake products often use hazardous materials, posing health risks. The illicit profits fund criminal networks, creating broader security concerns. Addressing counterfeiting is therefore a matter of both economic policy and social justice.

**Final Reflections**

India's fashion industry is poised to be a global leader, but its growth will remain fragile if counterfeit markets continue to flourish unchecked. The doctrinal tools exist, but they require **clarification, expansion, and consistent enforcement**. Comparative lessons demonstrate that there is no single solution; rather, the most effective systems combine legal reform, institutional investment, and public engagement.

Ultimately, the fight against counterfeit fashion is not solely about protecting profits. It is about safeguarding **creativity, innovation, and cultural integrity**. By adopting a holistic strategy that balances consumer welfare with brand protection, India can chart a path that

not only secures its place in the global fashion landscape but also reinforces its identity as a nation of creativity and craftsmanship.

# LEGAL LIABILITY AND REGULATORY CHALLENGES IN AUTONOMOUS VEHICLES AND AI-DRIVEN HEALTHCARE SYSTEMS

***Mohammad Taib***[896]

## ABSTRACT

*The rapid integration of Artificial Intelligence (AI) into critical sectors such as autonomous transportation and healthcare has transformed both operational efficiency and service delivery, while simultaneously introducing unprecedented legal and regulatory challenges. Autonomous vehicles (AVs) rely on complex AI-driven systems for navigation, obstacle detection, and real-time decision-making, aiming to enhance road safety and reduce human error. Similarly, AI in healthcare enables precise diagnostics, predictive analytics, and personalized treatment planning, often surpassing human capability in accuracy and speed. However, these technological advancements raise fundamental questions about accountability, liability, and regulatory oversight, as traditional legal frameworks—centred on human agency—struggle to address errors or failures arising from machine decision-making*[897]*This article explores the nuanced terrain of legal liability in both autonomous vehicles and AI-driven healthcare systems. It examines tort law, product liability, and medical negligence, highlighting the difficulties in allocating responsibility among manufacturers, software developers, healthcare providers, and end-users. Comparative analysis identifies common legal challenges, including accountability, foreseeability, and risk allocation, while also noting sector-specific differences in impact—immediate physical harm in transportation versus medical or clinical consequences in healthcare.*

*Furthermore, the study investigates regulatory frameworks across jurisdictions, analysing approaches such as the U.S. National Highway Traffic Safety Administration (NHTSA) guidelines, FDA and AI/ML SaMD oversight, the European Union AI Act, and emerging Indian regulations. The paper also proposes emerging solutions, including adaptive legal statutes, AI-specific insurance models, ethical and technical safeguards, international regulatory harmonization, and proactive governance mechanisms.*

[896] Mohammad Taib, *Faculty of Law, Integral University, Lucknow.*

[897] Bryant Walker Smith, Automated Driving and Product Liability, 2017 *Mich. St. L. Rev.* 1.

## INTRODUCTION

Artificial Intelligence (AI) is no longer a futuristic concept—it is steadily reshaping the landscapes of our daily lives, particularly in sectors that directly impact human safety and well-being. Autonomous vehicles promise to redefine transportation by reducing human error and enhancing mobility, while AI-driven healthcare systems offer unprecedented accuracy in diagnostics and treatment planning. Yet, with these advancements comes a profound legal and ethical challenge: who is accountable when AI errs? The integration of complex algorithms into decision-making processes raises questions that traditional legal frameworks struggle to address.

In autonomous vehicles, a split-second error by an AI system can result in catastrophic consequences, implicating manufacturers, software developers, and even vehicle users. Similarly, in healthcare, an AI-driven misdiagnosis or treatment recommendation could jeopardize a patient's life, challenging the conventional boundaries of medical negligence. These scenarios highlight a central dilemma of our time: the law, built around human agency, must now adapt to account for machine intelligence.[898]

This article seeks to explore the nuanced terrain of legal liability in AI-enabled autonomous vehicles and healthcare systems, while also examining the regulatory gaps that hinder accountability. By analysing tort law, product liability, and emerging regulatory frameworks across different jurisdictions, the discussion aims to shed light on how legal systems are evolving to address these unprecedented challenges. Beyond mere compliance, there is a pressing need for adaptive legal strategies that balance innovation with responsibility, ensuring that the transformative benefits of AI do not come at the cost of human safety or justice.

In doing so, this study not only maps the current legal landscape but also envisions the emerging paradigms that will define accountability in an AI-driven world—a world where machines make choices, yet humans must remain answerable.

## OVERVIEWS OF AI TECHNOLOGIES

Artificial Intelligence (AI) has rapidly evolved to become a cornerstone of innovation across diverse sectors. In autonomous vehicles, AI integrates sensors, machine learning algorithms, and real-time decision-making systems to navigate complex environments, anticipate hazards, and optimize driving performance. Similarly, in healthcare, AI supports diagnostics, predictive analytics, and personalized treatment planning by analysing vast datasets with precision beyond human capability. These technologies rely on continuous learning, pattern recognition,

[898] Smith, supra note 2.

and autonomous decision-making, which enhance efficiency and accuracy. However, their increasing autonomy also introduces unique legal and ethical challenges, particularly in assigning accountability when AI systems fail or produce unintended consequences.[899]

## AUTONOMOUS VEHICLES

The rise of autonomous vehicles has revolutionized transportation, promising increased safety, efficiency, and mobility. Yet, these innovations bring complex legal challenges, particularly in assigning liability when accidents occur. Traditional frameworks, which centre on human negligence, struggle to accommodate AI-driven decision-making where control is partially or fully delegated to machines.

Tort law remains a primary tool for addressing harm caused by autonomous vehicles. Questions arise regarding whether liability rests with the manufacturer, software developer, or the vehicle owner. Product liability claims have emerged as a key avenue, holding manufacturers accountable for design flaws, defective components, or software errors. For instance, accidents involving Tesla's Autopilot or Waymo vehicles have sparked debates on whether software malfunctions constitute a breach of duty of care.[900]

Regulatory frameworks also face challenges. While the United States relies on the National Highway Traffic Safety Administration (NHTSA) guidelines, and the European Union applies UNECE regulations, India is still in the process of drafting comprehensive rules under the Motor Vehicles Act. Liability allocation becomes particularly complex in multi-actor scenarios where several entities contribute to the AI system's functioning.

The evolving legal landscape emphasizes the need for adaptive legislation, insurance models tailored to autonomous systems, and clear accountability chains. Addressing these challenges is crucial not only to protect public safety but also to foster trust in AI-driven transportation. As autonomous vehicles become increasingly integrated into daily life, establishing robust liability mechanisms will be essential to balance innovation with ethical and legal responsibility.

## AI IN HEALTHCARE

Artificial Intelligence is transforming healthcare by enabling rapid, data-driven decision-making, improving diagnostics, and supporting personalized treatment plans. AI systems

[899] Harry Surden, Artificial Intelligence and Law: An Overview, 35 Ga. St. U. L. Rev. 1305 (2019).
[900] U.S. Dep't of Transp., Nat'l Highway Traffic Safety Admin., *Automated Vehicles for Safety* (2020), https://www.nhtsa.gov/technology-innovation/automated-vehicles-safety.

analyse vast datasets, recognize patterns, and offer recommendations that often surpass human capabilities in speed and accuracy. However, this technological advancement also introduces significant legal and ethical challenges, particularly concerning liability when AI-driven decisions result in patient harm.[901]

Medical negligence, a cornerstone of healthcare liability, is being redefined in the context of AI. Traditional frameworks hold physicians responsible for errors arising from their professional judgment. But when an AI system misdiagnoses a condition or suggests an incorrect treatment, accountability becomes blurred. Should liability fall on the healthcare provider for relying on AI, or on the software developers for errors in the algorithm? Real-life examples, such as AI diagnostic tools producing inaccurate results, highlight the urgent need to clarify these responsibilities.

Regulatory frameworks are attempting to catch up. In the United States, the Food and Drug Administration (FDA) provides guidelines for AI/ML-based medical devices, while the European Union's AI Act and the General Data Protection Regulation (GDPR) emphasize safety, transparency, and patient data protection. India, on the other hand, is in early stages of developing AI-specific healthcare regulations. Cross-border healthcare delivery adds another layer of complexity, as differing legal standards create potential conflicts in liability

Addressing these challenges requires a nuanced approach that combines traditional medical law with AI-specific regulations, ensuring patient safety, legal clarity, and ethical accountability. Establishing clear liability frameworks will be essential to foster trust and responsibly integrate AI into modern healthcare systems.

## LEGAL LIABILITY IN AUTONOMOUS VEHICLES

Autonomous vehicles promise safer and more efficient transportation, yet they pose unique legal challenges. Traditional liability frameworks, based on human negligence, struggle to account for AI-driven decision-making. Tort law and product liability remain central in addressing accidents, raising questions about whether responsibility lies with manufacturers, software developers, or vehicle owners. High-profile incidents involving autonomous systems, such as Tesla's Autopilot, highlight these complexities. Regulatory approaches differ globally: the U.S. relies on NHTSA guidelines, the EU applies UNECE standards, while India is drafting

[901] I. Glenn Cohen, Vered Shapiro & Dorit Rubinstein Reiss, The Legal and Ethical Concerns That Arise from Using Complex Predictive Analytics in Health Care, 33 *Health Affs.* 119 (2014).

comprehensive rules. Clear liability mechanisms are essential to balance innovation, accountability, and public safety.[902]

***Tort Liability***

Tort liability plays a central role in addressing harm caused by autonomous vehicles and AI-driven systems. Traditionally, tort law revolves around negligence, requiring proof that a duty of care was owed, breached, and directly caused harm. In the context of AI, this framework faces novel challenges, as decision-making is increasingly delegated to machines rather than humans. Determining fault becomes complex when an autonomous vehicle or medical AI system malfunctions, raising questions about foreseeability, standard of care, and reasonable reliance.

In autonomous vehicles, tort claims often focus on whether manufacturers implemented adequate safety measures in design and software. For instance, if an AI algorithm fails to detect an obstacle, the manufacturer may be held liable under product liability doctrines. Similarly, vehicle owners could be implicated if they fail to maintain systems properly or override safety protocols inappropriately. High-profile cases involving semi-autonomous driving systems, such as Tesla's Autopilot, have already tested these boundaries, prompting courts to consider shared liability models that distribute responsibility among developers, manufacturers, and users.

In healthcare, tort liability intersects with medical negligence. When AI misdiagnoses a patient or provides flawed treatment recommendations, courts must determine whether physicians exercised reasonable judgment in relying on AI tools or whether the software developers failed to meet professional standards. This evolving interplay emphasizes the need for adaptive tort frameworks, capable of accommodating both human and machine agency. By refining duty of care principles and liability allocation, tort law can remain a robust mechanism for protecting individuals while fostering responsible AI innovation.[903]

## REGULATORY CHALLENGES

The rapid integration of AI into autonomous vehicles and healthcare systems has exposed significant regulatory challenges. Existing legal frameworks were primarily designed for human-centric decision-making and are often ill-equipped to address the complexities introduced by AI. In autonomous vehicles, regulators face difficulties in defining standards for

[902] U.N. Econ. Comm'n for Eur., *Framework Document on Automated/Autonomous Vehicles*, U.N. Doc. ECE/TRANS/WP.29/2019/34/Rev.2 (June 2020).

[903] Mark A. Geistfeld, A Roadmap for Autonomous Vehicles: State Tort Liability, Automobile Insurance, and Federal Safety Regulation, 105 *Calif. L. Rev.* 1611 (2017).

AI performance, testing protocols, and acceptable levels of risk. While the United States relies on the National Highway Traffic Safety Administration (NHTSA) guidelines, and the European Union implements UNECE regulations, many countries, including India, are still in the process of drafting comprehensive rules under the Motor Vehicles Act.

Liability allocation is particularly complex in multi-actor scenarios, where manufacturers, software developers, and users may all contribute to an AI system's functioning. Questions regarding the adequacy of existing insurance models, mandatory reporting of AI failures, and compliance with evolving safety standards remain unresolved.

In healthcare, regulatory hurdles are equally pronounced. AI systems used for diagnostics or treatment planning must comply with data privacy laws, medical device regulations, and professional liability norms. Frameworks like the FDA's AI/ML SaMD guidance and the EU AI Act attempt to balance innovation with patient safety, yet global harmonization is limited. Cross-border healthcare delivery further complicates regulatory oversight, as varying standards create potential conflicts in liability and accountability

Addressing these challenges requires adaptive regulatory approaches that integrate ethical principles, technological understanding, and legal clarity. Establishing dynamic frameworks capable of evolving alongside AI technologies is essential to ensure both innovation and public safety, while maintaining trust in AI-driven systems across sectors.

## LEGAL LIABILITY IN AI-DRIVEN HEALTHCARE

Artificial Intelligence (AI) is rapidly transforming healthcare, offering unparalleled precision in diagnostics, predictive modelling, and personalized treatment plans. AI-driven systems analyse vast datasets to identify patterns and suggest interventions, often surpassing human capability in both speed and accuracy. However, the integration of AI into medical practice raises profound legal and ethical challenges, particularly concerning liability when AI-generated decisions result in patient harm. Traditional legal frameworks, built around human agency, must now contend with scenarios where decision-making is partially or fully delegated to machines.

## MEDICAL NEGLIGENCE & AI

Medical negligence traditionally involves assessing whether a healthcare provider exercised reasonable care in diagnosis or treatment. When AI tools are introduced, determining negligence becomes complex. For instance, if an AI diagnostic system misidentifies a condition, should liability rest with the physician who relied on the AI, or the software developer who created it? Physicians are expected to exercise professional judgment, yet

reliance on AI may blur the standard of care. Real-world cases, such as misdiagnoses from AI radiology software, underscore this dilemma. Courts must navigate the fine line between acknowledging AI as a support tool and holding medical professionals accountable for ultimate patient outcomes. In multi-stakeholder scenarios, liability may need to be shared among healthcare providers, hospitals, and AI developers, emphasizing the need for nuanced legal frameworks.

## REGULATORY FRAMEWORK

Regulatory oversight of AI in healthcare is evolving but remains inconsistent across jurisdictions. In the United States, the Food and Drug Administration (FDA) provides guidance for AI/ML-based software as medical devices (SaMD), emphasizing safety, validation, and continuous monitoring. The European Union has introduced the AI Act, focusing on risk classification, transparency, and accountability, alongside GDPR requirements for data privacy. India is at an early stage, with efforts underway to establish AI-specific healthcare regulations under broader medical and data protection laws. Cross-border healthcare delivery adds another layer of complexity, as differing regulatory standards can create conflicts in liability and accountability.[904]

Effective regulation must integrate ethical principles, technical understanding, and legal clarity. Dynamic frameworks should define responsibilities for software developers, healthcare providers, and institutions, while mandating transparency in AI decision-making and robust data protection. Additionally, liability insurance models may need adaptation to address AI-specific risks. By balancing innovation with accountability, regulatory frameworks can foster trust in AI-driven healthcare while ensuring patient safety remains paramount.

## COMPARATIVE ANALYSIS

The legal challenges posed by AI technologies manifest differently across sectors, yet some fundamental concerns remain consistent. Comparing autonomous vehicles (AVs) and AI-driven healthcare highlights both shared dilemmas in liability and distinctive sector-specific consequences. Understanding these similarities and differences is crucial for developing coherent legal and regulatory frameworks that can adapt to rapidly evolving technologies.[905]

### LIABILITY TREATMENT IN AUTONOMOUS VEHICLES VS HEALTHCARE AI

[904] Proposal for a Regulation of the European Parliament and of the Council Laying Down Harmonised Rules on Artificial Intelligence (Artificial Intelligence Act), COM (2021) 206 final (Apr. 21, 2021).

[905] Jack Boeglin, The Costs of Self-Driving Cars: Reconciling Freedom and Privacy with Tort Liability in Autonomous Vehicle Regulation, 17 *Yale J.L. & Tech.* 171 (2015).

In autonomous vehicles, liability traditionally centres on tort law and product liability. Accidents caused by AI-driven systems implicate multiple actors: manufacturers, software developers, vehicle owners, or even third-party service providers. Courts evaluate whether manufacturers implemented adequate safety measures, whether software developers maintained rigorous quality standards, and whether drivers acted responsibly within their residual duties of care. In contrast, AI-driven healthcare introduces a more nuanced liability landscape.

Medical negligence frameworks continue to hold physicians accountable, but the reliance on AI for diagnostic or treatment decisions complicates matters. Developers of AI medical tools may share liability if errors are attributable to algorithmic flaws or inadequate validation. Hospitals and institutions can also bear responsibility under vicarious liability principles, especially when AI is deployed as part of standardized care protocols.

## SIMILARITIES IN LEGAL CHALLENGES

Across both domains, three common legal challenges emerge. First, accountability is a central concern—determining who is answerable when an autonomous system fails remains difficult, particularly in multi-actor environments. Second, foreseeability of harm is critical. Courts must decide whether errors were reasonably predictable and preventable, a question complicated by AI's capacity for autonomous learning and adaptation. Third, risk allocation presents challenges, as existing insurance and liability structures were designed for human agents and must evolve to accommodate AI's shared responsibilities. Both sectors require legal innovation to balance technological advancement with public protection.

## DIFFERENCES IN IMPACT

Despite these similarities, the nature and consequences of harm diverge significantly. Autonomous vehicle failures typically result in immediate physical harm—injuries or fatalities—creating a high-stakes environment where accidents are visible, quantifiable, and often catastrophic. In healthcare, AI errors may lead to medical or clinical consequences, such as delayed diagnoses, incorrect treatments, or long-term health complications. These outcomes are sometimes less immediately apparent but can be equally serious, complicating causation and evidentiary requirements in litigation.

## EMERGING SOLUTIONS & RECOMMENDATIONS

As artificial intelligence increasingly permeates critical sectors such as transportation and healthcare, addressing legal liability and regulatory challenges is no longer optional—it is imperative. Both autonomous vehicles (AVs) and AI-driven healthcare systems operate in high-

stakes environments where errors can result in physical injury, medical complications, or even death. Emerging solutions must, therefore, focus on balancing technological innovation with robust accountability mechanisms, fostering public trust while safeguarding individual rights.[906]

## ADAPTIVE LEGAL FRAMEWORKS

A foundational step involves developing adaptive legal frameworks tailored to AI's unique characteristics. Traditional tort and product liability laws, though instructive, are insufficient for scenarios where autonomous decision-making is central. Legislatures and regulatory bodies should consider AI-specific liability statutes, clearly delineating responsibilities among manufacturers, developers, users, and institutions. For autonomous vehicles, this may include defining residual driver duties, mandatory safety standards, and shared liability protocols for multi-actor systems. In healthcare, regulations should clarify the roles of physicians, hospitals, and software developers, establishing thresholds for professional reliance on AI tools without undermining the duty of care.

### *Insurance And Risk Allocation Models*

Emerging solutions must also integrate innovative insurance models capable of addressing AI-specific risks. Standard liability insurance often fails to account for the unpredictability and rapid evolution of AI systems. Sector-specific insurance products could distribute risk across manufacturers, software developers, and end-users, ensuring victims receive timely compensation while incentivizing high safety standards. In healthcare, malpractice insurance may need recalibration to include AI-related errors, promoting accountability while protecting providers who responsibly employ AI support tools.

### *Ethical And Technical Safeguards*

Complementing legal and financial strategies, ethical and technical safeguards are essential. AI systems should incorporate transparent decision-making protocols, audit trails, and fail-safe mechanisms. Autonomous vehicles must have standardized testing for reliability, real-time monitoring, and emergency override functions. In healthcare, AI algorithms should undergo rigorous validation and continuous performance evaluation, ensuring alignment with established clinical standards. Ethical AI governance, including adherence to fairness, explainability, and non-discrimination principles, must be embedded into both design and deployment phases.

### *Regulatory Harmonization and International Collaboration*

[906] I. Glenn Cohen, Law, Ethics, and Artificial Intelligence in Health Care, 372 JAMA 2477 (2014).

Given the global nature of AI technologies, international regulatory harmonization is critical. Disparate standards across countries create conflicts in liability, hinder innovation, and expose users to inconsistent safety norms. Collaborative efforts, such as cross-border regulatory guidelines, international certification of AI systems, and shared best practices, can streamline compliance, enhance safety, and promote accountability. For example, aligning autonomous vehicle safety standards and AI medical device approvals internationally would reduce legal ambiguity and foster consumer confidence.

***Proactive Governance and Continuous Learning***

Finally, emerging solutions should embrace proactive governance and continuous adaptation. Regulators must monitor AI performance in real-world conditions, updating rules to reflect technological advancements and evolving risk profiles. Public engagement, expert consultation, and scenario-based testing can inform policy adjustments, ensuring laws remain relevant and effective. Dynamic governance structures, coupled with interdisciplinary collaboration among legal experts, engineers, ethicists, and healthcare professionals, can anticipate challenges rather than react to failures.

## CONCLUSION

The integration of Artificial Intelligence into critical domains such as transportation and healthcare marks a transformative moment in human progress. Autonomous vehicles and AI-driven healthcare systems hold the promise of reducing human error, enhancing efficiency, and ultimately saving lives. Yet these advancements also expose fundamental gaps in our legal and regulatory structures, which remain deeply rooted in concepts of human agency and intent. The central challenge is not whether AI should be embraced, but how societies can create fair, adaptive frameworks that distribute accountability when machines make consequential decisions.

Comparative analysis reveals that while both sectors share concerns over foreseeability, accountability, and risk allocation, the consequences of failure manifest differently—immediate physical harm in autonomous vehicles versus long-term medical and clinical repercussions in healthcare. This duality underscores the urgent need for sector-specific yet harmonized approaches. Emerging solutions, from adaptive tort principles to robust regulatory oversight, demonstrate the law's capacity to evolve. However, these must be balanced against the imperative of fostering innovation without stifling progress. Ultimately, the future of AI liability will depend on the law's ability to remain both principled and flexible. Only then can technology and justice advance in tandem, ensuring safety, accountability, and public trust.

# THEORY OF PENAL LIABILITY

***Prajjawal Singh***[907]

## ABSTRACT

*Penal Liability Theory as summed up in the maxim actus non facit reum nisi mens sit rea—an act alone does not suffice to establish guilt; it must be accompanied by culpable mental intent—the theory of penal liability bases criminal responsibility on two fundamental requirements: actus reus (the guilty act) and mens rea (the guilty mind).*

*A prohibited act or omission must be committed by the individual in order to meet the material (physical) criterion. It is impossible to impose criminal culpability without such an overt action. The act must be carried out with a guilty mentality in order to satisfy the formal (mental) criterion; this is usually manifested as intention, carelessness, or negligence. Wilful vs Careless Regardless of the likelihood of a particular event, intention involves a deliberate plan or anticipation of its effects. Negligence, on the other hand, results from apathy or reckless disregard. It could be unconscious, based on carelessness, or occur even when you know there is a risk but don't take action to avoid it. The person who does the act is usually held accountable. Nonetheless, in certain situations, such as when an employer is held accountable for an agent's activities while they are acting in the course of their job, legal systems acknowledge vicarious liability. Furthermore, in many jurisdictions—such as those pertaining to regulatory offenses—strict or absolute liability is applied without the need for mens rea. Liability in these cases stems only from the act itself, albeit depending on the jurisdiction, defences like due diligence may or may not be applicable. Establishing guilt is simply one aspect of penal liability; another is determining how it ought to be handled. Criminal law concentrates on the following, whilst civil wrongs are corrected by damages The goals of punishment include vengeance, prevention, deterrent, and reform. India. Certain groups of people are believed to lack voluntariness or intent and are therefore immune from criminal culpability. Examples of these groups include minors under a certain age or persons who lack capacity (for example, because they are insane). Similarly, if an error of fact is reasonable, pertains to facts rather than the law, and would disprove guilt if accurate, it can release the party from accountability.*

[907] Prajjawal Singh, *Babu Banarasi Das University.*

## INTRODUCTION

**Actus Reus and Mens Rea: A Definition of Penal Liability:**

The Latin proverb "actus non facit reum nisi mens sit rea"—"the act is not culpable unless the mind is guilty"—lays the groundwork for penal (or criminal) culpability. This sums up two requirements for proving criminal responsibility:

A voluntary bodily act or omission is known as the external guilty act, or actus reus. An accompanying mental condition, such as intent, knowledge, recklessness, or negligence, is known as mens rea, or the internal guilty mentality.

Criminal liability is a legal concept that holds individuals responsible for their actions or omissions if they are found to have committed a criminal act. Criminal liability differs from civil liability, which is based on the breach of a contract or tort. To be considered criminally liable, an individual must have acted with intention or negligently and thus there must be both an actus reus and mens rea.

Criminal liability is a complex concept that can have far-reaching legal implications. This article will provide an in-depth look at the concept of criminal liability, its various forms, and the legal consequences that may result from it.

The legal maxim “actus non facit reum, nisi mens sit rea” is a cornerstone of penal liability, emphasizing that guilt cannot be established solely based on an action — it must be accompanied by a guilty state of mind, known as “mens rea.”

**Actus reus**

Actus reus is a fundamental concept in criminal liability, often referred to as the “guilty act.” This Latin term encapsulates the external or objective component of a criminal offense. Essentially, it pertains to the actions or omissions that constitute the physical aspects of a crime, as defined by statute.

**Mens rea**

In contrast, mens rea — another cornerstone principle in criminal liability — translates to the “guilty mind.” This Latin expression signifies the mental element of an individual’s intent to engage in criminal conduct. The mental state is a crucial component when assessing criminal behaviour.

Therefore, mens rea serves as the driving force behind the commission of a crime. It reflects an individual’s cognitive state and their awareness of the wrongful nature of their actions.

The burden of proof in legal proceedings determines the standard required to establish a fact in court. In criminal cases, the prosecution must prove guilt beyond a reasonable doubt, while civil cases demand proof by a preponderance of the evidence.

This burden comprises two aspects — the burden of production such as presenting evidence, and the burden of persuasion like the convincing the fact-finder. Various standards exist, such as clear and convincing evidence, probable cause, reasonable suspicion, and more, each tailored to specific legal contexts.

These standards ensure fairness and accuracy in legal outcomes by aligning the burden of proof with the nature of the case and jurisdiction.

**Exception**

Criminal liability law acknowledges situations where a person, despite engaging in a criminal act, should not be held accountable for it. This includes individuals who, due to mental incapacity, lack the culpability required for criminal guilt.

Another group exempted from certain criminal liability is minors. The underlying rationale is that these individuals cannot form the necessary intent for it to be just to hold them responsible for the crime. In essence, they are responsible for their actions but not legally liable due to their incapacity to meet the required intent standard.

## DEFENCES

**Force**

Individuals can use force, even deadly force, to protect themselves from immediate physical injury, but the amount of force used must be proportionate to the threats they face. A reasonable defence applies when the force used was reasonable, while an imperfect defence may negate the intent by showing that the person had an unreasonable belief in the face of a deadly threat.

**Necessity**

This defence may be raised when an individual acts unlawfully in an emergency to prevent further serious harm. The threat is there, there are no alternatives, the damage caused by their actions should not be greater than it would have been and they also should not be held responsible for creating the dangerous situation.

**Insanity**

Different tests are used to determine if the defendant is not guilty by reason of insanity. These include the M'Naghten law (inability to distinguish between right and wrong), irresistible emotional experimentation (loss of control due to mental illness), the Durham law (guilty by reason of dementia), and the Model Penal Code (incapacity and criminal conduct).

**Intoxication**

Alcohol may cause a defendant to prevent comprehending the consequences from hearing the nature of their actions or if their actions were inappropriate. However, this defence is limited in use and generally does not apply to conventional crimes.

Consent can be a defence in cases of physical injury, especially in physical contact sports. It generally does not apply when there is serious bodily injury, the injury must be reasonably anticipated given the nature of the activity to which the victim consented, and the injured party may also benefit some from communication to use to protect himself from the consent.

Coercion can be caused when another person pressures the defendant to commit a crime by threats or actual use of physical force. The defendant must face a credible threat of serious bodily harm, believe that the threat will be carried out, have no other recourse or other recourse is generally irrelevant in the case of murder.

Criminal liability varies depending on jurisdiction and the type of crime committed. For example, some states may consider certain acts as felonies while other states may not recognize them as such. It is therefore important to understand jurisdictional differences when it comes to criminal law.

Additionally, different types of crimes carry different levels of punishment – ranging from misdemeanours that may result in probation or community service to felonies that can lead to prison time or even death sentences in some jurisdictions.

## TYPES OF CRIMINAL LIABILITY

Those accused of a crime should become aware of the various types of criminal liability that may be applicable in their case, as each carries its own implications.

**Strict liability**

The first type is strict liability, where someone can be held responsible for committing a crime without needing to prove any blameworthy conduct. An example would be laws governing sales of alcohol to minors. For instance, even if the seller was not aware of the customer's age, they could still face legal action.

**Negligence**

Negligence is another form which does not require intent but focuses on whether the accused should have been aware that their actions were illegal or posed risks to others. For instance, failing to secure hazardous materials can lead to criminal charges in certain cases even if there was no malicious intent behind it.

Intent requires proof that someone deliberately and knowingly violated the law with malicious intent or disregard for others' safety and wellbeing. This could include arson or murder where clear evidence exists that someone intended to cause harm through their actions.

**Vicarious liability**

Finally, vicarious criminal responsibility occurs when one person is held liable for another's actions in certain jurisdictions, often when an employer has failed in their duty to protect employees from breaking the law while carrying out job duties. Parental responsibility may also qualify as vicarious criminal liability depending on jurisdiction and circumstances involved in each case.

Educating oneself about these different forms of criminal liabilities can help individuals become more informed about their rights under the law and make better decisions within society while respecting boundaries set by authorities when necessary.

**Criminal liability and mental health**

When it comes to criminal liability, mental health greatly impacts the outcome of cases. The principle of insanity is often used as a defence in criminal cases — the idea that someone cannot be held criminally liable if they were unable to understand the wrongfulness of their actions due to mental illness or incapacity. This can be difficult to prove and may require expert psychiatric testimony in court.

Mental health issues can also increase the severity of sentences in some jurisdictions. For example, someone with an undiagnosed mental illness may not receive treatment for their condition while incarcerated, leading to further complications and potential harm for themselves and others. In some cases, a person's mental health condition may even lead to longer sentences than those without such conditions.

In response to this, many countries have begun implementing alternative sentencing programs for those with mental health issues who have committed crimes. These programs provide individuals with needed treatment and resources instead of incarceration, helping them get back on their feet while avoiding potentially detrimental long-term consequences associated with jail time. Such programs can also help reduce recidivism rates among those suffering from mental illnesses by providing them with the support they need so they are less likely to reoffend in the future.

## LEGAL CONSEQUENCES

Legal consequences of criminal liability can be severe and far-reaching. Depending on the type and severity of the crime, penalties can range from fines to jail time.

For cases that involve more serious crimes, harsher punishments may be imposed, such as life imprisonment or even the death penalty.

Aside from confinement, an individual who is convicted of a crime may also face professional consequences such as the revocation of their license or loss of their job.

Individuals convicted of a crime may have to forfeit property or assets acquired through illegal means. This includes money gained from criminal activities and any other tangible items used in the commission of a crime.

Furthermore, a conviction for a crime can result in the creation of a permanent criminal record which could negatively affect future employment opportunities and eligibility for certain government benefits.

## DEATH PENALTY IN INDIA

Our initiation into the criminal justice system was through the death penalty in India. Despite being the harshest punishment in our legal system, there was very little empirical information on the administration of the death penalty, including uncertainty about the number of people India had executed or information about prisoners who are sentenced to death. An effort to fill that gap led to our foundational work - the Death Penalty India Report (May 2016). Between 2013-15, we interviewed all of India's death row prisoners and their families to document their socio-economic profile and map their interaction with the criminal justice system.

Information gathered during the fieldwork for the Death Penalty India Report demonstrated the urgent need to design interventions that would provide quality legal representation to individuals sentenced to death. Our litigation efforts over the years have constantly drawn lessons from this experience and many of the practices we have adopted are designed to fill the gaps observed. Challenging the conviction as well as the sentence is a core commitment of our litigation practice. We have also invested significantly in developing a mitigation investigation practice to aid and develop the sentencing practices in our criminal courts; an exercise mandated by the death penalty sentencing framework in India. A central component of our work is maintaining regular communication with the prisoners we represent and their families, through letters and prison visits.

A measured and progressive expansion of the death penalty discourse in India demands that existing assumptions about capital punishment be challenged. Our research is, thus, grounded in an interdisciplinary approach and actively engages with penal philosophy, criminology, forensic science, psychiatry, and law. Our focus also lies in analysing contemporary and archival data in India to gauge the functioning of existing institutional stakeholders within the

criminal justice system. Our efforts to understand the death penalty rests on in-depth research on various aspects of its administration in India. Sentencing practices at all levels of the judiciary, mental health of death row prisoners, and opinion studies have been particular areas of interest. Since 2016, through our Annual Statistics reports, we have also emerged as the most authoritative source for the number of death sentences imposed in India every year.

## LEGAL REPRESENTATION

Our interdisciplinary team comprising practitioners of criminal law, forensic experts, legal researchers, social workers, psychologists and anthropologists is involved in representing prisoners on death row across India before the Supreme Court and various High Courts.

From victories involving significant commutations and acquittals in individual cases, we have also seen strategic success on issues of death warrant procedure, in limine dismissals without giving reasons and access to lawyers and mental health professionals towards effective legal representation of death row prisoners.

In addition to preparing the case on conviction, we also conduct robust mitigation investigations through interviews with prisoners and other witnesses of their lives to ensure individualized sentencing. To provide quality and effective legal representation on both conviction and sentencing we consult experts in forensics, psychiatry, anthropology, and psychology. Our litigation efforts have been made possible by the generous and dedicated support of a growing network of advocates from across the country, including Senior Advocates.

## DEATH PENALTY INDIA REPORT

The Death Penalty India Report (2016) is the genesis of our death penalty work. Based on interviews with all (373) prisoners sentenced to death and their families, the report is a significant contribution to developing empirical research on the death penalty in India, the socio-economic status of prisoners sentenced to death and its impact on their interaction with the criminal justice system. The report is divided into two volumes with a combination of quantitative and qualitative research that provides deep insights into the use and impact of the death penalty in India.

The report finds that an overwhelming majority of those on death row are economically vulnerable, and belong to backward classes and religious minorities. Through narratives of prisoners and their families, the report also documents the experience in custody, during trial and appeal, highlighting the infirmities within the criminal justice system.

## MATTERS OF JUDGEMENT

Matters of Judgment is an opinion study on the death penalty and the criminal justice based on interviews with 60 former Indian Supreme Court judges. The study was an attempt to understand judicial thought and adjudicatory processes that govern the administration of the death penalty within India's criminal justice system. The report records an overwhelming acknowledgment among the former judges about the crisis in criminal justice system on account of the widespread use of torture, fabrication of evidence, abysmal quality of legal aid and wrongful convictions, without these concerns having any bearing on their views on the death penalty. The study reveals a wide variance in the understanding of the 'rarest of rare' doctrine based predominantly on the nature of crime. The nature of retentionist arguments provided by the former judge's points to the legal discourse on death penalty being driven by a retributive instinct in response to 'brutality' rather than any real commitment to principled sentencing.

**Death Penalty Sentencing in Trial Courts: Delhi Madhya Pradesh and Maharashtra (2000-2015)**

This report offers an insight into the interpretation and application of the 'rarest of rare' capital sentencing framework originally developed by the Constitution bench of the Indian Supreme Court in Bachan Singh v State of Punjab (1980), at the trial court level. It also offers a doctrinal critique of the Bachan Singh framework and its evolution thereafter which has contributed to the errors in the last four decades. The report is based on analysis of all (215) death sentences imposed on 322 persons by trial courts of Delhi, Madhya and Maharashtra over a 16-year period, between 2000 and 2015. The report exposes the superficial nature of capital sentencing hearings conducted by trial courts. It also demonstrates the normative and procedural gaps in the capital sentencing framework in India that have been inherited from the Bachan Singh judgment and have been carried over in the subsequent Supreme Court decisions in the last 40 years.

## MENTAL HEALTH AND THE DEATH PENALTY

This is the first of its kind empirical and descriptive study to take a psychosocial approach to the mental health of death row prisoners in India. The study was conceived out of the need to collect accurate data on death row prisoners, through an empirical and descriptive study, in order to broaden the current sphere of knowledge on the death penalty.

Through this study, we aim to examine the presence of mental illness and intellectual disability among death row prisoners. An important component of the project is bringing forth narratives,

through an interpretive and phenomenological lens, on the lived experience of prisoners while on death row with a focus on mental health. The study also delves into the lifetime vulnerabilities of death row prisoners and adverse experiences that have marked their lives. We have interviewed over 90 death row prisoners and their families, across prisons in Delhi, Madhya Pradesh, Chhattisgarh, Kerala and Karnataka.

## LANDMARK CASES ON DEATH PENALTY IN INDIA:

### Delhi Gang Rape Case

The Vinay Sharma v. Union of India (2020) case, publicly known as the Nirbhaya gang rape case outraged the nation's conscience. A 23-year-old woman was viciously abused and gang raped by six persons in a moving bus in south Delhi on the dark chilly night of December 16, 2012. She was brutally abused & rapped which was totally inhuman in nature, one of the juvenile accused inserted an iron road into the private part of her body later they threw her naked half dead in the street of the moving bus. The brutality of this incident did not only shock India, it shocked the whole world also. She died as a result of all the emotional and physical suffering. One of the accused took his life in jail at the time when the matter was presented in front of the court, another was below 18 years old as a result he got spared from capital punishment. However, the court passed an order for the death penalty to the other 4 accused & they were executed by hanging at the Tihar Jail in Delhi in 2020. After examining the aggravating and mitigating considerations, this judgment was reached. Given the essential facts surrounding the crime and brutal in-human torture of the victim, which resulted in her death, the court issued capital punishment to the 4 accused.

### The Ajmal Kasab Case (2008-2012)

Md. Ajmal Md. Amir Kasab @ Abu v. State of Maharashtra (2012), also called The Ajmal Kasab case was another shocking incident to India as well as the whole world. Ajmal Kasab was a Pakistani terrorist, he & 9 other gunmen travelled from Karachi to Mumbai by boat. The terrorists split into five groups upon arriving in Mumbai on November 26, 2008, and spread terror by attacking different locations in Mumbai. Almost 166 people, including 26 foreign nationals lost their lives in this incident. 238 persons also suffered significant injuries. Also, this attack demolished properties worth millions of dollars. Among the 10 terrorists only Ajmal Kasab was captured alive, the other 9 were shot and killed during the rescue operation conducted by NSG and police. The Bombay High Court upheld Kasab's execution order on Feb 21, 2011. On Aug 29, 2012, The Supreme Court of India upheld the decision. On November 21, 2012, Kasab was hanged and buried behind the walls of Pune's Yerwada Central Prison.

**State Vs Mohd. Afzal**

In State v. Mohd. Afzal And Ors case or the Parliament attack case, Afzal Guru, a Kashmiri man, was charged with planning the 2001 attack on the Indian Parliament. He was detained in December 2001 and accused of planning the attack with the five other extremists. Eight security guards and a gardener lost their lives in the attack and all five terrorists were also eliminated. The case went to trial in the special court in 2002, upon hearing the case the special court issued capital punishment to Afzal Guru and 3 other men who were also found guilty in the case. Guru's sentencing was not carried out immediately, his case went through numerous appeals and reviews. Guru's defence team claimed that he was not a direct participant in the attack and he was also denied a fair trial. They further asserted that he was subjected to torture while he was being held captive and his confession was coerced. In spite of various objections, The Supreme Court of India upheld Guru's execution order in 2005. In 2011 the Indian President likewise denied his request for mercy and in Feb 2013, he was eventually hanged to death.

**1993 Mumbai Blast Case**

In the Yakub Abdul Razak Memon v. State of Maharashtra and Anr case, Yakub Memon, a chartered accountant of India was found guilty of taking part in the 1993 Bombay bombings, one of the deadliest terrorist assaults in Indian history. A squad of terrorists connected to the Pakistani extremist organization Lashkar-e-Taiba planned the explosion across Bombay. Memon was charged with giving the terrorists financial support, who carried out the explosions, which claimed 257 innocent lives and injured over 700 others. He was detained in 1994 and accused of a number of crimes, including murder, terrorism, and conspiracy. He was also found guilty of illegally transporting and possessing weapons and ammunition with the intent to harm his life. Memon was found guilty and given capital punishment in 2007 after a protracted trial. Yet after a series of appeals in his case, the Supreme Court of India upheld his execution order. Memon's mercy petition was denied despite pleas for mercy from a variety of human rights organizations and public figures, including some who said that he had cooperated with authorities and provided crucial information about the bombs. He was executed by hanging in July 2015. In India, this case is still a contentious one, while some claim that Memon was unfairly singled out while others maintain that his penalty was appropriate considering the seriousness of the offenses for which he was found guilty.

**Shabnam Case (2015)**

In Shabnam v. Union of India, the case refers to the brutal murder of seven members of a family in the Amroha district of Uttar Pradesh in 2008. Shabnam, a teacher plotted to murder her

parents, two brothers, sister-in-law, cousin, and 10-month-old nephew with the help of Salim, her lover. The family members were drugged before being strangled to death by Shabnam and Salim. After that, they dismembered the bodies and dumped them in a neighbouring field. The driving force behind such murder was Shabnam's family's objection to her relationship with Salim. The pair was detained shortly after the incident, and the case received extensive media coverage. They were given capital punishment by the district court in 2010. Both the High Court and the Supreme Court rejected their petitions against the death penalty. This is the first time the court issued capital punishment to a woman in the Indian criminal justice system.

**DEATH PENALTY IN CHINA**

The People's Republic of China continues to carry out more judicial executions than the rest of the world combined. In addition, despite having the largest population in the world, China possibly executes a higher proportion of its population than any other country, except for Singapore, which has one of the smallest populations. Law unto itself Behind these facts lies a criminal justice system which cannot and does not guarantee a fair trial under international law to defendants. Often defendants are denied their right to legal representation until after they have been interrogated, and even then, access in practice is strictly limited. The period of pre-arrest or pre-trial detention is often arbitrary, lasting in one extreme case for 28 years. Torture by police in China is rife, but there is no provision under Chinese law to exclude from court 'confessions or other 'evidence' extorted through torture. In practice, there is no presumption of innocence. "What evidence do you have that you didn't commit the murder?" A high court judge in Heilongjiang Province before passing a death sentence despite inadequate evidence. Beijing Youth Daily, 28 April 2002. Political pressure and interference Trials and the process of appeal are often summary. Furthermore, there is no independence of the judiciary in China. The ruling Chinese Communist Party influences the judicial process at every level of proceedings with courts in particular being monitored and run by Party bodies. Political pressure on the judicial process is particularly acute during officially designated "strike hard" campaigns, where police, prosecutors and judges are under pressure to demonstrate speed and resolve at the expense of rigour and justice. "Judges must effectively enhance the Party's leadership in people's court work." Luo Gan, Director of the Central Committee for the Management of Public Security, Xinhua, 17 December 2003. Death sentence is passed against a woman who was immediately executed with three other people on drugs charges. www.sina.com.cn 26 June 2003 (world anti-drugs day). © sina.com.cn Death is cheap Despite these obvious variances with international law and standards, China continues to execute huge

numbers of people. Indeed, a recent decision to promote lethal injection as a means of execution nationwide was reported in some quarters in China as a "cost-effective" and more efficient alternative to execution by bullet, possibly facilitating even higher rates of execution. Mobile execution chambers are also being used extensively throughout China – converted buses in which convicts can be executed by lethal injection "immediately after sentence is passed". [Quote] "All those present thought that drug injection is a very civilised and scientific method for carrying out death sentences." www.people.com.cn 18 September 2001. [Unquote] Lethal injection does not overcome fundamental objections to the death penalty. A convicted prisoner – whether innocent or guilty as charged – still faces the impending threat of death at the hands of the State while being held in extremely harsh conditions. Promoting a "humane" way for the State to kill people is hardly the sign of a "civilized" society.

## DEATH PENALTY IN SAUDI ARABIA

Saudi Arabia is one of the few countries in the world that still actively enforces the death penalty. The kingdom's justice system, rooted in Islamic Sharia law, mandates capital punishment for a range of offenses, including murder, terrorism, drug trafficking, apostasy, and sorcery.

Although in 2022 the Crown Prince Mohammed bin Salman has proposed changes to modernize laws, including reducing the use of the death penalty for non-violent offenses and forbidding the execution of individuals who committed crimes as minors, overall use of the death penalty remains high. In 2024, Saudi authorities carried out at least 338 executions, the highest number of executions recorded in the country since 1990. This event highlighted the ongoing tension between the kingdom's reformist image and its adherence to strict legal punishments.

Individuals convicted of terrorism-related activities are frequently executed, with Saudi authorities asserting that harsh penalties serve as a deterrent. Yet, this charge is often used against those who have participated in anti-government protests. For instance, in April 2024 Saudi Arabia's court of appeal approved death sentences for two Saudi men, Yousif al-Manasif and Ali al-Mabyook, for protest-related crimes allegedly committed when they were between the ages of 14 and 17.

Moreover, the country is planning to execute six Shia citizens, including five who were minors during the 2011-2012 pro-democracy protests and one businessman. The UN Working Group on Arbitrary Detention found their imprisonment violated multiple human rights categories,

including lack of legal basis, unfair trials, and discrimination against the Shia minority. Some were prosecuted under Saudi Arabia's controversial counter-terrorism law.

Many executions are mainly related to alleged drug smuggling with Saudi Arabia maintaining a strict zero-tolerance policy on drug trafficking and smuggling. In 2024, Saudi authorities executed around 50 individuals solely for drug-related offences compared to two executions for the same crime were documented in the country in 2023.

Moreover, this practice disproportionately affects the disadvantaged and the victims of discrimination such as foreign workers and women. Indeed, an increase in the executions of foreign nationals and women has been reported. Most of the women were foreign, including four Nigerians, all of whom were executed for drug-related offences. Executions of foreign nationals also rose, with 138 killed, up from 38 in 2023.

Sentences are often handed down by judges who have broad discretionary powers, leading to concerns over the consistency and fairness of rulings. Also, many capital offenses do now follow clear defining guidelines.

At the same time, Saudi authorities are spending billions to transform the country's reputation and present a more modern, progressive image to the world. As part of these efforts, the kingdom has hosted major sporting events, music festivals, and cultural exhibitions, attracting global celebrities and investors to distract the international community from ongoing human rights violations such as the mass executions.

ADHRB denounces the persistence of the death penalty, especially when the individuals were minors at the time of the crime. Also, the executions reflect systemic discrimination, particularly against the Shia minority, who are disproportionately targeted under vague anti-terrorism laws. Finally, ADHRB calls on Saudi authorities to immediately halt executions, implement judicial reforms ensuring fair trials, and comply with international conventions prohibiting capital punishment for minors. It also urges the global community to hold Saudi Arabia accountable for these human rights violations.

# LEGALISED VANISHING: BNSS LOOPHOLES THAT ENABLE SECRET DETENTION

***Bhuvaneswari Gullapudi***[908]

## ABSTRACT

*The evolution of criminal procedure often reflects a state's balancing act between investigative efficacy and the protection of fundamental liberties. In India, the transition from the Code of Criminal Procedure (CrPC) to the Bharatiya Nagarik Suraksha Sanhita (BNSS) represents a significant overhaul aimed at modernisation. However, this shift has engendered serious concerns regarding the potential for procedural law to be weaponised against citizens. This paper examines the disquieting phenomenon of "legalised vanishing" under the BNSS, a process where individuals are not abducted but are instead rendered invisible through the manipulation of legal mechanisms. It deconstructs how the triad of extended police remand under Section 187, the strategic use of sequential FIRs, and the erosion of physical oversight via digital court production collectively create an architecture for secretive detention. Grounded in an analysis of post-BNSS incidents and pre-existing patterns of custodial abuse from regions like Assam and Tamil Nadu, the study argues that the new code does not merely contain loopholes but actively institutionalises a framework that legitimises disappearance under a veneer of legality, thereby posing a grave threat to constitutional democracy.*

**Keywords:** Legalised Vanishing, BNSS, Extended Police Remand, Sequential FIRs, Custodial abuse.

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## INTRODUCTION

In a democracy, the legal systems are designed to protect citizens from the abuse of power. But when the same law becomes a tool for making individuals disappear, not secretly, but rather through legal means, it creates a paradox here. The Bharatiya Nyaya Suraksha Sanhita (BNSS), introduced in 2023 as a replacement for the decades-old CrPC, aims to modernise criminal procedures, but certain provisions have raised concerns regarding their potential misuse.[909] The new procedural powers granted by BNSS come with serious risks. One of the main troubling risks is the wider scope of the extended police custody, sequential FIRs, and remote judicial productions, which can be manipulated to secretly detain people still within the legal limits. The Orissa High Court has recently held that failure to produce an accused within 24 hours is a violation of the Constitutional safeguards, but these are often sidestepped through procedural loopholes. [910]

This paper argues that BNSS creates a legal architecture for "vanishing" - a hidden process by which detainees are held under the guise of law through extended remands, repetitive FIRs, and weakened judicial oversight. [911] Unlike traditional enforced disappearances, this vanishing happens openly within the legal system itself and often escapes public and judicial scrutiny.

## DEFINING LEGALISED VANISHING: DISTINCTION AND CONTEXT

The term "Legalised Vanishing" is not any specific clause mentioned explicitly in any law, but rather a process and a consequence that emerged from the manipulation of legal procedures. Unlike traditional enforced disappearances, where the perpetrators refute the custody or location of a person, legalised vanishing happens within the purview of legal systems.[912] Although the individual in question is acknowledged to be arrested or detained, their effective invisibility is a result of various reasons, such as procedural postponements, prolonged custody, and insufficient judicial scrutiny. This distinction is very crucial. According to the International Committee of the Red Cross (ICRC) report on enforced disappearances, enforced disappearances are characterised by the state or non-state actors routinely denying an individual's detention or whereabouts, thus making the act furtive and illegal. On the other

[909] Comparison Table: Bharatiya Nagarik Suraksha Sanhita (BNSS) 2023 vs. Code of Criminal Procedure (CrPC) 1973, *Latest Laws*, https://www.latestlaws.com/comparison/bnss-to-crpc/ (last visited Nov. 4, 2025).
[910] Jyoti Prakash Dutta, S.58 BNSS Bail Must Be Granted to Accused If Not Produced Before Magistrate Within 24 Hrs of Arrest: Orissa High Court, *LiveLaw* (Aug. 11, 2025), https://www.livelaw.in/high-court/orissa-high-court/orissa-high-court-ruling-production-of-accused-within-24-hours-illegal-arrest-and-section-58-bnss-300588 (last visited Nov. 4, 2025).
[911] Margaret J. Frossard, The Detainer Process: The Hidden Due Process Violation in Parole Revocation, 52(3) *Chi.-Kent L. Rev.* 550 (1976).
[912] About Enforced Disappearance, *Office of the High Comm'r for Hum. Rts.*, https://www.ohchr.org/en/special-procedures/wg-disappearances/about-enforced-disappearance (last visited Nov. 3, 2025).

hand, legalised vanishing occurs "in plain sight," shrouded behind the veil of legitimacy through formal written arrests and court remands by magistrates, but essentially operates to exclude detainees from accessible legal protections and wider awareness.[913]

This gap arises from the failure of the Indian legal system to criminalise disappearances explicitly, as mentioned in the lapsed 2017 bill, which was intended to address the enforced disappearances. [914] This legislative vacuum has allowed procedural mechanisms under laws like BNSS to facilitate vanishing without clear accountability.

This paper examines the phenomenon of legalised vanishing by exploring three primary mechanisms that collectively form the foundation of this hidden detention. The first mechanism is the pretextual arrest and bait-and-switch strategy, wherein individuals are detained for minor offences but subsequently subjected to more serious charges- often through the application of statutes such as the Unlawful Activities (Prevention) Amendment Act, 2019 (UAPA 2019). The second mechanism pertains to the temporal black hole created by prolonged police remand, as permitted by BNSS provisions, which can extend up to 60 or 90 days, thereby allowing extended detainment with minimal judicial oversight. The third component is the facade of digital or remote judicial processes, exemplified by video conferencing for appearances before magistrates, which complicates the ability of courts to evaluate the physical and mental well-being of detainees, thereby facilitating the concealment of abuse.

## THE BNSS ARCHITECTURE OF DISAPPEARANCE: DECONSTRUCTING THE PROVISIONS

The Bharatiya Nagarik Suraksha Sanhita (BNSS) enables "legalised vanishing" through three key procedural mechanisms. They are:

### The Pretext and the Pivot: Weaponizing Sequential FIRs

A key method through which BNSS gives a way for secretive detention is the use of sequential FIRs. It enables the authorities to arrest individuals for minor or pretextual charges and then move them to harsher offences. There is no particular section in the BNSS that explicitly prohibits the police from registering a new FIR for a different offence against the same person, even while an earlier one is being investigated. This established practice, carried over from the CrPC, creates the loophole.

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[913] Int'l Comm. of the Red Cross, *The Right to a Remedy for Enforced Disappearances in India: A Legal Analysis of International and Domestic Law Relating to Victims of Enforced Disappearances* (2023), https://missingpersons.icrc.org/library/right-remedy-enforced-disappearances-india-legal-analysis-international-and-domestic-law (last visited Nov. 5, 2025).

[914] *The Prevention of Enforced Disappearance Bill*, No. XXXI of 2017, https://sansad.in/getFile/BillsTexts/RSBillTexts/Asintroduced/enforced-E-151217.pdf (last visited Nov. 5, 2025).

A notable post-BNSS example is from Uttar Pradesh, where journalists were booked more than once for minor and trivial offences such as tweeting about mob lynching acts. [915] Such a case is an example of the pretext strategy, i.e., the first arrest on what appears to be a minor charge or everyday offence is merely the opening to a completely different legal procedure, which might end with a long and harsh remand and stiff penalties under harsh laws such as UAPA, to which BNSS clauses add.

**The Temporal Black Hole: Analysing Extended Police Remand**

Section 187 of the BNSS allows police custody for investigation purposes to extend up to 60 days, with a magistrate-controlled judicial custody up to 90 days, much more than the thresholds set by the old CrPC. [916]

The Commonwealth Journalists' Protection (CJP) article "Police Custody under CrPC & BNSS: A Paradigm Shift" highlights how BNSS represents a paradigm shift, allowing police to hold an accused in custody for longer, fragmented periods legally authorised over many weeks. [917] This extension in the custodial period, especially under police control rather than jail, creates a legal black hole. It is because the person isn't formally charged or physically produced in court. During this time, the risk of torture and abuse is relatively high, and they will be isolated. This is how 'vanishing' works. The person is invisible to the judicial system can't even see them to help.

The BNSS unwittingly creates a system that normalises secretive detention or detention that is unaccountable, by structurally accommodating extended periods of custody. This can be done by increasing the durations of custody and permitting sequential remands tied to separate FIRs or large-scale investigations.

**The Judicial Smokescreen: Erosion of Oversight through Digital Protection**

With BNSS replacing the old CrPC, many new legal provisions have been introduced to modernise the justice system and speed up the court processes, and one of them is the adoption of video conferencing and electronic procedures for the judicial production of detainees. Even though the intention behind it is to increase efficiency, the practicality of it can be moulded into being considered as one of the loopholes.

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[915] Sarasvati NT, UP Police Book Journalists Under Bharatiya Nyaya Sanhita for Tweeting About Mob Lynching Incident, What's Worrying?, *Medianama* (July 8, 2024), https://www.medianama.com/2024/07/223-up-police-book-journalists-bharatiya-nyaya-sanhita-tweeting-mob-lynching/ (last visited Nov. 3, 2025).

[916] *Bharatiya Nagarik Suraksha Sanhita*, No. 45 of 2023, Acts of Parliament, 2023 (India), https://www.indiacode.nic.in/bitstream/123456789/20099/1/eng.pdf (last visited Oct. 28, 2025).

[917] Citizens for Justice & Peace, *Police Custody Under CrPC & BNSS: A Paradigm Shift in Balancing Liberty and Investigation* (2025), https://cjp.org.in/police-custody-under-crpc-bnss-a-paradigm-shift-in-balancing-liberty-and-investigation/ (last visited Nov. 5, 2025).

The Orissa High Court, in its ruling in 2025, powerfully addresses this issue. The Court has held that the failure to produce an accused physically before a magistrate within 24 hours invalidates the arrest itself as unconstitutional and a violation of BNSS section 58 and Article 22(2).[918] Yet, this basic safeguard is routinely violated, with digital production often substituting physical court appearances. This substitution puts the person who was detained at a loss, because this digital production prevents the magistrates from observing the detainee's physical and mental state, permitting coercion, torture or neglect to go unnoticed. If the basic rule of 24-hour production is being disregarded, it shows that more complex remote procedures in the BNSS will likely be misused as well. This turns the legal process into a smoke screen, making it easier for people to vanish inside the system.

## REAL - LIFE CASES

This section demonstrates how the architecture of disappearance, outlined in the previous chapter, is not theoretical; it is already being operational across India. While the BNSS has only recently come into force, patterns of procedural misuse have long existed under the CrPC. These cases demonstrate how the same mechanisms, now reinforced by extended custody provisions and rebooking powers, can enable 'legalised vanishing'. The examples below are organised by patterns rather than by individual cases, highlighting recurring methods through which law is used to conceal rather than protect.

### Pattern A: The "Questioning" Pretext and Custodial Abuse

Across India, the Police merely justify detention as "questioning". However, once the person is taken into custody, they often face torture, prolonged confinement or even death, and all of this without the official acknowledgement of wrongdoing by the police. These incidents demonstrate how *questioning* serves as a legal cover for unrecorded detention.

In **Tamil Nadu** (2024), a temple security guard was taken for questioning in connection with a theft and was later found dead in custody. Post–mortem reports revealed severe internal injuries, yet the FIR registered only "unnatural death", illustrating how legal processes obscure accountability. [919] Similarly, in **Delhi (**July 2025), a young man was taken into custody for questioning in connection with a complaint of theft made against him by a woman supervisor. There were signs of physical torture; the victim had injury marks on his body. He was also

[918] Dutta, supra note 3.

[919] Harshita Das, Gagged and Beaten: Family Alleges Custodial Death of Tamil Nadu Temple Guard, *India Today* (June 29, 2025), https://www.indiatoday.in/india/tamil-nadu/story/gagged-and-beaten-family-alleges-custodial-death-of-tamil-nadu-temple-guard-2748053-2025-06-29 (last visited Nov. 5, 2025).

given electric shocks, due to which there was swelling in his ear. The absence of CCTV footage, explained as a "technical glitch", erased any trace of police responsibility.[920]

The problem extends even within the police force itself. In **Jammu and Kashmir**, a police constable was allegedly tortured by fellow officers during an internal investigation, which showcases the fact that custodial violence has become institutional rather than exceptional.[921] In Madhya Pradesh, four juveniles accused of petty theft were detained overnight without documentation and beaten before release, with no disciplinary action taken against the officers involved. [922]

These incidents reveal how temporary custody becomes a zone of unaccountable control. Under BNSS, which allows longer periods of police custody within the first 40 or 60 days of investigation, such practices gain further legitimacy. What was once an abuse of procedure under the CrPC could now become procedure itself under the BNSS framework. This marks the beginning of legalised vanishing - where disappearance occurs not by denying the law, but through its deliberate use.

**Pattern B: Targeting Journalists and Activists**

The second pattern illustrates the manner in which the government utilises detention legislation to target journalists, activists, and dissenters- individuals who question state narratives. These persons do not face secret abductions; instead, they are rendered to "disappear" through a legal framework characterised by repeated arrests, rebooking, and the implementation of digital hearings that restrict judicial scrutiny.

**Aasif Sultan**, a Kashmiri journalist, was repeatedly arrested under different FIRs even after being granted bail, reflecting how sequential rebooking neutralises judicial relief.[923] In Assam, journalist **Dilwar Hussain** was detained for covering a demonstration about alleged corruption at Assam Co-operative Apex Bank Ltd; his family was unaware of his location for over two days.[924] **Mohammad Zubair**, co-founder of Alt News, faced multiple arrests across

[920] *Id.*

[921] Nazir Masoodi, After Supreme Court Order, 6 J&K Cops Arrested for Brutal Torture of Policeman, *NDTV* (Aug. 21, 2025), https://www.ndtv.com/india-news/after-supreme-court-order-6-jammu-and-kashmir-cops-arrested-for-brutal-torture-of-policeman-9128770 (last visited Nov. 8, 2025).

[922] Press Release, National Human Rights Comm'n, NHRC Notice to the Government of Madhya Pradesh over Reported Illegal Detention and Torture of Four Juveniles in Police Custody in Tikamgarh (May 7, 2022), https://nhrc.nic.in/media/press-release/nhrc-notice-to-the-government-madhya-pradesh-over-reported-illegal-detention-an-torture-four-juveniles-in-police-custody-in-tikamgarh (last visited Nov. 7, 2025).

[923] Kashmiri Journalist Aasif Sultan Rearrested Days After Release, *Al Jazeera* (Mar. 2, 2024), https://www.aljazeera.com/news/2024/3/2/kashmiri-journalist-aasif-sultan-re-arrested-days-after-release (last visited Nov. 8, 2025).

[924] Press Release, Int'l Fed'n of Journalists, India: Digital Journalist Arrested for Corruption Reporting (Apr. 1, 2025), https://www.ifj.org/media-centre/news/detail/category/press-releases/article/india-digital-journalist-arrested-for-corruption-reporting (last visited Nov. 6, 2025).

jurisdictions for old social media posts - each time bail was granted, a new FIR emerged elsewhere, extending his detention in a technically "lawful" manner. [925]

Human Rights Watch and Civicus (2023) note that over 67 Indian journalists faced detention [926] or arrest between 2019 and 2023. India's civic sphere is described by these papers as "repressed", and the increasing pattern for laws aimed at public order to be used within the criminalisation of dissenting voices. Use of the BNSS to allow digital or video-conference hearings prior to magistrates further erodes judicial checks - judges rarely view the physical condition of detainees and thus further reduce the ability to detect coercion or abuse. These instances demonstrate the way vanishing ceases to be physical but institutional. By legal-appearing arrests and successive remands, the state is eliminating the voices of dissent from the public arena and effectively muffling them without any explicit violation of the law

**Pattern C: The Assam Blueprint - Covert Detentions and Enforced Disappearances**

Assam exemplifies a pronounced instance of legalised disappearance in practical terms. Following the National Register of Citizens (NRC) verification initiatives, various accounts have emerged detailing instances of Bengali-speaking Muslims being forcibly removed from their residences during nocturnal operations under the guise of "identity verification." In many cases, families were not furnished with arrest documentation, and local law enforcement subsequently disclaimed any awareness of the individuals in custody.

"Disappeared in the Night" is the name of a report filed by the Citizens for Justice and Peace (CJP) in 2022 on dozens of similar instances where people had been picked up and returned after several days with different charges/FIRs. [927] Sabrang India's follow-up report in 2023 established that many were subsequently booked under preventive detention acts and documentation filed after the fact to regularise their detention. Amnesty International also reported in 2023 on "informal detention centres" functioning outside court orders, where detainees remained detained indefinitely until confirmation.

This framework reveals how a sequential process - encompassing inquiry, rebooking, and bureaucratic validation generates a legally unrecognised domain. Although it is officially stated

[925] India: Arbitrary Detention of Journalist and Rights Defender Mohammad Zubair, *World Org. Against Torture* (July 12, 2022), https://www.omct.org/en/resources/urgent-interventions/india-arbitrary-detention-of-journalist-and-rights-defender-mohammad-zubair (last visited Nov. 5, 2025).

[926] Geetika Mantri, 67 Journalists Arrested, Detained, Questioned in India in 2020 for Their Work, *The News Minute* (Jan. 6, 2021), https://www.thenewsminute.com/news/67-journalists-arrested-detained-questioned-india-2020-their-work-140963 (last visited Nov. 5, 2025).

[927] Citizens for Justice & Peace, "Disappeared in the Night": CJP's Memorandum to NHRC on Assam's Secretive Detentions and Illegal Pushbacks (2025), https://cjp.org.in/disappeared-in-the-night-cjps-memorandum-to-nhrc-on-assams-secretive-detentions-and-illegal-pushbacks/ (last visited Nov. 5, 2025).

that no individuals are "disappeared," in reality, persons are excluded from legal acknowledgement for prolonged durations. Under the BNSS, the protracted remand duration and adaptable custody regulations facilitate the rationalisation of such detentions, potentially normalising the Assam model across the country.

**Cross-pattern analysis**

These patterns collectively reveal that legalised vanishing operates not as a sudden rupture, but through a sinister continuity within the system. The pretext of questioning serves as the gateway to unrecorded detention, while sequential FIRs and extended remands then sustain an individual's invisibility under a cloak of legality. This process is completed by remote hearings and relaxed controls, which normalise a lack of bodily accountability. Across diverse contexts- from security forces and juveniles to journalists and the marginalised- the same architectural pattern persists. Under the BNSS, procedural rationales have expanded, transforming formerly unlawful practices into legitimate ones. Consequently, the law no longer merely permits disappearances; it now actively enables them.

## ANALYSIS

While the Bharatiya Nagarik Suraksha Sanhita (BNSS) was introduced with the professed aim of modernizing and streamlining India's criminal justice system, its procedural architecture contains significant regressive drawbacks. BNSS's discretion on long police remand under Section 187, authorising detention until 60 days (police) and 90 days (judicial),[928] statutorily brings about a temporal black hole. Paradoxically, this is antithetical to the constitutional protections since the Bombay High Court held that the extension of remand without a reasoned hearing is inconsistent with Article 21 on the right to life and liberty.[929] Nevertheless, such judicial acknowledgement has not prevented BNSS from extending these powers that the judiciary has criticised to be susceptible to abuse and authorising long detention with limited checks.

Additionally, the development of digital and video-conference proceedings inhibits actual judicial examination. The Orissa High Court highlighted the constitutional requirement for physical production to magistrates within 24 hours of detention. [930] However, this protection is constantly breached or evaded by distant appearances, where detainees actual physical and mental state is not observable by the judges. This virtual smokescreen obscures coercion or

[928] *Bharatiya Nyaya Sanhita*, supra note 9.
[929] Ruchi Sharma, HC Declares: Extension of Remand Without Hearing or Reasoned Order Violates Article 21, *Latest Laws* (Oct. 13, 2025), https://www.latestlaws.com/high-courts/hc-declares-extension-of-remand-without-hearing-or-reasoned-order-violates-article-21-230538/ (last visited Nov. 11, 2025).
[930] Dutta, supra note 3.

torture that often accompanies prolonged remand, and which is hardly redressed by the courts. FIRs in quick succession and rebooking strategies also exacerbate the disappearance. Like in the case of the Uttar Pradesh journalists, individuals are detained on trivial grounds that turn into grave offences by special laws such as the UAPA through the procedural might of the BNSS to prolong detention and quell dissent. This bait-and-switch is a manifestation of the interaction between BNSS and stringent special laws.

The BNSS establishes a framework characterised by extensive remand authority, digital processing capabilities, and adaptable FIR protocols that, despite being constructed within a legal context, enable covert detention methods. The judiciary's opposition to prolonging remands and requirements for the presentation of detainees frequently becomes ineffectual due to procedural deficiencies and an increasing reliance on technology, underscoring an immediate necessity for reform to safeguard essential liberties effectively.

## RECOMMENDATIONS

The cases discussed earlier vividly illustrate how the BNSS framework operates in practice. These incidents show a consistent, systemic pattern enabled by the BNSS's procedural structure. Section 187, for instance, grants the police expansive remand powers, which are up to 60 days of police custody and 90 days of judicial custody for investigative purposes. Even though these provisions are intended to ensure a thorough investigation. In practice, however, they often result in extended periods of detention during which individuals remain largely outside the purview of meaningful judicial oversight.

Courts such as the Bombay High Court have repeatedly criticised the routine extension of remand without proper hearings, identifying such actions as a direct threat to the constitutional right to liberty enshrined in Article 21. In the 2025 decision of Ranganath Tulshiram Galande & Anr. v. State of Maharashtra, the court firmly held that extending judicial remand beyond 60 days under the BNSS, absent a hearing or a reasoned order, violates fundamental constitutional protections. This ruling underscore the necessity of procedural safeguards and indicates that perfunctory extensions of custody cannot withstand constitutional scrutiny.[931] [932]

Additionally, the adoption of digital and video-conference procedures under the BNSS, while ostensibly aimed at efficiency, further diminishes judicial oversight. The Orissa High Court has

[931] Dipak Shakya, HC Declares: Extension of Remand Without Hearing or Reasoned Order Violates Article 21, *Latest Laws* (Aug. 26, 2024), https://www.latestlaws.com/latest-news/hc-declares-extension-of-remand-without-hearing-or-reasoned-order-violates-article-21-230538/ (last visited Nov. 6, 2025).

[932] Snehalata D., Bombay High Court Rules Extension of Judicial Remand Without Hearing Opportunity Illegal, *LiveLaw* (Nov. 21, 2024), https://www.livelaw.in/high-court/bombay-high-court/bombay-high-court-rules-extension-of-judicial-remand-without-hearing-opportunity-illegal-section-187-bnss-306679 (last visited Nov. 5, 2025).

emphasised the constitutional requirement for the physical production of detainees within 24 hours of arrest. Failure to comply with this requirement undermines the very foundation of judicial review. Remote hearings hinder magistrates from properly assessing the physical and mental condition of detainees, creating conditions in which coercion or abuse may be obscured behind procedural compliance. This digital intermediation risks enabling a form of legalised disappearance, where the true circumstances of detainees remain concealed even as the process appears formally correct. [933] Moreover, the use of sequential FIRs and rebooking compounds the risk of such disappearances. Authorities may first arrest individuals on minor charges, only to escalate to more serious allegations—often invoking draconian statutes like the UAPA. This exploitation of BNSS's extended remand provisions allows for prolonged detention and the suppression of dissent. The experiences of journalists and activists demonstrate how these procedural flexibilities may be manipulated to facilitate extended, legally sanctioned confinement.[934]

BNSS codifies a legal structure with broad remand powers, flexible FIR protocols, and digital processing mechanisms that, while lawful on paper, enable secret detentions. Judicial safeguards against arbitrary custody extensions and inadequate production are frequently bypassed due to procedural loopholes and technological mediation. This gap between law and practice highlights an urgent need for reforms to ensure that procedural justice aligns meaningfully with constitutional liberties.

## CONCLUSION

This paper has shown that the BNSS, despite aiming to modernise criminal procedure, creates conditions for legalised vanishing. Extended police and judicial remands, sequential FIRs, and digital procedures have enabled the proliferation of secret detentions that often evade effective judicial scrutiny. Cases involving custodial abuse, the targeting of journalists, and the surveillance of minority communities make clear that these are issues that involve the system, not isolated incidents.

Even measures that are intended as safeguards, such as video-conference production or fixed custody periods, can be exploited, coerced or abused while maintaining a face of legality. Comparisons with pre-BNSS practices under the CrPC suggest that the risk of legal disappearance has grown under the new framework. To address these problems, strict

[933] Shivendra Pratap Singh, Orissa High Court Rules Delay in Filing Compassionate Appointment Application Can Be Condoned, *LiveLaw* (Nov. 25, 2024), https://www.livelaw.in/high-court/orissa-high-court/orissa-high-court-ruling-compassionate-appointment-limitation-period-307280 (last visited Nov. 4, 2025).
[934] *Bharatiya Nyaya Sanhita*, supra note 9.

enforcement of production requirements, reasonable limits on police custody, mandatory physical oversight, and robust civil society monitoring are essential. Reforming the BNSS to close procedural gaps is critical to ensuring that the law serves as a genuine protector of individual rights and constitutional freedoms, rather than permitting their erosion.

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