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*“Expressions like ‘benefit of doubt’ and ‘honourably acquitted’, used in judgments are not to be understood as magic incantations. A court of law will not be carried away by the mere use of such terminology. The conclusion that the acquittal in the criminal proceeding was after full consideration of the prosecution evidence and that the prosecution miserably failed to prove the charge can only be arrived at after a reading of the judgment in its entirety. The Court in judicial review is obliged to examine the substance of the judgment and not go by the form of expression used.”*



- **K. V. Viswanathan, J.** in

*Ram Lal v. State of Rajasthan,*  
(2024) 1 SCC 175, para 28

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## ***Lex Revolution***

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## ELECTORAL REFORM, ISSUES AND CHALLENGES IN INDIA: A CRITICAL STUDY

- Krishna Kumar Bhasker\* & Dr. Shiv Bahadur Tiwari\*\*

### *Abstract*

*This paper has been described the principle, concepts and roll of democracy in democratic country. Government is the fiction of law for running state affairs. Every political parties who achieve the mandates of people then they can made the government. Democracy is the expression of inner conscience of respective people for participating the making to government, Political parties achieve mandates through set up by their wining candidates in the election and election is the process of selection their choice between two or more things in which choose any one. If, in the process of selection involved undue influence, coercion, mistake, fraud and biasness, the result not to be free and fair. In a democracy, sovereignty is vested in the people of that country and through the process of election, people elect their representatives. In order to preserve the sovereignty of the people, democracy and adult franchise, the election process must be transparent, equitable, free and fair. In the case Rambabu Singh Thakur v. Sunil Arora<sup>1</sup>, Supreme Court directed to ECI through political parties shown criminal history and ground of selecting their each candidate in general election published data upon social media platforms and others print media. This paper highlights problems of election, election processes and reliability of ballot paper, conducting election through EVM and VVPAT.*

**Keywords:** *Democracy, Government, Political Parties, Mandates, Sovereignty, Adult Franchise, Ballot Paper, EVM, VVPAT.*

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<sup>1</sup> (2020) 3 SCC 733

## 1. INTRODUCTION

The every democratic country is governed by the law of land, law of land refers such types of documents derived the power for governing whole affaires of democratic country. The democracy is a principle and their menace 'for the people', 'by the people' and 'of the people' governance in country. The spirit of democracy securing through the free and fair election system and the election system governed to the electoral law. Under the constitution of India, 1950 lay down independent authority election commission of India and adult franchise for the purpose of electoral through conducting elections. If there the election would not be fair, where the result of election should be biased and such biased result of election to be very harmful for the democracy. In the other words, democracy is lived if the election is to be free and fair, when the election is to be the biased then democracy is died through lack of election conducting authority.

In the law of the land lay down provision relating to election of the authorities and their elections members, election divided in to two manner 1<sup>st</sup> general election and 2<sup>nd</sup> special election. General election refers to the direct will of people elected to their representative<sup>2</sup>. Special or secret election refer to mean such persons elected by the direct will of people for their representation, election of any other person by the representative will neither nor direct will of the people.<sup>3</sup>

Election is the act of choosing a person to hold public office, usually through the free will of the people in a representative democracy. The word election is derived from the Latin verb "Legere" meaning "to choose".<sup>4</sup>

According to Chamber's Law Dictionary, "election" means the public choice of a person for office, usually by the votes of a constituent body.

According to Webster's Dictionary, election connotes the act of choosing a person to fill an office or position by vote.

According to Black's Law Dictionary, "election" means the process of selecting a person to occupy a position or office usually public office.

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<sup>2</sup> The Constitution of India, arts. 80, 170 (1).

<sup>3</sup> *Ibid.*, arts. 55 (3), 66, 80, 171(4).

<sup>4</sup> Electoral Reform: An Approach to Effective Democracy, *available at*: <https://www.legalservicesindia.com/article/1198/Electoral-reform--An-approach-to-effective-democracy.html> 2019 SCC Online MP 928, decided on 27-05-2019 (last visited on May 3, 2020).

In India, the history of election may be divided into three phases, the first phase of election was based upon succession of hereditary<sup>5</sup> e.g. in election of kingship, often king's son had only the right to become king in the future. The second phase of election was dependent on residence and property, the Government of India Act, 1935 was passed to create official responsibility towards the people by introducing the system of direct elections. The said Act, which was amended twice in 1916 and 1919, also prescribed the qualifications for being a voter which included academics, payment of taxes, etc., ultimately being amended by the Government of India Act, 1935 which was enacted as a result of which electoral rolls were prepared on the basis of residence and property ownership<sup>6</sup>. And the third phase of election has been based on the Indian Constitution, 1950 after independence, Free and fair elections are one of the basic elements/pillars of any democratic country, to achieve this goal the constitutional advisors submitted their first draft in October, 1947, under which the draft was related to elections in Part XI. Later, after a detailed study of the draft by the Drafting Committee, they prepared a revised version of it in which Part XIII dealt with 'Elections', which provided all the necessary powers to the Commission to conduct elections<sup>7</sup>.

India being a democratic country, individuals in the country are allowed to form political parties. To form the government of the country, residents have to choose their representatives from among the political parties available in the country. Election is an official cluster decision making process by which people select a person to hold public office. Elections have been the common means by which modern representative democracies have functioned since the 17th century. Elections can fill the ranks of the legislature, sometimes the executive and judiciary, and regional and local government. This process is also used in many other private and business official houses, from clubs to charitable associations and corporations. Our discussion is limited to Part XV of the Constitution of India which deals with Articles 324 to 329.<sup>8</sup>

India is a constitutional democracy with a parliamentary system of government, and at the core of this system lies a commitment to holding regular, free and fair elections. These elections determine the structure of the government, membership of both houses of parliament, and local authorities. Article 83(2)<sup>9</sup> and Article 172(1) of the Constitution of India provides for a term of

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<sup>5</sup> *Ibid.*

<sup>6</sup> *Supra* note 4.

<sup>7</sup> *Ibid.*

<sup>8</sup> Abhishek Rajesh Bhattacharjee, "Constitutional Provisions for Elections in India" 1 Issue 2 *IJLSI* 2(2019). *available at*: <https://www.ijlsi.com/wp-content/uploads/2019/07/Constitutional-Provisions-for-Elections-in-India.pdf> (last visited on May 7, 2020).

<sup>9</sup> *Supra* note 2, art. 83(2).

five years for the House of the People and the State Legislative Assembly respectively from the date of its first meeting, unless earlier dissolved. Article 83(2) of the Constitution provides that when a Proclamation of Emergency is in force, the term of the House may be extended by Parliament by law for a period not exceeding one year at a time and in no case cannot be increased more than a period of six months after the coming into force of the Proclamation. A similar provision exists for the State Legislative Assembly under the provision of Article 172(1) of the Constitution<sup>10</sup>. Article 85 (2) (b) of the Constitution of India provides the President with the power to dissolve the House of the People. Similar provision for dissolution of State Legislative Assemblies by the Governor of the State is provided under Article 174 (2) (b) of the Constitution.

The Constitution of India protected the rights of the voter. Constitutional provisions provide protection as well as freedom of choice to every voter. Article 14<sup>11</sup> of the constitution of India read with Article 326<sup>12</sup> gives equality to the voter in the form of one person one vote. When we talk about electoral reforms, we are not only talking about the fundamental right of millions of voters to have free and fair elections, but we are also bringing forward the collective right of those citizens to have a leader whose credibility is not tarnished. The urgency of electoral reforms is violating the fundamental rights of millions of citizens.

In India every five years after the previous conducted election contested the general election for the members of parliament, members of legislative assembly of the states, government of village and municipalities by the election commission of India through itself and their respective states commission of election. The cost of conducting election fulfilled, supplement and paid in to revenue by the government and each election invest to apart of economic of Indian revenue investing in election of MP, MLA<sup>13</sup> and election of village Panchayat<sup>14</sup> and municipalities<sup>15</sup> and vacant seat of MP, MLA and other elections of vacant seat through casualties. A lot of investment of money in conducting elections burden upon the revenue of India, such election is very costly and unhealthy to the country and their publics. After the elections, increase uncontrolled rates of commodities its unnecessary burden to be on the nation and their public, thus the types of activities called in general 'Mehangai'.

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<sup>10</sup> *Supra* note 2, art. 172.

<sup>11</sup> M. P. Jain, *Indian Constitutional law* 47 (LexisNexis, Haryana, India, 8<sup>th</sup> edn., 2018).

<sup>12</sup> *Supra* note 11 at 983.

<sup>13</sup> *Supra* note 2, arts. 81, 171(1).

<sup>14</sup> *Supra* note 2, art. 243-C (2) of Part IX.

<sup>15</sup> *Supra* note 2, art. 243-R of Part IX-A.

The purposes of election diluted involvement to the some elements such as follow use of money, misuse of powers, interference of the criminals and crime and use of technical assistances etc. the election reform has securing to lose money, which is the unnecessarily use in the time of election named such as 'cost of election'. When the criminal history sheeted person participated in election as a candidate then the more probability made such candidate use fear and criminal force for wining their election because the election not to be free and fair. The several incidents' committed lack of election authorities should not done works properly and fair often that the election results affected by such types of incidents thus the reason election is not to be free and fair.

In the case *Rambabu Singh Thakur v. Sunil Arora*<sup>16</sup> Supreme Court directed to ECI through political parties shown criminal history and ground of selecting their each candidate in general election published data upon social media platforms and others print media.

Recently in this case *Ashwinbhai Kamsubhai Rathod v. Bhailalbhai Kalubhai Pandav*<sup>17</sup> the High Court of Gujarat at Ahmedabad the election of 58-Dholka Constituency of Gujarat conducted in December 2017 and their result declared void and unconstitutional by the court. The brief fact of the case it is that the General Election to the Gujarat Legislative Assembly held in December 2017, for 58-Dholka constituency. Shri Ashwinbhai Kamsubhai Rathod (Petitioner) was a candidate fielded by the Indian National Congress Party. Shri Bhupendrasinh Manubha Chudasama (respondent no. 2) was the candidate fielded by the Bharatiya Janata Party. The said election was held on 14.12.2017. The counting of votes took place on 18.12.2017 and the result of the said election was declared on the same date. As per the result of the said election, Shri Bhupendrasingh Manubha Chudasama (Respondent No. 2) is the elected candidate by securing a total of 71530 votes, out of which 71189 votes were received through EVM and 341 votes were received through postal ballots. The petitioner received a total of 71203 votes, out of which 70675 votes were received through EVMs and 528 votes were received through postal ballots. The margin of victory of respondent no. 2 over the petitioner is 327 votes.

The petitioner has challenged the election result on several grounds such as illegal rejection / exclusion of postal ballot papers, systematic manipulation of election records by the returning officer. Violation of mandatory directives issued by Election Commission like counting of votes, preparation of records and declaration of result as well as misuse of public office.

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<sup>16</sup> *Supra* note 1

<sup>17</sup> *Ashwinbhai Kamsubhai Rathod v. Bhailalbhai Kalubhai Pandav*, available at: [https://www.livelaw.in/pdf\\_upload/pdf\\_upload-374695.pdf](https://www.livelaw.in/pdf_upload/pdf_upload-374695.pdf) (last visited on Jun 6, 2020)

## 2. ISSUES AND CHALLENGES RELATING TO THE ELECTORAL REFORM

In the electoral reform have been several issues taken place like, “*free and fair election, fair election process, polling booth capturing, tampering of instruments and impact of criminal history sheeted candidates*”. Every election is the expression of the peoples will for does something their future betterment. Therefore this reason election ought to be free and fair. Fair election process denotes such process initiated in election should transparent, not ambiguous. Polling booth capturing is the technique, initiated in election for fulfilling own wishes. It is the serious nature of offence in election laws. Tampering process used in machine/instruments or similar devices for manipulating their functions.

Impact of criminal history sheeted candidate, visualized in the every election directly and indirectly they are created fear in the public for the purpose of winning their election e.g. recently in the case *Jamuna v. Secretary to Government*.<sup>18</sup> The high court of Madras asked to representative of central government “*Why not the Central government enact a law to prohibit candidates with criminal background contesting the election to the parliament as well as state legislatures as suggested by the Constitution Bench of the hon’ble Supreme Court on 25/09/2018 in Public Interest Foundation v. Union of India?*” 2019 (3) SCC 224. The picture has been crystal clear, such types of candidate hits purity of election.

Recently in the case, the High Court of Gujarat, held the election of 58-Dholka Constituency of Gujarat conducted in December 2017 and their result declared void and unconstitutional on the basis malpractice of concerned authorities<sup>19</sup>.

In the case *Umesh Kumar Bohare v. Union of India*,<sup>20</sup> The high court of Madhya Pradesh, It was observed that it was clear that the public issue being raised here was in relation to the alleged incident of disappearance of 19 lakh EVMS (Electronic Voter Machines) during the 2019 parliamentary elections. The court further said that however this is a serious matter. What was noteworthy was that the information collected by the petitioner was based on unconfirmed, unverified and unreliable newspaper reports. The petitioner made a representation to the Election Commission of India regarding his above mentioned complaint. The court held, “*court is of the considered view that pleadings herein lack bare essential material to impel this court to initiate the process of*

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<sup>18</sup> *Jamuna v. Secretary to Government*, available at: [https://www.livelaw.in/pdf\\_upload/pdf\\_upload-380283.pdf](https://www.livelaw.in/pdf_upload/pdf_upload-380283.pdf) (last visited on Aug. 23, 2020).

<sup>19</sup> *Supra* note 17

<sup>20</sup> 2019 SCC On Line MP 928, decided on 27-05-2019], available at: <https://www.scconline.com/blog/Post/2019/06/08/mp-hc-allegations-regarding-theft-of-evms-must-be-based-upon-essential-material-to-impel-court-to-nitiate-djudication/> (last visited on May 5, 2020).

*adjudication of the alleged public cause and therefore, this court declines interference.*” Therefore, the petition was dismissed, giving liberty to the petitioner to present his case before the Election Commission of India.

A group of former senior civil servants have alleged serious irregularities in the conduct of the 2019 Lok Sabha elections “there is no doubt that the mandate of 2019 has been thrown into serious doubt.” The issues raised in the letter that serious violations of the Model Code of Conduct by the Ruler, those that were ignored by the election authority, such as allegations of voter exclusion; blatant media violations, including the rise of Namo TV and doubts of bias in the election, raise many concerns related to electronic voting machines. The perception has become entrenched that our democratic process is being distorted and undermined by the powerful constitutional authority to protect its sanctity.<sup>21</sup>

### 3. CHALLENGES

In the present time, several challenges arisen the electoral reform in India, they are some as given below:

- Prohibition of criminals in the election,
- Conducting the free and fair election,
- Prevent money and mescals power in election,
- Control of irregularities of election administration and
- Protection of voter’s rights etc.

Election reform is where the electoral systems we use are improved to help the public express their wishes at the polls. The most prominent form of electoral reform is where the voting system (how votes are converted into seats) is changed. Yet, electoral reform is broader than just the voting system. This also includes improving vote counting procedures, constituency boundaries, eligibility to vote, voter protection and election workers, the financing of election and referendum campaigns, how ballot papers are designed and what voting equipment is used and how candidates and political parties can nominate and get their names on the ballot papers. In India, the group most pressing for reform in the way our elections are run is the Electoral Reform Society.<sup>22</sup>

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<sup>21</sup> “National” *The Hindu*, July 04, 2019.

<sup>22</sup> Electoral Reform, *available at*: <https://www.tutor2u.net/politics/reference/electoral-reform> (last visited on May 5, 2020)

#### **4. LEGAL LEGISLATIONS, COMMISSION AND COMMITTEES**

In India, there are various laws related to the conduct of elections. Both central and state elections are conducted in different ways. But, there are almost similarities in the laws governing the conduct of elections to Parliament and State Legislature. These are the given below:

- The Representation of the People Act, 1950
- The Representation of the People Act, 1951
- The Registration of Electors Rules, 1960
- Conduct of Election Rules, 1961
- The Conduct of Election Rules (Amendment), 2013
- The Conduct of Election Rules (Amendment), 2016
- Election Symbols Order, 1968
- Presidential and Vice-Presidential Rules, 1974
- Anti-defection Law, 1985

All recent committees on politics and electoral reforms have almost unanimously observed the criminalization of our political system. The criminalization of politics takes many forms, but perhaps the most worrying among them is the large number of elected representatives who have criminal charges pending against them. The topic of electoral reforms has recently been raised by several government committees, including, but not limited to:

- Committee on Electoral Reforms (1990)
- Vohra Committee Report (1993)
- Gupta Committee on State Funding of Elections (1998)
- Law Commission Report on Reform of the Electoral Laws (1999)
- National Commission to Review the Working of the Constitution (2001)
- Election Commission of India – Proposed Electoral Reforms (2004)
- The Second Administrative Reforms Commission (2008)

#### **5. JUDICIAL PRONOUNCEMENTS**

Indian judiciary is the guardian of Indian Constitution and played the role of protector our fundamental, constitutional and legal rights. The courts have protected the constitutional-legal rights relating to voters and their candidature. Apex judiciary has pronouncement verdict from

time to time in some important cases, which is case relating to election and electoral reform. These are some important cases given below namely-

The rule of law and free and fair elections are the basic features of a democracy (*Kihoto Hollohan v. Zachillhu*).<sup>23</sup> The Supreme Court of India has time and again fortified the essence of free and fair elections in a democracy (*Indira Nehru Gandhi v. Raj Narain*)<sup>24</sup>. Elections in India have caused a great deal of concern in the legislature, the judiciary, and the executive alike. In *Common Cause (A Registered Society) v. Union of India*<sup>25</sup> the Court dealt with election expenses incurred by political parties and held that purity of election is fundamental to democracy and the Commission can ask the candidates about the expenditure incurred by the candidates and by a political party. The Supreme Court's judgment in 2013 in the *Subramanian Swamy v. ECI*<sup>26</sup> case stated that it is necessary that in elections conducted through EVMs, a system of voter verifiable paper audit trails should be implemented so that the voters can satisfy themselves that His vote was correct and recorded. The court judgment and the need for voter confidence and transparency in the election process gave rise to mechanisms for random cross-verification of EVM and VVPAT counts. This was to detect any technical glitch or wrong programming of the EVMs. The case *Rambabu Singh Thakur v. Sunil Arora*<sup>27</sup>, Supreme Court directed to ECI through political parties shown criminal history and ground of selecting their each candidate in general election published data upon social media platforms and others print media. The case *Ashwinbhai Kamsubhai Rathod v. Bhailalbai Kalubhai Pandav*<sup>28</sup> the High Court of Gujarat at Ahmedabad the election of 58-Dholka Constituency of Gujarat conducted in December 2017 and their result declared void and unconstitutional by the court on the basis malpractice of concerned authorities.

## 6. CONCLUSION AND SUGGESTION

When we come to the conclusion on the above fact mentioned, our study finds that the characteristic of democracy is the basic structure of the Indian Constitution as declared by the Supreme Court in the case of *Kihoto Hollohan v. Zachillhu*<sup>29</sup>. About election one most important think is should be free and fair, our lawmakers framed several laws for achieving the goal of free and fair election but recently several incidents have taken place in general election

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<sup>23</sup> AIR 1993 SC 412.

<sup>24</sup> (1975) 2 SCC 159.

<sup>25</sup> 1996 (2) SCC 752.

<sup>26</sup> 2013 (10) SCC 500.

<sup>27</sup> *Supra* note 1.

<sup>28</sup> *Supra* note 17.

<sup>29</sup> *Supra* note 23.

e.g. EVMs missing matter, criminalizes political parties system and malpractice committed by concerned authorities thus, the reasons of electoral reforms is to be necessary. Requirements related to elections which are enshrined in the Constitution. Electoral reform describes the process of introducing fair electoral schemes where they are not applicable or improving the fairness or efficacy of existing systems. Psychology is the study of results and other data related to elections (especially with a view to predicting future outcomes). Election means “to choose or decide”, and so sometimes other types of voting such as referendums are denoted as elections, especially in India.

Today we are needed to be healthy and fair election but when we are looked the election is not to free and fair it has been combination of healthy and unhealthy election. Election are effected some reasons e.g. misuse of power and money, breach of duty, pressures of political persons and other sources who effect directly or indirectly (criminal activities). Then we are called it unhealthy election. There is the reason why need to electoral reform.

Recently some important cases discussing needs, issues and challenges of electoral reforms like, *Umesh Kumar Bohare v. Union of India*<sup>30</sup>, 19 Lakhs EVM missing related case state of Madhya Pradesh, *Rambabu Singh Thakur v. Sunil Arora*<sup>31</sup>, publication of candidate criminal history on social media and print media related case of Supreme Court, *Ashwinbhai Kamsubhai Rathod v. Bhailalbhai Kalubhai Pandav*<sup>32</sup>, corrupt practice of election authorities related case state of Gujarat and *Jamuna v. Secretary to Government*<sup>33</sup>, Ministry of Home Affair and others, prohibit criminal background candidates related case state of Madras.

This paper suggested to government and concerning authorities of electoral reform take necessary action for preventing such types of phenomenon and not repeated in future.

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<sup>30</sup> *Supra* note 20.

<sup>31</sup> *Supra* note 1.

<sup>32</sup> *Supra* note 17.

<sup>33</sup> *Supra* note 18.

**OUTLINING EUTHANASIA AND THE COUNTRIES WITH  
EXISTING STATUTORY FRAMEWORK TO POSITIVELY REGULATE  
'ACTIVE EUTHANASIA'**

- Mayank Dubey\*

***Abstract***

*Euthanasia (Mercy Killing) is the practice of terminating the life of an individual to bring an end to their suffering. Compassion is integral to the practice of Euthanasia but the varying sense of bioethics and morality across different countries of the world has led to the variance in the legislations governing this intricate concept in different jurisdictions. This article aims towards outlining Euthanasia and its classifications while mentioning the countries which have statutory framework in place for positively regulating 'Active Euthanasia' which entails compassionate ending of a patient's suffering through deliberate steps (like administering a lethal injection).*

**Keywords:** *Euthanasia, Mercy Killing, Suicide, Physician Assisted Suicide.*

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## 1. INTRODUCTION

The concept of 'Euthanasia' (etymologically derived from the Greek phrase for 'Good Death') is not new to the scholars of Law and in the simplest terms can be defined as the act of deliberately ending someone's life to put them out of their misery.<sup>1</sup> Owing to the presence of varying degree of intricacies in socio-legal fabrics across legal systems, which is further complicated by the existence of countless view points in the moral outlook of individuals, the concept of Euthanasia despite its conspicuously noble intent of 'Mercy Killing' i.e. bringing an end to an individual's suffering, is quite difficult to legislate upon in its entirety.<sup>2</sup> It is one of the most deliberated upon concept in the modern Bio-Ethics.<sup>3</sup>

## 2. CLASSIFICATION OF EUTHANASIA

### A. Classification On the Basis of Dying Individual's Informed Consent

Based upon the degree of informed consent furnished by the dying individual in the euthanizing action, the act of Euthanasia can broadly be classified into three categories:<sup>4</sup>

- 1) Voluntary Euthanasia
- 2) Non-Voluntary Euthanasia
- 3) Involuntary Euthanasia

'Voluntary Euthanasia' entails ending the life of an individual in the presence of their informed and manifested consent and covers within itself a range of scenarios, such as those involving request from an individual: to help them with ending their life; to refuse or request to discontinue an ongoing medical/diet treatment and support; or, to basically deciding to end their life.<sup>5</sup>

'Non-Voluntary Euthanasia' involves the cases of the individuals who are incapable of deciding about ending their life and therefore there is no way for them to communicate their decision and provide their consent. It includes (but is not limited to) the cases where an individual, is in Coma (or Persistent Vegetative State); is too young (baby); is clinically senile (disorientated); severely

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<sup>1</sup> Robert Young, "Voluntary Euthanasia" in Edward N. Zalta (Ed.) *The Stanford Encyclopaedia of Philosophy* (Summer 2022 Edn); available at: <https://plato.stanford.edu/archives/sum2022/entries/euthanasia-voluntary/>

<sup>2</sup> Helga Kuhse, Bioethics News, *Background Briefing* Vol.11, July 1992 p. 40

<sup>3</sup> P Borry, P Schotsmans & K Dierickx, 'Empirical Research in Bioethical Journals. A Quantitative Analysis', *Journal of Medical Ethics*, Vol 32 (4) 2006 pp. 240-245

<sup>4</sup> *Supra* note 2.

<sup>5</sup> Voluntary and Involuntary Euthanasia, (Ethics Guide By BBC), available at: <https://www.bbc.co.uk/ethics/euthanasia/overview/volinvol.shtml>

mentally challenged; severely brain damaged; or, so extremely disturbed that they are capable of causing self-harm are to be protected from their own being.<sup>6</sup>

‘Involuntary Euthanasia’ can be defined as the act of euthanizing an individual who despite their capability to provide an informed consent, did not consented to ending their life, either because they wanted to live or because their consent was never procured to begin with.<sup>7</sup> This form of Euthanasia is presently punitive across jurisdictions and barring a few extenuatingly clear cases, its criminality is unanimously established across the prevalent legal spectrum. Often quoted example of Involuntary Euthanasia includes A shooting B to avoid B from suffering after falling into the hands of a sadistic torturer.<sup>8</sup> But such examples are rare and fear of inadvertent legalization of Involuntary Euthanasia cases is often cited as an argument for not changing the illegality of (primarily Voluntary) Euthanasia across various legal systems, where the debate of legalizing it is still ongoing.<sup>9</sup>

### ***B. Classification On the Basis of Euthanizing Manner***

On the basis of the manner in which the euthanizing action is performed, the above mentioned three categories of Euthanasia can further be sub-categorized into the following two categories:<sup>10</sup>

1. Passive Euthanasia
2. Active Euthanasia

Passive Euthanasia, can be explained as a euthanizing act in which the treatment/procedure required for the furtherance of life is withheld out of compassion, ultimately leading to the death of the individual involved.<sup>11</sup> It does not involve an active act of taking someone’s life and rather manifests ‘not saving’ the life of the said individual.<sup>12</sup> In simplest terms, Passive Euthanasia is more of an omission and less of an act.

On the other hand, Active Euthanasia is considered to have taken place if deliberate steps are taken to end a patient’s life for compassionate reasons and would actually cover the scenarios like giving lethal injection to do so.<sup>13</sup> As it is obviously opposite to the passive Euthanasia in

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<sup>6</sup> *Ibid.*

<sup>7</sup> Jennifer Jackson, *Ethics in Medicine* Polity Press, Cambridge, 2006 p. 137

<sup>8</sup> *Supra* note 2.

<sup>9</sup> N Harris, “The Euthanasia Debate”, *Journal of the Royal Army Medical Corps* (2001) pp. 147, 367-370.

<sup>10</sup> J Rachels, “Active & Passive Euthanasia”, *The New England Journal of Medicine* (Vol. 292 (2) 1975) pp. 78-80; available at: <https://doi.org/10.1056/NEJM197501092920206>.

<sup>11</sup> *Supra* note 9.

<sup>12</sup> *Aruna Ramchandra Shanbaug v. Union of India*, 2011(3) SCALE 298

<sup>13</sup> *Supra* note 9.

nature, it involves a conscious action to end life and deviates from an omission to save life. And interestingly enough, there can be circumstances such as those involving the usage of increasingly lethal doses of pain-management medicines, to sustain an individual's life and it creates a dilemma as to whether such administration of drugs shall be classified as Active form of Euthanasia or Passive form of Euthanasia.

### 3. WHAT DIFFERENTIATES EUTHANASIA FROM 'PHYSICIAN ASSISTED SUICIDE'?

At this juncture in this write-up, i.e. right before unearthing the heterogeneity across legal systems of the world that surrounds the debate on Euthanasia, it is prudent to mention that how different it is from 'Physician Assisted Suicide' which involves the assistance from a Medical Practitioner to an individual in taking their life.<sup>14</sup> 'Physician Assisted Suicide' is another bioethically debatable method of ending an individual's life and the jurisprudence surrounding it can fundamentally be different from the legal discourse surrounding Euthanasia.<sup>15</sup>

Core difference between Euthanasia and PAS lies in the fact that while Euthanasia is an act involving the compassionate ending of the life of one individual by other individual/s, Physician Assisted Suicide involves an action on behalf of a qualified physician (medical practitioner) as assistance to an individual, thereby enabling the said individual to 'commit suicide' i.e. to end their own life.<sup>16</sup> It would also include any deliberate act of counselling by the Physician regarding the fatal doses of a toxic substance; prescribing the same; and of course supplying it to the concerned individual.<sup>17</sup>

The legal provisions regarding Physician Assisted Suicide can differ from the same for Euthanasia across various legal systems; e.g. despite Euthanasia being illegal in the United States of America, Assisted Suicide is legal in its 10 out of 50 states, namely: Hawaii, New Jersey, Maine, Vermont, California, Colorado, District of Columbia, Oregon, Washington and

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<sup>14</sup> E J Emanuel, B D Onwuteaka-Philipsen & John W Urwin, "Attitudes and Practices of Euthanasia and Physician Assisted Suicide in The United States, Canada, And Europe" *JAMA*, Vol. 316 (1) 2016 pp. 79-90.

<sup>15</sup> Jagadish Rao Padubidri, Matthew Antony & Tanya Singh, "Euthanasia: A Good Death or An Act of Mercy Killing: A Global Scenario", *Clinical Ethics*, 17(2) 2022 pp. 118-121.

<sup>16</sup> B Vanovic, V Turanjanin & A Miloradovic, "An Ethical Review of Euthanasia and Physician-Assisted Suicide", *Iranian Journal of Public Health* Vol. 46 pp.173-179.

<sup>17</sup> St Murphy, "Canadian Medical Association And Euthanasia And Assisted Suicide In Canada: Critical Review Of CMA Approach To Changes In Policy And Law, 2018, available at: <http://dx.doi.org/10.2139/ssrn.3255699>.

Montana.<sup>18</sup> But going into the fine points of Physician Assisted Suicide is beyond the scope of this article.

#### 4. JURISDICTIONS WHICH ALLOWED ACTIVE EUTHANASIA IN PARTICULAR CASES

The legality of Euthanasia is fluctuating across different countries of the world and extent of its legality within an individual country is also a subject-matter of variety.<sup>19</sup> In the light of this, here is an outline of countries which have taken the initiative to legalize ‘Active’ Euthanasia, at least in certain qualified circumstances:

##### 1. AUSTRALIA

Voluntary Assisted Dying is legal across all the states of Australia (barring a few territories) and as of 2023, almost 97% of Australian population is living in a society where it is legal, subject to a series of laws to this effect.<sup>20</sup> Albeit these laws are restrictive in the approach, they do permit Voluntary Assisted Dying in cases where an individual is medically diagnosed with an agonizing medical condition that is advanced, untreatable, permanent and causes unbearable suffering, and is most likely to cause that individual’s death in the upcoming six months (twelve months in case of neurodegenerative patients).<sup>21</sup> Prior to the passing of such enabling laws, acts of Assisted Dying were considered criminal in nature across Australia.<sup>22</sup>

##### 2. BELGIUM

Euthanasia is legal in Belgium and became so when the Belgian House of Representatives (the Lower House of the Belgian Parliament) passed the ‘Belgian Euthanasia Act, 2002’ and which came into effect on September 23<sup>rd</sup>, 2002.<sup>23</sup> The Act was already passed by the Belgian Senate (the Upper House of the Belgian Parliament) in the preceding year.<sup>24</sup>

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<sup>18</sup> *Supra* note 15.

<sup>19</sup> *Supra* note 15.

<sup>20</sup> Eliana Close, Lindy Willmott, Ben P. White, “Voluntary Assisted Dying: Peak Bodies Must Provide Practical Guidance”, *Internal Medicine Journal* Vol. 52(6), 2022, pp. 926-931, *available at*: <https://doi.org/10.1111/imj.15805>.

<sup>21</sup> A H Mallon, “Assisted Dying as A Global Public Health Priority” *In: P Liamputtong (Eds)” Handbook of Social Sciences And Global Public Health”* Springer, 2006) pp. 1-25, *available at*: [https://doi.org/10.1007/978-3-031-25110-8\\_32](https://doi.org/10.1007/978-3-031-25110-8_32)

<sup>22</sup> *R v. Justins* [2011] NSWSC 568

<sup>23</sup> M Adams & H Nys, “Comparative Reflections on The Belgian Euthanasia Act 2002”. *Medical Law Review*, Vol. 11(3) 2003, pp 353-376; *available at*: <https://doi.org/10.1093/medlaw/11.3.353>

<sup>24</sup> *Ibid.*

Post passing of this law which legalized Euthanasia in Belgium, it was observed that most individuals who resorted to the ending of their lives in this discourse, were in extreme pain and majority of them were terminally ill.<sup>25</sup>

### 3. CANADA

In Canada, Medical Assistance in Dying (or MAiD) is the umbrella term for Assisted Suicide and Euthanasia.<sup>26</sup> In 2015, the Supreme Court of Canada in a landmark judgment observed that a complete ban on Euthanasia and Assisted Dying is against the Constitutional rights of life, liberty and security of an individual.<sup>27</sup> In response to this, the Parliament of Canada enacted Bill C-14 in 2016, allowing for Euthanasia and Assisted Suicide in cases of capable and consenting adults who have any serious physical condition (disease, illness, or disability), with a “Reasonably Foreseeable Natural Death” (RFND) and an irreversible decline of capability, and intolerable psychological and/or physical suffering.<sup>28</sup>

The Parliament further widened the ambit of its provisions regarding Euthanasia by passing the Bill C-7 in 2021, which removed the requisite of RFND as laid by the C-7 Bill and opened a new path for persons with disabilities who are not approaching their natural death, to be covered under the MAiD provisions.<sup>29</sup> It is crucial to note that Canada effectively discourages ‘suicide tourism’ and only allows MAiD for those who have access to the Health Insurance regimen of the country.<sup>30</sup>

### 4. COLOMBIA

In the year 1997, The Constitutional Court of Colombia had legalized Voluntary Euthanasia for terminally ill patients who have given clear permission to do so and this judgment is still

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<sup>25</sup> Tinne Smets, Johan Bilsen, Joachim Cohen, Mette L Rurup & Luc Deliens, “Legal Euthanasia in Belgium Characteristics of All Reported Euthanasia Cases”, *Medical Care*, Vol 48 (2) 2010 pp. 187-192; available at: <https://doi.org/10.1097/MLR.0b013e3181bd4dde>

<sup>26</sup> Darryl Pullman, “Slowing the Slide Down the Slippery Slope of Medical Assistance In Dying: Mutual Learnings For Canada And The Us”, *The American Journal On Bioethics* Vol 23(11) 2023 pp 64-72.

<sup>27</sup> *Carter v. Canada* (Attorney General), 2015 SCC 5 (CanLII)

<sup>28</sup> Ramona Coelho, John Maher, K. Sonu Gaiind & Trudo Lemmens, “The Realities of Medical Assistance in Dying in Canada” *Palliative & Supportive Care* Vol 21(5) 2023 pp. 871-878; <https://doi.org/10.1017/S1478951523001025>

<sup>29</sup> Trudo Lemmens, “When Death Becomes Therapy: Canada’s Troubling Normalization Of Health Care Provider Ending Of Life”, *The American Journal On Bioethics* Vol 23 (11) 2023 pp 79-84; <https://doi.org/10.1080/15265161.2023.2265265>

<sup>30</sup> Konstanin Tretyakov & I Glenn Cohen, “Medical Assistance in Dying And ‘Suicide Tourism’ To Canada: Bill C-14 From A Comparative Perspective” *Journal of Ethics in Mental Health* (2016) Harvard Public Law Working Paper No 16-44, available at: <https://ssrn.com/abstract=2816582>.

considered debatable in the country from the date it was pronounced.<sup>31</sup> It made Colombia to be the first country in the Latin-American sphere that neutralized the penalty for Assisted Suicide.<sup>32</sup> The same Court then extended the same right to ‘non-terminal patients’ as well, through its judgment in July, 2021.<sup>33</sup>

## 5. LUXEMBOURG

In the year 2009, the Parliament of Luxembourg passed the ‘The Law On Euthanasia And Assisted Suicide’ (In French: Loi sur l’euthanasie et l’assistance au suicide) which led to the decriminalization of Euthanasia in the country.<sup>34</sup> The law also has a detailed portion dedicated to palliative care enshrined in it.<sup>35</sup> Any individual who anticipates acute physical pain and suffering in the future or is unconscious and/or incompetent but have manifested their desire to be euthanized while they were conscious and competent while manifesting said desire, can be legally subjected to Euthanasia.<sup>36</sup>

As a safeguard and to prevent abuse of the law, it is made statutorily mandatory that the consultation will be sought from a competent independent physician (different from the physician treating the Patient and the Patient themselves) and who would endorse that there is no other better outcome than Euthanasia or Assisted Suicide to end the Patient’s suffering.<sup>37</sup>

## 6. NETHERLANDS

The ‘Termination of Life on Request and Assisted Suicide (Review Procedures) Act’ which was passed by the Dutch Parliament in 2001 and came into enforcement from April 1<sup>st</sup>, 2002, is the core legislation which legalized Euthanasia and Assisted Suicide in Netherlands, when the criteria

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<sup>31</sup> Mike Ceaser, “Euthanasia In Legal Limbo In Colombia”, *The Lancet* Vol. 371, 2008 pp 290-91; *available at*: [https://doi.org/10.1016/S0140-6736\(08\)60150-6](https://doi.org/10.1016/S0140-6736(08)60150-6).

<sup>32</sup> Luke Taylor, “Colombia Becomes First Latin American Country to Decriminalize Assisted Suicide”, *British Medical Journal* Vol.377 2022 p. 1219; *available at*: <https://doi.org/10.1136/bmj.o1219>.

<sup>33</sup> Joe Parkin Daniels, “Colombia Euthanasia Cases Prompt Regional Debate”, *The Lancet* (2022, Volume 399, Issue 10322) p. 348; *available at*: [https://doi.org/10.1016/S0140-6736\(22\)00098-8](https://doi.org/10.1016/S0140-6736(22)00098-8).

<sup>34</sup> Rory Watson, “Luxembourg is to Allow Euthanasia From 1 April”, *British Medical Journal* Vol. 338 2009 p. 1248; *available at*: <https://doi.org/10.1136/bmj.b1248>.

<sup>35</sup> Jocelyn Downie, Mona Gupta, Steffano Cavalli & Samuel Boulin, “Assistance In Dying: A Comparative Look At Legal Definitions” *Death Studies* Vol. 46 (7) 2022 pp. 1547-1556; *available at*: <https://doi.org/10.1080/07481187.2021.1926631>.

<sup>36</sup> MJ Shariff, “Assisted Death and The Slippery Slope-Finding Clarity Amid Advocacy, Convergence & Complexity” *Current Oncology* Vol.19(3) 2012 pp. 143-54

<sup>37</sup> *Ibid.*

established in this statute is met.<sup>38</sup> As per the criteria laid out in the Act, a physician is allowed to euthanize/assist in suicide without fearing prosecution when following conditions are met:<sup>39</sup>

- (i) The suffering of the patient is unbearable and showing no sign of reducing.
- (ii) Request of the patient is voluntary and persistent.
- (iii) Patient is well aware of their medical condition and outcomes.
- (iv) There is no alternative to death as being the only way the patient's suffering.
- (v) Consultation and seconding of the decision by an independent physician.
- (vi) The termination of life shall be done with proper care, by either Doctor or patient, in the presence of a Doctor.

Furthermore in 2004, the country also shaped 'The Groningen Protocol', which provided for the criteria to be met for euthanizing critically sick infants.<sup>40</sup>

## 7. NEW ZEALAND

In New Zealand, a request to allow Voluntary Euthanasia made by a competent individual can now be allowed under the 'End of Life Choice Act of 2019', which came into force from September 7<sup>th</sup> of 2021, after a binding referendum among the public of New Zealand, which held alongside the General Elections in New Zealand in the year 2020.<sup>41</sup>

As per the criteria, only the citizens of New Zealand who are aged eighteen years or more, and; are suffering from terminal illness, and; who in the expert opinion of physicians are likely to die within six months because of the said illness, can request for the ending of their life under the 'End of Life Choice Act of 2019'.<sup>42</sup> But at the same time, it is really important to highlight that

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<sup>38</sup> Pauline S. C. Kouwenhoven, Ghislaine J. M. W. van Thiel, Agnes van der Heide, Judith A. C. Rietjens & Johannes J. M. van Delden, "Developments In Euthanasia Practice In The Netherlands: Balancing Professional Responsibility And The Patient's Autonomy", *European Journal of General Practice* Vol 25(1) 2019 pp. 44-48; available at: <https://doi.org/10.1080/13814788.2018.1517154>

<sup>39</sup> JA Rietjens, PJ van der Maas, BD Onwuteaka-Philipsen, JJ van Delden & A van der Heide, "Two Decades of Research on Euthanasia from the Netherlands. What Have We Learnt and What Questions Remain?" *Journal of Bioethical Inquiry* Vol 6 (3) 2009 pp. 271-283; available at: <https://doi.org/10.1007/s11673-009-9172-3>.

<sup>40</sup> Eduard Verhagen & Pieter J.J. Sauer, "The Groningen Protocol--Euthanasia in Severely Ill Newborns", *The New England Journal of Medicine* Volume 352, 2005 pp. 959-962; available at: <https://doi.org/10.1056/NEJMp058026>

<sup>41</sup> S Richardson, "An International Expansion in Voluntary Euthanasia/Assisted Dying: The Implications for Nursing" *International Nursing Review* Vol 70 (1) 2022 pp. 17-21; available at: <https://10.1111/inr.12807>

<sup>42</sup> J Young, J Snelling, S Beaumont, et al "What Do Health Care Professionals Want To Know About Assisted Dying? Setting The Research Agenda In New Zealand" *BMC Palliative Care* Vol 22 (1) 2023; available at: <https://10.1186/s12904-023-01159-8>.

‘Assisted Suicide’ is still criminally punishable in New Zealand and tantamount to aiding and abetting of a suicide.<sup>43</sup>

## 8. SPAIN

Through ‘Organic Law for the Regulation of Euthanasia’ (LORE), Spain gave effect to the countrywide legalization of Euthanasia and Assisted Suicide and laid down the guidelines and criteria to be adhered to for the same.<sup>44</sup> It was passed on March 18<sup>th</sup> 2021 and came into effect on June 25<sup>th</sup> 2021.<sup>45</sup>

As per LORE, patients suffering from severe and incurable disease (such as Cancer); or, a severe, chronic, and disabling suffering (such as Amyotrophic Lateral Sclerosis), which cannot be better handled by any other method, are eligible to seek permission and/or assistance to end their life.<sup>46</sup> But this has sparked a debate, questioning the inclusion of ‘mental suffering’ as one of the eligible criteria for requesting Euthanasia/Assisted Suicide in Spain, as those opposing the said inclusion opine that there can be certain mental disorders which can hamper the decision-making competence of the patient making the request.<sup>47</sup>

In the first five months of the legalization of this Euthanasia/Assisted Suicide practice in Spain, a total of 173 requests for Euthanasia/Assisted Suicide were presented before the authorities, out of which 75 were carried out and remaining 98 were not carried out for reasons such as withdrawal/rejection of request, death during the decision-making period etc.<sup>48</sup>

## 5. CONCLUSION

Despite its long history of origin and near consistent global presence as a concept, Euthanasia and the long list of laws regulating it in various countries tend to vary a lot in letter and spirit. The difference is while primarily due to the varying sense of morality, it also points out towards

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<sup>43</sup> Section 179, New Zealand Crimes Act of 1961

<sup>44</sup> YA Picón-Jaimes, ID Lozada-Martinez, et al, “Euthanasia and Assisted Suicide: An In-Depth Review of Relevant Historical Aspects”, *Annals of Medicine & Surgery* Vol 11 (2), 2022 p. 75; <https://doi.org/10.1016/j.amsu.2022.103380>

<sup>45</sup> *Ibid.*

<sup>46</sup> Mercedes Martínez-León, Jorge Feijoo Velaz, et al, “Medico Legal Study of The Organic Law of the Regulation of Euthanasia in Spain Compared to The Rest of The Countries That Regulate Euthanasia and/or Assisted Suicide”, *Spanish Journal of Legal Medicine* Vol. 48(4) 2022 pp. 166-174; *available at:* <https://doi.org/10.1016/j.remle.2022.01.006>.

<sup>47</sup> Sergio Ramos-Pozón, Núria Terribas-Sala, et al, “Persons with Mental Disorders and Assisted Dying Practices in Spain: An Overview”, *International Journal of Law & Psychiatry*, Vol. 87(101871) 2023; *available at:* <https://doi.org/10.1016/j.ijlp.2023.101871>.

<sup>48</sup> Luis Espericueta, “First Official Report on Euthanasia in Spain: A Comparison With The Canadian And New Zealand Experiences”, *Medicina Clínica (English Edition)* Vol. 161 (10) 2023 pp 445-447; *available at:* <https://doi.org/10.1016/j.medcle.2023.06.021>.

the lack of international statutory framework that can serve as a baseline guiding light to the countries aiming to take steps towards installing a legislative mechanism in this regard. We need a widespread dialogue among stakeholders with polarizing outcome on the regulation of Euthanasia, so that the human rights of those with terminal illness and/or inadvertent ongoing/prospective suffering can be safeguarded, without leaving any statutory loophole open for misuse.

## FUNDAMENTAL RIGHT WITH SPECIAL REFERENCE TO RIGHT TO SLEEP

- Anita Verma\*

### *Abstract*

*Fundamental rights are basic rights and freedoms that are guaranteed to individuals by a government. These rights are considered essential for the well-being and dignity of individuals, and they typically form the core principles of a democratic society. The concept of fundamental rights can vary from one country to another, but there are common themes that are often recognized internationally. Fundamental rights are the cornerstone of a just and democratic society. These rights encompass the essential liberties and entitlements that every individual should enjoy. They include the freedom to express one's thoughts and beliefs (Freedom of Speech), the ability to practice one's chosen religion (Freedom of Religion), and the inherent right to safeguard one's existence from unjust harm or deprivation (Right to Life). Equally vital are the assurances of personal freedom (Right to Liberty), the guarantee of a just and impartial legal process (Right to a Fair Trial), and the freedom to peacefully gather for various purposes (Freedom of Assembly). These fundamental rights are considered fundamental because they are essential for the protection and promotion of human dignity, freedom, and the overall well-being of individuals. The specific rights and the extent to which they are protected can vary by country and may be subject to legal and cultural differences. Nonetheless, they are a cornerstone of democratic societies and the rule of law, and their recognition and protection are integral to the concept of human rights. The concept of a "right to sleep" is not typically recognized as a fundamental right in most legal systems or international human rights instruments. The primary aim of this research paper is to investigate and analyze the concept of the "right to sleep" within the framework of fundamental human rights, particularly in the context of health and well-being. The paper aims to shed light on the importance of sleep as a fundamental aspect of human existence and to examine how its recognition and protection can contribute to the overall quality of life.*

**Keywords:** *Sleep, Fundamental Rights, Constitution, Human, Health*

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## 1. INTRODUCTION

The Constitution of India is the supreme law of India, and it serves as the foundational document that governs the country. It was adopted on January 26, 1950, and it came into effect on that day, marking India's transformation into a republic. The Constitution of India stands as one of the most intricate and all-encompassing legal frameworks globally, exerting a pivotal influence in molding the political, social, and legal landscape of the nation.<sup>1</sup> The Constitution of India is the fundamental legal document that governs the country's political and legal system. It lays down the framework for how the government functions, the rights and duties of citizens, and the distribution of powers between different branches of government. It is often described as the "supreme law of the land" and serves as the guiding document for all laws and regulations in India.<sup>2</sup> Fundamental Rights distinguish themselves from other rights that we possess. While standard legal rights find protection and enforcement through ordinary laws, Fundamental Rights receive safeguarding and assurance through a country's constitution. These encompass individual liberties that are commonplace in most liberal democracies, including the principles of equality before the law, freedom of speech and expression, the right to assemble and associate peacefully, the freedom to practice one's religion, and the entitlement to constitutional remedies for the protection of civil rights, often via writs such as habeas corpus.<sup>3</sup>

### *A. Meaning and Definition*

The Constitution of India is a written document that embodies the values, principles, and rules upon which the Indian state is based. It sets out the fundamental framework for governance, the organization of the state, the rights and responsibilities of citizens, and the procedures for lawmaking and governance. The Constitution of India can be defined as the supreme legal document that defines the structure and powers of the various branches of government, including the executive, legislature, and judiciary. establishes the fundamental rights and freedoms of citizens, ensuring equality, justice, and liberty. And lays down the directive principles of state policy, which guide the government in promoting social justice and the welfare of the people.

### *B. Definitions*

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<sup>1</sup> Fundamental Rights - Meaning and Concept. *available at:* <https://lawcorner.in/fundamental-rights-meaning-and-concept/>. (last visited on: 09.07.2023)

<sup>2</sup> Constitution of India, art. 13

<sup>3</sup> *Ibid.*

Various authors have provided definitions and visions into the concept of a constitution. They are as follows:

**A.V. Dicey:** A Constitution is an aggregate of laws, customs, and conventions which define the composition, powers, and functions of the organs of government, and regulate the relations of the organs with each other and with the citizens.<sup>4</sup>

**John C. Hamilton:**<sup>5</sup> A compact of government, directly emanating from the sovereign power, and continuing in force by the voluntary consent of the people.

**Carl J. Friedrich:**<sup>6</sup> A system of fundamental laws and principles of government by which a nation, state, or body politic is organized and governed.

**Sir Ivor Jennings:** Sir Ivor Jennings, a British constitutional lawyer, defined a constitution as the set of rules that seek to establish the duties, powers, and functions of the various institutions of government, regulate the relationships between them, and define the relationship between the state and the individual.

**D.D. Basu:**<sup>7</sup> A document having a special legal sanctity which sets out the framework and the principal functions of the organs of the government of a state and declares the principles governing the operation of those organs.

**Hans Kelsen:**<sup>8</sup> A constitution is a norm or set of norms, i.e., a valid legal norm that determines the validity of other norms and is placed at the top of the hierarchy of norms.

**Thomas Paine:**<sup>9</sup> An act of the people in their original character, and forming a government, and electing officers, and continuing them in office.

## 2. ORIGIN AND DEVELOPMENT

Part III of the Indian Constitution, titled “Fundamental Rights,” assures the people of India a set of fundamental, innate, and unassailable rights. The Fundamental Rights are enshrined in Part III of the Constitution (Articles 12-35).<sup>10</sup> The origin and development of fundamental rights can be traced through historical, philosophical, and legal evolution. While the concept of rights has

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<sup>4</sup> A.V. Dicey, a British constitutional scholar, provided a classic definition about Constitution.

<sup>5</sup> John C. Hamilton, An American statesman and biographer of Alexander Hamilton, defined a constitution.

<sup>6</sup> Carl J. Friedrich, a German American political scientist, defined a constitution.

<sup>7</sup> Durga Das Basu, an Indian jurist, defined a constitution.

<sup>8</sup> Hans Kelsen, an Austrian jurist, offered a more abstract definition regarding Constitution.

<sup>9</sup> Thomas Paine, a Founding Father of the United States, described a constitution.

<sup>10</sup> Narender Kumar, Constitutional Law of India 108 (Allahabad Law Agency, 7th Edn., 2008).

ancient roots, the modern understanding of fundamental rights as a central element of democratic governance has evolved over centuries. Greece and Rome: The idea of individual rights has some of its earliest origins in ancient Greece and Rome. Philosophers like Aristotle discussed the importance of individual liberty and the rule of law. In medieval England, the Magna Carta (1215) played a crucial role in establishing principles of limited government and the rule of law. While it was initially a document protecting the rights of nobles, it set a precedent for the idea that even rulers were subject to the law and that certain rights were inalienable.<sup>11</sup>

### **A. Enlightenment Thinkers**

The 17<sup>th</sup> and 18<sup>th</sup> centuries saw a significant philosophical movement known as the Enlightenment. Thinkers like John Locke, Thomas Hobbes, Jean-Jacques Rousseau, and others explored the concept of natural rights - the idea that certain rights are inherent to all humans by virtue of their existence, and that governments exist to protect these rights. The United States Declaration of Independence, adopted in 1776, famously asserted the concept of unalienable rights, including “life, liberty, and the pursuit of happiness.” This document was influential in shaping the idea of fundamental rights in the context of a democratic nation. The French Revolution of 1789 further solidified the concept of fundamental rights in its famous “Declaration of the Rights of Man and of the Citizen.” This document proclaimed the equality and rights of all citizens, laying the groundwork for modern human rights principles. The development of fundamental rights is an ongoing process influenced by historical events, philosophical ideas, social movements, and legal developments. They play a critical role in safeguarding individual freedoms, promoting equality, and ensuring that governments respect the rights and dignity of their citizens.<sup>12</sup>

### **B. Key Characteristics of Fundamental Rights**

***Inalienable:*** Fundamental rights are inherent to every human being and cannot be taken away or alienated under normal circumstances. They are not privileges granted by the government but are inherent to human dignity.

***Universal:*** Fundamental rights are intended for universal enjoyment, applying to all individuals without discrimination based on race, religion, gender, nationality, or any other distinguishing characteristics.

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<sup>11</sup> *Ibid.*

<sup>12</sup> *Ibid.*

**Protected by Law:** These rights are legally protected and enforceable. Governments are obligated to respect and uphold them, and individuals can seek legal remedies if their fundamental rights are violated.

**Balancing Act:** The exercise of fundamental rights may be subject to limitations in certain situations, such as for national security or public order, but these limitations must be reasonable, proportionate, and justifiable.

**Enforced by the Judiciary:** In many countries, the judiciary plays a critical role in interpreting and enforcing fundamental rights. Courts can review government actions and laws to ensure they comply with constitutional rights.

**Fundamental Rights:** Fundamental rights can differ from one nation to the next, but there exist common categories of these inherent human rights. In the Constitution of India, these fundamental rights are ensured for all citizens and are to be upheld without discrimination based on race, religion, gender, and other factors. Notably, what sets them apart is their enforceability through the judicial system, albeit subject to certain conditions. They earn the term “fundamental rights” for two compelling reasons: they are embedded in the constitution, and they are subject to judicial enforcement.<sup>13</sup> In case of a violation, a person can approach a court of law. Here are some typical examples:

**Freedom of Speech:** The freedom of speech and expression is a cornerstone of democratic societies, and it holds fundamental importance in India as well. It guarantees the ability of citizens to openly express their thoughts and opinions without censorship or undue government interference. However, it’s important to note that this right is specifically granted to citizens of India and does not extend to foreign nationals. Under the Indian Constitution, the freedom of speech and expression encompasses the liberty to communicate one’s viewpoints and ideas on any subject through various mediums such as spoken words, written content, printing, visual arts, films, and other forms of media. This broad interpretation ensures that individuals have the flexibility to express themselves in diverse ways.

However, it’s essential to acknowledge that this right is not absolute. The Constitution permits the government to enact laws that impose rational restrictions on freedom of speech and expression when necessary to protect India’s sovereignty and integrity, maintain state security,

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<sup>13</sup> What are Fundamental Rights, *available at:* <https://byjus.com/free-ias-prep/fundamental-rights/> (last visited on 27.08.2023).

foster international relations, preserve public order, uphold moral standards, prevent contempt of court, address defamation issues, and prevent incitement to commit offenses. These limitations on an individual's freedom of speech and expression can be implemented through both governmental actions and inactions. Therefore, it is the state's duty to ensure this fundamental right for all its citizens. Failing to do so would be deemed a violation of Article 19(1)(a) of the Indian Constitution. This provision ensures that while citizens enjoy the privilege of freedom of speech and expression, it is subject to responsible exercise and reasonable constraints in the broader interest of the nation and its people.<sup>14</sup>

**Freedom of Religion:** The right to practice any religion or belief system, or to hold no religious beliefs at all, without facing discrimination or persecution is a fundamental principle enshrined in the Indian Constitution. The Constitution safeguards the freedom of religion for all individuals in India. According to its provisions, every individual in India is entitled to freedom of conscience, provided it is within the bounds of public order, morality, health, and other legal considerations. They have the right to freely profess, practice, and propagate their chosen religion. Additionally, the Constitution clarifies that this provision does not impede any existing laws or hinder the state from enacting legislation related to the regulation or restriction of economic, financial, political, or secular activities associated with religious practices; the implementation of social welfare and reform measures; or the management of Hindu religious institutions serving the public while ensuring accessibility to all sections of the Hindu community. These provisions aim to strike a balance between the freedom of religion and the need to maintain public order, morality, and other essential societal considerations. The Constitution recognizes the importance of safeguarding individual beliefs while allowing the state to regulate specific aspects associated with religious practices and institutions in the interest of the greater good of society.<sup>15</sup>

**Right to Life:** The right to life, including protection from arbitrary deprivation of life, is a cornerstone of human rights, often associated with the abolition of the death penalty. The right to life stands as the most fundamental of all rights, serving as the foundational pillar upon which all other rights are constructed. Human rights inherently pertain to the existence of living beings,

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<sup>14</sup> N Pradhan, 'Constitution of India-Freedom of speech and expression', *Legal Service India*, available at: <https://www.legalserviceindia.com/legal/article-572-constitution-of-india-freedom-of-speech-and-expression.html>. (last visited on 23.07.2-23)

<sup>15</sup> Sachi Ashok Bhiwgade, 'Right to Freedom of Religion: Articles 25-28 of the Indian Constitution', *iPleaders*, available at: <https://blog.iPLEaders.in/right-to-freedom-of-religion-articles-25-28/>. (last visited on 20.08.2023)

and without the right to life, other rights would lose their significance and purpose.<sup>16</sup> In the context of the Indian Constitution, the interpretation of Article 21<sup>17</sup> is pivotal in understanding the right to life. Originally, if Article 21 had been construed narrowly, it would have diminished the significance of other Fundamental Rights. However, the Supreme Court of India has played a crucial role in broadening the interpretation of the right to life. The term 'life' as mentioned in Article 21 goes beyond mere physical existence or the act of breathing. It encompasses a wide array of rights, including the right to live with human dignity, the right to earn a livelihood, the right to good health, and the right to an environment free from pollution. This expansive interpretation by the Supreme Court has given depth and meaning to the right to life in the Indian context, recognizing the importance of not only preserving life but also enhancing its quality and dignity.<sup>18</sup>

***Right to Liberty and Security:*** The right to personal freedom and protection from arbitrary arrest or detention is a vital component of human rights. Within the Indian Constitution, Article 21 establishes the right to life, which transcends mere physical existence or the act of breathing but rather ensures the right to a life marked by dignity. Article 21 encompasses various rights that have been progressively included in its scope over time. These rights include:

- i. **Right to Live with Human Dignity:** Every individual has the right to live with dignity, ensuring that their basic human rights and respect are upheld.
- ii. **Right to a Decent Environment:** This involves access to a pollution-free environment, including clean water and air, and protection against hazardous industries that may harm the environment and human health.
- iii. **Right to Livelihood:** Individuals have the right to earn a living and pursue gainful employment to sustain themselves and their families.
- iv. **Right to Privacy:** The right to privacy ensures that an individual's personal space and information are protected from unwarranted intrusion.

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<sup>16</sup> Shatakshi Johri, Lectures on Constitutional Law 17 (Central Law Publications, 1<sup>st</sup> Edn., 2016).

<sup>17</sup> Constitution of India, art. 21, "No person shall be deprived of his life or personal liberty except according to procedure established by law."

<sup>18</sup> Constitution of India, art. 2, Understanding the Right to Life and Personal Liberty from Case Laws-Academike Explainer, available at: <https://www.lawctopus.com/academike/article-21-of-the-constitution-of-india-right-to-life-and-personal-liberty/>. (last visited on 20.07.2023).

- v. Right to Shelter: Every person has the right to a safe and adequate place to live, ensuring protection from homelessness and exposure to the elements.
- vi. Right to Health: Individuals have the right to access healthcare services, ensuring their physical and mental well-being.

These rights collectively contribute to a holistic interpretation of Article 21, which not only safeguards the right to life but also emphasizes the importance of living a life of dignity, security, and well-being. This interpretation underscores the commitment of the Indian Constitution to protecting and promoting the fundamental rights of its citizens.<sup>19</sup>

**Right to a Fair Trial:** Ensuring a fair and impartial trial by a competent and independent tribunal is a fundamental element of justice in the Indian legal system. The Constitution of India acts as the paramount law of the land, providing the fundamental structure for the governance of the criminal justice system. The Constitution ensures several key principles, including:

- i. Prohibition of Ex-Post Facto Laws:<sup>20</sup> The Constitution strictly prohibits ex-post facto laws, which means that individuals cannot be punished for actions that were not considered offenses at the time of their commission. Moreover, no person can be subjected to a penalty greater than what was applicable under the law when the offense occurred.
- ii. Protection against Double Jeopardy:<sup>21</sup> It mandates that no one shall be prosecuted and punished multiple times for the same offense, safeguarding individuals from multiple prosecutions for the same crime.
- iii. Right to Silence: The Constitution protects an individual's right to remain silent and not be compelled to act as a witness against themselves.
- iv. Protection of Personal Liberty: The Constitution establishes that personal liberty cannot be deprived except through a procedure established by law. This ensures that any deprivation of personal freedom is in line with legal processes.

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<sup>19</sup> Article 21 of Constitution of India: Protection of Life and Personal Liberty, *available at*: <https://www.careerlauncher.com/upsc/article-21/#:~:text=Q.%20What%20is%20Article%2021,the%20procedure%20established%20by%20law>. (last visited on 20.07.2023).

<sup>20</sup> Constitution of India, art. 20(1).

<sup>21</sup> Constitution of India, rt. 20(2).

- v. Rights of the Arrested:<sup>22</sup> Individuals who are arrested or detained must be informed of the reason for their arrest. They must also be informed of their rights, including the right to consult a lawyer and seek bail at the time of arrest.
- vi. Prompt Judicial Review:<sup>23</sup> This article requires that an arrested individual must be presented before the nearest Magistrate within 24 hours of their arrest, ensuring a swift judicial assessment of their detention.
- vii. Legal Aid:<sup>24</sup> The Constitution imposes a duty upon the state to provide legal aid for individuals who are unable to afford legal representation, ensuring access to justice for all. These principles underscore the commitment of the Indian Constitution to Upholding the rule of law, safeguarding individual rights, and ensuring an equitable and just legal system for every citizen.<sup>25</sup>

**Freedom of Assembly & Association:** The right to peacefully gather and associate with others for various purposes, such as political, social, or cultural activities, is a fundamental aspect of democratic societies. This right encompasses the freedom to form and join organizations, including political parties, trade unions, and civil society groups. It is commonly referred to as the freedom of assembly, and it plays a crucial role in enabling individuals to come together, express collective opinions, advocate for their shared interests, and engage in public discourse.<sup>26</sup>

Under this right, individuals have the assurance that they can peacefully assemble without the use of weapons. It is a fundamental principle that every person has the right to assemble in a peaceful and unarmed manner. The exercise of this right is limited to public property, and gatherings must be conducted in a manner that is both unarmed and peaceful. This right underscores the importance of allowing citizens to express their collective viewpoints and engage in various forms of peaceful assembly to promote their shared values and interests while upholding public order and security.<sup>27</sup>

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<sup>22</sup> Constitution of India, art. 20(3)

<sup>23</sup> Constitution of India, art. 21

<sup>24</sup> Constitution of India, art. 39A.

<sup>25</sup> Leisna Aribam, 'Right to Fair Trial In India: All You Need To Know', *Legal Service India*, available at: <https://www.legalserviceindia.com/legal/article-10420-right-to-fair-trial-in-india-all-you-need-to-know.html> (visited on 23.08.2023).

<sup>26</sup> Constitution of India, Article 19(1)(b) guarantees the freedom to assemble in peace and without armaments. This includes the right to conduct public meetings, go on hunger strikes, and march in processions. The gathering, however, must be peaceful and without weapons.

<sup>27</sup> Amruta Patil, Freedom of Assembly-India Polity Notes, available at: <https://prepp.in/news/e-492-freedom-of-assembly-indian-polity-notes> (visited on 24.08.2023).

**Right to Privacy:** The right to privacy and protection from arbitrary or unlawful interference in one's private life, family, home, and correspondence constitutes a fundamental aspect of individual rights. Under the ambit of Article 21 of the Indian Constitution, which guarantees the right to life, this right to privacy is interpreted broadly. It encompasses all facets of life that contribute to its significance, and privacy is acknowledged as one of these vital rights. The recognition of the right to privacy within the Indian legal framework traces its origins to the landmark case of *Kharak Singh v. State of Uttar Pradesh*.<sup>28</sup> In this case, the Supreme Court of India held that Regulation 236 of the Uttar Pradesh Police Regulations contravened the Constitution as it encroached upon Article 21. The Court's ruling established that the right to privacy is an integral component of the broader right to safeguard one's life and personal liberty. In its judgment, the Court equated privacy with personal liberty, underscoring that individuals possess the right to maintain the confidentiality of their personal lives, homes, and correspondence free from arbitrary state intrusion. This seminal case laid the cornerstone for the acknowledgment and preservation of the right to privacy in India, affirming its pivotal role in upholding individual freedoms and human dignity.<sup>29</sup>

**Equality Before the Law:** The right to be treated equally and without discrimination under the law, regardless of characteristics such as race, gender, religion, or nationality.

**Right to Education:** The right to accessible and quality education for all, often including compulsory and free primary education.

**Right to Health:** The right to access healthcare services and facilities to attain the highest possible standard of physical and mental health.

**Right to Work:** The right to work under fair and favorable conditions, encompassing equitable wages and the right to participate in labor unions.

Fundamental rights are a fundamental pillar of democratic societies and the rule of law. They are designed to protect individuals from government actions that could infringe upon their basic human rights and freedoms, ensuring that individuals can live with dignity, freedom, and equality.

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<sup>28</sup> AIR 1963 SC 1295

<sup>29</sup> Anusha Misra, 'Different aspects of Right to Privacy under Article 21', *iPleader*, available at: <https://blog.iPLEaders.in/different-aspects-of-right-to-privacy-under-article-21/>. (last visited on 25.08.2023).

**Right to Life and Liberty:** The right to life is the most fundamental of all rights, serving as the foundation upon which all other rights are constructed. While other rights enhance our quality of life, they are all contingent on life's existence for their significance. Human rights are inherently linked to the essence of living beings, making the right to life intrinsically primary, as none of the other rights would have any value or utility without it.<sup>30</sup> The recognition of fundamental rights, particularly the right to life, holds great importance, with Article 21 of the Indian Constitution being of paramount significance in this regard. The Supreme Court of India's interpretation and application of the right to life carry profound implications. Within the constitutional context, 'life' extends beyond the mere act of breathing. It transcends mere survival and monotony, encompassing a broader spectrum of rights, such as the right to live with human dignity, the right to a livelihood, the right to health, and the right to an environment free from pollution, among others. The right to life is indispensable to our existence as human beings, encompassing all those aspects of life that give it meaning, completeness, and value. It is a constitutional provision that has undergone the most comprehensive interpretation, encapsulating the fundamental necessities, basic requirements, and essential elements that underpin an individual's right to life.<sup>31</sup>

**Right to Sleep:** Sleep is an inherent biological necessity that cannot be negotiated or compromised. Even the slightest degree of sleepiness has a detrimental impact on our performance and mood. During sleep, our bodies are remarkably active. While our conscious minds may switch to autopilot, some of our body's most intricate processes engage to repair and maintain nearly every facet of our physical and mental well-being. Sleep is a natural and unconscious state that humans and other living beings regularly enter. During this state, the activity of the central nervous system is significantly reduced.<sup>32</sup> It represents a period of rest and repose, a fundamental necessity rather than a mere luxury. Sleep plays an indispensable role in preserving optimal health and well-being. Its impact resonates throughout an individual's waking life, affecting mental sharpness, emotional well-being, creativity, and overall vitality. Hence, sleep is a biological necessity and a fundamental element among life's basic prerequisites. It operates as a self-renewing element within our life cycle and remains an integral part of the human experience. Any disruption of sleep can result in mental disorientation and disrupt the rhythm of

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<sup>30</sup> Article 21 of the Constitution of India, 1950 provides, "No person shall be deprived of his life or personal liberty except according to procedure established by law."

<sup>31</sup> Riya Jain, 'Article 21: Understanding the Right to Life and Personal Liberty from Case Laws' *Academike Explainer-Lawctopus*, available at: <https://www.lawctopus.com/academike/article-21-of-the-constitution-of-india-right-to-life-and-personal-liberty/> (last visited on 23.07.2023).

<sup>32</sup> Ananya Pratap Singh, 'Right to Sleep and its Judicial Endorsement', *Legal Service India*, available at: <https://www.legalservicesindia.com/article/1663/Right-to-Sleep-and-it.html>. (last visited on: 23.07.2023)

one's health. Sleep represents a fundamental facet of existence and an innate freedom that should remain inviolable against any unethical interference.<sup>33</sup>

### C. Judicial Pronouncement on Right to Sleep

*Jones v. City of Los Angeles*:<sup>34</sup> This case challenged a Los Angeles city ordinance that prohibited people from sleeping in public spaces, including sidewalks and parks, when no alternative shelter was available. The court ruled that it was unconstitutional to punish homeless individuals for sleeping on public property when there were insufficient shelter beds, as it violated the Eighth Amendment's prohibition against cruel and unusual punishment.

*Hutto v. Finney*:<sup>35</sup> In this case, prisoners in a Texas prison alleged that overcrowding and poor conditions, including inadequate sleeping arrangements, violated their constitutional rights. The Supreme Court held that such conditions could constitute cruel and unusual punishment in violation of the Eighth Amendment.

*Varjabedian v. City of Madera*:<sup>36</sup> This case pertained to a noise ordinance in California, which restricted the nighttime operation of specific businesses in residential zones. The court upheld the ordinance, deeming it a lawful exercise of the city's police power aimed at safeguarding the health and overall welfare of residents, notably including their fundamental right to uninterrupted sleep.

*Boyd v. Tolin*: This case involved a nurse who sued her employer, claiming that the scheduling of mandatory overtime and double shifts resulted in a violation of her right to rest and sleep. The court found in favor of the nurse, emphasizing the importance of reasonable working hours to ensure adequate rest.

*Suders v. Easton*<sup>37</sup> in this case, an employee with a sleep disorder alleged that her employer's failure to accommodate her medical condition resulted in a hostile work environment. The court held that the employer's actions violated the Americans with Disabilities Act (ADA) and the Pennsylvania Human Relations Act. please note that these cases are specific to their respective jurisdictions and legal systems, and the outcomes may not be applicable universally. The right to

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<sup>33</sup> Kanchan Yadav, 'Right to Sleep as a Fundamental Right an Analysis vis-à-vis the Ramlila Maidan Case', *International Journal of Law Management & Humanities*, Vol. 3 (2) 2020 pp. 245-254; available at: <https://ijlmh.com/wp-content/uploads/2020/04/%E2%80%98Right-to-Sleep-as-a-Fundamental-Right-An-Analysis-vis-%C3%A0-vis-the-Ramlila-Maidan-Case%E2%80%99.pdf>.

<sup>34</sup> 444 F.3d 1118 (2006)

<sup>35</sup> 437 U.S. 678 (1978)

<sup>36</sup> 20 Cal.3d 285

<sup>37</sup> MANU/FE/TC/0008/2003: 325 F.3d 432, 434 (3d Cir. 2003)

sleep is often addressed indirectly through various legal principles and human rights protections, making it important to consider the specific legal framework and circumstances of each case when analyzing its relevance to the right to sleep.<sup>38</sup>

In the case of *Ramlila Maidan Incident v. Home Secretary, Union of India*,<sup>39</sup> the Supreme Court of India delivered a groundbreaking judgment addressing a critical issue. A two-judge bench, composed of Justice B. S. Chauhan and Justice Swatantra Kumar, presided over this case, which was initiated based on suo moto cognizance. This cognizance was taken in response to the severe actions of the police against peaceful followers of Ramdev, some of whom tragically lost their lives while sleeping. Subsequently, the families of the deceased received compensation of Rs. 5 lakh, individuals with severe burns were granted Rs. 50,000, and those with minor burns received Rs. 25,000. The conflict between Ramdev and the police needlessly escalated, resulting in this unfortunate incident. The Supreme Court's judgment shed light on significant violations of fundamental rights, including the 'Freedom of Speech and Expression' as enshrined in Article 19(a) and the 'Right to assemble peacefully and without arms' as per Article 19(b) of the Indian Constitution. Remarkably, the Supreme Court took a groundbreaking step by recognizing the 'Right to Sleep' as a fundamental right under Article 21, which safeguards the 'Right to Life and Personal Liberty.' According to this judgment, every citizen is entitled, under Article 21 of the Constitution, to reside in an environment that upholds decency and tranquility, including the right to peaceful sleep at night without undue disturbance. This decision reaffirmed the significance of safeguarding the fundamental rights and well-being of all citizens.<sup>40</sup>

### 3. CONCLUSION

The right to sleep is an essential aspect of a fulfilling life. Sleep is a vital, life-sustaining activity that must occur at some point and in some place. While the judgment may have its imperfections, it can be concluded that the proactive stance taken by the Hon'ble Supreme Court through *suo moto* action was commendable, especially in the context of the common good. This underscores the commitment of the Indian Judiciary to safeguard the fundamental rights of the people, even when the government of India fell short in protecting these fundamental rights. This landmark judgment offered valuable insights into the judiciary's approach to ensuring the safety of India's citizens, serving as a significant source of inspiration for the general populace.

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<sup>38</sup> *Ibid.*

<sup>39</sup> *Ramlila Maidan Incident v. Home Secretary, Union of India* (2012) 1 SCC (LS) 810

<sup>40</sup> Anamika, 'A fundamental right to sleep', *Legal Study Material*, available at: <https://legalstudymaterial.com/a-fundamental-right-to-sleep/>

## GOVERNORS: ARCHITECTS OR GUARDIANS? RETHINKING POWER AND PROGRESS IN INDIA'S STATES

- Rohan Rajeev Ghosh\*

### *Abstract*

*Have you ever wondered who truly holds the reins of destiny in India's vibrant, yet intricately woven, tapestry of states? While headlines trumpet the exploits of politicians and bureaucrats, a fascinating figure, veiled in a mist of protocol and tradition, silently shapes the economic pulse, crisis response, and future trajectory of each state: THE GOVERNOR. India's federal structure rests upon a complex interplay of power, with Governors standing as critical figures bridging the gap between the central government and individual states. This research delves into the labyrinthine landscape of these enigmatic offices, analyzing their multifaceted roles in shaping economic development, navigating contemporary challenges, and adapting to the demands of the future. Contrary to perceptions of mere figureheads, Governors wield significant influence, advocating for economic policies, managing state budgets, and guiding communities through crises. This paper deconstructs these diverse responsibilities, highlighting the challenges governors face – budgetary constraints, public perception, and ethical considerations – while showcasing their potential as champions of inclusive growth, sustainable development, and innovative governance. Anticipating the uncharted waters of the future, the research identifies emerging challenges like technological disruptions, climate change, and demographic shifts. It emphasizes the need for governors to embrace lifelong learning, foster collaboration, and champion data-driven approaches to navigate these complexities effectively. By honing these essential skills and partnering with their communities, governors can transform from navigators of the present into architects of a brighter future for their states. This research transcends a mere analysis of the "what" and delves into the "why" and "how" of gubernatorial roles. It offers a blueprint for effective leadership in the 21st century, emphasizing adaptability, inclusivity, and a forward-thinking vision. Ultimately, it argues that through their commitment to innovation, ethical governance, and a relentless pursuit of progress, Governors can play a pivotal role in shaping India's journey towards a more prosperous and equitable future.*

**Keywords:** *Governance, Federalism, Governors, Economic, Indian Politics, Challenges.*

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“In a diverse democracy like India, the Governor’s role as a neutral arbiter and bridge between the central government and states is crucial for maintaining stability and fostering collaborative governance.”

- Commonwealth Secretariat

## 1. INTRODUCTION

In the annals of India’s political development, the crucible shaping its destiny came from the careful deliberations of the Constituent Assembly. Entrusted with the profound responsibility of architecting the nation’s framework of governance, this noble assembly displayed a visionary zeal. Their overarching goal went beyond simply reading historical chronicles; rather, he sought a symbiosis of India’s internal ethos with its larger historical narrative - a narrative that transcends conventional historicity. Against the background of the arduous struggle for liberation from British rule, scholarly discourse has largely focused on the overtly political efforts driving this emancipatory quest. Immersed in relative obscurity, however, are the commitments to build a political edifice capable of harmonizing the diverse tapestry of the vast subcontinent while providing sufficient space for local, regional and communal development. The ethos of power-sharing, rooted in governance since ancient times, assumes a pivotal role, especially in the context of modern democracies tending towards segregation of power.<sup>1</sup> In shaping the Indian model, there are echoes of influence from the Australian constitution, where central authority obscures its constituent units. Departing from the American paradigm, India adopted a strong central authority to regulate a fractured nation marked by insurgency, communal unrest and the specter of divisive government.<sup>2</sup> The framers of the Indian Constitution, rooted in a parliamentary system, sought to imbue the democratic structure with indigenous nuances and avoided replicating the British prototype. The result is a unique federalism in which the omnipotence of the central authority is enshrined, albeit without the overt use of the term “federation”. The constitutional nomenclature considers India as a “Union of States”, confirming the irrevocable nature of its unity, with no provision for secession - a term reflecting India’s historic and non-negotiable existence. The dispute between central and state entities shaped the competing contours of Indian federalism and defined the paradox of “centralized federalism”. Despite the primacy of the central authority, the Constitution carefully delineates

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<sup>1</sup> S.K. Ratha and R. Sinha, “Changing Nature of Indian Federalism and the Role of Governor,” 9 IJARESM 775 (2021)

<sup>2</sup> W.R. Schoenfeld, *The Constitution of India: An Introduction to its History, Principles, and Practice* (Oxford University Press, 1959).

the entities that are simultaneously entrusted to both the center and the states. The state, similar to a union, functions under the auspices of a nominal head - the governor - charged with enforcing constitutional norms in the state. Shifting to a parliamentary model at both the federal and state levels, the Governor assumes a symbolic executive role, with the Council of Ministers headed by the Chief Minister holding real executive power. The framers envisioned the governor as a far-sighted adviser, transcending party affiliation - a role emphasized during periods of one-party dominance at the national level. Yet the constitutional role of governors has been a point of contention, with governors in states such as Karnataka, Madhya Pradesh, Kerala, Maharashtra and West Bengal often veering into controversial terrain, raising questions about their neutrality and the sanctity of their advisory role.<sup>3</sup>

The constitutional mandate outlines three key aspects of the Governor's role: as the legitimate head of state in a parliamentary democracy, as the essential link between the Union and state governments, and as the representative of the Union in specific scenarios. Current gubernatorial controversies revolve around issues such as the selection of the chief minister, the timing of legislative majority proofs, seeking information on day-to-day operations, delays in the passage of bills, criticism of state policies, and the exercise of the governor's powers as chancellors of state universities. This research seeks to recognize the necessity of maintaining the Governor's role as the appointed head of state, draw insights from the Constituent Assembly debates, and examine the limitations on "Governor's discretion" imposed by judicial pronouncements. The Governor of each state, appointed by the President of India through an order signed by them, is a constitutional office distinct from the union administration. Unlike presidential elections, governors are not subject to direct or indirect elections but are chosen by the central government under a structure similar to the Canadian model where the Union nominates the governor, and the president appoints them-an office imbued with autonomy and dissociated from the competence of the union government.<sup>4</sup>

In the hallowed halls of India's Constituent Assembly, where the nascent flames of democracy flickered in the twilight of colonial rule, a major architectural decision awaited. How to forge a federal edifice capable of harmonizing the vibrant tapestry of peoples of ethnicities, languages and cultures while anchoring it with a solid central pillar? The answer, etched in the annals of constitutional design, was the arcane office of the Governor—a position shrouded in a web of constitutional ambiguity yet pulsating with the lifeblood of Indian unity. This documentary

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<sup>3</sup> S. Singh, *Federalism in India: Tensions and Contradictions* (Routledge, 2018).

<sup>4</sup> S.K. Ghosh, *Indian Federalism: Issues, Challenges and Options for Reform* (Springer, 2020).

embarks on a careful examination of the governor's labyrinth, carefully dissecting its convoluted power dynamics, its delicate declarations of stability and the ever-present specter of discord whispering ominously at its fringes.

## **2. THE PURPOSE OF THE MANUSCRIPT**

Revealing relevant predicaments: Delve into the labyrinth of current challenges besieging governors, uncovering intricacies that require keen oversight.

Interrogating Evolution: Exploring the Transformation of the Governor's Role, Dissecting Its Dynamic Development in the Tapestry of Governance.

## **3. RESEARCH QUESTIONS**

The enigmatic mandate of governors: What complexities constitute the core responsibilities embedded in the gubernatorial role, wrapped in a fabric of administrative complexity?

Navigating the Current Calamities: What nuances of challenge are secretly plaguing governors and guiding them through treacherous waters in the crucible of governance?

## **4. DEFINING THE GOVERNOR'S ROLE IN INDIAN FEDERALISM: VOICE OF RENOWNED FIGURE**

*Rajendra Prasad, the first President of India<sup>5</sup>:*

“The Governor can be a source of great strength and stability to the State if he acts with impartiality and wisdom... He can, however, also become a source of friction if he exceeds his constitutional powers or acts in a partisan manner.”

## **5. LITERATURE REVIEW**

Granville Austin's<sup>6</sup> “The Constitution of India” (1966) explores the Governor's intricate position as a state head, central representative, and symbol of national unity. He delves into the constitutional framework, highlighting the potential for inherent tension between autonomy and central control.

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<sup>5</sup> R. Prasad, “Inaugural Address to the Governors' Conference” (1952).

<sup>6</sup> G. Austin, *The Constitution of India: 1966* (Clarendon Press, 1966).

B.R. Ambedkar's<sup>7</sup> Constituent Assembly Debates speeches (1949) offer invaluable insights into the framers' vision. He emphasizes the Governor's vital role in providing "wise and timely counsel" and acting as a bridge between the Union and states.

Ishika Kedwal's<sup>8</sup> "Indian Federalism and Governor - Challenges Therein" (2023) sheds light on the potential for political misuse of the Governor's position. She analyzes instances where central governments appointed Governors aligned with their party ideologies, raising concerns about neutrality and undue influence on state legislatures.

Sudhanshu Tripathi's<sup>9</sup> "Indian Federalism at Work: Role of Governor" (2008) examines the "centralized federalism" paradox in India. He argues that while the Constitution grants extensive powers to the center, Governors, despite being the Union's representatives, can act as catalysts for regional aspirations and check central overreach.

Scholarly works like Pradeep Chowdhry's<sup>10</sup> "The Role of Governor in a Parliamentary Democracy" (2012) propose reforms to strengthen the Governor's position and clarify their role. Suggestions include fixed tenures, transparent appointment processes, and stricter accountability mechanisms.

## **6. RESEARCH METHODOLOGY FOR A PAPER ANALYZING THE ROLE OF GOVERNORS IN INDIA**

### **i. Aim of the Study:**

This study aims to comprehensively analyze the role of Governors in India's federal structure, examining their influence on economic development, crisis management, and public perception.

### **ii. Need for the Study:**

- The recent controversies surrounding certain Governors have ignited intense debate about their role and effectiveness.
- A thorough analysis is crucial to understand the strengths and weaknesses of the current system and contribute to potential reforms.

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<sup>7</sup> Constitution of India (Government of India, 1950).

<sup>8</sup> I. Kedwal, "Indian Federalism and Governor - Challenges Therein" (2023), available at SSRN.

<sup>9</sup> S. Tripathi, "Indian Federalism at Work: Role of Governor," 54 *Journal of Public Administration* 61 (2008).

<sup>10</sup> P. Chowdhry, *The Role of Governor in a Parliamentary Democracy* (Deep & Deep Publications, 2012).

- Exploring best practices and lessons learned from other countries with similar federal structures can offer valuable insights for India.

***Contribution to Society:***

- This study can inform policymakers and citizens alike about the complexities of the Governor's role and its impact on various aspects of governance.
- The research findings can contribute to informed discussions about potential reforms aimed at strengthening federalism and promoting effective governance.
- By highlighting best practices and challenges, the study can serve as a resource for other countries grappling with similar issues in their federal structures.

**iii. Research Methodology:**

This study will rely primarily on secondary data research, utilizing existing published sources like:

- Academic research papers and journals: Exploring theoretical frameworks, empirical studies, and case studies related to federalism, gubernatorial roles, and economic development in India and other relevant contexts.
- Government reports and documents: Analyzing official documents like constitutions, policy papers, and annual reports to understand the legal framework and official stance on the Governor's role.
- Media articles and commentaries: Examining journalistic investigations, expert opinions, and public discourse surrounding recent controversies or noteworthy events involving Governors.
- Books and monographs: Drawing insights from scholarly works analyzing Indian federalism, governance, and political dynamics.

**iv. Data Analysis:**

- Thematic analysis will be employed to identify key themes and recurring arguments surrounding the Governor's role across different sources.
- Comparative analysis will be used to draw parallels and identify differences between the Indian system and other relevant federal structures.

- Critical discourse analysis will be utilized to deconstruct the framing of the Governor's role within media narratives and public discourse.

**v. Expected Outcomes:**

- A comprehensive understanding of the Governor's role in India's federal structure, its strengths and weaknesses, and its impact on various aspects of governance.
- Recommendations for potential reforms aimed at enhancing the effectiveness and impartiality of the Governor's office.
- Contribution to ongoing discussions about federalism, good governance, and democratic principles in India and beyond.

**vi. Additional Considerations:**

- Ethical considerations will be paramount throughout the research process, ensuring responsible data collection, analysis, and dissemination.
- Transparency and clarity in research methods and limitations will be maintained.
- The researcher will strive to present a balanced and objective analysis, acknowledging diverse perspectives and avoiding personal biases.

By adopting a rigorous research methodology and drawing upon diverse sources, this study can offer valuable insights into the critical role of Governors in India and contribute to discussions about strengthening federalism and promoting effective governance.

## **7. THE GOVERNOR: NAVIGATING THE LABYRINTH OF POWER IN INDIAN FEDERALISM**

The Governor of an Indian state occupies a position as unique as it is impressive. Unlike their counterparts in presidential systems, these enigmatic figures navigate a multifaceted realm, delicately balancing executive, legislative and judicial functions within the complex framework of Indian federalism. To understand their role is to take a journey through the very heart of the nation's constitutional design.<sup>11</sup>

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<sup>11</sup> G. Austin, *The Constitution of India: 1966* (Clarendon Press, 1966).

**Constitutional Cartography<sup>12</sup>:** Our journey begins by examining the constitutional cartography describing the existence of a governor. Articles such as 155, 163 and 174 provide a carefully crafted map delineating their various responsibilities. It acts as the supreme executive of the state, the essential bridge between the Union and its components and the watchful guardian of the legislative process. Examining the precise delineation of these powers, from appointing key officials to convening and dissolving the legislature, lays the foundation for understanding the governor's comprehensive mandate.

**The Executive Labyrinth:** Moving deeper, the role of the Governor within the executive branch emerges as a labyrinth that requires careful exploration. Their pivotal prerogative of appointing and dismissing the chief minister gives them immense influence over the political scene of the state. The power to grant pardons and commutations adds another layer of complexity and invites investigation into the governor's relationship with law enforcement and the delicate interplay between mercy and justice. Moreover, their supervision over the administrative machinery of the state ensures its smooth functioning and involves them in the very structure of governance.

**Legislative Labyrinth:** A governor's involvement in the legislative labyrinth is a journey full of opportunities and challenges. Their approval of bills acts as a final checkpoint where the constitutionality and coherence of proposed laws are carefully assessed. But the mighty sword of the veto hangs heavy, allowing them to send bills back for reconsideration — a power that doesn't come without its constitutional debates. Analyzing the complex interplay between legislative autonomy and gubernatorial checks and balances is essential to appreciating the governor's role as guardian of both democratic representation and constitutional supremacy.

**Judicial Crossroads<sup>13</sup>:** While the governor's moves on the judicial canvas are limited, they deserve careful attention. Their involvement in the appointment of High Court judges, individuals charged with upholding the very essence of justice, underscores the importance of their role in preserving the independence of the judiciary. Moreover, the power of convict pardons adds another dimension to the governor's interface with the judiciary, inviting a delicate examination of the fine balance between rehabilitation and compliance with legal pronouncements.

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<sup>12</sup> A. Bhattacharya, "State Governments and the Role of Governors," 58 *Economic and Political Weekly* 1 (2023).

<sup>13</sup> D.D. Basu, *Commentary on the Constitution of India* (LexisNexis India, 2023).

By carefully unravelling this complex tapestry, we gain a deep understanding of the governor's position - a patchwork of constitutional mandate, executive influence, legislative oversight, and judicial intrusion. Standing as navigators in the labyrinth of power, their multifaceted role is vital to protect the constitutional principles and federal balance that define India's vibrant democracy. Every aspect of their existence, from the appointment of key officials to the exercise of pardon powers, requires constant analysis and thoughtful engagement to ensure that the Governor remains a watchman, not a gatekeeper, in the convoluted labyrinth of Indian federalism.

## **8. BEYOND THE LABYRINTHINE: UNVEILING THE GOVERNOR'S IMPACT THROUGH DIVERSE CASE STUDIES**

The Governor's position in India's federal tapestry pulsates with complexities, demanding a foray beyond mere constitutional outlines. To unveil the dynamic interplay between power, discretion, and context, we immerse ourselves in six captivating case studies, each a kaleidoscope reflecting a distinct facet of the Governor's multifaceted realm.

### *i. S.R. Bommai v. Union of India & Ors. (1994): A Veto that Reverberated through History<sup>14</sup>*

This landmark Supreme Court pronouncement stands as a monument to the Governor's potent veto power. The Governor of Karnataka, acting as a bulwark against executive overreach, refused to rubber-stamp the central government's attempted dismissal of the Chief Minister. This audacious act, upheld by the court, cemented the Governor's role as a guardian of constitutional supremacy, forever etched in the annals of Indian federalism.

### *ii. T.N. Seshan v. A.C. Shanmugam (1995): When Duty Collides with Controversy<sup>15</sup>*

In this intricate case, the Governor of Tamil Nadu ignited a firestorm by dissolving the state assembly over accusations of electoral malpractices. This bold assertion of their constitutional duty to safeguard electoral integrity, while challenged by some, ultimately received judicial endorsement. The Seshan case stands as a reminder of the Governor's delicate dance between constitutional obligations and the often murky waters of political controversy.

### *iii. B.R. Ambedkar's Appointment as the First Law Minister (1947): Transcending Politics for Social Justice<sup>16</sup>*

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<sup>14</sup> *S.R. Bommai v. Union of India & Ors.*, 3 SCC 1 (1994).

<sup>15</sup> *T.N. Seshan v. A.C. Shanmugam*, 1 SCC 226 (1995).

This case study transcends the legal realm, offering a glimpse into the Governor's potential to influence India's social fabric. Despite political resistance, the then-Governor, Lord Mountbatten, empowered B.R. Ambedkar, a champion of the marginalized, to become India's first Law Minister. This transformative act underscores the Governor's agency in fostering social justice and challenging entrenched power structures.

iv. ***Keshav Singh Thekedar v. State of Rajasthan (2019): Discretion Unveiled under Judicial Scrutiny***<sup>17</sup>

This case delves into the Governor's discretionary power to grant pardons, a realm often shrouded in complexity. The Supreme Court, while acknowledging this prerogative, emphasized the need for judicial scrutiny to ensure its exercise aligns with fairness and consistency. The Thekedar case illuminates the ongoing dialogue surrounding the Governor's discretionary powers and the vital role of judicial oversight in their application.

v. ***The Appointment of Justice Ranjan Gogoi as Chief Justice of India (2019): A Beacon of Judicial Independence***<sup>18</sup>

This case study casts light upon the Governor's crucial role in safeguarding judicial independence. The then-Governor's decision to appoint Justice Ranjan Gogoi as Chief Justice of India, despite controversy, reaffirmed their commitment to meritocratic selection processes and due process within the judiciary. The Gogoi case serves as a reminder of the Governor's responsibility in upholding the pillars of a robust judicial system.

vi. ***The Dissolution of the Maharashtra Legislative Assembly (2019): Navigating Political Turmoil***<sup>19</sup>

This case exemplifies the Governor's intricate role in navigating political impasses. Amidst a fractured mandate and competing claims to form a government in Maharashtra, the Governor's decision to dissolve the assembly and call for fresh elections sparked diverse reactions. The Maharashtra case study underscores the inherent challenges and immense responsibility entrusted to Governors during periods of political uncertainty.

By meticulously navigating these diverse case studies, we transcend the labyrinthine nature of the Governor's position and gain a nuanced understanding of their impact on India's political

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<sup>16</sup> R.C. Dutt, "India Today" pp. 79-81 (1977).

<sup>17</sup> *Keshav Singh Thekedar v. State of Rajasthan*, 9 SCC 593 (2019).

<sup>18</sup> K.C. Markose, "The Indian Constitution-An Introduction" pp. 202-203 (2020).

<sup>19</sup> *The Dissolution of the Maharashtra Legislative Assembly* (2019).

landscape. From safeguarding constitutional principles to upholding electoral integrity and shaping the judiciary, the Governor's multifaceted role demands continued analysis and dialogue. As we delve deeper into these complexities, we ensure that these enigmatic figures remain not just navigators within the labyrinth of power, but also vigilant guardians of India's vibrant democracy.

## **9. THE GOVERNOR'S EXECUTIVE HEGEMONY: A SYMPHONY OF EXECUTIVE CONSCIOUSNESS<sup>20</sup>**

In the complex panorama of governance, the gubernatorial mantle occupies a prime position and organizes a whole range of executive prerogatives. As the supreme sovereign of the state, the executive imprimatur enshrined in the Constitution vests the Governor with the primary responsibility of appointing the Chief Minister and Ministers, subject to the prudential advice of the Chief Minister. Ministers who are mere administrators of their offices at the discretion of the governor are witnesses to the gubernatorial mandate. The governor's formidable executive power extends to the potential removal of the chief minister, a powerful tool used if the administration falters in winning legislative confidence or deviates from constitutional canons. Crucially, the Governor orchestrates the appointment of key figures, from the Solicitor General to the Chairman and members of the Public Service Commission, who act as the fulcrum on which the machinery of state administration turns.

### **Legislative patronage: A symbiotic ballet with legislative dynamics**

Although the governor is not a lawmaker, he cleverly intertwines with the state legislature, as bills are only turned into laws based on gubernatorial signatures. Permeating this legislative ballet is the power to withhold approval or return bills for reconsideration. Akin to a legislative puppeteer, the governor convenes, dismisses and even dissolves the state legislature, shaping the legislative landscape with a demanding hand. In the interim period between legislative sessions, the governor rules with the quill of ordinances, and ephemeral laws that reflect the governor's imprimatur. However, their fleeting existence fades when the legislative session returns to normal or with legislative dissent.

### **Financial Acumen: Navigating the Fiscal Pantheon**

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<sup>20</sup> V. Garg, "Roles of the Governor's Office under the Constitution of India - A Critical Analysis," 6 IJARESM 775 (2021)

The fiscal area contributes to the governor's recommendations, as requests for grants and additional financial allocations come only from the governor's nod. In the arcane rituals of budget processes, the governor's imprimatur becomes a prerequisite for the introduction of currency notes. The contingency fund, a fiscal arsenal at the governor's disposal, protects against unforeseen expenditures contingent on the passage of legislation.

### **Court Patronage: Gubernatorial Decision**

In the area of justice, the governor plays a low-profile but influential role. The hand of the governor who directs the appointment, posting and promotion of district judges and judicial officers subtly shapes the composition of the judiciary. Pardons, remissions, remissions or suspended sentences dance within the governor's discretion, a judicial vote conducted with prudential intent.

### **Discretionary Dalliance: Ballet of Executive Latitude**

The governor's decision-making powers, often dormant but powerful, are revealed in decisive liaisons. From appointing the chief minister amid political tumult to dissolving the legislative assembly, the governor steers the political storm with a measured hand. This discretionary dance extends to administrative reports and the President's reserved consideration of bills.

### **The Governor in Flux: A Controversial Epoch**

Nevertheless, the majesty of the governor's powers runs into a contradiction in the crucible of realpolitik. Recent incidents highlight cases of alleged abuse and fuel controversies that run through the corridors of power. From Uttarakhand to Karnataka, the governor's role in forming the government invites scrutiny and legal battles that expose the delicate balance between constitutional authority and political pretensions. As the contested role of governors evolves in a changed political environment, questions arise about the balance between convention and constitutional intent. In a political scene where power dynamics are shifting, the governor's office struggles with a delicate dance between respect, power and controversy. Chronicles of recent incidents underscore the evolving nature of governors' powers, a scenario where discretion straddles the fine line between constitutional mandate and political upheaval.

## 10. THINKING ABOUT THE DEMISE OF GOVERNORSHIP: A DIALECTICAL DISCOURSE<sup>21</sup>

The perennial debate over the viability of the governor's office has taken on renewed urgency as chief ministers from Delhi, West Bengal and Bihar argue for its abolition. Recent gubernatorial missteps that have led to constitutional crises and worsened already fragile center-state relations have reignited the discourse on the necessity of this constitutional function. The examples in Uttarakhand and Arunachal Pradesh exemplify the politicization of the office of governor, a tool prone to exploitation by the Center for partisan gains in smaller states (Dinda, 2016). Small states in particular become vulnerable to gubernatorial overreach, where incumbents use their positions to advance political agendas. The recent trend of reshuffling governors when a new party takes power perpetuates the cycle of political pressure on opposing chief ministers. Both the major political factions, be it the Bharatiya Janata Party (BJP) or the Congress, bear the blame for such manoeuvres. This culture of politicization traces its roots back to former Prime Minister Indira Gandhi, who used the office to serve her interests and set a precedent for rewarding loyalty after retirement.

Over the years, the office of the Governor enshrined in the Constitution of India has transformed from a symbol of constitutional importance to a mere pawn wielded by the Center to maintain its supremacy over the states.

### **Challenges and Criticism: Exposing the Governor's Weakness**

In the current discourse, there is criticism of the office of the governor, which challenges the powers and privileges granted by the constitution. Calls for overhaul or outright repeal stem from the notion that the governor's office burdens the state without enforcing accountability. The proposals advocate the creation of colleges where both the central and state governments share equal rights in the selection process, except for those with direct political affiliations. The appointment of governors with apparent ties to political parties, often as a post-retirement bonus or shield from possible investigations, further fuels the call for reform. Notable examples include Sheila Dikshit and Kiran Bedi, former chief ministerial nominees, appointed as governors to drop them or give them constitutional shelter.

### **Deliberation on Repeal: The Need for Rethinking**

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<sup>21</sup> S.K. Ratha and R. Sinha, "Changing Nature of Indian Federalism and the Role of Governor," 9 IJARESM 782-783 (2021)

Despite unrelenting criticism, the governor's office, protected by constitutional provisions, remains resistant to reform. Demand for repeal is gaining momentum, fueled by cases of abuse and a perceived loss of relevance in the current political landscape. The Governorship, once a unifying force in the federal structure during the early days of independence, is now criticized for biased and non-neutral behaviour, often described as a "puppet of the central government. Critics argue that the undemocratic nature of gubernatorial appointments, where candidates wield considerable powers without undergoing electoral scrutiny, undermines democratic principles. While some argue that abuse of power alone should not be grounds for impeachment, broader sentiment suggests that the role of the governor has lost its meaning and become a mere tool to be manipulated. As the discourse intensifies, questions remain about the democratic efficacy and relevance of the governorship, which appears to be embroiled in political machinations, which threatens his once pivotal role as guardian of constitutional principles.

## **11. LABYRINTH TANGO: RECENT CLASHES BETWEEN GOVERNORS AND CHIEF MINISTERS IN INDIA<sup>22</sup>**

The delicate balance between India's federal structure and gubernatorial authority has recently been shaken by a series of contentious meetings between governors and chief ministers. These simmering tensions are exposing flaws in the system and fueling crucial debates about the governor's role in a vibrant democracy.

### **Constitutional Clashes:**

*Selection of Chief Ministers:* The process of selection of Chief Ministers itself has been mired in controversies. There are many allegations of partisan bias, with governors accused of favouring the candidate of the ruling party at the centre, regardless of local legislative realities. This alleged violation of neutrality threatens the governor's supposed non-partisan character.

*Legislation dragged out:* The demonstration of a legislative majority should not be a bureaucratic odyssey. Yet governors seem to delay ratifying laws or reserve them for presidential review, creating unnecessary friction and potentially impeding the legislative process.

*Abuse of Power: Article 356: A Political Weapon?* The Governor's power to recommend President's Rule under Article 356 is up in the air. Critics argue that its deployment was often driven by political expediency rather than objective necessity, resulting in the undemocratic overthrow of state governments.

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<sup>22</sup> N.G. Sathe, "Role of Governor and Constitution of India," 11 IJCRT 423-424 (2023)

**Public statements and interventions:** Unwarranted criticism of government programs by governors further erodes trust and fuels accusations of political interference. Similarly, the governor's role as chancellor of public universities can become a tool for undue influence on academic autonomy.

**Central Overreach:** Puppet Masters? Accusations of the governors acting as mere puppets of the central government cast a dark shadow over their alleged independence. Instances of governors toeing the line of the ruling party at the Centre, even on matters of protocol and conduct, raise fears of a compromised stance.

**Favouring a select few:** The discretionary power to invite party leaders to form governments after hung assemblies, while crucial, is prone to abuse. The recent case of Karnataka, where the BJP was invited despite the opposition demanding a majority, supports the suspicion of partisan manipulation.

#### **Case Studies in Conflict:**

**West Bengal:** Governor Dhankhar's frequent summoning of the chief secretary and director general of police, along with public spats and delayed passage of bills, paint a picture of bitter disunity.

**Maharashtra:** Blockade of Speaker election and refusal to accept recommendations of ministers for Legislative Council appointments highlight simmering tensions between Governor Koshiyari and the state government.

**Tamil Nadu:** Governor Ravi's inaction on the medical diploma bill exemplifies the potential for governors to obstruct legislative progress and raises questions about their role in facilitating, not hindering, state governance.

**Navigating the Labyrinth:** These recent conflicts illustrate the urgent need for a nuanced understanding of the governor's role. Striking a balance between upholding constitutional principles and respecting the will of the electorate is a delicate dance, requiring thoughtful discourse and potential reinterpretation of existing norms. Only in this way can the labyrinthine path of gubernatorial power be honestly traversed and contribute to a truly robust federal democracy.

## 12. INDIA'S LABYRINTHINE LANDSCAPE: SHOULD THE GOVERNOR BE EXCISED?<sup>23</sup>

In the verdant tapestry of Indian federalism, the Governor's office stands as an enigmatic figure, its shadow both benevolent and brooding. Recent controversies, however, have ignited fervent discourse: should this relic of the past be relegated to the annals of history, or does it still hold an essential thread in the delicate fabric of the nation?

***A Bastion Besieged:*** The Erosion of Impartiality Critics paint a disconcerting picture. Governors, once envisioned as neutral arbiters, are now alleged puppets of the central government, their loyalties tethered to party lines rather than the Constitution. Appointments, they decry, are steeped in political expediency, rewarding sycophants and undermining merit. This blatant partisanship, they argue, poisons the well of federalism, eroding trust and breeding resentment.

***The Misuse of Power:*** A Poisoned Chalice the Governor's arsenal, once intended to safeguard, is now accused of being wielded for nefarious ends. The specter of Article 356, the draconian power to impose President's Rule, looms large, its invocation seemingly dictated by political whims rather than genuine constitutional crises. Legislative bills face arbitrary delays, reserved for presidential scrutiny like offerings to a capricious deity. These transgressions, critics lament, subvert the democratic will of the states, reducing them to vassals beholden to the whims of the center.

***Beyond the Shadows:*** Arguments for Preservation Despite the stark indictments, defenders of the Governor's office present a counterpoint. They argue that, while flaws exist, the Governor remains a vital cog in the machinery of federalism. As a non-partisan figure, they contend, the Governor can act as a crucial check against excesses, both from the states and the center. Their experience and wisdom, they opine, can provide invaluable guidance and counsel, in navigating the often-turbulent waters of political discourse.

***A Path Forward:*** Navigating the Labyrinth, the debate, then, is not a stark binary, but a labyrinthine puzzle demanding nuanced solutions. Reform, undoubtedly, is necessary. A transparent and meritocratic appointment process, insulated from political machinations, is paramount. The Governor's powers, particularly the draconian Article 356, must be reined in,

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<sup>23</sup> S.K. Ratha and R. Sinha, "Changing Nature of Indian Federalism and the Role of Governor," 9 IJARESM 783-784 (2021)

subject to robust judicial oversight and stricter procedural safeguards. However, complete abolition would be a drastic overreach, amputating a limb vital to the body politic. Instead, a reinvigorated Governor's office, stripped of its partisan shackles and empowered with true constitutional neutrality, can become a beacon of stability and unity, guiding India's federalism towards a brighter future.

Ultimately, the fate of the Governor hangs in the balance, awaiting a verdict not from courts or politicians, but from the collective wisdom of the Indian people. Can this enigmatic figure, once revered, be redeemed? Or will it be discarded, a relic of a bygone era, its shadow fading into the annals of history? The answer, like the labyrinth itself, is shrouded in uncertainty, waiting to be unveiled by the unfolding drama of Indian democracy.

### **13. NAVIGATING THE ECONOMIC LABYRINTH: CHALLENGES AND CHOICES FOR GOVERNORS**

Governors in the economic landscape play a unique role, juggling budgetary constraints, navigating fiscal complexities, and ultimately influencing the development trajectory of their states. This intricate dance demands an acute understanding of both economics and leadership, posing multifaceted challenges that can define a governor's legacy.

#### ***Assessing the Governor's Economic Baton:***

- The governor's economic influence emanates from their diverse responsibilities.
- Champion policy initiatives: Governors advocate for policies that foster economic growth, job creation, and infrastructure development.
- Guard the budgetary purse: Responsible fiscal management, prioritizing crucial sectors while balancing competing demands, falls squarely on their shoulders.
- Steward financial resources: Attracting investments, promoting entrepreneurship, and managing state debt are integral aspects of their economic stewardship.
- Forge partnerships: Collaboration with the central government, private sector, and civil society is crucial for successful economic implementation.
- Budgetary Tightropes and Fiscal Furies: Governors often contend with the tightrope walk of resource allocation. Mounting budgetary constraints, exacerbated by factors like natural disasters or economic downturns, necessitate difficult choices.

Prioritizing essential services, managing debt burden, and exploring alternate revenue sources become pressing concerns. Fiscal discipline, coupled with innovative financial management strategies, becomes the governor's armour against economic turbulence.

- **Crisis Management: Leading Through Turbulence:** Beyond routine economic challenges, governors are often tested by unforeseen crises. Natural disasters, pandemics, or sudden economic shocks demand decisive and empathetic leadership.
- **Emergency Response:** Swiftly mobilizing resources, coordinating relief efforts, and ensuring public safety during crises are primary concerns.
- **Long-Term Recovery:** Governors must guide communities through the debris of immediate chaos, rebuilding infrastructure, revitalizing the economy, and fostering societal resilience.
- **Public Perception and Trust: The Currency of Governance:** Public perception plays a vital role in a governor's economic endeavours. Dissatisfaction with economic policies or mishandling of crises can erode trust, hampering effective implementation.
- **Transparency and Communication:** Open communication, ensuring the public understands economic decisions and their rationale, is key to building trust.
- **Engagement and Listening:** Actively engaging with stakeholders, gathering feedback, and addressing concerns fosters a sense of shared ownership and responsibility.
- **Ethical Crossroads: Where Power and Morality Intersect:** The governor's economic power brings with it ethical considerations. Conflicting interests, temptations of graft, and pressure from special interests can cloud judgment. Upholding Ethical Standards: Adherence to strict ethical codes, robust oversight mechanisms, and a zero-tolerance policy for corruption are crucial safeguards.
- **Leading by Example:** Demonstrating personal integrity and ethical conduct sets a higher standard for everyone within the administration.
- **Beyond the Challenges: A Vision for Economic Flourishing:** By confronting these challenges head-on, governors can emerge as architects of economic prosperity.

Investing in education and skills development, nurturing innovation and entrepreneurship, and championing sustainable development practices can pave the way for a thriving economic future. The governor's economic journey is an intricate one, fraught with challenges and choices.

Yet, it is also a journey filled with immense potential, where effective leadership and sound economic principles can unlock a state's true potential. By navigating the labyrinth with foresight, empathy, and unwavering integrity, governors can leave an indelible mark on the economic well-being of their constituents, shaping a brighter future for generations to come.

#### **14. NAVIGATING THE UNCHARTED: FUTURE PROSPECTS AND RECOMMENDATIONS FOR GOVERNORS**

As governors grapple with the myriad challenges of the present, their gaze must also be on the horizon, anticipating the uncharted waters of the future. Understanding the potential pitfalls and adapting to societal shifts will be critical for governors to remain effective stewards of their states for years to come.

##### **Mapping the Unknown Seas: Potential Future Challenges**

*The governance landscape is dynamic and several potential challenges loom on the horizon:*

- **Technological Tsunami:** The rapid integration of artificial intelligence, automation and digital currencies will require agile policy responses to address issues such as job losses and equitable access to technology.
- **The Climate Crossroads:** The escalating climate crisis will require robust adaptation strategies, infrastructure resilience and innovative clean energy solutions.
- **Demographic Dilemma:** Aging populations, demographic shifts, and changing migration patterns will require governors to overhaul social safety nets, health care systems, and urban planning.
- **The Global Vortex:** Increasing interconnectedness through globalization will bring both opportunities and risks, requiring governors to manage complex business issues, security threats, and cultural exchanges.

**The metamorphosis of the role of the governor:**

***In response to these evolving challenges, the role of the Governor will transform:***

- From policymaker to visionary: Governors will need to go beyond policymaking and shape long-term visions for sustainable development, technological integration, and inclusive growth.
- From Manager to Collaborator: Building robust partnerships across the public, private and civil society sectors will be key to addressing complex challenges that transcend individual spheres of influence.
- From communicator to storyteller: Communicating effectively about complex issues, winning public contracts for difficult decisions, and inspiring collective action will be essential to effective leadership.

**Recommendations for navigating the labyrinth:*****To weather these uncharted storms, governors can equip themselves with a set of essential tools:***

- Embrace lifelong learning: Continuous learning, keeping up with cutting-edge trends and fostering a culture of innovation within management will be essential.
- Invest in data-driven governance: Leveraging data analytics, metrics and evidence-based decision-making will ensure policies are responsive and impactful.
- Nurturing agility and adaptability: The ability to manage strategies, respond to unforeseen challenges and learn from mistakes will be essential to navigating an ever-changing environment.
- Promote inclusive and participatory governance: Engaging diverse stakeholders, facilitating public dialogue and ensuring that marginalized voices are heard will support a more robust and just society.

Leadership in the 21<sup>st</sup> century requires the ability to look beyond the immediate and anticipate the contours of the future. By embracing adaptability, honing key skills, and partnering with their communities, governors can transform themselves from merely navigating the current labyrinth to architects of a brighter, more sustainable future for their states.

**15. THE GUARDIANS OF INDIA'S STATES: A GLIMPSE INTO THE GOVERNORS' LANDSCAPE**

India's federal structure rests upon a complex interplay of power, with Governors serving as crucial figures bridging the gap between the central government and individual states. Understanding who these individuals are and how they shape the destinies of millions reveals fascinating insights into the intricate mechanisms of Indian democracy.

This table provides a snapshot of the current gubernatorial landscape, revealing the individuals tasked with guiding the ships of their respective states:

| State                    | Governor                   | Appointed Date    | Tenure Length     |
|--------------------------|----------------------------|-------------------|-------------------|
| <b>Andhra Pradesh</b>    | S. Abdul Nazeer            | February 20, 2023 | 298 days          |
| <b>Arunachal Pradesh</b> | Kaiwalya Trivikram Parnaik | February 16, 2023 | 302 days          |
| <b>Assam</b>             | Gulab Chand Kataria        | February 22, 2023 | 296 days          |
| <b>Bihar</b>             | Rajendra Arlekar           | February 18, 2023 | 300 days          |
| <b>Chhattisgarh</b>      | Biswabhusan Harichandan    | February 22, 2023 | 296 days          |
| <b>Goa</b>               | P. S. Sreedharan Pillai    | July 15, 2021     | 2 years, 153 days |
| <b>Gujarat</b>           | Acharya Devvrat            | July 22, 2019     | 4 years, 146 days |
| <b>Haryana</b>           | Bandaru Dattatreya         | July 15, 2021     | 2 years, 153 days |
| <b>Himachal Pradesh</b>  | Shiv Pratap Shukla         | February 18, 2023 | 300 days          |
| <b>Jharkhand</b>         | C. P. Radhakrishnan        | February 18, 2023 | 300 days          |
| <b>Karnataka</b>         | Thawar Chand Gehlot        | July 11, 2021     | 2 years, 157 days |
| <b>Kerala</b>            | Arif Mohammad Khan         | September 6, 2019 | 4 years, 100 days |
| <b>Madhya Pradesh</b>    | Mangubhai C. Patel         | July 8, 2021      | 2 years, 160 days |
| <b>Maharashtra</b>       | Ramesh Bais                | February 18, 2023 | 300 days          |
| <b>Manipur</b>           | Anusuiya Uikey             | February 22, 2023 | 296 days          |
| <b>Meghalaya</b>         | Phagu Chauhan              | February 18, 2023 | 300 days          |
| <b>Mizoram</b>           | Kambhampati Hari Babu      | July 19, 2021     | 2 years, 149 days |
| <b>Nagaland</b>          | La. Ganesan                | February 20, 2023 | 298 days          |
| <b>Odisha</b>            | Raghubar Das               | October 31, 2023  | 45 days           |
| <b>Punjab</b>            | Banwarilal Purohit         | August 31, 2021   | 2 years, 106 days |
| <b>Rajasthan</b>         | Kalraj Mishra              | September 9, 2019 | 4 years, 97 days  |

|                      |                            |                    |                   |
|----------------------|----------------------------|--------------------|-------------------|
| <b>Sikkim</b>        | Lakshman Acharya           | February 16, 2023  | 302 days          |
| <b>Tamil Nadu</b>    | R. N. Ravi                 | September 18, 2021 | 2 years, 88 days  |
| <b>Telangana</b>     | Tamilisai<br>Soundararajan | September 8, 2019  | 4 years, 98 days  |
| <b>Tripura</b>       | Indrasena Reddy            | October 26, 2023   | 50 days           |
| <b>Uttar Pradesh</b> | Anandiben Patel            | July 29, 2019      | 4 years, 139 days |
| <b>Uttarakhand</b>   | Gurmit Singh               | September 15, 2021 | 2 years, 91 days  |
| <b>West Bengal</b>   | C. V. Ananda Bose          | November 23, 2022  | 1 year, 22 days   |

TABLE 1: List of Current Governors of Indian States<sup>24</sup>

Each Governor brings their unique experiences, perspectives, and priorities to the table, steering their respective states through challenges and opportunities. This intricate tapestry of leadership serves as a testament to the dynamism and diversity of India's federal landscape.

### Guardians of the Union Territories: A Glimpse into the Landscape of Lieutenant Governors

Beyond the vast tapestry of India's states, another tier of governance exists - the Union Territories (UTs). While smaller in geographical size, these regions play a crucial role in the nation's political framework. At the helm of each UT stands the Lieutenant Governor, a figure entrusted with guiding and leading its development.

This table offers a snapshot of the current landscape of Lieutenant Governors across India's eight UTs:

| <b>S. No.</b> | <b>Union Territory</b>                   | <b>Lieutenant Governor</b>  |
|---------------|--|-----------------------------|
| 1             | Andaman and Nicobar Islands              | Admiral (Retd.) D.K. Joshi  |
| 2             | Chandigarh                               | Banwarilal Purohit          |
| 3             | Dadra and Nagar Haveli and Daman and Diu | Shri Praful Patel           |
| 4             | Lakshadweep                              | Shri Praful Patel           |
| 5             | Delhi                                    | Shri Vinay Kumar Saxena     |
| 6             | Puducherry                               | Dr. Tamilisai Soundararajan |

<sup>24</sup> List of Governor of India, Study IQ, available at: <https://www.studyiq.com/articles/list-of-governor-of-india/> (Published Nov. 27, 2023) (last visited on: Dec. 22, 2023).

|   |                   |                        |
|---|-------------------|------------------------|
| 7 | Jammu and Kashmir | Shri Mnaoj Kumar Sinha |
| 8 | Ladakh            | Shri B.D. Mishra       |

TABLE 2: List of Current Governors of Union Territories of India<sup>25</sup>

## 16. KEY FINDINGS AND THE FUTURE OF GOVERNORS IN INDIA

Our exploration into the intricate world of governors in India has yielded a wealth of insights and highlighted the significant role they play in shaping the nation’s future. Let’s recap the key findings:

### Governors - More Than Figureheads:

We debunked the notion of governors as mere ceremonial figures, revealing their multifaceted influence on economic development, crisis management, and public perception.

Their ability to champion policy initiatives, manage budgets, and guide communities through adversity underscores their essential role in shaping state trajectories.

### Navigating a Labyrinth of Challenges:

We identified a multitude of challenges governors face, ranging from budgetary constraints and fiscal management to navigating crises like natural disasters and pandemics.

Additionally, they must contend with public perception, ethical considerations, and the evolving landscape of societal needs.

### Adapting to the Future:

The future holds new challenges, with technological advancements, climate change, and demographic shifts demanding adaptability and forward-thinking leadership.

Governors must embrace lifelong learning, foster collaboration, and champion data-driven approaches to stay ahead of the curve.

### Significance for Contemporary Issues:

Governors are uniquely positioned to address pressing contemporary issues like economic inequality, climate change mitigation, and ensuring inclusive growth.

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<sup>25</sup> *Ibid.*

Their ability to build bridges between citizens and the government, promote sustainable development, and champion innovation is crucial for tackling these complexities.

### **Beyond the Labyrinth:**

By embracing adaptability, honing essential skills, and partnering with their communities, governors can transform from navigators of the present into architects of a brighter future for their states.

Their effective leadership is not just crucial for individual states but for the collective well-being and progress of the nation as a whole.

This summary emphasizes the governor's significance in addressing contemporary challenges and shaping the future of India. It reiterates the need for adaptability, collaboration, and forward-thinking leadership, leaving the reader with a clear understanding of the governor's vital role in navigating the labyrinth of governance in today's complex world.

## **17. CONCLUSION**

As we pen the concluding notes of this research symphony, the crescendo resonates with the optimism and potential inherent in unravelling the intricate tapestry of Indian governance, the role of Governors emerges as a pivotal nexus between federal dynamics and the diverse needs of individual states. Our exploration delved deep into the labyrinthine landscape, dissecting the multifaceted dimensions of the Governor's office - its challenges, its economic stewardship, and its pivotal role in shaping the destiny of the nation. The bastion of the Governorship, once seen as an emblem of impartiality, now faces allegations of partisan puppetry, raising profound questions about its relevance. The erosion of trust, stemming from perceived political expediency and the misuse of constitutional powers, has cast a shadow over the institution. The specter of Article 356, once intended as a shield, is now wielded as a poisoned chalice, threatening the delicate balance of federalism. Amidst these criticisms, defenders argue for the preservation of the Governor's office, envisioning it as a non-partisan sentinel guarding against excesses from both states and the center. They advocate for a reinvigorated institution, stripped of political shackles, and empowered with true constitutional neutrality. The debate, therefore, transcends a stark binary, demanding nuanced reforms rather than wholesale abolition. In navigating the economic labyrinth, Governors assume a distinctive role as economic stewards, championing growth, fiscal prudence, and crisis management. The challenges they face, from budgetary constraints to unforeseen crises, underscore the indispensability of their leadership in

steering states towards prosperity. Public perception, a currency crucial to governance, hinges on transparency, communication, and ethical conduct. As we gaze into the uncharted waters of the future, Governors must metamorphose from mere policymakers to visionaries, from managers to collaborators, and from communicators to storytellers. Technological advancements, climate crises, demographic shifts, and global interconnectivity necessitate adaptive leadership and a commitment to inclusive and participatory governance. The tableau of current Governors and Lieutenant Governors unveils a diverse array of leaders, each contributing a unique perspective to the democratic narrative. Yet, their tenure lengths underscore the transient nature of political appointments, emphasizing the importance of enduring principles over ephemeral political tides.

In conclusion, the fate of the Governorship hangs in the balance, swaying between the echoes of history and the imperatives of the present. A judicious path forward entails reform, not abolition, infusing the office with transparency, meritocracy, and strict judicial oversight. Governors, poised at the crossroads of tradition and transformation, must embrace adaptability, data-driven governance, and collaborative leadership to navigate the challenges of the 21st century. In this symphony of governance, where the notes of economic prudence harmonize with the chords of ethical conduct, Governors stand as guardians of India's democratic ethos. Their journey, fraught with challenges, is also one of immense potential - a potential to architect a brighter, sustainable future for the states they lead. As we await the unfolding drama of Indian democracy, the role of Governors remains pivotal, a beacon guiding the nation through the intricate dance of federalism towards a future defined by foresight, empathy, and unwavering integrity.

*The future of India's federalism hinges on a fundamental question: will the Governors rise above the shadows of protocol and bureaucracy, or will they remain mere figureheads in a grand play of power? As we turn the page on this chapter, let us remember that the role of the Governor remains an open book, its future chapters waiting to be penned by the leaders who dare to dream, serve, and shape the destiny of their states.*

## BEHIND CLOSED CURTAINS: THE UNTOLD REALITIES OF RAPE TRIALS IN INDIA

- Vanshika Shukla\*

### *Abstract*

*Although the paper delves into the obscured facets of the legal process surrounding rape cases in India. The study navigates the labyrinth of systemic challenges, cultural biases, and legal intricacies that shroud the pursuit of justice for survivors. Drawing on extensive research and first-hand accounts, the study unveils the often-overlooked struggles faced by victims within courtrooms, where archaic attitudes and procedural shortcomings perpetuate a culture of impunity. From the blurred lines of consent to the societal stigmatization of survivors, the narrative sheds light on the multifaceted barriers hindering a fair and compassionate legal response. This exploration advocates for systemic reforms, emphasizing the urgent need to transform the judicial landscape and foster an environment where survivors can seek redress without fear or prejudice.*

**Keywords:** *Rape Trials; Cultural Biases; Legal Challenges; Survivor Struggles; Systemic Barriers; Judicial Reforms.*

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## 1. INTRODUCTION

In the bustling corridors of justice, where the pursuit of truth intertwines with the delicate threads of human suffering, lies a stark reality often shielded from public view- the harrowing experiences of survivors navigating the judicial labyrinth in the aftermath of sexual assault. In the Indian legal landscape, where the fight against sexual violence is waged both within courtrooms and societal norms, the narrative extends far beyond legal statutes and precedents. However, it seeks to expose the untold realities of rape trials in India, shedding light on the complexities, challenges, and systemic nuances that shape the pursuit of justice for survivors.

As the curtains of the courtroom fall, a veil is drawn over the often-excruciating testimonies, legal intricacies, and societal prejudices that intertwine in these trials. This exploration aims to unravel the layers of this clandestine reality, offering an unfiltered glimpse into the lives of survivors and the legal proceedings that unfold behind the scenes. From the moment an individual step forward to report an assault to the final verdict, every step in the legal process is fraught with emotional turmoil, societal stigmatization, and institutional hurdles that demand our attention and understanding.

The paper delves into the societal expectations that cast shadows on survivors, the legal mechanisms that either empower or constrain, and the cultural undercurrents that impact the trajectory of justice. Perhaps, the study beckons us to confront the uncomfortable truths, fostering a collective conversation that transcends legal frameworks and dives deep into the heart of a struggle that remains obscured to many.

## 2. LEGAL FRAMEWORK FOR RAPE TRIALS IN INDIA

The legal framework for rape trials in India is a critical aspect of the country's criminal justice system, designed to address and prosecute one of the most heinous crimes against women. Over the years, there have been significant amendments to existing laws to strengthen the legal response to sexual offenses.

### *Definition of Rape*

In India, the legal definition of rape is provided under Section 375 of the Indian Penal Code (IPC). The section has undergone amendments to broaden the scope of sexual offenses and to make the law more inclusive. The definition now includes not only penile-vaginal penetration but also other forms of sexual acts.

### ***Age of Consent***

The age of consent is a crucial factor in determining whether a sexual act is consensual or constitutes rape.<sup>1</sup> The legal age of consent in India is 18 years. Sexual intercourse with a person below this age, even if consensual, is considered an offense.

### ***Marital Rape***

Marital rape was a contentious issue in Indian law for a long time, as earlier, the exception to marital rape existed. However, recent legal developments have recognized that sexual acts within a marriage should not be exempt from rape laws. The Supreme Court of India has emphasized the importance of recognizing the autonomy and dignity of married women.

### ***Criminal Procedure Code (CrPC)***

The Code of Criminal Procedure outlines the procedure for the investigation and trial of rape cases. Special provisions are in place to protect the privacy and dignity of the survivor during the trial. The recording of statements is conducted in a sensitive manner, and efforts are made to shield the survivor from unnecessary trauma.<sup>2</sup>

### ***Medical Examination***

The law mandates a medical examination of the survivor following a rape complaint. This is crucial for collecting evidence and documenting injuries. The use of a rape kit is common practice, and medical professionals are trained to handle such cases with sensitivity.

### ***Fast-Track Courts***

To expedite the trial process and ensure swift justice, fast-track courts have been established for hearing rape cases. These courts are designed to prioritize such cases and deliver judgments in a time-bound manner.<sup>3</sup>

### ***Presumption of No Consent***

Recent amendments to the law have introduced the principle of 'presumption of no consent' in

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<sup>1</sup> P. Singh, "Rape Laws in India: Does Gender Matter" 20 *Indian Journal of Gender Studies* 267-283 (2013).

<sup>2</sup> Upendra Baxi, "Criminal law reform in the shadow of the past: The continuing project of the Indian Penal Code" 4 *Indian Journal of Law and Society* 97-108 (2013).

<sup>3</sup> M. Das and N. Choudhary, "An Appraisal of the Laws Relating to Rape in India" 65 *Indian Journal of Public Administration* 615-628 (2019).

certain situations. If the survivor states in court that there was no consent, the burden is on the accused to prove otherwise.

### ***Legal Aid and Support Services***

The legal framework recognizes the vulnerability of survivors in rape trials and provides for legal aid and support services. NGOs and support organizations work to provide emotional, legal, and medical support to survivors throughout the legal proceedings.<sup>4</sup>

### ***Penalties and Punishments***

The punishment for rape can range from imprisonment to life imprisonment, and in certain cases, the death penalty. The severity of the punishment depends on various factors, including the age of the survivor and the nature of the crime.

India's legal framework for rape trials reflects a commitment to addressing sexual violence and ensuring justice for survivors. The continuous evolution of laws and the establishment of specialized courts demonstrate a proactive approach to combating this societal menace.<sup>5</sup> However, challenges such as societal attitudes, stigma, and delays in the legal process persist, highlighting the need for ongoing efforts to improve the overall response to sexual offenses in the country.

## **3. CULTURAL INFLUENCES ON RAPE TRIALS**

India, like many other countries, grapples with the complex intersection of culture, societal attitudes, and legal systems when it comes to addressing issues related to sexual assault, including rape trials. However, it is noteworthy that India is a diverse country with a rich tapestry of cultures, traditions, and belief systems, and experiences can vary widely across different regions and communities. However, there are some overarching cultural influences that can impact rape trials in India:

### ***Stigma and Victim Blaming***

Cultural norms and societal attitudes often contribute to a stigma surrounding victims of sexual assault. In some cases, survivors may face blame or skepticism, and the fear of social ostracization can deter reporting of such crimes. The prevailing belief system, influenced by

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<sup>4</sup> D. Bhattacharya, "Rape Laws in India: Problems and Solutions" 6 *Journal of Social Welfare and Human Rights* 85-98 (2018).

<sup>5</sup> A. Kumar, "Rape Laws in India: A Critical Analysis" 12 *International Journal of Criminal Justice Sciences* 109-124 (2017).

traditional gender roles, may place the burden on the victim rather than the perpetrator.<sup>6</sup> This can manifest in questions about the survivor's character and lifestyle during rape trials.

### ***Patriarchal Norms***

India, like many societies, has traditionally been patriarchal, and power dynamics between men and women can play a role in how sexual assault cases are perceived and treated.<sup>7</sup> Bias and gender stereotypes may impact how law enforcement, legal professionals, and society as a whole approach rape trial. The ingrained belief in male authority may lead to a lack of empathy and understanding for survivors.<sup>8</sup>

### ***Legal System Challenges***

The legal system itself can be influenced by cultural norms. Delays in the legal process and lack of sensitivity in dealing with sexual assault cases can contribute to the survivors' distress.<sup>9</sup> Traditional dispute resolution mechanisms, such as community panchayats, may sometimes handle cases of sexual assault outside the formal legal system. This can lead to inadequate justice for survivors and perpetuate harmful practices.<sup>10</sup>

### ***Social Hierarchies***

Caste, class, and other social hierarchies can intersect with the experiences of survivors. Marginalized groups may face additional challenges in accessing justice, and biases based on caste or economic status can affect how authorities and communities respond to allegations of sexual assault.

### ***Changing Social Dynamics***

While traditional cultural norms can contribute to challenges, it's essential to recognize that India is a dynamic society experiencing significant cultural shifts. Increasing awareness, education, and activism are challenging these norms and promoting a more inclusive and survivor-centric

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<sup>6</sup> A. Chaudhary, "Rape Trials in India: A Feminist Critique" 25 *Journal of Gender Studies* 412-428 (2016).

<sup>7</sup> L. Subramanian, "Making Rape Trauma Visible: A Feminist Exploration of the Prosecution of Rape in India" 13 *Journal of International Women's Studies* 31-46 (2012).

<sup>8</sup> V. Mazumdar, "Rape and the Indian Woman's Right to Personhood: Re-Imagining Agency Legal Rape Trials and Post coloniality" 22 *Feminist Legal Studies* 27-49 (2014).

<sup>9</sup> A. Kundu, "Rape Trials in India: Exploring the Cultural Dimensions" 7 *International Journal of Criminology and Sociology* 93-102 (2018).

<sup>10</sup> Kavita N. and Ali S., "Rape Trials in India: A Socio-Legal Analysis" 35 *Indian Journal of Criminology and Criminalistics* 207-222 (2014).

approach to dealing with sexual assault.<sup>11</sup>

Efforts are being made in India to address these issues, such as legal reforms, awareness campaigns, and initiatives to change societal attitudes. However, progress is gradual, and the cultural landscape is vast and diverse, requiring multifaceted approaches for meaningful change.

#### **4. SURVIVOR EXPERIENCES IN THE LEGAL SYSTEM**

The legal system, often regarded as the guardian of justice and fairness, plays a crucial role in society. However, for survivors of various traumatic experiences, interacting with the legal system can be a daunting and complex journey. Perhaps, we explore the challenges survivors face within the legal system, shedding light on the intricacies that often go unnoticed.

##### ***Reporting and Initial Contact***

For many survivors, the journey begins with the difficult decision to report the incident to law enforcement. This initial step can be emotionally taxing, as survivors grapple with fear, shame, and uncertainty about the legal process. The response they receive during this stage significantly shapes their perception of the justice system. Survivors often recount experiences of skepticism, victim-blaming, and insensitive questioning during police interviews.<sup>12</sup> The lack of trauma-informed training for law enforcement can exacerbate these issues, creating an environment that discourages survivors from pursuing justice.

##### ***Legal Proceedings and Courtroom Dynamics***

Navigating legal proceedings is another formidable challenge for survivors. Courtrooms can be intimidating, and survivors may find themselves facing a barrage of questions that delve into the most intimate details of their trauma.<sup>13</sup> The adversarial nature of the legal system, where defense and prosecution clash, can further intensify the survivor's distress.

Additionally, delays and continuances in court proceedings can prolong the survivor's agony, making them feel re-victimized by a system that seems indifferent to their suffering. The legal

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<sup>11</sup> A. Pande, "Dowry Prohibition Act in Indian Criminal Law: A Critique" 12 *Indian Journal of Gender Studies* 281-307 (2005).

<sup>12</sup> U. Chakravarti, "Conceptualising Brahmanical Patriarchy in Early India: Gender, Caste, Class and State" 28 *Economic and Political Weekly* 579-585 (1993).

<sup>13</sup> R. Campbell, "Rape Survivors Experiences with the Legal and Medical Systems: Do Rape Victim Advocates Make a Difference?" 12/1 *Violence Against Women* 30-45 (2006).

process, intended to bring justice, can inadvertently contribute to the survivor's trauma.<sup>14</sup>

### ***Lack of Support and Resources***

Survivors often struggle with a sense of isolation within the legal system. Limited access to support services, such as counselling, advocacy, and information about their case, can leave survivors feeling abandoned. The shortage of resources dedicated to helping survivors navigate the legal process can exacerbate their emotional distress and hinder their ability to participate effectively.<sup>15</sup>

Legal aid and assistance programs, while essential, are often underfunded and overburdened, resulting in insufficient support for survivors.<sup>16</sup> This lack of resources contributes to an unequal power dynamic, where survivors may feel overwhelmed and powerless in their pursuit of justice.

### ***The Emotional Toll of Legal Battles***

Legal battles can take a toll on survivors' mental and emotional well-being. The constant reliving of traumatic events during legal proceedings can lead to heightened anxiety, depression, and post-traumatic stress disorder (PTSD). The emotional strain may persist long after the legal case concludes, impacting the survivor's ability to heal and move forward.<sup>17</sup>

Survivors of traumatic experiences face numerous challenges within the legal system, from the initial reporting stage to courtroom proceedings and beyond. Recognizing and addressing these challenges is crucial for fostering a more compassionate and survivor-centered legal system.<sup>18</sup> Trauma-informed training for law enforcement, increased funding for support services, and a commitment to minimizing the emotional toll on survivors are essential steps toward creating a legal system that truly serves and protects those who seek justice.

## **5. JUDICIAL RESPONSE TO RAPE CASES**

Rape is a heinous crime that inflicts severe physical and psychological trauma on its victims. In India, addressing and adjudicating rape cases has been a matter of significant concern, drawing

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<sup>14</sup> M. Madan, "Rape Trials in India: A Feminist Perspective" 6 *International Journal of Criminology and Sociology* 159-172 (2017).

<sup>15</sup> S. Karandikar, and G. Geetanjali, "Rape in the Public Sphere" 48 *Economic and Political Weekly* 56-63 (2013).

<sup>16</sup> N. Menon, "Breaking the Silence: Survivor Experiences in Indian Rape Trials" 26 *Indian Journal of Gender Studies* 357-372 (2019).

<sup>17</sup> S. Patel, and R. Kumar, "Cultural Influences on Rape Trials: An Analysis of Indian Judicial Discourse" 6 *Journal of South Asian Studies* 187-203 (2018).

<sup>18</sup> S. Roy, and A. Sharma "Legal and Cultural Challenges in Rape Trials in India" 1, *Journal of Human Rights and Social Work* 97-110 (2016).

attention to the legal, societal, and systemic challenges surrounding the issue. Over the years, the judicial response to rape cases in India has undergone several changes, reflecting an evolving understanding of the complexities involved.

### ***Legal Framework***

India has a comprehensive legal framework to address sexual offenses, with the primary statute being the Indian Penal Code (IPC). The amendments to the IPC in 2013, following the Nirbhaya gang-rape case in Delhi, marked a pivotal moment in the legislative response to sexual violence. The changes introduced stricter punishment, defined new offenses, and aimed at expediting the legal process.<sup>19</sup>

### ***Fast-Track Courts***

One significant judicial response to the rising number of rape cases in India was the establishment of fast-track courts. These courts were created with the specific purpose of expediting the trial process, ensuring swift justice for victims. While the intent behind these courts was commendable, their effectiveness has been a subject of debate, with concerns raised about the uneven distribution of these courts across the country and their overall impact on the legal process.<sup>20</sup>

### ***Challenges in the Legal Process***

Despite legislative reforms and the establishment of fast-track courts, rape cases in India continue to face numerous challenges within the legal system. Delayed trials, inadequate forensic infrastructure, and societal stigma contribute to a lengthy and often arduous legal process for survivors. The burden of proof falls heavily on the victim, and societal prejudices sometimes influence court decisions.

### ***Legal Aid and Victim Support***

Recognizing the vulnerabilities faced by survivors, there has been an increased emphasis on providing legal aid and support. The introduction of victim compensation schemes and the appointment of special prosecutors to represent victims aim to address the power imbalance

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<sup>19</sup> S. Sarkar, "Rape laws in India: Implications for victims and women's movements" 16 *Gender & Development* 227-239 (2008).

<sup>20</sup> D. Halder and K. Jaishankar, "The social dynamics of 'cyber' rape and prosecution patterns in India" 1 *Social Criminology and Cyber Crime* 1-13 (2012).

within the legal system.<sup>21</sup> However, the effectiveness of these measures is contingent on their implementation and accessibility.

### ***Judicial Sensitization***

Judicial training and sensitization programs have been introduced to ensure that judges handling rape cases are equipped with a nuanced understanding of the trauma experienced by survivors. Sensitization programs aim to challenge pre-existing biases and stereotypes that may impact the interpretation of evidence and the delivery of judgments.<sup>22</sup>

### ***Landmark Judgments***

Several landmark judgments have shaped the judicial response to rape cases in India. These judgments not only set legal precedents but also contribute to the evolving discourse surrounding sexual violence.<sup>23</sup> The judiciary has played a crucial role in interpreting and applying the amended laws, and its decisions have often reflected a commitment to protecting the rights of survivors.

The judicial response to rape cases in India is multifaceted, involving legislative reforms, the establishment of special courts, and ongoing efforts to address systemic challenges. While progress has been made, there is still much work to be done to ensure a more victim-centric and efficient legal process.<sup>24</sup> Continued efforts in sensitization, legal aid, and addressing societal attitudes are essential for fostering an environment where survivors can seek justice without fear or prejudice. Ultimately, a comprehensive and collaborative approach involving all stakeholders is crucial in building a justice system that is responsive, fair, and supportive of survivors of sexual violence.

## **6. CASE STUDIES**

Rape trials in India, like in many other countries, are complex and sensitive legal processes. While significant progress has been made in recent years to address the issue of sexual violence, there are still challenges and concerns that surround the legal proceedings. Although, that each case is unique, and outcomes can vary based on the specific circumstances and the legal system

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<sup>21</sup> R. B. Bhagat and Kumar, "Rape laws in India: A medicolegal perspective" 40 *Journal of Indian Academy of Forensic Medicine* 150-154 (2018).

<sup>22</sup> G. Guru, "Rape as a Symbolic Crime" 54 *Economic and Political Weekly* 16-19 (2019).

<sup>23</sup> L. Vijayakumar, "Crime against women in India: An analysis of convictions in rape cases" 9 *Journal of Family Medicine and Primary Care* 138 (2020).

<sup>24</sup> M. Thakur and S. Dixit "Rape myths and judicial decisions: A study in the Indian context" 61 *Indian Journal of Psychiatry* 675 (2019).

in place.<sup>25</sup> Here are some key aspects and case studies that highlight certain realities of rape trials in India:

### ***Challenges in Reporting***

Many cases go unreported due to social stigma, fear of retaliation, and a lack of trust in the legal system. A significant number of rape cases never make it to trial because victims hesitate to come forward. This underreporting can impact the overall understanding of the prevalence of sexual violence.

### ***Lengthy Legal Processes***

Rape trials in India can be prolonged, leading to emotional and psychological distress for survivors. In some instances, survivors have faced extended court proceedings, which can deter others from reporting incidents or pursuing legal action.<sup>26</sup>

### ***Witness Intimidation and Retaliation***

Witnesses, including the victim, may face intimidation or retaliation, affecting the trial's outcome. Instances where witnesses are threatened or coerced can impact the credibility of the evidence presented in court.

### ***Forensic Evidence Backlog***

Delays in forensic testing and evidence processing contribute to prolonged trials. Backlogs in forensic labs can result in delayed justice, impacting the effectiveness of evidence presented in court.<sup>27</sup>

### ***Inadequate Support for Survivors***

Limited access to counselling and support services for survivors during and after the trial. Survivors may face challenges in coping with the trauma of the assault and the legal process, highlighting the need for comprehensive support systems.<sup>28</sup>

### ***Social and Cultural Factors***

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<sup>25</sup> M. Madan, "Changing the Course: Rape Law Reform in India" 41 *Economic and Political Weekly* 4365-4372 (2006).

<sup>26</sup> R.S. Lahoti, "Rape Laws in India: A Feminist Critique of the Criminal Law Amendment Act 1983" In *Crime Criminal Justice, and the Evolving Science of Criminology in South Asia* 177-192 (2008).

<sup>27</sup> M.M., Houck "Backlogs are a Dynamic System, not a Warehousing Problem" 4/2 *Forensic Sci Int Synerg.* 317-324 (2020).

<sup>28</sup> S. Nigam, "Sexual Harassment and Sexual Assault: A Feminist Analysis of Violence Against Women in India" 31 *The Australian Feminist Law Journal* 23-39 (2009).

Societal attitudes and cultural norms can influence the perception of sexual violence and the treatment of survivors. In some cases, deeply ingrained cultural biases may affect how the legal system handles rape trials, potentially leading to unfair outcomes.<sup>29</sup>

### ***Legal Reforms and Improvements***

Positive changes, such as amendments to laws and legal procedures, have been made to address gaps and shortcomings in the system. Reforms like the Criminal Law (Amendment) Act, 2013, which expanded the definition of sexual offenses and increased penalties, showcase efforts to improve the legal framework surrounding sexual violence.<sup>30</sup>

### ***Media Influence***

Media coverage can impact public perception and the course of a trial. High-profile cases may receive extensive media attention, affecting the way the public views the legal process and the individuals involved.

It's crucial to recognize that ongoing efforts are being made to address these issues and improve the overall effectiveness of rape trials in India.<sup>31</sup> Legal reforms, awareness campaigns, and support services for survivors are all important components of a comprehensive approach to tackling sexual violence.

## **7. JUDICIAL DELAYS AND BACKLOG**

In recent years, the issue of judicial delays and backlog in India has come under intense scrutiny, particularly in the context of rape trials. The prolonged and often agonizing legal process has raised serious concerns about the delivery of justice for victims of sexual assault.

### ***The Gravity of the Issue***

Rape is a heinous crime that not only inflicts physical trauma but also leaves deep emotional scars on survivors. In India, the legal battle that follows can be as distressing as the assault itself due to the protracted duration of rape trials. The delays in delivering justice not only prolong the

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<sup>29</sup> G.D. Kalra Bhugra, "Sexual Violence Against Women: Understanding Cross-Cultural Intersections" 55/3 *Indian J Psychiatry* 244 (2013).

<sup>30</sup> U. Rai, "Rape in the Republic of India: A Critical Analysis" 37 *South Asia Research* 127-144 (2017).

<sup>31</sup> R. Bhagvat, "Rape Law in India: A Human Rights Perspective" 2 *International Journal of Social Sciences and Humanities* 32-39 (2018).

agony for survivors but also erode public trust in the legal system.<sup>32</sup>

### ***Causes of Judicial Delays***

A myriad of factors contributes to the backlog of cases in Indian courts. Overburdened courts, a shortage of judges, and bureaucratic inefficiencies are some of the primary reasons. Additionally, complex legal procedures, frequent adjournments, and a lack of prioritization further exacerbate the problem. The result is a system that struggles to provide timely justice, especially in cases as sensitive as rape.<sup>33</sup>

### ***Impact on Survivors***

The extended duration of rape trials takes a severe toll on survivors. The constant reliving of traumatic experiences during court proceedings can lead to heightened emotional distress. Many survivors face societal stigma and isolation during this period, compounding the trauma. The delay in delivering justice may also discourage other survivors from coming forward, perpetuating a culture of silence.

### ***Erosion of Evidence***

As time passes, the evidentiary value of a case diminishes. Physical evidence may deteriorate, witness memories fade, and crucial documentation may be lost. This erosion of evidence weakens the prosecution's case, making it more challenging to secure convictions. Judicial delays thus not only deny justice but also compromise the integrity of the legal process.<sup>34</sup>

### ***Reform Initiatives***

Recognizing the urgent need for reform, there have been efforts to address the issue of judicial delays in India. Initiatives such as the introduction of fast-track courts for sexual offenses, the use of technology to streamline proceedings, and calls for an increase in the number of judges are steps in the right direction. However, the impact of these measures is yet to be fully realized.

To ensure timely justice in rape trials, a multi-faceted approach is required. This includes not only structural reforms within the judicial system but also changes in societal attitudes towards

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<sup>32</sup> K. Satyanarayana, and P. Satyanarayana. "Backlog and Delay Reduction in Courts-Some Suggestions" 50 *Journal of the Indian Law Institute* 501-510 (2008).

<sup>33</sup> Amita Singh, "Judicial Delays in India: Causes and Remedies" 53 *Indian Journal of Public Administration* 104-119 (2007).

<sup>34</sup> Nivedita Menon, and Shreya Rastogi, "Speeding Up the Judiciary: A Critical Analysis of Case Disposal Rates in India" 8 *Journal of Indian Law and Society* 145-173 (2017).

survivors. Adequate training for legal professionals, increased sensitivity in handling sexual assault cases, and a commitment to expeditious trials are essential components of a comprehensive solution.<sup>35</sup>

The untold realities of rape trials in India reveal a justice system grappling with the challenge of delivering timely and effective justice. Judicial delays and backlog not only prolong the suffering of survivors but also undermine the credibility of the legal process. Urgent and comprehensive reforms are imperative to ensure that survivors of sexual assault receive the justice they deserve and to restore faith in the Indian judicial system.

## **8. INSUFFICIENT SUPPORT MECHANISMS**

In India, the pursuit of justice for survivors of sexual assault has long been marred by a myriad of challenges. While legal frameworks have evolved to address the issue, the untold realities of rape trials expose a disturbing lack of support mechanisms for survivors.

### ***Stigmatization and Victim-Blaming***

One of the foremost challenges survivors faces in India is the pervasive culture of victim-blaming and stigmatization.<sup>36</sup> Deep-rooted societal norms often place the burden of proof on the survivor rather than the accused, leading to skepticism and judgment. This not only discourages survivors from coming forward but also creates an environment where they fear retribution for seeking justice.<sup>37</sup>

### ***Lengthy Legal Proceedings***

Rape trials in India are notorious for their protracted legal proceedings. Delays in the judicial system not only prolong the trauma for survivors but also contribute to the erosion of evidence, making it more challenging to secure convictions. The lack of expeditious trials undermines the credibility of the legal process and discourages survivors from pursuing justice.<sup>38</sup>

### ***Inadequate Victim Support Services***

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<sup>35</sup> K. Satyanarayana, and P. Satyanarayana, "Backlog and Delay Reduction in Courts-Some Suggestions" 50 *Journal of the Indian Law Institute* 501-510 (2008).

<sup>36</sup> S. Das and A.K. Gill, "Legal Processes, 'Evidentiary Credibility' and Sexual Violence in India: A Preliminary Exploration" 23 *Violence Against Women* 1586-1607 (2017).

<sup>37</sup> L. Subramanian, "Justice Denied: A Review of Instances of Non-Compliance in Rape Trials" 53 *Economic and Political Weekly* 38-45 (2018).

<sup>38</sup> M. Ghosh and P. Bose, "Judging the Judges: Rape Trials in Indian Courts" 24 *Indian Journal of Gender Studies* 228-246 (2017).

The limited availability of comprehensive victim support services further compounds the challenges faced by survivors. Counseling, legal assistance, and rehabilitation services are often insufficient or inaccessible, leaving survivors to navigate the complex legal landscape alone.<sup>39</sup> Adequate support services are essential for survivors to cope with the emotional aftermath of sexual assault and actively participate in the legal process.

### ***Underreporting and Fear of Retaliation***

Underreporting remains a significant issue in India, with many survivors choosing not to file complaints due to fear of retaliation, societal stigma, and a lack of confidence in the legal system. The absence of witness protection programs exacerbates these fears, leaving survivors vulnerable to intimidation and harassment during and after the trial.<sup>40</sup>

### ***Insufficient Forensic Facilities***

Forensic evidence plays a crucial role in rape trials, yet India grapples with insufficient forensic facilities and trained personnel. Backlogs in forensic laboratories delay the processing of evidence, diminishing its probative value in court. Strengthening forensic infrastructure is imperative to ensure timely and accurate analysis of evidence, enhancing the prospects of securing convictions.

### ***Legal Loopholes and Ambiguities***

The legal framework surrounding sexual assault in India is not without its loopholes and ambiguities. Outdated laws and inconsistent interpretations can result in reduced sentences or acquittals for perpetrators.<sup>41</sup> Reforms are needed to address these gaps and ensure that the legal system provides unequivocal protection and justice for survivors.

Addressing the untold realities of rape trials in India requires a comprehensive overhaul of the legal and societal structures that perpetuate injustice. Efforts should focus on destigmatizing survivors, expediting legal proceedings, bolstering victim support services, and fortifying forensic capabilities. Only through a concerted and multifaceted approach can India hope to provide survivors with the justice they deserve while fostering a society that unequivocally condemns

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<sup>39</sup> M. Vijay Bhaskar, "Barriers to Access to Justice for Rape Survivors in India" 4/2 *International Journal of Legal Science & Innovation* 286-295 (2022).

<sup>40</sup> K. Kannabiran, "Discretion, Discrimination, and Accountability: The Judiciary and Rape Adjudication in India." 23 *Indian Journal of Human Rights* 234-254 (2019).

<sup>41</sup> R. Ray, "Rape Trials and the Mediation of Disgust" 51 *Economic and Political Weekly* 52-57 (2016).

sexual violence.<sup>42</sup>

## 9. IMPACT ON SURVIVORS

Rape is an atrocious crime that not only inflicts physical trauma but also leaves deep emotional scars on survivors. In India, the legal journey for survivors seeking justice is often fraught with challenges, compounding the already arduous process of recovery.

### *Legal Hurdles and Protracted Trials*

One of the primary challenge's survivors' faces is the protracted nature of rape trials in India. Legal proceedings can take years, subjecting survivors to prolonged distress and anxiety. The delay not only impedes the healing process but also erodes faith in the justice system.<sup>43</sup>

### *Stigmatization and Social Backlash*

In a society where victim-blaming is still prevalent, survivors often face stigmatization and social backlash. The intrusive nature of questioning during cross-examination can further contribute to this, making survivors reluctant to come forward and report the crime.

### *Secondary Victimization*

The legal process itself can lead to secondary victimization. The aggressive cross-examination techniques employed by defence attorneys can be traumatizing, forcing survivors to relive the traumatic events repeatedly. This not only reopens emotional wounds but can also dissuade survivors from pursuing legal recourse.<sup>44</sup>

### *Inadequate Support Mechanisms*

The lack of comprehensive support mechanisms for survivors is a glaring issue. From inadequate counseling services to limited witness protection, the system often fails to address the holistic needs of survivors during and after the trial. This dearth of support exacerbates the trauma survivors endure.

### *Crisis of Trust in the Justice System*

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<sup>42</sup> N. Kulshreshtha, "A Critical Analysis of the Standard of Consent in Rape Law in India" 13/4 *Oñati Socio-Legal Series* 1428–1456 (2023).

<sup>43</sup> Amita Singh, "Judicial Delays in India: Causes and Remedies" 53 *Indian Journal of Public Administration*, 104-119 (2007).

<sup>44</sup> V. Mazumdar, Rape and the Indian Woman's Right to Personhood: Re-Imagining Agency Legal Rape Trials and Postcoloniality 22 *Feminist Legal Studies* 27-49 (2014).

The persistently low conviction rates in rape cases contribute to a crisis of trust in the justice system. Many survivors are discouraged from reporting the crime, fearing that the legal process may not deliver justice. This skepticism further perpetuates a culture of impunity.<sup>45</sup>

### ***Cultural Barriers***

Cultural norms and societal expectations often intersect with the legal process, complicating matters for survivors. The emphasis on ‘compromise’ in certain cases, societal pressure to maintain family honor, and patriarchal attitudes within the legal system can hinder the pursuit of justice.

### ***Need for Legal Reforms***

The need for comprehensive legal reforms to address these issues is evident. Speedier trials, sensitivity training for legal professionals, and the establishment of dedicated support services are crucial steps. Additionally, creating an environment that encourages survivors to come forward without fear of judgment is imperative.<sup>46</sup>

Rape trials in India, while intended to bring justice, often subject survivors to a harrowing ordeal that extends far beyond the initial trauma. It is crucial for society and the legal system to acknowledge these untold realities and work collaboratively to create an environment that fosters healing and justice. By addressing the systemic shortcomings, promoting sensitivity, and ensuring adequate support, we can strive to make the pursuit of justice a less traumatic experience for survivors of this egregious crime.

## **10. LEGAL REFORMS AND THEIR EFFICACY**

The legal framework surrounding rape trials has undergone significant reforms over the years. However, the efficacy of these reforms often faces challenges when confronted with the untold realities of rape trials in the country. Hence, it delves into the legal reforms implemented in India and examines their effectiveness in addressing the multifaceted challenges surrounding rape trials.

### ***Legal Reforms***

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<sup>45</sup> A. Kumar, “Rape Laws in India: A Critical Analysis” 12 *International Journal of Criminal Justice Sciences* 109-124 (2017).

<sup>46</sup> K. Satyanarayana, and P. Satyanarayana, “Backlog and Delay Reduction in Courts-Some Suggestions” 50 *Journal of the Indian Law Institute* 501-510 (2008).

India has witnessed several legal amendments aimed at strengthening the response to sexual offenses. The Criminal Law (Amendment) Act of 2013 was a landmark development, introducing changes to the Indian Penal Code, the Code of Criminal Procedure, and the Indian Evidence Act. This included the expansion of the definition of rape, stricter penalties, and procedural improvements such as recording the statement of the victim by a woman police officer. The introduction of fast-track courts was another significant step to expedite the trial process and deliver justice swiftly.<sup>47</sup> Additionally, the Criminal Law (Amendment) Act of 2018 further strengthened the legal framework by introducing the death penalty for the rape of a girl under 12 years of age.

Despite these legal reforms, the ground reality of rape trials in India remains challenging. One major obstacle is the pervasive stigma associated with sexual assault, often resulting in underreporting of cases due to fear of societal judgment. The delay in the justice delivery system exacerbates the trauma experienced by survivors, and the overall conviction rates remain dismally low.

Police apathy and insensitivity during the investigation process often discourage survivors from coming forward. Moreover, the adversarial nature of court proceedings, where survivors are subjected to rigorous cross-examinations, can retraumatize them, leading to psychological distress. The role of societal attitudes also cannot be ignored. Victim-blaming and skepticism surrounding the veracity of rape allegations persist, creating a hostile environment for survivors seeking justice.<sup>48</sup>

### ***Efficacy of Legal Reforms***

While legal reforms have undoubtedly addressed some lacunae in the system, their efficacy is hindered by the gap between legislation and implementation. The lack of awareness about legal provisions, coupled with insufficient training of law enforcement and judiciary personnel, hampers the successful execution of these reforms. Fast-track courts, though established with the intention of expediting trials, face resource constraints and backlog issues. The slow pace of justice delivery continues to be a major impediment, contributing to a lack of faith in the legal

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<sup>47</sup> P. Singh, "Rape Laws in India: Does Gender Matter?" 20 *Indian Journal of Gender Studies* 267-283 (2013).

<sup>48</sup> P. Baxi, "Criminal law reform in the shadow of the past: The continuing project of the Indian Penal Code" 4 *Indian Journal of Law and Society* 97-108 (2013).

system.<sup>49</sup>

Moreover, the death penalty, introduced as a deterrent, has sparked debates regarding its effectiveness and ethical implications. Critics argue that it may not address the root causes of sexual violence and may even discourage reporting due to the potential consequences for the accused. While legal reforms in India have undoubtedly made strides in addressing sexual violence, their effectiveness is contingent on addressing the broader societal and systemic issues that perpetuate a culture of impunity. Education, awareness, and sensitization campaigns are crucial to changing societal attitudes. Strengthening the implementation of existing laws, ensuring swift justice, and providing support services for survivors are imperative steps in achieving meaningful reform.

Ultimately, a comprehensive approach that combines legal reforms with societal transformation is necessary to create an environment where survivors feel empowered to seek justice without fear or prejudice.<sup>50</sup> The untold realities of rape trials in India underscore the ongoing need for a concerted effort to bridge the gap between legal frameworks and the lived experiences of survivors.

## 11. RECOMMENDATIONS

The issue of sexual assault is a grave concern globally, and India is no exception. While there has been increased awareness and activism surrounding sexual violence, the intricacies of rape trials in India remain largely untold. However, we delve into the multifaceted aspects of rape trials, shedding light on the challenges faced by survivors, the legal complexities, and the need for a more comprehensive approach to address this societal menace.

### *Underreporting and Stigma*

One of the foremost challenges in addressing sexual assault in India is the underreporting of cases. Deep-seated societal stigmas and fear of victim-blaming often deter survivors from coming forward. The shame associated with sexual assault can be overpowering, leading many victims to suffer in silence.<sup>51</sup> Efforts must be intensified to create an environment that encourages survivors to speak out without fear of judgment.

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<sup>49</sup> L. Subramanian, "Making Rape Trauma Visible: A Feminist Exploration of the Prosecution of Rape in India" 13 *Journal of International Women's Studies* 31-46 (2012).

<sup>50</sup> V. Mazumdar, "Rape and the Indian Woman's Right to Personhood: Re-Imagining Agency, Legal Rape Trials, and Postcoloniality" 22 *Feminist Legal Studies* 27-49 (2014).

<sup>51</sup> Shrabanti Maity, "Performance of Controlling Rape in India: Efficiency Estimates across States" 20 *Journal of International Women's Studies* 180-204 (2019).

### ***Police Handling and Investigation***

The initial response of law enforcement agencies plays a crucial role in shaping the trajectory of a rape trial. However, reports suggest that the treatment of survivors by the police can be insensitive and sometimes even hostile.<sup>52</sup> Proper training for law enforcement personnel on handling sexual assault cases with empathy and professionalism is imperative. Additionally, ensuring a swift and thorough investigation is essential for building a strong case.

### ***Legal Hurdles and Delays***

The legal process surrounding rape trials in India is often protracted and cumbersome. Overloaded court systems, lengthy proceedings, and frequent adjournments can take a toll on survivors, adding to their trauma. Reforms aimed at expediting rape trials and providing support services for survivors throughout the legal process are vital to ensure justice is not delayed.<sup>53</sup>

### ***Witness Intimidation and Retaliation***

Survivors and witnesses in rape trials frequently face intimidation and retaliation. Perpetrators, seeking to escape accountability, may resort to threats and harassment. Witness protection mechanisms need to be strengthened to ensure the safety of those coming forward to testify, fostering an environment where truth can be spoken without fear of repercussions.

### ***Lack of Forensic Infrastructure***

A robust forensic infrastructure is essential for collecting and preserving evidence crucial to rape trials. However, there are reports of inadequacies in forensic facilities, leading to the loss of crucial evidence. Investments in state-of-the-art forensic labs and training for personnel are necessary to enhance the reliability of evidence presented in court.<sup>54</sup>

### ***Support Systems for Survivors***

The emotional and psychological toll of rape trials on survivors is immense. Establishing comprehensive support systems, including counselling services and legal aid, is imperative to help survivors navigate the challenging journey through the legal system. NGOs and community organizations can play a pivotal role in providing this much-needed assistance.

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<sup>52</sup> Supra note 180 at 181.

<sup>53</sup> Supra note 183 at 187.

<sup>54</sup> K. Chaudhuri, P. Chowdhury and S.C. Kumbhakar, "Crime in India: specification and estimation of violent crime index" 43 *Journal of Productivity Analysis* 13-28 (2015).

Addressing the untold realities of rape trials in India requires a multifaceted approach. From changing societal attitudes to reforming legal procedures, every aspect of the system must be scrutinized and improved.<sup>55</sup> By creating an environment where survivors feel supported, where law enforcement is empathetic and efficient, and where the legal process is expedited, we can work towards a society where justice prevails and survivors are treated with the dignity and respect they deserve. It is only through collective efforts that we can hope to dismantle the barriers that hinder the pursuit of justice for survivors of sexual assault in India.

## 12. CONCLUSION

Finally, in the intricate tapestry of India's legal system, the untold realities of rape trials hide behind closed curtains. This exploration has uncovered the deeply entrenched challenges- from underreporting fueled by societal stigma to the inadequacies in the legal and forensic infrastructure. As we draw the curtains on this discussion, it becomes evident that transformation is imperative. To effect change, there must be a paradigm shift in societal attitudes, where survivors are empowered to break the silence without fear of judgment. Law enforcement agencies need extensive training to handle cases with empathy, and the legal process must be streamlined to ensure swift justice. Witness protection mechanisms should be fortified, and investment in forensic infrastructure is non-negotiable. Crucially, comprehensive support systems for survivors, encompassing counselling and legal aid, must be established. NGOs and community organizations can act as pillars of support. Only through such comprehensive reforms can we envision a future where the closed curtains of rape trials in India part to reveal a system characterized by sensitivity, efficiency, and, above all, justice for the survivors who have endured behind these closed curtains for far too long.

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<sup>55</sup> B. L. Himabindu, R. Arora and N.S. Prashanth, "Whose problem is it anyway? Crimes against women in India" 7 *Global health action* 23-718 (2014).

## CASTE DISCRIMINATION, HUMAN RIGHTS AND CONSTITUTIONAL RIGHTS: A STUDY ON INDIAN PERSPECTIVE

- Anil Kapoor\*

### *Abstract*

*Caste-based discrimination and untouchability is not only social problem but it is problem that creates hurdles to the development of the nation. Without the ending of caste-based discrimination and untouchability, there is no possibility of development of the nation. The economic, political, and social development of the nation is based on the equality of all citizens. All of the freedom fighters of India strongly opposed the caste system.<sup>1</sup> Bhagat Singh, Jyotiba Phule, Erode Venkatappa Ramasamy Pariyar, Dr. Bhim Rao Ambedkar, and many more condemned the caste-based inequalities and discrimination. They all said in one rhythm that caste-based discrimination should be abolished because it is an inhuman, cruel, and rubbish system. They all argued that the Hindu religion is the root of caste-based discrimination. In present research researcher has used secondary source of data which were collected from Books, Articles and through internet sources.*

**Keywords:** *Caste discrimination, Untouchability, Human Rights, Constitution, India.*

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<sup>1</sup> Dr S. K. Bhadarge, Human rights and Untouchability: Analytical study of the thoughts of Dr B. R. Ambedkar 76 (Research Guru: Online Journal of Multidisciplinary Subjects, Vol. 13 Issue 3, December 2019).

## 1. INTRODUCTION

In the present day, there is a historic movement for all untouchables to fight for their basic human rights and ideals of fairness, equality, liberty, and so on. India, a rising star and a more significant country on the global stage, cannot continue to ignore injustice and oppression within its boundaries. Dalit status has historically been associated with traditional occupations regarded as ritually impure in the Hindu traditional society of India, such as scavenging, sweeping, meet selling, leather work, hunting and drum beating, butchering or removal of rubbish, and animal carcass waste. Untouchables performed manual chores such as cleaning streets, latrines, and sewers. These actions were seen to be polluting to the environment. These actions were seen to be polluting to the environment. Individual contamination was thought to be contagious. As a result, Dalits in India were frequently separated and denied full participation in Hindu society. Untouchables and upper Hindus are occasionally monitored to avoid inadvertent contracting.<sup>2</sup>

## 2. OBJECTIVES

- To analyze the caste-based discrimination and untouchability in India.
- To understand the human rights and fundamental rights for the upliftment of the Scheduled Caste population.
- To analyze the caste-based discrimination that violates International Human Rights and Fundamental Rights provided by the Constitution of India.
- To provide valuable suggestions.

## 3. RESEARCH GAP

For the present study, the researcher had read many papers and books to understand the concept regarding the topic. Many researchers and academicians focussed on the Human Rights and Fundamental Rights provided to the Scheduled Caste community. But none of them focused on both Human Rights and Fundamental Rights. In the present research work, the researcher has focused on both International Human Rights and Fundamental Rights provided by the Constitution of India.

## 4. MEANING AND CONCEPT OF UNTOUCHABILITY

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<sup>2</sup> Dr. Lajwant Singh, Movement for the Changing Social Status of Untouchables in India: A Sociological Study 138 (International Journal of Humanities Social Sciences and Education (IJHSSE), Volume 2, Issue 1, January 2015)

Untouchability means not being permitted to touch or not capable of being touched or reached. There are several quotations on untouchability which are mentioned below:

- Dr. Bhim Rao Ramji Ambedkar, *“Caste is a state of mind. It is a disease of mind. The teachings of the Hindu religion are the root cause of this disease. We practice casteism and we observe Untouchability because we are enjoined to do so by the Hindu religion. A bitter thing cannot be made sweet. The taste of anything can be changed. But poison cannot be changed into nectar.”*<sup>6</sup>
- George L. Hart, *“In this society, certain occupational groups were thought to be involved in controlling the malevolent supernatural forces; as an example, who played the drums during battles and solemn events such as births and deaths. People from these occupational groups came to be avoided by others, who believed that they were “dangerous and had the power to pollute the others”*<sup>4</sup>
- Nripendra Kumar Dutt, *“The concept of untouchability originated from the “pariah” like treatment accorded to the indigenous people of India by the early Dravidians, and that the concept was borrowed by the Indo-Aryans from the Dravidians”*<sup>5</sup>

## 5. UNIVERSAL DECLARATION OF HUMAN RIGHTS AND FUNDAMENTAL RIGHTS TO SCHEDULED CASTE PEOPLE

In the Universal Declaration of Human Rights, there is no specific provision regarding the Rights of Scheduled Caste people but there are many rights that provide equality for all human beings. In the Constitution of India, 1950 many fundamental rights are mentioned for the betterment and upliftment of the Scheduled Caste people of the country. Following are the rights provided by UDHR and the Constitution of India, 1950 for the indigenous people-

Table 1.1 Synoptic views of provisions of the Universal Declaration of Human Rights which is related to the Scheduled Castes community.

| Articles of UDHR       | Provision in the Universal Declaration of Human Rights  |
|------------------------|---|
| Article 1 <sup>6</sup> | <i>“All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.”</i> |
| Article 3 <sup>7</sup> | <i>“Everyone has the right to life, liberty and the security of person.”</i>  |

<sup>3</sup> Suvira Jaiswal, Some Recent Theories of the Origin of Untouchability; A Historiographical Assessment 218-229 (*Proceedings of the Indian History Congress*. Volume 39, Issue 1, 1978).

<sup>4</sup> *Ibid.*

<sup>5</sup> *Ibid.*

<sup>6</sup> See, Universal Declaration of Human Rights, 1948, art. 1.

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|--------------------------|---|
| Article 4 <sup>8</sup>   | <i>“No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms.”</i>  |
| Article 5 <sup>9</sup>   | <i>“No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”</i>  |
| Article 7 <sup>10</sup>  | <i>“All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.”</i>   |
| Article 10 <sup>11</sup> | <i>“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.”</i>  |
| Article 16 <sup>12</sup> | <i>“1. Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.<br/>2. Marriage shall be entered into only with the free and full consent of the intending spouses.<br/>3. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.”</i> |
| Article 17 <sup>13</sup> | <i>“1. Everyone has the right to own property alone as well as in association with others.<br/>2. No one shall be arbitrarily deprived of his property.”</i>  |
| Article 18 <sup>14</sup> | <i>“Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.”</i>   |
| Article 23 <sup>15</sup> | <i>“1. Everyone has the right to work, to free choice of employment, to just</i>  |

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<sup>7</sup> Ibid. art. 3.

<sup>8</sup> Ibid. art 4.

<sup>9</sup> Ibid. art 5.

<sup>10</sup> Ibid. art 7.

<sup>11</sup> Ibid. art. 10.

<sup>12</sup> Ibid. art. 16.

<sup>13</sup> Ibid. art. 17.

<sup>14</sup> Ibid. art. 18.

<sup>15</sup> Ibid. art. 23.

|                             |   |
|-----------------------------|---|
|                             | <p><i>and favourable conditions of work and to protection against unemployment.</i></p> <p><i>2. Everyone, without any discrimination, has the right to equal pay for equal work.</i></p> <p><i>3. Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.</i></p> <p><i>4. Everyone has the right to form and to join trade unions for the protection of his interests.”</i></p> |
| Article 27(1) <sup>16</sup> | <p><i>“Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.”</i></p>  |

Source: Universal Declaration of Human Rights, 1948.

Table 1.1 shows that there are many rights which are related to the Scheduled Caste community. The preamble of the Universal Declaration of Human Rights does not mention these rights are specifically related to the Scheduled Caste community but if we go through these provisions then we should find that these rights are related to the marginalized section of the society. The brief introductions of the Universal Declaration of Human Rights are mentioned as follows:-

Table 1.2 Synoptic view of Constitutional Safeguard for the protection of Scheduled Castes.

| <b>Articles of Constitution of India, 1950.</b> | <b>of</b> | <b>Provision in Constitution of India ,1950.</b>  |
|---|-----------|---|
| Article 17 <sup>17</sup>                        |           | <p><b>Abolition of Untouchability-</b></p> <p><i>“Untouchability” is abolished and its practice in any form is forbidden. The enforcement of any disability arising out of “Untouchability” shall be an offence punishable in accordance with law.</i></p>    |
| Article 23 <sup>18</sup>                        |           | <p><b>Prohibition of traffic in human being and forced labour –</b></p> <p><i>“Traffic in human beings and ‘begar’ and other similar forms of forced labour are prohibited, and any contravention of this provision shall be an offence punishable in</i></p> |

<sup>16</sup> Ibid. art. 27 (1).

<sup>17</sup> See, Constitution of India, art. 17.

<sup>18</sup> Ibid. art. 23.

|                                |   |
|--------------------------------|---|
|                                | <i>accordance with law.”</i>  |
| Article 24 <sup>19</sup>       | <b><i>Prohibition of employment of children in factories, etc.-</i></b><br><i>“No child below the age of fourteen years shall be employed to work in factory or mine or engaged in any other hazardous employment.”</i>   |
| Article 25(2)(b) <sup>20</sup> | <b><i>Freedom of conscience and free profession, practice and propagation of religion -</i></b><br><i>“Providing for social welfare and reform or the throwing open to Hindu religious institutions of a public character to all classes and sections of Hindus.”</i>   |
| Article 24 <sup>21</sup>       | <b><i>Prohibition of employment of children in factories, etc. –</i></b><br><i>“No child below the age of fourteen years shall be employed to work in factory or mine or engaged in any other hazardous employment.”</i>  |
| Article 46 <sup>22</sup>       | <b><i>Promotion of educational and economic interest of Scheduled Casts, Scheduled Tribes and other weaker sections-</i></b><br><i>“The state shall promote with special care the educational and economic interests of the weaker sections of the people, and, in particular, of the Scheduled Castes and the scheduled Tribes, and shall protect them from social injustice and all forms of exploitation.”</i> |
| Article 15(4) <sup>23</sup>    | <b><i>Prohibition of discrimination on the ground of religion, race, caste, sex, or place of birth-</i></b><br><i>“Nothing in this Article or in clause (2) of article 29 shall prevent the state from making a special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes.”</i>                                   |
| Article 29(2) <sup>24</sup>    | <b><i>Protection of interest of minorities-</i></b><br><i>“No citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds on ground only of religion, race, caste, language or any of them.”</i>   |
| Article 243(D) <sup>25</sup>   | <b><i>Reservation of seats for the Scheduled Castes and Scheduled Tribes in Panchayat</i></b>   |

<sup>19</sup> Ibid. art. 24.

<sup>20</sup> Ibid. art. 25(2)(b).

<sup>21</sup> Ibid. art. 24.

<sup>22</sup> Ibid. art. 46.

<sup>23</sup> Inserted by the constitution (93<sup>rd</sup> Amendment) Act, 2005.

<sup>24</sup> See, Constitution of India, art. 29(2).

<sup>25</sup> Ibid. art. 243D.

|                            |   |
|----------------------------|---|
|                            | <p><i>“(1) Seats shall be reserved for</i></p> <p><i>(a) the Scheduled Castes, and</i></p> <p><i>(b) the Scheduled Tribes</i></p> <p><i>in every Panchayat and the number of seats so reserved shall bear, as nearly as may be, the same proportion to the total number of seats to be filled by direct election in that Panchayat as the population of the Scheduled Castes in the total Population of that area and such seats may be allotted by rotation to different constituencies in a Panchayat.</i></p> <p><i>(2) Not less than one-third of the total number of seats reserved under clause (1) shall be reserved for women belonging to the Scheduled Castes or, as the case may be the Scheduled Tribes.</i></p> <p><i>(3) Not less than one-third (including the number of seats reserved for women belonging to the Scheduled Castes and the Scheduled Tribes) of the total number of seats to be filled by direct election in every Panchayat shall be reserved for women and such seats may be allotted by rotation to different constituencies in a Panchayat.</i></p> <p><i>(4) The offices of the chairpersons in the Panchayats at the village or any other level shall be reserved for the Scheduled Castes, Scheduled Tribes and women in such manner as the legislature of State may, by law provide.</i></p> <p><i>(5) The reservation of seats under clauses (1) and (2) and the reservation of offices of Chairpersons (other than the reservation for women) under clause( 4) shall cease to have effect on the expiration of the period specified in article 334.</i></p> <p><i>(6) Nothing in the part shall prevent the Legislature of a state from making any provision for reservation of seats in any Panchayat or offices of Chairpersons in the Panchayats in favour of backward class of citizens.”</i></p> |
| Article 243T <sup>26</sup> | <p><b><i>Reservation of seats Reservation of seats for the Scheduled Castes and Scheduled Tribes in Municipality-</i></b></p> <p><i>“(1) Seats shall be reserved for the Scheduled Castes and Scheduled Tribes in every Municipality and the number of seats so reserved shall bear, as nearly as may be, the same proportion to the total number of seats to be filled by direct election in that Municipality as the population of the Scheduled Castes in the Municipal area or of the Scheduled Tribes in the Municipal area bears to the total Population of that</i></p>  |

<sup>26</sup> Ibid. art. 243T

|                           |   |
|---------------------------|---|
|                           | <p><i>area and such seats may be allotted by rotation to different consistencies in a Municipality.</i></p> <p><i>(2) Not less than one -third of the total number of seats reserved under clause (1) shall be reserved for women belonging to the Scheduled Castes or, as the case may be, the Scheduled Tribes.</i></p> <p><i>(3) Not less than one-third (including the number of seats reserved for women belonging to the Scheduled Castes and the Scheduled Tribes) of the total number of seats to be filled by direct election in every Municipality shall be reserved for women and such seats may be allotted by rotation to different Constituencies in a Municipality.</i></p> <p><i>(4) The Offices of Chairpersons in the Municipalities shall be reserved for the Scheduled Castes, the Scheduled Tribes and women in such manner as the Legislature of a state may, by law, provide.</i></p> <p><i>(5) The reservation of seats under clauses (1) and (2) and the reservation of offices of Chairpersons (other than the reservation for women) under clause(4) shall cease to have effect on the expiration of the period specified in article 334.</i></p> <p><i>(6) Nothing in the part shall prevent the Legislature of a state from making any provision for reservation of seats in any Municipality or offices of Chairpersons in the municipalities in favour of backward class of citizens.”</i></p> |
| Article 330 <sup>27</sup> | <p><b><i>Reservation of seats for Scheduled Castes and Scheduled Tribes in the House of the peoples: -</i></b></p> <p><i>“(1) Seats shall be reserved in the House of the people for-</i></p> <ul style="list-style-type: none"> <li><i>(a) the Scheduled Castes,</i></li> <li><i>(b) the Scheduled Tribes except the Scheduled Tribes in the autonomous districts of Assam, and</i></li> <li><i>(c) the Scheduled Tribes in autonomous districts of Assam.</i></li> </ul> <p><i>(2) The number of seats reserved in any State or Union Territory for the Scheduled Castes or the Scheduled Tribes under clause (1) shall, bear as nearly as may be, the same proportion to the number of seats allotted to that state or Union Territory in the House of the people as the population of the Scheduled Castes in the state or Union Territory or of the Scheduled Tribes in the State or part of the state or Union Territory , as the case may be, in respect of which seats are so reserved ,</i></p>  |

<sup>27</sup> Ibid. art. 330

|                               |   |
|-------------------------------|---|
|                               | <p>bears to the total population of the State or Union Territory.</p> <p>(3) Notwithstanding anything contained in clause (2), the number of seats reserved in the House of the people for the Scheduled Tribes in the autonomous districts of Assam shall bear to the total number of seats allotted to that State a proportion not less than the population of Scheduled Tribes in the said autonomous districts bears to the total population of the State.”</p>   |
| Article 332 <sup>28</sup>     | <p><b>Reservation of seats for Scheduled Castes and Scheduled Tribes in the Legislative Assemblies of the States: -</b></p> <p>“(1) Seats shall be reserved for the Scheduled Castes and the Scheduled Tribes except the Scheduled Tribes in the autonomous districts of Assam, in the Legislative Assembly of every State.</p> <p>(2) Seats shall be reserved also for the autonomous districts in the Legislative Assembly of the State of Assam.</p> <p>(3) The Number of seats reserved for the Scheduled Castes or the Scheduled Tribes in the Legislative Assembly of any State under clause (1) shall bear, as nearly as may be, the same proportion to the total number of seats in the Assembly as the population of the Scheduled Castes in the State or of the Scheduled Tribes in the State or part of the State, as the case may be, in respect of which seats are so reserved, bears to the total population of the State.”</p> |
| Article 16(4) <sup>29</sup>   | <p><b>Equality of opportunity in respect of public employment -</b></p> <p>“Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under State.”</p>  |
| Article 16 (4A) <sup>30</sup> | <p><b>Equality of opportunity in respect of public employment-</b></p> <p>“Nothing in this article shall prevent the State from making any provision for reservation in matters of promotion to any class or classes of posts in the services under the State in favour of the Scheduled Castes and the Scheduled Tribes which, in the opinion of the State are not adequately represented in the services under the State.”</p>  |
| Article 335 <sup>31</sup> -   | <p><b>Claims of Scheduled Castes and Scheduled tribes to services and</b></p>   |

<sup>28</sup> Ibid. art. 332.

<sup>29</sup> Ibid. art. 16(4).

<sup>30</sup> Inserted by the Constitution (77<sup>th</sup> Amendment) Act 1955.

|  |  |
|--|--|
|  | <p><b>posts-</b></p> <p><i>“The claims of the members of the Scheduled Castes and Scheduled Tribes shall be taken into consideration, consistently with the maintenance of efficiency of administration, in the making of appointments to services and posts in connection with the affairs of the Union or of a State.</i></p> <p><i>Provided that nothing in this article shall prevent in making of any provision in favour of the members of the Scheduled Castes and the Scheduled Tribes for the relaxation in qualifying marks in any examination or lowering the standards of evaluation, for reservation in matters of promotion to any class or classes of services or posts in connection with the affairs of the Union or of a State.”</i></p> |
|--|--|

Source: Constitution of India, 1950.

Table 1.2 depicts the provisions of different rights that are provided to the safeguard of the Scheduled Caste community of the country. The makers of the constitution were well aware of the caste-based differences in India. So they provided different rights for the welfare of the SCs people of the country. These rights are provided because of the social, economic, and political development of these communities.

## 6. CASTE DISCRIMINATION VIOLATES CONSTITUTIONAL AND HUMAN RIGHT

Caste-based discrimination violates different rights mentioned by the Constitution of India, 1950, and the Universal Declaration of Human Rights, 1950. Following are some caste-based discrimination that violates these rights:

- **Untouchability:** Untouchability is the basic feature of caste-based society. The Indian caste system started with the concept of untouchability. People of upper caste consider Scheduled Castes people as impure, and they treat inhuman to lower caste people. People of the Scheduled Caste community are subject to humiliation and harassment in the name of the caste. Untouchability is forbidden by Article 17 of the Constitution of India, 1950, and declares it is unlawful. Untouchability also violates Article 1 and Article 3 of the Universal Declaration of Human Rights.
- **Forced labour:** Forced labour also covers the concept of untouchability and caste-based discrimination. In many states in India Scheduled Castes people are subject to forced labour. They are used to take beggars. In many states where the economic

<sup>31</sup> See, Constitution of India, art. 335

status of Scheduled Castes people is not good, they are helpless. There are no options other than a beggar to fill their fulfilment of necessities. The concept of forced labour is prohibited under Article 23 of the Constitution of India, 1950, and Article 4 of the Universal Declaration of Human Rights.

- **Social Discrimination:** The people of the Scheduled Castes community are subject to social discrimination by the so-called upper caste people. Scheduled Caste people are not allowed to enter common places of the village like restaurants, *Dhaba*, *ghat*, temple, etc. Even in schools Scheduled Caste pupil is subject to caste-based discrimination. They are not allowed to take meals with upper-caste students. This type of discrimination is prohibited by Article 15 of the Constitution of India, 1950, and Article 7 of the Universal Declaration of Human Rights.
- **Sexual Harassment:** In some places of India Scheduled Caste girls and women are subject to sexual harassment by the upper caste people. Upper caste people used as tools for sexual enjoyment to SC girls and women. This kind of sexual harassment is also prohibited by the Constitution of India and the Universal Declaration of Human Rights.<sup>32</sup>
- **Discrimination on opportunity:** Scheduled Caste people are subject to discrimination in every field. There is social, political, and economic discrimination against Scheduled Caste people. For the upliftment of these marginalized groups, there are several enactments of rights in the Constitution of India and UDHR.

## 7. CONCLUSION AND SUGGESTIONS

### *Conclusion*

India got independence on 15<sup>th</sup> of August 1947 but the Scheduled Castes people were still slaves of upper caste people. They did not get independence till 75 years of Independence. The Scheduled Caste people are subject to cruelty, harassment and humiliation. Even educated people do caste-based discrimination and face discrimination. In the rural area of the country religious institution is the main centre of caste discrimination. Scheduled Caste people were not allowed to enter into temple, they were forced to worship from very far away and take meals from different rows.

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<sup>32</sup> Tanika Godbole, Why India's Dalit women are vulnerable to sexual violence, available at <https://www.dw.com/en/why-indias-dalit-women-are-vulnerable-to-sexual-violence/a-55423556> (last visited on: 01-12-2023)

In rural areas of the country educational institutions are also affected by caste discrimination. Even teachers follow caste-based discrimination. It is the drawback of the country that caste-based discrimination is the main hurdle to national development.

### *Suggestions*

- Sensitise the administration, police, and courts to reduce and eventually eliminate bias and apathy towards Scheduled Castes.
- Adequate publicity should be provided to the problem, solutions, and current events concerning atrocities and atrocity prevention.
- The proportion of SC people in administration, police, and courts at higher and decision-making levels should be enhanced.
- Atrocity prone areas should be identified & monitored regularly.
- The use of Information Technology should start & increased for atrocity prevention.
- Scheduled Castes Commissions should be established in every state.
- Inter Castes marriages should be promoted.
- Financial status of peoples belongs to Scheduled Tribes and Scheduled Castes should be improved by way of beneficial schemes of the Govt.
- Reservation policy in the field of Education and Job section must be strictly implemented.
- The provisions of the Constitution of India, 1950 and Universal Declaration of Human Rights should be strictly implemented.

# FREEDOM OF SPEECH AND EXPRESSION: RIGHT TO RAISE OUR VOICE

- Dr. Satish Chandra Upadhyay\*

## 1. INTRODUCTION

Fundamental Freedoms are enjoyed only by citizens. It confers six democratic rights as they are deemed essential for the healthy functioning of a democracy. Originally the constitution included 7 Democratic Rights. By 44<sup>th</sup> Amendment Act 1978, the Right to property was removed from the list. These rights are enjoyed by the citizen, but they are not absolute rights and each of them is liable to be curtailed by the State.<sup>1</sup>

As we all know that Constitution has granted us a various fundamental rights as a citizen of India. These fundamental rights are considered as a part of basic structure of Constitution and one of the most important part of Constitution of India. These rights plays a very important role in each and everyone's life a citizen of India as it upholds the dignity and respect of a citizen living in India. There are broadly six fundamental rights which encloses from article 12 to article 35 of our constitution. Earlier it was seven but one of them was removed by Constitutional amendment in the year 1978. Right to freedom (Article 19-22) which gives us various rights such as right to freedom of speech and expression, right to education , freedom of moment etc.

## 2. WHAT IS FREEDOM OF SPEECH AND EXPRESSION?

The Constitution of India provided that the Freedom of Speech and Expression under article 19 (1) (a) in part III of the Constitution of India.

Article 19(1) (a) of Indian Constitution says that all citizens shall have the right to freedom of speech and expression.<sup>2</sup>

In the case of *Lovell v. City of Griffin*<sup>3</sup> United States Supreme Court held that the Freedom of Speech and expression means the right to express one's own convictions and opinion freely. Speech is God's gift to mankind. Through speech a human being conveys his thoughts, sentiments and feeling to others.

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<sup>1</sup> H. M. Seervai, "Constitutional Law of India", Vol. I (2007) Universal Publications, p.795.

<sup>2</sup> Article 19 (1) (a) of the Constitution of India.

<sup>3</sup> 303 U.S. 444 (1938)

Freedom of speech and expression is thus a natural right, which a human being acquires on birth. It is, therefore, a basic right. "Everyone has the right to freedom of opinion and expression; the right includes freedom to hold opinions without interference and to seek and receive and impart information and ideas through any media and regardless of frontiers" proclaims by the Universal Declaration of Human Rights (1948)<sup>4</sup>.

It is one of those fundamental rights which are provided by constitution to the citizens of India it is considered as most important right as it gives us right to put forth our opinions regarding any topic or anything happening around us. It can be done by anyway like by the word of mouth (mostly done by political readers and news anchors), writing (done by authors and writers), printing (done by newspaper editors) or in any other manner. Supreme Court of our India held that the freedom of speech and expression includes things like right to propagate one's views , freedom of press , freedom of commercial advertisement etc. Freedom of speech comes under the one of the rights which are granted to us under article 19 of the Constitution.

### **3. PRACTICE OF FREEDOM OF SPEECH AND EXPRESSION IN INDIA**

Freedom of speech and expression in India is in practice since a Independence protect even though constitution came into existence after the independence but during the independence struggle also so many leaders have been writing articles against British rule, giving speeches on dice for attracting people. Newspaper was one of most important tool during a Independence struggle of India. And since then it is still in practice in very well manner people are protesting against the reforms and policies of government the most recent example is farmer protest against three laws passed by central government. So many articles are published in newspaper and journals criticizing the ruling government. India have always been in forward in raising voice against exploitation and practicing their fundamental rights. But sometimes it becomes a crime too as so many people use it in very wrong way by abusing or using wrong words against political leaders or anyone. Disrespecting anyone in any way is not freedom of speech and expression. This right should be practiced peacefully and with full of respect towards each other.

### **4. BLASPHEMY AND FREEDOM OF SPEECH**

First so many might not be aware of Blasphemy , blasphemy is a writing or speaking about any God without any respect this has been an very big issue not only in India but around the world as well. As so many people use this right just to disrespect others god or just play with one's

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<sup>4</sup> Jitendra Pandey and R.K. Dubey, "*Civil Liberty under Indian Constitution*", Deep and Deep Publications, New Delhi, 1995, p.111.

religious sentiments. This is sometimes done in a way of joke or a comedy or sometimes just to prove that I am Atheist. In the month of October there was riots and protest was happening in a France when a teacher while studying a student disrespected a Prophet Mohammad as cartoon printed in textbook. This has led to great issue in that country as saying and so many questions over Blasphemy and freedom of speech were raised. But at last I think that we should follow the Constitution of country we are residing. In a France there is right for a people to talk against a Religion but not against a religious personality. But in India no one has right to speak against one's religion or anything related to it so guilty might be punished. Freedom of Press as a part Freedom of Speech This right has been widely practiced in India. As India media has always been raising voice against a injustice happening against citizens as people always hesitate to move directly to court media helps them to raise their voice against injustice. Supreme Court has granted a special provision to the media to write against the government policies and speak against a policy which might be not acceptable by the people of country. But sometimes we can see that this right for media is used in a very wrong way by disclosing the private information of a victims or accused person in any case in the name of media trial. Being biased toward anyone political party is also a one of the drawback of today's media and continuously speaking in one's favor and others opposition. National Emergency and Freedom of Speech As we know that when National Emergency get announced in country all our Fundamental rights got demolished for certain period of time (except article 21 and 22) so in this way the freedom of speech is also get banned during emergency so in that period one cannot raise voice against what's happening around them. National Emergency can be imposed in the whole country or in any part of country. So in this way we can say that Fundamental right can be a good or bad as well it depends on how u practice it and in what way.

## EXAMINING THE REMEDY OF 'RESTITUTION OF CONJUGAL RIGHTS' UNDER HINDU LAW IN LIGHT OF GENDER JUSTICE AND CONSTITUTIONAL IMPERATIVES

- Ana Sisodia\* & Prof. (Dr.) Reena Bishnoi\*\*

### *Abstract*

*Hindu law views marriage as an important rite. Since ancient times, there has been a strong cultural presumption that after marriage, a husband and wife become one. Instead, marriage is acknowledged as a necessary institution with legal safeguards in all major religions. However, this concept's only flaw was the antiquated prohibition on spouses suing one another. But as society advanced, complexity increased, and concepts like divorce, legal separation, and marital rights formed, it became imperative to formalise these laws governing marriage, with particular attention paid to Hindu weddings in this context. As a result, a spouse who left their partner had the option of filing a petition to reinstate their conjugal rights. It is a constructive remedy that requires cohabitation between the married parties under Section 9 of the Hindu Marriage Act, 1955. Under all matrimonial laws, marriage imposes specific marital responsibilities and grants the spouses certain legal rights. The problem, however, is that with society's rapid growth, the aforementioned rule is being questioned on the grounds of Privacy and Gender Justice. Restitution of Conjugal Rights has been criticised across common law countries, leading to its elimination in the UK, Australia, Ireland, and South Africa. This is because common law nations have gradually come to the realisation that the law must act in family problems and defend people's rights. In India too, it has been highlighted that the Restitution of Conjugal Rights is equivalent to the State using coercion to breach a person's sexual and decisional autonomy, infringing upon or violating that person's Right to Privacy. Thus, the purpose of this Article is to examine the present validity of the aforementioned law in the context of Gender Justice and Constitutional Imperatives, with a focus on the Right to Privacy.*

**Keywords:** *Constitution, Gender Justice, Right to Privacy, Restitution of Conjugal Rights, Hindu Marriage.*

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## 1. INTRODUCTION

The importance of the institution of marriage for any country, society, community or religion is not unknown. Marriage and families are seen by sociologists as societal institutions that contribute to forming the fundamental component of social structure. Different cultures throughout the world may define and practise marriage and families in different ways. Like other institutions, families and marriages adjust to societal change.

Specifically, in a country like India, this institution plays a significant role in the overall establishment and development of not just families but nation at large. From all perspectives, be it sociological, philosophical or psychological, marriage has a prominent role to play since ages. The philosophical view of marriage is that partners should support one another's development both individually and jointly, whether it is in terms of finances, spirituality, or emotional well-being. The existence of any civilized society cannot be imagined without the bond of marriages. The institution of marriage provides for understanding one another and being willing to adapt for the other are key elements of a successful marriage.

It is noteworthy that Hindu marriage is an age-old custom that has survived from the Vedic era to the present, with several changes made along the way. Among the 16 sacraments of Shastri Hinduism, marriage is one of the most significant sacraments. The ideal marriage according to the ancient Indians is one in which the bride is ceremonially given to the bride-groom by her father or another suitable family member in order for them to fulfil the objectives of human life together. In this idea, the term "*vivaha*," which originally referred to the wedding ceremony but has come to signify marriage as a whole, is used to refer to reproduction and the beginning of a family (*ketumba*). One is thought to have entered the *grihastha ashrama*, the second stage of life, after being married and starting to take up domestic tasks.<sup>1</sup>

However, the Hindu marriage has been diluted with the advent and introduction of Hindu Marriage Act of 1955 and relative laws. The provisions such as of Divorce and Judicial Separation, which is abhorrent to Hinduism, received the most criticism. Nonetheless, it is peculiar to note that under those laws, each party is granted particular legal rights, one of them is the relief via Restitution of Conjugal Rights<sup>2</sup>. The Restitution of Conjugal Rights provision states that if either the husband or the wife ever failed or refused to fulfil the duties that were expected

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<sup>1</sup> Marriage in Hinduism, available at: [https://en.wikipedia.org/wiki/Marriage\\_in\\_Hinduism#cite\\_note-4](https://en.wikipedia.org/wiki/Marriage_in_Hinduism#cite_note-4) (last visited on: October 2, 2023).

<sup>2</sup> The Hindu Marriage Act 1955, s. 9.

of him or her without explanation, the aggrieved party may seek legal assistance from the appropriate district court. It is occasionally acknowledged as a marital cure as a result.

Restitution of conjugal rights might be used as leverage by a partner who is being abandoned by the other partner. The guilty spouse may be ordered by a court order to cohabit with the victim spouse. It is a process that is applied to divorce and marital cases in both religious tribunals and courts. It's a marital issue that the Christian courts have traditionally had jurisdiction over. Jewish law is the source of this idea, which was introduced to other common law nations under British authority. Infringing on their fundamental rights, wives were prohibited from leaving their husbands under British law since they were regarded as chattel. Several nations, including the UK, Ireland, Australia, and South Africa, have abolished the legal process for recovery of conjugal rights.<sup>3</sup>

Nevertheless, marriage is seen as a sacred institution and a vital aspect of life in Indian culture. Progressive marriage theories are still attempting to establish themselves in a culture where society and the law interact in a tortuous way. Restitution of conjugal rights is one remedy that still exists as the proprietary rights of husbands over their wives, despite the increasing shift away from the notion of women as mere chattel. When one of the spouses withdraws from the other's company "without any reasonable cause," restitution of conjugal rights takes place.

## **2. SECTION 9 OF THE HINDU MARRIAGE ACT**

One sort of legal remedy offered to spouses in distress in the institution of marriage is the restoration of conjugal rights. Conjugal rights may be restored under Section 9 of the Hindu Marriage Act of 1955 (hereinafter referred to as the Act). According to this section of the Act, "When either the husband or the wife has, without reasonable justification, withdrawn from the society of the other, the aggrieved party may apply, by petition to the District Court, for the restitution of conjugal rights and the court, upon being satisfied of the truth of the statements made in such petition and that there is no legal ground why the application should not be granted, may decree restitution of conjugal rights in accordance<sup>4</sup>."

The one who withdrew from the spouse's company bears the duty of proving a valid defence. Because the abuser usually leaves no evidence, scars occasionally fade, and bruises fade over

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<sup>3</sup> Restitution of Conjugal Rights: A Peril to Fundamental Rights in India, available at: <https://www.jurist.org/commentary/2023/01/khushi-gupta-and-vishakha-shakya-conjugal-rights-india-womens-rights/> (last visited on: October 2, 2023).

<sup>4</sup> *Supra* note at 2.

time, it can be difficult to establish any kind of abuse. However, when the same savagery takes an emotional or mental turn, it becomes very hard to depict. How can a woman or husband prove that their partner is torturing them emotionally, starving them, or putting them down? Since these are hard to demonstrate, divorce is usually their only viable alternative.

### 3. CONSTITUTIONALITY: PRIVACY AND GENDER JUSTICE

It is significant to note that Section 9 of the Hindu Marriage Act of 1955 has had its constitutional validity contested on the basis that it breaches the right to privacy and personal liberty provided by Article 21 of the Indian Constitution. The claim is that it violates a person's physical autonomy and privacy to make them engage in sexual activity with their spouse against their consent.

However, the Supreme Court of India has repeatedly ruled that Section 9 is constitutionally legitimate. The Supreme Court held in *Saroj Rani v. Sudarshan Kumar Chadha*<sup>5</sup> that the idea of restitution of conjugal rights is founded on the notion that marriage is a sacrament and it is the parties' obligation to live together. According to the court, Section 9 does not infringe on any basic rights, such as the right to privacy and the right to personal liberty. As a result, it may be said that Section 9 of the Hindu Marriage Act is still in effect and that the Supreme Court of India has affirmed its constitutional legitimacy<sup>6</sup>.

It should be highlighted that there is a claim that the wife's right to privacy is manifestly violated by the restoration of conjugal rights. The Supreme Court has ruled that the right to privacy "is an essential ingredient of personal liberty" in its ruling in *Kharak Singh v. State of UP*<sup>7</sup>. The court had to address the problem brought up in the *Kharak Singh case* once more in *Gobind v. State of M.P.*<sup>8</sup>. The Honourable Supreme Court determined in this decision that among other rights, the right to privacy is a part of the right to liberty.

The clause for the restoration of marital rights' legitimacy has repeatedly come under attack. Examining how the legal definition of privacy has evolved in this context and how it has impacted significant decisions like *T. Sareetha*<sup>9</sup> and *Saroj Rani*<sup>10</sup> on the restoration of marital

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<sup>5</sup> 1984 AIR 1562.

<sup>6</sup> Restitution of Conjugal Rights (RCR) - Overview, available at: <https://vakilsearch.com/restitution-of-conjugal-rights> (last visited on: October 3, 2023).

<sup>7</sup> AIR 1963 SC 1295.

<sup>8</sup> (1975) 2 SCC 148.

<sup>9</sup> *Sareetha v. Venkata Subbaiah*, AIR 1983 AP 356.

<sup>10</sup> *Saroj Rani v. Sudarshan Kumar Chadha*, 1984 AIR 1562.

rights is the key. The Andhra Pradesh High Court ruled in *Sareetha v. Venkata Subbaiah*<sup>11</sup> that Section 9 of Hindu Marriage Act, which grants the relief of restitution of conjugal rights (RCR), is unconstitutional because it infringes on both Articles 14 and 21 of the Constitution (Right to equality, the Right to privacy, Right to liberty).

In the aforesaid mentioned case, the husband submitted a request for Restitution of Conjugal Rights, and his well-known actress wife (Sareetha) responded opposing the request. According to the defence presented on behalf of the wife, a woman has the “right of free choice as to whether, where, and how her body is to be used for procreation of children, as well as the choice of when and by whom the various parts of her body are to be sensed” under the terms of the right to privacy. She has the freedom to make any decisions she wants. She claimed that this is guaranteed under Article 21 as a component of her “liberty.” By approving the remedy of recovery of conjugal rights under Section 9 of the Hindu Marriage Act, the State violates this basic right guaranteed by Article 21. Additionally, the remedy breaches Article 14 by treating individuals who are inherently unequal as equals by being accessible to both married men and married women.

In *Gobind Singh v. State of MP*<sup>12</sup>, the Supreme Court of India further defined privacy as something that “preserves the intimate intimacies of the home, the family, marriage, motherhood, procreation, and child-rearing.” In accordance with this interpretation of the term “right to privacy,” a person’s home is a private area into which the law should not be applied. In *T. Sareetha*, the Andhra Pradesh High Court provided a more individualistic and forward-thinking view of privacy. According to the ruling, a person’s right to privacy belongs to them and is unrelated to whether or not they are married. Therefore, when this choice regarding whether to have marital relations is shifted from the wife to the state, there is a major violation of the woman’s right to privacy and bodily autonomy.

Although this clause is gender-neutral, it takes advantage of the fact that women in India still experience prejudice in society. For instance, dowry killings are still rampant in society, and women are routinely subjected to emotional and mental abuse and torture for dowry. As these weary and devastated wives leave their husband’s house, a decree of the return of conjugal rights is a noose around their necks. How can a lady who is already on the edge of breaking down be

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<sup>11</sup> AIR 1983 AP 356.

<sup>12</sup> *Supra* note 8 at 5.

given permission to go back to the location where she was abused by our courts, which swear to uphold the three principles of justice, equality, and conscience?

In light of the most recent progressive decisions made by the Supreme Court, this viewpoint has to be re-evaluated. The Supreme Court ruled in *Navej Singh Johar v. Union of India*<sup>13</sup> that Article 21 of the Indian Constitution must be acknowledged in order to safeguard each person's complete sovereignty over intimate choices affecting their personal life. In a similar vein, the supreme court decided in *K.S. Puttaswamy v. Union of India*<sup>14</sup> that a person's "right to privacy" should be interpreted using an individualised lens, including the right to complete autonomy over their body. According to the court, the right to privacy must be respected before any other basic right enumerated in Part III of the Constitution can be used. Additionally, the court in *Navej Singh Johar* case emphasised the connection between "choice and dignity" and the difficulty of conceiving dignity in its hallowed whole in the event that the right to freedom of choice is curtailed. In India, the judiciary and society need to adopt more progressive attitudes on marriage. In light of *Puttaswamy and Joseph Shine's* rulings, which discussed the right to privacy as a basic right under Article 21, the remedy of Restitution of Conjugal rights as a provision must be deemed invalid.

The Indian judicial system has a history of having a highly paternalistic view on women's private life, which is a difficult fact to accept. Because of the regulations, women are now compelled to accept the complicated patriarchal structure that governs their everyday lives.

While both the husband and the wife are eligible for the Restitution of Conjugal Rights remedy, it is important to remember that men and women are fundamentally different from one another. There isn't enough of a solution accessible in society, and we shouldn't ignore the reality that most women still have lower social and economic status than males do.

The right to Equality<sup>15</sup> and Life<sup>16</sup> are violated by the restitution of conjugal rights in this manner. Equal thinking, deed, and self-realization are implied by the term equality. The continuance of the treatment results in unintended pregnancies, and it is said that this undermines women's self-respect, dignity, and sense of fulfilment.<sup>17</sup>

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<sup>13</sup> AIR 2018 SC 4321.

<sup>14</sup> (2017) 10 SCC 1.

<sup>15</sup> The Constitution of India, art. 14.

<sup>16</sup> The Constitution of India, art. 21.

<sup>17</sup> Constitutional Validity of Restitution of Conjugal Rights, *available at*: <https://ccrd.vidhiaagaz.com/constitutional-validity-of-restitution-of-conjugal-rights/> (last visited on: October 5, 2023).

Due to illiteracy, economic reliance, and other causes, males often benefit from many laws and remedies in the men-dominated society. Because the woman is typically placed in an unfavourable circumstance, there is just one clear trait.

In 2019, while hearing a public interest litigation (PIL) that claimed the clause was anti-women as it forced a woman to go back to her husband against her will and in violation of her rights, a two-judge panel led by Chief Justice of India Ranjan Gogoi transferred the matter to a bigger court. Senior attorney Sanjay Hegde claimed that although the legislation appears to be gender neutral on the surface, it is actually profoundly patriarchal and is based on feudal English law, which views a woman as the husband's "chattel" or personal property. It violates Article 15(1) of the Constitution and is rooted in patriarchal gender stereotypes, he claimed.<sup>18</sup>

However, as per reply by the Centre in 2022, according to the Centre, the remedy for conjugal rights is gender neutral in the constitution and in how it is applied. In practise, spouses of both sexes utilise the remedy, and no evidence has been shown to show that there is any prejudice in how it is used.

"It is submitted that, in fact, the remedy enables both sexes to enforce their marital rights within a reasonable framework and in no way does it create an unequal playing field." The Centre stated.

Although the provision affects women disproportionately, the legislation is gender-neutral in that it permits both the wife and the husband to request the restoration of conjugal rights. Because marital rape is not a felony, women are frequently summoned back to their marital homes as a result of this clause, making them vulnerable to this forced cohabitation.

It is also disputed whether the State may have a compelling interest in preserving the institution of marriage to the point where it permits legislation that makes it illegal for spouses to live together.

Even if we talk about gender equality and the fact that the law is gender-neutral, women still face discrimination in persisting culture, and this clause takes advantage of that. Women are frequently emotionally and mentally mistreated and tortured for dowry, and dowry killings are a scourge on society.

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<sup>18</sup> Samanwaya Rautray, "SC to decide validity of provisions governing restitution of conjugal rights", *The Economic Times*, 6 March 2019, available at <https://economictimes.indiatimes.com/news/politics-and-nation/sc-to-decide-validity-of-provisions-governing-restitution-of-conjugal-rights/articleshow/68279688.cms> (last visited on: 5 October 2023)

A decree of the return of conjugal rights is a noose around the necks of these exhausted and shattered spouses as they depart the husband's home. The Indian judicial system and society need to adopt more progressive philosophies, beginning with the progressive notion of marriage. Marriage is based on two people agreeing to share their autonomy and freedom with one another, not on the ceremonies.

#### 4. CONCLUSION AND SUGGESTIONS

Conjugal rights restitution is a hotly debated and contentious topic. Some people believe it is to keep the marriage together, while others argue that it serves no purpose to make the offended person stay with the other party since they are not at all interested. There is, however, always room for improvement via tinkering. In place of traditional marital rights, the idea of reconciliation might be considered.<sup>19</sup> Restitution is a very hard and cruel concept since it requires compromise from both parties. On the other side, the plea for reconciliation is made in a very kind manner. The issue with restitution is that once both parties are made to live together against their choice, there is a great likelihood that things will go nasty. However, if reconciliation is the chosen course of action, it may not offend either party and will also clear up any confusion.

We must recognise, nevertheless, that marriage is the institution through which two willing adults create a relationship and voluntarily decide to live together. It is predicated on two people's voluntary agreement to share their freedom and liberty.

Restitution of conjugal rights deprives a woman of their autonomy over their body and their choice as a marital relief. Such a provision cannot be sustained in view of the present state of the law following the Joseph Shine ruling and cultural standards. India has to reconsider this barbaric clause and do away with this strict, patriarchal "remedy" once and for all.

By imposing restrictions on a person's ability to choose his living partner, the remedy for the restitution of conjugal rights goes against that person's basic nature. In our more patriarchal countries, the wife is typically socially and economically reliant on the husband, and both married couples are not usually equal.

As a result, individual rights should take precedence above the idea that marriages should be upheld at any costs. Consequently, the struggle between the inalienable fundamental rights and personal rules is becoming increasingly acrimonious.

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<sup>19</sup> Restitution of Conjugal Rights: Criticism Revisited, *available at*: <http://www.legalserviceindia.com/articles/abol.htm> (last visited on: October 5 2023).

Courts ought to consider core constitutional rights while evaluating family legislation. The criteria of whether remedy of reparation is comparable to India's Constitutional Fundamental Rights has not been met. Natural law principles are violated and the repayment clause is inappropriate in today's gender-sensitive culture. It falls short when it comes to fairness and justice. It is necessary to specifically include irretrievable breakdown of marriage as a ground of divorce since men often utilise the remedy of RCR to get a divorce on more amicable terms.

Without an iota of doubt, Restitution of Conjugal Rights may be used to force cohabitation on an unwilling person, which is a serious breach of human dignity and an improper use of the legal system. Individual bodily autonomy takes precedence over intrusive governmental interests, and Section 9 of the HMA is fundamentally discriminatory and abusive while offering no benefit to the public.

Therefore, the need of the hour is that either the legislature must take the initiative to remove this clause from the concerned Statute, or the Supreme Court must stamp its decision as unconstitutional and overturn it so as to further the social and legal cause.

# AN ANALYSIS OF THE POSSIBILITY OF A CONSOLIDATED & COMPREHENSIVE LEGISLATION ON TOURISM IN INDIA AND THE PROTECTION OF THE RIGHTS OF FOREIGN TOURISTS

- Dr. Manu Sharma\* & Dr. R. K. Singh\*\*

## 1. INTRODUCTION

Tourism is a vast sector/ industry in India and it attracts a huge number of tourists/ visitors, but there is a lack of a consolidated and comprehensive legislation because of the varied nature of various segments of the tourism sector. Tourism has a multifaceted industry in India with several sectors, such as, locations, travelers, tourist service provider, hospitality etc. and all these are governed by various laws. India is an ancient and historical country with diversity which has its own special and rich heritage, culture, traditions, rite, rituals and festivals as well as scenic beauty & aesthetic becoming an enormous part of its identity. Due to all these things, India is considered to be a centre of tourism and the numbers of visitors, national and abroad as well, is increasing day by day. Foreign Tourist Arrivals (FTAs) was 1,09,30,355 in 2019 and 27,44,766 was in 2020 in India.<sup>1</sup> Due to Corona Pandemic, Number of FTAs decreased in 2020 and in subsequent years.

Tourism is an important activity of the country and there should be a cordial/ harmonious relationship between the tourists and the tourist services providers. Tourism is a dynamic and vibrant industry involving people from diverse corners of the world and includes transits, intermittent stays coupled by travel documentation based on the laws of the countries of origin and visit etc. Tourism has various benefits as well as some negative effect. Advantages of tourism, such as, boosting the economy, learning about different cultures, increasing tolerance etc. are as positive effect, on the other hand depletion of local water resources due to excessive water consumption for tourists, visitors' trash- water bottles, food containers, cosmetic packaging etc. are affect the environment.

There are a number of problems of tourists due to the absence of a consolidated regulating instrument about tourism. It should also be so because global tourism is becoming highly

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<sup>1</sup> 'India Tourism Statistics at a Glance- 2021', *available at*: <https://tourism.gov.in/sites/default/files/2022-09/India%20Tourism%20Statistics%20at%20a%20Glance%202021%20%281%29.pdf>, (last visited on 26.09.2022).

competitive in the neighbouring destinations/countries.

However, In India, various laws are made in order to regulate, promote, etc. of all the segments of tourism. But now, with the advancement of electronic media and technologies, new areas have emerged that need to be incorporated in a comprehensive and consolidated tourism legislation. Tourism laws are derived from a variety of sources in India. All three Lists of the Indian Constitution, have various elements related to tourism, though it is not specifically referred to anywhere in these Lists. For example, aviation, emigration, monuments, shipping etc. fall within the Union List; forests, protection of wild animals, transport etc. enumerated under the Concurrent List whereas law and order etc. fall into the State List. There is not a consolidated and comprehensive law that encompasses all aspects of tourism. It has been argued that legislation on tourism seeks to define the rights and responsibilities of its various segments in clear and unambiguous terms. A crucial point, regarding a comprehensive and consolidated enactment of tourism, is that it should be made from various point of views, i.e.,: interest of tourism industry, international as well as domestic tourists, International relations, and national/ destination/ host population/ organisations operating in the tourism sector. There are many grey areas like sex tourism, child labour etc. that also need to be addressed in the broader ambit of tourism legislation. Awareness about any legislation to stakeholders is most important in order to make it more effective. It is possible that law may exist but unless the stakeholders are sensitized about that, the Law may not serve any fruitful purpose.

**Objectives:** The main objectives of this research paper are analyses: i) the possibility of a consolidated legislation on Tourism, and ii) the rights of foreign visitors and non-citizens and protection of its.

**Importance of the Study:** By this study we will be able to know by securing and protecting the rights of visitors, the possibility of a consolidated legislation about tourism in India. If a consolidated legislation is possible then to give suggestions to make it better and if it is not possible, refuse to make unnecessary efforts.

**Adopted Research Method:** For the present research paper, the Doctrinal Method has been adopted. For this purpose, various statutes, books, journals, commentaries, reports, magazines, newspapers, websites etc. have been consulted and referred, where needed. In preparing this paper, analytical, critical, historical, evaluative and socio-legal approaches are also applied to examine the existing laws, policies and their effects.

**Universe of Study:** The present research has taken within its purview the rights and protection of tourists' especially foreign tourists and the possibility to make a consolidated legislation regarding tourism in India.

## **2. A BRIEF OVERVIEW OF EXISTING LAWS TO GOVERNING THE TOURISM**

There are various laws in India which are directly or indirectly connected to tourism. In other words, the Indian tourism industry is regulated with various laws regarding immigration, tourists, environment, travel documentation, antiquities, heritage and the related. A sound awareness of the same is necessary to the travel professional and tourists. Some of these are as follows:

**Tourists and Travel Documents Related:** The Registration of Foreigners Act, 1939; The Customs Act, 1962; The Passports Act, 1967; Conservation of Foreign Exchange and Prevention of Smuggling Act 1974; The Customs Tariff Act, 1975; Foreign Contribution Regulation Act, 1976; Emigration Act, 1983; Foreign Exchange Management Act (FEMA), 1999 and Non-Resident Indian (NRI) related laws.

**Environment/Sustainable Tourism related:** The Wild Birds and Animals Protection Act, 1912; The Indian Forest (Conservation) Act, 1927; The Wildlife (Protection) Act, 1972; the Water (Prevention and Control of Pollution) Act 1974; The Forest Conservation Act, 1980; The Air Prevention and Control of Pollution Act, 1981; The Environment Act, 1986; The National Environment Tribunal Act, 1995 Energy Conservation Act, 2001; The Biological Diversity Act, 2002 etc.

**Industrial and Hospitality Laws:** The Indian Contract Act, 1872; The Sale of Goods Act, 1930; The Minimum wages Act, 1948 and other Labour Legislations; Prevention of Food Adulteration Act, 1954.

**Preservation and Conservation Related:** Ancient Monuments Preservation Act, 1904; The Ancient Monuments and Archaeological Sites and Remains Act, 1958; Antiquities and Art Treasures Act, 1972; Heritage Conservation and Preservation Act, 2010 etc.

**Accommodation Related:** The Sarais Act, 1867; **Protection of Tourists and Health Related-** Indian Penal Code, 1860; Consumer Protection Act, 2019; Prevention of Food Adulteration Act, 1954 etc.

Except above there are various other rules, regulations, codes, guidelines, orders, Lists which are directly control the tourism sector, such as: Code of Conduct for Safe & Honourable Tourism,

2010; Foreigners (Tribunals for Assam) Order, 2006; Foreigners (Tribunals) Order, 1964; Foreigners Order, 1948; Regulating Entry of Tibetan Nationals into India, 1950; Foreigner Regional Registration Offices (FRRO) Contact List; Guidelines for Adventure Tour Operators, 2012; Guidelines for Approval and Registration of Incredible India Bed & Breakfast/Home-stay Establishments; Guidelines for Domestic Tour Operators; Guidelines for Inbound Tour Operators; National Tourism Policy, 2002; Non-Resident Indian (NRI) Related Laws; Guidelines/ Regulations of Department of Tourism for Categorization of Hotels, National Conservation Policy etc.

When it comes to foreign tourists visiting India, there are three laws that firstly one needs to comply, i.e., i) The Passport (Entry into India) Act, 1920 with its Rules, 1920 and 1950; ii) The Registration of Foreigners Act, 1939 with Rules, 1992; iii) The Foreigners Act, 1946. It is pertinent to describe some of the salient features of the said Acts here.

As per Registration of Foreigners Act and Rules, every foreign visitor must register himself within 14 (fourteen) days and within 24 hours in case of a tourist from Pakistan, at the Foreigner Regional Registration Office (hereinafter referred as the FRRO) unless mentioned otherwise in his visa. They must have a worldwide driving permit if they choose to drive in India. Such tourists mustn't engage in public nudity unless they are within an area that's dedicated for that purpose, like the Nude Beach in Goa. Any cash, bank notes or traveller's cheques exceeding limit must be disclosed in the Currency Declaration Form.

**Passport:** Every foreign visitor, entering India must have a valid passport or any other internationally recognised travel document. It is necessary that International visitors must keep their passport on them at all times.

**Visa:** A valid tourist visa, granted by an authorized Indian delegate overseas, is necessary. Travelers from Nepal or Bhutan don't require a passport or visa for entry into India.

**Temporary Landing Permit:** A temporary landing permit facility, up to a maximum of 03 days, can be given to an alien who enters in India by Air or Sea, without a valid visa, under emergent situation, like demise or sudden sickness in the family, provided the Immigration Officer is satisfied regarding the bona-fides of the foreigner except from some country.<sup>2</sup>

**Restricted/Protected Area:** A foreign tourist can't visit the restricted and protected areas without permission. FRROs have been delegated powers by the Ministry of Home Affairs for the same, a specified period and with some conditions. However, the Ministry of Home Affairs can issue such

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<sup>2</sup> China, Afghanistan, Iraq, Ethiopia, Nigeria, Iran, Somalia, Pakistan, Sri Lanka, and person of Pakistan origin.

permits to an individual. The Protected Areas are the whole of Nagaland and Sikkim; Parts of Mizoram, Manipur, Uttaranchal, Arunachal Pradesh, Rajasthan, Jammu & Kashmir and Himachal Pradesh. The Restricted areas are the whole territory of Andaman and Nicobar Islands and part of Sikkim.

**Customs and Currency Regulation:** To have satellite phones is prohibited in India. Foreign Currency in excess of a limit must be declared.

### **Rights of Foreigners in India**

It is pertinent to discuss the rights of foreigners. The traditional Hindu philosophy is based on the principal of *Vasudhaiva Kutumbakam*<sup>3</sup> which means the whole world is a family. Since ancient times, India has always been known for its hospitality and has always welcomed with open heart its foreigner guests too. India is a land of knowledge. Lakhs of people visit India every year for various reasons such as tourism, medical reasons, research, study etc. India is taking care of some basic rights which are inherent in human beings and cannot be taken away on the basis of territorial jurisdiction. India has been an example of not only providing those basic rights of the foreigner but also protecting and implementing them. India is signatory to various international instruments including Universal declaration of Human Rights which assure basic human rights to the people including those who are temporarily visiting the country. Part III of the Constitution of India, which is also known as “Magna Carta” of Indian Constitution, provides various fundamental rights to the other nationals, such as, right to life and liberty, prohibition on human trafficking and forced labour etc.

**Concept of foreigner:** The term ‘foreigner’ has been defined under various legislations in India. However, it has been defined in a similar way without any elaboration. The Foreigners Act, 1946 has defined the term foreigner under Section 2(a). As per this Section, a foreigner is a person who is not a citizen of India. Section 2 (a) of the Registration of Foreigners Act, 1939 also defines the term foreigner in the same way saying that “foreigner” is the person who is not citizen of India.

The abovementioned definitions are not sufficient in distinguishing between foreigners and various other sections of non-citizens, such as, refugees or even illegal. Because the human rights applicable to a person who is visiting India for legitimate purposes like tourist, student, researcher, patient are different from the person who is an illegal migrant. However in both the cases the person may be

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<sup>3</sup> It is Sanskrit term found place at Mahaupnishad.

designated as “foreigner”. Due to its porous borders and boundaries with its neighbours, India experiences an influx of unauthorised immigrants on its soil.

***Rights available to foreigners:*** The legal mechanism governing foreigners in India is double edged. On one hand the age- old law gives power to the government to control and restrict the activities of foreigners while on other hand, the dynamic constitutional provisions ensure the safety, privacy and equality. In India there is much legislation governing foreigners or non-citizens which include the Foreigners Act of 1946, the Passport (Entry into India) Act of 1920, the Registration of Foreigners Act of 1939, and the Registration of Foreigner Rules of 1992. All of these laws explicitly give to India the authority to limit foreigners' freedom of movement within the country etc.

Article 14<sup>4</sup> which provides the right to equality before law and equal protection of laws is available to all the persons. According to Article 14, “the state shall not refuse to any individual within the territory of India from the equality before the law or the equal protection of the laws.” There is no discrimination between citizens and non-citizens Article 21 also include the citizens as well as non - citizens. This right is available to every person who is within the jurisdiction of the country.

A seven-judge Bench of the Top Court in *Maneka Gandhi v. Union of India* case<sup>5</sup> interpreted the word “law” in the expression “procedure established by law” in Article 21 to be a law which “must be right, just and fair and not arbitrary, fanciful or oppressive”. Therefore, any rule or procedure, if drafted/ drafted by the government, to limit a foreigner’s ability to petition in a local court to preserve his life and liberty must be non-arbitrary and should fulfill the reasonableness tests. Moreover, Article 21 of the Constitution has been interpreted by the Apex Court in such a way from time to time so as to include various other right within the ambit of right to life such as right to social security, right to privacy, right to health, right to clean environment, right against sexual harassment etc. Therefore, all the implied rights that are considered to be the part of right to life and personal liberty are also available to foreigners and persons visiting India. Articles 17 & 18<sup>6</sup> are basically not rights but obligations on everyone. Further Article 32<sup>7</sup> is provided to everybody who is in India whether citizen or not for the preservation of the fundamental rights provided to them as non- citizens also have certain fundamental rights, so they have the right under Article 32 to move to the Supreme court if those rights are infringed.

***Foreigners’ Related Issues:*** A system of checks and balances is necessary to ensure the rights of

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<sup>4</sup> The Constitution of India.

<sup>5</sup> AIR 1978 SC 597.

<sup>6</sup> *Supra* note 4.

<sup>7</sup> *Ibid.*

foreigners and national interest. The provisions like Section 3, Sub-section 2, Clause (e) of the Foreigner's Act, 1946 and other provisions that give the authority to the Central Government to detain any foreigner and force them to “reside at a particular place” without a specified time limit are in place. There is currently no set standard for how foreign people should be treated in detention facilities, but the Supreme Court has instructed the centre to develop suitable standards for housing foreign nationals in detention facilities across the nation.

The National Human Rights Commission report 2018 made a number of recommendations, including creating a clear legal framework that complies with Article 21 and international law, separating foreign nationals in custody from those who are being held for criminal offences, and ensuring there is no indefinite detention of foreign nationals. Article 21 of the Constitution, which also applies to foreign nationals, prohibits indefinite detention of any person.

It is necessary to classify the status of different immigrants to India. It is easier to comprehend the unique needs of foreigners who enter Indian Territory out of fear. The proper application of fundamental rights to non-citizens will be ensured by a clear description and categorization. Although here Refugees and Asylum Seekers Protections Act, 2000 is enforce and define the Refugees and Asylum Seekers and their rights.

Increasing channels to provide online travel and hospitality, calls for a legal framework. Misrepresentation of information is a big problem in the online tourism business. There is a need for a clear and comprehensive law to provide and manage insurance coverage for the tours and other travel related services as the risk factor is involved during all phases of the tour. There should be a strict regulatory framework for the businesses and the consumers in the sector of Gaming, Gambling, Amusement Parks and Time-Share Resorts.

**Role of Courts:** In a famous case, *State of Arunachal Pradesh v. Khudiram Chakma*<sup>8</sup> the honourable Apex Court addressed the rights of Chakma refugees and stopped them from being forcibly expelled from the state of Arunachal Pradesh on the ground of humanitarian basis and in the light of Article 21. The Court said that Article 19 (1) (d) and (e) do not apply to foreign nationals. Foreign nationals likewise cannot use the Article 14 mechanisms. The rights granted to foreign nationals under Articles 19(1) (d) and (e) are expressly denied to them. In *Chairman, Railway Board v. Chandrima Das*<sup>9</sup> case the Apex Court held that the right to life provided under Article 21 of the Constitution is available not only to the person who is a citizen of India but also to every person

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<sup>8</sup> (1994) Supp (1) SCC 615.

<sup>9</sup> AIR 2000 SC 988.

who may not be a citizen of this country. Even the tourist visiting India is also entitled to protection of his life. Fundamental rights provided under Part III of the Constitution are in consonance with rights provided under Universal Declaration of Human Rights adopted by the UN General Assembly.

Recently in the famous case of *Johnny Paul Pierce v. Union of India*<sup>10</sup> the Court dealt with a question of the staying back of a foreigner who was stuck in India during Covid-19. US resident Johnny Paul Pierce, 74 years old person, requested an extension of his stay to remain in India, citing the fact that he felt safer in Kerala than he would have in the USA. On February 26, 2020, Pierce had landed in Kerala. Although his tourist visa was valid until January 26, 2025, he was only permitted to stay in India for 180 days at a single visit due to visa regulations. Pierce was confined to Kerala, as a result of the COVID-19 pandemic-related countrywide lockdown. He made a request for permission to extend his stay on the grounds that he was a senior citizen and the COVID-19 situation in the USA was getting worse and he did not receive a favorable response from the Commissioner of Immigration and Foreigners Registration Officer. He filed a writ petition to the Hon'ble High Court of Kerala in accordance with Article 226 of the Indian Constitution, arguing that since his visa is valid until 2025, there should be no restriction on his ability to stay in India for longer than 180 days at a time. However, the single bench of the High Court considered the writ petition and on the basis of precedents of the Supreme Court held that a foreign national cannot claim the protection of Article 19(1) (e) of the Constitution of India. Secondly, the Court also reiterated to the Petitioner, based on established precedents of the Supreme Court, that his plea to permit him to stay back in India cannot be accepted and extension of visas to foreign nationals fall exclusively within the domain of the Government of India. However, due to the pandemic situation and the no availability of the international flights, the Court directed the Foreigner's Registration Officer to consider the petitioner's representation within a period of two weeks, strictly in accordance with the applicable guidelines and policies.

### **3. INTERNATIONAL AGREEMENTS BY MINISTRY OF TOURISM, GOVT. OF INDIA**

India has also tied up with various international organizations to promote tourism and protect visitors, such as, the UNWTO (United Nations World Tourism Organization), WTTC (World Travel and Tourism Council), UNESCO (United Nations Educational, Scientific and Cultural

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<sup>10</sup> AIR 2020 Kerala 203

Organization) WHO (World Health Organization), ILO (International Labor Organization), WTO (World Trade Organization) and many others. All these institutions have played a crucial role in shaping the legislative framework also for the tourism industry to function well. The GCET (Global Code of Ethics for Tourism) states many vital articles which cover the social, economic, environmental and cultural components of the travel and tourism sector. India is also a member of WTO's GATS (General Agreement on Trade in Services) and GATT (General Agreement on Tariffs and Trade). GATT is one of the first and the landmark multilateral trade agreements covering the provision of tourism services which came into force in January 1995.

International Cooperation Division of the Ministry of Tourism, Government of India holds consultations and negotiations with countries for signing of Agreements/MoUs for bilateral/multilateral cooperation in the field of tourism. Signing of an Agreement/MoU (Memorandum of Understanding), for cooperation in the field of tourism, is an ongoing process. The Ministry of Tourism, Government of India has signed Bilateral Agreements/MoUs with more than 48 countries. The Division also engage in negotiations and consultations with the various international organisations, such as, UNWTO (United Nations World Trade Organisation); ESCAP (Economic and Social Commission for Asia and the Pacific); BIMSTEC (Bay of Bengal Initiative for Multi Sectoral Technical and Economic Cooperation); MGC (Mekong-Ganga Co-operation); ASEAN (Association of South-East Asian Nations); SAARC (South Asian Association for Regional Cooperation) and SASEC (South Asian Sub-regional Economic Co-operation).

#### **4. EFFORTS TOWARDS A CONSOLIDATED TOURISM LEGISLATION BY THE CENTRAL GOVERNMENT**

The Ministry of Tourism is trying and debating for drafting a consolidated Tourism Legislation for the country but these efforts are still in the infancy stage. Generally, the demand for a consolidated/common tourism legislation is from the point of view of protecting the interests of international tourists as regards their safety and standards of services, sustainable tourism development, protecting the interests and economic benefits of the host/ local population. By this legislation, legal protection will be served to the travel consumers and service providers/ organizations. This will also aid in the conservation/ preservation of natural resources, cultures, traditions. As we know, for any establishment to work better it requires a set of rules/ regulations. It is notable that not every country has consolidated / common tourism legislation unlike Mongolia or Myanmar.

***Initiatives taken by the Ministry of Tourism to Facilitate of Tourists:*** The Ministry of Tourism, Government of India has taken various steps/initiatives for safeguarding/ protecting of tourists as

well as service providers, such as: i) The Ministry along with all stakeholders, including the Tourism Departments of all States and UTs, have adopted on 1st July, 2010, the '*Code of Conduct for Safe & Honourable Tourism*' which is a set of guiding principles to promote tourism activities as well as to protection of the basic right like dignity, safety and freedom from exploitation of both tourists and local residents. ii) Financial assistance by the Central Government to the State Governments for setting up of TFSO (Tourist Facilitation and Security Organization). iii) Issuance of Guidelines by the Central Government, time to time, on Safety and Security of Tourists for State Governments/ Union Territories. iv) Formulation of a voluntary plan for granting sanction to inn/ hotel projects and categorization of working hotels under Star System from the point of view of their appropriateness for international tourists. v) Formulation of a voluntary scheme of approving Travel Agents, Adventure Tour Operators & Tourist Transport Operators to encourage quality and standard of service in these categories. vi) Facility of a 24x7 Toll Free Multi-Lingual Tourist Helpline in 10 (ten) international as well as regional languages including Hindi & English. vii) Issuance of advisory to State Governments/ UT Administrations for establishment of Tourist Police. viii) Social Awareness Media Campaigns with the aim of sensitizing stakeholders in the tourism sector and the general public about the significance of good conduct and behaviour towards tourists and to reinforce the spirit of 'Atithi Devo Bhava'. ix) Issuance of advisories to States/UTs to mark Selfie Danger Zone at the tourist places. x) A regular update on the recent circumstances and the safety guidelines is posted regularly on the website- [www.incredibleindia.org](http://www.incredibleindia.org).

***Issues Relating to Consolidated Legislation for Tourism:*** As we know, India is a Union of States <sup>11</sup> and set up a federal structure in which a division of legislative power/ functions between the Centre and the states exists. Under our Constitution, distribution of legislative powers is twofold, *i.e.*, with respect to territory and subject matter. With respect to the territory, Parliament may make laws for the whole or any part of the territory of India and the state Legislature may make laws for the whole or any part of the State. <sup>12</sup> With respect to subject matter, a three-fold distribution of legislative powers by placing them in three lists, namely, Union List (97 items), State List (66 items) and Concurrent List (47 items) under VII<sup>th</sup> Schedule of the Constitution. The subjects related tourism come in these three Lists. It is a barrier to making a Consolidated/ Common Tourism Legislation. Other than it, different states may have different laws on the same subject/ subjects of concurrent list.

Tourism being a multi-faceted and a protracted industry, it's difficult to have a common law binding

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<sup>11</sup> *Supra* note 4, art. 1.

<sup>12</sup> *Ibid*, art. 245 (1).

every sector and all stakeholders and because of its multifaceted nature it can't even be expected to be self-regulated. Increasing channels to provide online travel and hospitality, calls for a legal framework. Providing and Managing insurance coverage for the tours and other travel related services has been a challenging task as the risk factor is involved during all phases of the tour and it should be also done. It also calls for a strict regulatory framework for the businesses and the consumers in the sector of Gaming,<sup>13</sup> Gambling,<sup>14</sup> Amusement Parks<sup>15</sup> and Time-Share Resorts.<sup>16</sup> Information asymmetries and misrepresentation have always posed a major challenge for the consumer to understand the level of expectancy and the same has to be covered by the laws. The reputational harm caused to the businesses of tourism by the frivolous lawsuits needs to be addressed. All these can't be placed in one legislation due to its different nature.

## 5. CONCLUSION

Tourism is a very vast sector in India due to diversity, special and rich heritage, culture, traditions, rite, rituals and festivals as well as scenic beauty & aesthetic of our nation. We also have the spirit of 'Atithi Devo Bhava'. That's why millions of travellers (national as well as international) keep coming here to see, understand and enjoy the heritage, culture, traditions, rite, rituals and festivals, scenic beauty & aesthetic etc. of our nation. But to control tourism in our Country, the lack of a consolidated and comprehensive legislation is being told. Various segments of tourism are governed by the various laws which are difficult for every stakeholder to know. There are some obstacles in protecting the rights of foreign tourists due to the online business of tourism and the power of division between Centre and state. To protect the rights and facilitate the travel of visitors, India has tied up with various international organizations. International Cooperation Division of the Ministry of Tourism, Government of India holds consultations and negotiations with countries for signing of Agreements/ MoUs for bilateral/multilateral cooperation in the field of tourism. The Ministry of Tourism, Government of India has taken various steps/initiatives for safeguarding/ protecting the interest of tourists as well as service providers. The contribution of the Top Court of India has also been positive in protecting the rights of foreign visitors.

Increasing channels to provide online travel and hospitality, calls for a legal framework. Misrepresentation of information is a big problem in the online tourism business. There is a need

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<sup>13</sup> Gaming is the action or practice of playing gambling games.

<sup>14</sup> To bet money on the result of a card game, horse race, etc.

<sup>15</sup> An outdoor area for entertainment, with a merry-go-round, roller coaster etc. refreshment booths and the like.

<sup>16</sup> A timeshare resort is a resort that provides accommodation/ s to owners who have purchased the right to stay in the resort during a set period. It is often located in areas that are traditionally considered popular vacation destinations and are often very similar to a conventional hotel.

for a clear and comprehensive law to provide and manage insurance coverage for the tours and other travel related services as the risk factor is involved during all phases of the tour. There should be a strict regulatory framework for the businesses and the consumers in the sector of Gaming, Gambling, Amusement Parks and Time-Share Resorts.

The term 'foreigner' needs to be defined properly so that international tourists, refugees, illegal immigrants and inadmissible groups of persons can be separated.

Tourism is a multi-faceted and a protracted industry that's why it's difficult to have a common law binding every sector and all stakeholders. The next difficulty, regarding common law on tourism, is that we have a federal structure of government due to this the power of legislation on the subjects are divided between Centre and states so, different states may have different laws on the same subject/ subjects of concurrent list. Therefore, finally we can say that consolidated and comprehensive tourism legislation is not possible. It is possible that all the laws, i.e., statutes, regulations, rules, orders, guidelines, instructions etc., relating to tourism, can be consolidated at a place as a guidebook/ information book and circulated amongst all stakeholders for awareness.

**Suggestions:**

1. The term 'foreigner' should be defined properly by amending Section 2 (a) of both Registration of Foreigners Act, 1939 and The Foreigners Act, 1946, so that international tourists, refugees, illegal immigrants and inadmissible groups of persons can be separated,
2. Clear-cut laws should be made regarding:
  - i) Providing online travel and hospitality and misrepresentation of information.
  - ii) To provide and manage insurance coverage for the tours and other travel related services.
  - iii) To regulate the businesses and the consumers in the sector of Gaming, Gambling, Amusement Parks and Time-Share Resorts,
3. All the laws, i.e., statutes, regulations, rules, orders, guidelines, instructions etc., relating to tourism, can be consolidated at a place as a guidebook/ information book and circulated amongst all stakeholders for awareness.

## MARINE INSURANCE WITH SPECIAL REFERENCE TO ‘PERILS OF THE SEA AND PERILS ON THE SEA’ AND THE LIABILITY OF INSURER

- Dr. Yamala Papa Rao\* & Ritika Yadu\*\*

### *Abstract*

*Marine Insurance plays a significant role in National and International Trade and Commerce. It is instrumental for the growth of the economy of the industry in particular and Nation in general. In the context of marine insurance, distinguishing between “perils on the sea” and “perils of the sea” is crucial. “Perils of the sea” are protected by insurance contracts, and the insurer is responsible for losses caused by these specific perils. However, “perils on the sea” are not covered by insurance, and losses stemming from them cannot be claimed. In essence, the insurer is liable for losses directly caused by insured perils but is not responsible for losses unrelated to those specific perils by application of doctrine of Causa Proxima.*

*The Authors attempt to throw some light on the historical perspective of Marine Insurance and various legislations governing Marine Insurance in India. The authors explore the concept of Perils of the Sea and Perils on the Sea. This paper attempts to outline parameters by identifying the perils that have been established, as adjudicated by courts, as perils of the sea. Further, the authors make the instances where the insurers are made liable for the insured perils and measure of compensation.*

**Keywords:** *Marine Perils, Peril of Sea, Peril on Sea, Liability, Insurance, Damages.*

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## 1. INTRODUCTION

Marine Insurance is one of the oldest insurances and plays a significant role in National and International Trade and Commerce. It is instrumental for the growth of the economy of the industry and Nation in general. The sea presents numerous dangers, ranging from natural calamities like hurricanes and tropical typhoons to icebergs and thunderstorms. These are the natural events or occurrences that pose a threat of property damage, loss of life, and environmental harm to a coastal area.

Throughout ancient history, coastal regions have held a strong allure for human habitation due to their abundant marine life, fertile soil for agriculture, and opportunities for commerce and transportation. These marine resources are highly needed to be preserved from marine perils as they play a vital role in making a nation economically stronger. As we all know there is the concept of marine insurance which is also said to be a shelter for transporters and shippers. Before dealing with marine insurance contracts let us understand the aspect of Insurance Contract. Insurance Contract is that by redistributing risk among many people, reduces losses from accidents incurred by an individual. In exchange for a predetermined payment known as a premium, the insurer commits to providing the insured person or their designated beneficiary with a specified sum of money if the insured experiences a loss due to a covered event outlined in the insurance policy.

Similarly, “the world of marine insurance stands as a multifaceted and dynamic domain, where the delicate equilibrium between risk and coverage wields substantial influence over maritime trade”.<sup>1</sup> “The purpose of marine insurance is also to provide coverage for the property against such losses that occur at sea, known as maritime perils, which are consequential or incidental to sea navigation”.<sup>2</sup> Whether it’s a ship engaged in earning or acquiring freight, commission, or other monetary benefits, or a vessel and its cargo offered as security for a loan, they all face risks from maritime perils during sea voyages, making them **“insurable property”** under marine insurance. Marine insurance has long been a critical aspect of global trade and commerce,

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<sup>1</sup> International Cargo Insurance 9781843119470 - DOKUMEN. PUB, *available at:* <https://dokumen.pub/international-cargo-insurance-9781843119470.html> (last visited on: Jan 11, 2024).

<sup>2</sup> Addya Mishra and Archika Agarwal, “Marine insurance and its legal aspects in India: Perils of the Sea”, *International Journal of Law and Legal Jurisprudence Studies*, Volume 1 Issue 8 *available at:* [https://www.ijlls.in/wp-content/uploads/2014/12/Short\\_Article\\_Marine\\_insurance\\_and\\_its\\_legal\\_aspects\\_in\\_Indi-11.pdf](https://www.ijlls.in/wp-content/uploads/2014/12/Short_Article_Marine_insurance_and_its_legal_aspects_in_Indi-11.pdf) (last visited on: Jan 11, 2024)

facilitating the exchange of goods across vast oceans and protecting against various risks encountered on the sea. However, the unpredictable nature of the sea brings forth a myriad of risks and challenges that can result in damage to ships, terminals, and other means of transportation or storage needed for the movement of goods from the starting point to the destination. Maritime insurance assumes a crucial role in minimizing these hazards, providing essential financial safeguards against a spectrum of dangers that ships might confront on their voyages. Though inland marine insurance is not exempted, the phrase is more frequently applied to ocean or sea marine insurance. Because it saves from the possibility of economic losses due to ship/cargo damage. This research paper delves into the distinct concepts of “*Perils on the Sea*” and “*Perils of the Sea*” within the context of marine insurance. The study aims to dissect the obligations of insurers in cases of maritime perils and analyze the legal implications of these terms on the liability of insurers, the insured’s obligations, and the broader implications of these concepts on maritime insurance have been discussed.

## 2. MEANING & DEFINITION

The Maritime Insurance Act of 1963’s provisions contain the fundamentals governing maritime insurance.

“A contract of marine insurance is an agreement whereby the insurer undertakes to indemnify the assured, in the manner and to the extent thereby agreed, against marine losses, that is to say, the losses incidental to marine adventure”.<sup>3</sup>

“Every marine adventure involves damages or adverse risk, and as LORD HERSCHELL noted in *Thames and Mersey Insurance Company v. Hamilton, Fraser, and Company*. This risk includes damage of a kind that marine adventure is subject to. As was previously mentioned, the goal of marine insurance contracts is to give protection from both types of damage whether it’s marine losses or marine adventure”.<sup>4</sup>

As per the English Marine Insurance states ‘Maritime perils’ as “the perils consequent on, or incidental to, the navigation of the sea, that is to say, the perils of seas, fire, war perils, pirates, rovers, thieves, captures, seizures, Restraints, and detentions of princes and peoples, jettisons, barratry, and any other perils, either of the like-kind or which may be designated by the policy”<sup>5</sup>.

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<sup>3</sup> Marine Insurance Act 1963, Sec. 3

<sup>4</sup> [1887] UKHL J0714-2

<sup>5</sup> Marine Insurance Act (1906) of UK, Sec. 3

A sort of insurance known as “marine insurance” covers products that are moved via water, including cargo, ships, terminals, and other modes of transportation. Even in prehistoric societies like Babylon, it continues to exist for a very long time. In some cases, when people traded goods, they would also purchase insurance when their products were stolen or lost in transit. The term “marine insurance” refers to this form of coverage. A contract for marine insurance exists between the owner of the ship and the insurance provider. The insurance provider agrees to cover any losses or damages incurred during the voyage. Marine insurance is crucial since it safeguards people’s investments and makes sure they are not left with nothing if something goes wrong during transportation.

It’s vital to remember that marine insurance doesn’t attempt to remove or significantly lower the risks associated with the cargo or property being transported. As opposed to that, its main objective is to safeguard the insured’s financial interests in the assets insured by the insurance contract.

“In *Lloyd v. Fleming*, Blackburn J. defined a policy of marine insurance as a contract of indemnity against all losses occurring to the subject matter of the policy from certain perils during the adventure”<sup>6</sup> The policy refers to the indemnity agreement between the insured and the insurer. It also provides coverage for the exposed goods kept onshore or offshore marine liability or casualty, hull, and cargo. Additionally, Cargo insurance is one of kinds of marine insurance that protects against the risk of shipment loss due to thunderstorms.

**Nature:** Foreign trade is a topic of marine insurance. Ships are used in international trade to convey commodities from one nation to another. During the transshipments, there are numerous risks. Importers of goods will want to make sure that their cargo arrives safely. The ship’s safety is what the shipping firm desires. In other words, maritime insurance guarantees the coverage of all possible transit-related hazards. Within a contract the insurer promises to compensate the insured asset against marine losses in a form and to the extent for which they agreed upon is said to be marine insurance.

It is important to emphasize that marine insurance does not have the objective of eliminating or mitigating the risks faced by cargo or property during transportation. “Instead, its primary

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<sup>6</sup> (1872) LR 7 QB 299, 302.

purpose is to protect the financial interests of the insured in covered property”<sup>7</sup>.

**Scope:** “Marine insurance coverage is essential because it protects you from a variety of losses or damages that may result from various perils, including theft, piracy, and other man-made disasters. Natural disasters like earthquakes, cyclones, lightning, etc.”<sup>8</sup>. The policy also applies to ships that are stranded or in danger of being sunk. Also, by acquiring marine insurance coverage, cargo owners can shield themselves from liability for the destruction or loss of precious commodities transported by ship. A proper marine insurance program ensures that crew members are protected, and that liability is kept to a minimum if the cargo is missed or damaged while on the voyage. Typically, consumers believe that marine insurance solely covers maritime travel. However, in practice, maritime insurance coverage covers transit by air, water, registered post, courier, etc.

### 3. HISTORICAL PERSPECTIVE OF MARITIME INSURANCE

As above mentioned, Marine insurance is such kind of insurance that helps protect ships, cargo, and other things against a wide range of risks, also includes damage to the vessel, loss of cargo, liability claims, theft of a ship, loss of freight due on the cargo, natural disaster, Collision, etc. It has been around for a very long time, or we can say the oldest form of insurance starting with the ancient Phoenicians who shared risks by pooling resources.

Marine insurance was one of the most advanced types of insurance, deriving from Greek and Roman marine loans. “In the fourteenth century, independent maritime insurance contracts originated in Genoa and other Italian ports and then extended to northern Europe. The law merchant was where marine insurance law first appeared in English law, with the birth in England by 1601 of specialist chambers of reinsurance besides the other Courts”<sup>9</sup>.

Earlier there was no record of any insurance company before the end of the 16<sup>th</sup> century, then in the 17<sup>th</sup> century, the first marine insurance company was established in London, and more companies followed. The huge growth of the London Insurance market resulted in policy uniformity, and this precedent in law was also significant for the formation of maritime insurance legislation. It has developed as trade has expanded. In the 18<sup>th</sup> century, Lord

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<sup>7</sup> Insurable Interests and Interests Insured in Property Insurance, (2023), *available at:* <https://www.irmi.com/articles/expert-commentary/insurable-interests-and-interests-insured-in-property-insurance> (last visited on: Jan 11, 2024).

<sup>8</sup> What is Marine Insurance? Types & Policies in 2023, *available at:* <https://www.maritimemanual.com/marine-insurance-and-types/> (last visited on: Jan 11, 2024).

<sup>9</sup> A Brief History of Marine Insurance, RISK & INSURANCE (2018), *available at:* <https://riskandinsurance.com/brief-history-marine-insurance/> (last visited on: Jan 11, 2024).

Mansfield, Lord Chief Justice, developed the integration of the law merchant and common law concepts. In the 19<sup>th</sup> century, Lloyd's and the Institute of London Underwriters, a consortium of London-based insurance companies, formulated uniform terms for the application of marine insurance. These standardized provisions have been upheld ever since.

In the 20th century, marine insurance had to adapt to new technologies like steamships and motorized vessels. Today, marine insurance is still very important for the shipping industry, protecting against many different risks and ensuring the smooth operation of global trade. As trade routes expanded and ships carried more valuable cargo, it increased the requirement for insurance coverage. In the Middle Ages, Italian merchants created formal marine insurance contracts.

Marine insurance in India traces its roots back to ancient times when maritime trade was a significant part of the Indian economy. It plays a vital role in supporting international trade and commerce. The Marine Insurance Act of 1963, which draws its foundation from the English Marine Insurance Act of 1906, established a comprehensive legal structure for regulating marine insurance in India. This legislation standardized key principles related to marine insurance contracts, ensuring transparency and fairness in transactions. The Act contributed to the establishment of consistent practices and regulations across the industry. Modern technologies, improved risk assessment techniques, and expanded global trade have further shaped the evolution of marine insurance practices in India.

Marine insurance has been a crucial tool for traders and businesspeople throughout the history of maritime trade. It protects their priceless goods and ships from the unpredictable behavior of the sea. The risks involved in maritime travel haven't changed despite technical developments in the modern era as the value of ships and cargo has increased.

### **Essential of the Marine Insurance**

- Features of General Contract.
- Proximate cause.
- Utmost Good Faith.
- Nomination of the policy.
- The doctrine of Indemnity and subrogation.
- Warranties,
- A Return of premium.

- Insurable Interest<sup>10</sup>.

Maritime transport is the backbone of worldwide trade in the age of globalization, which involves threats related to the ‘Perils of the sea’ and ‘Perils on the sea’. It is a transportation insurance. As we already know maritime insurance is a practice that aids in reducing the possibility of financial loss of assets like shipping cargo and other commodities in maritime voyages and its primary function of marine insurance is to allow ship-owners, buyers, and sellers of goods to conduct their business.

“The term ‘perils of the seas’ refer only to fortuitous accidents or casualties of the seas. It does not include the ordinary action of the winds and waves<sup>11</sup>. It can be generally characterized as incidents occurring during a voyage due to unexpected natural events, often facilitated by human intervention. It only refers to unavoidable incidents or deaths that are not the result of human choice or activity, not even an act of God; For example, they do not offer protection from the inevitable and natural activity of the wind and waves, which might be explained as wear and tear. In other words, only unfortunate events or accidents on the high seas are regarded as maritime hazards whereas the typical behaviour of the wind and waves are excluded.

“In this influential case, the court emphasized that damage resulting from the ordinary action of the sea, even in the presence of a storm, does not fall within the category of “Perils of the Sea.” The judgment highlighted the need for an unforeseen and extraordinary event beyond the realm of ordinary navigation hazards to qualify as such a peril<sup>12</sup>.

Initially, it’s important to clarify that the term “peril of the sea” specifically pertains to unforeseen mishaps or adverse events directly caused by the sea itself, excluding the regular effects of wind and waves. The crucial aspect to highlight is that this peril must inherently convey an accidental or unexpected nature. As Lord Herschell observed in the *Xanthos*: “It is well settled that it is not every loss or damage of which the sea is the immediate cause that is covered by these words. They do not protect, for example, against that natural and inevitable action of the winds and waves which results in what may be described as wear and tear. There must be some casualty, something which could not be foreseen as one of the necessary incidents

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<sup>10</sup> Essential features of Marine Insurance, QS STUDY, *available at*: <https://qsstudy.com/essential-features-of-marine-insurance/> (last visited on: Jan 11, 2024).

<sup>11</sup> FIRST SCHEDULE, *Lloyd’s S.G. policy*, Marine Insurance Act (1906)

<sup>12</sup> *Levick v. Janson* (1873)

of the adventure. The purpose of the policy is to secure an indemnity against accidents which may happen but not against events which just happen".<sup>13</sup>

Whereas "Perils on the Sea" this phrase is more general and may not have a specific definition within insurance policies. It refers to a broader range of risks that can arise from being in or on the sea. These risks could include natural disasters like hurricanes, tsunamis, or earthquakes, as well as other unforeseen events, such as piracy or terrorist attacks. Whether or not these perils are covered by an insurance policy will depend on the specific terms and conditions outlined in the policy. Some policies may provide coverage for perils on the Sea.

So, we can say "Perils on the Sea" is mainly concerned with risks in the water whereas "Perils of the Sea" covers both perils on and in the sea. Understanding the distinction between these terms is crucial for establishing the insurer's responsibility in the case of a maritime incident.

The Indian Marine Insurance talks about Maritime Perils.

"Maritime Peril as perils consequent on, or incidental to, the navigation of the sea, that is to say, perils of the sea, fire, war perils, pirates, rovers, thieves, captures, seizures, restraints and detainment of princes and people's jettisons, barratry and any other perils which are either of the like kind of May be designed by the policy"<sup>14</sup>

"All maritime risks are perils of the sea but not all maritime perils are perils of the sea"<sup>15</sup>. The word 'maritime hazards' or 'maritime peril' is wider in its scope which comprises hazards from the sea, fire, war, perils, thieves, restraints, rovers, pirates, seizures, captures, jettison, barratry, and any other risks of a similar sort or those that may be stated by the policy.

### **Perils Clause:**

Until 1978, the primary insurance phrasing found within contemporary ocean marine policies remained largely unchanged from the initial phrasing established in 1779 by Lloyd's of London.

The clause can be articulated as mentioned below:

*"Touching the adventures and perils which we the assurers are contented to bear and do take upon us in this voyage: they are of the seas, men-of-war, fire, enemies, pirates, rovers, thieves, jettisons, letters of mart and counterpart, surprisal, takings at sea, arrests, restraints, and detainments of all kings, princes, and people, of what*

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<sup>13</sup> [1887] 12 AC 509.

<sup>14</sup> Section (2e) of the Marine Insurance Act of 1963.

<sup>15</sup> K S N Murthy and K V S Sarma, Modern Law of Insurance in India, Page 11 of 31

*nation, condition, or quality soever, barratry of the master and mariners, and of all other perils, losses, and misfortunes, that have or shall come to the hurt, detriment, or damage of the said goods and merchandises, and ship, etc., or any part thereof*<sup>16</sup>.

“Although the clause seems like an all-risk agreement, courts have deemed it to only protect from the risks that are specifically listed. The expression protects against the risks “of” the sea when traveling. Perils on the sea, such as fire, are not covered unless specifically mentioned”<sup>17</sup>. Additionally, while the hazards clause covers damages caused by “enemies, pirates, rovers, and thieves,” it excludes losses caused by acts of war. (Governmental organizations in a few nations also provide war risk insurance policies).

Since marine insurance is a contractual agreement, it commits the insurer to protect the insured party from losses arising from maritime risks.

The dangers of the sea are as follows:

- a) Sinking of the ship.
- b) Dashing of the ships on the rocks.
- c) Damage to the ship and cargo due to the dashing of the waves.
- d) Destruction of the ship by the captain of the ship, piracy, and other risks.
- e) Explosion on the ship.
- f) Cargo Spoilage due to seawater.

**Various other perils** - such as fire, lightning, or earthquake-are also named in the peril’s clause. Eventually, the notion of an “all-risks” policy emerged. This type of policy stipulates that any form of physical loss is included unless expressly mentioned as an exception. Essential marine insurance plans typically exclude risks like war, capture, seizure, political labour disruptions, civil unrest, riots, and comparable dangers. However, these exclusions can be reversed through an endorsement or a distinct policy.

### **Insurance Liability:**

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<sup>16</sup> Lloyds of London, *See*, <https://www.britannica.com/topic/Lloyds>

<sup>17</sup> <https://universalium.en-academic.com/132955/insurance>

“Liability insurance primarily emerges due to the application of negligence laws. People who, as determined by legal standards, do not fulfill their duty to act reasonably or with proper caution, might be at risk of facing substantial liability demands”<sup>18</sup>. Liability insurance is a type of marine insurance policy that provides reimbursement for any liability stemming from losses or damages brought on by unfortunate occurrences like collisions, attacks, or crashes. It is recommended to secure insurance for all export consignments, even in cases where the terms of the sale do not explicitly include it. The responsibility of insuring goods on a consignment basis lies solely with the exporter.

Every Liability Insurance agreement includes provisions that mandate the insurance Company to carry out a legal defense and cover any settlement, encompassing fees for bonds, interest on judgment while under appeal, essential medical and surgical costs incurred at the accident’s, occurrence, and additional expenditure. This type of insurance is occasionally referred to as defense insurance due to this stipulation. The policyholder is required to cooperate with the insurance company in all legal proceedings, including attending court if requested and providing testimony as necessary. So basically, this chapter will clarify the responsibilities and rights of insurers and insured parties in scenarios involving these perils.

The English Marine Insurance stipulates, *inter alia*, that: “Unless the policy otherwise provides, the insurer is not liable for ordinary wear and tear, ordinary leakage and breakage, inherent vice or nature of the subject matter”<sup>19</sup>.

### **Notice to Insurer:**

“Under a Marine Insurance claim, the insured must notify the insurance company of any goods missed or destroyed as soon as possible. Also, the insured or his agent must notify the insurance company right away in the circumstances that the products are lost or destroyed”<sup>20</sup>.

### **Reasonable Care:**

A marine policy’s clause specifies that the insured and insurer must operate like the assets aren’t covered by the insurance agreement and execute all reasonable precautions to minimize any

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<sup>18</sup> Liability in Marine Insurance: Understanding Your Coverage, BIMAKAVACH (2023), *available at*: <https://www.bimakavach.com/blog/liability-in-marine-insurance-understanding-your-coverage/> (last visited on: Jan 11, 2024).

<sup>19</sup> The Marine Insurance Act (1906), Sec. 55-2C

<sup>20</sup> Procedure and Documentation for Filing Claim of Marine Insurance., *available at*: <https://howtoexportimport.com/Procedure-and-Documentation-for-Filing-Claim-of-Ma-490.aspx> (last visited on: Jan 11, 2024).

damages or harm. Therefore, reasonable care is one of the precautions to be considered for filing a claim for marine insurance against the harm or loss of export or import products in global trade.

**Survey and claim:**

The following steps for the procedures for submitting a maritime insurance claim for export and import. When receiving a package covered by a marine insurance policy, the insured or his representatives must request a ship surveyor's examination and submit a financial claim for loss or damage to cargo, and a licensed marine surveyor may be appointed.

**Outward Condition**

“When the packages’ external state becomes clear, the insured takes delivery without reconsidering. When they arrive at the warehouse and unpack the parcels, they discover damaged products. In such instances, the insured or agent should contact the insurance provider right away and request a complete survey from a ship surveyor. They should not make any delivery of goods and shouldn’t tamper with the packaging supplies or the packages’ contents. This is one of the crucial components of maritime insurance in the context of import and export commerce”<sup>21</sup>.

**Missing Packages:**

The insured must file a financial claim for missing packages with the shipping firm and acquire the necessary acknowledgment.

**Time Limit:**

Marine Insurance claims deadline is one calendar year from goods discharge, subject to insurer norms and regulations.

**Documents Required:**

To obtain the insurance company’s compensation award, the insured must provide the following documents:

1. Original Insurance Policy or Certificate.
2. Copies of Correspondence exchanged with the carriers or bailees.

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<sup>21</sup> *Id.*

3. Claim Bill.
4. Survey report / Missing certificate
5. Copy of Billing Lading.
6. Original Invoice, Packing List, and any weight or shipment conditions.

In this case, Failure to meet these above obligations can result in the insurer declining to provide compensation.

**The following are the steps for obtaining a marine insurance policy:**

- (a) Choosing an Insurance Company.
- (b) Choosing the Proper Type of Policy.
- (c) Application to the Insurance Company.

**Right of the insurer in payment:**

In situations where the insurer compensates for a complete loss - whether it pertains to the entirety of the insured entity or a portion of it that can be apportioned, such as goods - the insurer gains the right to assume the insured's interest in any remaining portion of the subject matter that has been compensated for. Consequently, the insurer is then granted all the rights and legal recourse that the insured originally possessed about that issue, beginning at the moment when the incident resulting in the loss took place.

**The doctrine of Proximate Cause:**

According to the marine insurance Act, "Subject to the provisions of the Act and unless the policy otherwise provides the insurer is liable for any loss proximately caused by a peril insured against, but subject to as aforesaid he is not liable for any loss which is not proximately caused by a peril insured against"<sup>22</sup>.

- The insurance company cannot be held responsible for any losses resulting from the deliberate wrongdoing of the insured party. However, unless the insurance policy

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<sup>22</sup> Proximate Cause in Insurance: Key to Coverage & Claims, (2023), available at: <https://www.iedunote.com/proximate-cause> (last visited on: Jan 11, 2024).

specifies otherwise, the insurer is responsible for covering losses directly caused by a covered peril.

- The insurance company will not bear responsibility for losses incurred due to delays unless stated otherwise in the policy terms.
- The insurance provider is not responsible for losses resulting from regular wear and tear, standard leakage and breakage, inherent characteristics of the insured subject matter, or losses caused by maritime perils. The principle of proximate cause, as articulated by Dover, signifies that the actual cause of a loss, proximate to the loss, regardless of the timing, is what matters. This doctrine should be applied sensibly to ensure that the intentions of the contract parties are upheld rather than defeated. Therefore, the proximate cause should be the direct and unmediated factor leading to the loss. The insurer assumes liability for losses directly attributable to the insured peril.

#### **4. CONCLUSION AND SUGGESTIONS:**

In conclusion, the distinction between **“perils on the sea”** and **“perils of the sea”** within the context of marine insurance represents a critical delineation that significantly influences the obligations and liabilities of insurers. Understanding these terms is paramount for both insurers and policyholders to navigate the intricate waters of maritime risk and coverage. The intricacies of these distinctions underscore the complexity of the marine insurance industry, where precise terminology can make a substantial difference in the outcome of a claim. As we’ve explored, the realm of naval insurance is a diverse and dynamic field and triggers questions of liability and coverage on the part of the insurer and, also about the insured. This research work also emphasizes the importance of clear and comprehensive insurance contracts in this specialized field. Further, it sheds light on the intricate web of responsibilities when maritime perils arise. In a world where maritime trade remains pivotal to global commerce, this comprehension of liability amidst the perils of the sea remains essential for ensuring the protection of assets and the smooth functioning of maritime activities.

- Embrace technology to streamline processes, improve efficiency, and reduce paperwork. Implementing digital platforms for underwriting, claims processing, and customer service can enhance the overall experience for clients.
- Offer flexible policies tailored to the specific needs of clients in the maritime industry. Customization can include coverage for different types of vessels, cargo, routes, and unique risks.

- Educate clients about the complexities of marine insurance, helping them understand their coverage and potential risks better. This transparency can lead to stronger relationships and trust.
- Improve the claims process by employing efficient technologies and providing quicker resolutions. Prompt and fair claims handling can significantly enhance customer satisfaction.