NIU INTERNATIONAL JOURNAL OF HUMAN RIGHTS
A UGC CARE Listed Journal
Volume 10, 2023
ISSN: 2394-0298

NOIDA INTERNATIONAL UNIVERSITY

Plot No 1, Sector – 17 A, Yamuna Expressway, Gautam Buddha Nagar, Uttar Pradesh
Website: www.niu.edu.in

NOIDA INTERNATIONAL UNIVERSITY

ज्ञान–विज्ञान विमुक्तये

Volume 10, 2023 ISSN: 2394-0298

# NIU International Journal of Human Rights

A UGC CARE Listed Journal

NOIDA INTERNATIONAL UNIVERSITY
www.niu.edu.in

NIU International Journal of Human Rights (NIUIJHR) is published annually by Noida International University

**ISSN:** 2394 – 0298
**Volume** 10, 2023

Website: niu.edu.in/niuijhr/

Listed @ Indian Citation Index

**Copyright @ Noida International University**
All rights reserved. No part of this publication, including the cover page may be reproduced, stored in the retrieval system in any form or by any means-electronic, mechanical, photocopying, recording, or otherwise, without prior written permission of NIU.

**Disclaimer**
The views expressed in the papers incorporated in the Journal are purely of the authors and not of the Noida International University.

**Address:**
Plot No. 1, Sector 17-A, Yamuna Expressway
Gautam Buddha Nagar, Uttar Pradesh
www.niu.edu.in



ज्ञान–विज्ञान विमुक्तये
**A UGC-CARE Listed Journal**

## PATRONS

**Dr. Devesh Kumar Singh**
Chairman, Noida International University, U. P, India

**Prof. (Dr.) Vikram Singh**
Chancellor, Noida International University, U. P, India

**Prof. (Dr.) Uma Bhardwaj**
Vice Chancellor, Noida International University, U. P, India

**Prof. (Dr.) Prasanjeet Kumar**
Pro-Vice-chancellor, Noida International University, U. P, India

**Dr. Mukesh Parashar**
Registrar, Noida International University, U. P, India

## ADVISORY BOARD

**Prof. David W. Tushaus,** J.D.
Professor of Legal Studies, Missouri Western State University, USA
tushaus@missouriwestern.edu

**Prof. (Dr.) Sanjeev Kumar Sharma**
Vice Chancellor
Mahatma Gandhi Central University, Bihar
sanjeevaji@gmail.com

**Dr. Veerendra Kumar Mishra**
Indian Police Service Officer Police Headquarters, Bhopal
vmishra2005@gmail.com

**Prof. (Dr.) Anil Sehrawat**
Deputy Director
AICC Amity University, Noida
anilsehrawat@hotmail.com

**Prof.(Dr.) Abdulrahim P. Vijapur** (Retd.)
Department of Political Science,
Aligarh Muslim University, India

**Prof. Amos Megged**
Head of the Program in Religious Studies
Department of General History, University of Haifa,
Israel megged@research.haifa.ac.il

**Prof. Leni Widi Mulyani,** SH, MH
Head of Clinical Legal Education,
Faculty of Law, Bandung, University of Indonesia leniwidimulyani16@gmail.com

**Dr. Labrina Gioti**
Assistant Professor,
Aristotle University of Thessaloniki, Greece I

**Dr. Saumyajit Ray**
Assistant Professor, School of International Studies
Jawaharlal Nehru University, New Delhi
*Ray.saumyajit@gmail.com*

**Prof. (Dr.) Uday Shankar**
Professor, IIT Kharagpur,
*uday@iirkgp.ac.in*

**Ms. Veena Ralli**
Advocate, Senior Mediator,
Organizing Secretary, Samadhan, Delhi High Court
*veena.ralli@gmail.com*

**Dr. Dhiraj Kumar Nite**
Assistant Professor, History Ambedkar University Delhi
*dhirajnite@gmail.com*

**Prof. Pinki Sharm**
Faculty of Law,University of Delhi
*Pinki_sharma2004@yahoo.co.in*

**Prof. (Dr) Asha Verma**
Pro Vice-Chancellor, IILM University Gurugram
*asha.verma@iilm.edu*

**Dr Sangita Laha,**
Associate Professor& Assistant Registrar,
National University of Study & Research in Law,Ranchi
*Sangitalaha05@rediff.com*

**Dr. Tapan Chandola**
Dean ICFAI Law School, Dehradun
*apanchandola76@gmail.com*

**Dr. Parag Garg**
Principal,Law Department, S.R.C. Law College, Meerut
*parag22garg@rediffmail.com*



**Dr. Nitesh Upadhyay**
Associate Professor of Law, Symbiosis Law School, Noida
Research Advisor South Ural State University, Russia
*niteeshupadhyay1988@gmail.com*

**Dr. Virendra Singh Bithoo**
Assistant Professor, Department of History
College of Vocational Studies, University of Delhi
*virendrasinghcharan@gmail.com*

**Dr. Vikram Srivastava**
*Vikram.ithought@gmail.com*

**Pro. (Dr.) Tariq Ahmad**
Department of Law, Aligarh Muslim University

## EDITOR-IN-CHIEF

**Prof. (Dr.) Aparna Sharma**
Dean, School of Liberal Arts, Noida International University, U.P., India

## ASSOCIATE EDITOR

**Prof. (Dr.) Manu Singh**
Dean, School of Law and Legal Affairs, Noida International University, U.P., India

## EDITORIAL BOARD

**Dr. Manju Kundu**
Assistant Professor, Department of Political Science/International Relation,
School of Liberal Arts, Noida International University, U.P. India

**Dr. Mohd. Asif**
Assistant Professor, Department of Public Administration
School of Liberal Arts, Noida International University, U.P. India

**Dr. Rachna Davi**
Associate Professor, Department of English
School of Liberal Arts, Noida International University, U.P. India

# Message from National Commission of Women


Rekha Sharma
Chairperson
Tel. : 011-26944808
Fax : 011-26944771

भारत सरकार
राष्ट्रीय महिला आयोग
प्लाट नं. 21, जसोला इंस्टीट्यूशनल एरिया
एफ.सी.-33, नई दिल्ली-110 025
GOVERNMENT OF INDIA
NATIONAL COMMISSION FOR WOMEN
PLOT NO.-21, FC-33, JASOLA
INSTITUTIONAL AREA, NEW DELHI-110 025
Website : www.ncw.nic.in
E-mail : chairperson-ncw@nic.in
sharma.rekha@gov.in


No.HCP/NCW/PS(Y)/MSG/2023 January 27, 2024

## Foreword

It's a pleasure to have a look at NIU International Journal of Human Rights, (UGC Care Listed) 2023 edition, Vol. X. This esteemed journal holds critical human rights issues through a unique lens of existing laws and potential future measures. It serves as a vital platform for human rights activists to share their insights and perspectives. I commend the NIUIJHR team and contributors for their invaluable efforts in advancing human rights scholarship and activism. I have no doubt that this publication will be instrumental in propelling the human rights discourse forward and I extend my heartfelt congratulations to the contributors and the NIUIJHR team for this impactful compilation. I am sure, readers will be greatly benefitted by this publication.

**(Rekha Sharma)**



# Message from Hon'ble Vice Chancellor

It gives me immense pleasure to release Volume X, Issue of 2023, NIU International Journal of Human Rights. I am glad to witness humanitarian concerns of the Journal and its multi-disciplinary approach to raise the awareness through various themes.

The Journal, disseminates information on vivid aspects in sync with UDHR (Universal Declaration of Human Rights) keeping a check on the protection of human rights worldwide. Noida International University has always reinforced the principles and values like human dignity, non- discrimination, zero tolerance for ragging, sexual harassment, justice for all, and much more. The University Grants Commission issued different guidelines for human rights teaching and research, at all levels of education, the Journal is a step ahead in this direction.

The Journal aims to provide a platform for showcasing innovative approaches that apply the framework of International Human Rights standards to various contexts. It offers comprehensive coverage of a wide range of human rights issues such as globalization, LGBTQ, cyber-crime, gender, regionalism, United Nations, G-20, discriminations, prison reforms etc. In addition, the Journal features articles and reviews that focus on the human rights aspects of genocide, torture ,capital punishment, laws of war and war crimes etc.

I congratulate the editorial team, particularly Prof. (Dr.) Aparna Sharma, Editor-in-Chief of the Journal and Prof. (Dr.) Manu Singh, Associate Editor of the Journal for their constant hard work and valuable efforts.

I sincerely hope that the Journal will be appreciated by students, researchers, policymakers, human rights activists and the interested general public, paving way for the betterment of humanity.

**Prof. (Dr.) Uma Bhardwaj**
Vice Chancellor
Noida international University

# Message from Editor-in-Chief

*"The capacity for creativity is universal. And everybody is creative!"*

**- Ken Robinson**

Ever since humans formed societies, the pursuit of knowledge has been our compass. A society's progress is measured by its exploration of varied fields and its relentless push for advancement. The dream of an equitable world may wait, but our united steps pave the path, empowering individuals through human rights for a sustainable and equitable future.

I feel immense pleasure in presenting the Vol. X of our Noida International University Journal of Human Rights, issue of 2023. The edition focuses on conceptual issues with a pragmatic approach. The Journal covers wide range of discussions like gender issues, LGBTQ, cyber-crime, regionalism, environmental and health concerns, various reforms, and laws etc. It not only discusses but tries to provide an insightful solution from social and legal perspective.

In order to endure the success of this Journal, we welcome contributions from the various communities and countries as authors, reviewers, and guest editors. We appreciate feedback and ideas as it helps us to advance the quality of Journal. We are hoping that readers of NIUJHR to be more enlightening and advanced in coming years.

I am thankful to our Honorable Chairman - Dr. Devesh Kumar Singh, Honorable Chancellor - Dr. Vikram Singh and our constant pillar of support, Honorable Vice Chancellor Prof. (Dr.) Uma Bharadwaj, without her we would not have been able to come up with the present edition. I am personally thankful to Associate Editor, Prof. (Dr.) Manu Singh and we both express our gratitude towards the Editorial team, Dr. Mohd. Asif, Dr. Manju Kundu and Dr. Rachana Davi for their constant efforts. We are equally thankful to the Design Team of NIU and to all members who contributed to this Journal directly or indirectly.

I am hopeful that with the support of all, we shall have many academic volumes of the Journal in future.

**Prof. (Dr.) Aparna Sharma**
Editor-in-Chief
Dean - School of Liberal Arts
Noida International University
*editorinchiefniuijhr@niu.edu.in*



# CONTENTS

**ISSN – 2394 - 0298** **Volume 10, 2023**

1. Analyzing Legal Framework For LGBTQIA+ Rights in India Achievements and Challenges **01**
**Ms. Tanya Pandey and Dr. Sthita Prajna Mohanty**

2. Promoting Equity in Technology Transfer: Upholding Human Rights in a Changing Climate **20**
**Ms. Bhavya Singh, and Dr. Eakramuddinz**

3. Infringement of Human Rights vis a vis Cyber Crimes: A Study with Special Reference to Digital Platform of Internet Banking System **33**
**Ms. Anudeep Kaur and Dr. Bhumika Sharma**

4. Promoting Equal Employment Opportunities for The Third Gender in The Public Sector **50**
**Ms. Manisha and Dr. Shambhavi Sinha**

5. Strategizing Corporate Social Responsibility Towards Human Rights Agendas: The Study of Indian Framework **62**
**Dr. Neelam Tyagi**

6. Tribal Women in The Hindu Nationalist Discourse: Interrogating Marginal Lives Beyond Empowerment and Disempowerment **82**
**Mr. Sufal Bepari**

7. Need For Reformed Cyber Law to Tackle the Cyber Crime vis -a- vis Human Rights: A Study **96**
**Mr. Kamshad Mohsin and Prof. (Dr.) K.B. Asthana**

8. United Nations General Assembly and Human Rights: Modification of The UN Charter by Subsequent Practice **108**
**Ms. Anshul Saxena. and Prof. (Dr.) Vaibhav Goel Bhartiya.**

9. Human Right of Legal Assistance at Early Stages of Criminal Justice System: A Critique **120**
**Prof. (Dr.) Anuradha Chadha, and Mr. Puneesh Jindia**

10. Time for the G20 to Act on Commitments and Step-Up Leadership on Human Rights **137**
**Dr. Priyanka Redhu and Mr. Sagar Kundu**

11. Implementation Mechanisms Under International Law for Indigenous Peoples: A Critical Overview **147**
**Dr. Rashwet Shrinkhal**

# CONTENTS

ISSN – 2394 - 0298 Volume 10, 2023

12. Globalisation's Cost in Human Dignity: The Paradoxical Relation of Migrant Labour and International Trade **179**
**Ms. Ipsita Ray and Mr. Anshuman Shukla**

13. Women Empowerment Through Handloom Industry: Challenges, Opportunities, and way Forward **193**
**Dr. B. C Das and Mrs. Ruby Choudhury**

14. Sentencing Disparities: A Study of Racial and Socioeconomic Factors in Criminal Justice System **206**
**Mr. Waseem Akram, and Dr. CLV Sivakumar**

15. Oppression, Exploitation and Feminisation in Alice Walker's Works **222**
**Ms. Enamala Kalavathi, and Dr.E.S. Sharmila Sigamany**

16. The Conditions of Prisoners and Prison Reforms: A Comparative Study with Other Commonwealth Countries **231**
**Ms. Kaushiki Roy, Prof.(Dr.) Beena Deewan**

17. The Legal Paradox of Male-Directed Sexual Violence in India **243**
**Dr. Meenakshi Punia and Miss. Heena Goyal**

18. Concept Of Right to Health: National and International Perspective **269**
**Dr. Pankaj Dwivedi, Dr. Pramod Kumar and Mr. Prateek Tomar**

19. One Nation One Election: The Need of Hour **285**
**Prof. (Dr.) Rashmi Khorana Nagpal and Shubham Sharma**

20. Prison Reforms in India Vis A Vis Human Rights: An Analysis **295**
**Dr. Jatin Sharma**

21. Beyond Legislation: A Comprehensive Analysis of Muslim Women's Human Rights Post Triple Talaq Law in India **303**
**Ms. Smiriti Rai**

22. Gender Influence on Business Startups: Unveiling the Challenges Hindering Female Entrepreneurs' Growth Prospects **313**
**Ms. Mahima Sharma**

23. Unboxing Human Rights in The Era of Artificial Intelligence **323**
**Dr. Avinash Kumar Babu and Tanya Singh**



# CONTENTS

ISSN – 2394 - 0298 Volume 10, 2023

24. Understanding The Role of Data Privacy in The Investigation and Prosecution of Digital Crimes and Real Crimes **338**
**Ms. Sana Samdani**

25. Circular Pattern of Labour Migration in India: Seeking A Multi-Dimensional Lens of Study: - Fighting the Stigma- A Discourse on Suggestive Policy Measures Towards Redressive Augmentations from The Plinth of Societal Maladies **353**
**Ms. Sohini Chatterjee**

26. Sinicisation In Tibet, Tibetanisation in India: Cultural Preservation and Restoration of Human Rights Among Tibetan Refugee Institutions in India. **365**
**Dr. Joanna Pereira Coelho**

27. Position Of Transgenders in India: An Analytical Study **376**
**Ms. Swarnima Singh Tomar and Dr. Jyoti Yadav**

28. Interdisciplinary perspectives on gender & related issues: Book Review on 30 Women in Power: Their Voices, Their Stories (2015), by Naina Lal Kidwai **387**
**Ms. Anwesha Ghosh and Prof. (Dr.) Deepak Kumar Chauhan**

# Analyzing legal framework for LGBTQIA+ rights in India achievements and challenges

***Tanya Pandey[1] Dr. Sthita Prajna Mohanty[2]***
*Ph.D Research Scholar KIIT University [1]*
*Assistant Professor, KIIT University [2]*

**Abstract**

This paper gives a brief summary of how the law in India affects the rights of people who identify or associate themselves as lesbian, gay, bisexual, transgender, queer, intersex, or asexual. It highlights the significant milestones achieved in recent years, explores the challenges faced by the LGBTQIA+ community, and outlines potential avenues for further progress. The discussion begins by examining the historical context of LGBTQIA+ rights in India, acknowledging the presence of colonial-era laws that criminalized same-sex relationships. Then, it moves on to the ground breaking decision that the Supreme Court of India made in 2018 when it partially struck down section 377 of the Indian Penal Code,1860 and made homosexual acts between consenting adults no longer illegal. Following the decriminalization, several positive developments have taken place. The paper discusses the emergence of public discourse, the increased visibility of LGBTQIA+ individuals, and the growth of community support networks. It also emphasizes the importance of civil society organizations and the judiciary in campaigning for the rights of LGBTQIA+ people. Despite the progress, significant challenges persist. The paper addresses the social stigma and discrimination faced by the LGBTQIA+ community at different levels. It also recognizes the absence of comprehensive anti-discrimination legislation protecting LGBTQIA+ individuals and the limited recognition of same-sex relationships. To overcome these challenges, the paper explores potential future paths. It emphasizes the importance of education and awareness campaigns to promote acceptance and understanding. It also highlights the need for comprehensive legislation to address discrimination and provide legal recognition to same-sex relationships, including marriage equality. The paper concludes by emphasizing that while significant strides have been made in recognizing and there is still work to be done in India to defend the rights of LGBTQIA+ people. It calls for continued efforts from lawmakers, civil society, and the public to create an inclusive and equal society for all, irrespective of sexual orientation or gender identity.

**Key words:** - *Equality, Homosexuality, Judiciary, LGBTQIA+, Right.*





## Introduction

The struggle for LGBTQIA+ (lesbian, gay, bisexual, transgender, queer, intersex, and asexual) rights has been a poignant battle across the globe, seeking recognition, equality, and social acceptance for individuals who identify with diverse sexual orientations and gender identities. In India, the journey toward securing the legal rights of the LGBTQIA+ community has been a complex and evolving process, marked by both significant achievements and persistent challenges. The present research examines India's LGBTQIA+ rights legal framework, delving into the achievements that have been made over time and the obstacles that continue to impede the full realisation of equality and justice for the LGBTQIA+ community. India's socio-cultural and legal history concerning LGBTQIA+ rights is a tapestry woven with discrimination, prejudice, and systemic marginalisation. For many decades, the archaic Section 377 of the Indian Penal Code criminalised consensual same-sex relations, rendering millions of LGBTQIA+ individuals vulnerable to social stigma, harassment, and legal prosecution. The deep-rooted heteronormative societal norms exacerbated the plight of the LGBTQIA+ community, hindering their access to fundamental human rights and impeding their ability to live authentically and without fear. But during the last two decades, India's legislative and societal debate on LGBTQIA+ rights has undergone a profound transformation. A new framework that attempts to defend and acknowledge the rights of LGBTQIA+ people as equal citizens under the law has emerged as a result of landmark judicial judgments, committed activism, and evolving public opinions. Notably, the historic Navtej Singh Johar v. Union of India, which culminated in 2018, marked “a” significant milestone in India's journey toward LGBTQIA+ rights by decriminalising consensual homosexual acts between adults. This pivotal judgment set a precedent for recognising the fundamental rights of LGBTQIA+ individuals and highlighted the potential for progressive legal reforms in the country. The Supreme Court of India also made history by pronouncing the judgment in the National Legal Services Authority v. Union of India case, in which transgender people are referred to as the "third gender." The decision confirmed that everyone has the same access to the fundamental rights guaranteed by the Indian Constitution. Although LGBTQIA+ rights have advanced significantly since this decision, the LGBTQIA+ population in India still faces greater social and legal obstacles than non-LGBTQIA+ people. After India attained independence, laws that had made homosexuality a crime during the Colonial era were repealed by adding Article 15 to the Indian Constitution. Despite these groundbreaking achievements, the struggle for LGBTQIA+ rights in India is far from over. The legal framework still grapples with challenges, including the absence of comprehensive anti-discrimination laws and the limited recognition of transgender rights. This research paper seeks to unravel the intricacies of the legal framework governing LGBTQIA+ rights in India, with a focus on understanding the key achievements and the persistent challenges that demand urgent attention. By critically examining landmark court cases, legislative developments, and the impact on the lives of LGBTQIA+ individuals, we aim to shed light on the evolving state of LGBTQIA+ rights in

India. Moreover, this analysis intends to offer insights into potential pathways for further progress and the realisation of the long-overdue dream of a truly inclusive and just society, where every individual's identity and expression are celebrated and protected under the law.

### Concept of Homosexuality

The dictionary definition of homo is "same," while sexuality refers to "sexual orientation" or “sexual behavior." A homosexual is attracted to others of the same sex. LGBTQIA+ refers to Lesbians, Gays, Bisexuals, Transgender, Queer, Inter-Sex and Asexual people. A lesbian is a woman who is attracted to another woman. Similarly, if a man is attracted to another man, he is considered gay. Bisexual refers to a person who is attracted to both sexes, i.e., he is attracted to both men and women. Transgender people are those whose gender identity is neither male nor female. A relationship with individuals whose sexual orientation is not heterosexual or whose gender identification is not typically male or female is queer. Intersex people have genitals or other sexual traits that do not clearly fit the traditional concept of a male or female body.[1] Asexual are those who have no sexual attraction to any gender. Homosexuality is merely a sexual orientation. Some consider it a disease, while others believe it is a mental disorder, which is erroneous. When people believe that homosexuality is a personal choice or a sickness, their attitudes toward it is atrocious. Many people consider homosexuality to be a social issue. As a result, numerous scholars, ranging from anthropologists to zoologists, psychologists to theologians, have taken a particular interest in understanding the roots of homosexuality. According to research, individuals who feel sexual orientation is inborn are more likely to be accepting of homosexual men and lesbians, but those who believe it is a choice is less tolerant.[2]

### Continuum of Homosexuals

The history of homosexuality in India is rich and complex, reflecting a diverse range of cultural, religious, and societal attitudes towards same-sex relationships and gender identities. Homosexuality has been a part of Indian society for centuries, and its perception has evolved over time.

1 *Kristen L. Eckstrand. (2016). Lesbian, Gay, Bisexual, and Transgender Healthcare: A Clinical Guide to Preventive, Primary, and Specialist Care. Springer International*

2 *Wallace Swan. (2004). Handbook of Gay, Lesbian, Bisexual, and Transgender Administration andPolicy. Routledge*





### 1. TRANSGENDER RELATED IDENTITIES, CULTURES AND EXPERIENCE IN INDIA:

In ancient Indian texts, such as the Vedas and epics like the Mahabharata and Ramayana, there are references to homosexuals. Hindu mythology contains tales of same-sex relationships and gender fluidity. Stories like that of Shikhandi, a character in the Mahabharata, are interpreted as early examples of transgender representation in Indian literature.[3] The idea of Ardhanareeshwar in Indian mythology is a prominent example of it.

Hijras: Hijras are naturally born men who reject their "masculine" personality at the right time to recognise themselves as a lady, a "no man" or "in the middle of a man and a woman," or "neither man nor woman." The hijras can be considered as transgender / transsexual people (from men to women), however, Hijras have a strong social structure and have designated pathways to enter the local communities (which become specific to each Hijra group). There are local iterations of the defining term used to referring to Hijras for example, Kinnars (Delhi) and Aravanis (Tamil Nadu).[4]

Eunuch: The eunuch refers to a man weakened and intersexed with an individual whose private parts are equivocally identical to those of a man during childbirth. However, the tyke that had been given to the male sex would be reclassified as intersexual as a hijra.

“Aravanis and Thirunangi": The Hijras of Tamil Nadu are known as "Aravani." The Tamil Nadu Aravanigal Social Welfare Council, an express government under the Department of Social Welfare, characterises the Aravanis as organic types that are recognised as a woman captured in the body of a man. Kothi: The Kothis are a mixed bunch of individuals and can be described as organic types that show changing degrees of "femininity" that can be situational. Some kothis drive blind and are tied to a lady.

Jogtas and Jogappas: The jogtas and jogappas are ardent followers of Yellama or Renuka Devi. These serve as sanctuaries for the transgender community. "Jogta" refers to the male servant of this goddess, and "Jogti" refers to a servant (also frequently called "Devadasi"). Many of them have a place in the transgender community..[5]

3 *Devdutt Pattanaik. (2015). Shikhandi and Other Stories They Don’t Tell You. Zubaan Books*

4 *Devdutt (2023, 22 July). http://devdutt.com/articles/world-mythology/the- hijra-legacy*

5 *Amara Das Wilhel. (2004). Tritity Prakriti: People of the Third Sex, Understanding Homosexuality, Transgender Identity, and Intersex Conditions Through Hinduism. Xlibris corporation Philadelphia.*

## 2. INDIAN MEDIEVAL PERIOD:

During the mediaeval period, same-sex love and gender variance continued to be explored in various forms of art, literature, and poetry. Some Hindu temples, such as the Khajuraho Temples, feature erotic sculptures that depict same-sex couples engaged in intimate acts. In the Islamic world, hijras also played a significant role in the royal courts, particularly in the Ottoman Empire and the Mughal Empire in mediaeval India. The hijras enjoyed unique positions in the royal courts during the Mughal Empire and were appointed as guardians, administrators, generals, and political advisors to the king.

## 3. COLONIAL ERA IN INDIA AND SECTION 377 IPC:

With the arrival of British colonial rule in the 19th century, attitudes towards homosexuality began to change. In 1861, the British colonial government introduced Section 377 into the Indian Penal Code, which criminalised "unnatural" sexual acts, including consensual same-sex relations. This law had a profound impact on the perception and treatment of homosexuality in India, contributing to the stigmatisation and persecution of LGBTQIA+ individuals.

## 4. LGBTQIA+ RIGHTS MOVEMENT:

Despite the oppressive colonial-era law, the 20th and 21st centuries saw the emergence of the LGBTQIA+ rights movement in India. Activists and organisations started advocating for the decriminalisation of homosexuality and equal rights for the LGBTQIA+ community. The first-ever homosexual rights protests in India took place on August 11, 1992. The event was organised by the AIDS Bhedbhav Virodhi Andolan (ABVA) to protest against the arrest of men from Central Park in Connaught Place on the basis of homosexuality. It was held outside the ITO Police headquarters in Delhi.[6]

## 5. INTERNATIONAL HISTORY:

The Stonewall Riots in 1969, often considered the catalyst for the modern LGBTQIA+ rights movement, included transgender activists, such as Marsha P. Johnson and Sylvia Rivera, who played a significant role in the resistance against police raids at the Stonewall Inn in New York City. In 1979, Christine Jorgensen publicly rejected transsexuals and identified herself in the newspaper as a transgender person, saying: "Sex has nothing to do with bedfellows; it's

[6] *Paisley Currah, Shannon Minter, Jamison Green. (2000). Transgender Equality a Handbook for Activists and Policymakers. National Center for Lesbian Rights and The Policy Institute of the National Gay and Lesbian Task Force.*





about identity." By 1984, the concept of "transgender community" had solidified to be inclusive of individuals who did not conform to the gender they were born with but to the one with which they identified most. Richard Elkins created the Trans-Gender Archive in 1985 at the University of Ulster to increase awareness. In 1992, the International Conference on Transgender Rights and Employment Policy defined "transgender person" as a general term that includes transsexuals, transgender people, transvestites, and anyone in transition. Therefore, the terms "cisgender" and "transgender" became very popular in the 1990s. The term "cisgender" comes from the term "cissexual," used for the first time by the German sexologist Volkmar Sigusch in 1995 in the title of his article, "Transsexual Desire and Cissexual Defense," as well as by him in 1998 in his essay, "The Neo-Sexual Revolution." However, the terms "cissexual" and "cisgender" were used explicitly in 2006 in an article in the Journal of Lesbian Studies and in 2007 by Julia Serano in her book Whipping Girl..[7]

### Legal History of Homosexuals in India

This section aims to present the legal history of homosexuals in India through the use of the concept of community work, methods, and procedures from a theoretical perspectives.[8] As a naturally occurring and accepted phenomenon, transsexuality has gained very little acceptance, mainly because of the limited knowledge or intentional arrogance of our society. This is the main reason why it is so easy for us to distance ourselves from and ridicule it. Prejudice quickly turns into violence, frequently brutal, in public places, police stations, jails, and even the residences of individuals. The fact that society has yet to understand that transsexuals do not fit into the standard gender classifications is the driving force behind the violence. The transgender communities' struggle against this type of violence can be traced back to the historical structure of the legislation in colonial India. The Criminal Tribes Act of 1871 posed a huge challenge to the rights of the LGBTQIA+ population as this act deviated from the principles of the penal code; the accused were proven guilty beyond any reasonable doubt in a court of law. At the time, India's hierarchical social order consisted of some communities that were perceived as unclean from the time of birth, and this act was in line with the prevailing social conditions. An Act for the Registration of Criminal Tribes and Eunuchs was an addendum to the Act in 1897 that further specified the criminalisation of eunuchs. Local government maintained a registry of eunuchs and marginalised populations, and increased suspicion was put on these populations. Such registered eunuch could be arrested without a

[7] *Bina Fernandez. (1999). A Resource Book on Lesbian, Gay and Bisexual Rights in India. India Centre for Human Rights and Law.*

[8] *Serena Nanda. (1999). Neither Man nor Woman: The Hijras of India. Wadsworth*

warrant and punished with fines and imprisonment.[9] Following Independence, the Indian government repealed the Criminal Tribes Act of 1871, claiming it was "a bolt on the law book of free India." The Indian government established the Habitual Offenders Act, 1952, which preserved most of the terms of the Criminal Tribes Act, 1871, with the exception of the premise that an entire group of people could be criminals from birth. The emphasis has shifted from criminalising a tribe to criminalising an individual. The 1996 amendment to the 1956 Immoral Traffic (Prevention) Act made it into law without regard to gender. Both male and female sex workers, as well as those whose gender identification has not yet been defined, are included in the Act. Because of the move, both male and hijra sex workers were classified as criminals, granting police the authority to jail and persecute transgender sex workers. Under this Act, the penalties varied from three to ten years in prison. In the year 2003, a transgender person won an election and got elected to the local government. A petition for the same was filed in the Madhya Pradesh High Court, which concluded that the contested seat, which was reserved for women and won by Kamala Jaan, a transgender woman, was illegal and that her position was nullified. Then a transgender person wrote a letter to the Chief Election Commissioner, inquiring about which category transgender people were classified under. The Election Commission (EC) stated that transgender people can be registered in electoral roles as either male or female, depending on their statement at the time of enrolment. Herein, we can see how the basic rights of an individual were violated just on the basis of their sexuality. Coming to the other aspect, Section 377 of the Indian Penal Code, which criminalises "unnatural intercourse with any man or a woman, even if it is voluntary," this provision was most frequently used to threaten the hijra and kothi communities, as well as the homosexual population in India. The law, which is based on colonial moral beliefs, assumes that a hijra or homosexual person is engaging in "carnal intercourse against the order of nature," making this entire group of marginalised populations liable to police harassment and arrest. The Constitution of India implicitly mandates the establishment of an inclusive society for all people, including transgender people, and safeguards all people's rights to equity, freedom, justice, and dignity.[10] In recent years, society's perception of transgender people has shifted drastically. People have recognised that transgender people should have equal access to diverse social development opportunities and the same opportunities for success. India, as a welfare state, promotes the well-being and prosperity of many marginalised people who have long been oppressed because of their caste, religion, tribe, or occupation.

[9] *R. B. Towle, L.M. Morgan. (2006). Romancing the Transgender Native: Rethinking the Use of the "Third Gender" Concept. Routledge.*

[10] *Durga Das Basu. (2016). Introduction to the Constitution of India. Lexis Nexis Butterworths Wadhwa.*





However, transgender individuals in India have long been disregarded, and specific national or state government initiatives for their well-being have only recently been broadened to include them. Even if transgender people are eligible for these benefits and subsidies, it's possible that they won't be able to access the current government programmes due to their lack of gender perception. While recognising that the term "transgender" is fairly broad and inclusive, the Supreme Court stated, "Transgender is commonly regarded as an umbrella term for those whose gender identity, gender expression, or behaviour does not conform to their biological sex".[11]

**Human Rights & International Laws on Homosexuals:**

According to human right accords, states have a commitment to protect everyone from discrimination based on sexual orientation or gender identity. Six of the eight major human right treaty bodies have frequently mentioned sexual orientation and gender identity. "Being lesbian, gay, bisexual, or transgender does not limit your right to enjoy the full range of human rights," the General Assembly says. With the exception, to some extent, of EU treaties[12], sexual directives and gender identity are frequently not explicitly specified as grounds for discrimination in international human rights treaties, but are included by their open discrimination clauses. States are obligated to defend and uphold specific international human rights norms that apply to LGBTQIA+ people.[13] "All human beings are born free and equal in dignity and rights," states Article 1 of the Universal Declaration of Human Rights. Everyone has the right to be recognised as an individual in the eyes of the law. In addition, Article 17 of the Covenant states that "no one shall be subjected to arbitrary or unlawful interference with their privacy, family, home, or correspondence, nor to unlawful attacks on their honour and reputation." In 2006, an eminent group of international human rights experts met in Yogyakarta, Indonesia, to explore the need to provide guidelines for the application of international human rights laws to sexual orientation and gender identity. Following this meeting, certain guidelines and principles known as the Yogyakarta Principles were developed,

[11] *Sophie Mcbain. (2023, 12 July). India's Supreme Court recognizes a third gender. https://www.newstatesman.com/world-affairs/2014/04/india-s-supreme-court-%20recognises-third-gender*

[12] *The European Convention for Prevention of Torture and Inhuman or degrading the treatment 1987*
*The European Convention for the Protection of Human Rights and Fundamental Freedoms 1950*
*The European Social Charter 1961*

[13] *Equality and Human Rights Commission. (2012). 83rd research report on Equality and Human Rights. https://www.equalityhumanrights.com/sites/default/files/83._european_court_of_human_rights.pdf*

acknowledging the conferral of, among other things, the right to universal enjoyment of human rights, equality and non-discrimination, recognition before the law, the right to life, the right to security of person, the right to privacy, and so on, to everyone, regardless of sexual orientation and gender identity, and prescribing the role to be played by respective States. In this regard, the "Additional Principles and State Obligations on the Application of International Human Rights Law in Relation to Sexual Orientation, Gender Identity, Gender Expression, and Sexual Characteristics to Complement the Yogyakarta Principles" were adopted in November 2017, which updated the aforementioned Principles.[14] .As a result, new rights and obligations were established, such as those relating to governmental protection, legal recognition, the right to cleanliness, the right to be free of poverty, and so on. Many global, regional, binding, non-binding, general, and specialised rights have been defined and clarified during the previous four decades, as have the requirements that states must meet. Some of these human rights were not always (ideally) protected for LGBTQIA+ individuals. Transgender people's rights to work, personal security, asylum, private life, and freedom of thought and speech are the most regularly pressed or abused areas. [15]

**Indian Judicial approach towards Homosexuals:**

A Delhi-based HIV/AIDS NGO, Naz Foundation, filed a writ petition claiming Section 377 IPC is violative of Articles 14, 15, 19, and 21 of the Indian Constitution. They stated that Section 377 of the IPC violates the rights to equality, life, and liberty. They argued that Article 15's right to non-discrimination based on sex should also encompass "sexual orientation." So in the year 2009, a landmark Delhi High Court landmark judgment came out that stated that Section 377 of the IPC violated Articles 14, 15, 19, and 21 of the Indian Constitution, and therefore the Hon'ble Court decrimilised Adult Consensual Acts. Suresh Kumar Koushal & Ors v. Naz Foundation & Ors[16] has rigorously reviewed the judgment in Naz Foundation v. The Government of the National Capital Territory of Delhi. The appellant in this case argued that the Honourable High Court committed a significant error since the Writ Petition lacked the required evidence to establish whether a statutory provision was constitutional or not. Furthermore, it was claimed that the Indian Penal Code's Section 377 was being utilised to prosecute homosexuals as a group rather than

[14] *Yogyakarta Principles. (2007). Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity. www.yogyakartaprinciples.org/principles_en.htms*
[15] *Rajesh Talwar. (1999). Third Sex and Human Rights. Gyan Publishing House*
[16] *Suresh Kumar Koushal & Ors v. Naz Foundation & Ors, (2013) Civil Appeal No.10972*





to discriminate against the transgender population. The two-judge bench of the Supreme Court overturned the decision in the Naz Foundation case and declared the decision "legally unsustainable." In *National Legal Services Authority v. Union of India*[17], the Supreme Court reviewed all of the international legislation that recognised transgender rights and contrasted them with the circumstances of transgender people in India. As a result, the Supreme Court stepped in to fill the gaps, identifying Hijras and Eunuchs as "third genders" for the sake of maintaining their rights under Part III of the Constitution as well as laws established by Parliament and the State Legislature. Simultaneously, the Central and State governments were directed to legalise transgender people's right to choose their own gender identity, such as male, female, or third gender. The Supreme Court was also pleased to direct the Central and State Governments to treat such individuals as socially and educationally backward classes of citizens, extending all types of reservations in admission to educational institutions and public appointments, developing a sense of acceptability, and addressing issues such as fear, shame, and gender dysphoria. Notably, the historic *Navtej Singh Johar v. Union of India*[18] case, which culminated in 2018, marked a significant milestone in India's journey toward LGBTQIA+ rights by decriminalising consensual homosexual acts between adults. In *Arunkumar and Sreeja v. Inspector General of Registration and Ors.*[19], judgment, the Madras High Court ruled that formal unions between transgender males and transgender women are valid under the Hindu Marriage Act of 1955 and must be registered by the Clerk of Matrimonies. Additionally, it made it possible for the greater LGBTQIA+ population to access civil rights, including marriage, succession, and inheritance. The decision given by the Court broadens the view and emphasises the rights of the transgender population, which have long been disregarded.

**Transgender Communities and Inclusive Future**

Pride Month celebrates LGBTQIA+ diversity, equality, and acceptance in June with the rainbow. Many companies will alter their logos to rainbow hues and hold diversity and inclusion training. Reimagining a truly inclusive future for cisgender and transgender people is vital. For a fair and egalitarian society, Articles 14, 15, 16, 17, and 18 of the Indian Constitution ensure equality. These constitutional provisions aim to eradicate social and economic biases and create an inclusive society. Reimagine a queer-inclusive future for cisgender people. Affirmative action is required under the Constitution to attain this purpose. This

[17] *National Legal Services Authority v. Union of India, (2014) SCC 438*
[18] *Navtej Singh Johar v. Union of India, (2018), AIR 2018 SC 4321*
[19] *Arunkumar and Sreeja v. Inspector General of Registration and Ors, (2019), W. P. (MD) No. 4125*

entails enacting laws and executive orders that promote equality and remove discrimination. Inclusion, not exclusion, underpins the Indian Constitution. Queer and transgender people confront stigma beyond gender identity and sexual orientation, including caste and privilege. Untouchability interpretations differed in the Sabarimala Temple Entry case[20]. Dalit transgender people experience gender and caste discrimination the *State of Kerala v. NM. Thomas (1975)*[21] shows a better understanding of structural inequality and marginalization. Indian reservations and affirmative action jurisprudence are well documented. The right to reservation must be derived from equality. This equality should include legal and real equality in position and opportunities for LGBTQIA+ people, considering caste. These factors support a queer Equality Code interpretation. The transgender community has historically supported horizontal reserves, which include many marginalized groups. In 2014, the Supreme Court ordered the government to preserve transgender rights in the National Legal Services Authority v. Union of India. Promote their economic, social, cultural, and political rights. Equality goes beyond legal protection and fairness. It seeks caste-adjusted social status and opportunity equality for LGBTQIA+ people. [22]

The government was instructed to treat transgender and intersex people as socially and educationally backward and provide them reservation benefits in education and public appointments. Except for Karnataka, this directive has been poorly implemented. Karnataka is the first state to offer transgender public servants a 1% reservation across castes since August 2021.[23] The Supreme Court ruled in Indira Sawhney that horizontal caste-based reservations are lawful. Women, sportspeople, and veterans have reserved seats regardless of caste. Subsequently, the Patna High Court allowed a transgender woman to run for a "female unreserved" seat in the Patna Municipal Elections, while the Bombay High Court authorized a transgender woman to run for a seat reserved for women. These rulings support transgender rights. Transgender people are sometimes classified as OBC or MBC in vertical reservations that combine all castes. This strategy ignores caste and gender. Transgender people need more than vertical reservations. [24]

[20] *Indian Young Lawyers Association & Ors vs. The State of Kerala & Ors. (2017) 10 SCC 689*
[21] *State of Kerala v. NM. Thomas. 1976 AIR 490*
[22] *Sakshi Parashar. (2017). Inclusion of transgender community within socially and educationally backward classes: Examining the deeper concern. Journal of ILI Review. https://ili.ac.in/pdf/sakshi.pdf*
[23] *V. Venkatesan. (2021, July 22). Karnataka Becomes the First State to Reserve Jobs for Transgender Persons. The Wire.ttps://thewire.in/lgbtqia/karnataka-first-state-reserve-jobs-transgender-persons*
[24] *Sukhmani Malik. (2023, July 5). Reservation for transgender community: What the demand for 'horizontal' reservation is. The Indian Express.https://indianexpress.com/article/explained/explained-law/transgender-demand-horizontal-reservation-explained-8694004/*





Important reservation court judgments have occurred in our nation. The Indira Sawhney[25] case ruled that horizontal caste reservations are constitutional. Women, sportspeople, and veterans have reserved seats regardless of caste. Transgender women have election rights in two cases. Transgender reservations have three major drawbacks. First, transgender people who are also SC/ST (Scheduled Castes/Scheduled Tribes) cannot receive reservations in both groups. Second, OBCs (Other Backward Classes) would not benefit. Thirdly, transgender people must compete with other OBCs for reservations. The state has power and responsibility for the reservation system. The state has failed transgender people in this regard. Supporting transgender people requires supportive structures, including workplace non-discrimination regulations, gender identity affirmation policies, inclusive washroom facilities, and welcoming policies like transitional leave. Without these enabling measures, reservations would be perceived as surface gestures without addressing the core concerns.

The article highlights a landmark judicial decision that favors LGBTQIA+ people and the gay community in India. On June 8th, the Madras High Court issued this decision,[26] ordering the federal and state governments to act to end "conversion therapy." This therapy, which seeks to "cure" or alter the gender identification of LGBTQIA+ people, is dangerous and unscientific. Numerous techniques may be used, including counseling, hormone injections, and even electric shocks. Due to their parents' acts, two LGBTQIA+ women who sought protection from police harassment filed the issue before the court. To foster understanding and compassion, Justice Anand Venkatesh, who presided over the case, also established rules for educating courts, police, and educational institutions about gay problems. It's interesting to note that although he admitted to having prejudices of his own, Justice Venkatesh tried to address them by speaking with psychologists and community people. His decision triggered debates on social media on the need for more accepting judges who uphold the rights of all people, regardless of sexual orientation.

The instance of senior counsel Saurabh Kirpal, who was repeatedly delayed in being appointed as a judge in the Delhi High Court despite receiving a recommendation to do so back in 2017, is also mentioned in the piece. Kirpal, who is openly gay, thinks these delays were caused by his sexual orientation and concerns about his partner's foreign citizenship and marital status. Even though the Supreme Court made a decision that decriminalised consenting same-sex partnerships in 2018, the legal community still appears to have prejudices

[25] *Indra Sawhney v. Union of India. (1992). AIR 1993 SC 477*
[26] *S. Sushma v. v. Commissioner of Police. (2021). W. P. No. 7284*

against the queer population. Like society, the legal system generally tends to adhere to a traditional understanding of gender and relationships, which frequently excludes or discriminates against LGBTQIA+ people. The Supreme Court did recognise the rights and equal protection of the law for the LGBTQIA+ community in an earlier case, but there are exceptions. Overall, this article emphasises the continued challenges faced by the LGBTQIA+ population in India and the requirement for more accepting attitudes and practices within the legal system to guarantee equal rights for everyone, regardless of their sexual orientation or gender identity. [27]

The paper also emphasizes the requirement for LGBTQIA+ representation in the legal system. People who identify as queer include persons who are lesbian, gay, bisexual, transgender, and others. Additionally, it can aid in addressing problems that transgender persons face, such as discrimination and harassment online. Two advocates working on matters involving transgender rights, Santa Khurai and Swati Bidhan Baruah, are given as examples in the article. Santa Khurai is a member of the Transgender Women's Grievance Cell in Manipur, which deals with various issues trans women experience in the region. In Assam, Swati Bidhan Baruah has fought for the rights of transgender people by contesting legislation and pursuing justice on their behalf. [28]

As a result of a shortage of LGBTQIA+ representation, the legal system may be rife with misconceptions and biases. Mihir Samson, an attorney in Delhi, notes that many judges may not have encountered or comprehended the relationships of LGBTQIA+ individuals, which may impact how they manage cases involving queer people. The attire required of attorneys is one instance of discriminatory policy. The Bar Council of India has dress codes for "advocates" and "lady advocates," which perpetuates old-fashioned gender roles and may exclude people who identify as gender nonconforming.

The government's 2019 Transgender Persons (Protection of Rights) Act is another problem. Because of this rule, it is more challenging for non-binary and transgender people to get legal identification that accurately matches their gender identity. To have their identification recognized, they must go through a district magistrate, and during this procedure, it is frequently enforced that they have a Sex Re-Assignment Surgery, which is not appropriate or necessary for everyone. The paper also emphasizes how difficult it can be for gay persons to

[27] *Express News Service. (2023, April 21). Key Supreme Court verdicts that moved the needle on LGBTQ rights in India. The Indian Express. https://indianexpress.com/article/explained/explained-law/key-sc-verdicts-that-moved-the-needle-on-lgbtq-rights-8565720/*

[28] *AbhinayLaxman.(2022,May15). Despite legislation, transgender community faces discrimination andabuse.TheHindu.https://www.thehindu.com/news/national/despite-legislation-transgender-community-faces-discrimination-and-abuse/article65417482.ece*





find employment prospects in the legal sector. It might be tricky to challenge these ingrained conventions because some informal networks and circles influence employment chances.

The paper discusses how society must change to promote inclusion and fight discrimination. To rectify this, the Equality Law (Prohibition of Discrimination) will be introduced in 2021 by the Centre for Law Policy & Research. With this measure, the issue of discrimination against individuals based on caste, gender, religion, transgender and intersex identity, disability, and other reasons would be addressed. The topic of reservations is one of the article's key points. Reservation refers to reserving places or chances at higher learning institutions and government positions for particular excluded groups. The paper argues that although there should be horizontal reservation (i.e., chances for all groups should be equal), it isn't being carried out in a way that supports an inclusive approach. The important NALSA ruling acknowledged the third gender's constitutional rights and permitted people to self-identify their gender. This verdict also ordered the government to provide transgender people with reservation privileges in public employment and educational settings. The paper, however, makes the case that more work needs to be done in this area. The paper emphasizes the value of hiring more LGBTQIA+ academics at law schools to foster a more welcoming learning environment.

Additionally, it highlights the necessity of inclusive curricula and stringent anti-discrimination regulations in these schools. This action is essential to fostering an environment free from prejudice and bias against people based on their identities in the legal profession. The article makes the case that, in terms of LGBTQIA+ representation, it's time to go beyond merely having representation and to begin elevating and assisting queer community leaders. This entails giving them chances to assume leadership positions and make a bigger influence across various industries.

The author makes the case that since these transgender people had the chance to vote in elections like women, they ought to have the same benefits and rights as women. For reservation purposes, transgender people are frequently classified as belonging to the Most Backward Class (MBC) or Other Backward Classes (OBC) in India. But this method is flawed since it doesn't take into account the unique experiences of transgender people in comparison to caste-based groups. According to Mihir Rajamane[29], who made this point in the article, there are three fundamental problems with the current system:

1. Even if they are members of both communities, Scheduled Castes (SC) or Scheduled Tribes (ST) they are not eligible for reservation benefits for both SC/ST and transgender categories.

[29] *Rohin Bhat. (2023, June 4). Horizontal reservations for transgender persons: Queering the equality code. The Leaflet. https://theleaflet.in/horizontal-reservations-for-transgenders-queering-the-equality-code/*

2. If a person is trasngender and falls within the OBC group, they do not receive any additional benefits.
3. Few transgender people benefit from reservations because they must compete with other OBCs, especially in states like Tamil Nadu.

The author further notes that the reservation system is a responsibility and a power granted to the government. The author contends that it is insufficient to have horizontal reservations (reservations for transgender people). Additional supportive structures, such as non-discrimination employment regulations, gender-affirming policies and restrooms, and welcoming policies, such as leave policies to accommodate transitioning individuals, must be implemented to embrace the transgender population genuinely. Without these auxiliary institutions, the reservations risk becoming hollow, ineffectual, or "pinkwashing." [30]

**Laws & Loopholes Governing Homosexuals:**

All the social atrocities that cast trauma, pain, and anguish upon this group impelled the Parliament to finally legislate the Transgender Persons (Protection of Rights) Bill, which was introduced by the Ministry of Social Justice and Empowerment on July 19, 2019. The bill received presidential assent on December 5, 2019, and the act came into effect on January 10, 2020. This Act was passed with the objective of improving the overall welfare of transgender people in India. The striving for equal treatment was somewhat achieved by the struggle and resultant legislation. Transgender people have been routinely criminalised, discriminated against, and deprived of access to education and employment. The crux of the goal is the recognition of other genders and the establishment of a space for the third gender, not merely accommodation within the binary framework. By reviewing the Transgender Persons (Protection of Rights) Act, 2019, many voids, ambiguities, lacunas, or inconsistencies with the present day statutes and the high law of the Constitution of India were realised. The Act failed to meet expectations and neglected many recommendations made by the Expert Committee. It failed to accommodate the Supreme Court directions, as a result of which it has caused a stir among the transgender community, lawyers, and activists in India. The Act remains ignorant of the variation that exists among transgender people. Thus, it had become prudent to articulate areas where a legislative act related to gender parity must be abided

[30] *Ministry of Information and Broadcasting. (2022, June 30). Welfare of transgender persons in India: Slew of measures by Central Government in Last three years Umbrella Scheme "SMILE". https://static.pib.gov.in/WriteReadData/specificdocs/documents/2022/jun/doc202263068801.pdf*





by, lest it be considered a failure of implementation. The transgender community claims that the Act just briefly discusses affirmative action and provides no actual mechanism to enhance the lives of transgender people. Quite ironically, the Act, instead of preventing it, encodes discrimination. The Act must also strive to provide for crisis counselling for transgender victims of rape and other crisis intervention centers. The Act limits the consultation to only sex reversal surgery and hormonal treatment, with no psychological well-being counselling included. The Act, on the other hand, has continually let people down. The Act further departs from the NALSA decision by replacing the National Council for Transgender Persons with provisions that would have established National and State Transgender Welfare Commissions (STWC). Because of the majority of its provisions, the Transgender Protection Act of 2019 is seen as a degenerating law with inaccurate descriptions of transgender people. In addition to the provisions outlined in the Act, it is crucial to grant the transgender population other civil rights, such as the right to marriage, adoption, and succession. Transgender persons ought to be given the opportunity to live in dignity, free from prejudice, and with equal access to healthcare, work, and educational opportunities.

**Conclusion**

Analysing the legal framework for LGBTQIA+ rights in India reveals a mixture of achievements and ongoing challenges. Significant progress has been made, particularly in recent years, but there are still areas that require further attention and reform. Here is a conclusion summarising the achievements and challenges:

Achievements:

1 Decriminalisation of Homosexuality:The 2018 Supreme Court decision that struck down Section 377 of the Indian Penal Code, decriminalising consensual same-sex relationships between adults, was one of the most significant successes. This landmark decision was an important step towards recognising the rights of LGBTQIA+ people.

2 Recognition of Transgender Rights: The recognition of transgender rights as a fundamental right by the Supreme Court in 2014, along with the affirmation of the right to self-identify one's gender and the creation of a third gender category, marked a positive development in the legal landscape for transgender individuals in India.

3 Anti-Discrimination Measures: Some progress has been made in recognising LGBTQIA+ individuals' right to be protected from discrimination in employment and education, with courts and legal bodies recognising that sexual orientation and gender identity should not be grounds for discrimination.

**Challenges:**

1 Lack of Comprehensive Legislation: While there have been some positive judicial developments, India lacks comprehensive legislation specifically addressing the rights and protections of LGBTQIA+ individuals. Without such legislation, the community is vulnerable to discrimination and lacks legal safeguards in various areas of life.

2 Social Stigma and Discrimination: Despite legal advancements, societal attitudes towards LGBTQIA+ individuals remain a significant challenge. Stigma, discrimination, and violence against the community persist, especially in rural areas and conservative communities.

3 Marriage Equality:In India, marriages between people of the same sex are not yet recognised, limiting LGBTQIA+ couples access to the legal rights and privileges that heterosexual couples enjoy. This constraint prevents complete equality in areas such as inheritance, adoption, and property rights.

4 Healthcare Access: Transgender individuals often face challenges accessing adequate healthcare, including gender-affirming treatments and surgeries. Lack of awareness and sensitivity among healthcare professionals further compounds these issues.

**Bibliography:**

**Books:**

1 Amara Das Wilhel. (2004). Tritity Prakriti: People of the Third Sex, Understanding Homosexuality, Transgender Identity, and Intersex Conditions Through Hinduism. Xlibris corporation Philadelphia.

2 Bina Fernandez. (1999). A Resource Book on Lesbian, Gay and Bisexual Rights in India. India Centre for Human Rights and Law.

3 Devdutt Pattanaik. (2015). Shikhandi and Other Stories They Don't Tell You. Zubaan Books

4 Durga Das Basu. (2016). Introduction to the Constitution of India. Lexis Nexis Butterworths Wadhwa.

5 Kristen L. Eckstrand. (2016). Lesbian, Gay, Bisexual, and Transgender Healthcare: A Clinical Guide to Preventive, Primary, and Specialist Care. Springer International

6 Paisley Currah, Shannon Minter, Jamison Green. (2000). Transgender Equality a Handbook for Activists and Policymakers. National Center for Lesbian Rights and The Policy Institute of the National Gay and Lesbian Task Force.

7 R. B. Towle, L.M. Morgan. (2006). Romancing the Transgender Native: Rethinking the Use of the "Third Gender" Concept. Routledge.

8 Rajesh Talwar. (1999). Third Sex and Human Rights. Gyan Publishing House

9 Serena Nanda. (1999). Neither Man nor Woman: The Hijras of India. Wadsworth

10 Wallace Swan. (2004).Handbook of Gay, Lesbian, Bisexual, and Transgender Administration andPolicy. Routledge





**Articles:**

1 Sakshi Parashar. (2017). Inclusion of transgender community within socially and educationally backward classes: Examining the deeper concern. Journal of ILI Review. https://ili.ac.in/pdf/sakshi.pdf

2 Equality and Human Rights Commission. (2012). 83rd research report on Equality and HumanRights. https://www.equalityhumanrights.com/sites/default/files/83._european_court_of_human_rights.pdf

3 Yogyakarta Principles. (2007). Application of International Human Rights Law in RelationtoSexualOrientationandGenderIdentity. www.yogyakartaprinciples.org/principles_en.htms

4 LakshyaKalra.(2013).Because We Were Born This Way: Here Are Ten Indian Organizations Working For The LGBTQ. https://www.youthkiawaaz.com/2013/08/because-we-were-born-this-way-here-are-ten-indian-organizations-working-for-the-lgbtq/amp/

5 V. Venkatesan. (2021, July 22). Karnataka Becomes the First State to Reserve Jobs for Transgender Persons. The Wire. https://thewire.in/lgbtqia/karnataka-first-state-reserve-jobs-transgender-persons

6 Abhinay Laxman(2022, May15). Despite legislation, transgender community faces discrimination and abuse. The Hindu. https://www.thehindu.com/news/national/despite-legislation-transgender-community-faces-discrimination-and-abuse/article65417482.ece

7 Ministry of Information and Broadcasting. (2022, June 30). Welfare of transgender persons in India: Slew of measures by Central Government in Last three years Umbrella Scheme "SMILE". https://static.pib.gov.in/WriteReadData/specificdocs/documents/2022/jun/doc202263068801.pdf

8 Express News Service. (2023, April 21). Key Supreme Court verdicts that moved the needle on LGBTQ rights in India. The Indian Express. https://indianexpress.com/article/explained/explained-law/key-sc-verdicts-that-moved-the-needle-on-lgbtq-rights-8565720/

9 Rohin Bhat. (2023, June 4). Horizontal reservations for transgender persons: Queering the equality code. The Leaflet. https://theleaflet.in/horizontal-

reservations-for-transgenders-queering-the-equality-code/

10 Sukhmani Malik. (2023, July 5). Reservation for transgender community: What the demand for 'horizontal' reservation is. The Indian Express. https://indianexpress.com/article/explained/explained-law/transgender-demand-horizontal-reservation-explained-8694004/

11 Sophie Mcbain. (2023, 12 July). India's Supreme Court recognizes a third gender. https://www.newstatesman.com/world-affairs/2014/04/india-s-supreme-court-%20recognises-third-gender

12 Devdutt. (2023, 22 July). http://devdutt.com/articles/world-mythology/the-hijra-legacy

13 Sanyukta Dharmadhikari, Sharanya Gopinath. (2018, 18 December). Equal to killing us: Why India's transgender community is rejecting the Trans Bill. The News Minutes. https://www.thenewsminute.com/article/equal-killing-us-why-indias-transgender- community-rejecting-trans-bill-93579

**International Conventions:**

1 The European Convention for Prevention of Torture and Inhuman or degradingthetreatment,1987

2 The European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950

3 TheEuropeanSocialCharter,1961

4 UniversalDeclarationofHumanRights,1948.

**Indian Statutes:**

1 Criminal Tribes Act, 1871

2 Immoral Traffic Prevention Act of 1986

3 Rights of Transgender Persons Bill, 2014

4 The Constitution of India 1950

5 The Indian Penal Code, 1860

6 The Protection of Human Rights Act, 1993

7 Transgender Persons (Protection) Rights Bill 2016

8 Transgender Persons (Protection) Rights Bill 2018

9 Transgender Persons (Protection) Rights Bill 2019

**E-sources:**

1 www.indiankanoon.com

2 www.legalserviceindia.com

3 www.manupatra.com





# Promoting equity in technology transfer: Upholding human rights in a changing climate

***Bhavya Singh[1], Dr.Eakramuddin [2]***
*Research Scholar, Department of Law, Jamia Millia Islamia, New Delhi [1]*
*Assistant Professor, Department of Law, Jamia Millia Islamia, New Delhi [2]*

**Abstract**

The convergence of human rights and technology transfer in the context of climate change is a complex and pivotal issue. With climate impacts disproportionately affecting vulnerable populations, the fair distribution of climate-related technologies is critical. This dynamic interplay between rights and technology holds significant implications, but also poses challenges.

This paper aims to explore if there are certain obligations in the human rights law that relate to the concept of technology transfer. Not only that, the viability of incorporating human rights based approach when analysing the arguments for technology transfer within the context of climate change is also tested. Moving further, with technology transfer as the centre of discussion, the mention of intellectual property becomes inexorable and therefore it becomes abundantly necessary to evaluate its significance.

The work also delves into the complexity that persists in the dynamics of development, human rights and technology transfer. Lastly, the implications of post-2015 climate change developments on human rights frameworks are evaluated.

Unveiling the tapestry of interconnected aspirations, our exploration delves into the intricate relationship between human rights and technology transfer, revealing how these two essential elements interweave to shape a more equitable and sustainable response to the challenges of climate change.

**Key words: -** *Climate change, Human rights, Intellectual property rights, Technology transfer.*

## Introduction

Climate change poses a severe threat to life on Earth, as evidenced by the Intergovernmental Panel on Climate Change (IPCC). This threat is supported by clear evidence of changes in the climate system, including warming of the atmosphere and oceans, melting glaciers and polar ice, rising sea levels, and unprecedented levels of greenhouse gases in the atmosphere over the past eight

hundred thousand years.

Despite the ocean's role in mitigating climate change by absorbing thirty percent of greenhouse gases, the Kyoto Protocol adopted in 1997 as an initial effort to stabilise the climate has proven ineffective in reducing atmospheric greenhouse gas concentrations. The 2015 Paris Agreement, designed to combat climate change, might struggle to achieve its goals. Even if fully implemented by all parties, it could be challenging to limit global temperature increases to 2°C, let alone the more ambitious target of 1.5°C.

The impact of climate change is already negatively affecting a wide range of internationally protected human rights, including food, shelter, water, life, health, property, livelihood, culture, migration, resettlement, and personal security. These impacts are interconnected and particularly affect individuals and groups whose rights are already precarious. The poorest countries, where the protection of rights is already quite weak, are experiencing the most severe effects of climate change, creating a vicious circle of vulnerability.

The root of the relationship that exists between climate change and human rights vulnerability lies in the common economic factors. Governments with limited resources are less able to address climate change harms, leading to unequal impacts and de facto discrimination. Despite the clear overlaps between climate change and human rights, mainstream climate change discussions and literature have only recently started considering human rights concerns.

Now, in order to adapt and mitigate the impacts of climate change, it is pertinent to share and disseminate environment friendly or environmentally sound technologies, which is termed as technology transfer in the common parlance.

The United Nations Framework Convention on Climate Change (UNFCCC) emphasises the importance of technology transfer as a core mechanism to address climate change and promote equity. It recognises that poorer countries will require technological assistance to adapt to climate change and develop sustainably, and that wealthier countries have an obligation to provide this assistance due to their greater contribution to climate change and technological capacity.

However, structured technology transfer has not been effectively realised for various reasons, leading to obscurity and limited public awareness of the issue. Despite this, technology transfer plays a crucial role in achieving climate change goals fairly. When the discussion of technology comes into play, the mention of intellectual property rights is inevitable, and so does the mention of Trade Related Aspects of Intellectual Property Rights (TRIPS). A lot of efforts have been made to expand the constraints of the TRIPS Agreement, as the WTO's approach to its flexibilities has raised challenges. Despite differences in membership and obligations between human rights treaties and the WTO, Pauwelyn suggests that conflicts between the two would favour human rights law due to its integral and fundamental nature. Hence, should developing nations assert that technology transfer is imperative to meet their climate requirements in alignment with human rights commitments, they may initiate a





conflict resolution mechanism that would inherently give precedence to the fulfilment of human rights duties.

Authors set forth to capture the essence of the paper's pursuits, aiming to elucidate the pivotal role of technology transfer in advancing human rights within the dynamic landscape of climate change, with the following objectives:

i. To scrutinise if there are certain obligations in the human rights law that encompass the concept of technology transfer. It bifurcates further into two more objectives:
   - To explore if there exists, in general, any right to technology transfer.
   - To examine if there are any specific human rights that necessitate technology transfer in order to be ensured effectively.

ii. To explore the viability of incorporating human rights perspective when analysing the arguments for technology transfer within the context of climate change.

iii. To evaluate the significance of Intellectual Property in the realm of transferring technology based on rights.

iv. To entangle and analyse the complex dynamics of development, human rights and technology transfer.

v. To evaluate the implications of post-2015 climate change developments on human rights frameworks, weighing the challenges and potential synergies.

## I. Are There Mandates within Human Rights Frameworks that pertain to the Transfer of Technology?

Regarding whether or not there are human rights obligations for technology transfer, there are two sides to the argument. The first concerns, whether there is, in general, a right to technology transfer. This might entail the idea of a right to access technology with extraterritorial implications or reach. The other side concerns, whether there are there any human rights that depend on technology transfer to be effectively protected.

### a) Is There a Right to Technology Transfer?

Article 15(1) of the International Covenant on Economic, Social, and Cultural Rights (ICESCR) establishes a comprehensive framework for recognising and safeguarding the right of individuals to benefit from scientific progress, participate in cultural life, and protect their moral and material interests arising from creative contributions. Article 15(1)(b), which is, 'to enjoy the benefits of scientific progress and its applications', seems to have a lot of relevance in the discussion of technology transfer.

It would be safe to say that articulation of Article 15(1)(b) has not been very proper as yet. The relationship that is there in between, technology

transfer and this article, is not supported by a lot of literature. In order to have a better understanding of this clause, it is important that it must be read in the context of Article 15(1) in its entirety.

Nonetheless, it's evident that Article 15(1)(b) seemingly establishes an individual entitlement for individuals to reap the advantages of scientific progress. Now, this presents two legal issues. First one relates to the phrase, 'enjoy the benefits' and the second one is, 'apply scientific progress'. Analysing the two phrases and looking at the article's history, there seems to have been an intentional and deliberate distinction made between 'the applications' of science on the one hand and pure science research on the other. The former are more inclined towards technologies and more closely associated with patents, whereas the latter is typically not done with an aim to commercialise or for the purposes of sale. Both types of knowledge fall under the purview of the provision. The word 'benefit' does not find a proper definition. Nonetheless, as per Article 15(1)(c), the term 'benefit' must, at a minimum, encompass the notion of gaining access to and utilising scientific knowledge and applications owned by others for one's own advantage.

The United Nations Educational, Scientific and Cultural Organization (UNESCO) has attempted to elaborate on Article 15(1)(b), particularly in the context of health and bioethics, through Article 15 of the Universal Declaration of Bioethics and Human Rights, where the right to benefit from scientific progress includes access to scientific knowledge, new products, and capacity building. It underscores the significance of sharing the benefits derived from scientific research and its applications, including technology, across society in its entirety, with a specific focus on sharing these benefits with developing nations. It paints a clearer picture of the idea of 'benefit'. Although, a more comprehensive method might be required to apply this approach to climate change. Meeting of experts in 2007, UNESCO, addressed the issue. According to UNESCO, rights like right to food, right to education, right to health, right to information, etc. can properly be fulfilled after the fulfilment of this right. Consequently, instead of functioning solely as a clause mandating technology transfer, it could be suggested that the provision's potency resides in its alignment with the fulfilment of additional rights.

The tension between intellectual property rights and the right to benefit from scientific progress has been a recurring topic in expert meetings. Concerns over IP rules obstructing access to essential medicines have led to discussions on balancing creator's interests with promoting general welfare and other human rights. While General Comment 17 raised concerns over exclusive ownership, Article 15(1)(b) isn't analogous to IP due to distinct characteristics. The Committee on Economic, Social, and Cultural Rights (CESCR) acknowledges the





interrelation of Article 15(1)(c) and (b), emphasising a balance between moral and material interests of creators. Limitations under the General Comment should be proportional, pursuing legitimate aims while not hindering other rights. The Comment indicates progress on the right to enjoy scientific benefits, potentially linking it with technology access rights, especially pertinent in climate change and technology transfer scenarios.

**b) Is Technology Transfer Necessary to Satisfy Human Rights Obligations in the Context of Climate Change?**

The climate-related human rights that may necessitate access to technology for their fulfilment, pertains to rights directly affected and threatened by climate change, such as the right to health, food, and water. Addressing these rights involves establishing the connection between each right and climate change, and identifying the climate-related technology and knowledge required for their realisation.

Additionally, Article 2(1) of ICESCR plays a role, highlighting the duty for international assistance and cooperation in fulfilling economic, social, and cultural rights, which aligns with the principle of common but differentiated responsibilities and technology transfer obligations outlined in Article 4.5 of the UNFCCC for developed countries.

i. The Right to Health: Article 12 of ICESCR establishes the right to the highest attainable standard of physical and mental health. The right to health is closely linked to climate change through direct health impacts and the broader determinants of health. Extreme weather events, shifts in disease patterns, and changes in ecological systems due to climate change affect health. Necessary climate-related technologies for the well-being of health encompass medical goods and services aimed at addressing health needs amidst extreme weather events, heatwaves, and cold spells. Moreover, technologies to resist vector-borne and temperature-sensitive diseases, vaccines, and those promoting hygienic conditions are crucial. The fulfilment of the right to health demands both the availability and accessibility of health resources and technologies, including safe water, sanitation facilities, medical personnel, hospitals, clinics, and essential drugs, within reasonable proximity and affordability for all.

ii. The Right to Food: The right to food is recognised in various international human rights conventions and subsequent declarations. In the context of climate change, food production contributes to greenhouse gas emissions through practices like agriculture and deforestation, while climate impacts such as droughts and flooding affect food production. Access to diverse plant varieties, drought-resistant seeds, water for irrigation, and addressing privatisation of the food sector are key elements of climate-related technology and

knowledge needed for fulfilling the right to food. However, private ownership of technologies and knowledge in this sector, protected by intellectual property rights, presents challenges to ensuring this right.

iii. The Right to Water : The ICESCR implicitly recognises the right to water under Article 11 as part of an adequate standard of living, particularly stated by the Committee on Economic, Social, and Cultural Rights. Climate change affects the right to water through extreme weather events and decreased freshwater availability. This results in unequal water distribution, necessitating adaptation strategies. Climate-related technologies for water rights encompass various categories such as water capture, distribution, efficiency, and reclamation. Specific technologies include rainwater harvesting, water filtration, sewerage systems, and efficient water use techniques.

iv. The Right to Life: The preservation of the right to life is ensured by ICCPR Article 6(1) and various other instruments of human rights. Climate change directly affects the right to life through occurrences of severe weather events, which can lead to loss of life. The IPCC highlights effects like floods, cyclones, and storm surges. Securing access to technology and knowledge relating to climate, to uphold the right to life, involves resources for preventing, preparing for, managing, and recovering from these incidents. These include early warning systems, food and water distribution, water resource management, disaster-resilient transport, waste disposal, and building materials. These technologies aim to reduce vulnerability and enhance response capacity.

v. The Right to Development: The right to development, framed as an individual right, emphasises on participation in development including social, cultural and economic ones, with full realisation of human rights. Article 1 of Declaration on the Right to Development is important here. Despite its origin in state dialogues, it has potential for addressing policy space and development assistance. While the 1986 Declaration on the Right to Development lacks technology transfer mention, the Vienna Declaration through Article 11 and developing countries recognise the importance of technology access. The right intersects with climate change through principles like common but differentiated responsibilities within the UNFCCC. Fulfilment of the right to development in the context of climate change necessitates access to diverse climate-related technologies, echoing other human right's requirements.

vi. Duty to Extend Global Assistance and Joint Cooperation: To address international technology transfer, these rights establish extraterritorial obligations on States and actors. The ICESCR Article





2 emphasises cooperation and assistance, while CESCR comments underscore international cooperation's vital role in realising specific rights. For instance, in the case of the right to health, States must respect and protect the right globally and facilitate access to health resources. The CESCR similarly emphasises international responsibility for the right to food and water. Climate change, being trans-boundary and endangering rights, compels all State Parties to cooperate in preserving economic, social, and cultural rights for vulnerable populations.

## II. Investigating the Feasibility of Adopting a Human Rights Lens in Analysing Arguments for Technology Transfer in the Climate Change Context.

This section explores the integration of a rights-based approach into arguments for technology transfer concerning climate change adaptation and mitigation. The approach involves two perspectives: demanding access to technology as a direct right or as an essential element in the fulfilment of other rights; and justifying technology transfer actions based on human rights obligations, even if not conforming to existing agreements. Within the realm of adaptation, technology transfer is intricately connected to issues of justice. Specifically, developed nations have a unique obligation, as articulated in Article 4.8, to assist developing countries in adapting to the effects of climate change. Technology transfer can be seen either as a separate commitment or an integral part of adaptation programs. In contrast, the rationale behind technology transfer for mitigation doesn't inherently lend itself to a human rights framework, primarily resting on contractual obligations within the UNFCCC. Although the right to enjoy the benefits of scientific progress and its applications, Article 15(1)(b) of ICESCR could be invoked, practical hurdles for using human rights as justification for technology transfer in mitigation persist, rendering this approach less robust than for adaptation.

## III. Interplay of Human Rights, Intellectual Property, and Climate Change

The mandates under the human rights are universally binding and fundamental, not subject to exemptions or balancing tests. Even during situations like economic sanctions, human rights retain their applicability and must be protected. The principle of 'progressive realisation' accounts for differing capacities and timeframes for economic, social, and cultural rights fulfilment. Human rights take precedence over other standards, establishing a priority within regime interactions. Leveraging human rights language, some seek to limit intellectual property rights, while others aim to expand them. The challenge lies in integrating human rights into the World Trade Organization and TRIPS Agreement. Necessity provisions in GATT, TBT, and SPS Agreements could provide space for human rights justifications. However, TRIPS Agreement interpretation struggles to

balance IP rights and human rights due to its elevation of intellectual property holder's rights. Bridging this gap may necessitate revisiting the broader interpretive approach, aligning with the International Law Commission's perspective. This approach could broaden discussions within the WTO and the UNFCCC to address intellectual property and enhance TRIPS Agreement limits.

## IV. Harmonizing Priorities: The Challenge of Development, Technology Transfer, and Human Rights in Climate Response

The categorisation of countries has had a lot to do with their economic and developmental status. The economic activities of developed countries, since the industrial revolution, amongst them many being colonial powers, attributed a huge amount to the increase in greenhouse gas emissions. The terms developing and developed countries and economies in transition have emerged to differentiate nations based on economic and geopolitical criteria. The Group of 77 (G77) and China represent developing countries' common interests, negotiating for fair treatment in international forums. The concept of special and differential (S&D) treatment in the World Trade Organization acknowledges the historical impact of colonialism and grants concessions to developing countries. The demand for technology transfer, central to the New International Economic Order (NIEO), has faced resistance due to intellectual property rights concerns. The shift towards harmonization in international economic policy, as seen in TRIPS, reflects a transition from recognising fairness and justice claims to a more uniform approach. S&D treatment continues to influence environmental negotiations.

When the approach to development is observed through the lens of technology transfer and human rights, there appears to be a complex situation regarding adaptation, taking into account existing capacity, vulnerability, economic growth, and development. The intersection of adaptation and development needs creates challenges in defining technology transfer obligations. There is a growing reluctance of industrialised countries to fund adaptation due to concerns about duplicating development assistance. The lack of clear differentiation between adaptation and development makes accountability for climate change obligations difficult to enforce.

It would not be completely wrong to say that, largely, human rights approach to adaptation contrasts with the development approach. From the perspective of human rights, it can be said, that, the focus shifts to prioritising the needs of the most vulnerable individuals rather than those who are already well-off or capable of adapting. This approach directs attention to small-holder and subsistence farmers, especially in rural areas, as well as populations facing urbanisation due to climate-induced displacement. As far as the selection of technologies that are human rights appropriate are concerned, the choice of technologies is influenced by the





accessibility, sustainability, and adaptability required by the most vulnerable populations. While these technologies don't necessarily have to be basic or low-cost, they should be easily deployable, maintainable, and supportive of near-term impacts on vulnerable communities. The key is to ensure accessibility and sustainability for the vulnerable, even if more advanced technologies are considered.

The incorporation of human rights perspective guides the selection of technologies that address the immediate needs of the most vulnerable, such as water purification or weather monitoring systems, while still considering broader infrastructure development. The focus remains on safeguarding the rights and well-being of those most affected by climate change impacts.

## V. Human Rights and the Evolving Climate Change Landscape Post-2015

### a) Climate Change and Human Rights

The Paris Agreement's preamble acknowledges the relevance of human rights to climate change action, stating that parties should consider their obligations on human rights, health, indigenous peoples, local communities, migrants, children, persons with disabilities, and more. However, this recognition falls short of incorporating human rights into the agreement's legal framework. The preamble's use of 'should' rather than 'shall' and the phrasing 'respect, promote and consider' indicates a cautious endorsement of human right's relevance. The preamble's failure to bind parties to fulfil or protect rights undermines the assertion of a comprehensive incorporation of human rights. The absence of concrete obligations towards sinking island States or other vulnerable populations further weakens its effectiveness. Moreover, the challenge of attributing responsibility for transboundary climate impacts complicates the application of human rights law. Existing international climate agreements, such as the Kyoto Protocol and the Paris Agreement, may not inherently violate human rights obligations. The tension between national economic development and respect for rights abroad is difficult to establish, given the voluntary nature of emissions reduction targets.

In conclusion, while the Paris Agreement's recognition of human rights is a step forward, its limited legal incorporation, vague language, and lack of concrete obligations limit its impact. The complexity of attributing transboundary impacts to specific State obligations further complicates the application of human rights law to climate change. The focus on cooperation rather than imposing obligations may be a more feasible approach to addressing this global challenge.

### b) Technology Transfer, Human Rights and Climate Change

The relationship between technology transfer and human rights under the Paris Agreement is complex and multifaceted. While the agreement acknowledges the importance of technology transfer in addressing

climate change, it does not explicitly lay out a comprehensive framework for integrating human rights into technology transfer efforts. However, there are several key points of intersection and potential implications for human rights within the context of technology transfer under the Paris Agreement. For instance, recognition of right to development and the emphasis on the importance of sustainable development. Technology transfer, especially to developing countries, can play a crucial role in enabling them to pursue sustainable development pathways. Access to clean and efficient technologies can enhance energy access, improve living standards, and promote economic growth, aligning with the right to development.

Then the principles of equity and common but differentiated responsibilities has been highlighted in the Agreement. Ensuring equitable access to climate-related technologies is essential to prevent exacerbating existing inequalities. Failing to provide technology transfer to vulnerable and less developed countries could be seen as a violation of their rights to a fair share of global resources.

The agreement also recognises the rights of indigenous peoples and local communities. Technology transfer should respect their rights, including their traditional knowledge and cultural practices, and ensure their participation in decision-making processes related to technology adoption and implementation.

The importance of gender equality has also been acknowledged. Technology transfer should consider the differing impacts of climate change on genders and ensure that technologies benefit both men and women equally.

The Agreement also highlights capacity-building support for developing countries. Technology transfer efforts should include provisions for building local capacity to adopt, adapt, and develop technologies. Enhancing technological capabilities aligns with human rights principles by empowering countries to address climate challenges effectively. While the Paris Agreement provides a platform for addressing the relationship between technology transfer and human rights, it falls short of providing detailed mechanisms for integrating these two aspects comprehensively. The extent to which technology transfer efforts align with human rights principles depends on the actions of parties, financial support mechanisms, and the integration of human rights considerations into national climate strategies. Therefore, further efforts are needed to ensure that technology transfer under the Paris Agreement respects and promotes human rights, particularly in the context of vulnerable and marginalised populations.





## VI. Conclusion

Efforts aimed at leveraging human rights against the TRIPS Agreement to incite interpretive clashes seem improbable to yield success. This is primarily due to the configuration of climate change responsibilities for developing nations within the UNFCCC framework, coupled with the recognition of rights resembling intellectual property in the human rights domain itself. Instead of residing outside the sphere of human rights, the fundamental discourse about the equitable equilibrium between rights holders and beneficiaries is inherently embedded in the fabric of Article 15 of the ICESCR. Consequently, the quest for equilibrium between proprietary rights and user interests is intrinsic to the structure of the human rights framework.

The essence of this debate encompasses not only an external context but also resonates within the broader human rights context. Within the UNFCCC, developing countries' climate change obligations are woven into the tenets of justice and fairness, shaping their policy approach. Concurrently, the human rights paradigm itself acknowledges rights analogous to intellectual property rights, further entwining the dialogue. Therefore, rather than an external encounter, the core argument over equilibrium manifests within the established contours of Article 15.

Amid these considerations, developing nations are left with a final recourse to potentially expand their manoeuvring room within the TRIPS Agreement: invoking the precepts of general international law. This involves invoking overarching obligations and shared principles common across diverse regimes. This approach constructs a framework guiding their collective interpretation, even when overt conflicts are absent. As such, this strategy aligns with the broader objective of harmonizing seemingly disparate frameworks to address the intricate interplay of human rights, intellectual property, and climate change obligations.

Regarding the tussle that exists in the dynamics of development, technology transfer and human rights, one such proposal can be to focus on the responsibility of all states toward vulnerable populations rather than categorising developed and developing countries. This approach suggests that vulnerable citizens in developing nations could make direct claims for technology assistance. This shift challenges the conventional donor framework, potentially making it harder for developed countries to contest these claims on legal, political, or economic grounds. This is howhuman rights approach could be used to address the impasse within the UNFCCC.

In sum, the nexus between human rights and technology transfer in the climate change arena demands careful consideration. Integrating rights into technology transfer can bridge gaps, fostering a more balanced and just global response to climate challenges.

**References:**


1. Boyle, A. (2018). Climate change, the Paris Agreement and human rights. International & Comparative Law Quarterly, 67(4), 759-777.
2. CDP and UN DESA. (2015). Handbook on the least developed country category: Inclusion, graduation, and special support measures.
3. Cornwall, A., & Nyamu‐Musembi, C. (2004). Putting the 'rights‐based approach'to development into perspective. Third world quarterly, 25(8), 1415-1437.
4. Declaration on the Right to Development 1986, Art. 1
5. Falvey, R. E., Foster, N., &Memedovic, O. (2006). The role of intellectual property rights in technology transfer and economic growth: theory and evidence. Geneva: UNIDO.
6. Faunce, T. A., & Nasu, H. (2009). Normative foundations of technology transfer and transnational benefit principles in the UNESCO Universal Declaration on Bioethics and Human Rights. Journal of Medicine and Philosophy, 34(3), 296-321.
7. Hall, M. J., & Weiss, D. C. (2012). Avoiding adaptation apartheid: Climate change adaptation and human rights law. Yale J. Int'l L., 37, 309.
8. Hamm, B. I. (2001). A human rights approach to development. Hum. Rts. Q., 23, 1005.
9. Humphreys, S. (2008). Perspective: Technology Transfer and Human Rights: Joining Up the Dots. Sustainable Dev. L. &Pol'y, 9, 2.
10. Humphreys, S. (2013). Climate Change and Human Rights: A Rough Guide. In Health and Human Rights in a Changing World (pp. 501-515). Routledge.
11. International Covenant on Civil and Political Rights 1966, Article 6(1)
12. International Covenant on Economic, Social and Cultural Rights 1966, Art. 15(1).
13. International Covenant on Economic, Social and Cultural Rights 1966, Art. 2(1).
14. International Covenant on Economic, Social and Cultural Rights 1966, Art. 12
15. International Covenant on Economic, Social and Cultural Rights 1966, Art. 11
16. IPCC. (2007). Climate Change 2007: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change. Cambridge University Press, Cambridge, UK.
17. Khor, M. (2012). Climate change, technology and intellectual property rights: Context and recent negotiations (No. 45). Research paper.
18. Maskus, K. E. (2004). Encouraging international technology transfer (Vol. 7). ICTSD.
19. Pauwelyn, J. (2003). Conflict of norms in public international law: how WTO law relates to other rules of international law (Vol. 29). cambridge university press.
20. Rimmer, M. (2011). Intellectual property and climate change: inventing clean technologies. Edward Elgar Publishing.
21. Schabas, W. A. (2007). Study of the Right to Enjoy the Benefits of Scientific and Technological Progress and its Applications. Human Rights in education, science and culture, 273-308.
22. Shabalala, D. B. (2018). Climate change, human rights, and technology transfer: Normative challenges and technical opportunities. Human Rights, and Technology Transfer: Normative Challenges and Technical Opportunities (August 24, 2018). in Molly K. Land and Jay D. Aronson (eds.) New Technologies for Human Rights Law and Practice Cambridge University Press.
23. UNESCO. (2007). Report of Experts Meeting on the Right to Enjoy the Benefits of Scientific Progress and its Applications. Amsterdam, 7-9 June 2007. Available at <https://unesdoc.unesco.org/ark:/48223/pf0000154583?posInSet=1&queryId=N-EXPLORE-b2269a5f-b23c-4b0e-be2e-33486cfbfffe> (last visited 26 July 2023).
24. United Nations Framework Convention on Climate Change 1992, Art. 4.5
25. United Nations Framework Convention on Climate Change 1992, Art. 4.8

# Infringement of human rights vis a vis cyber crimes: a study with special reference to digital platform of internet banking system

***Anudeep Kaur[1], Dr. Bhumika Sharma[2]***
*PhD Research Scholar, School of LawSharda University, [1]*
*Assistant Professor School of LawSharda University, [2]*

**Abstract**

In the modern digital world, let's get into the specifics of how cybercrime can violate human rights: Hacking, data breaches, and internet spying are just a few examples of cybercrimes that can seriously impair people's right to privacy. Unauthorized access to personal information, financial information, and sensitive conversations can result in identity theft, stalking, and the unauthorized release of private information. An individual's control over their personal data is violated by these violations. An individual's right to free speech may be violated by cybercrimes such internet harassment and cyber bullying. Online harassment and threats can prevent people from openly discussing their ideas and engaging in free speech, which restricts their ability to engage in public debates. The spread of misleading information, or "fake news," over the internet has the potential to sway public opinion and make it more difficult for people to get accurate and trustworthy information. This impairs the ability to request and obtain the knowledge required for making educated decisions. Cybercrimes that target financial institutions or people's accounts can result in large financial losses, which is against the law. This involves theft of intellectual property, ransom ware attacks, and unauthorized access to financial accounts. In the digital world, cybercrime breeds unease.

**Key words:** - *cybercrime, intellectual, property and crime.*

## Introduction

In the modern digital world, let's get into the specifics of how cybercrime can violate human rights: Hacking, data breaches, and internet spying are just a few examples of cybercrimes that can seriously impair people's right to privacy. Unauthorized access to personal information, financial information, and sensitive conversations can result in identity theft, stalking, and the unauthorized release of private information. An individual's control over their personal data is violated by these violations. An individual's right to free speech may be violated by cybercrimes such internet harassment and cyber bullying. Online harassment and threats can prevent people from openly discussing their ideas and engaging





in free speech, which restricts their ability to engage in public debates. The spread of misleading information, or "fake news," over the internet has the potential to sway public opinion and make it more difficult for people to get accurate and trustworthy information. This impairs the ability to request and obtain the knowledge required for making educated decisions. Cybercrimes that target financial institutions or people's accounts can result in large financial losses, which is against the law. This involves theft of intellectual property, ransom ware attacks, and unauthorized access to financial accounts. In the digital world, cybercrime breeds unease. Cyber-attacks, malware, and phishing can all corrupt systems, interrupt online activity, and even cause physical harm. An individual's right to an unafraid and threat-free life is violated by this. Because of their potential for reprisal, monitoring, or harassment, cybercrimes might discourage people from participating in online activism or social movements. This may limit their ability to engage in public affairs. The potential seriousness of some cybercrimes is shown by this violation of the right to life. Governments, international organizations, and entities are attempting to create laws, rules, and cyber security measures to safeguard human rights in the digital sphere in response to these dangers. In an increasingly linked world, combating cybercrime involves respecting fundamental human rights in addition to maintaining the integrity of digital networks. It is essential to take human rights considerations into account while designing internet banking systems. Internet banking, commonly referred to as online banking or e-banking, is the practice of using digital platforms to carry out various banking tasks such account administration, transactions, and financial services. In this setting, it is crucial to ensure that human rights are preserved and safeguarded. Here is a thorough explanation of the connection between online banking systems and human rights. A person's ability to manage their personal information is included in the fundamental human right of privacy. Users disclose sensitive financial details and private information for transactions and account management when using internet banking. To protect sensitive data from unwanted access or cybercrimes, internet banking systems must adopt strong security measures. Within a second, we can establish a connection with anyone, anywhere. People of all ages, especially the student community, now have a huge chance to contribute to and gather knowledge thanks to the internet and digital communication technology. It is not overstated that people are connecting with one another via email, chat rooms, and social networking sites like Face book, Whatsapp, Twitter, etc. However, as more people utilize the internet, cybercrime rates are rising quickly as well. Cyber criminals can quickly hack any important data. Cyberspace-related crimes are becoming more prevalent every day. Hackers with more advanced technologies and organized cybercrime groups exist. For instance, a hacker may be paid to install malware on an end user's device. Modern malware is hard to track down and steals data to make money. Some people believe that becoming hackers will earn them more money than becoming security personnel. There are far too many instances of bank fraud where thieves called you and grabbed all of your money from your bank account.

**Eleanor Roosevelt, supervised the Declaration's drafting:**

In little towns– close to home and so tiny that they are not recognizable on any earth maps. Unless and up to the point these rights have worth in that surroundings, they have little significance anyplace. We will not see modifications in the stronger global until citizens unite together to protect them individually. (UN News, 2016)

Human rights and cybercrime: Cybercrime infringe on rights to secrecy, privacy, freedom from torture, and freedom from all forms of blackmail. Hackers typically lock confidential user or corporate data and demand ransom to unlock them. They also steal data and use it for their own purposes. Like in a recent incident where they hacked the Twitter accounts of numerous well-known people and used the accounts fraudulently to steal money, some of the victims sought payment to get their accounts back. By posting their movies and images on various websites, they extort youngsters and violate their rights.

We now live in an interconnected world which has resulted in significant progress in India and throughout the world in terms of a people-centered, inclusive, and development-oriented Information Society. At the same time, because technology continues to outrun legal, regulatory, and ethical factors, it has produced multifaceted and often unanticipated issues. Cybercrime and cyber-attacks have raised the stakes of the confrontation between individual liberties and state security to unprecedented heights.

**International Perspective:**

Article 19 of the Universal Declaration of Human Rights (UDHR) and Article 19(2) of the International Covenant on Civil and Political Rights (ICCPR) both explicitly safeguard one's right to autonomy in opinion and communication. This liberty is defined in the sections that followed as the 'liberty to express one's viewpoints any coercion and to look for, undergo, and exchange data and thoughts using any avenue with little considering frontiers.' In the past couple of years, the Organization of Nations has specifically expanded this freedom to unforeseen occurrences.

**Indian Perspective:**

India has passed the United States and is now the second-most Web user population in the entire globe, upon China. However, despite the number of people in India approaching 1.2 billion, as of March 2016, there were only 340 million people online in the country. The Indian government has been attempting to close the technological gap as part of its Electronic India Program since recognizing that free expression involves the freedom to obtain and use knowledge besides. (Sharma & Kumar, 2016).





**What are Human Rights?**

No government has the power to grant human rights; we simply enjoy these rights as a benefit of being humanity. Humans are each blessed by these fundamental liberties regardless of our citizenship, sexual orientation, ethnic background, color, creed, ethnic background, or position in life. A person's entitlement to exist is among the most foundation of all rights, afterwards the rights which give living valuable. The Universal Declaration of Human Rights (UDHR), which turned 70 in 2018, is the foundation of all international law pertaining to human rights. All future and current human rights conventions, treaties, and other legal agreements are built upon its 30 articles. The Universal Declaration of Human Rights and the treaties on Civil and Political Rights and the Rights of the Economy, Society, and Culture constitute the global Bill of Responsibilities. (United Nations Human Rights, 1996-2023).Human rights are currently being publicly challenged in the digital era. Daily human rights breaches occur, and the current developments in cyberspace put an individual's privacy at risk. Nowadays, the internet is all-pervasive and affects every person's life. We are all generally aware of the advantages of the internet, but because it is anonymous, criminals may engage in a variety of online crimes. Cyberspace, however, is still a relatively uncharted territory in terms of the issues it brings up regarding human rights and obligations. (Agarwal, 2021).

**What are Cyber Crimes?**

Cybercrime is defined as any unlawful conduct involving a computer, connected device, or internet. While the majority of cybercrimes are committed to make profit for the perpetrators, certain cybercrimes are committed against devices such as computers directly in order to cause damage or disable them. Others make use of computers or networks to disseminate viruses, illicit information, photos, or other stuff. Some cybercrimes attack computers in order to contaminate them with a computer virus, which is subsequently propagated to other machines and, in some cases, whole systems. (Brush, et al., 2023)

Cybercrime may violate a variety of human rights, particularly in the digital environment, where people's personal information, privacy, and security are at risk. Cybercrime has the potential to violate the following human rights. The convergence of human rights and online banking is a crucial and difficult subject, since financial sector digitalization has both good and possibly harmful repercussions for people' human rights. Here's a rundown of how human rights intersect with online banking and cyber-attacks.

**Human Rights are getting infringed by Cyber-attacks especially in banking industry while using Digital Platform**

**Cybercrime and Breach of Right to Privacy:** In cybercrime, one's privacy is breached and personal information and data are taken. When hackers steal a person's intellectual property, that individual is violated. Section 66E28 of the IT

Act of 2000 addresses consequences for breaching privacy. It punishes cyber thieves who violate a person's privacy while using the internet. (Shireen, 2022). Incorrect interruption in online banking might result in unwanted access to financial and private data. Individuals' right to privacy is directly breached when their private data is readily available and possibly utilized without their knowledge or permission.

**Cybercrime and Freedom of Expression:** Online abuse, cyber bullying, and hacking that targets freedom of expression can prevent people from freely expressing themselves online. Article 19 (UDHR) says, 'Anyone has the liberty to find, acquire, and share information and concepts using any means with no respect to borders. They also have the liberty to exercise their beliefs from interference.'

**Cybercrime infringes Right to Information:** False information or propaganda sent via cyberspace might jeopardize the right to accurate and reliable information. Cybercrime may threaten people's access to trustworthy and accurate banking data. False activities, illegal changes to financial knowledge about or false information can all endanger their possession of truthful data. Right to Information is under Article 19.

**Cybercrime violating Right to Property:** Online fraud, identity theft, and illegal access to bank accounts are examples of cybercrimes that can breach the right to property by incurring financial damages. Illegal actions, deception, or stealing of cash from internet savings accounts are instances of cybercrimes that breach people's right to property. Such behaviors may end up in monetary damages and the loss of trustworthy ownership. Article 17 of UDHR says, 'Every person has the capacity to own assets on themselves or in collaboration with others. Nobody's assets shall be confiscated by him indiscriminately'.

**Cybercrime infringes Right to Security:** Cyber-attacks that interrupt online activity, corrupt data, or target essential infrastructure can infringe on the right to live free of fear and threat. To protect users, internet monetary transactions and web-based banking rely on secure advances in technology. Wrongful tampering compromises the safeguards of these systems, essentially infringing people's right to feel safe and secure. Article 3 of (UDHR),"Every person has a fundamental right to safety, independence, and personal protection".

**Cybercrime interferes Right to Education:** Cybercrime that interrupts online learning systems or educational facilities can impede the right to an education. (United Nations Human Rights Office of High Commissioner, 2016). According to Article 26, "Knowledge should concentrate on all aspects of the growth of the





personality of a person and also emphasizing the importance of reverence for human rights and essential freedoms."Cybercrime disturbs Right to Participate: Cybercrime targeting activists or minority groups on the web could hinder their capacity to engage in politics and activism. Individuals may be discouraged from engaging in internet-based financial transactions owing to worries of security breaches or money losses caused by wrongful intervention in online banking through cybercrime.

**Cybercrime weakens the Right to Life:** Cyber-attacks on medical facilities or essential infrastructure might result in the loss of life in severe situations, infringes a person's freedom of liberty. (Universal Declaration of Human Rights, 2021).

**Cybercrime interferes into the Right to access to Financial Services:**

The "right to access banking services" is not explicitly recognized as a distinct privilege in the Universal Declaration of Human Rights (UDHR). However, the UDHR's principles and rights could be directly or indirectly attached to the principle of monetary inclusion and having access to monetary services. The right to receive financial services can be examined in the context of multiple UDHR stipulations, including: Article 17, 21, 22& 25. Access to financial services may help people participate in the economy since banking and credit is necessary for people to manage and safeguard their property. It may additionally assist with financial stability and social integration. By offering access to funding for healthcare obligations, banking services may be detrimental to an individual's well-being. By giving access to funds for healthcare bills, financial services can indirectly contribute to an individual's a healthy lifestyle. (Universal Declaration of Human Rights, 2021).

Human rights may be violated as a result of numerous acts and practices in the context of internet banking or the banking industry. Internet banking involves the communication of financial details, and if banks don't appropriately protect their client's data, it can result in violations of their privacy rights. Improper exposure of sensitive financial data may constitute an infringement of a person's right to privacy. People and groups may face discrimination from banks or financial companies based on variables such as race, gender, religion, or nationality. Discriminatory activities of this nature can constitute an explicit infringement of human rights. Individuals' right to money safety may be violated if they are denied having access to banking services or financial assets depending on considerations such as socioeconomic level. This consists of rejecting persons with low incomes loans or accounts.

**Human Rights and Cyber Crime:** Human rights including the right to confidentiality, to privacy, and the freedom from torture and extortion are all violated by cybercrime. Hackers often lock confidential user or corporate data

and demand ransom to unlock them. They also steal data and use it for their own purposes. Like in a recent instance where they hacked the Twitter accounts of several famous people and used those accounts fraudulently to steal money; some of the accounts were demanding money to be returned to them. By posting their movies and images on various websites, they subject minors to blackmail and violate their rights.

In ***Ajay shood & Ors. V. Nasscom case***

The Delhi High Court made history when it ruled that online phishing was unlawful and required an injunction as well as the collection of damages. According to the Supreme Court, phishing is a type of computer fraud in which a perpetrator poses as a reputable organization. The Delhi High Court ruled that although if spoofing has never been explicitly illegal in India, the court however considers the conduct to be enacting off and detrimental to Nasscom's image. (National Information Centre(NIC), 2023).

**Bank NSP case**

Cybercrime instances, the Bank NSP case. Using the business computers, the pair sent and received numerous emails. Following their breakup, the girl created phony email accounts and accomplished this using bank's CPU. The boy's business suffered a significant loss of clientele and sued the bank. The emails sent utilizing the bank's technology were held accountable by the bank. (Parasar, 2000).

You ought to be able to respond to the following inquiries by the conclusion of the module:

- What are the primary human rights issues that cyber security raises?
- Does cyber security fall under any international rules or standards? Do they address issues relating to human rights?
- How is regional and global cyber security addressed?

In July 2012, the UN Committee on Human Rights reaffirmed that 'the identical liberties that individuals possess publicly ought to be respected on the internet' underscoring the significance of the above human rights. (Rossini & Green, 2015).

Government, industry, and civil society groups are increasingly adopting online platforms for information sharing and service delivery. But as cybercrime and cyber security have grown in prevalence, a worrying question has emerged: What influence do these issues have on human rights? Does it violate privacy rights of individuals? Many national and international regulations, including Article 19 of the UDHR, which covers safeguards for freedom of expression, communication, and access to information, pertain to cyber security. As a result, numerous nations disregard the laws, including India. The rights to privacy,





freedom of speech, freedom of the press, and free flow of information are all violated by cyber security. The government has developed a number of laws intended to safeguard computers used in criminal activity, but many of these laws lack clear checks and balances, are ill-defined, and otherwise lack democratic accountability, processes that might hinder innovation and result in violations of human rights. All of this demonstrates that the state, which defines security as defending itself against political instability and employs excessive means to do so, becomes the cause of insecurity. As we can see, there are certain limitations on what we may say, write, or publish on social media platforms. Cyber security regulations may frequently be used to silence critics, keep tabs on communications, and punish internet users for expressing their opinions. Government authorities have the ability to monitor user communications at any time when they have reason to suspect someone, however sometimes such presumptions are incorrect. All of this is a flagrant violation of the UHDR's or the countries own legislation on human rights.

**What is the right to privacy?**

The right to solitude is described as privacy by the Oxford Dictionary of Law. India's Supreme Court has frequently issued judgments objecting to any violation of a person's right to privacy, and there were multiple occasions when individuals have raised issues of confidentiality in relation to the country's right to private. The provisions of Article 21: Right to Privacy. Supreme court ruling Justice K.SPuttaswamy(Retd) vs.Union of India 2017 During the hearing of a lawsuit challenging the legality and constitutionality of the Aadhar-based biometric structure, the Supreme Court of India overwhelmingly determined that the right to private is an inalienable right guaranteed by the laws of the nation. The court expanded the application of Article 21 and ruled that the right to solitude was covered by the guarantees of life and liberty provided by that clause. After the verdict, the right to privacy was instantly elevated to an essential right because Article 21 is regulated by the third section of the Indian Constitution, which deals with fundamental rights. (BYJU'S, 2021). In this case, The authenticity of the Aadhar program was addressed. The court ruled that linking your Aadhar card to your cell phone or financial institution is not required. (Raghav & Marwaha, 2022).

**Aadhar and the right to privacy**

A government that cannot defend its people' right to privacy in the twenty-first century cannot legitimately sustain a democratic framework of equal rights under the rules of law.(The Hindu, 2015).

Our ability to manage and share information selectively, as well as how we engage with our peers, society, and the government, are all influenced by our level of privacy. The Inter American Court of Human Rights recognized this normative view of privacy as supporting a individual's dignity and

independence. The protection of one's private life, according to the IACHR, entails a 'ensemble of considerations connected to the integrity of the individual' including the ability to determine one's own sense of self, set one's own goals, and determine one's social relationships.

**Why does privacy matter?**

Hardly ever, privacy compromised by one action or one person. Instead, it consists of several small-scale surveillance and data collecting activities carried out by both public and private parties, including tracking our movements and surfing habits in addition to monitoring our call histories and call contents. Whether we define privacy as the right to keep certain information about oneself secret, then why should we worry whether such information is being collected? If knowledge about us may be used against us negatively, that is the question with the clearest response. Does this depend on who is doing the data collection? The types of data that various organisations may acquire about us.(UK ICO Information Commissioner's Office, 2022).

**Privacy Issues in Cyber Space**

The substance of the privacy right has changed along with the form it takes in the age of digital technology. Due to the integration of voice, text, picture, recording, and retrieval technologies, as well as a bigger capacity for the inadvertent acquisition of information about people's private lives, the World Wide Web, particularly Web 2.0, has recently posed concerns for privacy. This poses a wide range of privacy issues that go beyond what was previously understood in terms of both content and scope. If a privacy violation is limited by 'the right to leave alone,' it cannot be appropriately handled in the digital era. The significance of marketable data has grown so significantly that some argue that privacy, a fundamental idea, should encompass "Data confidentiality" for transactions via the internet and individually recognizable data refers to the right of an individual to decide how their "private data" is collected, shared, and utilized. (Banday & Farooq, 2012).

Youth and teens, which make up the bulk of internet users and are vulnerable to recognizing the risk of exposing oneself to the cyber world, are those who are most affected by this worry. The right to privacy can be infringed in cyberspace in a number of different ways. When someone's privacy is violated online, there are many difficult questions to be resolved, such as what constitutes a violation. To whom does the same belong? And what will be the suggested remedy?. (Kakde, 2020).

The NATGRID initiative aims to establish a central database that streams sensitive data from 21 data sources, including banking, travel information, etc. (Bhandari & Sane, 2016).





**Trust in the digital technologies**

Individual trust is fast eroding, as is the assumption that digital technology and services (and the companies that provide them) will protect all stakeholders' interests and preserve society standards and values. To halt the present decline in trust, executives of firms that develop and use digital technologies must make more reliable judgments regarding such technologies. They must begin to see people and users as stakeholders in technology innovation, rather than viewing technological damages as externalities that must be handled only if they affect the bottom line. It implies they must make judgments in favor of digital trust. We want to think that the technology we let into our homes and workplaces, which help us, retain social ties and support everything from industries to democratic institutions, are reliable. Until recently, we've attempted to avoid thinking about data breaches and cyber-attacks because we wanted to trust so desperately.(Dobrygowski, 2021).(Masiga, 2021).

**Human Rights focus on regarding Cyber security**

Social justice activists and other individuals are increasingly mindful of the adverse effects that broad and comprehensive internet safety regulations and values make on human rights, despite the fact that some local and global laws try to consider issues of human rights while formulating cyber security requirements. When we refer to rights related to humans, we normally meant those that are protected by the UN's Worldwide Covenant on Civil and Political Rights (ICCPR) and the Universal Declaration of Human Rights (UDHR).In July 2012, the United Nations Human Rights Council stated that 'the similar liberties that humans enjoy outside ought to be safeguarded on the web' so making the UDHR and ICCPR and other former human rights treaties compatible with the world of the internet. A number of cyber security rules and regulations adopted by specific nations might be detrimental to digital interaction and liberty of speech (Rossinni & Green, 2015).

**What is a cyber law?**

The legislation controlling the internet is known as cyber law. It offers a framework to promote e-filing and e-commerce transactions, as well as a legal framework to reduce and stop cybercrimes. It also gives legal legitimacy to electronic documents. The legislation provides a thorough definition of each type of offenses' offenses as well as the associated punishments. Therefore, cyber regulations are the sure way to stop cybercrime. According to the UNHRC, the freedom of expression and information guaranteed by Article 19 of the ICCPR includes the ability to access and share information, ideas, and opinions online. Article 19(3) of the ICCPR has a crucial provision that reads that the privilege granted in this article's second paragraph comes with specific obligations and responsibilities. For the preservation of public health, morality, or public order;

(a) For the observance of others' rights or reputations; and

(b) For the protection of national security.

Therefore, it is necessary to strike a balance between the right to information freedom and other rights. The United Nations Human Rights Commission has emphasized that people's online rights must be safeguarded in the same way that their offline rights are. Human rights are being debated freely in the internet era. With recent improvements in the cyber domain, we see human rights violations every day, and an individual's privacy is jeopardized. These include online freedom of expression and sexual harassment, as well as cyber racism, cyber bullying, and cyber homophobia. (Agarwal, 2021).

Fortunately, the use of the World Wide Web or advancements regarding technology do not give the criminal license to abuse and do everything he desires. Of course, there are laws in place to protect the right to privacy both in the real world and in online. The following statutory model may be useful in addressing abuses of privacy.

- Information Technology Act, 2000
- Indian Penal Code, 1860
- The Personal Data Protection Bill, 2019
- The Information Technology (Intermediary Guidelines and Digital
- Media Ethics Code) Rules 2021

**Information Technology Act, 2000**

In India, the Information Technology Act of 2000 includes laws aimed at combating cybercrimes and defending human rights online. In cases of cybercrimes, Section 43A, which addresses payment for illegal disclosure of sensitive personally identifiable information, is one of the essential provisions that supports human rights.

The Information Technology Act additionally contains a number of other provisions that address cybercrimes in along with Section 43A, including Section 66 (computer-related offenses), Section 66A (punishment for transferring abusive messages through interaction services), Section 66B (punishment for dishonestly acquiring hacked resources from computers or communication devices), Section 66 C deals with “punishment for violating privacy, Section 67 penalizes the digital publication of pornographic materials. and Section 66E (punishment for privacy violation).

Section 72 and Sec 72 A of the Act addresses penalties for breaches of privacy and confidentiality in this respect. Under Sec 72 A person will be punished for three years or with fine, which can extend to 3 years or can be punished with both. (Raghav & Marwaha, 2022).

These divisions work together to provide legal guidelines to prevent cybercrimes and give victims redress, so promoting the protection of human





rights in the digital sphere. It's important to remember, though, that based on case law and legislative changes, the interpretation and application of these rules may change over time. In order to comprehend how these regulations, safeguard human rights in the context of information security, individuals and groups should keep up with the most recent advances in cybercrime legislation and doctrine.

**Indian Penal Code, 1860**

Voyeurism is covered in Section 354 C. The Criminal Law (Amendment) Act of 2013 introduced this clause. It therefore becomes illegal to observe or record a lady doing something confidential. According the terms of the IPC, taking pictures with the female's permission but then sharing them with anyone else constitutes a crime.

According to Section 354 D, a male who stalks a woman by following her and making attempts to communicate with her notwithstanding her obvious dislike or by monitoring her online activities or other types of digital correspondence. The victim of some crimes, as defined in sections 376, 376 A, 376 B, 376 C, 376 D, and 376 E, is protected from revelation by section 228-A. It safeguards the confidentiality of the victim so that it won't be compromised by any form of publicity. The Indian Evidence Act's Section 126 addresses communication between businesses. Even after the employment has ended, this duty remains. Section 129 safeguards private communications with legal professionals. (Raghav & Marwaha, 2022).

**The Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules2021**

The Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, often known as the IT Rules 2021, are crucial for governing the Indian digital market. These regulations, which were established by the Information Technology Act of 2000, have an impact on human rights, notably those related to equal treatment, confidentiality, and freedom of expression. An outline of how these laws may affect online human rights is given below: The increasing obligation placed on electronic agents, such as social media platforms and messaging applications, to block or restrict availability to specific content, is one of the main features of the IT Rules 2021. Although the restrictions are designed to stop the spread of dangerous content, there are worries that they could lead to excessive censorship and restrict freedom of speech. A further worry is that intermediaries might be held accountable for failing to immediately delete information that has been reported to them.(Ministry of Electronics and Information Technology, Government of India, 2023).

Various public and commercial organizations are collecting countless unique details, usually without the subjects' knowledge or agreement. Personal data are pieces of information that are gathered about a person without that person's

consent, and their use has raised questions about people's rights to privacy and protection. The GDPR lays forth rigid regulations for accessing personal data safely and preventing its misuse without the individual's or organization's authorization. Additionally, it has provided access to their personal information so that anyone can update their information and delete any records that are no longer needed or legitimate. (European Union, 2016)

**The Personal Data Protection Bill, 2019**

The 2019 Personal Data Protection Bill, which is being proposed in India. The bill was presented on December 11, 2019, in the Lok Sabha, the lower house of the Indian parliament, where it is now being discussed. The main goal of the legislation is to provide people significant control over their personal data. The law requires that before collecting, using, or disclosing a person's personal information, an organization get that person's consent. The bill stipulates that a narrow subset of personal data categories may only be collected in India. There should only be a few exceptions allowed. (Personal Protection Data Bill, 2019).

**Conclusion**

Crime predates human civilization, and cybercrime predates the creation of the computer, the marvel device that forever changed how people lived. The use of computers has permeated every aspect of daily life. They have been used for a wide variety of things, from study to personal and professional activity. Computers are becoming more and more common, and they are used in every industry, which has led to the development of new technologies. It would be accurate to state that the computer is what is powering the information technology revolution. As a result, privacy has grown to be a significant issue. (Sood, 2014). Global actions are the key to solving this issue, so acting at the national level is unlikely to have a significant impact. However, it is still required to provide a process by which persons who are the victims of privacy violations can receive an appropriate remedy.(Kakde, 2020). India doesn't have any independent data protection laws. The current legal norms have yet to be put to the test in cyberspace since the courts have not had the chance to directly address any cases concerning cyberspace privacy issues.(Banday & Farooq, 2012). Cyber security has gained worldwide attention as the digital economy has developed over the past ten years. Although the public and private sectors are undergoing a digital revolution, it is increasingly clear that they are lagging behind when it comes to cyber security threats.(Garg, 2022). The 2013 publication of the National Cyber Security Policy is another key move made by the Indian government to ensure cyber security and manage cyber attacks in India.(Kakde, 2020). A fundamental human right is privacy. The right to privacy is guaranteed under Article 21 of the Indian Constitution as an essential component of life and individual freedom. Since the advent of digitalization has made privacy more vulnerable in both the real and virtual worlds, it would seem that legislation and safety measures are now necessary.(Raghav & Marwaha,





2022).

We separate the privacy protection into the following stages.

(a) Data gathering: The first step in protecting privacy is the gathering of the data itself. The highest authority must establish rigorous data collecting policies that expressly state the following things.

- Only authorized appointed agencies are permitted to collect information.
- Information is solely gathered legally necessary purposes.
- Personal information must be sufficient, pertinent, and not excessive, and the reason for information acquisition must be stated.

(b) Data Safety

The proper organizational and technical measures must be used. If data is stored on a server, the Indian government must have complete authority over that server. All security precautions against unauthorized access must be implemented by the server.

(c) Data Processing

Personal information must be handled honestly and legally. Processing of data should be limited to the intended use. It is necessary to properly dispose of the data after processing.

(d) Data Accessibility

Additionally, there have to be measures functioning to make certain that data does not leave Indian Territory. If information crosses borders, appropriate safeguards should be adopted to guarantee that its authenticity stays confidential elsewhere than India, and additionally there shall be an arbitration agreement amongst each country for processing the data.

**Findings**

- India finally received its first, long-awaited model e-Court. E-court adoption in India is ostensibly just getting started. Privacy-related issues are yet unresolved.
- Due to the extensive storing of sensitive and private data, e-governance presents special privacy challenges. E-government has offered growth and internationalization new dimensions, but governmental privacy needs to be systematically improved.
- Stars' privacy is their primary concern, yet the press presents an enormous risk to it because every famous person speculation turns into breaking news on the vast majority of news networks. Today, casting couches are a fairly common marketing technique that directly attack people's privacy. There is no set procedure for handling this problem; however privacy borders will offer an alternative.
- As long as we do not guarantee organizations with an effective structure for

safeguarding private information, we could lose the global outsourcing market. We continue to rely on certain global norms, but it will be challenging to protect the rights of stakeholders without a legal framework in place.

- We require a privacy framework that concentrates solely on e-business and addresses privacy concerns while also providing legal aid in the event of fraud or criminality. Issues that must be addressed within the privacy framework include adequate preservation of personally identifiable information such as credit cards, safe credit of money throughout online transactions, privacy, honesty, availability, and verification of the party before the exchange of funds begins.
- If we do not guarantee businesses with an adequate structure for safeguarding personal information, we risk losing the outsourcing market. We continue to depend on some global norms, but it will be challenging to protect the interests of stakeholders without a framework of law. There should be rules on the job like mobile devices that are completely prevented, beforehand detection of staff members all work under electronic surveillance, and technological advances utilized for accessing staff members computers because confidentiality at the place of employment is also neglected. Hundreds of thousands of staff members are employed in the foundations, and as "individuals are the most vulnerable component for data protection," there must be guidelines there.(Kunar & Ganjoo, 2018).

The suggested approach has provided headroom for development so that novel fields can be introduced without affecting with other areas. The idea for a system has been designed to be adaptable and scalable in order to meet not only current but also prospective requirements. An organized well structure to guarantee privacy is certainly essential not just for a human being, but also for the community's and the advancement of the nation's economy. For Improving the security of human rights in internet banking is critical for protecting individuals' privacy, security, and respect in the digital era. To safeguard the transfer of private information over the World Wide Web, banks should utilize strong encryption techniques. To get to their online banking accounts, demand clients to use multi-factor authentication methods such as biometrics, one-time passwords (OTP), or physical tokens. To repair weaknesses to safeguard against new dangers, businesses should keep their digital banking systems, apps for mobile devices, and security programs up to updated.

**References:**

1. Legal Advice. (n.d.). Retrieved from Breach of Privacy and confidentiality under information Technology Act,2000: legalserviceindia.co/article/1288-Breach-of-confidentiality-html#: ~:text
2. Adam, M. (2017). Big Data and Individual Privacy in the Age of the Internet of Things. Technology Innovation Management Review, 12-24.





3. Agarwal, S. (2021, Feburary 5). Cyber security and human rights. Retrieved 2023, from Rising Kashmir: http://risingkashmir.com/cyber-security-and-human-rights#:~:text=Cyber%20crimes%20are%20unlawful%20acts,real%20threats%20to%20victims%20worldwide.
4. AI and Privacy: The privacy concerns surrounding AI, its potential impact on personal data. (2023, April 25). Retrieved from The Economic Times: https://economictimes.indiatimes.com/news/how-to/ai-and-privacy-the-privacy-concerns-surrounding-ai-its-potential-impact-on-personal-data/articleshow/99738234.cms?from=mdr
5. Alawida, M., Omolara, A. E., & Abiodun, O. I. (2022). A deeper look into cybersecurity issues in the wake of Covid-19: A survey. Journal of King Saud University - Computer and Information Sciences, 8176-8206.
6. Article 12 Universal declaration of Human Rights, 1. (n.d.).
7. Article 12 Universal Declaration of Human Rights, 1. (n.d.).
8. Article 17 International Covenant on Civil and Political Rights, 1. (1976).
9. Article 18 ICCPR, 1. (1966).
10. Article 19 ICCPR, 1. (1966).
11. Article 2 UDHR, 1. (1948).
12. Article 2(1) ICCPR, 1. (1966).
13. Article 2(2) ICESCR, 1. (1976).
14. Article 21 Constitution of India, 1. (1948).
15. Article 21 ICCPR, 1. (1966).
16. Article 22 ICCPR, 1. (1966).
17. Ashraf, C. (2022). Exploring the impacts of artificial intelligence on freedom of religion or belief online. The International Journal of Human Rights, 757-791.
18. Banday, T., & Farooq, A. M. (2012). Indian approach to Privacy in Cyberspace. IARIA.
19. Bhandari, V., & Sane, R. (2016, Oct 10). Towards a Privacy Framework for India in the age of Internet. Retrieved 2023, from National Institute of Public Finance and Policy: https://macrofinance.nipfp.org.in/PDF/1LEPCPr_BhandariSane20160926.pdf
20. Braun, V., & Clarke, V. (2021). One size fits all? What counts as quality practice in (reflexive) thematic analysis? Qualitative Research in Psychology, 328-352.
21. Brush, K., Rosencrance, L., & Cobb, M. (2023, sep 25). Cybercrime. Retrieved sep 27, 2023, from Tech Target Security:

https://www.techtarget.com/searchsecurity/definition/cybercrime

22. BYJU'S. (2021, 12 23). Right to Privacy. Retrieved 2023, from Byjus Exam Prep: https://byjus.com/free-ias-prep/right-to-privacy/
23. Chen, Y., Ramamurthy, K., & Wen, K.-W. (2014). Organizations' Information Security Policy Compliance: Stick or Carrot Approach? Journal of Management Information Systems, 157-188.
24. Daryabar, F. e. (2013). A survey about impacts of cloud computing on digital forensics. International Journal of Cyber-Security and Digital Forensics, 77.
25. Dastin, J. (2018, October 11). Amazon scraps secret AI recruiting tool that showed bias against women. Retrieved from Thomson Reuters: https://www.reuters.com/article/us-amazon-com-jobs-automation-insight-idUSKCN1MK08G
26. Dastin, J. (2018, October 11). Amazon scraps secret AI recruiting tool that showed bias against women. Retrieved from Thomson Reuters: https://www.reuters.com/article/us-amazon-com-jobs-automation-insight-idUSKCN1MK08G
27. David, K. A., Al-Hadhrami, T., & Alazab, M. (2021). BCFL logging: An approach to acquire and preserve admissible digital forensics evidence in cloud ecosystem. Future Generation Computer Systems, 1-13.
28. Dobrygowski, D. (2021, Nov 23). Rebuilding Digital trust for inclusive future. Retrieved sep 25, 2023, from World Economic Forum: https://www.weforum.org/agenda/2022/12/losing-digital-trust-will-harm-technological-innovation/
29. European Union. (2016). Regulation (EU) 2016/679 of the European Parliament and of the Council on General Data Protection Regulation. Retrieved sep 29, 2023, from available at: https:/eur-lex.europa.eu/eli/reg/2016/679/oj





# Promoting equal employment opportunities for the third gender in the public sector

***Manisha[1], Dr. Shambhavi Sinha[2]***
*Research Scholar, Bennett University, Greater Noida, Uttar Pradesh [1]*
*Assistant Professor, Bennett University, Greater Noida, Uttar Pradesh[2]*

**Abstract**

Employment in the public sector guarantees that the general public has the ability to engage in state affairs. In principle, public employment may be considered as a new sort of property or economic wealth. However, in order to share benefits or powers, it needs equitable and effective involvement. Representation of several groups and individuals is necessary for efficient administration. To make democracy and national unity a reality, all sectors of society must participate equally and effectively in the activities and administration of the country. Prior to independence, the nation's public sector was dominated by powerful and privileged groups of individuals, making the philosophy of equal opportunity in public employment very essential to Indian residents.[1] This principle is established in clause 1 of Article 16 of the Indian Constitution, which declares that all citizens would have equal opportunity in employment and appointment to any governmental office. It also permits the state to reserve appointments for the most disadvantaged members of society, so that the "right to equality" is no longer a utopian idea. The vulnerable and disadvantaged groups, such as women and transgender, continue to be underrepresented in the public sector and confront several obstacles in the workplace. This research seeks to investigate the many forms of gender prejudice and discrimination against women and transgender in the workplace. In addition, it examines the requirements of Articles 14 and 16 pertaining to equality of opportunity in public employment

**Key words: -** *Employment, Economic wealth, Democracy and national Unity and Indian Constitution.*

[1] *Das A, "Gay and Transgender Rights in India: Naz Foundation V. Government of NCT of Delhi" [2010] SSRN Electronic Journal http://dx.doi.org/10.2139/ssrn.1701077.*

## Introduction

Affirmative action seeks to create social equality by providing sociologically and economically excluded groups with privileged and preferential treatment. According to Aristotle, injustice arises when equals are treated unequally as well as when unequal are treated equally. The major purpose of the Indian Constitution was to construct a democratic republic where justice thrived in all dimensions, including social, political, and economic justice, as well as equality in dignity and opportunities.

One of the six essential rights granted to all Indian citizens is the right to equality. Article 16 concerns equitable job opportunities in the public sector. There are several interpretations of the idea of equal opportunity, and there is no consensus on its precise meaning. The Indian Constitution has given this clause an expansive interpretation. The Equal Employment Opportunity notion refers to: Job opportunities, Job conditions, In the workplace, the re-area variety of relationships to consider, The assessment of results, Possibilities for preparation and advancement in one's profession.[2]

Article 16 is an illustration of the application of the fundamental guideline with specific attention to the possibility of governmental appointments. It says that everyone has an equal chance in things pertaining to jobs or recruiting for any government work. Article 16 guarantees equal opportunity in the choosing of public authorities. In State of J & K vs. Triloki Nath Khosa, the Supreme Court of India ruled that "equality of opportunity" implies that every individual should be eligible for employment in any job under the State based on his or her qualifications and talents[3] Therefore, Article 16 does not prohibit the state from suggesting the necessary qualifications or screening exams for public service selection.

This investigation aims to demonstrate a relationship between Articles 14 and 16 of the Constitution and service reservations. Article 16(1) is one of the aspects of Article 14 (1); it concretizes the generality of Article 14 and defines "equality of opportunity" in sectors of work under the State in a constitutional setting.[4]

[2] *C. L. Cole and Shannon L. C. Cate, "Compulsory Gender and Transgender Existence: Adrienne Rich's Queer Possibility" (2008) 36 WSQ: Women's Studies Quarterly 279 http://dx.doi.org/10.1353/wsq.0.0088.*

[3] *"Empowering Transgender Population in India through Community Libraries" (2022) 68 Annals of Library and Information Studies http://dx.doi.org/10.56042/alis.v68i4.54884.*

[4] *Sawant N, "Transgender: Status in India" (2017) 1 Annals of Indian Psychiatry 59 http://dx.doi.org/10.4103/aip.aip_43_17.*





This article also examines "equal pay for equal work" and chances for transgender in the public sector. The article concludes with a discussion of significant case law, as the right to equal opportunity in public employment is established via multiple landmark decisions and reforms, and it builds an appreciation for employment issues under the Indian Constitution.

## Part 1- Gender Biasness

### Biasness on the basis of gender: Third gender

A pattern of conduct that favors one gender over the other constitutes gender prejudice. Gender bias is often characterized as preferring males over women. To define gender prejudice in its entirety, we must first differentiate between the terms gender and sex. When we speak to "sex," we mean socially or culturally determined standards and roles for males, women, and transgender individuals. When we discuss transgender rights, we position the subject in an area where an excessive number of difficulties develop. The word "sex" refers to the biological differences between men, females, and transgender individuals.[5]

Women continue to be underrepresented in corporate industries across the board and their representation declines as they ascend the corporate or social ladder. In order to advance into corporate leadership positions, they encounter several obstacles and problems, including both gender-based and unconscious gender discrimination. Several organizations have shown their dedication to gender equality by developing family welfare policies and programmers and by boosting women's careers and the professional environment.[6] Notwithstanding, latent gender discrimination continues to impact women in the workplace, and additional efforts should be done to enable highly qualified women to rise into administrative positions.

- Biasness in public employment towards Transgender at workplace Transgender employees often face and endure considerable prejudice on the job due to their gender identity or sexual orientation. This sort of discrimination may entail a variety of offensive actions, such as office rumors and false rumors about the identity of a transgender employee. Physical or sexual violence is conceivable[7] The first-ever report on transgender rights by the National Human Rights Commission offers a transgender picture of the transgender situation in the United States.

[5] *"EDUCATION FOR THE HIJRAS: TRANSGENDER PERSONS OF INDIA" (2018) 6 Knowledge Cultures 51 http://dx.doi.org/10.22381/kc6120185.*

[6] *Dutta A and Roy R, "Decolonizing Transgender in India" (2014) 1 TSQ: Transgender Studies Quarterly 320 http://dx.doi.org/10.1215/23289252-2685615.*

[7] *LGBT T, Proud to Be Transgender (2019).*

According to the 2011 census, there are 490,000 transgender people in India, however only a tiny number of them are employed. In its 14-month existence, a Chennai-based startup that aims to integrate the transgender population into society has only been able to place 42 transgender persons. Therefore, specialization in transgender professions in the workplace is an urgent need.[8] The delay in the Indian legal system to acknowledge the third gender resulted in a denial of equal protection under the law and socioeconomic discrimination in the community, especially in the job. Improving the employment environment in India to be more accepting of transgender individuals would be a challenging task, since societal transformation of this sort has historically been a difficult process in India.[9]

## Part 2- Indian Constitution

### Constitutional Rights

The principle of equality is an evolving and active concept. The key elements that are significant to Indian society are stated in the Preamble of the Indian Constitution, as well as in the articles under subtitle "Right to equality" (Articles 14-18). “Equality of status and opportunity” is the primary target because one of the greatest cornerstones of Indian democracy is equality.[10] The Universal Declaration of Human Rights, adopted in 1948 states that “all are equal before the law and are entitled to equal, protection of the laws without any discrimination”. The principle of equality implies preventing discrimination based on inequalities in wealth, status, services, and resources not just between people but also between groups of citizens such as Scheduled Tribes and Scheduled Castes. Equality of opportunity goes hand in hand with equality of equality.[11] Article 14 refers to the genus, while Articles 15 and 16 refer to the organisms. The Delhi High Court ruled that the issue of employment comes under Article 16 and not Article 15 (3), and therefore declined to refer to Article 15.

[8] *Gunjawate DR and others, “Knowledge and Attitudes toward Transgender Community among Speech-Language Pathologists in India: A Questionnaire-Based Exploration” (2020) 21 International Journal of Transgender Health 455 http://dx.doi.org/10.1080/26895269.2020.1753135.*

[9] *Hurbada O, “Transgender Community Property Rights in India” [2021] SSRN Electronic Journal http://dx.doi.org/10.2139/ssrn.3998578.*

[10] *Gunjawate DR and others, “Knowledge and Attitudes toward Transgender Community among Speech-Language Pathologists in India: A Questionnaire-Based Exploration” (2020) 21 International Journal of Transgender Health 455 http://dx.doi.org/10.1080/26895269.2020.1753135.*

[11] *Das A, “Gay and Transgender Rights in India: Naz Foundation V. Government of NCT of Delhi” [2010] SSRN Electronic Journal http://dx.doi.org/10.2139/ssrn.1701077.*





“Equality is a fundamental part of the Indian Constitution, and any treatment of equals unequally or unequal as equals would be a breach of the basic structure of the Constitution of India,” the Supreme Court said. Affirmative action aims to achieve equality in different communities by going beyond the principle of non-discrimination.[12] The rule of law is at the center of our Constitution, and the rule of law is one of its most prominent features. As a result, the Court cannot prevent itself from issuing an order that is contrary to Articles 14 and 16 of the Constitution. Articles 14 and 15 are given effect by Articles 16(1) and 16(2). All of these articles are part of the same fundamental code of guarantees and are mutually reinforcing. Citizens of India have the right to apply for vacant positions in the public sector. Reasonable classification is acceptable for a variety of employment-related reasons. In order to eradicate administrative bias, favoritism, unfairness, or abuse of power in this field, the Supreme Court has established doctrines governing characteristics of public service from the initial appointment to termination of public servants.[13]

The Supreme Court of India proposed in K.C. Vasanth Kumar vs. State of Karnataka that reservations for backward groups should be dependent on the mean test. The court also proposed that the reservation policy be revised every five years or so, and whether a class has progressed to the point that it no longer needs reservations. The name of this backward class should be taken off the list.

In Indira Sawhney &Ors. v. Union of India the Supreme Court decided:

- Supported Separate reservations for other weaker and backward classes in state and central government jobs are being imposed.
- Creamy layer and other backward classes have been ordered to be denied reservation privileges.
- Reservations must be kept to a minimum of 50% of total capacity.
- Separate reservations for socially disadvantaged forward castes were declared unconstitutional.

[12] *Bhattacharya S, Ghosh D and Purkayastha B, “‘Transgender Persons (Protection of Rights) Act’ of India: An Analysis of Substantive Access to Rights of a Transgender Community” (2022) 14 Journal of Human Rights Practice 676 http://dx.doi.org/10.1093/jhuman/huac004.*

[13] *“EDUCATION FOR THE HIJRAS: TRANSGENDER PERSONS OF INDIA” (2018) 6 Knowledge Cultures 51 http://dx.doi.org/10.22381/kc6120185.*

## Reservation and Quotas In Services

Article 16(4) entails the requirement that the government may make commissions, positions, or reservations in favor of any "backward class" of people or individual who is not fairly represented in the state's public services. In the case Mohan Kumar Singhania vs. Union of India, the Apex Court clarified that Article 16(4) is an "enabling clause" that gives the state the authority to make certain reservations or provision of appointments or positions in the favor of any weaker or backward group.[14] For demanding reservation, Article 16(4) does not enforce any constitutional obligation organ any Fundamental Right.

As result, the provision of 50% reservation in a particular year should be applied to the entire unit rather than the whole cadre, division, or unit, as the matter may be.[15] In this phase ofreservationunderArticle16,the state cannot disregard the rights of other people. Reservations of castes and communities such as the Harijans, backward Hindus, Muslims, Non-Brahmins, and Christians were rendered in a state on the basis of different class groups and castes. In Venkataraman v/s State of Madras, the Supreme Court of India held that Article 16(4) specifically allows backward-class reservation of positions. Reservations should not be made rashly because Article 335 supports the consideration of the arguments of members of the STs and SCs in the appointment process.

## Equal Pay for Equal Work

The Supreme Court derived the concept of "equal pay for equal work" from Articles 14, 16,and 39(d) of the Indian Constitution, as well as the Preamble. “The theory of Equal Pay for Equal Work was first addressed in the 1962 case of Kishori Mohanlal Bakshiv. Union of India, in which the Supreme Court ruled hatit could not be applied in acour to flaw.” However,it wasn't until Mackinnon Mackenzie's case in 1987 that it gained proper recognition. Whilesuch a concept is not explicitly stated in the Constitution, it has evolved into a Fundamental Right. As the Apex Court stated in Stateof Madhya Pradesh vs. Pramod Bhartiya, the doctrine of "equal pay for equal work" is essential to the equality

[14] *Gunjawate DR and others, “Knowledge and Attitudes toward Transgender Community among Speech-Language Pathologists in India: A Questionnaire-Based Exploration” (2020) 21 International Journal of Transgender Health 455 http://dx.doi.org/10.1080/26895269.2020.1753135.*

[15] *Hurbada O, “Transgender Community Property Rights in India” [2021] SSRN Electronic Journal http://dx.doi.org/10.2139/ssrn.3998578.*





principle contained in Article 14 and derives from it.[16] The doctrineisalsoreintroducedinArticle39(d),whichisadirectiveprinciplethat requires the government to guide its policies toward achieving equal pay for equal work for men and women. “The principle of equal work for equal pay will apply on the basis of similarorequal work, but it does notimply that there should be full similarityinall contexts,”the Court said. If the two types of people perform identical jobs for the same employer, with similar responsibilities and work environment, the law would apply, and the state would not be able to differentiate between the two categories in terms of salary.” Previously, the right to equal pay for equal work was only guaranteed through Article 39 of the constitution under Directive Principles of State Policy. Although these Directive Principle sarenoten for ceablein the courts, they are critical to the nation's governance, and a state is required to take them in to account when enforcing laws. However, it is now undeniably a constitutional right under Articles 14, 15, and 16 of the Right to Equality, as previously stated. Via numerous court decisions, the right to equal pay for equal work has become a fundamental right.

The Fundamental Rights and Directive Principles are not meant to be mutually exclusive; rather, they are meant to complement one another. The essence of the job and the common employe rare then ecessitated specified conditions in order to invoke the applicable concept of equal pay for equal work.[17] The theory can be properly extended to cases of unfair pay scales based on no classification or an unreasonable classification that imbibes varied and separate pay levels when doing similar work and working for the same employer. Employees of the same level, fulfilling similar roles, and discharging identical duties and obligations under thesame employer must be paid similarly. An army order granting certain benefits to thoseentering the Army Medical Corps after obtaining a post-graduate certification was found notto be in violation of Articles 14 and 16. It was offered as a reward in order to attract morepeople with higherqualifications. Inthiscontext,theSupremeCourtobserved“Solongassuchvaluejudgmentisrendered bonafidefairlyonacomprehensiblecriteriathathasalogicalrelationwiththesubjectof distinction,suchdifferentiationwouldnotamounttodiscrimination,”It'salsoveryimp or tant to stress that equal pay for equal work is a requirement of Article 14. Equal wages for unequal jobs, on the other hand, is an atural renunciation of that right.”

[16] *Hurbada O, “Transgender Community Property Rights in India” [2021] SSRN Electronic Journal http://dx.doi.org/10.2139/ssrn.3998578.*

[17] *Gunjawate DR and others, “Knowledge and Attitudes toward Transgender Community among Speech-Language Pathologists in India: A Questionnaire-Based Exploration” (2020) 21 International Journal of Transgender Health 455 http://dx.doi.org/10.1080/26895269.2020.1753135*

**Part- 3 Other Legislative laws**

**Transgenders And Their Employment Status**

Transgenderpeopleareamongthemostvulnerableandunprotectedgroupsinoursociety,withmany rights denied to them, including the right to participate in economic activities and opportunities in public jobs. They experience high levels of humiliation and embarrassment in almost every aspect of their lives, including health, education, jobs, social schemes, and entitlement. Self-esteem and a sense of responsibility a real so harmed by severe social exclusion.

Article 14 of the Indian Constitution provides equal opportunities to both men and women in are as such as politics, economics, and civil affairs.

Article16deals with matters of public jobs, equality of opportunity.

Article 42 also requires the government to make provisions to ensure that people are treated fairly and humanely.

Furthermore, there are many factors that contribute to their economic hardship, which are discussed below:

- Discrimination: Transgender people face prejudice at work as well, and there is a high degree of stigma and embarrassment at work, pushing and pressuring them to leave in a short period of time. At work, they are mentally, emotionally, and sexually assaulted for which they have never earned justice. Transgender people who are unable to find employment are forced to take suboptimal or low-paying jobs or rely on begging for a living.
- Livelihood: Transgender who prefer or are forced to work in such sex jobs do so for a variety of reasons, including the potential HIV and health risks.
- Family and Society: Transgender people are excluded from their communities and do not receive any financial assistance. There are no job openings for transgender people, even though they are educated and trained.•Economic Deprivation: Transgender people are forced to live in harsh economic circumstances due to a lack of education and social support. There is no financial safety net for the group in the event of a crisis or medical problem, especially for poor transgender people or elderly transgender people.

In the landmark case of National Legal Services Authority v. Union of India,[18] the Supreme Court of India ruled transgender people to be distinct from gender

[18] *Das A, "Gay and Transgender Rights in India: Naz Foundation V. Government of NCT of Delhi" [2010] SSRN Electronic Journal http://dx.doi.org/10.2139/ssrn.1701077.*





binary (male/female) and to be recognized as a third gender under the Constitution of India on April 15, 2014. The Transgender Persons Actwasrecently passed by the Indian parliament to give legislative force to the judgment.[19] This act describes "transgender" as "any person whose gender does not correspond to or fit the gender assigned at birth," which comprises trans-woman as well astrans-man. The Transgender Persons Act forbids employers from showing any type of discriminatory behavioragainsttrans gender people in hiring, promotion, and other job-related decisions. Asa result, the majority of employers will be considered establishments. An' establishment' is abroad term that refers to any corporation, firm, association, trust, organization, or institution. Denial or terminations of access to, or unequal treatment at workplace, are both examples of discrimination.

The government has suggested offering transgender people equal work opportunities in the proposed Transgender Persons (Protection of Rights) Rules, 2020—anamended edition of an earlier draft released in April, 2020.[20] Accordingto the new draft, every establishment must take all reasonable steps to ensure that no transgender individual is discriminated against in any matter relating to employment, including, but not restricted to, infrastructure adjustments, recruitment, promotion, and other associated matters.

The proposed laws require every business to post an equal opportunity plan for transgender people on its website or in prominent locations around its premises. The policy will outline the infrastructure, security and safety procedures, and facilities that will be offered to transgender people for them to efficiently perform their duties. [21]

[19] *Bhattacharya S, Ghosh D and Purkayastha B, "'Transgender Persons (Protection of Rights) Act' of India: An Analysis of Substantive Access to Rights of a Transgender Community" (2022) 14 Journal of Human Rights Practice 676 http://dx.doi.org/10.1093/jhuman/huac004.*

[20] *Bhattacharya S, Ghosh D and Purkayastha B, "'Transgender Persons (Protection of Rights) Act' of India: An Analysis of Substantive Access to Rights of a Transgender Community" (2022) 14 Journal of Human Rights Practice 676 http://dx.doi.org/10.1093/jhuman/huac004.*

[21] *Deangelo L, Transgender (Webster's Digital Services 2011).*

## Conclusion

The principle "equality of opportunity" has widespread support among citizens of modern societies. The concept of a society in which people are not discriminated against because of their race, nationality, sex is commonly held as desirable in and of itself. For certain people, the concept is relatively more convincing than any justification given in favor of it smattered justice.

Talking about the transgenders, there must be attempts to register a transgender in the course of the employment with the Central and State Governments, as well as a nodal division that can collaborate with other related departments to provide access to available Government programs for transgenders, such as schooling, jobs, healthcare, and other social safeguards schemes. To provide continuous support to them, some adverse and substantive mechanism must be developed. (For example, the Ministry of Small and Micro Enterprises (MSME), Indian Institutes of Management (IIMs), and the Ministry of Human Resources Development (MHRD).

Since the aim of this study was to analyze types of gender discrimination at workplace along with the provisions of Articles 14 and 16, it's important to remember that it's not just the government that needs to develop; we, too, must evolve. On the bright side, concerns are being lifted in support of equal treatment for all genders in our country, and they are being addressed, but not properly. After all, every gender is a human being, and every human being has the right to a proper and good living if given the right opportunity. There is also no need for needless and explicit reservations in the realm of services if all people are given a fair chance in the educational sector. To conclude this paper, it is clear that a change in the reservation in public employment, i.e. equal opportunities in public employment, is both necessary and urgent in India.

To usher in a new era of global equality, everybody, regardless of gender, age, or race, must contribute to the promotion of women and transgender rights. Gender inequality is clearly a severe problem in today's world, as evidenced by the preceding discussion. Regardless of the fact that its scope has shrunk dramatically, it appears to persist and has an impact on millions of people every day. And there are several complicated variables that lead to gender disparity. However, with education and positive thinking; there are reasons to believe that theopathetic ending gender inequality can be found.

## Reference:


1. Das A, “Gay and Transgender Rights in India: Naz Foundation V. Government of NCT of Delhi” [2010] SSRN Electronic Journal http://dx.doi.org/10.2139/ssrn.1701077
2. C. L. Cole and Shannon L. C. Cate, “Compulsory Gender and Transgender Existence: Adrienne Rich’s Queer Possibility” (2008) 36 WSQ: Women’s Studies Quarterly 279 http://dx.doi.org/10.1353/wsq.0.0088.







3. Empowering Transgender Population in India through Community Libraries” (2022) 68 Annals of Library and Information Studies http://dx.doi.org/10.56042/alis.v68i4.54884.
4. Sawant N, “Transgender: Status in India” (2017) 1 Annals of Indian Psychiatry 59 http://dx.doi.org/10.4103/aip.aip_43_17
5. EDUCATION FOR THE HIJRAS: TRANSGENDER PERSONS OF INDIA” (2018) 6 Knowledge Cultures 51 http://dx.doi.org/10.22381/kc6120185.
6. Dutta A and Roy R, “Decolonizing Transgender in India” (2014) 1 TSQ: Transgender Studies Quarterly 320 http://dx.doi.org/10.1215/23289252-2685615.
7. LGBT T, Proud to Be Transgender (2019). Gunjawate DR and others, “Knowledge and Attitudes toward Transgender Community among Speech-Language Pathologists in India: A Questionnaire-Based Exploration” (2020) 21 International Journal of Transgender Health 455 http://dx.doi.org/10.1080/26895269.2020.1753135.
8. Hurbada O, “Transgender Community Property Rights in India” [2021] SSRN Electronic Journal http://dx.doi.org/10.2139/ssrn.3998578.
9. Gunjawate DR and others, “Knowledge and Attitudes toward Transgender Community among Speech-Language Pathologists in India: A Questionnaire-Based Exploration” (2020) 21 International Journal of Transgender Health 455 http://dx.doi.org/10.1080/26895269.2020.1753135.
10. Das A, “Gay and Transgender Rights in India: Naz Foundation V. Government of NCT of Delhi” [2010] SSRN Electronic Journal http://dx.doi.org/10.2139/ssrn.1701077
11. Bhattacharya S, Ghosh D and Purkayastha B, “‘Transgender Persons (Protection of Rights) Act’ of India: An Analysis of Substantive Access to Rights of a Transgender Community” (2022) 14 Journal of Human Rights Practice 676 http://dx.doi.org/10.1093/jhuman/huac004.
12. EDUCATION FOR THE HIJRAS: TRANSGENDER PERSONS OF INDIA” (2018) 6 Knowledge Cultures 51 http://dx.doi.org/10.22381/kc6120185
13. Gunjawate DR and others, “Knowledge and Attitudes toward Transgender Community among Speech-Language Pathologists in India: A Questionnaire-Based Exploration” (2020) 21 International Journal of Transgender Health 455 http://dx.doi.org/10.1080/26895269.2020.1753135.
14. Hurbada O, “Transgender Community Property Rights in India” [2021] SSRN Electronic Journal http://dx.doi.org/10.2139/ssrn.3998578
15. Bhattacharya S, Ghosh D and Purkayastha B, “‘Transgender Persons (Protection of Rights) Act’ of India: An Analysis of Substantive Access to Rights of a Transgender Community” (2022) 14 Journal of Human Rights

Practice 676 http://dx.doi.org/10.1093/jhuman/huac004.

16. Bhattacharya S, Ghosh D and Purkayastha B, "'Transgender Persons (Protection of Rights) Act' of India: An Analysis of Substantive Access to Rights of a Transgender Community" (2022) 14 Journal of Human Rights Practice 676 http://dx.doi.org/10.1093/jhuman/huac004.
17. Deangelo L, Transgender (Webster's Digital Services 2011).





# Strategizing corporate social responsibility towards human rights agendas: the study of Indian framework

***Dr. Neelam Tyagi,***
*Senior Assistant Professor, Faculty of Law, University of Delhi,*

**Abstract**

Today, the corporate sector is growing immensely but also evolving as an abuser of various rights of the people affected by its operations. Consistent with the realisation that corporation with deep pockets are responsible towards society and have a duty to redeem the abuses they inflict; liability is now statutorily imposed on them. However, little empirical evidence is available that gives due attention to the dynamics among the concept of CSR and human rights, current legal and regulatory structure, level of compliance, transparency in reporting, challenges surrounding CSR mandate and ambiguity in its implementation. Through secondary data, the paper sheds light on the realities of safeguarding human rights through CSR initiatives and uncovers the gaps between CSR in theory and its operation in practice. It concludes that a positive correlation between CSR and human rights objectives exists that requires further strategizing.

**Key words: -** *Corporate Social Responsibility, Human Rights, Corporate Sector and Human Rights Initiatives, Ground realities and Challenges to CSR mandate.*

***"Wealth created by the society has to be ploughed back into the society"***

**Mahatma Gandhi**

## 1. Introduction

Corporations draw and depend on society for their business operations. They require upgraded infrastructure for carrying out their activities and an educated workforce. Their actions affect consumers, employees, shareholders and other stakeholders. This interdependence calls for imposing a duty on corporations to responsibly and ethically contribute a portion of their wealth towards the welfare of society (Sharma, 2011). Self-regulation is also necessary by including societal concerns in their operations rather than mere focus on profit maximization (Garriga &Meie, 2004). The term Corporate Social Responsibility (CSR) is also known as corporate accountability, corporate citizenship, corporate ethics,

corporate responsibility and corporate sustainability. Originally, it was featured in 1953 in a write-up by William J. Bowen (Windsor, 2001). In 1970, Milton Friedman opined that Companies must adopt measures for integrating social and environmental matters into other commitments that will result in inclusive growth (Friedman, 1970). Since then, the theory of CSR has evolved and been acknowledged as an ethical standard, a moral duty and a socio-legal responsibility.

Regarding human rights, the General Assembly resolution 217 A in Paris led to a landmark document around human rights known as the Universal Declaration of Human Rights, 1948(UDHR). It documented universally protected fundamental human rights and laid the foundation for more than seventy human rights treaties. Subsequently, the United Nations Draft Code of Conduct on Transnational Corporations (1983) directed transnational corporations to respect the human rights of people in the country of their operation. The United Nations sub-commission on Human Rights (2003) laid down norms and responsibilities for transnational corporations and other business enterprises (U.N. Doc. E/CN.4/Sub.2/2003/38/Rev.2, 2003). Thus, the international documents oblige the companies to respect their ethical duty towards the stakeholders and society through CSR initiatives. The activities and projects undertaken as a part of CSR and the contribution received are a significant aid for the governmental goal of developing welfare states and a means to accomplish several human rights goals.

India promotes social welfare goals and strives to accomplish socio-economic justice through its policies and programmes. It is prescribed in the Indian Constitution under Part III on fundamental rights (e.g. right to life and personal liberty under Article 21) and Part IV on Directive Principles of State Policy (e.g. promoting social order under Article 38 and responsibility of the state to provide employment and education under Article 41). India became the foremost country to declare CSR spending binding under its Companies Act, 2013 (Act). Today, the Indian government utilizes CSR assistance for initiating activities and projects towards fulfilling its several goals and tackling diverse issues like poverty, education, nutrition and development.

The existing literature on CSR spending demonstrates its potential for socio-economic and environmental-related human rights protection. Even though there is an appreciation of the interconnect between CSR and its role in promoting human rights, there is little research on finding a deeper appreciation of ways to strengthen this distribution pattern in the future. With this idea, the paper assesses the effectiveness of CSR commitment and the role of corporations in fulfilling their objective of paying back to society. It gives insight into the magnitude of support extended by corporates in the government's efforts to uphold human rights.





## 2. Background Of The Study

Conventionally, the government authorities were duty-bound to protect and promote the human rights of its citizens. In contemporary times, it is an insufficient proposition as state funds are inadequate to meet societal demands. Above that, the corporate activities that intrude upon human rights and exert pressure on society and their financial capacity are some of the reasons that justify the inclusion of corporations as potent participants in the evolvement process (Balasubramanian et al., 2005). Companies commit their shareholders and stakeholders including employees, customers, investors, suppliers, governments, and local communities, to foster their human rights with utmost sincerity (Arrillaga & Andreessen, 2011). With this background, the study analyses the role of CSR initiatives in community development and human rights protection, benefits received under CSR and allocations for human rights defence (Tandon & Kaur. 2017). Few studies empirically analyse the CSR initiatives, willingness to perform these obligations and the scope of desired policy initiatives and interventions in accelerating the progress of the human rights agenda. The larger aim is to make the corporates accountable and contribute to several socio-economic and environment-related initiatives for protecting and promoting the human rights of its stakeholders at its core.

## 3. Review Of Past Studies/Literature

### 3.1 CSR

The Indian public sector operates in almost every area of business enterprises. They have a long tradition of CSR and frequently contribute to the development of different parts of the country, employment generation, caring for the health and safety of their workers and education of the children of their employees (Mishra & Suar, 2010). Jurists, thinkers and philosophers paved the foundation of the CSR movement and its varied facets. Bowen defines CSR as a duty towards relevant objectives and values of society (Bowen, 1953). Frederick expressed CSR as a way to 'oversee the operation of an economic system that fulfils expectations of the people (Frederick, 1960). World Business Council for Sustainable Development states CSR is a corporate commitment to be ethical and contribute to economic growth alongside improvements in the lives of their workforce and families, local communities and society (Garg, 2016). Again, the Economic Council defines CSR in terms of the duty of the corporations for its bearing on society (European Commission, 2001). The United Nations Industrial Development Organization describes CSR as the corporate integration of social and environmental concerns in its work operation.

However, corporates and critics resist the CSR movement on several grounds. For them, the company has an economic role and should make a profit only. As they already pay taxes, the state should refrain from financially burdening further. The companies lack a knack and understanding of varied social issues and CSR makes private organizations take up the function of public organizations/governments within whose domain the social issues fall (Smith,

1990). Contrarily, reports suggest that CSR initiatives remove the company's carbon footprints and improve its goodwill, market acceptability and recognition. It permits the companies to aid the government efforts by contributing to welfare initiatives for society (Buhmann, 2006). The corporation balances socio-economic and environment-related requirements or the triple-bottom-line approach. It allows corporates to address the wants of their shareholders and stakeholders, enhances the credibility and company's public image and a consequential increase in the business (Swanson &Orlitzky, 2018).

Internationally, the United Nations and several bodies have regularly examined the association between corporations and human rights, building standards for corporations worldwide to make them liable and committing to fulfilling moral, social and human rights norms of the shareholders, employees, customers and the community in which they operate. Every state government is accountable towards the international guidelines and human rights directives. With the vision of CSR, the social responsibility and role of corporations has become equally crucial. As parties to these international documents and guidelines (eg: OECD guidelines) meant for multinational enterprises, states respect them and corporations follow them. United Nations Global Compact Initiative (2009) is another endeavour towards convincing international companies to work towards the conservation of the universal principles of human rights (Runhaar& Lafferty, 2009).

### 3.2 Indian CSR Policy

The Indian Constitution is the grundnorm that enshrines the ideals of a welfare state. It honours every universal human rights-related instrument enforceable through Indian Courts. In the noteworthy judgement of M. Nagaraj &Ors. v. Union of India &Ors. (2006) 8 SCC 212, the Hon'ble Supreme Court of India determined that every individual possesses human rights independent of any Constitution because they are members of the human race, notwithstanding age, nationality, race, religion, sex, or economic status. CSR is now a statutory command in India. The Indian CSR programme based on the United Nations Guiding Principles on Business and Human Rights began with the Ministry of Corporate Affairs Voluntary Guidelines on Corporate Social Responsibility (2009) and National Voluntary Guidelines on Social, Environmental and Economic Responsibilities of Business (2011). Additionally, in 2012, the Securities and Exchange Board of India insisted that the listed companies file their business responsibility report based on National Voluntary Guidelines. Finally, India became the first country to introduce and legally pronounce the concept of CSR under Section 135 of the Act. It statutorily made CSR spending obligatory and reporting compulsory for every company under Rule 8 of the Companies (Corporate Social Responsibility) Rules, 2014. The provision aimed at enhancing the accountability of the corporates and made them contribute to the march towards socio-economic development.





As per this law, every company whose net worth is INR 500 crores or more, has a turnover of INR1,000 crores or more, or earns a net profit of INR 5 crore or more has to necessarily spend 2% of their net profit over the preceding three years on specified CSR activities. Furthermore, the list of CSR initiatives is stated under Rule 2 (d) of the Companies (Corporate Social Responsibility) Rules, 2014 and under Schedule VII of the Act. Proviso 2 to section 135(5) permits the company to clarify reasons for not spending the requisite amount. The Act stipulates the constitution of an internal monitoring committee known as the CSR committee to make decisions regarding the planning of the budget, implementing it in a structured manner and monitoring the policies concerning it.

In recent improvements, the high-level committee on CSR constituted by the Ministry of Corporate Affairs made much-required recommendations in 2015 and 2018, leading to the draft “National Action Plan on Business and Human Rights” and the “National Guidelines on Responsible Business Conduct”. For stricter observance of the CSR dictates, the Companies (Amendment) Act 2019 modified Section 135 and established that in the next three years, the companies will transfer the unspent amount to a special CSR account for expenditure on ongoing projects. If the CSR account is still unutilised, within 30 days it will be transferred to the funds mentioned under Schedule VII (including the Prime Minister National Relief Fund). Schedule VII relates to hunger, poverty, education, gender equality and women empowerment, providing employment and vocational training as prominent action areas for Indian corporations. Failure to comply with these provisions makes the company liable to a penalty of more than INR 50,000 but less than INR 25 Lakhs and a fine on every officer of such non-compliant company of more than INR 50,000 but less than INR 5 Lakhs, or up to 3 years of imprisonment as punishment, or even both.

### 3.3 CSR And Human Rights Connect

Corporate governance includes a set of policies and regulations about the functioning of a company. It remains integral to the market by determining power, accountability, decision-making and adequate functioning in a company. Corporate governance focuses on legal and ethical rules and brings accountability to functioning (Verma & Kumar, 2014). The CSR initiatives help enhance the reputation and brand image of a company. It provides them visibility through campaigns, attracts customers, makes them brand loyal, increases sales, motivates the employees and increases their retention rate (Luo & Bhattacharya, 2006). CSR activities can have far-reaching prospects for institutions and can be a means to advance the reputations of corporations to gain global investors (Sharma & Sathish, 2022).

Human rights touch on different aspects of a corporation connected with labour rights, payment of fair wages and non-discrimination. Every corporation views itself as a part of the social system and its operation positively impacts society (Kotler & Lee, 2005). United Nations Universal Declaration of Human Rights

(UDHR) under Article 1 declares 'each human being is born free with equal rights and has dignity'. The Protection of Human Rights Act (1993) under Section 2 (1) (d) declares human rights as a gamut of rights. Later, the World Conference on Human Rights (1993) or Vienna Declaration and Programme of Action oblige States to promote and protect human rights and fundamental freedoms irrespective of their political, economic and cultural systems. Human rights were specified as interrelated, interdependent and indivisible that facilitate, advance and adversely affect each other. Human rights are fundamental, universal, egalitarian and inalienable, entitling individuals to freedoms and liberties regardless of nationality, origin, sex, race, language, religion, or status (Reddy, 2016). These rights can be national or international and natural or civil rights (comprising of socio-economic and political rights). Within its ambit falls the right to life, liberty, work, food, shelter, movement, living standards, education, equality, vote, conscience, religion, freedom of speech, and non-discrimination as its essential facets. As mentioned in the international documents, states also accept their duty towards individuals and groups, refrain from any interference and abuse and initiate positive actions to facilitate the enjoyment of every human right. The state and the business landscape are shifting from mere philanthropy to responsible conduct to safeguarding human rights (Sood & Arora, 2006).

Human rights are thus rooted in the law and companies are obliged to appreciate and guard them, though this relationship between CSR and human rights is not appreciated. CSR measures are acknowledged to improve a company's goodwill in the market and contribution to sustainable development and the welfare of society (International Organization for Standardization, 2010. p.2.18). Within its scope, the concept includes a wide range of initiatives that has the upliftment of society at its base. It is a mechanism to alleviate poverty, human deprivation and other social issues beyond profit making. It influences reasonable compliance with human rights ideals, addresses labour and social security standards, tackles climate change imperatives, and marks sustainable utilisation of natural resources and fairer protection of consumer rights (Hanano, 2023).

CSR, denoted as the "triple bottom line approach", encloses the People (social), Planet (environment) and Profit (economic) facets of corporate initiative (by John Elkington). However, the CSR approach is top-down i.e.: a company decides and addresses the issues like community education, healthcare, disaster relief, and reducing pollution. But the bottom-up i.e.: keeping the individual at heart as against corporations should be followed. Companies should not simply pick issues of comfort but adopt unrepresented human rights agendas in their CSR initiatives (Avery, 2006). The CSR activities in the Asian continent still lag behind the West, especially in human rights and employment practices. Asia has become the factory of the world with the highest number of labourers so it must focus on defending the human rights of workers, labour-related abuses, gender discrimination, environment, health, and issues of migrant labour and trafficking (Debroux, 2006). In the context of reporting CSR activities, balance sheets and annual reports of the corporates leave scope for improvement (Gautam & Singh,





2010).

### 3.4 CSR Initiatives Of Corporate In India

Though the Right to food is a human right as well as a fundamental right in India, as per the Global Hunger Index Report of 2021, India (even with its schemes and programmes like Antodaya Ann Yojana, Annapurna Scheme, and Mid-Day Meal Scheme) stands at 101 (it was 94 in 2020) with a poorer ranking than neighbouring countries of Bangladesh, Nepal and Pakistan. The CSR initiatives remain concentrated on restricted sectors like community outreach, health, education and environmental issues. The problems of food security, challenges of poverty, conflicts, climate change and natural disasters are often not duly dealt with. The CSR and the right-to-food association remain the most under-researched due to poor transparency and a lack of efforts and commitment by corporations (Toussaint et al., 2021). Limited CSR initiatives for training farmers in scientific techniques, crop cultivation and appropriate usage of soil and fertilisers to decode the food security issue are assumed.

To combat Malnutrition and Malnourishment, companies run centres for women, children and other groups and provide medicinal facilities. Multiple corporations fund clean drinking water in villages (Ruia et al., 2018). Regarding Poverty Reduction, the government emphasises public-private partnership, industrial growth, eradication of poverty and running schemes for poor and weaker sections of society. Corporations create opportunities for workers through better job generation, employment creation and infrastructure development. It helps community livelihood, especially in rural and far-flung areas (Hole et al., 2019) and solves the persistent problems of unemployment and resulting poverty. Appropriate training and other livelihood options make the once poverty-ridden, untrained person a contributor to our economy and the development of society. Regarding the Adequate Housing problem in India, despite government programmes and schemes (Pradhan Mantri Awas Yojna and Swachh Bharat Abhiyan), millions of families still struggle with poor access to housing, living in informal settlements under unhealthy living conditions.

For the rights of Child and Education, Article 32 of the UNCRC on the right of the child specifies that the state must prevent hazardous work conditions, provide education, and prescribe penalties for noncompliance with the norms. India has a voluminous number of child labourers deprived of numerous human rights. The child labourers grow up in an unhealthy environment and do not receive basic primary education (Varghese & Supraja, 2016). Poverty and lack of social security are the prime reasons for child labour. These labourers working under unregulated conditions at a poor wage face all sorts of abuses (Chopra, 2015). The corporates work towards the issue of education, vocation, health and nutrition, preventing child labour and their welfare. Curbing child labour through awareness, running schools, orphanages and scholarships to meritorious children are crucial CSR initiatives (Gautam & Singh, 2010). With

these education programmes, the company improves the academic performance of students, their pass percentage and minimises drop-out rates. The focus is on improving access to quality education either by running sponsored education programmes or running schools and educational institutions (Ojha & Chakravarty, 2012).

Towards promoting Gender Equality, CSR activities can be a crucial means to raise the status of women, address inequalities and facilitate women's empowerment through opportunities, training, quotas, scholarships and by incorporating their voice in policymaking (Chaudhary, 2017). Companies like Unilever are advancing gender equality by investing in training and skills, removing inequalities in the workplace and empowering women (Unilever, 2021). Other companies like Jindal and Tata are carrying measures towards women's education, skill development, and inclusive participation in the workplace by holding power positions and reducing the gender wage gap (Srivastava, 2010). For digital and socio-economic empowerment of women in rural areas of Rajasthan, Hindustan Zinc Ltd. initiated the Sakhi initiative or "Safal Sakhi" under which it distributes mobile tablets (Udaipur Times, 2020).

As a signatory to international human rights instruments on the Right to Health, including the International Covenant on Economic, Social and Cultural Rights and UDHR, the Indian healthcare sector is focused. Even the Indian constitution under Article 21 on the right to life, acknowledges the right to health. It imposes a duty on states to ensure social and economic justice and humane conditions of work (Article 42) and nutrition, standard of living and healthcare (Article 47). However, the privatised healthcare system largely caters to the needs of affluent patients in urban areas. For other groups, there are a dearth of effective medical facilities and access to essential drugs. In this context, the CSR initiatives by the private sector are vital when organising blood donation and eye check-up camps, constructing hospitals and dispensaries in rural areas to directly benefit poverty-ridden people or running mobile medical units and blood banks. Companies like Tata Consultancy Services runs various health program, organises medical camps and train people in first-aid (The CSR Journal, 2023). Another company, Pfizer provides healthcare facilities and organizes campaigns to raise awareness about non-infectious diseases.

To protect the Worker's Rights, the ILO lays down the labour standards that every corporation must adhere to. Furthermore, the UDHR recognise several labour rights to association, just and favourable working conditions and remuneration. In India, labour welfare schemes and payment of fair wages have a legislative basis that corporates follow. The company tries to provide its employees with a safe and healthy work environment, free from discrimination and creates awareness on prevention, care and counselling (CSR Box, 2023).

Towards the right to Clean Environment CSR activities, campaigns and programmes aimed at preventing the deprivation and degradation of the environment. CSR initiatives for biodiversity conservation, clean and renewable energy and electronic and nuclear waste management verify their concern and





sincerity towards these causes (Workshop Summary, 2007). CSR activities like advocacy, developing farmland, tree planting drives, and treating wastewater before discharging are the endeavours in this direction that are positively improving the environment (Rangan, 2015). Corporations are investing in green energy and pollution reduction and searching for renewable energy sources. The corporates can mitigate climate change and environmental impacts by promoting sustainable agricultural practices and developing climate-resilient food systems (Pillai et al., 2019).

## 4. Context And Methods Of The Study

CSR necessitates that corporations follow a self-regulating approach by shouldering responsibilities and actively and positively participating in the community's progress. Ethical corporate citizens should not merely be focused on personal growth and profit-making but must operate as an espouser of larger societal and human rights goals. The present paper deals with several issues on the interface among CSR and human rights aspects. The paper seeks to accomplish these broader research objectives:

- Scrutinize the contemporary scenario of the concept of CSR in India and its correlation with the human rights perspective
- Study the gaps between CSR in theory and the level of its implementation by Indian corporates in practice.
- Shed light on the ground realities and social impact and shared the challenges concerning transparency in CSR initiatives.
- Identify and address the ambiguities in the CSR reporting by companies requiring further action for developing holistic and effective CSR practices.

The study thoroughly analyses the existing secondary data in the form of reports, statistics and data published by renowned government and other authorities and departments concerning the CSR ecosystem. Indicators, parameters and benchmarks on CSR spending and human rights concerns aim to establish if they help the government's goal of a welfare state. The content analysis of selected reports and parameters and descriptive analysis will correlate CSR and human rights and the grey areas requiring further efforts. The designated parameters link CSR spenders and contribution trends, recipients of CSR funds and their utilisation, compliance with CSR dictate and spending by PSU and Non-PSUs, CSR distribution of funds, spending on human rights-based initiatives, compliance level and reporting pattern.

## 5. Results And Interpretations On Key Findings On Corporate Initiatives, Strength And Weakness To CSR Expansion In India

### 5.1 CSR Spenders And Contribution Trends

The latest statistics of 2022 on CSR initiatives of corporations demonstrate that 6,819 companies (Statista (a). 2023) spent over INR 121 billion as part of their

CSR initiatives (Statista (b). 2023). The CSR analysis by CSR outlook report for the financial year 2020-2021 of 301 listed companies shows that around 40% or INR 12180 comes from the 10 large companies. Among them, nine companies spent more than their prescribed CSR (CSR Box, 2021). In 2021, the top CSR contributors were Tata Group (INR 1,000 crores), followed by Reliance Industries (INR 922 crores) and Infosys (INR 362 Crore) (Zachariah, 2021). During 2022, the NSE-listed firms spent INR 14,801 crore on CSR. Reliance Industries, HDFC Bank and TCS are among the top ten contributors who collectively spent 32 % of the total CSR contributions (BT Bazar, 2023). In 2023, TATA Group, Infosys, Wipro, Reliance Industries, ITC, HDFC Bank, Hindustan Unilever, Larsen & Toubro, Aditya Birla Group and Mahindra & Mahindra are the top ten CSR companies (Inventiva, 2023)

If we assess the CSR conduct of Indian corporations, it shows an upward trend in the rate of spending by companies. With the availability of this enormous finance, India can successfully frequently support human rights tasks. However, few large public sector entities not incorporated under the Act makes their CSR contributions optional.

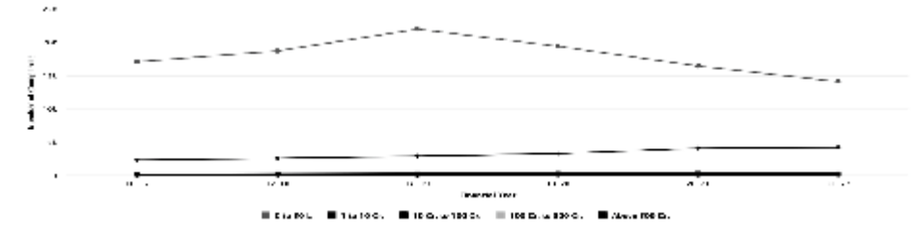


Figure 1:CSR Spent: Expense Overview from 2016 to 2022
(Source: National CSR Portal(a), 2023)

### 5.2 Recipients Of CSR Funds And Its Utilisation

In terms of who most benefitted from the CSR contributions, the 2021 data by the Ministry of Corporate Affairs on spending illustrates that the small and far-flung states like Andaman & Nicobar, Dadra and Nagar Haveli, Daman and Diu, Lakshadweep, Mizoram and Tripura received the meagre CSR funds ranging from nothing ie: zero contributions received to INR 1 crore. The Northeastern states (Manipur, Meghalaya and Nagaland) received minor grants. Against them, ten large state economies benefitted the most as over 80% (together receiving INR 4,135.5 crores) of the funds received by the eight largest state economies (Andhra Pradesh, Gujarat, Haryana, Karnataka, Madhya Pradesh, Maharashtra, Odisha, Rajasthan, Tamil Nadu, Uttar Pradesh). There is a lack of uniformity among the fourteen eligible fund sectors. The CSR expenditures are lopsided and confined to a few geographical areas and states. CSR disbursements are restrained to a few determinate human rights issues covering two-thirds of all the spending on education, initiatives for differently-abled, livelihood and health care topics (Ministry of Corporate Affairs, 2019). The statistics suggest that





companies prefer spending CSR money in areas of their operation. They try to give the direct benefit of the welfare measures to the local community so that they earn their goodwill (Prasad, 2021).

### 5.3 Compliance With CSR Prescription And Position Of PSU And Non-PSUs

One of the significant points is the fact that few companies are spending more than the amount recommended. The CSR company-wise compliance data for 2022 demonstrates that 9935 companies spent more than their prescribed CSR amount on recommended activities; 1511 companies spent the exact prescribed amount, 3506 companies spent less than their stipulated amount, but 5888 companies made zero spent. Companies cite numerous reasons for not investing the recommended sum. This could be due to an inability to find a proper project, the absence of a suitable implementing partner to implement the initiatives and their lack of expertise to handle the way things must proceed towards due execution of the assignment.

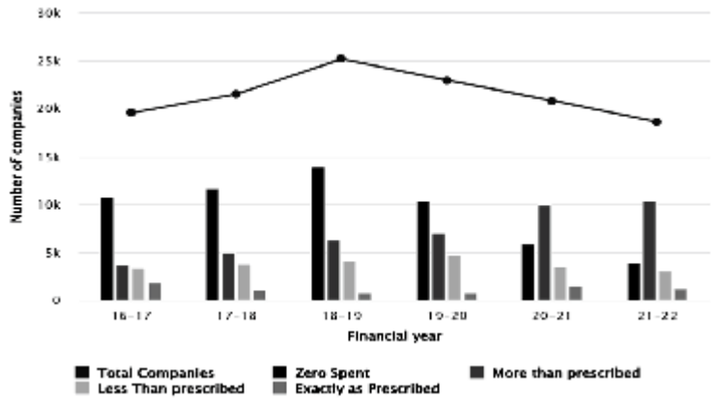



Figure 2:CSR Compliance: Company-wise during 2016-2022
(Source: National CSR Portal (b), 2023).

The 2020 data shows that around 104 companies are involved in activities related to human development, with 30 PSUs and 74 private firms (Kukreti, 2020). In the year 2022, the contribution by Non-PSU was 83% (with INR 21724.68 spent), whereas for PSUs, it was 17% (with INR 4486.27 spent). The sector-wise or causes with the highest CSR funding from corporations are development, health and sanitation, safe drinking water, encouraging Sports, Rural Development, Clean Ganga Fund, Slum Development, Swachh Bharat Abhiyan etc.

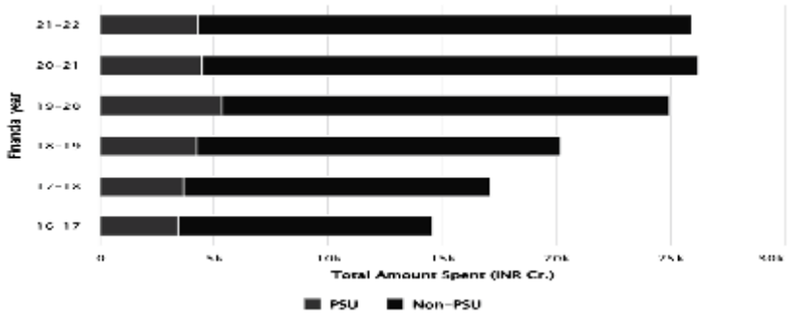



Figure 3: CSR Spent: PSU vs Non PSU (2016-2022)
(Source: National CSR Portal ©, 2023).

### 5.4 CSR Distribution Of Funds And Spending's On Human Rights Based Initiatives

Consequently, most CSR initiatives directly or indirectly include at least one international standard on human rights but under some other label and not as a human right per se. The statistics on CSR spending show that Indian corporations are assisting causes essential for human rights. Usually, they do so after aligning their CSR initiatives with their business policy/domain and with a consideration of the effect it will wield on their business purpose and their stakeholders (Manner, 2018). The National CSR Portal data on sector-wise development and the amount spent per financial year for 2014 to 2022 shows that health care (7636.18 Crores) remains the topmost recipient of CSR funds. It is followed by education (6367.33), environment sustainability (2366.15), poverty, eradicating hunger, malnutrition (1873.68) and rural development (1801.43) with the least spending on technology incubators (7.33), setting up orphanage (25.79), Swachh Bharat Kosh (32.92), agroforestry (33.13) and NEC/Not mentioned (0.59) (National CSR Portal (d), 2023) (National CSR Portal (d), 2023).

Thus, the corporates protect the civil and political human rights of stakeholders. CSR initiatives cover children, labour, workers and women and activities like women empowerment, education for all and at every level, safe drinking water, electricity, health care facilities, environment protection etc. During natural calamities like earthquakes and floods, the initiatives concentrate on disaster management and indulging in actions for collecting old clothes, distributing food and medicine and infrastructural development. Moreover, awareness campaigns drive for groups of people requiring an understanding of their rights, remedies and human rights infringement are launched. The companies are generally reluctant to invest in causes that are risky in nature, require technical expertise or are complex and require dedicated efforts.





### 5.5 Compliance Level And Reporting

Corporate compliance are measured through several parameters like the presence of CSR policy, spending of the prescribed CSR amount, and reporting about the CSR initiatives, projects and activities. A KPMG report about the 'largest companies' or N100 (listed companies with the largest market capitalisation shows that the CSR expenditure is increasing steadily. The results are encouraging as almost 98% of corporates show compliance and make their policies accessible in the public domain. The disclosure of details of outreach efforts in the company's financial statements has also increased by a whopping 325%. The companies align their CSR activities with social initiatives, development projects and rehabilitation programmes (KPMG, 2020- 24 February).

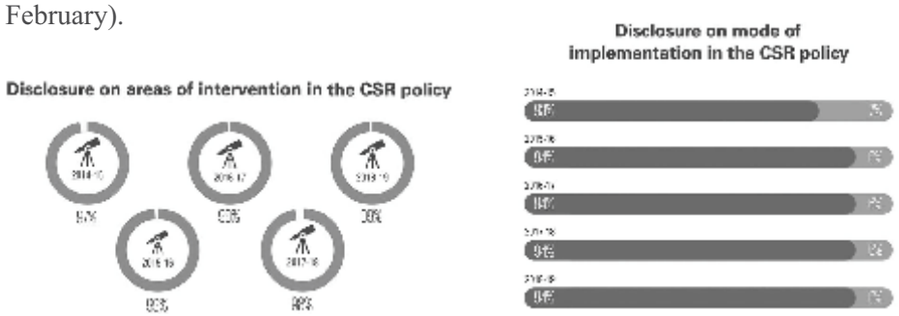



Figure 4:Disclosure on areas of intervention and mode of implementation in CSR policy during 2014-2019 by N100 (listed companies with the largest market capitalisation (Source: KPMG, 2020)

For the rest of the companies, adequate monitoring mechanisms are missing. It leads to lapses, fraud, misrepresentation in financial spending, indulging in tax evasion by creating ghost beneficiaries and conducting ghost CSR activities on paper. The CSR funds are diverted for other pursuits, siphoned, disbursed irregularly or inflated for record keeping. This online survey by EY on understanding CSR programmes related to fraud and leakage and safeguarding against them concluded that organizations fulfil their goals by complying with laws but it will not be success till the fraud and leakage are identified and addressed (Forensic & Integrity Services, 2020).

According to Rule 4(1) of the Companies (Corporate Social Responsibility Policy) Rules (2014), any company undertaking a CSR initiative can execute the initiative or may engage an implementing agency i.e.: or any other organization prescribed under the rules and Act. Around 55% of the companies preferred Government Partnerships for CSR projects. However, the CSR funders face genuine constraints with some implementation partners. Around 1/4th of the companies reported that implementing partners utilizing CSR funds have issues with government agencies and 60% reported poor capacity among implementing partners. Still, there was a 50% preference for implementing agencies as the favoured modality of execution of CSR projects (India CSR Outlook Report,

2023). This is because implementing agencies have expertise in executing projects based on social causes. The company connects the targeted local areas and people with these implementing entities.

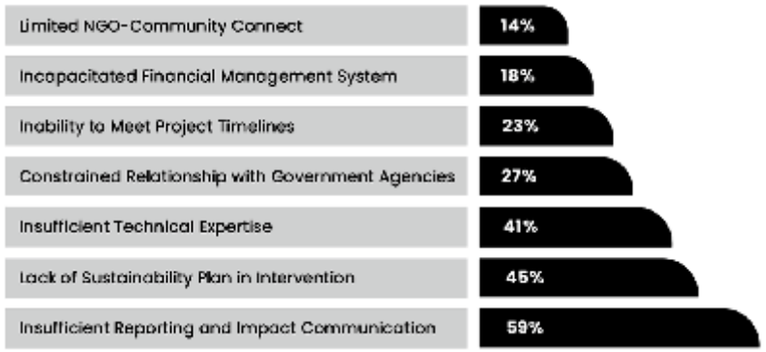



Figure 5: Not so good experience of CSR Funders with implementation Partners (Source: India CSR Outlook Report 2023, p.7)

## 6. Discussion And Conclusion

### 6.1 Challenges And Way Forward For CSR Human Right Development In India

Corporations exert a remarkable influence on the economy of any country as they aid government endeavours through several initiatives like generating employment, poverty reduction programmes and so forth. At the International level, human rights instruments prescribe respect for human rights in every society and curb the effects of activities embarked on by corporations. Within the Indian legal framework, the emphasis is on protecting human rights as per international documents. The paper analyzed the mentioned objectives with parameters of CSR spending, contribution trends, recipients of CSR funds and their utilization, compliance with CSR command by PSU and Non-PSUs, CSR distribution of funds, spending on human rights-based initiatives, compliance level and transparency in reporting.

Compliance- The study highlighted that the corporates operating in India are fulfilling their commitment to being socially responsible. Even though an undersized volume of companies are involved in CSR activities, they have numerous positive transformations and consequences to their credit. However, the achievements are still inadequate due to the non-appreciation of ground realities and peculiar problems of Indian society. CSR spending has failed to manage social problems and human rights issues sufficiently.

Spending- CSR initiatives under the Act must be permitted beyond fiscal spending to establish itself as an efficacious remedy. It must allow proactive research and collaboration to invest in real social problems and human rights matters. CSR initiatives should concentrate on the rural and remote rural areas,





indigenous communities, and the poor and needy section of society. The human rights violations prevailing in the specific area must be dissected and restrained by CSR spending. Several tribulations in Indian society need focused attention. CSR initiatives must prioritise the human rights of those affected by corporate activities. Abuses arising from poor working conditions, sexual harassment, bonded and child labour will be dynamic interventions away from the prescribed but restricted pigeonholes under the Act.

Implementation – CSR implementation must not be a mere arrangement existing on paper. There should be stricter punishments and liability for noncompliance, failure to spend the CSR amount and covering or deceiving records with unethical and immoral practices. Corporations must share information about CSR programmes, best practices, activities undertaken, implementation strategies and success stories.

Reporting- CSR funds must be integrated as a part of the development process, nation-building, bringing inclusive growth and sustainable development that has human rights at the centre. Despite a command under the Act for the companies to spend 2% of their net profit earned on CSR activities, the tendency to conceal or mislead exists. Poor reporting of actual spending, sections of imperfect sectors and indicators and lack of effective monitoring make the CSR process counterproductive.

Role of Government- There is limited awareness about ways to regulate the prevailing CSR expenditure and means to cover maximum human rights issues under its ambit. It is needed to roll out comprehensive guidelines, find novel areas for CSR funds, lower the profit limit investment criteria, permit diversified spending, create a favourable environment and robust and formal enforcement machinery to achieve the full impact of CSR and cover an increased amount of recipients under its activities.

Role of Corporations- Along with social media, corporations should create a mechanism to notify the people about modes to avail of CSR benefits. They must respect human rights and proactively work towards their preservation. There should be greater clarity on the tax implications for CSR activities in tune with income-tax laws. Lastly, for pro-human rights, partnering with NGOs and other organizations will positively address human rights goals.

### 6.2 Conclusion

Today, our society receives direct and indirect benefits due to the CSR endeavours of corporations. Based on the utilitarian principle and doctrine of a welfare state, CSR is a legal and normative concept for corporations and a legislative duty to commit to human rights and values. The Indian laws explicitly protect human rights against the activities and operations of corporations. The CSR initiative can push the nation towards development, deal with challenges and drive any country towards constructive transformation. The paper substantiates that CSR and human rights are interconnected. Corporations

are willing to perform their statutory duty as the scope of CSR is expanding manifold with a positive outlook and acceptance. Absence of efficient formalisation and institutionalization of the programme makes its convincing implementation far away. Overall, the paper establishes a constructive but insufficient role of CSR in shielding human rights. Companies with their desired policy initiatives and interventions for equitable and inclusive growth are accelerating progress towards human rights agendas.

**References:**


1. Arrillaga Andreessen, L. (2011). Giving 2.0: Transform your giving and our world. John Wiley & Sons.
2. Avery, C. (2006). The difference between CSR and human rights. Corporate citizenship briefing, 89 (p.4).
3. BT Bazar. (2023) RIL, TCS, Infosys, ITC, ONGC, Tata Steel, NTPC among top 10 firms. Business Today. Retrieved from https://www.businesstoday.in/markets/top-story/story/nse-listed-firms-spent-rs-14801-crore-on-csr-in-fy22-ril-hdfc-and-tcs-among-top-10-contributors-393613-2023-08-10
4. Balasubramanian, N. K., Kimber, D., Pussayapibul, N., and Davids, P. (2005). Emerging Opportunities or Traditions Reinforced? An Analysis of the Attitudes Towards CSR, and Trends of Thinking about CSR, in India. Journal of Corporate Citizenship, 17, spring: 79-92. DOI:10.9774/GLEAF.4700.2005.sp.00010
5. Bowen, H.R. (1953). Social responsibilities of the businessman. Harper & Row, New York.
6. Buhmann, K. (2006). Corporate social responsibility: Some aspects of law and CSR. The International Journal of Business in Society, 6(2) 189 (188-202). DOI:10.1108/14720700610655187
7. CSR Box. (2023). Retrieved from https://csrbox.org/index.php.
8. CSR Box. (2021). 301 Large Indian Corporate have spent over INR 12000 crore, more than their prescribed CSR limit in FY 20-21. Retrieved from https://csrbox.org/India_CSR_report_301-Large-Indian-Corporate-have-spent-over-INR-12000-crore,-more-than-their-prescribed-CSR-limit-in-FY-20-21_110
9. Chaudhary, R. (2017). Corporate social responsibility and employee engagement: can CSR help in redressing the engagement gap?.Social Responsibility Journal, 13 (2) (323-338). DOI:10.1108/SRJ-07-2016-0115
10. Chopra, G. (2015). Child rights in India. Springer.
11. Debroux, P. (2006). Corporate Social Responsibility in Asia: the Beginning of the Road. 17-29
12. European Commission. (2001). Green Paper: Promoting a European Framework for CSR. Retrieved from https://ec.europa.eu/commission/presscorner/api/files/document/print/en/doc_01_9/DOC_01_9_EN.pdf
13. Forensic & Integrity Services. (2020). Corporate social responsibility in India: re-engineering compliance and fraud mitigation strategies. Earnest and Young. Retrieved from https://assets.ey.com/content/dam/ey-sites/ey-com/en_in/topics/forensic/ey-csr-survey-2020.pdf
14. Frederick, W.C. (1960). The growing concern over business responsibility. California Management Review. 2(4).
15. Friedman, M. (1970). The Social Responsibility of Business Is to Increase Its Profits. New York Times Magazine. Retrieved from https://www.nytimes.com/1970/09/13/archives/a-friedman-doctrine-the-social-responsibility-of-business-is-to.html
16. Garg, P. (2016). CSR and corporate performance: evidence from India. Decision, 43 (333-340). DOI: 10.1007/s40622-016-0131-7
17. Garriga, E. M., &Meie, D. (2004). Corporate social responsibility theories: Mapping the territory. Journal of Business Ethics, 53(2), 51–71. DOI: https://doi.org/10.1023/B:BUSI.0000039399.90587.34
18. Gautam, R. & Singh, A. (2010). Corporate social responsibility practices in India: A study of top 500 companies. Global Business and Management Research. 2(1) (41-47).
19. Hanano, Rima. (2023). Corporate Social Responsibility, Prioritizing Positive Societal Impact. Retrieved from
20. http://en.reset.org/knowledge/corporate-social-responsibility-csr-%E2%80%93-societal-responsibility-companies.
21. Hole, Y., Pawar, S., Bendale, S. (2019). Corporate Social Responsibility (CSR) in India: a conceptual framework. GIS Business. 14 (6) (330-337). Retrieved from: https://gisbusiness.org/index.php/gis/article/view/11844/7511
22. India CSR Outlook Report 2023. (2023). CSRBOX Research Desk. Retrieved from www.csrbox.org
23. International Organization for Standardization (2010). ISO 26000 Final Draft International Standard, Guidance on Social Responsibility. Geneva, Switzerland.
24. Inventiva. (May 16, 2023). Top 10 Best Corporate Social Responsibility Companies In India In 2023. Retrieved from https://www.inventiva.co.in/trends/corporate-social-responsibility-compan/
25. KPMG. (2020-24 February). CSR expenditure is on the rise across India's business environment. Consultancy.in. Retrieved from https://www.consultancy.in/news/consulting/csr
26. Kotler, P. & Lee, N. (2005) Corporate Social Responsibility: Doing the

Most Good for Your Company and Your Cause. Wiley, New York

27. Kukreti, I. (2020). CSR: Is India Inc spending responsibly? Retrieved from https://www.downtoearth.org.in/news/governance/csr-is-india-inc-spending-responsibly--69353.
28. Luo, X. & Bhattacharya, C.B. (2006). Corporate social responsibility, customer satisfaction and market value. Journal of Market. 70 (2-9). DOI: https://doi.org/10.1509/jmkg.70.4.001
29. Manner, R. (2018) Corporate Governance and Corporate Social Responsibility: The Indian Context. CASIRJ 9 (161-165).
30. Ministry of Corporate Affairs. (2019). Report of the High level committee on Corporate Social Responsibility, 2018. Government of India.
31. Mishra, S., & Suar, D. (2010). Does Corporate Social Responsibility Influence Firm Performance of Indian Companies? Journal of Business Ethics, 95(4), 571–601. DOI: 10.1007/sl0551-010-0441-l.
32. National CSR Portal (a). (2023). CSR Spent: Expenses Overview (2016-2022). Ministry of Corporate Affairs, Government of India. Retrieved from https://www.csr.gov.in/content/csr/global/master/home/home.html.
33. National CSR Portal (b). (2023). CSR Compliance: Company-wise (2016-2022). Ministry of Corporate Affairs, Government of India. Retrieved from https://www.csr.gov.in/content/csr/global/master/home/home.html.
34. National CSR Portal ©. (2023). CSR Spent: PSU vs Non PSU (2016-2022). Ministry of Corporate Affairs, Government of India. Retrieved from https://www.csr.gov.in/content/csr/global/master/home/home.html.
35. National CSR Portal (d) (2023). Development Sector Wise. Ministry of Corporate Affairs, Government of India. Retrieved from https://www.csr.gov.in/content/csr/global/master/home/ExploreCsrData/mis-reports/development-sector-wise.html)
36. Ojha, A.K. & Chakravarty, D. (2012). Beyond corporate social responsibility: a role for corporate India in rural primary education. IIM Kozhikode Society & Management Review. 1(2) (55-58). DOI: https://doi.org/10.1177/2277975213477265
37. Pillai, L. R. (et.al.) (2019). Sustainable agriculture and food systems: Channelling CSR investments to promote science backed development in agriculture sector. Khanna Publishers.
38. Prasad, G. C. (2021). Large states corner most CSR funds. Mint. Retrieved from https://www.livemint.com/economy/its-mostly-large-state-economies-that-benefit-from-corporate-charity-11639053148002.html .
39. Rangan, K., Chase, L., & Karim, S. (2015). The Truth about CSR. Harvard Business Review. 93 (40-49). Retrieved from https://hbr.org/2015/01/the-truth-about-csr
40. Reddy, G.V. (2016). The Human Rights. Sujatha Law Books Pvt. Ltd.,





Hyderabad.

41. Ruia, A., Gupta, R.K., Bandyopadhyay, G. (2018). Can corporate social responsibility be a force multiplier to control malnutrition in India?" 9(2) Indian Journal of Public Health Research and Development. 9(2) (168-169). DOI:10.5958/0976-5506.2018.00113.4
42. Runhaar H. & Lafferty, H. (2009). Governing corporate social responsibility: An assessment of the contribution of the UN Global Compact to CSR strategies in the telecommunications industry. Journal of Business Ethics. 84 (479-490). DOI: https://doi.org/10.1007/s10551-008-9720-5
43. Sharma, E., Sathish, M. (2022). CSR leads to economic growth or not: an evidence-based study to link corporate social responsibility (CSR) activities of the Indian banking sector with economic growth of India. Asian Journal of Business Ethics, 11, 67–103. https://doi.org/10.1007/s13520-022-00142-5
44. Sharma, S. (2011). Corporate social responsibility in India. Indian Journal of Industrial Relations, 637-649.
45. Smith, C.N. (1990). Arguments for and against corporate social responsibility in Allhoff F.& Vaidya A. (eds.), Business Ethics, Ethical Theory, Distributive Justice and Corporate Social Responsibility. Sage, London.
46. Sood, A. & Arora. B. (2006). The Political Economy of Corporate Responsibility in India (2006). United Nations Research Institute for Social Development (UNRISD) Programme Paper
47. Srivastava, D. K. (2010). Perspectives on corporate social responsibility (CSR): a case study of the Tata Group of companies in Gupta, A. Ethics, Business and Society: Managing Responsibly. Sage Publications.
48. Statista (a). (2023). Retrieved from https://www.statista.com/statistics/731969/india-number-of-companies-listed-in-nse-and-bse/#statisticContainer .
49. Statista (b). (2023). Retrieved from https://www.statista.com/statistics/1248102/india-csr-spending-of-leading-bse-listed-companies/ (last visited on August 01, 2023).
50. Swanson, D. L. &Orlitzky, Marc. (2018). Leading the triple bottom line: A corporate social responsibility approach. Sage handbook of industrial, work, and organizational psychology. 3. DOI:https://doi.org/10.4135/9781473914964
51. The CSR Journal (2023). Complete CSR Report of Tata Consultancy Services (TCS) in India FY 2022-23. Retrieved from https://thecsrjournal.in/csr-report-tcs-india-tata-consultancy-services/
52. Tandon, N. & Kaur, S. (2017). The role of Corporate SR in India. The international Journal of commerce and behavioural science, 6(3), 29-34

53. Toussaint, M. (et.al.) (2021). Social sustainability in the food value chain: An integrative approach beyond corporate social responsibility. Corporate Social Responsibility Environment Management. 28 (103-113). DOI: https://doi.org/10.1002/csr.2035

54. U.N. Doc. E/CN.4/Sub.2/2003/38/Rev.2 (2003). Commentary on the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights. Retrieved from. http://www1.umn.edu/humanrts/links/commentary-Aug2003.html.

55. Udaipur Times. (2020). Hindustan Zinc empowers rural women digitally with Safal Sakhi Tablet. Retrieved from https://udaipurtimes.com/business-udaipur/hindustan-zinc-empowers-rural-women-digitally-with-safal/cid1278058.htm.

56. Unilever. (2021). Unilever commits to helping build a more inclusive society. Retrieved from https://www.unilever.com/news/press-and-media/press-releases/2021/unilever-commits-to-help-build-a-more-inclusive-society/ .





# Tribal women in the Hindu Nationalist discourse: Interrogating marginal lives beyond empowerment and disempowerment

***Sufal Bepari,***
*Ph.D Research Scholar, Department of Political Science,*
*Vidyasagar University, West Bengal, India*

**Abstract**

Over the last few decades, there has been an unprecedented surge in right-wing politics on a global scale. The profound socio-political transformations caused by such majoritarian politics have led feminists to critically reevaluate many well-established assumptions derived from liberal-secular values. Among the myriad questions that continue to circulate, one stands out: how can a politics predominantly fueled by authoritarianism, xenophobia, and ultra-nationalism offer a purportedly 'liberatory' space for women, especially when the mainstream feminist movement struggles to engage them effectively? This conundrum similarly applies to women aligned with the Hindu Right, prompting scholars studying these rightist women to delve into uncharted territories and unearth divergent voices of feminism. By adopting an intersectional understanding of the category 'women', the current study endeavours to provide innovative perspectives within the broader realm of 'gender and right-wing politics'. Drawing on ethnographic fieldwork conducted in the tribal areas of the Gosaba and Sandeshkhali-II blocks in the Sundarbans of West Bengal, the paper elucidates how the Purvanchal Kalyan Ashram, a Hindu Right organisation working for tribal welfare, is mobilising the local tribal communities in general and tribal women in particular by exploiting specific prevailing issues in the region. The study further explores an array of mutually intersecting factors, ranging from climate change and environmental disasters to underdevelopment and migration, that serve to amplify the Hindu nationalist agenda of the Ashram, thereby escalating the politics of sevā (service) and resulting in a paradoxical 'empowerment for disempowerment' phenomenon.

**Key words: -** *Hindutva Politics, Tribal Women, Sundarbans, Purvanchal Kalyan Ashram*

## Introduction

Does right-wing politics have anything to do with women or offer anything to them? The scholarly analysis of such a question has been delayed mainly because of two reasons: an overemphasis on men as the primary agents in

analysing right-wing politics (Bacchetta & Power, 2002) and an excessive priority given to the left-leaning women's movement by mainstream feminism (Mansbach & Hagel, 2020). Although right-wing women's movements are not new, it was not until the mid-1980s that rightist women gained recognition in mainstream academia within the emerging field of inquiry called 'gender and right-wing politics.' Similarly, in India, women of the Hindu Right secured their place in Indian feminist scholarship only after the resurgence of Hindu nationalist politics in the 1990s. This period was marked by the destabilisation of many assumptions held by left and secular women's organisations, brought about by the women of ultra-nationalist forces (Sarkar &Butalia, 1996). The subsequent decades witnessed a series of studies covering the mobilisation of women in different Hindu Right groups, with a particular focus on Rashtra Sevika Samiti (Bacchetta, 2004; Menon, 2010), Durga Vahini (Mehta, 2015; Katju, 2022), and Mahila Aghadi, aka, the Shiv Sena women (Sen, 2007; Bedi, 2016).

The homogenising project of Hindutva requires a larger support base. To achieve this in a country as diverse as India, the Sangh Parivar, led by the Rashtriya Swayamsevak Sangh (RSS), has adopted a differential strategy. Their goal is to create a monolithic society by mobilising people from different segments of society, particularly marginalised groups such as women, dalits, and adivasis. To encroach upon the worldview of the tribals, the Akhil Bharatiya Vanvasi Kalyan Ashram (ABVKA), affiliated with the RSS, is actively involved in ground-level sevā politics. This organisation, disavowing the Aryan invasion theory, refers to tribal people as vanvasis (forest dwellers) instead of adivasis (original inhabitants), and for them, tribal religion is not distinct from Hinduism but rather perceived as a degraded form that necessitates reformation (Alles, 2017). Consequently, relying on this comprehension, ABVKA and other similar groups have been engaging with the tribal populace, offering various social services aimed at promoting Hindu identity and fostering the integration of Hindu cultures, principles, and values within these communities. Such processes have led to the Hinduisation of tribals (Longkumer, 2020), the communalisation of tribal life (Pinto, 1995), the harmful diversion of adivasi indigeneity (Baviskar, 2005), the formation of anti-democratic civil society (Sahoo, 2013), and anti-Christian rhetoric (Froerer, 2007).

However, a comprehensive analysis of the existing literature on women and tribal mobilisation within Hindutva reveals two crucial research gaps. On the one hand, current feminist scholarship lacks an intersectional understanding of the category 'women' when examining the gender aspect of Hindutva. On the other hand, the traditional analysis of the effects of Hindu nationalist politics in tribal areas has completely neglected the experiences of adivasi women. In light of these gaps, the present study aims to shift the focus of discussion from 'women in Hindutva' to 'tribal women in Hindutva,' providing new insights about the motivations from the demand side (tribal women) and the techniques employed by the supply side (Hindu nationalist groups). Drawing on an ethnographic investigation conducted in the tribal areas of the Gosaba and





Sandeshkhali-II blocks in the Sundarbans of West Bengal, this paper illustrates how the Purvanchal Kalyan Ashram (PKA), affiliated with the larger ABVKA, effectively mobilises tribals, especially tribal women, by capitalising on specific local issues prevalent in the region. The nationalist agendas of the PKA are thriving because of their popular social service schemes, such as girls' hostels, vocational training courses in sewing, one-teacher schools, and rainwater harvesting projects.

## Hindutva's Entry in the Sundarbans of West Bengal

The manifestation of Hindutva in West Bengal is rooted in the political endeavours of the Hindu Mahasabha, Bharatiya Jana Sangh (BJS), and later the Bharatiya Janata Party (BJP), along with the gradual yet steadfast expansion of the socio-cultural activities of the Sangh Parivar (Kanungo, 2015). According to the official publication, the RSS established its first branch in Kolkata in 1939. Subsequently, until 1948, the RSS expanded its branches in areas such as Nadia, Burdwan, Birbhum, Jalpaiguri, and Darjeeling. Starting in 1948, the Bengali mouthpiece Swastika, a weekly publication, began disseminating its contents. Until 1956, the number of branches remained relatively low and was declining. However, from the 1960s onwards, and particularly after the lifting of the ban on the RSS in the post-emergency period in 1977, the branches experienced rapid growth, and new affiliated organisations like the Purvanchal Kalyan Ashram (PKA) came to the forefront (Swastik Prakashan Trust, 2022).

The RSS's engagements in the Sundarban region of West Bengal commenced with the establishment of its branches in Sagar Island in 1962, Basirhat in 1968, Baruipur in 1977, Basanti in 1982, and Gosaba in 2001 (Swastik Prakashan Trust, 2022). In addition to the RSS, several like-minded organisations, such as Vishva Hindu Parishad (VHP), Rashtra Sevika Samiti, Vidya Bharati, Seva Bharati, Samskrita Bharati, Hindu Jagran Manch, and Bharatiya Mazdoor Sangh (BMS), have been and continue to be operational in the Sundarbans as well as throughout West Bengal.

The Purvanchal Kalyan Ashram (henceforth Ashram), as a constituent of the ABVKA, embarked on its journey in West Bengal in 1977 under the leadership of RSS volunteer Vasant Vinayak Bhatt. Upon assuming the role of organisation secretary of the Ashram, he was tasked with expanding the RSS's style of 'benevolent Hindutva' in the eight northeastern states, along with West Bengal and the Andaman Islands. The first centre of the Ashram in West Bengal began as a boys' hostel in January 1978 in the village of Baghmundi, Purulia. Over the following years, the Ashram expanded its activities in various regions, including Balarampur, Banduan, Kumari, Jhalda, and Begunkodor in Purulia; Rautara in Bankura; Belpahari in Jhargram; and Midnapore and Kalimpong (Purvanchal Kalyan Ashram, 2020).

Environmental disasters have always served as an opportunity for Hindu Right organisations to promote and reinforce their ideology through sevā (social service) (Bhattacharjee, 2021). The Sundarbans of West Bengal is highly

susceptible to natural calamities, and it was Cyclone Aila of 2009 that paved the way for the Ashram's entry into this region. Since then, the Ashram has been actively involved in relief work during various disasters, including the COVID-19 pandemic, Cyclone Matmo-Bulbul (2019), Cyclone Amphan (2020), and Cyclone Yaas (2021). To function as an organised force, the Ashram established a girls' hostel in 2012 in Manmathanagar, Gosaba. Starting in the same year, they began forming Sishu Shiksha Kendras (SSKs) in different areas and embarked on other initiatives, launching additional programmes. Currently, the Ashram is actively operating in the Sandeshkhali I and II, Hasnabad, Minakhan, and Haroa blocks of the North 24 Parganas, as well as in the Gosaba, Basanti, and Canning-II blocks of the South 24 Parganas.

## Pritilata Girls' Hostel: Hub of Hindutva and the Manufacturing of Nationalist Sevaks

The Ashram's organised effort was first manifested in the Sundarbans through the establishment of the Pritilata Girls' Hostel in 2012, situated in Manmathanagar village, Gosaba. While the hostel's stated purpose is to provide full-time accommodation and tuition to underprivileged tribal girls in grades 4 to 12, its primary objective is to civilise the adivasi children with brahminical Hindu religious teachings and enculturation. The increasing acceptance of the hostel is evident, as the number of students has grown from 12 in 2012 to over 50 in 2023. Within the hostel, a stringent daily schedule (table 1) is enforced, and upon closer examination of the hostel's rulebook and through ethnographic observation of the hostel activities, it becomes clear that the Ashram has embarked on a project of civilising tribal children influenced by a pedagogy rooted in monolithic Hindutva ideology. However, this approach appears to be retrogressive and alien to tribal society and culture.

**Table 1: Daily activity schedule for students residing at the Pritilata Girls' Hostel run by the Purvanchal Kalyan Ashram at the Manmathanagar village of Gosaba block of Canning subdivision of South 24 Parganas district in West Bengal, India**

| Routine for March to August | | | Routine for September to February | | |
|---|---|---|---|---|---|
| **Time** | **Activities in Weekdays** | **Activities in Holidays** | **Time** | **Activities in Weekdays** | **Activities in Holidays** |
| 04:00 a.m. | Jāgaraṇa | Jāgaraṇa | 04:30 a.m. | Jāgaraṇa | Jāgaraṇa |
| 04:45 a.m. | Stōtrapāṭha | Stōtrapāṭha | 05:15 a.m. | Stōtrapāṭha | Stōtrapāṭha |
| 05:10 a.m. | Śarīracarcā | Śarīracarcā | 05:40 a.m. | Śarīracarcā | Śarīracarcā |
| 05:45 a.m. | Āśramacaryyā | Āśramacaryyā | 06:15 a.m. | Āśramacaryyā | Āśramacaryyā |
| 06:00 a.m. | Pāṭhyābhyāsa | Pāṭhyābhyāsa | 06:30 a.m. | Pāṭhyābhyāsa | Pāṭhyābhyāsa |
| 08:00 a.m. | ---- | Sbalpāhāra | 08:00 a.m. | ---- | Sbalpāhāra |
| 08:30 a.m. | ---- | Pāṭhyābhyāsa | 08:30 a.m. | ---- | Pāṭhyābhyāsa |
| 09:00 a.m. | Sāphā'ikārya | ---- | 09:15 a.m. | Sāphā'ikārya | ---- |
| 09:15 a.m. | Snāna | ---- | 09:30 a.m. | Snāna | ---- |
| 10:00 a.m. | Bhōjana | ---- | 10:00 a.m. | Bhōjana | ---- |
| 10:30 a.m. | ---- | Āśramacaryyā | 10:30 a.m. | ---- | Āśramacaryyā |
| 11:30 a.m. | ---- | Snāna | 11:15 a.m. | ---- | Snāna |
| 12:30 p.m. | ---- | Bhōjana | 12:00 p.m. | ---- | Bhōjana |
| 02:00 p.m. | ---- | Pāṭhyābhyāsa | 01:30 p.m. | ---- | Pāṭhyābhyāsa |
| 04:30 p.m. | Sbalpāhāra | Pāṭhyābhyāsa | 04:15 p.m. | Sbalpāhāra | ---- |
| 04:45 p.m. | Āśramacaryyā | Āśramacaryyā | 04:30 p.m. | Āśramacaryyā | Āśramacaryyā |
| 05:15 p.m. | Śākhā | Śākhā | 04:45 p.m. | Śākhā | Śākhā |
| 06:45 p.m. | Ārati | Ārati | 06:15 p.m. | Ārati | Ārati |
| 07:00 p.m. | Pāṭhyābhyāsa | Pāṭhyābhyāsa | 06:35 p.m. | Pāṭhyābhyāsa | Pāṭhyābhyāsa |
| 09:30 p.m. | Naiśabhōjana | Naiśabhōjana | 09:15 p.m. | Naiśabhōjana | Naiśabhōjana |
| 10:15 p.m. | Śaẏana mantra | Śaẏana mantra | 10:00 p.m. | Śaẏana mantra | Śaẏana mantra |

**Note:**
1) **Students are also directed to think about the Indian state (Rāṣṭracintā) every Sunday after the lunch at 2:30 p.m.**
2) **Jāgaraṇa: awaken; Stōtrapāṭha: morning prayer; Śarīracarcā: physical activities; Āśramacaryyā: hostel related works; Pāṭhyābhyāsa: reading; Sbalpāhāra: eating; Sāphā'ikārya: cleaning; Snāna: bathing; Bhōjana: eating; Śākhā: general and ideological discussions; Ārati: evening prayer; Naiśabhōjana: dinner; Śaẏana mantra: night prayer.**

**Source: Data collected from a rulebook of the Pritilata Girls' Hostel titled 'Prārthanā' (Prayer).**

As mentioned in Table 1, certain activities such as stōtrapā ha, ārati, and śa ana mantra, among others, have been specifically designed to instill a Hinduised form of 'moral character' among tribal girls. These activities involve worshipping Hindu deities and prominent Hindu nationalist figures and chanting religious hymns in Hindi and Sanskrit while sitting in a dedicated prayer hall. Furthermore, the girls are also directed to sing patriotic songs dedicated to akhan abhārata (an imagined integrated India of the Hindu Right). In this brahminical civilising project, there is no place for tribal culture, customs, and values, as these are considered regressive within the discourse of Hindutva.

One question that remains unanswered is why parents agree to send their daughters to the hostel. The answer can be attributed to three factors. First, the region experiences a remarkably high rate of temporary out-migration in search

of livelihoods (Ghosh, 2018). Thus, many families see the hostel as a trustworthy and cost-effective (five hundred rupees per month) agency that can be entrusted with the responsibility of their girls in their absence. Second, parents often lack time to invest in child care due to their busy daily schedules related to household earnings. And thirdly, the Sundarban region is highly susceptible to human trafficking, making girls and women particularly vulnerable. Environmental disasters further escalate this process (Biswas & Chatterjee, 2021). As a result, Ashram's hostel emerges as a potentially safe haven, as no viable alternatives currently exist.

The hostel serves as a centre for Hindutva mobilisation, catering not only to tribal girls but also to tribal women. During guardian meetings and various occasions, the Ashram endeavours to build closer relationships with parents, persuading them to join the organisation and contribute to the welfare of tribal communities. These meetings are predominantly attended by women, either because male family members have migrated elsewhere or because they are pre-occupied with their daily jobs outside the home. Seizing this opportunity, the Ashram has initiated various gender-focused schemes, such as vocational training in sewing, to ensure that tribal women remain affiliated with Hindutva for an extended period. To recruit its foot soldiers, the Ashram relies heavily on an informal communication network, which is why women from non-tribal communities have also been included in the vocational training programme. This inclusion is evident in the data presented in Table 2.

**Table 2: Profile of some trainees who are currently pursuing or have completed vocational training in sewing offered by the Purvanchal Kalyan Ashram**

| Sl. No. | Name | Age | Caste/Ethnic Identity | |
|---|---|---|---|---|
| 1. | Basanti Mazumdar Naskar | 37 | Paundra | SC |
| 2. | Mousumi Sardar | 23 | Oraon | ST |
| 3. | Supriya Sardar | 24 | Oraon | ST |
| 4. | Suchitra Mahato | 38 | Bhumij | ST |
| 5. | Shyamali Mahato | 38 | Bhumij | ST |
| 6. | Santilata Sardar | 38 | Munda | ST |
| 7. | Sushila Sardar | 32 | Bedia | ST |
| 8. | Supriya Sardar | 40 | Munda | ST |
| 9. | Sabitri Munda | 45 | Munda | ST |
| 10. | Bharati Mondal | 44 | Paundra | ST |

**Note: ST refers to Scheduled Tribes, and SC refers to Scheduled Castes.**

**Source: Data collected during the fieldwork on April 17 and 20, 2023.**





The vocational training course in sewing typically lasts for six months, with two days of classes each week. There are two sessions in a year, one from January to June and the other from July to December. Participants do not need to pay any fees to pursue the course; instead, the Ashram provides them with a remuneration of two thousand rupees to cover their travel costs. As a result, both the monetary benefit and the desire to acquire new skills motivate them to undergo the training. Like the hostel girls, these women also engage in Hindu religious practises during their training. Additionally, the Ashram organises outreach programmes such as mahilācētanāśibira (conference for raising women's consciousness) and mātr sam'mēlana (conference of mothers) at different times of the year. These events aim to educate these women about various Hindu nationalist ideas and narratives, including guidance on being a good wife and raising children while fostering religious and nationalist values within them. They are also taught why it is essential to remain vigilant against perceived threats from individuals of 'other' religions, particularly Muslims and Christians.

## Sishu Shiksha Kendras (SSKs): Saffron Teachers and Obedient Pupils

The Hindu Right groups are actively engaged in saffronising the teaching curriculum and rewriting Indian history with the aim of building 'Hindu nationalist cadres' for a 'Hindu nationalist order'. Organisations such as Saraswati Shisu Mandir (Froerer, 2007), Ekal Vidyalaya, Vidya Bharati, and Sewa Bharati (Guichard, 2010), or the Vivekananda Kendra Vidyalaya (Longkumer, 2020), which are run by the RSS and its affiliated groups, share the same objectives despite having different names. They are vigorously involved in indoctrinating children from various segments of society with Hindu religious and nationalist teachings while simultaneously rejecting the pluralistic ethos that is an integral part of the Indian way of life. In the tribal areas, the primary goal of philanthropic Hindutva groups, inspired by such ideals, is to make the tribals aware of their Hindu identity and safeguard it from the threat of conversion, which they consider a necessary step towards the formation of an imaginative Hindu Rashtra (Guichard, 2010).

Following a similar pattern as discussed above, the Ashram began forming Sishu Shiksha Kendra (henceforth SSKs) in the year 2010, starting with 10 SSKs in the Sonakhali village, Basanti. Since then, approximately 10–12 SSKs have been inaugurated each year in different parts of the Sundarbans. According to an official of the Ashram, there are currently approximately 54 SSKs operating in the North 24 Parganas and 74 SSKs in the South 24 Parganas. The SSKs function as one-teacher schools, accommodating around 15–16 children at the pre-primary level, belonging to different tribal ethnic groups and, in some cases, non-tribal children as well. Besides providing formal education, the SSKs actively impart Hindu religious teachings and a code of conduct into the psyches of their pupils. The children undergo 'disciplinary practise,' which involves reading poems and singing songs dedicated to Hindu deities and patriotic

themes.

The 'disciplinary practise' is more rigorous when it comes to the teachers of SSKs, which is the central focus of this study. The teachers of SSKs, officially known as Acharyas, are predominantly tribal women and, in some cases, women belonging to the scheduled castes. However, before delving into the investigation of why and how adivasi women are becoming saffron teachers and training the future Hindu nationalist warriors, it is imperative to take a quick look at the profiles of some of them, as described in Tables 3, 4, and 5.

**Table 3: Profile of the teachers of SSKs located at Daudpur village of Sandeshkhali-II block of Bashirhat subdivision of North 24 Parganas district in West Bengal, India**

| Sl. No. | Name | Age | Educational Qualification | Ethnic Identity | |
|---|---|---|---|---|---|
| 1. | Namita Mahato | 55 | Class 8 | Bedia | ST |
| 2. | Kalpana Mahato | 46 | Secondary | Bedia | ST |
| 3. | Sarama Sardar | 31 | Higher Secondary | Bhumij | ST |
| 4. | Maya Mahato | 34 | Class 9 | Bedia | ST |
| 5. | Sankari Mahato | 34 | Secondary | Bedia | ST |
| 6. | Krishna Sardar | 40 | Higher Secondary | Bhumij | ST |
| 7. | Padma Mahato | 40 | Higher Secondary | Bedia | ST |
| 8. | Manju Mahato | 46 | Class 8 | Bedia | ST |
| 9. | Sumitra Sardar | 37 | Class 8 | Munda | ST |
| Note: ST refers to Scheduled Tribes. | | | | | |
| Source: Data collected during the fieldwork on April 17, 2023. | | | | | |

**Table 4: Profile of the teachers of SSKs located at Durgamandap village of Sandeshkhali-II block of Bashirhat subdivision of North 24 Parganas district in West Bengal, India**

| Sl. No. | Name | Age | Educational Qualification | Caste/Ethnic Identity | |
|---|---|---|---|---|---|
| 1. | Mallika Sardar | 26 | Higher Secondary | Bhumij | ST |
| 2. | Jamuna Mahato | 28 | Class 9 | Bedia | ST |
| 3. | Keya Mondal | 38 | Class 8 | Paundra | SC |
| 4. | Kanika Sardar | 24 | Secondary | Munda | ST |
| 5. | Bijali Sardar | 34 | Higher Secondary | Bhumij | ST |
| 6. | Arati Sardar | 33 | Secondary | Bhumij | ST |
| 7. | Mamani Mahato | 32 | Secondary | Bedia | ST |
| 8. | Madhabi Sardar | 37 | Graduation | Bhumij | ST |
| 9. | Bandana Mahato | 31 | Secondary | Bedia | ST |
| 10. | Rakhi Mondal | 19 | Higher Secondary | Paundra | SC |
| 11. | Chapala Sardar | 38 | Secondary | Bhumij | ST |
| 12. | Bishnupriya Munda | 33 | Graduation | Munda | ST |
| 13. | Tagari Mahato | 23 | Higher Secondary | Bedia | ST |
| 14. | Mitali Mahato | 31 | Graduation | Bedia | ST |
| 15. | Bandana Mahato | 37 | Secondary | Bedia | ST |
| Note: ST refers to Scheduled Tribes, and SC refers to Scheduled Castes. | | | | | |
| Source: Data collected during the fieldwork on April 17, 2023. | | | | | |

**Table 5: Profile of the teachers of SSKs located at Kumirmari village of Gosaba block of Canning subdivision of South 24 Parganas district in West Bengal, India**

| Sl. No. | Name | Age | Educational Qualification | Caste/Ethnic Identity | |
|---|---|---|---|---|---|
| 1. | Duriya Mondal | 22 | Graduation | Paundra | SC |
| 2. | Bhabani Sardar | 30 | Higher Secondary | Munda | ST |
| 3. | Sulata Baidya | 32 | Secondary | Paundra | SC |
| 4. | Manasa Gayen | 50 | Secondary | Paundra | SC |
| 5. | Maya Sardar | 32 | Graduation | Bedia | ST |
| 6. | Jamuna Sardar | 42 | Secondary | Bedia | ST |
| Note: ST refers to Scheduled Tribes, and SC refers to Scheduled Castes. | | | | | |
| Source: Data collected during the fieldwork on April 21, 2023. | | | | | |

The data from Tables 3, 4, and 5 reveals that women from different tribal sub-groups and castes, varying in age and educational background, are acting as teachers of SSKs. The survival of these schools largely depends on the support of these marginalised women, which stems from various factors, including out-migration for livelihood, a lack of opportunities, and governmental failure. Due to the high rate of temporary out-migration in the Sundarbans, as mentioned earlier, women's decision-making capacity increases to some extent. Additionally, the lack of interest and busy work schedules of male family members outside the home leave women to take up teaching jobs at SSKs. The Acharya's salary starts at eight hundred rupees per month, with a two-hundred-rupee increment every two years. However, it is not just the monetary benefits that motivate them; the opportunity and respect they receive encourage them to perform their duties diligently. The data indicates that these women have educational qualifications ranging from 8th grade to graduation. However,

before the advent of the SSKs, they had no other opportunities to utilise their knowledge, highlighting the failure and inability of the government to provide adequate opportunities. After becoming Acharyas, they are now addressed by people as 'didibhā'i' (elder sisters), and they are consulted in different matters, which gives them the sense of respect and empowerment they have desperately been seeking.

Nevertheless, this sense of achievement comes at the cost of carrying a long-term burden in the future of which they are unaware. Starting from the training they have to undergo before assuming the responsibility of teaching to the monthly teachers' meetings and various other occasions, they go through a process of 'conditioning' aimed at making them more civilised and ideal 'Hindu' women. During these gatherings, they assemble under the patriarchal guidance of the Ashram and chant different religious and patriotic hymns, for example, bargagīti (patriotic verse), prārthanākālānśa, and gā atrī mantra (adoration of goddess lak ī, sarasbatī, and gā atrī), ēkātmatāstatrama (tribute to mother India), śāntipā ha (praising the gods of nature), and brahma nāda (worshipping lord brahmā). They are also directed to remember, explain, and follow these religious principles in their real lives, and this is considered the main criteria that need to be fulfilled by them to continue their association with the Ashram. Through such a disciplinary process, the adivasi women, who are already under the shackles of patriarchy, come under the process of adopting a more 'stringent version of brahminical patriarchy'.

## Water Harvesting Project (WHP): Ecological Hindutva?

One of the most popular programmes implemented by the Ashram, aligned with its objective of rural development, is the Water Harvesting Project (henceforth WHP). The primary goal of this project is to excavate ponds to conserve rainwater. The project's widespread popularity stems from the scarcity of drinking water and the significance of ponds in the lives of people living in the Sundarbans. According to the 2009 'Human Development Report for South 24 Parganas, West Bengal', approximately 60% of households lack access to clean drinking water (Ghosh, 2018). In the islands, deep tube wells are the sole source of drinking water, and there is a limited and basic piped supply system available only in areas connected to the mainland. Additionally, there is a shortage of agricultural water due to the declining levels of groundwater and the high presence of salinity in the water bodies. This situation underscores the crucial role that ponds play in the day-to-day life of the Indian Sundarbans, serving multiple functions such as irrigation, aquaculture, providing potable water, supporting sanitation, bathing, and water storage (Das et al., 2022). Consequently, those without ponds are desperately in need of one. Given this context, the Ashram has effectively utilised the 'aspiration' of having a pond to mobilise tribal families under the roof of Hindutva, using its WHP.

The Ashram's WHP was initially launched in 2017 in the village of Durgamandap, situated within the Sandeshkhali-II block. As of April 2023, the





Ashram has dug up more than 36 ponds in different areas, with the sole beneficiaries of this initiative being the tribals. Here is a compilation of some of the individuals who have benefited from this endeavour:

**Table 6: Profile of some beneficiaries of the Water Harvesting Project (WHP) of the Purvanchal Kalyan Ashram**

| Sl. No. | Name | Age | Gender | Ethnic Identity | |
|---|---|---|---|---|---|
| 1. | Ashok Mahato | 50 | Male | Bedia | ST |
| 2. | Mintu Sardar | 37 | Male | Oraon | ST |
| 3. | Sushil Sardar | 38 | Male | Munda | ST |
| 4. | Ashok Sardar | 45 | Male | Oraon | ST |
| 5. | Kamal Mahato | 30 | Male | Bedia | ST |
| 6. | Sumitra Sardar | 37 | Female | Munda | ST |
| 7. | Kanak Mahato | 34 | Male | Munda | ST |
| 8. | Bimal Singh | 55 | Male | Bhumij | ST |
| 9. | Sanyasi Mahato | 54 | Male | Bedia | ST |

**Note: ST refers to Scheduled Tribes.**

**Source: Data collected during the fieldwork at Durgamandap village of Sandeshkhali-II block of Bashirhat subdivision of North 24 Parganas district in West Bengal, India, on April 18, 2023.**

When analysing the data from Table 6, which indicates a predominance of male recipients of the WHP, it is important to understand that this does not imply exclusive benefits for males. Instead, it sheds light on the gender disparity concerning property ownership, particularly land ownership in this case. By adopting an intersectional framework, eco-feminists have long demonstrated the gendered nature of water-related issues. It is widely recognised that women, especially rural women, bear primary responsibility for daily household chores and childcare, which makes them the primary users of ponds. Furthermore, they are often tasked with fetching water from distant sources, adding to their workload.

The unique aspect of the Sundarbans is that climate change is impacting existing economic opportunities, leading to male migration. As more men leave the villages, women are left to shoulder household and livelihood duties, resulting in increased female participation in pond use (Banerjee & Vincent, 2022). Following the implementation of the WHP, many tribal families have been able to engage in dry-season irrigation, small-scale aquafarming, and poultry farming. Particularly, tribal women have found solutions to navigate their daily challenges, including poverty and domestic violence, as the project reduces their

workload and positively impacts their family's economy. Consequently, tribal women have become more engaged in the civilising project of Hindutva. By actively participating and recruiting others, they are gradually embracing Hindu Right ideals, leading to the alignment of their subjectivities with the broader Hindu nationalist movement.

## Conclusion

The surge of Hindu nationalist activity in a region that lags behind in every development indicator raises numerous questions and concerns. It is clear from the above discussion that external factors largely contribute to providing the Ashram with the required space and opportunity to deeply penetrate into the lives of marginalised individuals, thus aiding in the construction of obedient servants of Hindutva. The limited scope for socio-economic mobility, leading to out-migration due to geographical barriers and exacerbated by natural calamities, along with the government's failure to meet the basic needs of its people and give special attention to vulnerable areas, contributes to the nurturing of benevolent Hindutva in the Sundarbans. Furthermore, mainstream civil society organisations' inability to go beyond their occasionally philanthropic character and top-down approach further perpetuates the growth of the Ashram.

Every problem related to the Sundarbans has traditionally been viewed (with some exceptions) in a gender-neutral way, which leaves out women in general, and particularly those women who are at the margins of marginalisation, from developmental initiatives, and often their voices go unnoticed. Even when reporting on women-specific issues, an intersectional approach that focuses on the existing power dynamics within the category 'women,' such as the differences between tribal women and scheduled caste women, has been completely ignored. The Ashram has successfully capitalised on this vacuum and placed tribal women at the centre of all their initiatives, whether it is the girls' hostel, vocational training, or the SSKs. This has indeed enabled adivasi women to cope with some of their problems to some extent. Nevertheless, such conditions cannot be treated as equal to empowerment because true empowerment involves having choices from different options, not simply being limited to having no other options. Therefore, it can rightly be characterised as 'empowerment for disempowerment,' a phenomenon that transcends dualistic modes of thinking.

## References:

1. Alles, G. D. (2017). Are Adivasis Indigenous?. In G. Johnson & S. E. Kraft (Eds.), Handbook of Indigenous Religion(s), (pp. 247-262). Brill.
2. Bacchetta, P., & Power, M. (2002). Right-wing Women: From Conservatives to Extremists Around the World. Routledge.
3. Bacchetta, P. (2004). Gender in the Hindu nation: RSS Women as Ideologues. Women Unlimited.





4. Banerjee, S., & Vincent, K. (2022). The Socio-Cultural and Economic Role of Ponds in Delta Communities: Insights from Gosaba Block of the Indian Sundarbans Delta. In S. Das, A. Chanda, and T. Ghosh (Eds.), Pond Ecosystems of the Indian Sundarbans: An Overview, (pp. 217-236). Springer.
5. Baviskar, A. (2005). Adivasi Encounters with Hindu Nationalism in MP. Economic and Political Weekly, 40(48), 5105-5113.
6. Bedi, T. (2016). The Dashing Ladies of Shiv Sena: Political Matronage in Urbanizing India. SUNY Press.
7. Bhattacharjee, M. (2021). Building a 'Hindu Rashtra' through 'Seva'. Economic and Political Weekly, 56(3), 1-9.
8. Biswas, P., & Chatterjee, N. D. (2021). Environmental Vulnerability and Women Trafficking: Exploring the Bengal Sundarban Deltaic Region of India. In R. B. Singh, S. Chatterjee, M. Mishra, & A. J. de Lucena (Eds.), Practices in Regional Science and Sustainable Regional Development: Experiences from the Global South, (pp. 279-296). Springer.
9. Das, S., Chanda, A., & Ghosh, T. (2022). An Introduction to the Ponds of Indian Sundarbans: An Essential Socio-Ecological System. In S. Das, A. Chanda, and T. Ghosh (Eds.), Pond Ecosystems of the Indian Sundarbans: An Overview, (pp. 1-20). Springer.
10. Froerer, P. (2007). Religious Division and Social Conflict: The Emergence of Hindu Nationalism in Rural India. Routledge.
11. Ghosh, A. (2018). Sustainability Conflicts in Coastal India: Hazards, Changing Climate and Development Discourses in the Sundarbans. Springer.
12. Guichard, S. (2010). The Construction of History and Nationalism in India: Textbooks, Controversies and Politics. Routledge.
13. Kanungo, P. (2015). The Rise of the Bharatiya Janata Party in West Bengal. Studies in Indian Politics, 3(1), 50-68.
14. Katju, M. (2022). Sanskaras, Sexuality and Street Activism: VHP Women at Work. In A. Basu & T. Sarkar (Eds), Women, Gender and Religious Nationalism, (pp. 149-168). Cambridge University Press.
15. Longkumer, A. (2020). The Greater India Experiment: Hindutva and the Northeast. Stanford University Press.
16. Mansbach, D., & Von Hagel, A. (2020). Right-Wing Women's Movements. In N. A. Naples (Ed.), Companion to Women's and Gender Studies (pp. 427-445). John Wiley & Sons Ltd.
17. Mehta, A. (2015). The Aesthetics of "Everyday" Violence: Narratives of Violence and Hindu Right-Wing Women. Critical Studies on Terrorism, 8(3), 416-438.
18. Menon, K. (2010). Everyday Nationalism: Women of the Hindu Right in

India. University of Pennsylvania Press.

19. Pinto, S. (1995). Communalisation of Tribals in South Gujarat. Economic and Political Weekly, 30(39), 2416-2419.
20. Purvanchal Kalyan Ashram (2020). Sabāra Āpanajana (Sbargī aBasantarā a Bha a: Sansmara aSmārikā). Kolkata Block & Print.
21. Sahoo, S. (2013). Civil Society and Democratization in India: Institutions, Ideologies and Interests. Routledge.
22. Sarkar, T., &Butalia, U. (1996). Women and Right-wing Movements: Indian Experiences. Zed Books.
23. Sen, A. (2007). Shiv Sena Women: Violence and Communalism in a Bombay Slum. Indiana University Press.
24. Swastik Prakashan Trust (2022). Bānlā aSa ghaKājēraItihāsa. The New Jaikali Press.





# Need for Reformed Cyber Law to tackle the Cyber Crime vis -a- vis Human Rights: A Study

***Kamshad Mohsin*[1], *Prof. (Dr.) K.B. Asthana*[2]**
*Research Scholar Maharishi Law School,* [1]
*Prof of Law and Dean, Maharishi Law School,* [2]

**Abstract**

In the rapidly evolving digital landscape, the emergence of cyberspace has reshaped human interaction, commerce, and governance. However, alongside its numerous benefits, the digital realm has also become a breeding ground for cybercrimes, presenting unprecedented challenges to individuals, enterprises, and governments worldwide. This study investigates the pressing need for reformed cyber laws to effectively address cybercrimes while upholding fundamental human rights in this digital era.

The research analyzes the intricate interplay between cyber laws and the protection of human rights, particularly focusing on the escalating incidence of cybercrime and its implications for individuals' privacy, freedom of expression, and security. It examines the inadequacies of current legal frameworks in combatting cyber threats effectively, highlighting the ever-evolving nature of cybercrimes that outpace existing regulations.

Moreover, the study explores the intersection between cyber laws and human rights, deliberating on the balance required between law enforcement imperatives and the preservation of individual freedoms in cyberspace.

**Key words:** - *Human Rights, Cyber Crimes, Data Privacy, Fundamental Human Right.*

## Introduction

Human beings are responsible for the establishment of the digital realm known as cyberspace, which has gained significant influence over various aspects of our human existence. This Influence encompasses various matters such as human rights which includes freedom of speech and preservation of personal privacy. Although information and communication technology (ICT) have balanced our daily lives, they introduced fresh challenges and vulnerabilities to individuals, enterprises and also to the governments. This practice of governmental surveillance over citizens has failed substantial scrutiny due to its encroachments on fundamental human rights.

A new class of computer-related offenses, commonly referred to as "Cyber Crimes," has surfaced due to the advancements in information technology and electronic media, particularly from the 1980s onward.[1] As we entered the new millennium, there has been a significant surge in these types of crimes, prompting global concerns and posing formidable challenges for law enforcement agencies. What sets these crimes apart is their unique nature, as they can be executed anonymously, often from remote locations, without the perpetrator being physically present. Cybercriminals enjoy a distinct advantage, as they can inflict harm through computer technology without the fear of immediate discovery. These offenses encompass a wide range of activities, including but not limited to communication service abuses, industrial espionage, the distribution of explicit and sexually explicit material online, electronic money laundering and tax evasion, digital vandalism, acts of terrorism and extortion, telemarketing fraud schemes, and the illegal interception of telecommunications, among others.[2]

As the use of computers increased, so did the growth of technology, and people started to hear the term "cyber" more frequently in the age of the internet.[3] The development of information technology (IT) gave rise to the cyberspace, where internet connection offers everyone the same opportunity to access any information and utilize advanced technologies for data storage, analysis, and other purposes. Because there are more people using the internet, technology was being misused in cyberspace, which gave rise to both domestic and international cybercrimes.[4]

While many individuals believe they have a clear understanding of the concept of terrorism, there exists a surprising lack of a universally accepted definition. Currently, there are literally hundreds of definitions in circulation, with the sole common element being the utilization or threat of violence. Only the terms "Political" and "fear, terror emphasized" are found in over 50% of these definitions.[5] Consequently, some nations argue that certain terrorist organizations have a legitimate basis for their actions. This lack of consensus hinders international cooperation. What sets terrorism apart is its pursuit of a specific goal and strategic objective, distinguishing it from other criminal activities, due to its distinct motivations.[6]

1 *FARC (Revolutionary Armed Forces of Columbia) are probably the most active today.*
2 *The PKK Kongra/Gel terrorist organisation, active in Turkey, began seeking a socialist revolution in that country.*





The debate surrounding the definition of terrorism itself has been a subject of significant international and intellectual discourse. Even more diversity exists in the discussions regarding what, if anything, constitutes cyberterrorism. This paper aims to delve into several key aspects: the battle against terrorism in the realm of cyberspace, the concept of cyberterrorism as a method of attack, and the utilization of the Internet by terrorists for orchestrating physical attacks. Additionally, it will explore the dimensions of counterterrorism and antiterrorism strategies within the context of the cyberenvironment & human rights.

Although not very novel, there are a number of ways that terrorists use the Internet to carry out their operations more easily and with greater reach than they might with non-electronic methods. Terrorist groups can potentially use a wide range of areas in cyberspace. It serves as a tool for fundraising, radicalization, propaganda, recruitment, and rapid and easy command and control.[7] Undoubtedly, the Internet and other electronic media have numerous benefits for terrorists, and the potential for their exploitation is growing everyday given how simple they are to use and how dependent modern countries are on the Internet. The use of the Internet by terrorists is the first area of worry.

The main exploitation methods used by contemporary terrorists include radicalization, recruitment, promotion, and research. The Internet gives terrorists in small groups or acting alone the chance to easily reach millions of people. The fact that the Internet gives voice to many people who are unable to pay for or attract media attention is perhaps one of its most promising qualities.[8]

The recruiter will receive the possible recruit from the groomer and will then, for the first time, indicate that they are affiliated with a terrorist group.[9] Before they are ever in a position to meet or learn the. identity of anyone they have been engaging with, the skill set of the prospective hire will be assessed, followed by a last check of their commitment.

According to U.S. National Infra-structure Protection centre, Cyber terrorism defines as-

*"A criminal act perpetrated by the use of computer and telecommunication capabilities, resulting in violence, destruction and disruption of service to create fear by causing confusion and uncertainty within a given population, with the goal of influencing a government population to conform to a particular political, social or ideological agenda."*

3 *Religio-Political groups have been more lethal over the last 5 years.*
4 *Gabrial Weimann, Terror in the Internet: The new arena, the new challenges.*
5 *Wilson Clay: Computer attack and Cyber Terrorism (2003).*

Nevertheless, the study of cyber terrorism has played a pivotal role within the broader field of cybercrime. The far-reaching consequences and impact of cyber terrorism have been so pronounced that it necessitates its distinct examination as a separate subject.[10]

## Cyber Crime: A threat to National and International Security

Unquestionably, globalization has permanently altered the world in which we live, a world that is now interconnected with technological growth. The most notable tool that has enabled this interconnection is probably the internet. It has revolutionized how people live their daily lives, prompted states to adapt how they engage with one another, and given a sizeable portion of the world's population access to unprecedented amounts of information. These modifications are typically touted as beneficial enhancements to the environment in which we live. However, there are also some drawbacks.

Similar to territorial safe havens, the internet provides terrorists with a place where they may train, recruit, and carry out a variety of operational duties. Additionally, terrorist organizations that have become international in character and lack a strong territorial or geographic safe haven have turned to the internet as a de facto sanctuary.[11]

Terrorists, terrorist organizations, and their supporters have successfully established a space and a significant presence for themselves in the realm of cyberspace. For them, this digital domain serves as a secure haven, as discussed in "Cyber Crime Issues and Explanations, Terrorism, and the Internet" by an anonymous source.:

1) Official terrorist websites, These sites are run by the terrorist groups themselves or by experts from extreme religions.
2) Unofficial terrorist websites, such as blogs and discussion forums that debate terrorism (often from a pro-terrorist standpoint)
3) Distributor websites, which connect to the aforementioned as well as other terrorist-related content including online publications and movies.[12]

Indeed, the transformation in cyberspace extends much beyond communications. This is due to the fact that usage of the Internet has literally gone from a small group of American scientists to almost everyone in the globe having access to the "net." Terrorists are not an exception to how the internet has evolved into a platform for all things good, bad, and ugly. Terrorists, terrorist

[6] *David H Gray "The importance of the internet to the post-modern terrorist and its Role as a form of safe haven- European Journal of scientific research-2009).*





groups, and their backers are all increasingly using the internet for various purposes. Terrorists used to rely on other technologies like the telephone, radio, mail, and other networks, but they can now access the internet without being stopped and will continue to do so for their intended purposes.[13]

For example, in the case of supervisory control and data acquisition systems (SCADA), various critical infrastructure components such as railway track switches, drawbridges, sewage treatment and water purification facilities, traffic signals in densely populated urban areas, the electrical distribution grid, underground control systems, and other vital systems are all interconnected through the internet. These systems also operate using widely recognized standard operating systems and communication protocols. Exploiting vulnerabilities in these systems could potentially lead to catastrophic injuries and loss of life if maliciously targeted.

## Role of Cyber space in Propaganda

Ayman al-Zawahiri, a senior Al Qaueda commander, declared in a writing that "we are in a battle and more than half of this battle is taking place in the battlefield of the media" and that the internet is crucial in spreading terrorist acts.[14]

Terrorist groups make use of the internet to disseminate propaganda, promote awareness of their cause, and motivate people all around the world. The websites run by terrorist organizations may include graphic depictions of alleged successful terrorist attacks, a list and biography of notable martyrs, and a forum for debating tactics and doctrine. For instances:

i) The Quetta Shura Taliban is said to run a number of official websites, including one with an Arabic-language online magazine. They also apparently post daily electronic news releases on jihadist forums in Arabic.
ii) Websites may also include detailed instructions on how to construct and deploy weapons, including cyberweapons.
iii) The website of HAMAS, for example, featured more than 20 really beneficial design elements, such as search engines, goal statements, a what's new part, and a frequently asked questions page.

[7] *Study conducted by Miniwatts Marketing group, http://www.internetworldstats-.com/stats.htm). Data retieved on 30th July, 2023.*

[8] *Supervisory Control and Data Acquisition System (SCADA) related to the nation's critical infrastructure and are the industrial controls systems that are managed by computer system).*

### Role of Cyber Space in Fun-Raising

Terrorist groups use a variety of techniques and methods to facilitate fund raising, and one of the simplest ways to do so is by phishing, or online credit card fraud. Additionally, terrorists and radicals in the Middle East and South Asia are working more and more closely with cybercriminals to smuggle illicit drugs, weapons, and money across borders.

### In Planning and Coordination

Terrorists have been known to utilise the internet as a primary tool to plan and organise assaults. As an example, they have been known to use chat rooms and open email accounts to post instructions, commands, and plans for communication operations.

### To Spread Publicity in following ways

1. The internet may be used to carry out "psychological warfare," for example, by disseminating gruesome pictures and threatening messages meant to instill fear, such as the publication of beheading films by Islamic fundamentalist organizations of captive western victims.
2. Terrorists might utilize the internet to promote propaganda that highlights themes of victimhood and injustice and appeals to the sympathies of current and future followers.

Thus these six differences categories, sometimes overlapping, also include Data mining.[15]

The threat of misuse if this technology is growing with each day and with every development in technology and this is possible because of:

1. The globalization of Internet users makes it more difficult than ever for governments to manage Internet attacks.
2. There are a lot of websites geared at hackers, which has democratized the instruments available for disruption and devastation.
3. Terrorist groups have dispersed, further complicating matters for our technologically precarious civilizations.

[9] *in the data mining the internet is a vast source. of information on the topics and is utilized by terrorists ti gather any information that may be relevant to their causes or to future operations- such as the satellite images, maps and blueprints of future targets. Information from http://www.unicri.it ). Data. retrieved on 30th Jun, 2023.*





Given that information technology is a double-edged sword that can be used for both constructive and destructive purposes, these new political realities have increased the threat and capabilities of terrorist organizations to the point where they could permanently alter the existence of our planet. Thus, the success of many endeavors depends on the user's intent, whether malicious or benevolent.

### The Information and technology Act, 2000

The Information Technology Amendment Act 2008, which was revised and went into effect on October 27, 2009, provides a legal framework to handle the problems related to information technology infrastructure hacking and security breaches. Any computer resource that directly or indirectly impacts the functionality of essential information infrastructure is defined as a protected system under Section 70 of the Act. The creation of a national nodal agency for the protection of the critical information infrastructure is provided by Section 70(a). Indian Computer Emergency response Team (CERT-In) is now authorized by Section 70B to act as the country's nodal agency for cyber security.[16]

### Logical Security

Logical security is a crucial aspect of cybersecurity that focuses on safeguarding digital information and conducting security operations in the digital realm, typically performed by non-human devices or software solutions. The components of logical security include:

- Encryption: Encrypting data to protect it from unauthorized access by converting it into a secure and unreadable format, which can only be decrypted by authorized parties.
- Network security: Implementing measures to secure the network infrastructure, such as firewalls, intrusion detection systems, and virtual private networks (VPNs), to protect data in transit.
- System security: Protecting computer systems, servers, and endpoints through measures like access controls, operating system hardening, and vulnerability management.
- Application security: Ensuring the security of software applications, including web applications, mobile apps, and other software, to prevent vulnerabilities and exploitation.

[10] *Crisis management Plan for cyber attacks, Ministry if communication and information technology, available at : http://pib.nic.in*

- Security monitoring/auditing: Continuously monitoring systems and networks for suspicious activities and performing audits to assess and improve security measures.
- These components collectively contribute to maintaining the integrity, confidentiality, and availability of digital information in the face of cyber threats and risks.

The government has developed a comprehensive plan to combat cyberattacks and cyberterrorism, which is intended for implementation by all Ministries/Departments of the Central Government, State Governments, and affiliated organizations across various sectors. This plan emphasizes the importance of adopting information security management procedures based on the International Standard ISO 27001, particularly for organizations that oversee critical information infrastructures.

A prominent organization plays a vital role in supporting the Central Government, Union Territories, Districts, and other government entities in their efforts related to e-governance and network infrastructure. This organization offers a wide array of ICT (Information and Communication Technology) services, including a national communication network designed to enhance decentralized planning, improve government services, promote transparency, and strengthen local governance.

To bolster the security of the network and the services it provides, the organization serving Ministries/Departments employs a multi-faceted approach. This includes enforcing security policies, conducting regular security audits, and implementing various technologies at different network levels to safeguard against the evolving tactics employed by hackers. These ongoing efforts are aimed at continuously enhancing the security posture of the network and the services delivered by these government entities.

**Online Data Privacy - Whether a fundamental Human Right?**

The question of whether online data privacy is a fundamental human right is a subject of ongoing debate and discussion. Different countries and legal systems may have varying interpretations and levels of protection for online data privacy.

Some argue that online data privacy is indeed a fundamental human right. They contend that the right to privacy, which is enshrined in various international agreements and documents such as the Universal Declaration of Human Rights, extends to the digital realm. According to this perspective, individuals should have control over their personal information and how it is collected, processed, and used by others, including governments and corporations.[17]

Others may argue that while privacy is important, it may not be an absolute and unqualified right in all situations. They might emphasize the need for balancing privacy rights with other societal interests, such as national security, law enforcement, and public safety. In some cases, governments may collect and use





online data for legitimate purposes, but the extent of these practices is a subject of contention.

Ultimately, whether online data privacy is considered a fundamental human right can depend on legal, cultural, and ethical perspectives. Many countries have enacted laws and regulations to protect online data privacy, such as the European Union's General Data Protection Regulation (GDPR).[18] However, the specific legal protections and their interpretation can vary significantly from one jurisdiction to another. As technology continues to evolve and shape our digital lives, the debate over the status of online data privacy as a fundamental human right is likely to persist.

Human rights, which are essential and inherent to human existence, are not contingent on factors like nationality, race, religion, or gender. These rights are intrinsic to all individuals simply because they are human beings. They do not derive from societal constructs or human-made rules but exist independently, even before the development of organized civilizations. Now, the question arises: what rights can be categorized as human rights? This is a complex matter because there is no comprehensive list of human rights universally agreed upon. Different legal traditions have defined human rights in their own ways and have recognized various rights as being fundamental. At the international level, numerous attempts have been made to compile a list of human rights. Examples include the English Bill of Rights (1689), the French Declaration (1789), the Universal Declaration of Human Rights (1948),[19] the Covenants on Civil and Political Rights (1966), and Economic, Social, and Cultural Rights (1966), among others. These rights have largely found their place in national constitutions, statutory laws, or through judicial interpretations of fundamental rights and principles enshrined in national constitutions.

Privacy has always been a concern at the international level, and the current framework of international human rights law has evolved over centuries. It has been shaped by pivotal events, including revolutions and the aftermath of two devastating world wars. During these historical phases, the right to privacy has consistently been recognized in various forms. Landmark cases such as Griswold v. Connecticut, which invalidated a law prohibiting contraceptives, and Roe v. Wade, which established a woman's right to abortion, have emphasized the value of the right to privacy. In Planned Parenthood v. Casey, the court upheld limited abortion rights, underscoring that abortion is a personal matter with no role for the state to play.

Likewise, after the establishment of the United Nations, several international covenants and conventions have aimed to protect various aspects of privacy. The International Covenant on Civil and Political Rights, the United Nations Declaration of Human Rights, and numerous international and regional agreements all recognize privacy as a fundamental human right. Privacy supports principles like human dignity, free speech, and association. In the modern era, it has become one of the most critical human rights challenges, growing in significance, diversity, and complexity. However, the advent of

information technology has posed a serious threat to the right to privacy. The proliferation of technological devices has made it easier to monitor individuals' activities. It has been recognized that existing laws are insufficient in addressing this issue, necessitating the creation of new legislation.

## The Constitution of India

Similar to many other constitutions globally, the Indian Constitution is dynamic and adaptable, capable of evolving over time to address the evolving needs of society. As society undergoes transformation, it becomes crucial for a nation to have appropriate laws in place to address emerging issues in their various forms and manifestations. Among these issues, one of the most serious crimes committed online, which also has substantial real-world consequences, is terrorism. Therefore, it becomes imperative to expand the boundaries of legal regulations to encompass actions that demand immediate attention. In certain situations, the protections guaranteed by different articles of the constitution may be broadened to safeguard an individual's rights.[20]

## Conclusion

In conclusion, it's evident that just as the internet is leveraged for the purposes of terrorism, it is also being utilized as a tool to counter terrorism. This involves monitoring and tracking terrorists through their online activities, infiltrating their groups anonymously, and disrupting their operations. Measures such as shutting down their email accounts, websites, and other online communication methods are employed.

However, it's important to note that negative aspects such as the digital divide and brain drain can be attributed to these developments. The advancement of technology has facilitated a convergence between hackers and terrorists, blurring the lines between the two. It's foreseeable that terrorists themselves may become proficient hackers, fundamentally transforming the landscape of terrorism. This is reminiscent of scenarios depicted in movies like "Live Free or Die Hard," where hackers can bring down communication networks, transportation systems, and power grids.

In the contemporary world, nearly every aspect of modern life is interconnected through electronic information networks, encompassing transportation systems, communication networks, and critical services like military, finance, and

[11] *The Constitution of India, 1950.*





emergency responses. The dependence on computer-mediated communication is evident in radio, television, cell phones, and email. Disruptions in the cyber realm have the potential to cripple essential utility networks, including water, gas, and electricity. Attacks on any of these networks could lead to catastrophic consequences for individuals and society as a whole.

In summary, ongoing social changes and the proliferation of modern technologies and infrastructures pose a significant challenge to established human rights and the right to privacy. The researcher concludes that vigilance is necessary to address these evolving threats and safeguard individual freedoms in an increasingly interconnected digital world.

## References:


2. International Bill of Human Rights' (OHCHR2023) https://www.ohchr.org/en/what-are-human-rights/international-bill-human-rights [Accessed 12 July. 2023].
3. The Constitution of India, 1950.
4. Rengel A, 'Privacy as an International Human Right and the Right to Obscurity in Cyberspace' (Ssrn.com5 December 2014) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2599271 accessed 13 October 2023
5. Data Protection and Privacy Laws | Identification for Development' (Worldbank.org2016) https://id4d.worldbank.org/guide/data-protection-and-privacy-laws [Accessed 11 June. 2023].
6. The internet is a huge source of information on the subjects, and terrorists use it to obtain any material that may be important to their objectives or upcoming operations, such satellite photographs, maps, and blueprints of potential targets. Information from http://www.unicri.it ). Data retrieved on 30th Jun, 2023.
7. Crisis management Plan for cyber-attacks, . Ministry of IT, . available at : http://pib.nic.in
8. Study conducted by Miniwatts. Marketing group, http://www.internetworldstats-.com/stats.htm). Data retieved on 30th July, 2023.
9. Marshallcenter.org. . (2023). Available at: https://www.marshallcenter.org/en/publications/occasional-papers/jihadist-terrorist-use-strategic-communication-management-techniques-0 [Accessed 9 June. 2023].
10. Wilson Clay: Computer attack and Cyber Terrorism (2003).
11. Weimann G, 'Cyberterrorism: How Real Is the Threat?' (2014) https://www.usip.org/sites/default/files/sr119.pdf

12. David H Gray "The importance. of the internet to the. post-modern terrorist and its Role as a form of safe haven"- European Journal of. scientific research-2009).
13. Borum R, 'Psychology of Terrorism' (2003) https://www.ojp.gov/pdffiles1/nij/grants/208551.pdf
14. FARC (Revolutionary Armed Forces of Columbia) are probably the most active today.
15. The PKK Kongra/.Gel terrorist organisation, . active in Turkey, began seeking. a socialist revolution in. that country.
16. Charvat A, 'Cyber Terrorism: A New Dimension in Battlespace' https://ccdcoe.org/uploads/2018/10/05_CHARVAT_Cyber-Terrorism.pdf
17. Religio-Political groups have. been more lethal over the last 5 years.
18. 'Media and Terrorism' (Coe.int2023) https://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewHTML.asp?FileID=10914&lang=EN [Accessed 8 June. 2023].
19. Gabrial Weimann, . Terror. in the Internet: The new arena, the new challenges.
20. United Nations Office on Drugs and Crime, 'Handbook on Children Recruited and Exploited by Terrorist and
21. Violent Extremist Groups: The Role of the Justice System' (2017) https://www.unodc.org/documents/justice-and-prison-reform/Child-Victims/Handbook_on_Children_Recruited_and_Exploited_by_Terrorist_and_Violent_Extremist_Groups_the_Role_of_the_Justice_System.E.pdf
22. Završnik A, 'CYBERCRIME DEFINITIONAL CHALLENGES and CRIMINOLOGICAL PARTICULARITIES' https://core.ac.uk/download/pdf/230601102.pdf
23. Jarrett, . H., . Bailie, M., Assistant, E. and Eltringham, . S. (2023). OLE Litigation Series. Prosecuting Computer Crimes. Computer Crime and Intellectual Property. Section Criminal Division Published. by Ofce of Legal. Education Executive Ofce. for United. States Attorneys. . [online] Available at: https://www.justice.gov/criminal/file/442156/download.





# United Nations General assembly and Human Rights: Modification of the UN charter by subsequent practice

***Anshul Saxena[1], Prof. (Dr.) Vaibhav Goel Bhartiya[2]***
*Ph.D. Research Scholar, Subharti University, Meerut, [1]*
*Dean, Faculty of Law, Subharti University, Meerut, [2]*

**Abstract**

One of the main objectives of the United Nations is protection and promotion of human rights. To achieve this objective, maintenance of international peace and security is a must because some of the worst episodes of grave human rights violations happen during times of crisis and conflicts. The Charter also lays a great emphasis on maintaining peace and security with this being one of its objectives as stated in its first Article. Under the Charter, Security Council has been given the main power to take action, including enforcement action, whenever there is threat or breach of peace and security. General Assembly has only got a secondary role under the Charter in this regard. However, over the years, Security Council has not dealt with such threats or violations of peace and security as effectively as the Charter had envisaged. It has been so ineffective because of abuse of veto power by its permanent members. This paper argues that General Assembly being the representative body of all the civilized nations of the world, is better suited to deal with this issue. To achieve this, it is argued that other ways to amend the Charter are looked into since formal amendment is not going to happen again because of veto of the permanent members. One solution that is suggested by the paper is doctrine of modification by subsequent practice. It is contended that this doctrine while controversial does have some validity in International Law. It is shown that it got support from International Law Commission when it was drafting the Vienna Convention Law of Treaties and included it under one of the draft articles. Some States too supported it during the vote on whether it should be included in final draft. Some scholars have also supported this doctrine and have called it as part of customary International Law. Further, it is shown that considering the unique nature and content of the UN Charter as well as composition of the General Assembly, it is all the more reasonable for this doctrine to be employed to achieve the goal of maintenance of international peace and security which is crucial to defend human rights of the people all over the world.

**Key words: -** *Human Rights, Maintenance of International Peace and Security, Modification by Subsequent Practice, Treaties, United Nations General Assembly.*

## Introduction

One of the most significant aspects of the United Nations (hereinafter 'UN') Charter is its emphasis on human rights. The Charter's preamble itself talks about reaffirming faith in fundamental human rights and dignity and worth of the human person. Then one of the clauses of Article 1 which lists out the purposes of the Charter also talks about promoting and encouraging respect for human rights. The Charter lays the groundwork for the development of a comprehensive human rights framework, which has since been elaborated upon in various treaties, declarations, and resolutions. Interesting thing to note is how many times phrase 'maintenance of international peace and security' is mentioned in the Charter. More importantly, it is present both in the preamble as well as in Article 1 as one of the purposes of the UN. When we consider that the Charter came into effect just after the horrific World War II had come to an end, it is clear that the drafters believed that the basic human rights of the people cannot be protected unless there is international peace and security and aggression and conflicts are brought to an end.

It was believed that after coming into force, UN would be able to stop any major acts of aggression as well as serious internal conflicts. For this the Charter gave primary responsibility to the United Nations Security Council (hereinafter 'UNSC'). On the other hand, United Nations General Assembly (hereinafter 'UNGA') was handed the task to be the main deliberative body with representation from all the countries of the world. As far as human rights were concerned, the scheme of the Charter was such that UNSC was supposed to defend them by maintaining international peace and security. UNGA had a non-binding role in this matter and it was more like a forum to provide guidance to all the countries in promoting and respecting human rights. However, with time the Assembly has become more crucial in this regard and has played a pivotal role in recognizing new types of human rights as well as keeping an oversight on different States to ensure that they adhere to universally accepted human rights framework in their domestic jurisdiction. Still, it lacks teeth to act in a potent manner in cases of serious violations of human rights during conflicts which is problematic because UNSC has been ineffective due to veto abuse of permanent members. There is a need to revisit the Charter to come up with a solution so that UNGA can be a viable force in such situations when UNSC cannot act properly.

## Brief Look at role played by UNGA in protection of Human Rights so far

The UNGA has been instrumental in promoting and protecting human rights globally through its various efforts and initiatives. One of the major contributions of the UNGA in the protection of human rights has been the adoption of the Universal Declaration of Human Rights (UDHR) in 1948. The UDHR is a landmark document that sets out the fundamental rights and freedoms that every human being is entitled to, including the right to life, liberty, and security of person, freedom of thought, conscience, and religion, and





the right to work, education, and health. It sets out, for the first time, fundamental human rights to be universally protected and it has been translated into over 500 languages. Since then, the UNGA has continued to adopt various human rights-related resolutions and treaties aimed at promoting and protecting human rights globally. For example, the UNGA in 1966 adopted the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social, and Cultural Rights (ICESCR). These two treaties along with UDHR have since become the cornerstone of the international human rights regime and have been ratified by almost all the member states of the United Nations. Moreover, the UNGA has also established various human rights bodies and mechanisms to monitor and promote the implementation of human rights treaties and resolutions. The most important among these is the United Nations Human Rights Council (UNHRC) created in 2006. The Human Rights Council replaced the former United Nations Commission on Human Rights. It is responsible for promoting and protecting human rights globally, as well as investigating and reporting on human rights violations. It has a complaint procedure which allows individuals and organizations to bring human rights violations to the attention of the Council.

The UNGA has also played a critical role in addressing specific human rights issues such as discrimination, racism, gender inequality, and violence against women. For example, in 1979, the UNGA adopted the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), which requires states to take measures to eliminate discrimination against women in all areas of life. The UNGA has also adopted various resolutions aimed at combating racism, racial discrimination, xenophobia, and related intolerance. In addition, the UNGA has also established various mechanisms for protecting and promoting the rights of vulnerable groups such as children, refugees, and persons with disabilities. For example, the Convention on the Rights of the Child, which was adopted in 1989, sets out the rights of children, including the right to education, health, and protection from violence, abuse, and exploitation. The UNGA has also adopted various resolutions aimed at protecting the rights of refugees and internally displaced persons, as well as promoting the rights of persons with disabilities.

## Human Rights violations in Conflicts

As we can see from the discussion above, role of UNGA cannot be overstated when it comes to protection and promotion of human rights. However, even though world has made great progress on this front, still there is a lot of work yet to be done especially considering the frequent and widespread episodes of grave human right violations that keep on happening in different parts of the world. While there are now so many treaties and resolutions in place that talk so elaborately about various human rights ranging from the most basic and fundamental to complex and nuanced ones, yet they all sound so hollow when they are reduced to just a piece of paper during times of grave crisis when there is a blatant disregard for any sort of human rights. Human Rights treaties should

be treated as a means to end rather than end itself. What is meant by this is that role of international community is not finished by just penning down a treaty or adopting a resolution talking about human rights. Rather that is only the first step and the focus should then shift as to how it is ensured that every human being living on this planet enjoys those human rights that these documents talk about.

This is where it becomes so crucial that serious conflicts and crisis situations all over the world are resolved at the earliest since it is during these instances that persons suffer the greatest depravity of their rights. For example, in World War 2, it is estimated that somewhere between 70 to 85 million people lost their lives with majority of them being civilians. India itself lost some 2 million people even though it was only indirectly involved in the war.

In another major episode of shocking human rights violations, more than one million people perished and more than 2,50,000 women were raped in 1994 in what is also called as 'Rwandan Genocide' of the Tutsi community.

Then if we talk about the ongoing Syrian conflict which has been going on for more than ten years.It is estimated as per the report released by UN Human Rights office last year in 2022 that between March 2011 and March 2021, more than 3 lakh people have died.

In the ongoing Russia-Ukraine war, there has been destruction on an unimaginable scale. While the exact number of casualties are hard to determine, recently UN Human Rights Office deplored the number of deaths that have taken place and estimated that more than 8000 civilians have died so far with nearly 13000 injured, while acknowledging that actual number might be far higher.

As we can see, greatest threat to human rights is posed by such conflicts and crisis. This the reason that UN Charter talks about maintenance of international peace and security in so many of its articles as well its preamble. Indeed Article 11 empowers UNGA to discuss and make recommendations on matters pertaining to it, while Article 24 empowers United Nations Security Council to take actions for the same purpose.

## Scheme of the UN Charter

The scheme of the Charter is such that UNSC has been trusted with the primary role for this purpose as the Charter only gives the Council the power to take enforcement action. Article 41 gives the council the power to take measures short of using armed force like economic sanctions or disruptions of communications among others. Article 42 is like a last resort as it authorizes the UNSC to use armed force if measures undertaken under Article 41 do not prove to be sufficient.

On the other hand, UNGA has only been given a deliberative role in this regard as it can only make recommendations to the UNSC and when UNSC is seized of the matter then UNGA cannot even make any recommendations.





However, this has proved to be the biggest roadblock in protection of human rights as UNSC cannot seem to come to any sort of unanimity among its permanent members as invariably there is veto by one of the permanent members directed by geopolitical concerns and objectives. The most recent and glaring example of this is the ongoing Russia-Ukraine conflict where it is impossible for UNSC to act since any resolution would be vetoed either by USA or Russia. This makes whole procedure of protection of human rights given under the Charter almost redundant since the only organ having real power of any sorts in this regard is rendered toothless due to abuse of veto power.

The most realistic way forward is for UNGA to assume central role when it comes to maintaining international peace and security because it the only body which has representation from almost all nations and can be called as the 'Voice of the World'. Now the issue is how can UNGA do anything meaningful when there is an explicit bar under the UN Charter.

## Modification by Subsequent Practice

UN Charter has prescribed a very onerous procedure for its amendment. Article 108 of the Charter talks about the amendment procedure. The condition of requiring a supermajority of two-third of the total members of the UNGA including all the five permanent members of the Security Council as per Article 108 has effectively made any substantial amendment to the Charter next to impossible. So far, the Charter has been formally amended only five times all of which can at best be termed as minor changes which have not made any significant change to the working of the UN organs and its subsidiary bodies. As we have discussed earlier, present structure of the Charter has hindered the UN in effectively addressing crisis situations involving grave and widespread human rights violations. The primary responsibility of maintaining peace and security under the Charter vests with the Security Council which has been rendered toothless due to veto power of the permanent members. While UNGA has tried to help by sending peacekeeping missions over the years in various conflict situations, still they have been limited in effectiveness due to the absence of having any power to take enforcement measures. As an organ which represents almost all nations of the world, UNGA should ideally be having all the power that is necessary to tackle conflicts that threaten international peace and security. It is therefore of vital interest that in absence of formal modifications to the Charter, some other means are thought and discussed about which can bring about desired changes in the Charter so that UNGA is more effective in addressing human right violations around the world.

In this article, it is proposed that by using the concept of subsequent practice which in this case would involve looking at conduct of General Assembly through its resolutions and acts, a meaningful change can be brought which will also have some basis in law. There are primarily two ways in which subsequent practice can change the way a treaty is applied. Subsequent practice can either be evidence of agreement among parties to accept a particular interpretation of

any treaty provision or it can be evidence of agreement among them to modify any treaty provision. However, the second proposition is still controversial and many legal scholars do not accept modification of a treaty by subsequent practice.

In Vienna Convention on the Law of Treaties (hereinafter 'VCLT'), Article 31(3)(b) talks about how subsequent practice can be used to establish an agreement among parties regarding interpretation of any treaty. Further, in the 'Draft conclusions on subsequent agreements and subsequent practice in relation to interpretation of treaties' adopted by International Law Commission (hereinafter 'ILC') at its seventieth session in 2018, one of the draft conclusions was to use that type of subsequent practice which does not necessarily provide any evidence of such agreement, as a supplementary means of interpretation under Article 32 of the VCLT. It also termed subsequent practice under Article 31(3)(b) as authentic means of interpretation. This shows that using subsequent practice to interpret a treaty is a well-established legal norm.

There have been few instances in the past where the UN Charter was interpreted in the light of subsequent practice of the organs of the UN. One was regarding Article 27(3) which talks about the requirement of 'concurring' votes of all the permanent members of the UNSC to make any decision on a non-procedural matter. In its advisory opinion on South Africa's presence in Namibia (1971), International Court of Justice (hereinafter 'ICJ') relied on the hitherto practice of the council to treat abstentions as not violating the concurrence requirement given under Article 27(3). ICJ held that the longstanding practice of the UNSC had been to not interpret 'concur' as requiring affirmative vote of the permanent members. It looked into the practice of the permanent and non-permanent members to infer that such an interpretation had been uniform and well accepted.

Another relevant example is that of Article 12(1) which bars UNGA from making any recommendations regarding matters in respect of which UNSC is also 'exercising' its functions. However, UNGA has interpreted 'exercising to mean 'exercising at the moment' which has meant that despite UNSC being seized of any particular matter, it has still made recommendations. The very first case was in 1950 when it passed Uniting for Peace Resolution as UNSC was unable to make any decision regarding the Korean war due to veto of erstwhile Soviet Union. ICJ in its opinion in the Palestine Wall case (2004), accepted this interpretation of Article 12(1) by relying on the uniform practice of UNGA in the various other situations after 1950 like that of Angola, Bosnia, Somalia among others. It interestingly called it the 'evolution of the accepted practice of the General Assembly.'

Interesting thing to note here is that in both of the above instances, ICJ termed the changes in application of the Articles as mere interpretations. However, there can be an argument made that these changes were not mere interpretations, rather they were in effect modifications of the Charter. The primary reason that ICJ did not term it as modification was because modification by subsequent





practice it is still not accepted by most of the legal jurists and scholars. It has also not been recognised under VCLT as seen earlier. So, even when sometimes the subsequent practice moves too far away from the plain text of the Charter, still it is only called as change in the interpretation, or 'evolution of accepted practice' etc. This means that any changes to be made using subsequent practice by this criterion must normally fall in the range of possible interpretations for them to be acceptable. Sure, even when it is difficult to reconcile such interpretation with ordinary and plain meaning of the text of the Charter, it might still sometimes be held valid using terms like 'evolution', 'uniform' etc. Yet, in most of the situations, changes will be minor and not substantial so as to not fall under modification category.

To illustrate the above point in the context of power of UNGA to act decisively during serious conflicts, let us look at the regime of peacekeeping operations done by UN forces over the years. Traditional peacekeeping operations have no explicit legal basis in the UN Charter. They have sometimes been justified under Article 29 which allows UNSC to create subsidiary organs to perform its functions as laid down in Article 34,36,37,38 or 39. Other times such operations have been thought to derive legitimacy from implied power of UNGA to maintain international peace and security. This theory of implied power of UNGA to act comes from a combined reading of Article 24 with Article 11to 14. Article 24 says the primary responsibility to maintain international peace and security lies with UNSC. It has been interpreted by UNGA to mean that such power is not exhaustive and a secondary responsibility lies with the Assembly. Consequently, it passed Uniting for Peace Resolution in 1950 which gave power to UNGA to make appropriate recommendations when there was threat to international peace and security and Security Council could not act due to veto of any of the permanent members.

As we have seen earlier, the restraint of Article 12(1) on this resolution was not accepted by the ICJ in the Palestine Wall case by using the interpretation established by the subsequent practice of the UNGA. Uniting for Peace resolution also authorised UNGA to use force, when necessary, in case there was a breach of peace or act of aggression. However, this would have meant to give power of enforcement action to the UNGA which was only available to UNSC under Chapter VII. Clearly this would have been a substantial change which could only be called as modification of the Charter and can never be justified as a different interpretation, Unsurprisingly, in the Certain Expenses case (1962), ICJ held that enforcement action has to be compulsorily referred to UNSC under Article 11(3) and UNGA can't undertake any enforcement measures in its peacekeeping operation without the approval of UNSC.

This has meant that UNGA can only engage in traditional peacekeeping operations where consent of the host State is necessary and UN forces are primarily meant to separate hostile factions without taking recourse to enforcement action. It has resulted in Uniting for Peace system being not as effective as it was envisaged initially (Shaw, 2014). This shows that for any substantial change to happen to the UN Charter, especially in the role played by

UNGA to protect human rights in conflict situations, we need to look at using subsequent practice as a means of modification instead of mere interpretation.

It is no doubt true that VCLT does not allow modification of a treaty by subsequent practice. However, it is interesting to note that ILC (1968) did include it under Article 38 of Draft Articles on the Law of Treaties. The draft article allowed modification of a treaty if the subsequent practice of the parties indicated common consent to modify the treaty even if not every party was actively engaged in the practice. Even though, later in the United Nations Conference On The Law of Treaties (hereinafter 'UNCLT') the draft article was deleted from the final version of the Act by an amendment, the amendment to delete it was not adopted unanimously. Some States were in favour of the draft article being adopted in the final version. Some of them contended that international law was less formalistic than domestic law and so informal modification by subsequent practice is well suited in international treaties. Further it was also argued by many States like Austria, Italy, Switzerland, and Argentina that such a modification might already be a pre-existing principle in international law. Israel made a surprising remark that though it did not support inclusion of draft Article 38 in the final version, still it would not go to the extent to say that it did not exist as a principle in International Law. Interesting thing to note is that even ILC did not explicitly reject the idea that modification by subsequent practice is a part of customary international law. This view is also supported by few scholars who endorse customary principle of treaty modification by subsequent practice. M.E. Villiger (2009) while supporting this idea described the customary rule as 'States, when interpreting a treaty, may in their subsequent practice gradually move away from the treaty text in their interpretation thereof and eventually amend the treaty'. Similarly, another scholar Joost Pauwelyn (2003) talks about the existence of customary rule of 'implied agreement among States to change the law' which according to him makes modification by subsequent practice as perfectly valid. This shows that even though this concept is still not accepted by most of the people, yet there are few scholars who still try to base its legality in the customary law. Further, as we saw above, ILC did support its inclusion in the VCLT and many States too supported it when discussing it in the UNCLT.

So far, we were discussing as to how modification by subsequent practice can be treated as legal by analyzing the different arguments as seen above. Now, we shall discuss as to how it should be employed in practical terms to modify a treaty. The most important issue is whether the consent to modify the treaty like this should be unanimous or there can be some different criteria? If we look at what the special rapporteur Sir Humphrey Waldock had to say in the UNCLT, it would be clear that as far as ILC was concerned, tacit agreement of all the parties was required to modify the treaty. Scholar Fitzmaurice (2021) supported the possibility to amend the treaty in such a manner by 'subsequent and uniform practice of all the parties'. It is not surprising that there is a stress on consent of all the parties since it would make such modification as highly genuine and also allay fears that by legitimizing such informal modification stability of the





treaties would be eroded.

However, while it is desirable that that consent of all the parties is present to modify any treaty in this manner, it would hardly ever be achieved in real world (Bianchet, 2017). This is especially true in case of multilateral treaties with large number of parties. Since, in this article we are focusing on the UN Charter, we should look if stressing on requiring consent of all the parties is feasible. As we know, it has 193 members at present. It would be next to impossible to get all the 193 members to reach a tacit agreement on any matter which can modify the Charter in this manner. Moreover, it would defeat the very purpose for which this manner of informal amendment is being suggested. As discussed earlier, procedure for formal amendment prescribed in the Charter is too cumbersome requiring two thirds majority of all the members with concurring votes of all the five permanent members of the UNSC. Now if we stress on consent of all the members for informal modification by subsequent practice, it would make no difference to the existing situation since that would mean any permanent member can still sort of veto the tacit agreement. This implies that there will not be possible any substantial change through this method just like it has been the case so far with formal amendment procedure. Therefore, it is essential that such stringent numerical criteria is not stressed upon. There are scholars who do propose a bit lenient test for such modification. The most suitable suggestion is the requirement of two third supermajority for the modification of the UN Charter, like for example given by scholar Michael Barton Akehurst (1975). This would mean that an overwhelming majority of the member States are in favor of a particular modification which would give it legitimacy while at the same time remove the unjust veto power of the permanent members which has no place in the modern world where all Sovereign States are seen as equals.

The thought of informal modification of the Charter in this manner will no doubt make many jurists and scholars uncomfortable. The primary concern will be the disregard for the text of the Charter which increases the scope of arbitrariness in the decision making of the relevant organizations. The parallels are drawn with the domestic law of liberal democracies where government authorities cannot go against the written text of the Constitution. Even in the absence of a written text, there are written judgements of the highest Court of the land to act as a check on the power of the government. For any government to act in a different manner than what their Constitution says, it has to first amend it and invariably the procedure is somewhat rigid and normally the procedure prescribed has to be followed and no other informal amendments can take place. So understandably, when it is suggested that the UN Charter be modified in an informal manner bypassing the formal method given in Article 108 of the Charter, it does not sit well with many.

However, while it is helpful in most of the cases to compare the International Law with the domestic laws, in this particular instance it might not be the most justified comparison. When we talk of Constitution of any civilized nation, we must remember that there is normally a mechanism of judicial review prescribed by it, either explicitly or in an implied manner like in case of India. In the case

of UN Charter, there is no provision of judicial review either explicitly or impliedly (Engel,1953). ICJ does not have any power to bind either UNSC or UNGA through its judgement. It can only give advisory opinion to the General Assembly which as the name suggests is not binding. So, the Charter itself did not create any authority which can be called as the final interpreter of its text nor any which can review actions taken by other organs under the Charter, unlike the case with Constitutions of domestic countries. It was felt more suitable to let the organs created by the UN Charter be self-restrained by their own understanding of the Charter and its purposes (Blum,1993). This reflects the primarily political nature of the UN and its organs (Kelsen,1951).

In our view, looking at the scheme of the Charter as discussed above combined with the less formalistic nature of the International Law, it is perfectly reasonable to treat modification by subsequent practice as valid when supported by two third supermajority of the members of the UNGA. As we saw above, there is an argument for a customary rule of modifying treaty by subsequent practice. When the formal amendment procedure has been rendered almost redundant due to abuse of the veto power, the assembly can employ this customary rule to modify the Charter which gets actually more legitimacy than any other case since UNGA has 193 States as its members. Lack of any judicial review of the actions of the UNGA suggests that it has the implied power to take actions to further the objectives for which UN was created even if that means modifying the Charter in a manner different than what the text suggests. This discussion does not suggest that UNGA should act arbitrarily without support from the UN Charter. Even when we point out that there is no judicial review of its actions, it is not to conclude that the assembly is free to do what it likes even if it means going contrary to plain letter of the Charter. That will make the legal regime of the UN very unstable and arbitrary and whimsical. What is being discussed here is that lack of any review means that there is greater freedom with the UNGA to interpret the Charter in a way that keeps it relevant. However, this can only be stretched up to a point beyond which no interpretation will be able to support the actions directly in contravention the text of the Charter. As we saw earlier, for the UNGA to fulfill its role as defender of human rights especially in cases of serious conflicts which threaten international peace and security, it needs to take actions which can only be supported if there is modification of the Charter. Consequently, we have proposed the legal doctrine of informal modification by subsequent practice which has greater justification here than in other cases due to the unique contextual and structural nature of the UN Charter (Liang,2012). This will ensure that the actions of the assembly are not termed as arbitrary being against the plain meaning of the Charter and can be held legitimate by reading informal modifications into the Charter.

## Conclusion

It is acknowledged that above proposal is quite radical and would require strong will, particularly on part of the smaller nations to stand up to the pressure tactics





of the powerful permanent members of the UNSC. However, as we discussed earlier, it is of vital importance that international community does not remain a mute spectator owing to rigid amendment procedure prescribed by the UN Charter and let millions more die in ongoing and future conflicts. International Law cannot be rendered so weak so as to be helpless in defending the fundamental human rights due to a provision in a document and any solution, no matter how radical it sounds should be tried to protect life and liberty of the people as that is the end goal of all the complex provisions of the Charter and various other Human Rights treaties

## References:


1. Bianchet, Lara. (2017). Treaty modification by subsequent practice: analysis of the present legal framework, the expansive potential and the consequences of treaty modification by subsequent practice. Retrieved date June 14,2023. https://www.diva-portal.org/smash/get/diva2:1189907/FULLTEXT02
2. Akehurst, M. (1975). The hierarchy of the sources of international law. British Yearbook of International Law, 47(1), 273-285.
3. Bianchet, L. (2018). Treaty Modification by Subsequent Practice: Analysis of the present legal framework, the expansive potential and the consequences of treaty modification by subsequent practice.
4. Blum, Y. Z. (1993). Eroding the United Nations Charter.
5. Engel, S. (1970). UN Peace-Keeping: Concept, Law, and Politics. Polity, 3(2), 285-292.
6. Costelloe, D. (2022). Compatibility in the Law of Treaties and Stability in International Law. The British Yearbook of International Law, brac005.
7. Oliver, C. (1962). Certain Expenses of the United Nations (Article 17, Paragraph 2, of the Charter). American Journal of International Law, 56(4), 1053-1083.
8. International Court of Justice. (1971). Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa): Notwithstanding Security Council Resolution 276 (1970). ConséquencesJuridiques Pour Les États de la Présence Continue de L'Afrique Du Sud enNamibie (Sud-Ouest Africain) Nonobstant la Résolution 276 (1970) Du Conseil de Sécurité (Vol. 2). AW Sijthoff.
9. Evans, M. D., & Breau, S. C. (2005). I. Legal consequences of the construction of a wall in the occupied Palestinian territory: Advisory Opinion, 9 July 2004. International & Comparative Law Quarterly, 54(4), 1003-1013.
10. International Law Commission. (2018). Draft conclusions on subsequent agreements and subsequent practice in relation to interpretation of treaties (U.N. Doc. A/73/10, para. 51).

11. Kelsen, H. (2000). The law of the United Nations: a critical analysis of its fundamental problems: with supplement (Vol. 11). The Lawbook Exchange, Ltd..
12. Liang, J. (2012). Modifying the UN Charter Through Subsequent Practice: Prospects for the Charter's Revitalisation. Nordic Journal of International Law, 81(1), 1-20.
13. OHCHR. (2022). UN Human Rights Office estimates more than 306,000 civilians were killed over 10 years in Syria conflict. Retrieved from https://www.ohchr.org/en/press-releases/2022/06/un-human-rights-office-estimates-more-306000-civilians-were-killed-over-10, accessed on June 25, 2023.
14. Outreach Programme on the 1994 Genocide against the Tutsi in Rwanda and the United Nations. (n.d.). Historical background. Retrieved from https://www.un.org/en/preventgenocide/rwanda/historical-background.shtml, accessed on June 25, 2023.
15. Pauwelyn, J. (2003). Conflict of norms in public international law: how WTO law relates to other rules of international law (Vol. 29). cambridge university press.
16. Shaw, M. N. (2017). International law. Cambridge university press.
17. United Nations General Assembly. (1950). Uniting for Peace Resolution (U.N. Doc. A/RES/5/377).
18. United Nations Conference on the Law of Treaties. (1968). U.N. Doc. A/CONF.39/11.
19. United Nations General Assembly. (1948). Universal Declaration of Human Rights. G.A. res. 217A (III). U.N. Doc. A/810.
20. Vienna Convention on the Law of Treaties. (1969). Done at Vienna on 23 May 1969, entered into force on 27 January 1980. United Nations Treaty Series, Volume 1155, page 331.






# Human Right of Legal Assistance at Early Stages of Criminal Justice System: A Critique

***Prof. (Dr.) Anuradha Chadha[1], Mr. Puneesh Jindia[2]***
*Principal, University School of Law, Desh Bhagat University, Mandi Gobindgarh, [1]*
*Research Scholar, University School of law, Desh Bhagat University, Mandi Gobindgarh, [2]*

**Abstract**

Access to justice at early stages of criminal justice has grown not merely to a legal right but has acquired the status of a human right which is to be recognised, implemented and practiced in all States at the international level and national level. All member States are also obligated to attain Sustainable Development Goal 16, which calls for universal access to justice for all. Legal assistance at the early stages of criminal justice brings justice to the doorstep of poor and deprived strata of society. The legal assistance provided at the initial stages impacts not only the implementation of law with regard to arrest but also ultimately leads to fair trial. Thus, legal assistance made available at all stages in the criminal justice system as required by the fair trial standard – on arrest, during investigation, at trial and post-trial is quite crucial for people who are arrested or called to the police station as suspects especially poor. Despite of Constitutional and other statutory provisions like; Articles 14, 22 & 39 A of the Constitution of India and Sections 41-A, 41 B, 41 C & 41 D under the Criminal Procedure Code, 1973 along with Legal Services Authority Act, 1987 providing for the legal assistance at the early stages of criminal justice administration, it is not being properly implemented properly in India. It is because of a number of reasons such as; un-awareness among the general public about the legal provisions, corruption, lack of police reforms, in-adequacy of the existing legislations and more importantly lack of proper implementation mechanism in this direction. The measures like; increasing legal aid services, simplifying legal procedures, improving infrastructure, addressing corruption and ensuring adequate support and protection to the victims of gender-based violence, spreading awareness among the general public through electronic media along with amending the statute particularly including the specific legal provisions regarding early access to justice through pro-bono clinics at various levels are required to be adopted in order to bring the justice within the reach of poverty ridden strata of the society at the stages of criminal investigation and pre-litigation of the cases so as to reduce the number of under-trial prisoners.

**Key words:** - *Criminal justice, Early access, Fair Trial, Legal Assistance, Prisoners, Under-trial.*

## Introduction

The Preamble of the Constitution mentions the aims and objectives of the Constitution itself. The emphasis is on social, economic and political justice to all. To achieve this purpose the access to justice for all should be made easily available. It is also to be seen that there is no misuse of power by any authority. The early stages of criminal justice process are quite crucial for suspects and arrested persons because of the fact that at this stage they are in a vulnerable position. In India majority of those arrested and imprisoned belong to poor, ill-educated or disadvantaged sections of the society (National Crime Record Bureau, 2017). Hence, the legal assistance provided at the initial stages impacts not only the execution of law in respect of arrest but also finally leads to just trial (Birk, Moritz & Others, 2011).

In this way, the early stages of the criminal justice process are vital for the efficiency and effectiveness of the criminal justice system as a whole (United Nations Office on Drugs and Crime, 2014). During this period, to the maximum extent, quality of evidence is collected, so that the prospects for a fair trial and appropriate decisions about guilt or innocence could be determined (Sri Rao T. Mallikarjuna). Decisions are also made about pretrial detention that have far reaching consequences not only for the individuals concerned and their ability to support their families and dependents (Dhami, K. Mandeep & Yannick N. van den Brink, 2022, 381-395), but also with regard to the resources needed to maintain the facilities in which they are incarcerated.

## Pre-Trial Stages of Legal Assistance

At the pre-trial level, there are a number of stages for Legal Assistance:

- **Pre-Arrest Stage:** Most of the persons called for interrogation to the police station on suspicion of having committed a criminal offence are inherently vulnerable to factors such as- the environment of the police station and the uncertainty of what may happen to them. Providing legal assistance to such persons can entail following benefits (National Legal Services Authorities):

  a) Making the suspect feel less isolated or intimidated;

  b) Safeguarding his welfare and rights during interrogation:

  c) Providing a check on police aggression;

  d) Avoiding unnecessary arrests.

- **Arrest Stage:** The presence of a lawyer at the stage of arrest can make a huge difference to how the accused is treated in police custody (Jaishree Suryanarayanan, Jaishree, Maja Daruwala, Das Sana &Dr. Mrinal Satish). A lawyer at this stage can ensure that the police respect the rights of the accused and prevent unwarranted harm to the arrested person (Office of the United Nations High Commissioner for Human Rights, 2004). It reduces the possibility of beating, torture, coercion for disclosures, wrongful detention, fabrication, false implication and much more. A prompt legal assistance by lawyer at the time a person is arrested by the police may provide (National Legal Services Authorities):

  a) Assistance to understand the reason behind his/her arrest;

  b) Protection against intimidation, ill-treatment and torture;

  c) Assistance to understand and navigate the criminal justice process;

  d) Actualisation of procedural rights;

  e) Ensuring bail in bailable offences at the police station itself.

- **Remand Stage:** Similarly, at the remand stage, efficient representation to unrepresented arrestees is quite imperative to ensure that unnecessary arrests are challenged, bail applications are filed, unnecessary remands are resisted and procedural rights are protected (National Legal Services Authorities).

All persons in custody, which would obviously include detention at pre-arrest stage and, between arrest and production in the Court, are entitled to free legal services by virtue of Section 12 of the Legal Services Authorities Act, 1987 (Jaishree Suryanarayanan, Jaishree, Maja Daruwala, Das Sana &Dr. Mrinal Satish). Since a large number of them do not have an opportunity or means to engage a lawyer on their own, Legal Services Authorities have an important role to play in reaching out to them.

## Kinds of Legal Assistance at Early Stages of Criminal Justice

The Legal Assistance Concept has two broad dimensions which are as follows:

- The first aspect is the traditional approach, i.e., providing financial assistance to a poor litigant (Pathak, Varun), who has a case in a court of law or in an administrative tribunal, or Government department.
- The 'Preventive Legal Aid Services Program,' as Justice Bhagwati refers to it, is the second component of the legal aid program (Pathak, Varun). This initiative is critical and much more required in a developing country like India, where there is extreme poverty, ignorance, and illiteracy, and where the general population is both ignorant of its rights and powerless to defend them. More often than not, they are not aware of available machinery for seeking judicial or administrative redress. This becomes further aggravated by the fact that the courts as well as tribunals are following an adversarial system. Being itself dilatory, the adversarial system leaves ample scope for all types of behindhand tactics in any litigation. Moreover, the courts in India including the Highest Court are over-burdened with pending cases. The situation in the District Courts is much worse. The case sometimes hangs on for 10 or 12 years. Thus, in India, the emphasis has to be on the Preventive Legal Aid Services Programmes.

  The noted jurist further explains the six components of the Preventive Legal Aid Service Programme, adopted sufficiently in India as an integral and

important part of the legal aid concept. These components are:

- The first application of this initiative is to host Lok Adalats and legal aid camps in impoverished urban and rural regions (Choudhary, Shubham) to bring legal assistance to the doorsteps of the populace and facilitate the resolution of their problems.
- Second application is the development of legal awareness among the populace relating to the rights and advantages bestowed onto them by the social assistance laws (Datta, Arindam) and also by implementation of the socio-economic relief points through administrative measures. The ultimate goal is that legal aid should reach every hamlet in the nation (Sripriya. T).
- The third component of this approach is the recruitment of law professors and students to assist the less fortunate members of society by establishing legal aid clinics in law schools and universities (Legal Desire, 2015, May 3).
- Encouragement of study in the area of law that affects the poor makes up the fourth component of this initiative.
- The promotion of Public Interest Litigation with an eye to ensuring the rights of the underprivileged is the fifth component of this program.
- Finally, there ought to be a comprehensive program to teach paralegals (Grey Shery, 2022, December 1) and what is now referred to as barefoot lawyers.

Thus, access to justice at the early stages of criminal justice is one such ameliorative function of catering justice to the unmet legal needs of citizens. Indeed, early access to legal assistance is the constitutional duty of putting the power of law in the hands of the people.

## Review of Literature

The following is the review of literature relevant to Legal Assistance at early stages of criminal justice:

1. **The United Nations Office on Drugs and Crime in the handbook, 'Early access to legal aid in criminal justice processes:** a handbook for policymakers and practitioners' (United Nations) was intended to be a practical guide to developing and implementing policies and programmes to ensure early access to legal aid, including implementing the international standards set by the United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems.
2. **S. Muralidhar in Law, poverty and legal aid- Access to criminal justice (Muralidhar S, 2004)** focuses on the importance of the right of access to justice for those interacting with the criminal justice system as complainants, suspects, offenders or prisoners. He further explains that the law, processes, procedures and practices that govern the functioning of the system are largely in-comprehensible to the lay person and, therefore, legal





assistance becomes imperative at each stage.

   a. **Moritz Birk and others in Pretrial Detention and Torture:** Why Pretrial Detainees Face the Greatest Risk (Birk, Moritz & Others, 2011) examine the impact of excessive pretrial detention. In addition to the socio-economic impact of pretrial detention, the intersection between pretrial detention and public health, torture, and corruption is explored.

3. **Ed Cape in Improving Pretrial Justice:** The Roles of Lawyers and Paralegals (Ed Cape, 2012) demonstrates the positive impact that early intervention by lawyers and Paralegals can have in reducing the abuses and other negative effects of pretrial detention, and to provide a guide to establishing pretrial justice schemes.
4. **B. Uma Devi in Arrest, Detention, and Criminal Justice System:** A Study in the context of the Constitution of India (B., Uma Devi, 2012) builds a comprehensive narrative of provisions relating to arrest and detention in the Indian Constitution. The author argues that there is an urgent need for a genuine departure from the imperial legal regime by a radical revision of Indian Penal Code, 1860, Criminal Procedure Code, 1973, Police Act, 2007 and the Legal Services Authorities Act, 1987. The main premise of the book is that pre-trial detention as well as punitive detention has to be restricted to only those cases which fall under the grounds on which individual liberty can be restricted.
5. **Dr. G. Mallikarjun in his Article 'Legal Aid in India and the judicial Contribution' (Dr. Mallikarjun, G., 2013)** has tried to analyse the concept of legal aid, and has stated that legal aid implies giving free legal aid services to be provided to the underprivileged and indigent by whom the services of attorneys for the conduct of a case or a legal proceeding in any Court of Law, Tribunal or before an Authorised officer cannot be afforded. In the suggestion part, he has made reference to legal awareness and the Alternative Disputes Redressal methods that would remove the barriers to access to justice.

   a. **The law Commission of India, in its 177th Report on Law Relating to Arrest, (Law Commission of India, 2001)** suggested far reaching changes in the criminal laws to maintain a balance between the liberty of the citizen and the societal interest in maintenance of peace, law and order. It also suggested measures for making police accountable for their omission and commission. The Law Commission also reiterated its earlier 154th Report and commended the reasoning therein for the establishment of a separate investigating agency and separation of investigating and protecting agency from the police staff engaged in the maintenance of law and order.

**Objectives of the Study**

Following objectives have been intended in the study:

- The fundamental goal of this research work is to look into the concept of the human right of access to justice in the form of legal assistance at the early stages of criminal justice in India by determining the exact scope of law providing for it at the global and national level.
- To examine the implementation mechanism and the measures adopted for providing the legal assistance at the early phases of criminal justice to the maximum extent.
- To suggest the ways and means for strengthening and improving the existing law as well as implementation strategies for providing access to justice at the early stages of the criminal justice system in letter and spirit.

**Research Methodology**

While pursuing this research paper, the traditional doctrinal technique has been followed. The research has focused upon the legal statutory provisions at the international and national level along with landmark judgements pertaining to necessity of providing early access to justice to the deprived section of the society particularly at the stage of investigation and arrests. Books, magazines, published and unpublished reports of National Law Commission, various committees, research papers, websites, news-papers, landmark judgements and views and opinions of eminent jurists' contributory to the relevant field have been the significant tools for study.

Legal Provisions Relating to Legal Assistance at the Early Stages of Criminal Justice System

In India, the framework of procedural law and the judgments of the Supreme Court of India provide for legal assistance at early stages of the criminal process (CGSLSA). A cardinal principal in the legal system is the presumption of innocence offered to the accused until he is found guilty at the end of the trial (Amaravathi, Pooja and Mishra, Ananya, 2021) and accordingly, there exists a need to protect these rights of the accused. The right to equal access to justice stems from the concept of equality and equal protection of laws recognised by the Constitution of India. The right to equal justice and free legal aid is enshrined under Article 39A of Indian Constitution. Article 39A states that:

"The State shall ensure that justice is promoted by the process of the legal system, on a foundation of equivalent opportunity, and free legal assistance shall, specifically, be provided by appropriate regulation or systems or in any other method, to safeguard that there is no denial of opportunity to secure justice to any national due to monetary or other disablement."

Right to a lawyer of an arrested person is also a Constitutional guarantee enforceable in the form of a fundamental (human) right (Constitution of India, Article 22). A bare reading of fundamental Right guaranteed under Article 22





(1), which states that, 'No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice,' elucidates that the Constitution provides a safeguard against abuse of power by authority by providing the right to consult and be represented by a lawyer. Article 14 (Constitution of India, Article 14) that deals with Right to Equality and Article 22(1) that makes it clear that there's an obligation of the State to safeguard equality before law and a lawful system, encourage righteousness on the foundation of equal opportunity to everybody.

The spirit and sense of Article 22 (1) is that it is fundamental to the rule of law that the services of a lawyer shall be available for consultation to any accused person under the circumstances of near-custodial interrogation. Moreover, the observance of the right against self-incrimination is best promoted by conceding to the accused the right to consult a legal practitioner of his choice (Jagir Singh & Another v. The State, 1985).

In fact, the right of suspects to get access to the legal aid arises before the interrogation begins, as soon as they become aware of the fact that they are being subjected to investigation and when they are under a threat of abuse and intimidation (Jaishree Suryanarayanan, Maja Daruwala, Das Sana &Dr. Mrinal Satish), for example, in case of custodial violence. However, Section 41 A does not mention anything on the duration for which an accused/suspect can be detained in a police station for investigation which can lead to harassment but can be alleviated by the presence of a lawyer.

When the person who is served with the notice complies with the notice and keeps complying with the terms of the notice, then as per the provision of Section 41A (3) such person shall not be arrested with regards to the offence mentioned in the notice, However, if the Police officer who has the power to arrest is of the view that the person must be arrested, they can arrest the person after recording the reasons for arrest (Agarwal, Pooja).

When there is a failure on the part of the person served with the notice to comply with the terms of the notice or he is not willing to identify himself, then as per the provisions of Section 41A (4), the police officer may arrest such person for the offense stated in the notice, however such arrest is subjected to the orders passed by a competent court (Digital Repository of all Central and State Acts).

The Code of Criminal Procedure was amended in 2008 ((Sections 41B, 41C, 41D), whereby, a pre-arrest stage was added to the stages identified by the committees. Early access to legal assistance, therefore, needs to be seen in the context of these amendments.

Section 41-B, entails the procedure of arresting a person. It reads that the police officer while making an arrest is required to wear an accurate, visible and clear identification of his name on his dress while going to arrest, he is also required to prepare a memorandum of arrest and get it signed by at least one witness, either by a family member or by a respectable member of the locality and

counter-signed by the arrested person's relative or a friend, which are parallel to the guidelines issued in the landmark judgment of D.K. Basu v. State of West Bengal (AIR 1997 SC 610).

While Section 41-C, provides for establishment of Control room at districts by the State Government in every district and at State level. These control rooms in the district have to put a notice board on which the names and addresses of the persons arrested are to be written and the control room which is set up at the Police Headquarters, has to collect the information about the persons arrested, nature of the offence with which they are charged and keep up a data base record for the information of the general public.

Section 41-D makes a provision to consult a lawyer during interrogation, it lays that when any person is arrested and interrogated by the police, he has right to meet an advocate of his choice during interrogation but not throughout interrogation. These provisions are to protect the persons from arbitrary arrest and also to provide the safeguards to the suspects who are really not the accused or offenders. So, to provide the access to legal assistance at the pre-trial and during investigation to the offenders/ suspects is very significant provision in the case of criminal trials (UNODC).

Furthermore, Section 12(g) of the Legal Services Authority Act, 1987 provides that any person in 'custody' is entitled to legal aid, which will begin the very moment a person comes in to contact with the police i.e., the first point of contact within the criminal justice system- as a suspect or an accused or a witness. The terms 'custody' and 'arrest' have not been defined in the Code. However, it has been held by the Supreme Court that 'in every arrest', there is custody but not contrarywise and that both of the words 'custody' and 'arrest' are not identical terms (Directorate of Enforcement v. Deepak Mahajan, 1994). Moreover, 'police custody' does not commence only when the accused is formally arrested but 'would commence from the moment when his movements are restricted and he is kept in some sort of direct or indirect police surveillance.' Thus, it also covers an accused who is called for questioning pursuant to a notice of appearance. Therefore, right to a lawyer/legal aid through lawyer of suspects emerges before putting questions, when they develop awareness that they are the focus of interrogation and are in custodial conditions (Jaishree Suryanarayanan, Maja Daruwala, Das Sana &Dr. Mrinal Satish).

**The Legal Services Authorities Act, 1987** also lays down the legal framework through the constitution of Legal Services Authorities for affording free legal services to the unprivileged segments of the society. The Act enunciated the creation of the Legal Services Authorities at the National, State, District and Taluka levels which would assist in facilitating Access to Justice to the weak and the marginalised people of the country. Besides, in every single High Court, a High Court Legal Services Committee has been established while a Supreme Court Legal Services Committee has been constituted to administer and implement the legal services programme in so far as it connects to the Supreme





Court of India (National Legal Services Authority). NALSA is the apex body which is in charge of laying down policies and framing effective schemes for the implementation of legal services programmes through the State, District and Taluk Legal Services Institutions (National Legal Services Authorities). The following broad functions are being performed by the Legal Services Institutions:

1. Court based-legal aid and advice to the eligible persons and counselling.
2. Lok Adalat and ADR-forum where the disputes/cases pending in the court of law or at pre-litigation stage are settled/compromised amicably.
3. Outreach activities-NALSA aims to provide free legal services to every last person in the queue.

At the International Level also, the European Court of Human Rights in the case of Salduz v. Turkey (European Court of Human Rights, 2008), has held that 'access to lawyer need to be given from the first examination of a suspicious persons by the law enforcement agency. In another case, viz., Zaichenko v. Russia (No. 39660/02, §§ 41-43. 2010, February 18), the European Court of Human Rights stated that the right should apply as soon as there was significant curtailment of a suspect's freedom which would include detention short of arrest.

Principal 3 of the United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems speak about legal aid for persons suspected of or charged with a criminal offence. It states that,

'State should make certain that everyone who is incarcerated, detained, alleged with a charge or incriminated with a criminal offence and punishable by a term of incarceration or the capital sentence is eligible to get legal assistance at all phases of the criminal justice procedure (United Nations Office on Drugs and Crime. 2013, March 28).'

It further states that 'Legal assistance should be given, irrespective of an individual's resources, if the interests of justice so necessitate, for instance, given the inevitability or intricacy of the case or the graveness of the prospective punitive action (Black, Samantha. 2017, January 2).'

**The Report of the UNODC on Early Access to Legal Assistance**

Early intervention by the Legal aid providers, in order to ensure that human rights of suspects/ incarcerated are respected, also improves the efficiency and fairness of the criminal justice system and represents an important safeguard against torture and other forms of ill-treatment against them. It also has the potential to reduce costs, both of the system overall and of the individual and families concerned, for example, in terms of the costs involved in paying bribes or the loss of income resulting from detention (United Nations, February 14).

Thus, an early access to legal assistance ensures an honest trial which is in consonance with the principles of the rule of law. Through such early access, the

fundamental rights of a human beings may be preserved thereby, reposing the trust of the people in the criminal justice system (The United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems).

## Discussion and Findings

However, legal assistance at the early stages of criminal justice in India is a complex issue and within the Indian society, it is problematic to implement this concept in its most comprehensive sense, despite the numerous attempts made by the Executive, the Judiciary and particularly legislature through various legal provisions to give free legal help to the needy and destitute of society at the early phases of prosecution so as to secure the actual perseverance of the Welfare State in India.

Factually, despite the knowledge that impanelled legal professionals to offer free legal aid services, consumers are reluctant to contact legal aid agencies. The Empanelled legal professionals provide legal assistance to the beneficiaries in civil and criminal proceedings before different courts and quasi-judicial authorities in the form of preparation and legal arguments, official responses, and provide consultation to those who are currently on trial and those who have been convicted. However, the general public believe that such lawyers are not committed or serious about the purposes of Legal aid programs, rather they utilise them to gain cheap fame. Because of their in-competence and irresponsibility and due to not providing justice to needy timely particularly at the earlier phases of the criminal justice system in real sense, which is the scheme's main driving force, the investigation officials and impanelled legal practitioners, have lost the faith (Lawrence M. Grosberg, 1987) and respect of beneficiaries thereby emphasising upon the much more need of pre-litigation access to criminal justice.

Secondly, disputes can be resolved without resorting to formal litigation if pre-litigation services are provided competently (Chakraborty, Mekhla) and timely. If proper advice is given to the parties before initiating proceedings in the courts, the parties can be saved from unnecessary hurdles and difficulties arising from litigation which is not being provided to them.

Thirdly, the ignorance and illiteracy of poor leads to helplessness and further impoverishment. The poor people are un-educated and are not aware about their rights and obligation due to which they face legal troubles arising from ignorance. They are not capable of seeking legal advice in time resulting into further legal difficulties and inability to prevent un-necessary litigation.

In legal literacy programs, awareness is created so that the rural masses are to be restrained to approach the courts of law for unnecessary and baseless causes so awareness is helpful nowadays for providing them early access to justice in order to achieve the main objective of providing legal aid to them properly in the real sense (Yadav, Mahima and Yadav, Suryansh, 2021). However, this is again not possible due to the lack of proper legal provisions as well as a lot of





challenges being faced while providing early access to justice to the general masses ((Yadav, Mahima and Yadav, Suryansh, 2021). The responses obtained earlier cull out that people were not aware of the Legal Assistance available at pre-arrest and arrest stages. They come to know about it only when they approach the court and other institutions on legal matters such as Mahila cells etc. It is so because the Government has not taken appropriate steps regarding the legal aid awareness programs.

It is also a proved fact on the basis of the critical analysis that due to lack of effective legal assistance, unnecessary remand to police custody and judicial custody is taking place. In the course of the present research endeavour, it has been found that at Pre-Litigative Stage Legal Aid Services are still inchoate and haven't reached maturity. Although some provisions are available to settle disputes in the form of conciliation, mediation, and Lok Adalat at the Pre-litigation stage, but they remain by and large infructuous owing to the lackadaisical approach of the authorities (Supreme Court of India & Indian Law Institute. 2018, July 27-28). Additionally, the concept of Gram Adalats/Nayalayas has not yet been institutionalised.

In the course of compiling the present research work after going through all germane provisions and schemes as envisaged in various legislations, it has been found that various legal services authorities at given strata are sufficiently independent in their sphere to carry out their statutory functions. There is minimal scope for any kind of hierarchical clash. Throughout the study, it is also evident that “the right to early access to justice” as provided in the Indian Constitution, legislations, judicial pronouncements, and umpteen schemes and programs conceptualised there under has evolved in the shape of a legal guarantee. However, it has also been outrageously appalled to note that the lukewarm, lack-luster, and half-baked approach towards implementation of the said mandate of law has brought the whole constitutional and statutory drill to nought and thwarted the noble ideal of securing equal justice to all. Evidently, it is quite clear that early access to justice which itself is part and parcel of access to legal aid is a fundamental right of every citizen in India and human right at the global level. However, in practice, still many people in India face barriers when seeking justice. One of the major barriers is the delay in the justice delivery system. Cases often take years, if not decades, to be resolved, which results in prolonged suffering and frustration for the parties involved. It is chiefly because of un-awareness and lack of efficient, trained and skilled enforcement agencies for the proper implementation of the provisions regarding access to criminal justice at early stages which can reduce the sufferings of the people to a large extent at the pre-trial phases and can help in reducing the huge number of under-trial prisoners. Thus, despite the country's commitment of providing justice to all its citizens, there are several challenges that hinder access to justice particularly for marginalised and vulnerable populations. Some of the key issues include:

**Legal System:** India's legal system is complex, with a large number of laws, regulations, and procedures. The legal process is lengthy, expensive, and confusing for many people, especially those who are illiterate or have limited resources (Raza, Aadil. 2020).

**Understaffed legal assistance:** There is a shortage of legal assistance services in India, and those that do exist are often underfunded and understaffed (Pandey, Suryanshi. 2022, December 25). This means that many people, who cannot afford a lawyer or do not understand the legal system, are unable to have early access to justice.

**Infrastructure:** The justice delivery system in India is burdened with inadequate infrastructure. Lack of proper infrastructure affects the functioning of courts, police stations, and prisons leading to delays in cases and trials.

**Corruption:** Corruption is a major problem in India's justice system. It often results in people being denied justice or cases being dragged out for years (Committee on Police Reforms. 2000, August).

Hence, on the basis of the research study, it is clear that Legal Assistance at investigation, pre-arrest and arrest stages is not taking place due to lack of awareness and implementation framework. A range of strategies is needed to tackle the lack of knowledge and understanding about the right to early access to legal assistance. The ways in which suspects and accused persons are informed of their right to such access are carefully required to be considered, analysed and implemented. So, evidently there is a challenge for India to provide citizens with early access to the justice system. This is mainly due to the fact that Indian society is extremely hierarchical and decentralised. Even while the early access to legal assistance program's implementation has, at least in part, had favourable results, further reformation is still required. It is necessary to acknowledge and accept the challenges, and are to be criticised and put in their place.

## Conclusion and Recommendations

Thus, finally, it can be concluded that due to the lack of access to criminal justice at the early phases in letter and spirit due to a number of barriers, the chief objective of access to justice to all is not being achieved in reality. No doubt, India has taken several measures to provide early access to justice to its citizens. These measures aim at addressing the delay in the justice delivery system and providing quick and efficient resolution of disputes. It is also quite evident that access to justice is not just limited to the courts and judicial process in India, but it also extends to the investigation stage. It is essential to ensure that individuals have access to justice at the investigation stage, which is very crucial in determining the course of justice. While early access to justice at the investigation stage has improved in India, but there is still a long way to go and more reforms are needed to make justice more accessible to all especially in the criminal justice system. The general public is still totally un-aware of their rights to have early access to justice due to in-adequacy of the existing legislations and





more importantly due to lack of proper implementation mechanism in this direction.

It can be unequivocally contested that in order to ensure that legal assistance at the early stages of criminal justice system is not a mere myth or a semantic jargon, a collaborative effort at the level of the Bar, the Bench, the Legal Academia and the Law Students is required in order to promote, facilitate and propagate the cause for clinical legal education, and legal assistance work so that Justice can also be manifestly done. Thus, to improve access to justice particularly at the early stages of investigation and pre-litigation in India, there are several steps that can be taken. These include increasing legal assistance services, simplifying legal procedures, improving infrastructure, addressing corruption and ensuring that victims of gender-based violence receive adequate support and protection. Moreover, the following measures are recommended to be consideredso asto further improve legal assistance at the investigation and pre-litigation stages of criminal justice system.

1. The present existing law relating to providing free legal assistance under Article 39 A of the Indian Constitution and statutory enactment of National Legal Services Act, 1987 needs to be amended keeping into consideration the concept of free legal assistance at the early stages of the investigation as well as pre-litigation in order to make it (law) adequate one for reducing the burden of the courts of law with un-necessary litigations and thereby reducing the harassment and sufferings of the under-trial prisoners.
2. The Indian Government is required to undertake serious police reforms (Committee on Police Reforms. 2000, August), including the introduction of community policing, increasing the strength of police personnel, and creating separate wings to investigate serious crimes. The reforms should be aimed at making the police more accountable and efficient in their investigation. In this line, the Government also needs to focus at increasing the duration and quality of police training programs as well as at introducing courses on human rights, modern investigation techniques, and forensic science.
3. The National Human Rights Commission and the State Human Rights Commissions are required to be given more powers to investigate cases so that individuals can approach them to file a complaint against the police or other Government officials.
4. The Government is required to establish more Forensic Science Laboratories in all States to ensure that the investigation is conducted in a scientific and objective manner.
5. The Government can consider for using tools such as crime mapping, digital evidence management systems, and automated case management systems for streamlining the investigation process, reducing delays, and ensuring transparency.
6. The Government can consider to be partner with NGOs and civil societies

to create awareness about legal rights among the general public, to provide legal assistance at the early stages of criminal justice system properly and to monitor investigations.

7. The law ministry can take action to get senior attorneys to take on some of the impoverished people's cases pro-bono. For this purpose, the Government should implement new incentive programs, such as better stipends, to entice students also to choose remote village regions as their operating bases. Some States now require lawyers to report the number of pro bono hours they perform each year, while other States and National Bar Associations have increasingly urged lawyers to perform pro bono work. If the same trajectory is followed regularly, then Law Firms and not just lawyers can realise that they owe a responsibility to the people in India. It would further be an incentive for the law students who take up placements with such law firms.
8. The digitalisation process of Justice has reduced a lot of problems for the common man. However, a lot remains to be done in this context. Mobile Courts, and Electronic – FIR Registration procedures have to be made more efficient so as to be within the reach of the common man.
9. The electronic media can take the initiative to educate the public on the current legal assistance laws (Legal Services Corporation). Through the publication of articles in newspapers and other resources, the current legal assistance regulations can potentially gain more public awareness.
10. The prior experiences regarding the benefits of implementation of the concept of the Gram Nayalaya, can be a useful and effective tool for reaching the goal of a free legal assistance mechanism at the early stages of criminal justice (Srivastava, Dhawal. 2020, November 29).

If the above-mentioned steps are taken then there is ray of hope for the proper and efficient implementation of the law relating to legal assistance at the early stages of criminal justice system in India. However, in order to achieve this objective, first of all the present legislation needs to be amended to include the specific legal provisions regarding legal assistance at the early stages of criminal investigation through pro-bono clinics at various levels so as to realise the human right of the poverty ridden and deprived strata of the society to bring justice within their reach for reducing not only their burden, precious time and money but also of the courts and thereby reducing the number of under-trial prisoners who suffer a lot and linger in the prisons because of no fault on their part but for their worse financial condition.

**References:**


1. Aleksandr Zaichenko v. Russia, No. 39660/02, §§ 41-43 (2010, February 18).
2. Agarwal, Pooja. Online Legal Advice - Lawyers in India-Arrest Without Warrant, Legal Service India E-Journal, Retrieved from [ Legal Service India E- Journal]
3. Amaravathi, Pooja and Mishra, Ananya (2021). The Presumption of Innocence and its Role in the Criminal Process, IJLMH 4(3) Page 1135–114. Retrieved from DOI: https://doij.org/10.10000/IJLMH.11641
4. B., Uma Devi (2012). Arrest, Detention, and Criminal Justice System: A Study in the context of the Constitution of India. OUP India.
5. Birk, Moritz & Others (2011). Pretrial Detention and Torture: Why Pretrial Detainees Face the Greatest Risk, New York: Open Society Foundations.
6. Black, Samantha. (2017, January 2). International Law Right to Timely and Confidential Access to Counsel-Report, Lawyers' Rights Watch Canada. Retrieved from [Layers' Rights Watch Canada]
7. Boyle, Katie. Camps, Diana. English, Kirstie & Ferrie, Jo (2022, May), The Practitioner Perspective on Access to Justice for Social Rights: Addressing the Accountability Gap -Research Report, University of Stirling.
8. Chakraborty, Mekhla. An Understanding of Pre-litigation Mediation in India, Latest News, Mediation & Arbitration Centre. Retrieved from [VIA Mediation and Arbitration Centre]
9. Choudhary, Shubham. Lok Adalat- Online Legal Advice - Lawyers in India, Legal Service India E-Journal. Retrieved from[Legal Service India E-Journal]
10. Committee on Police Reforms (2000, August). Report of Committee on Police Reforms. Government of India. p109, para 9.4.
11. Constitution of India, Article 14.
12. Constitution of India, Article 22.
13. D.K. Basu v. State of West Bengal, AIR 1997 SC 610.
14. Datta Arindam. Legal Aid in India-Famous Trial, Legal Service in India. Retrieved from [Legal Service India]
15. Dhami, K. Mandeep & Yannick N. van den Brink (2022). A Multi-disciplinary and Comparative Approach to Evaluating Pre-trial Detention Decisions: Towards Evidence-Based Reform, European Journal on Criminal Policy and Research, 28, 381–395. Retrieved from https://doi.org/10.1007/s10610-022-09510-0
16. Digital Repository of all Central and State Acts. Section 41 A of Code of Criminal Procedure, 1973. Retrieved from [India Code- Digital India]
17. Directorate of Enforcement v. Deepak Mahajan, AIR 1994 SC 1775; 1994 SCR (1) 445 1994. Law Commission of India. (2017). Implementation of UN Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment through Legislation. Report No. 273. Retrieved from [Advocate Khoj]
18. Dr. Mallikarjun, G. (2013). Legal Aid in India and the judicial contribution.

NALSAR Law Review, 7(1).

19. Ed Cape (2012). Improving Pretrial Justice: The Roles of Lawyers and Paralegals. A Global Campaign for Pretrial Justice Report.
20. European Court of Human Rights. (2008). 1542, (2009) 49 EHRR 19, 26 BHRC 223, IHRL 3268.
21. Grey, Shery. (2022, December 1). How to become a para-legal: Responsibilities, Requirements and Salary, Forbes Advisor. Retrieved from [ Forbes Advisor]
22. In 2008, for the first time, significant amendments were made to the 1973 Code. The 2008 Act met with severe criticism from some sections and was notified and enforced only on December 31, 2009 (Sections 54, 55, 60A). Provisions dealing with arrest powers were again sent to the Law Commission and on its recommendations, provisions were further amended by the 2010 Act. The arrest provisions in the 2008 Act were notified and enforced from October 30, 2010 and the 2010 Act was notified on November 1, 2010 (Sections 41B, 41C, 41D).
23. Jagir Singh & Another v. The State on 19 July, 1985.
24. Jaishree Suryanarayanan, Maja Daruwala, Das Sana & Dr. Mrinal Satish. 'Early' Access to Legal Aid: Stages of Pre-Arrest and Arrest-Briefing Paper. Commonwealth Human Rights Initiative. New Delhi. Retrieved from [Commonwealth Human Rights Initiatives]
25. Law Commission of India (2001). Law Relating to Arrest (177th Report). Retrieved from [Latest Laws.com - Library]
26. Lawrence M. Grosberg (1987). Illusion and Reality in Regulating Lawyer Performance: Rethinking Rule 11. Vill. L. Rev. 32, 575. Retrieved from [Digital Commons]
27. Legal Desire (2015, May 3). Importance of Legal Aid Clinics in Law Schools," Desire-Newsletter. Retrieved from [Newsletter- Legal Desire]
28. Legal Services Corporation. LSC's Technology Initiative Grant (TIG's) Impact, Retrieved from [TIG- Legal Services Corporation].
29. Muralidhar, S. (2004). Law, poverty and legal aid Access to criminal justice, Lexis Nexis, Butterworths.
30. National Crime Record Bureau (2017). Report: Prisons statistics.
31. National Legal Services Authorities. About NALSA- Information about State, District, Taluka Legal Services Authorities. Government of India. Retrieved from [National Legal Services Authorities]
32. National Legal Services Authorities. Early Access to Justice at Pre-Arrest, Arrest and Remand Stage. Government of India. Retrieved from [National Legal Services Authorities]
33. National Legal Services Authority, Department of Justice -Ministry of Law





and Justice. Government of India. Retrieved from [Department of Law & Justice- NALSA]

34. National Legal Services Authority. CGSLSA, cgslsa.gov.in. Retrieved from [National Legal Services Authority- CGSL- SA].
35. Office of the United Nations High Commissioner for Human Rights (2004). Expanded Pocket Book on Human Rights for the Police-Human Rights Standards and Practice for the Police (Professional Training Series No. 5/Add.3), United Nations, New York and Geneva.
36. Pandey, Suryanshi. (2022, December 25). Why quality of free legal aid remains poor in India- Legal aid lawyers are grossly underpaid, poorly treated and overworked. India Spend, Legal Aid-Scroll.in. Retrieved from [Scroll.in- Legal Aid]
37. Pathak, Varun. A Brief History of Legal Aid. Legal Service in India. Retrieved from [ Legal Service in India]
38. Raza, Aadil. (2020). Legal Literacy: A Key to Socio-Economic Justice, YIF Critical Writing Programme. A Journal of the YIF Critical Writing Programme.Retrieved from [ Ashoka University- A Journal of the YIF Critical Writing Programme]
39. Sri Rao T. Mallikarjuna. General Principles of Fair Trial. Retrieved from [ E Courts- Mission Mode Project].
40. Sripriya. T. Legal Aid and Awareness in India: Issues and Challenges- Online Legal Advice - Lawyers in India, Legal Service India E-Journal, Retrieved from [ Legal Service India E- Journal]

# Time for the G20 to Act on Commitments and step up Leadership on Human Rights

***Dr. Priyanka Redhu[1], Mr. Sagar Kundu [2]***
*Assistant Professor, Department of English, GC, Rithoj [1]*
*Research Scholar, Geeta Global Law School, Geeta University [2]*

**Abstract**

The Group of Twenty (G20) has emerged as a pivotal forum for addressing global economic challenges and fostering international cooperation. However, amidst the complex landscape of interconnected issues, the imperative of human rights often remains overshadowed. This research paper delves into the critical need for the G20 to fulfil its commitments and elevate its leadership role in the realm of human rights.

The paper begins by tracing the historical evolution of the G20 and its primary focus on economic matters. It highlights the fundamental shift in the global landscape, where the impact of economic decisions on human rights cannot be underestimated. With increasing inequality, discrimination, and challenges to basic human freedoms, the G20 faces a moral obligation to integrate human rights concerns into its agenda.

Furthermore, the paper analyzes the existing commitments and declarations related to human rights within the G20 framework. It scrutinizes the effectiveness of these commitments and identifies gaps in their implementation, often due to the prioritization of economic interests. Drawing upon case studies, it offers insights into instances where G20 member states have made significant strides in advancing human rights and where collective action has fallen short.

To move forward, the paper proposes a series of concrete recommendations for the G20 to enhance its leadership on human rights. These recommendations encompass re-evaluating the G20's core principles to encompass a human rights-based approach, establishing dedicated working groups, promoting transparency and accountability, and fostering partnerships with civil society organizations.

The paper also underscores the importance of mainstreaming human rights considerations into economic policies and decision-making processes. In conclusion, this research paper underscores that the G20 has reached a crucial juncture in its evolution, where it must recognize that economic prosperity and human rights are interdependent. It calls upon the G20 to take swift and tangible actions to fulfil its commitments and assume a more prominent leadership role in advancing human rights worldwide. By doing so, the G20 can contribute significantly to a more just, equitable, and sustainable global order.



*Time for the G20 to Act on Commitments and step up Leadership on Human Rights*

**Key words:** - *G20, Human rights, Commitments, Leadership and Global governance*

## Introduction

The Group of Twenty (G20), originally established in 1999, has evolved into a prominent international forum for addressing global economic challenges and fostering cooperation among the world's largest economies. Its primary mandate has traditionally revolved around economic matters, such as financial stability, trade, and development. However, in a world where the effects of economic decisions are inextricably intertwined with the fate of human rights, there is an urgent and compelling need for the G20 to expand its leadership role in this critical area.

Human rights, a cornerstone of international law and values, encompass a wide spectrum of principles and freedoms essential for the dignity, well-being, and equality of all individuals. These rights encompass civil, political, economic, social, and cultural aspects and are enshrined in numerous international agreements and conventions. They serve as a moral compass for global governance, guiding nations toward a more just and equitable world order.

The nexus between economic policies and human rights is undeniable. Economic disparities, discrimination, labour exploitation, and environmental degradation are just a few examples of issues that have a direct impact on people's lives and well-being. As the G20 pursues economic growth and stability, it cannot afford to overlook the inherent interconnectedness between economic and human rights concerns.

This research paper delves into the critical imperative for the G20 to not only acknowledge but also actively integrate human rights considerations into its agenda. It argues that, in an increasingly complex and interconnected world, the G20 must recognize that economic prosperity cannot be truly sustainable without a parallel commitment to human rights. By doing so, the G20 can fulfil its moral obligation and play a pivotal role in promoting a more just, equitable, and compassionate global order. In the following sections, we will explore the historical evolution of the G20, its existing commitments related to human rights, and propose concrete recommendations for the G20 to step up its leadership in this vital area of global governance.

## DEFINITION OF G-20 AND HUMAN RIGHTS:

### "G20" (Group of Twenty):

The "G20", officially known as the Group of Twenty, represents an international forum comprising 19 individual countries and the European Union. These member countries are some of the world's most influential and economically significant nations, including "Argentina, Australia, Brazil, Canada, China, France, Germany, India, Indonesia, Italy, Japan, Mexico, Russia, Saudi Arabia,

South Africa, South Korea, Turkey, the United Kingdom, and the United States". Established in 1999, the G20 initially focused on addressing financial crises and global economic challenges. Over time, it has evolved into a vital platform for high-level discussions, cooperation, and policy coordination on a wide range of global issues.

**Human Rights:**"Human rights" are a foundational set of inherent rights and freedoms to which every individual is entitled by virtue of their humanity, irrespective of factors like nationality, ethnicity, gender, religion, or other distinguishing characteristics. These rights are considered universal, indivisible, and inalienable, forming the bedrock of human dignity, equality, and well-being. Human rights encompass a broad spectrum of principles and liberties, including:

1. **"Civil Rights"**- These encompass fundamental freedoms such as the right to life, liberty, and personal security, as well as the right to freedom of thought, conscience, religion, and expression.
2. **"Political Rights"**- These pertain to the rights to participate in government, have access to political representation, and engage in the democratic decision-making process.
3. **"Economic Rights"**- Economic rights encompass the right to work under fair conditions, receive just wages, and enjoy an adequate standard of living, including access to food, clothing, housing, and healthcare.
4. **"Social and Cultural Rights"**- These rights include the right to education, cultural participation, and the benefits of scientific and technological progress.
5. **"Environmental Rights"**- While not universally codified, the right to a healthy environment is increasingly recognized as a component of human rights, as environmental degradation can directly impact human well-being.

"Human rights" are enshrined in numerous international agreements and conventions, with the "Universal Declaration of Human Rights" (UDHR), adopted by the United Nations in 1948, serving as a landmark document in this regard. These rights provide a universal ethical and legal framework for safeguarding the intrinsic worth and rights of all individuals and guiding the actions of governments, organizations, and individuals in promoting and respecting human rights across the globe.

## RESEARCH OBJECTIVES:-

1. To highlight the Nexus between G20 and "Human Rights", emphasizing the interdependence of economic decisions and human rights.
2. To assess G20 Commitments on "Human Rights", critically evaluating their effectiveness and implementation.
3. To recommend Concrete Steps for G20 Leadership on "Human Rights", including policy changes, structural adjustments, and partnerships.





4. To raise Awareness and Promote Discussion among policymakers, academics, and civil society about the G20's role in human rights.
5. To contribute to Policy Development by providing analysis and actionable recommendations for integrating "human rights" into economic decision-making within the G20 and global governance.

## RESEARCH METHODOLOGY:

The research methodology for this study is primarily qualitative and involves a literature review and analysis to assess the G20's engagement with "human rights" and develop policy recommendations.

## LITERATURE REVIEW:

1. Kirton, (2013). "G20 Governance for a Globalized World" Kirton's in-depth analysis highlights the G20's transformation from a primarily economic forum to a pivotal global governance institution. He underscores the forum's evolution in addressing multifaceted global challenges that extend well beyond conventional economic concerns, including its potential impact on issues such as human rights.
2. Gao.H.S, (2019)."The G20 on "Human Rights": In Search of Effective Leadership" Gao critically assesses the G20's official commitments to human rights, emphasizing the pressing need for effective leadership within the G20 to drive substantial advancements in the sphere of human rights .
3. Steiger.B, (2017). "The G20 and "Human Rights": How the World's Most Powerful Forum Can Drive Human Rights Progress" Steiger delves deep into the challenges encountered by the G20 in effectively addressing human rights concerns. She posits that the G20, as one of the world's most influential forums, possesses the potential to catalyze progress in the realm of human rights.
4. Smith.J.T, (2020). "G20 Member States and Human Rights: A Comparative Analysis" Smith's research involves a comprehensive comparative analysis through case studies of select G20 member states. His work offers detailed insights into the distinct approaches of individual member states regarding human rights policies and progress (Smith, 2020).
5. Young. D, (2018). "Civil Society Influence on "G20 Human Rights" Agendas: A Comparative Study" Young's research explores the influential role played by civil society organizations in shaping the human rights agendas of the G20. Her work provides comparative insights into the impact of civil society engagement on G20 discussions and actions related to human rights.
6. Miskimmon.A, (2016)."Comparative Analysis of G20 and United Nations Approaches to Human Rights"Miskimmon's comparative analysis critically examines and contrasts the approaches of the G20 and the United Nations

to human rights. His work identifies both commonalities and differences, shedding light on the strengths and weaknesses of each forum's engagement with human rights.

7. Roberts, E. (2021). "Enhancing G20 Leadership on “Human Rights”: A Policy Framework" Roberts presents a comprehensive policy framework with actionable recommendations aimed at strengthening the G20's leadership in the realm of human rights. Her work emphasizes the necessity for structural reforms within the G20 and calls for increased transparency to enhance its effectiveness in addressing human rights issues
8. Scherer. L. (2015). "The G20 and “Human Rights”: An Ethical Perspective" Scherer's work offers an ethical perspective on the prioritization of human rights within the G20. She underscores the ethical and moral imperatives that underlie the call for the G20 to prioritize human rights, emphasizing the intrinsic connection between human rights and global stability and prosperity.
9. Maclaughlin. P. (2019). "Human Rights and the G20: A Comparative Analysis of Commitments and Actions” Maclaughlin conducts a comparative analysis of the G20's commitments to human rights and their subsequent actions in this domain. Her work assesses the alignment between G20 declarations and actual efforts to promote human rights.
10. Larson, E. (2017). "The G20 and Human Rights: An Empirical Assessment" Larson's research provides an empirical assessment of the G20's actions related to human rights. He analyzes concrete measures taken by the G20 to address human rights issues and evaluates their impact.
11. Kim, S. (2018). "The Influence of Economic Interests on G20 Human Rights Agendas" Kim's work explores the influence of economic interests within the G20 on human rights agendas. She investigates how economic priorities may sometimes overshadow human rights concerns in G20 discussions.
12. Foster, R. (2020). "G20 Human Rights Commitments: A Longitudinal Analysis" Foster's research conducts a longitudinal analysis of the G20's human rights commitments over time. He traces the evolution of G20 declarations related to human rights and assesses their consistency and impact.
13. Chang, A. (2016)."G20 Accountability Mechanisms in Promoting Human Rights" Chang's work examines the accountability mechanisms within the G20 for promoting human rights. She assesses the effectiveness of these mechanisms in holding G20 members accountable for their human rights commitments.
14. Wagner, M. (2019) - "The Role of the G20 in Advancing LGBT Rights" Wagner's research focuses on the role of the G20 in advancing the rights of the LGBTQ+ community. He analyzes the G20's efforts in promoting LGBT rights and their impact on global human rights discussions.





## ANALYSIS TO ASSESS THE G20'S ENGAGEMENT WITH HUMAN RIGHTS

The Group of Twenty (G20) is a prominent international forum primarily focused on addressing global economic challenges. Over the years, it has recognized the interconnectedness of economic stability and human rights. Assessing the G20's engagement with human rights requires a comprehensive analysis of official G20 documents, declarations, speeches, and actions. This analysis aims to provide insights into the G20's commitment to human rights, its actions in promoting human rights, and the challenges it faces in this regard.

**Formal Commitments to Human Rights:**

The G20 has made formal commitments to human rights in various documents, including summit communiqués and declarations. These commitments often emphasize the importance of respecting and upholding human rights as fundamental to global stability and prosperity. The language used in these documents reflects the G20's recognition of the significance of human rights as a global concern.

**Actions Taken to Promote Human Rights:**

Document analysis reveals that the G20 has taken several actions to promote human rights:

1. **Inclusion of Human Rights Language:** G20 summit communiqués frequently include statements that reaffirm the commitment to human rights principles, such as non-discrimination, freedom of expression, and gender equality. These statements demonstrate the G20's acknowledgment of the relationship between human rights and economic progress.
2. **Working Groups and Taskforces:** The G20 has established working groups and taskforces dedicated to specific human rights issues. For instance, the Women 20 (W20) engagement group focuses on gender equality and women's rights. These specialized groups indicate a deliberate effort to address human rights concerns within the G20 framework.
3. **Capacity Building and Knowledge Sharing:** The G20 has initiated programs to facilitate knowledge sharing and capacity building in areas related to human rights, such as combating corruption and promoting labor rights. These initiatives demonstrate practical efforts to promote and protect human rights.

**Challenges in G20's Engagement with Human Rights:**

Despite its commitments and actions, the G20 faces several challenges in effectively engaging with human rights:

1. **Limited Enforcement Mechanisms:** The G20's commitments to human rights lack robust enforcement mechanisms. While it can set agendas and encourage member states to act, it does not possess the authority to compel compliance.

2. **Diverse Member State Positions:** G20 member states have diverse positions on human rights, and some may prioritize economic interests over human rights concerns. Achieving consensus on human rights issues can be challenging.
3. **Focus on Economic Mandate:** The G20's primary focus on economic matters sometimes leads to the relegation of human rights issues to secondary importance. Balancing economic concerns with human rights considerations can be complex.
4. **Civil Society Engagement:** Civil society organizations have called for greater transparency and inclusivity in G20 processes related to human rights. Engaging civil society effectively remains a challenge.

The G20's engagement with human rights is characterized by formal commitments, actions, and challenges. While it acknowledges the importance of human rights, the G20 faces challenges in translating these commitments into tangible outcomes. Policymakers and stakeholders must continue to work towards strengthening the G20's role in promoting and protecting human rights within the context of global economic governance.

**POLICY RECOMMANDATION:**

Based on the analysis of the G20's engagement with human rights, here are policy recommendations aimed at enhancing its role in promoting and protecting human rights globally:

a) **Strengthen Formal Commitments:** The G20 should reinforce its formal commitments to human rights by incorporating specific language and targets related to key human rights principles in its summit communiqués and declarations. This would emphasize 'the importance of human rights as a core component' of the G20's agenda.

b) **Create Human Rights Mechanisms:** Establish dedicated mechanisms within the G20 framework for monitoring and reporting on human rights progress. These mechanisms should facilitate regular assessments of member states' adherence to "human rights" commitments and provide a platform for sharing best practices.

c) **Foster Dialogue and Consensus:** Encourage open and constructive dialogue among G20 member states on "human rights" issues. Create opportunities for member states with diverse perspectives to engage in meaningful discussions and seek consensus on human rights concerns.

d) **Enhance Civil Society Engagement:** Increase the involvement of "civil society organizations" in G20 processes related to human rights. Establish mechanisms for civil society consultation and input in shaping G20 policies and actions on human rights.

e) **Integrate Human Rights into Economic Agendas:** Promote the integration of human rights considerations into economic discussions and policies. Emphasize the interconnectedness of economic stability, social justice, and human rights, recognizing that economic development should not come at the expense of human rights.

f) **Capacity Building and Knowledge Sharing:** Continue and expand capacity-building programs and knowledge-sharing initiatives within the G20. These programs should target member states' officials, particularly in areas such as anti-corruption, labor rights, and gender equality.

g) **Encourage Member States' Commitment and "Develop a Comprehensive" Human Rights Framework:** Urge G20 member states to align their national policies with international human rights standards. "Emphasize the importance of" member states' commitment to upholding human rights principles and encourage them to take concrete actions in this regard. Create a comprehensive G20 framework for addressing human rights issues, outlining specific action plans, timelines, and accountability measures. This framework should encompass areas such as gender equality, labor rights, non-discrimination, and freedom of expression.

These policy recommendations aim to enhance the G20's role in promoting and protecting human rights on a global scale. By implementing these recommendations, the G20 can further align its actions with its commitments and contribute to a more equitable and rights-respecting world.

**FINDINGS: Mentioned below are the findings according to the stated objectives:**

**Objective 1: Highlight the Nexus between G20 and Human Rights:**

- The "G20" recognizes the intrinsic link between economic decisions and human rights, acknowledging their mutual influence on global well-being.

**Objective 2: Assess G20 Commitments on Human Rights:**

- G20 has formal commitments to human rights, articulated in official documents like summit communiqués and declarations.
- Further evaluation is needed to gauge the practical effectiveness and implementation of these commitments.

**Objective 3: Recommend Concrete Steps for G20 Leadership on Human Rights:**

- Policy recommendations encompass actions such as reinforcing formal commitments, facilitating inter-member state dialogue, fostering increased civil society engagement, and integrating human rights into economic agendas.
- Structural adjustments within the G20 and strengthened partnerships with external stakeholders are proposed to enhance its leadership on global human rights issues.

**Objective 4: Raise Awareness and Promote Discussion:**

- The research findings serve as a catalyst for raising awareness among policymakers, academics, and civil society regarding the evolving role of the G20 in human rights.
- They encourage well-informed and constructive discussions regarding the G20's potential and limitations in addressing human rights.

**Objective 5: Contribute to Policy Development:**

- The analysis contributes significantly to policy development by offering comprehensive insights and actionable recommendations.
- It underscores the necessity of harmonizing economic policies with human rights principles within the G20 and the broader context of global governance.

## CONCLUSION:

In conclusion, this research has undertaken a comprehensive examination of the G20's engagement with human rights, guided by a set of clearly defined objectives. The findings of this analysis shed light on the intricate relationship between economic decisions and human rights, emphasizing their mutual influence on global well-being. While the G20 has articulated formal commitments to human rights within official documents such as summit communiqués and declarations, our evaluation underscores the need for a more thorough assessment of the practical effectiveness and implementation of these commitments. To enhance the G20's leadership in human rights, a set of concrete policy recommendations has been formulated, spanning a range of actions from strengthening formal commitments to fostering inter-member state dialogue, increasing civil society engagement, and integrating human rights into economic agendas. Structural adjustments within the G20 and robust partnerships with external stakeholders are also proposed to amplify its impact on global human rights issues.

Moreover, the research findings serve as a catalyst for raising awareness and stimulating informed discussions among policymakers, academics, and civil society stakeholders. They provide valuable insights into the G20's evolving role in addressing human rights and encourage constructive dialogues regarding its potential and limitations in this context. Above all, this analysis significantly contributes to policy development by offering a comprehensive understanding of the intricate relationship between economic policies and human rights. It underscores the urgent need to align economic decisions with human rights principles, both within the G20 and within the broader landscape of global governance. As the world grapples with complex economic and human rights challenges, the role of the G20 remains pivotal, and its commitment to human rights principles is central to shaping a more equitable and rights-respecting future.



*Time for the G20 to Act on Commitments and step up Leadership on Human Rights*

**References:**

1. Baxi, U. (2007). The future of human rights. Oxford University Press.
2. Chang, A. (2016). G20 Accountability Mechanisms in Promoting Human Rights. Human Rights Quarterly.
3. Foster, R. (2020). G20 Human Rights Commitments: A Longitudinal Analysis. International Journal of Human Rights.
4. Gao, H. S. (2019). The G20 on Human Rights: In Search of Effective Leadership. Springer.
5. Kim, S. (2018). The Influence of Economic Interests on G20 Human Rights Agendas. Journal of Global Governance.
6. Kirton, J. J. (2013). G20 Governance for a Globalized World. Routledge.
7. Larson, E. (2017). The G20 and Human Rights: An Empirical Assessment. Cambridge University Press.
8. Maclaughlin, P. (2019). Human Rights and the G20: A Comparative Analysis of Commitments and Actions. Palgrave Macmillan.
9. Marks, S. P. (2014). Prospects for Human Rights in the Post-2015 Development Agenda.
10. Miskimmon, A. (2016). Comparative Analysis of G20 and United Nations Approaches to Human Rights. Sage Publications
11. Ramcharan, B. (2013). The UN human rights council. Routledge.
12. Roberts, E. (2021). Enhancing G20 Leadership on Human Rights: A Policy Framework. Georgetown University Press.
13. Saiz, I. (2009). Rights in recession? Challenges for economic and social rights enforcement in times of crisis. Journal of Human Rights Practice, 1(2), 277-293.
14. Scherer, L. (2015). The G20 and Human Rights: An Ethical Perspective. Taylor & Francis.
15. Smith, J. T. (2020). G20 Member States and Human Rights: A Comparative Analysis. Oxford University Press.
16. Steiger, B. (2017). The G20 and Human Rights: How the World's Most Powerful Forum Can Drive Human Rights Progress. Palgrave Macmillan.
17. Young, D. (2018). Civil Society Influence on G20 Human Rights Agendas: A Comparative Study. Cambridge University Press.

# Implementation Mechanisms under International Law for indigenous Peoples: A critical overview

***Rashwet Shrinkhal***
*Assistant Professor, Department of Human Rights*
*School of Legal Studies, BBAU, Lucknow*

**Abstract**

The struggle of indigenous peoples for agency in international law is directly relatable to the expansion and praxis of indigenous rights claims in international law. The empirical achievement in realisation of indigenous rights requires effective framework of implementation mechanism. The present article aims to explore and evaluate the existing mechanisms in international law for indigenous peoples concerns to be addressed and argues that the non-judicial approach dominates the global system.

**Key words:** - *Indigenous Peoples; International Law; Implementation Mechanism*

## 1. Introduction

The recognition of pre-eminent rights to indigenous peoples, in the manner that the right to self-determination and collective ownership over their ancestral lands, not only considerably distinguishes the discourse of indigenous rights from that of minority rights but also, and critically, contests conventional notion of state sovereignty and common Western understanding that human rights are primarily individualistic in nature. However the efforts of indigenous peoples for a robust indigenous rights regime essentially requires effective implementation mechanisms. This article will critically examine the available implementation mechanisms for enforcing indigenous rights at international level. To begin with, it briefly discusses the concept of implementation in international law. Thereafter, both treaty and charter based mechanisms are analysed and discussed. Finally, there is a brief concluding remarks.

## 2. Implementation in International Law

### 2.1. Why do Nations Obey International Law?

A very basic and relevant question under international law discourse is why do





States comply with international law?[1] The question is foundational from both practical and theoretical viewpoint in the study of international law. H. H. Koh in his article "Why do Nations Obey International Law"attempts to explain the "compliance question" under international law.[2] Koh presents three different perspectives to compliance issue in international law.

First one is proposed by Abram Chayes and Antonia Handler Chayes. They argue that international law is advanced through a "managerial model".[3] In his work The New Sovereignty, Chayeses' explain that States obey international law not because of any fear of sanctions, but are induced to observe by the system generated by the treaty regimes to which they are party. Koh quoting Chayeses' observes: "the fundamental instrument for maintaining compliance with the treaties at an acceptable level, they argue, is an iterative process of discourse among the parties, the treaty organisation, and the wider public".[4] Chayeses' assign several reasons for non-compliance of international rules by nations. They argue that "enforcement" model based on coercive tools of economic and military sanctions is generally doomed to failure. In their own words: "sanctioning authority is rarely granted by treaty, rarely used when granted, and likely to be ineffective when used".[5] Alternatively, they propose "managerial model", which seeks compliance through cooperation among national actors. For them "sovereignty" is not all about freedom from external interference but freedom to engage external forces as a component of international society. Chayeses' explains that interactive process in "managerial model" advances in the following stages: (a) survey about the situation prevalent in parties under obligation; (b) the behaviour which is the cause of concern for non-compliance; (c) identifying the root cause for defiant behaviour; (d) assessment of the capabilities of violating State in carrying out the obligation; (e) offers of technical assistance if the defying State is short of ability to carry out obligation ; (f) invocation of dispute settlement mechanism; (g) adjustment of treaty norms to accommodate Sates based on "differential treatment" policy in international relations.[6] A second set of reasons for compliance is fostered by Thomas Franck

1 *Lousi Henkin observes that "almost all nations observe almost all principles of international law", LOUIS HENKIN, HOW NATIONS BEHAVE 47 (1979 ); Eric A. Posner, Do States Have a Moral Obligation to Obey International Law? 55 Stan. L. Rev. 1901 (2003); Heath Pickering, Why Does State Mostly Obey International Law?, available at http://www.e-ir.info/2014/02/04/why-do-states-mostly-obey-international-law/ [Accessed on 02.01.2017].*

2 *Harold Honju Koh, 'Why do Nations Obey International Law?' [1997] 106(8) The Yale Law Journal 2599*

3 *Abram Chayes and Antonia Handler Chayes, The New Sovereignty: Compliance with International Regulatory Agreements (Harvard University Press 1995)*

in his book, Fairness in International Law and International Institutions.[7] Franck argues that nations obey rules if benefit exceeds the implementation cost. The underlying gist of his argument is that nations find little or no motivation to comply with international rules if they are not fair. Franck also acknowledges that nations feel "communitarian peer pressure" as part of international society.[8]

Finally, Koh offers his view on the "compliance question" in international law. He argues that transnational actors through "transnational legal process" interact and internalise rules of international law.[9] According to Koh, "transnational legal process has four unique characteristics: (i) it is non- traditional in a sense that it rejects the dichotomy between public and private, domestic and international a key aspect in traditional way of studying international law; (b) it is non-Statist as non-State actors also have an important role to play in the development and implementation of international law; (c) it is a dynamic process, it transudes both up and down from public to private and domestic to international level; and (d) it is normative, the process ends up in rule framing which is thereafter internalised and enforced.[10]

### 2.2. Meaning of Effective Implementation?

There exists a fundamental aspect to the "compliance question" about what constitutes an effective implementation? Daniel Bodansky in his work Implementation in International Environmental Law distinguishes between three different meanings of the term "effectiveness". First, legal effectiveness, which focuses on actual compliance of legal rules and obligations.[11] For example if an international treaty ascribes certain conduct to be observed by member States then it would be legally effective if States act accordingly. For example arrangements made by States to establish benefit sharing mechanism as contemplated under Article 8(j) of the Convention on Biological Diversity for the protection traditional knowledge.[12]

4 *Harold Honju Koh, 'Why do Nations Obey International Law?' [1997] 106(8) The Yale Law Journal 2599*
5 *Ibid 2636.*
6 *Ibid 2635-2640; Andrew T. Guzman, 'A Compliance-Based Theory of International Law'[2002] 90(6) California Law Review 1823-1833*
7 *Thomas M. Franck, Fairness in International Law and Institutions (Oxford University Press 1998)*
8 *Thomas M. Franck , The Power of Legitimacy Among Nations (Oxford University Press 1990) 196*





Secondly he refers to behavioural effectiveness, which in the context of indigenous peoples rights would mean that a State or government institutions starts to move forward in the "right direction" towards recognising their concerns.[13] Lastly, he refers to problem-solving effectiveness which focuses on the overall capacity of international rules to resolve the problem. In reference to indigenous people's rights, effectiveness of norms established by international legal regime shall be judged on the basis of overall condition of indigenous peoples at the ground level.[14] The concept of problem-solving effectiveness thus necessitates us to look beyond theoretical level.

## 3. ILO Compliance Mechanism

The ILO supervises States' assurance to meet the ideals outlined in ILO Conventions through its review of States reports and suitably discussing complaints from oppressed groups and individuals commonly implemented via workers institutions. The usual regulatory mechanism is provided under Article 22 of the ILO Constitution, an annual report on the measures taken to implement the provisions of Conventions is required to be provided by the Ratifying States to which they are parties.[15] Simultaneously, governments are obligated to send copies of these reports to workers' and employers' organisations within their realm, who then have their own prerogative to make comments. For example, it is possible for them to point that the government is misrepresenting the situations, or has not revealed complete information.[16]

These annual reports are examined by the Committee of Experts on the Application of Convention and Recommendation (CEACR), which meets once a year.[17] Generally, the CEACR indulges itself in asking clarification questions from the Government concerned. If, after repeated requests, the government

9 *Harold Hongju Koh, 'The 1994 Roscoe Pound Lecture: Transnational Legal Process' [1996] 75(1) Nebraska Law Review*
10 *Ibid.*
11 *Daniel Bodansky, 'Implementation in International Environmental Law', [2011] 54 Japanese Y.B. Int'l L. 62*
12 *Ibid at 65*
13 *The Republic of Kenya enacted "The Protection Traditional Knowledge and Cultural Expression Act, 2016" available at http://www.wipo.int/edocs/lexdocs/laws/en/ke/ke030en.pdf [Accessed on 02.02.2017]; For detail discussion on the protection of traditional knowledge, See, Lindsey Schuler, 'Modern Age Protection: Protecting Indigenous Knowledge Through Intellectual Property Law', [2013] 21 Mich. St. Int'l L. Rev.*

attempts to evade the clarification process or provides an indifferent reply, the Committee may formulate observations which are included in its report—referred to as "green book"—that goes to the Tripartite Conference Committee on the Application of the Conventions.[18] The ILO CEACR regularly takes note of the State inefficacy to comfort indigenous peoples with restoration, redress and reparation albeit it frames its recommendations in soft and recommendatory.[19] For example, the ILO CEACR submitted the desired modes of redress for Mexican State inability to recognise Huichol people existence[20] and land rights may consist of "special measure to safeguard the interest of these peoples as such and the way of their life" and "allocating additional land to the Huichol people when their own land ceases to be sufficient to provide the essentials of normal existence".[21] Similarly, the ILO CEACR subtly expresses its concern on the issue of resettlement of people in India and awarding of low amount of compensation.[22]

The Constitution of ILO also furnishes two sets of procedures regarding the implementation of Convention, first of which can be identified with "representations". According to Article 24 of ILO Constitution, "representations refer to charges submitted to International Labour Office declaring that a Member has failed to secure in any respect the effective observance within its jurisdiction of any Convention to which it is party".[23] Aforementioned charges can be filed "by an industrial association of employers or workers".[24] As specified by the constitutional regulations, the Governing Body of ILO has a broad range of alternatives as regard to the follow-up; it may disseminate this complaint to the concerning Government and may invite the rebuttal or viewpoint of the said Government against which the representation is made.[30] According to Article 25, "if no statement is received within reasonable time from the Government in question, or of the statement when received is not

[14] *In 2008 Kevin Rudd, the then PM of Australia, seek apology for "stolen generation", See, http://www.australia.gov.au/about-australia/our-country/our-people/apology-to-australias-indigenous-peoples [Accessed on 02.02.2017].*

[15] *Daniel Bodansky, supra note 11 at 64.*

[16] *Constitution of the ILO Article 22, Oct. 9, 1946, 62 Stat. 3485,15 UNTS 35 [hereinafter ILO Constitution] also available at http://www.ilo.org/dyn/normlex/en/f?p=1000:62:0::NO:62:P62_LIST_ENTRIE_ID:2453907:NO#A22 [Accessed on 02.02.2016]*

[17] *S James Anaya, International Human Rights and Indigenous Peoples (Aspen Publishing 2009) 145*

[18] *The ILO CEACR came into existence in 1926 to review the burgeoning figure of government reports on ratified conventions. At present, it involves twenty distinguished jurists appointed by the Governing Body for a period of three years. See, http://www.ilo.org/global/standards/applying-and-promoting-international-labour-standards/committee-of-experts-on-the-application-of-conventions-and-recommendations/lang--en/index.htm [Accessed on 02.02.2016]*





deemed to be satisfactory by the Governing Body, the latter shall have the right to publish the representation and statement, if any, made in reply to it".[31] Indigenous Peoples have utilised this strategy through workers association (the association in question does not require to prove any connection to harm). When a submission is thought-about as 'receivable', the ILO Governing Body institutes a tripartite committee comprising of workers, employees and State representatives, to examine the petition which at that point list down recommendations to be adopted by the ILO Governing Body.[32]

The ILO supervisory system also consists of a more detailed and formal procedure of 'complaints' prescribed under Article 26 of the ILO Constitution. The purpose of the complain procedure corresponds to that of representation.[33] A grievance relates to charges that a Member fails to achieve "the effective observance of any Convention"[34] with the significant transformation that the complaint procedure is accessible to various entities. The capacity to file the complaint is attributed to any other ILO Member State, being affiliated to an identical Convention, by a delegate at the Conference, or by the Governing Body as such. A further, and possibly noteworthy variance relates to handling of complaint and to possible 'obligatory' nature of conclusion.[35]

In case of complaint, the Governing Body may, applying reasonable discretion, assign the responsibility to an impartial Commission of Inquiry after communicating the complaint to the Government, the same way as in the representation proceedings.[36] Governing Body subsequently proceeds for constituting three –memberadhoc body that also sets up its own rules of

[19] *Cynthia Price Cohen, The Human Rights of Indigenous Peoples (Transnational Publishers 1998) 28*

[20] *Charters Claire, 'Reparations for Indigenous Peoples: Global International Instruments and Institutions' in Federico Lenzirini (ed), Reparations for Indigenous Peoples: International and Comparative Perspectives (Oxford University Press 2008) 175*

[21] *Int'l Labour Conference, 88th Session, Report of Committee on the Application of the Standards, Direct Request Concerning Convention No. 169, Indigenous and Tribal Peoples, 1989 : Mexico (Geneva 2000) available at http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID,P11110_COUNTRY_ID,P11110_COUNTRY_NAME,P11110_COMMENT_YEAR:2179016,102764,Mexico,1999 [Accessed on 02.02.2016]*

[22] *Int'l Labour Conference, 93rd Session, Report of Committee on the Application of the Standards, Direct Request Concerning Convention No. 169, Indigenous and Tribal Population, 1957: India (Geneva2005) available at http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID,P11110_COUNTRY_ID,P11110_COUNTRY_NAME,P11110_COMMENT_YEAR:2236713,102691,India,2004 [Accessed on 02.02.2016]*

[23] *Constitution of the ILO Article 24.*

procedure (based upon standard format), which involves, inter alia, the examination of witness.[37] Article 28 categorically states that, "when the Commission of Inquiry has fully considered the complaint, it shall prepare a report embodying its findings on all questions of fact relevant to determining the issue between parties and containing such recommendations as it may think proper as to the steps which should be taken to meet the complaint and the time within which they should be taken".[38]

It is noteworthy that the Commission of Inquiry is exclusively accountable for preparing report on the complaint. The moment the report of the Commission is concluded and signed, it becomes final. Thereafter, information is transmitted to Governing Body and also "to each of the Governments concerned in the complaint".[39] In this point of reference, the function of Governing Body is restricted to register the report—without any authority to give its assent or alter it. The Governments concerned (besides the Government complained of) are free to disagree and reject the content of the report; they have a right to contest the suggestions proposed in the report by raising the matter to the International Court of Justice by the virtue of Article 29(2) of the Constitution for a final decision.[40] According to Article 32, the final decision "may affirm, vary or reverse any of the findings or recommendations of the Commission of enquiry, if any".[41]

As far as the validation of the subject matter of report is concern, Governing Body is not empowered, however it has the power to interpret and decide the ramifications to be made out from the failure of the Member concerned, within a stipulated time period, the proposals and suggestions made out in the report of the Commission of Inquiry, or, as conceivably, in the verdict of International Court of Justice. In such situation, "the Governing Body may make recommendations to the Conference to take such action as it may deem wise and

[24] *Ibid.*
[25] *Ibid.*
[26] *Constitution of the ILO Article 25; "Tripartite means that representatives of workers' and the ILO's governance structures, and that the ILO promotes social dialog on the national level on the same basis", See, Kari Tapiola and Lee Swepston, 'The ILO and the Impact of Labour Standards: Working on the Ground After and ILO Commission of Inquiry', [2010] 21 Stan. L. & Policy Rev. 513*
[27] *Claire Charters, supra note 20 at 176.*
[28] *Francis Maupain, 'The Settlement of Disputes Within the International Office', [1999] 2 J. Int'l Econ. L. 273-278*
[29] *Constitution of the ILO Article 26.*
[30] *Francis Maupain, supra note 28 at 278.*
[31] *Constitution of the ILO Article 26(2).*
[32] *Francis Maupain, supra note 28 at 279.*
[33] *Constitution of the ILO Article 28.*
[34] *Francis Maupain, supra note 28 at 279.*
[35] *Ibid.*
[36] *Constitution of the ILO Article 32.*





expedient to secure compliance therewith" (Article 33 of the Constitution). Simple examinations of ILO web-based database point out that indigenous peoples have not yet invoked this procedure.[42]

## 4. The Human Rights Council Procedures

Consequent to the dissolution of the Human Rights Commission and the creation of Human Rights Council,[43] the UN has now more viable and innovative mechanism with which it can address the problems of indigenous peoples and shift them from the background to a more upfront position within the UN human rights family. There is a reporting mechanism in the form of the Universal Periodic Review (UPR)[44] wherein every Member State of the UN had to update human rights status, in a four years block, to the Human Rights Council. At variance with treaty body mechanism, in UPR process States are not exceedingly constrained as to area and scope of their recommendations or reports, which provides an opportunity and place of discussion on vulnerable groups such as indigenous peoples.

The review process is comprised of four components and facilitated by triad of States, selected randomly through drawing lots procedure. The first phase of UPR is made of information acquisition, which is based on documents, involving (i) a brief report, prepared by the State undergoing review process; (ii) a digest of inputs, facts and particulars from NGOs and other stakeholders, which is prepared by Office of High Commissioner for Human Rights; and (iii) facts from autonomous practitioners, treaty based human rights bodies and other UN subsidiary bodies. It includes information's, which has been collected over by the Special Procedure mechanisms, for instance the Special Rapporteur on the Rights of Indigenous Peoples, besides other UN machinery such as the

[37] *Claire Charters, supra note 20 at 177.*
[38] *Human Rights Council came into existence by the virtue of G.A. Res. 60/251, U.N. Doc. A/RES/60/251 (15 March, 2006); The Human Rights Committee was abolished by the ESC Res 2/206, U.N. Doc. E/RES/62/2 (22 March 2006); See generally, Helen Upton, 'The Human Rights Council: The First Impression and the Future Challenges', [2007] 7 Hum. Rts. L. Rev. 29*
[39] *G.A. Res. 60/251, U.N. Doc. A/REC/60/251 (15 March 2006); For an overview on the UPR, See, Noelle Higgins, "Advancing the Rights of Minorities and Indigenous Peoples: Getting UN Attention via the Universal Periodic Review", [2014[ 32 Neth. Q. Hum. Rts. 379, 385*
[40] *H.R.C. Res. 5/1. U.N. Doc. A/HRC/RES/5/1 ¶ 15 (18 June 2007); See also, Felice D. Gaer, 'A Voice Not an Echo: Universal Periodic Review and the UN Treaty Body System', [2007] 7 Hum. Rts. L. Rev. 109; Gareth Sweeney and Yuri Saito, 'An NGO Assessment of the New Mechanism of the UN Human Rights Council', [2009] 9 Hum. Rts. L. Rev. 203*

Expert Mechanism on the Rights of Indigenous Peoples. Prior to the submission of oral report, any member State of the UN can question the State under examination in writing.[45]

Second, all through the UPR working group session (which comprises of all 47 members of Human Rights Council and holds meetings thrice a year), all States undergoing scrutiny provide an oral report on the status of human rights violation.[46] This is referred to "interactive dialogue" stage of review procedure amongst States under review[47] and all other UN members. States may direct their queries and put forward their observations and recommendations on the report prepared by the State under review. However, paucity of time limits the scope of the interactive stage.[48] The review process continues for three hours in the course of which the State under examination is allotted half an hour for its demonstration, supervened by a question and answer session encompassing all States for next two hours.[49] The review comes to an end with a 30-minute spell in the course of which, State under review can get back to queries and observations that have been made.[50] Time limitations have exhibited in "many States not being able to speak at all, and diplomats lining up in the pre-dawn darkness to register to speak".[51] It is noteworthy to mention that, a State, which misses out the opportunity to make queries or provide certain reference and suggestion to the incumbent State, can note down their remark on UPR's extranetto which the State undergoing examination has a choice to rebut prior to the adoption of concluding report .[53]

Third, subsequent to the interactive dialogue phase the working group submit a report on dialogue and incorporates a rejoinder submitted by the State under review to observations made by other States.[54] A supplementary text is also finalised which consist of State reactions to recommendations made which they have had an occasion to acknowledge. This is generally in mode of addendum to Working Group's report.

Lastly, the outcome report, that comprises of Working Group's report besides

41 *H.R.C. Res. 5/1 supra note 40 at para 18.*
42 *Ibid at para. 19-21.*
43 *Noelle Higgins, Supra note 39 at 388.*
44 *H.R.C. Res. 5/1 supra note 40 at para 22; Ibid.*
45 *Ibid. at para 23.*
46 *Edward R. McMahon, Herding Cats and Sheep:Assessing Stateand Regional Behavior in the Universal Periodic Review, available at http://www.upr-info.org/sites/default/files/general-document/pdf/-mcmahon_herding_cats_and_sheeps_july_2010.pdf (2010) [Accessed on 03.02.2016] cited in Noelle Higgins, Supra note 39 at 388.*





any additional comments or promises rendered by State under review, is adopted in the course of the plenary session of Human Right Council. A look into the review is then organised during next round of UPR.[55]

The span of first cycle of the UPR was from 2008 to 2011 under which 48-States underwent examination every year different Forty-eight States were assessed on yearly basis in different sessions of the Human Right Council. The procedure was tweaked prior to the commencement of Cycle 2 in May 2012 which concluded in 2016, with certain minimal modifications being made to modalities, comprising an extension in the period devoted to each State's review before the Human Rights Council and subsequent increase of the time period of Cycle 2 from four to four and a half years.[56]

The first cycle of UPR recorded a total of 389 recommendations on the issues of indigenous peoples, putting it in 33rd place out of 56 diverse sets of issues raised. Precisely, 81 States upheaved concerns of indigenous peoples and 55 States received recommendations on the topic.[57] These numbers are promising given the fact that the UNDRIP was recently adopted in 2007 just as the HRC and the UPR being created, this once again is helpful in establishing the emerging strength of indigenous voices within the international community. It was found that States with indigenous peoples were more proactive in interactive dialogue phase with regard to raising issues and receiving recommendations.[58] The key thrust areas which was discussed in interactive dialogue phase of UPR on the issue of indigenous peoples included (a) domestic or constitutional recognition of indigenous peoples; (b) ratification and implementation of ILO Convention No. 169; (c) the adoption and implementation of UNDRIP; and (d) land and cultural rights.[59]

47 *The Extranet of the UPR is a community site where updated documents, statements, and schedules of the UPR are accessible.*
48 *Noelle Higgins, Supra note 39 at 388.*
49 *H.R.C. Res. 5/1 supra note 40 at para 29.*
50 *Edward R. McMahon, The Universal Periodic Review: A Work in Progress, available at http://library.fes.de/pdf-files/bueros/genf/09297.pdf 8-9 (2012) [Accessed on 03.02.2016]*
51 *H.R.C. Res. 16/21, U.N. Doc. A/HRC/RES/16/21 (12 April 2011); H.R.C. Dec. 17/119, U.N. Doc. A/HRC/DEC/17/119 (19 July 2011); Noelle Higgins, Supra note 39 at 389.*
52 *Statistics of UPR Recommendations, available at https://upr-info-database.uwazi.io/library/?q=(_types:!(%275d8ce04361cde0408222e9a8%27),allAggregations:!f,filters:(cycle:(values:!(%27567eec7b-d5ab-4c36-a712-57c38fae9124%27)),issues:(values:!(c9b68820-ffd6-4690-9320-50375385bb6f))),from:0,includeUnpublished:!f,limit:30,order:desc,sort:creationDate,types:!(%275d8ce04361cde0408222e9a8%27),unpublished:!f) [Accessed on 02.05.23]*

During the second cycle of UPR (2012-2016), the number of recommendation on indigenous issues increased to 610 and in the third cycle of UPR (2016-2021) it was 743. This indicates that the issues of indigenous peoples are getting more attention. However, there is a long way to go. The key thrust area were similar to that in first cycle, with added focus on issues of indigenous women and child; asylum; relationship with international institutions; socioeconomic development of indigenous peoples; indigenous peoples health; protection of indigenous culture and legal status.[40]

## 5. The CERD Committee

The International Convention on the Elimination of All Forms of Racial Discrimination 1966[41] (the ICERD) is one of the most prominent international legal instrument on race, and its vital principle has a strong prerogative to the stature of a peremptory norm of international law.[42] The Committee on the Elimination of Racial Discrimination (the CERD Committee) is established by Article 8 of the ICERD.[43] The CERD Committee operates basically by reviewing and commenting on reports by States which are lawfully required, as directed by the Article 9(1) of the ICERD . Every two years a State is expected to submit a Report or whenever the CERD Committee expressly demands for. It may also request for additional information from the State Parties.[44] Every single communication with a State Party is followed by a series of concluding remarks by the CERD Committee which consist of token of appreciation, bulletin of concerns and directions for future action. Where deserved, the Committee can identify the problems State have had in implementing the ICERD because of various hardship including man-made ones. Reports behind schedule for five

[53] *Noelle Higgins, Supra note 39 at 390-391.*
[54] *Statistics of UPR Recommendations, supra note 52.*
[55] *Ibid.*
[56] *International Convention on the Elimination of All Forms of Racial Discrimination, adopted 21 December 1965 (entered into force 4 January 1969) (hereinafter the ICERD)*
[57] *Brian D. Lepard, Customary International Law: A New Theory with Practical Applications (Cambridge University Press 2010) 249*
[58] *The CERD, General Recommendation No. 23, Rights of Indigenous Peoples (Fifty-first session, 1997), U.N. Doc. A/52/18, annex V at 122 (1997).[hereinafter the CERD Recommendation No.23)*
[59] *The CERD, http://www.ohchr.org/EN/HRBodies/CERD/Pages/CERDIndex.aspx [Accessed on 04.06.2015]*
[60] *Report of the Committee on the Elimination of Racial Discrimination, 27 February 1992, U.N. Doc. A/46/18 at para 27.*
[61] *The CERD Recommendation No. 23 at paras 1 and 3 cited in Claire Charters, supra note 20 at 182.*
[62] *Ibid.*





years or above may be subjected to the 'review' procedure under which the CERD committee may decide to examine a country situation in the absence of a Report.[45]

In the recent past, the CERD Committee has considered a number of indigenous peoples rights issues. It has commented on State reports and monitored grave situations under its early warning and urgent action procedure. From the vantage point of reparations it is appealing to note that the CERD Committee has turned out to be more direct in its recommendations to States as to how they can better comply with the ICERD.

The CERD Committee's General Recommendation on Indigenous Peoples requires that States shall take "all appropriate means" to prevent and abolish all form of discrimination against indigenous peoples and observes that in several parts of the globe, indigenous peoples have "[l]ost their land and resources to colonist, commercial companies and state enterprises".[46] It calls on State Parties to approve and respect indigenous peoples' cultures, assure equality, support indigenous development, make possible for indigenous peoples effective participation in decision making in matters related with their rights and interests and to make sure that indigenous communities freely follow their traditional customary practices.[47]

In comments on State reports the CERD Committee has in many instances requested to afford reparation for protection of indigenous peoples land rights. For instance, it recommended that Costa Rica take necessary steps to protect indigenous lands from being annexed and to warrant the restitution of those lands that have been misappropriated by members of non-indigenous[48]

[63] *The CERD, Report on the Grave and Persistent Violation of Indigenous Peoples' Rights (87th Session, 3-28 August 2015) available at http://www.forestpeoples.org/sites/fpp/files/publication/2015/07/cerd-report-final-eng.pdf [Accessed on 06.10.2015]*
[64] *The CERD, Concluding Observations (61st session 15 May 2006) UN Doc. CERD/C/GTM/CO/11.*
[65] *The CERD, Concluding Observations (61st session 4 April 2006) UN Doc. CERD/C/GUY/CO/14.*
[66] *The CERD, Procedural Decisions of the Committee on the Elimination of the Racial Discrimination, (42nd session 15 September 1993) UN DOC. A/48/18, Annex III ; Also see, Theo Van Boven, 'Prevention, Early-Warning and Urgent Procedures; A New Approach by the Committee on the Elimination of Racial Discrimination' in Erik M G Denters and Nico J Schrijver (eds), Reflections on International Law from the Low Countries (Martinus Nijhoff Publishers 1998) 165*
[67] *The CERD, Decision 2(54) on Australia (18 March 1999), UN Doc. A/54/18.*

communities. Likewise, it has frequently commented on the necessity to restitute to indigenous peoples in cases of loss of land as a result of conflict and/or resource development[49] and recommended that institutions established to settle indigenous land issues take indigenous customary practices into consideration.[50]

The CERD Committee's readiness to uphold indigenous peoples land rights, and direct the State to ensure redress, is also mirrored in a series of decisions exercising its early warning and urgent action procedure.[51] This process is devised to empower the CERD Committee, as reflected by the nomenclature, to react expeditiously in conditions involving discrimination. For instance, in the year 1999, the CERD Committee, discovered that the amendments made by Australian government in 1998 to its Native Title Act 1993 were a contravention of the ICERD on the line of reasoning that they extended the possibility of extinguishment or depreciation of Aboriginal title.[52] Appealingly, the CERD Committee recognised the perpetual repercussions of prejudicial historical practices on Australia's Aboriginals and Torres Strait Islander population, thus clarifying that it has not limited itself with apparent contemporary problems. The CERD Committee recommended, as it has persistently done, discussions between the Aboriginal and Torres Strait Islanders peoples and Australia with "a view to finding solutions acceptable to the indigenous peoples and which would comply with Australia's obligations under the Convention".[53] At the same time, it also requested Australia to forestall the implementation of the 1998 amendments during the process of discussions. This was rare but refreshing example of the CERD Committee rendering detailed orders similar to an

[68] *Ibid at para 11*
[69] *Ibid.*
[70] *The CERD, Decision 1(66): New Zealand Foreshore and Seabed Act 2004, (11 March 2005), UN Doc. CERD/C/66/NZL/Dec.1*
[71] *Ibid at para 7*
[72] *The CERD, Conculuding Observations on the combined tenth to twelfth reports of the United States of America (21 September 2022) UN Doc. CERD /c/USA/CO/10-12.*

[68] *Ibid at para 11*
[69] *Ibid.*
[70] *The CERD, Decision 1(66): New Zealand Foreshore and Seabed Act 2004, (11 March 2005), UN Doc. CERD/C/66/NZL/Dec.1*
[71] *Ibid at para 7*
[72] *The CERD, Conculuding Observations on the combined tenth to twelfth reports of the United States of America (21 September 2022) UN Doc. CERD /c/USA/CO/10-12.*





injunction. In counter, Australia altogether denied the charges. Moreover, it disputed the authority of the CERD Committee to recommend the suspension of the Native Title Act 1998. Even so, in its response to Australia's subsequent State reports, the CERD Committee maintained its stand that there is insufficient protection of Aboriginal land rights in Australia.[54]

The CERD Committee likewise found New Zealand's Foreshore and Seabed Act 2004, which nullifies existing Maori[55] title in the foreshore and seabed, to embody discriminatory provisions against Maori. It recommended to the New Zealand Government to conceive space for interlocution with Maori to "seek ways of lessening its discriminatory effects" specifically indicating the likelihood of legislative promulgation where necessary.[56] However, New Zealand government refused to accept the CERD Committee decision. Notwithstanding such rejection, the CERD committee did not prevent it from taking a progressive stand with reference to the protection of indigenous peoples rights. Recently, CERD committee in its official review on the USA's reports, in its concluding observation, maintained that government has renegade from securing the rights of indigenous peoples.[57]

Despite progressive advances made by the CERD, it is worth mentioning that the CERD committee is not a court of justice with the authority to establish State violations of international law governing socio-economic human rights of racial minorities. The general recommendations of the CERD Committee are not acknowledged to a greater extent due to the fact that these recommendations are not binding on the State Parties. It appears that, the CERD Committee's function is to aid States in their resolution to observe their commitments under CERD.

[73] *Patrick Thornberry, 'Confronting Racial Discrimination: A CERD Perspective', [2005] 5 Hum. Rt. L. Rev. 239-269*
[74] *CHR, Human Rights and Indigenous Issues (57th session, 24 April 2001) Comm. H. R. Res. 2001/57, UN. Doc. E/CN.4/RES/2001/57.*
[75] *JAMES ANAYA, supra note 17 at 107.*
[76] *HRC, Human Rights Indigenous Peoples: Mandate of the Special Rapporteur on the Rights of Indigenous Peoples, (6 October 210) A/HRC/RES/1514 available at http://unsr.vtaulicorpuz.org/site/ index.php/en/un-mandate/12-hrc-res-15-14-2010 [Accessed on 05.011.2015]*
[77] *HRC, Human Rights and Indigenous Peoples: Mandate of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, (28 September 2007) UN Doc. A/HRC/RES/6/12.*

The bottom line is not to get fix on issues of the conformity or non-conformity of a State with its commitment under CERD. Instead, committee member identify their task as helping States acknowledge and mitigate racial discrimination inside their frontiers.[58]

## 6. The Special Rapporteur on the Rights of Indigenous Peoples

In connection with its increasing focus on the rights of indigenous peoples, the U.N. Human Rights Council's foregoer, the Commission on Human Rights, warranted in 2001 the appointment of a "special rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples".[59] The commissioning of this position supplemented the commission's scheme of thematic mechanism, which involves special rapporteurs or working groups on varied dimension of human rights issues such as torture, religious intolerance, and violence against women. These thematic mechanisms have been passed down to the Human Rights Council.[60]

The dictate of the Special Rapporteur on indigenous peoples was entrenched with the jurisdiction: (a) to promote good practices in order to implement international standards with reference to indigenous rights; (b) to muster relevant information from every possible source on all seeming violations of the rights to indigenous peoples; (c) to provide roadmap for reparation on violations of the rights of indigenous peoples; (d) to work in association with other ancillary bodies engaged in implementation of indigenous rights especially Expert Mechanism on Rights on Indigenous Peoples.[61]

Within the terms of its mandate the Special Rapporteur on indigenous peoples

[78] *James Anaya, supra note 17 at 109.*
[79] *Statementof James Anaya, available athttp://www.un.org/apps/news/story.asp?NewsID=29336 #.V6G07dJ97IU [Accessed on 06.11.2015]*
[80] *Special Rapporteur James Anaya, Addendum-Index of Report of the Special Rapporteur on the Rights of Indigenous Peoples, James Anaya, by Theme and by Region, UN. Doc. A/HRC/24/41/Add.5*
[81] *HRC, Expert Mechanism on the Rights of Indigenous Peoples, (6th session, 14 December 2007), UN Doc. A/HRC/RES/6/36. [hereinafter HRC 6/36]*
[82] *James Anaya, supra note 17 at 110.*





carry out the work in four interrelated sphere of activities. First, area of work is to "identify . . . and promote best practice".[62] The Special Rapporteur has been deeply engaged in process of advancing legal, administrative and scheduled reforms at domestic level to enforce the norms of UNDRIP and other relevant legal instruments. In this reference, Special Rapporteur has been contacted to render assistance with legislative and constitutional initiative by preparing outlook on how to symphonise the initiatives with international norms.[63] The Special Rapporteur has also encouraged good practices by cheering affirmative measures that States have created. For example, In December 2008, Special Rapporteur received an invitation to be present at a ceremony in Awas Tingni, Nicaragua, in course of which the Government conveyed to that indigenous group the much-awaited title to its ancestral lands, as ordered by a 2001 judgement of Inter-American Court of Human Rights. In a media release subsequent to titling, Special Rapporteur applauded the Government of Nicaragua for taking affirmative steps to implement the judgement.[64]

A second area of work, which is helpful in contributing to ensure good practices in specific country situations, comprises supervising or undertaking studies on problems or themes that are of relevance to indigenous peoples across frontiers and regions of the world. Some of the thematic studies included studies on the impact of development projects on indigenous communities, explicating the idea of free prior informed consent, indigenous peoples and their educations system, corporate responsibility and the rights of indigenous peoples, incorporation of international standards within the domestic laws of the countries having indigenous population, development of indigenous peoples with their culture

[83] *James Anaya, available at http://unsr.jamesanaya.org/list/country-reports [ Accessed on 05.12.2015]*
[84] *HRC, Promotion and Protection of All Human Rights, Civil, Political Economic, Social and Cultural Rights, Including the Rights to Development: Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples (12th session, 15 July 2009) Agenda Item 3, UN Doc. A/HRC/34 para 30 and 31.*
[85] *Ibid at para 32-35.*
[86] *James Anaya, supra note 17 at 111-112.*

and issue pertaining to their identity preservation.[65] In the year 2007, HRC resolution established an Expert Mechanism on indigenous issues with the obligation to provide recommendations and thematic expertise to the Council on issues that affect indigenous peoples.[66] Thereafter, the work of thematic studies became more sort of complementary and supportive assistance to the Expert Mechanism.[67]

A third domain of the Special Rapporteur's mandate consists of probing and documenting on general human rights conditions of indigenous peoples in particular countries. The reports of country situations consist of conclusions and suggestions intended to promote good practices, ascertain the key issues, and bettering human rights conditions of indigenous peoples.[68] Reporting procedure normally requires a visit to the countries under review, together with the capital and specific areas of concern within the country, in the course of which the Special Rapporteur communicate with the State administrative delegates, native aboriginals from diverse province, and the members of civil society organisations dealing with indigenous issues. In accordance with the Code of Conduct for Special Procedures Mandate-holders, these visits can only take place with Government consent and cooperation. . Over the past years, Special Rapporteur has visited several countries, which includes Brazil, Nepal, Botswana, and Australia to report on those countries.

Lastly, the fourth, and possibly primary, area of work comprises of making responses, on a continuing basis, to specific problems of alleged human rights infringement. The Special Rapporteur's dexterity to focus on peculiar cases of alleged violations counts, to a large extent, on information received by him through indigenous peoples and their organizations, NGOs and other sources. It

[87] *Fleur Adcock, The Limitation of the Current International Human Rights LawSystem in Regard to Monitoring of Rights? Does it Encourage 'Right Ritualism'? 4 available at http://www.un.org/esa/socdev/unpfii/documents/EGM/2015/Concept-note.pdf [Accessed on 06.11.2015]; See, https://www.ohchr.org/en/press-releases/2022/06/tanzania-un-experts-warn-escalating-violence-amidst-plans-forcibly-evict ; Oryem Nyeko and Juliana Nnoko-Mewanu, Tanzania's Eviction of Maasai Pastoralist Continues, available at https://www.hrw.org/news/2023/02/02/tanzanias-eviction-maasai-pastoralists-continues [Accessed on 04.05.2023]*

[88] *Bertrand G. Ramcharan, The Law, Policy And Politics of The Human Rights Council (Brill 2015) 8*

[89] *HRC 6/36 supra note 80 at para 3.*

[90] *Ibid at para 6.*

[91] *Ibid at para 8.*

[92] *Ibid.*





is noteworthy that there are no official preconditions for recording information to the Special Rapporteur on alleged violation. Moreover, the usual prior requisite of exhaustion of domestic remedies does not come as a bar in communicating with the Special Rapporteur. The general practice corresponds to the communication to the concerned Government requesting it to respond on allegations made out. In some cases, the Special Rapporteur had publically called out the human rights violation in the Member states. If it is urgently necessary and situation allows it, with the consent of alleged Government, the Special Rapporteur may induce a country visit to investigate a particular situation.

In spite of the progressive normative structure of the Special Rapporteur mechanism, the key question which still remains pertinent is that how far the recommendations are translated into functional reality in respective State's domestic legal structure. Fleur Adock, in her study on "the impact of UN Human Rights Council's Special Procedures' mechanism on State behaviour" found that the "mechanism's impact although perceptible was slight". Her opinion is based on the study of New Zealand and Guatemala. She maintains that the government of New Zealand response to the Special Rapporteur's recommendation can be categorised as "one of ritualism". The same is further substantiated by the fact that in spite of Special Rapporteur expresses it concerns on forced eviction of Maasai people by the Tanzania government, nothing much has changed at ground zero. [71]

## 7. The UN Expert Mechanism on the Rights of Indigenous Peoples

In the year 2007, the United Nation Expert Mechanism on the Rights of Indigenous Peoples (the EMRIP) was established by the Human Rights Council

[93] *Ibid at para 9.*

[94] *HRC, Study on Lessons Learned and Challenges to Achieve the Implementation of the Rights of Indigenous Peoples to Education, Report of the Expert Mechanism on the Rights of Indigenous Peoples (31 August 2009) UN Doc. A/HRC/12/31.*

[95] *HRC, Final Report of the Study on Indigenous Peoples and the Right to Participate in Decision Making, Report of the Expert Mechanism on the Rights of Indigenous Peoples, (17 August 2011) UN Doc. A/HRC/18/42*

[96] *HRC, Role of Languages and Culture in the Promotion and Protection of the Rights and Identity of Indigenous Peoples, Study of the Expert Mechanism on the Rights of Indigenous Peoples (16 August 2012), UN Doc. A/HRC/18/42*

[97] *HRC, Study on Promotion and Protection of the Rights of Indigenous Peoples in Disaster Risk Reduction, Prevention and Preparedness Initiatives, Study by the Expert Mechanism on the Rights of Indigenous Peoples (28 April 2014), UN Doc. A/HRC/EMPRIP/2014/2.*

[98] *HRC, Study on Treatise, Agreements and other Constructive Arrangements between Indigenous Peoples and States, including Peace Accords, Study by the Expert Mechanism on the Rights of Indigenous Peoples (28 July 2022), UN Doc. A/HRC/51/50*

as its subsidiary body. The mandate of the EMRIP was "to provide the Council with thematic expertise on the rights of indigenous peoples", laying emphasis on, "studies and research based advice".[72] Moreover, the EMRIP may also submit proposal to the Council and after its review the same may be endorsed.

The EMRIP consists of five independent experts on indigenous peoples rights. The members of EMRIP serve for a three-year period and may be re-elected for an additional period. Within its mandate, EMRIP decides its own modus operandi. EMRIP meets once annually for up to five days. Its session can be a sequence of open and private meetings. There are observers and representatives from States, indigenous peoples, United Nations mechanism, bodies and specialised agencies, international governmental organisations, regional human rights institutions and mechanisms, civil society organisation, domestic human rights institutions and academia. The EMRIP has delivered several important studies including that on the implementation of the right of indigenous peoples to education another one studied indigenous peoples and the right to participation in decision-making studies have been conducted on the significance and function of languages and culture in safeguarding and promotion of distinct identity of indigenous communities and on indigenous peoples access to justice; there has been study on the "promotion and protection of the rights of indigenous peoples in natural disaster risk reduction". The study explores the link between disaster risk reduction and human rights. It also examines how indigenous peoples can contribute to disaster risk reduction initiatives. Lately, the EMRIP studied the legal status and the scope of indigenous treaties and agreements. As a point of advice, it called for the State to respect and interpret indigenous treaties and agreements in the favour of

99 *ECOSOC, Establishment of a Permanent Forum on Indigenous Issues, (28 July 200) E/RES/2000/22.*

100 *CHR, Report of the Working Group on Indigenous Populations on the Discrimination Against Indigenous Peoples, (16 August 1996) E/CN.4/Sub.2/1996/21 at para 120.*

101 *E/RES/2000/22 supra note 99.*

102 *Isabell Schulte-Tenckhoff and Adil Hasan Khan, 'The Permanent Quest for a Mandate: Assessing Permanent Forum on Indigenous Issues', [2011]20 Griffith L. Rev. 673, 680*





indigenous people. In this regard, State should ensure that indigenous peoples are part of the institutional mechanisms responsible for execution of such agreements and treaties.

## 8. UN Permanent Forum on Indigenous Issues

An extremely momentous accomplishment in the first "International Decade of World's Indigenous People" was the formation of the "UN Permanent Forum on Indigenous Issues (UNPFII)", currently the main stage for indigenous peoples at the United Nations. The UN Working Group on Indigenous Populations (WGIP) was at the bottom in the pecking order of UN organisational Structure, notwithstanding its substantial imprint and function. On the other hand, the UNPFII responds directly to the UN Economic and Social Council, one of the principal organs under the UN Charter.

It was in the year 1993 that the formation of the Permanent Forum was conceived within World Conference on Human Rights held in Vienna. In the meeting it was recommended that the UN General Assembly review the plan of constituting a permanent forum for indigenous peoples in the UN system. This set the ball rolling, ultimately resulting into the formation of UNPFII by the ECOSOC in June 2000 as a subsidiary advisory body with the aim to review Indigenous concerns within the mandate of the Council involving fiscal and social growth, culture, the environment, education, health and human rights; in doing show Permanent forum shall:

Firstly, to Provide expert advice and recommendation on indigenous issues to the Council, as well as to programmes, funds and agencies of the United Nations, through the Council;

103 *Victoria Tauli-Corpuz, 'Reflections on the Role of the United Nations Permanent Forum on Indigenous Issues in Relation to the Millennium Development Goals', [2010]12 SUR-Int'l J. on Hum. Rts. 79*

104 *UNPFII, Study on the Structures, Procedures and Mechanism that Presently Exist and that Might be Established to Effectively Address the Human Rights Situation of Indigenous Peoples and to Arrange for Indigenous Representation and Inclusion in Structures, Procedures and Mechanisms, (19 December 2008), E/C.19/2008/2.*

105 *Inspection Panel, The Inspection Panel for the International Bank for Reconstruction and Development and International Development Agency, Operating Procedures , (August 1994) available at http://ewebapps.worldbank.org/apps/ip/Pages/Panel-Mandate.aspx [Accessed on 25.12.2016]*

Secondly, to raise awareness and promote the integration and coordination of activities relating to Indigenous issues within the United Nations system; and

Thirdly, to prepare and disseminate information on indigenous issues.

The UNPFII, through its annual report issued in 2003, insisted that that the rest of the UN bodies "report regularly to the forum". Later, in the subsequent session, the UNPFII desired to enlarge its mandate this time on the basis of Millennium Development Goals. Raising its concerns on indigenous peoples health within the scope of MDGs, it categorically requested States to prepare a status report  It specifically requested governments to prepare and submit reports to it on how they were addressing indigenous peoples' health and the MDGs. Ultimately, with the adoption of the UNDRIP in 2007 the responsibility of UNPFII in the execution of indigenous rights gained extra girth. Article 42 of the UNDRIP states that:

The United Nations, its bodies, including the Permanent Forum on Indigenous Issues, and specialized agencies, including at the country level, and States shall promote respect for and full application for provisions of this Declaration and follow up the effectiveness of this Declaration

This was soon addressed in a report formulated in 2008 by two members of the Forum, Ms Ida Nicolaisen and Mr Wilton Littlechild, to address the existing mechanism to deal with indigenous peoples' rights. As per the report, no fresh set of mandate was necessary by the UNPFII to carry out these new functions that had been bestowed upon it by the UNDRIP.

[106] *Ibrahim Shihata, The World Bank Inspection Panel: In Practice (Oxford University Press 2000) 954*

[107] *Elvira Nurmukhametova, 'Problems in Connection with the Efficiency of the World Bank Inspection Panel', [2006] 10 Max Planck Y.B. U.N. L. 397, 398*

[108] *Ole Kristian Fauchland, Hardening the Legal Softness of the World Bank Through an Inspection Panel, 12 available at https://www.jus.uio.no/ior/personer/vit/olefa/dokumenter/wb_insp_panel_final.pdf [Accessed on 05.02.2017]*

[109] *Res. No. IBRD 93-10 & Res. No. IDA 93-6 of September 22, 1993 available at http://ewebapps.worldbank.org/apps/ip/PanelMandateDocuments/Resolution1993.pdf [Accessed on 10.01.2017] [Hereinafter the Resolution]*

[110] *Ibid at para 12.*

[111] *Ibid at para 19.*

[112] *World Bank, 1999 Clarification of the Board's Second Review of the Inspection Panel, para 9 available at http://siteresources.worldbank.org/EXTINSPECTIONPANEL/Resources/1999ClarificationoftheBoard.pdf [Accessed on 02.01.2017]*





**9. World Bank Inspection Panel**

The World Bank Inspection Panel (the Panel) was established in 1993 for "the purpose of providing people directly and adversely affected by a Bank-financed project with an independent forum through which they can request the Bank to act in accordance with its own policies and procedures". The Panel has the capacity and mandate to investigate into matters wherein it is alleged by the borrowing countries that the World Bank had deviated itself from self-imposed regulatory standards while planning, reviewing and/or implementing the Bank financed projects. These are non-judicial administrative inquiries, where Panel engages with facts and information on matters of complaint, provide an independent assessment and make recommendations to the President and the Executive Directors. For a financial institution, the Inspection Panel was a bold and unique step. The Inspection Panel serves to provide a non-judicial process to ensure accountability in implementation of projects, financed by the World Bank, having adverse effects on people. The Resolution establishing the Panel lays down the condition for initiating an inspection on the request of an affected party. In addition to this there are two other ways by which an inspection by the Panel may be invoked. The Board of Executive Directors is empowered to direct the Panel to conduct an inspection. In special circumstance pertaining to serious violations of World Bank operational policies and procedure, an individual Executive Director is authorised to ask the Panel for an inspection.

After receiving the request for an inspection the Chairperson of the Panel promptly decide whether to register the request or not and accordingly communicate with the Executive Directors and the Bank Management. Within

[113] *Ibrahim Shihata, The World Bank Inspection Panel: In Practice (Oxford University Press 2000) 954*

[114] *Elvira Nurmukhametova, 'Problems in Connection with the Efficiency of the World Bank Inspection Panel', [2006] 10 Max Planck Y.B. U.N. L. 397, 398*

[115] *Ole Kristian Fauchland, Hardening the Legal Softness of the World Bank Through an Inspection Panel, 12 available at https://www.jus.uio.no/ior/personer/vit/olefa/dokumenter/wb_insp_panel_final.pdf [Accessed on 05.02.2017]*

[116] *Res. No. IBRD 93-10 & Res. No. IDA 93-6 of September 22, 1993 available at http://ewebapps.worldbank.org/apps/ip/PanelMandateDocuments/Resolution1993.pdf [Accessed on 10.01.2017] [Hereinafter the Resolution]*

[117] *Ibid at para 12.*

[118] *Ibid at para 19.*

[119] *World Bank, 1999 Clarification of the Board's Second Review of the Inspection Panel, para 9 available at http://siteresources.worldbank.org/EXTINSPECTIONPANEL/Resources/1999ClarificationoftheBoard.pdf [Accessed on 02.01.2017]*

21 working days of being notified of a request for inspection, the Management of the Bank shall produce evidence sufficient to support that the Bank's relevant policies and procedures were observed. After receipt of the notification of Managements response, the Panel is required to ensure whether the request meets the eligibility criterion. If the request fulfils he eligibility criterion, the Panel recommends to the Board of Executive who would give final decision on initiation of investigation.

Once the investigation is completed the Panel sends its findings to the Executive Director and President. The outcome report of Panel include all relevant facts and final observations as to whether or not relevant policies and procedures had been taken into consideration. The Bank Management has six weeks' time to respond to the findings of Inspection Panel. Based upon the Panel recommendations and response of Bank Management, the Executive Director akes the final decision on what should be done.

The first formal policy on indigenous peoples was adopted by the Bank in the year 1982 as Operational Manual Statement 2.34 on Tribal People in Bank Financed Projects (OMS 2.34). Its primary focus was to safeguard the interests of tribes who were relatively isolated. It stated that the Bank: will not assist development projects that knowingly involve encroachment on traditional territories being used or occupied by tribal people unless adequate safeguards are provided . . . The Bank will assist projects only when satisfied that the Borrower or relevant government agency supports and can implement measures that will effectively safeguard the integrity and well-being of the tribal people.

In the year 1991, the Bank came with a separate indigenous peoples policy: Operational Directive 4.20 (OD 4.20). This directive was responsible for making it essential to involve project-affected indigenous peoples in the decision making

[120] *Elvira Nurmukhametova, supra note 108 at 400.*

[121] *Benedict Kingsbury, 'Operational Policies of International Institutions as Part of the Law- Making Process: The World Bank and Indigenous Peoples' in Guy S Goodwin and Stefan Talmon (eds), The Reality of International Law: Essays in Honour of Ian Brownlie (Oxford University Press 1999) 323-342*

[122] *Shelton Davis, 'The World Bank and Operational Directive 420: The World Bank and Indigenous Peoples' in Lydia Van die fliert (ed), Indigenous Peoples and International Organization ( 1994)*

[123] *World Bank, Operation Policy 4.20 on Indigenous Peoples (September 1991)*





process of the Bank-financed projects. It asserted, as a matter of general policy, that development process shall foster "full respect for the dignity, human rights and cultural uniqueness" of indigenous peoples. One of the significant directive was intended to advise and assist borrowers in "establishing legal recognition of the customary or traditional land tenure system of indigenous peoples" or, where traditional lands have already under State control, arrangements be made "to grant long-term, renewable rights of custodianship and use to Indigenous Peoples" over such lands.

The OD 4.20 was replaced by the Operation Policy/Bank Procedures 4.10on Indigenous Peoples (OP/BP 4.10) in the year 2005. The policy aims to achieve three major objectives: First, the development process is designed in a manner which upholds the dignity, culture and human rights of indigenous peoples. Second, to avoid potential damage to indigenous peoples from the project financed by the Bank. Third, in cases when it is not possible to avert damage, efforts be made to minimise or mitigate the loss. As part of project design and implementation, OP/BP 4.10 requires authentication of "free prior informed consultation process". Another notable feature of the OP/BP 4.10 policy is that it introduces the concept of benefit sharing from the commercial investment on indigenous peoples land.

In a study published by the World Bank, it was revealed that Inspection Panel has to deal with following issues related to indigenous peoples: (a) identification related issues; (b) consultation and broad community support; (c) social assessment; (d) indigenous peoples plans; (e) supervision; (customary rights).

Inspection Panel is a bold initiative but chances of complaints to have favourable outcome is nearly fifty percent. In study it was revealed that out of eighty two requests up to 2012 only twenty seven have positive final outcome.

[124] *Ibid;*

[125] *See, Fergus MacKay, 'Universal Rights or a Universe unto Itself—Indigenous Peoples' Human Rights and the World Bank's Draft Operational Policy 4.10 on Indigenous Peoples', [2002] 17 Am. U. Int'l Rev. 527; Fergus MacKay, 'The Draft World Bank Operational Policy 4.10 on Indigenous Peoples: Progress or more of the same', [2005]22 Ariz. J. Int'l & Comp. L. 65*

[126] *The Inspection Panel, Emerging Lesson Series No.2 on Indigenous Peoples, 4 available at http://ewebapps.worldbank.org/apps/ip/Pages/Emerging-Lessons.aspx [Accessed on 20.01.2017]*

[127] *Inspection Panel, Lessons from the Panel Cases: Inspection Panel Perspectives, Presentation at the Board's Committee on Development Effectiveness (CODE), ( 22 October 2012) available at http://ewebapps.worldbank.org/apps/ip/Documents/IPNpresentation_CODE__Oct2012.pdf [Accessed on 20.01.2017]*

the implementation of indigenous rights rests, to great extent, on non-judicial mechanisms. Generally speaking, global institutions having the responsibility to monitor States compliance with international legal instruments. States and indigenous peoples together needs to work out suitable a remedies when dealing with continuing problems. In response, according to Fleur Adcock, the Sates exhibit mere ritualism and most of time States are reluctant to move in accordance with recommendations of international bodies.

**References:**


1. Adcock, F. (2015). The Limitation of the Current International Human Rights Law System in Regard to Monitoring of Rights? Does it Encourage 'Right Ritualism'?. available at http://www.un.org/esa/socdev/unpfii/documents/EGM/2015/Concept-note.pdf
2. Anaya, J. (2010). Statement by Professor James Anaya Special Rapporteur on the situation of the human rights and fundamental freedoms of indigenous people, available at https://www.un.org/esa/socdev/unpfii/documents/statement%20by%20SR.pdf
3. Anaya, J. (2013). Report of the Special Rapporteur on the Rights of Indigenous Peoples, James Anaya : addendum, A/HRC/24/41/Add.5
4. Anaya, J. (n.d.) Country Reports avilable at https://unsr.jamesanaya.org/?cat=11
5. Anaya, S. J., Lenoir, J. J., & Rogers, J. (2009). International Human Rights and Indigenous Peoples. Aspen Publishing.
6. Bodansky, D. (2011). Implementation of International Environmental Law. Japanese Year Book of International Law, 54, 62.
7. CERD (1992). Report of the Committee on the Elimination of Racial Discrimination, 27 February. U.N. Doc. A/46/18 at para 27.
8. CERD (1993), Procedural Decisions of the Committee on the Elimination of the Racial Discrimination, (42nd session 15 September). UN DOC. A/48/18, Annex III.


[136] *Fleur Adcock, supra note 87.*






9. CERD (1997). General Recommendation 23, Rights of indigenous peoples (Fifty-first session, 1997), U.N. Doc. A/52/18, annex V at 122 .
10. CERD (1999). Decision 2(54) on Australia (18 March ), UN Doc. A/54/18.
11. CERD (2005). Decision 1(66): New Zealand Foreshore and Seabed Act 2004, (11 March), UN Doc. CERD/C/66/NZL/Dec.1
12. CERD (2006). Concluding Observations (61st session 15 May). UN Doc. CERD/C/GTM/CO/11
13. CERD (2015). Report on the Grave and Persistent Violation of Indigenous Peoples' Rights (87th Session available at https://www.forestpeoples.org/sites/fpp/files/publication/2015/07/cerd-report-final-eng.pdf
14. CERD (2022). Concluding Observations on the combined tenth to twelfth reports of the United States of America (21 September). UN Doc. CERD /c/USA/CO/10-12.
15. Chayes, A., & Chayes, A. H. (1995). The New Sovereignty: Compliance with International Regulatory Agreements
16. CHR (1996). Report of the Working Group on Indigenous Populations on the Discrimination Against Indigenous Peoples, (16 August) E/CN.4/Sub.2/1996/21
17. CHR (2001). Human Rights and Indigenous Issues (57th session, 24 April ) Comm. H. R. Res. 2001/57, UN. Doc. E/CN.4/RES/2001/57.
18. Claire, C. (2008). Reparations for Indigenous Peoples: global international instruments and Institutions. In Oxford University Press eBooks (pp. 163–196)
19. Cohen, C. P. (1998). The human rights of Indigenous peoples. Brill Nijhoff.
20. Davis, S. H. (2021). The World Bank and Indigenous Peoples. In Springer eBooks (pp. 191–204). https://doi.org/10.1007/978-3-030-57426-0_13
21. Dias, X. (2005). World Bank in Jharkhand-Accountability Mechanisms & Indigenous Peoples. Law, Environment and Development Journal 1, 71.
22. ECOSOC (2022), Establishment of a Permanent Forum on Indigenous Issues, (28 July ) E/RES/2000/22.
23. Fauchald, O. K. (2013). Hardening the legal softness of the World Bank through an inspection panel. Social Science Research Network. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2361099
24. Franck, T. M. (1990). The power of legitimacy among nations. Oxford University Press, USA.
25. Franck, T. M. (1998). Fairness in international law and institutions. Oxford University Press, USA.

26. Gaer, F. D. (2007). A voice not an echo: Universal Periodic Review and the UN treaty Body system. Human Rights Law Review, 7(1), 109–139
27. Guzmán, A. T. (2002). A Compliance-Based theory of international law. California Law Review, 90(6), 1823.
28. Hair, J. et al. (1997). Pangue Hydroelectric Project (Chile): An Independent Review of the International Finance Corporation's Compliance with Applicable World Bank Group Environmental and Social Requirements. available at https://static1.squarespace.com/static/5bb24d3c9b8fe8421e87bbb6/t/5c3bd5bef950b7929a2cbe89/1547425250086/Pangue-hydroelectric-project.pdf
29. Henkin, L. (1979). How nations behave: Law and foreign policy. University Microfilms International.
30. Higgins, N. (2014). Advancing the rights of minorities and Indigenous peoples: Getting UN attention via the Universal Periodic Review. Netherlands Quarterly of Human Rights, 32(4),
31. HRC (2009). Study on Lessons Learned and Challenges to Achieve the Implementation of the Rights of Indigenous Peoples to Education, Report of the Expert Mechanism on the Rights of Indigenous Peoples (31 August), UN Doc. A/HRC/12/31.
32. HRC (2010) Human Rights Indigenous Peoples: Mandate of the Special Rapporteur on the Rights of Indigenous Peoples, (6 October) A/HRC/RES/1514.
33. HRC (2011). Final Report of the Study on Indigenous Peoples and the Right to Participate in Decision Making, Report of the Expert Mechanism on the Rights of Indigenous Peoples, (17 August) UN Doc. A/HRC/18/42.
34. HRC (2012). Role of Languages and Culture in the Promotion and Protection of the Rights and Identity of Indigenous Peoples, Study of the Expert Mechanism on the Rights of Indigenous Peoples (16 August), UN Doc. A/HRC/18/42 .
35. HRC (2014), Study on Promotion and Protection of the Rights of Indigenous Peoples in Disaster Risk Reduction, Prevention and Preparedness Initiatives, Study by the Expert Mechanism on the Rights of Indigenous Peoples (28 April), UN Doc. A/HRC/EMPRIP/2014/2.
36. HRC (2022). Study on Treatise, Agreements and other Constructive Arrangements between Indigenous Peoples and States, including Peace Accords, Study by the Expert Mechanism on the Rights of Indigenous Peoples (28 July ), UN Doc. A/HRC/51/50
37. ILO (2007).Newsletter 2007, The ILO and Indigenous Tribal Peoples, available at





https://www.ilo.org/wcmsp5/groups/public/@ed_norm/@normes/documents/publication/wcms_100542.pdf
38. Inspection Panel (1999). Clarification of the Board's Second Review of the Inspection Panel, para 9 available at https://www.inspectionpanel.org/sites/ip-ms8.extcc.com/files/documents/ClarificationSecondReview.pdf
39. Inspection Panel (2012). Inspection Panel, Lessons from the Panel Cases: Inspection Panel Perspectives, Presentation at the Board's Committee on Development Effectiveness (CODE), available at https://consultations.worldbank.org/content/dam/sites/consultations/doc/migration/IPNSubSafRevwithPPPs.pdf
40. Inspection Panel (2014). Annual Report, available at https://www.inspectionpanel.org/sites/default/files/publications/AnnualReport2013-2014f.pdf
41. Inspection Panel (2016). Indigenous Peoples, available at https://www.inspectionpanel.org/sites/default/files/publications/Emerging%20Lessons%20Learned%20No.%202%20-%20Indigenous%20Peoples.pdf
42. International Labour Organisation (2019). Handbook of procedures relating to international labour Conventions. Intertnational Labour Office, Geneva.
43. International Labour Organization (ILO), Constitution of the International Labour Organisation (ILO), 1 April 1919, available at: https://www.refworld.org/docid/3ddb5391a.html
44. Kingsbury, B. (1999). Operational policies of international institutions as part of the Law-Making Process: the World Bank and Indigenous Peoples. In Oxford University Press eBooks (pp. 323–342).
45. Maupain, F. (1999). The settlement of disputes within the International Labour Office. Journal of International Economic Law, 2(2), 273-293.
46. McMahon, E. R. (2010). Herding cats and sheep: Assessing state and regional behavior in the Universal Periodic Review mechanism of the United Nations Human Rights Council. UPR Info, Geneva.
47. McMahon, E. R. (2012). The Universal Periodic Review: A Work in Progress; an Evaluation of the First Cycle of the New UPR Mechanism of the United Nations Human Rights Council. Friedrich-Ebert-Stiftung, Global Policy and Development.
48. Nurmukhametova, E. (2006). Problems in Connection with the Efficiency of the World Bank Inspection Panel. Max Planck Yearbook of United Nations Law, 10(1), 397–421.
49. Petersen, N. (2010). Brian D. Lepard. Customary International Law. A New Theory with Practical Applications. European Journal of International Law, 21(3), 795–797.

50. Posner, E. A. (2003). Do states have a moral obligation to obey international law. Stanford Law Review, 55(5), 1901–1920.
51. PRO 169. (n.d.). https://www.pro169.org/implementation-of-169/
52. Ramcharan, B. G. (2015). The law, policy and Politics of the UN Human Rights Council.
53. Rudd, K.Prime Minister of Australia. (2023, December 25). Prime Minister of Australia. http://www.australia.gov.au/about-australia/our-country/our-people/apology-to-australias-indigenous-peoples
54. Schuler, L. (2013). Modern Age Protection: Protecting Indigenous Knowledge through Intellectual Property Law. Michigan State International Law Review, 21(3), 751.
55. Schulte-Tenckhoff, I., & Khan, A. H. (2011). The permanent quest for a mandate. Griffith Law Review, 20(3), 673–701
56. Shihata, I. F. (2000). The World Bank Inspection Panel : in practice. RePEc: Research Papers in Economics, 1. http://ci.nii.ac.jp/ncid/BA46235174
57. Statistics of UPR (2023) , available at https://upr-info-database.uwazi.io/
58. Sweeney, G., & Saito, Y. (2009). An NGO assessment of the new mechanisms of the UN Human Rights Council. Human Rights Law Review, 9(2), 203–223.
59. Tapiola, K., & Swepston, L. (2010). The ILO and the Impact of Labor Standards: Working on the Ground after an ILO Commission of Inquiry. Stanford Law & Policy Review, 21, 513.
60. Tauli-Corpuz, V., & Padilha, S. (2017). Reflections on the Role of the United Nations Permanent Forum on Indigenous Issues in relation to the Millennium Development Goals. Sur - International Journal on Human Rights
61. Thornberry, P. (2005). Confronting Racial Discrimination: A CERD perspective. Human Rights Law Review, 5(2), 239–269.
62. UN General Assembly (2007), United Nations Declaration on the Rights of Indigenous Peoples : resolution / adopted by the General Assembly, 2 October, A/RES/61/295
63. UN General Assembly, Human Rights Council : resolution / adopted by the General Assembly, 3 April 2006, A/RES/60/251
64. UN General Assembly, International Convention on the Elimination of All Forms of Racial Discrimination, 21 December 1965, United Nations, Treaty Series, vol. 660
65. UN Human Rights Council, Institution-building of the United Nations Human Rights Council, 18 June 2007, A/HRC/RES/5/1
66. UN Human Rights Council, Review of the work and functioning of the Human Rights Council : resolution / adopted by the Human Rights Council, 12 April 2011, A/HRC/RES/16/21
67. UNPFII (2008), Study on the Structures, Procedures and Mechanism that Presently Exist and that Might be Established to Effectively Address the Human Rights Situation of Indigenous Peoples and to Arrange for Indigenous Representation and Inclusion in Structures, Procedures and Mechanisms, (19 December), E/C.19/2008/2.
68. World Bank (1991). Indigenous Peoples, Operational Directive 4.20 (September). Washington DC.

# Globalisation's cost in human dignity: the paradoxical relation of migrant labour and international trade

***Rs. Ipsita Ray[1], and Mr. Anshuman Shukla[2],***
*Assistant Professor School of Law, NCR campus,*
*Christ Deemed to be University, Bangalore, India.[1]*
*Associate Professor, Jindal Global Law School, O.P. Jindal Global University[2]*

**Abstract**

Free trade and labour migration are necessary elements of contemporary global markets. Technical regulation of these processes is managed through an elaborate arrangement of the Bretton Woods institutions. These institutions and their underlying mechanisms are justified as instrumental to ushering the new age of global prosperity and unbridled economic growth. This essay analyses and challenges the paradoxes of these prevailing assumptions, which constitute the normative justification for the phenomenon of contemporary globalisation. It pitches the intrinsic conflict of interest between the regime of free international trade and the basic aspirations of migrant labour. The essay examines the entrenched problems of labour mobility through capabilities approach and social choice theory. It concludes that such conflicting and paradoxical relation between foreign capital and labour migration renders the latter's deprivation as a significant externality of the former. The existing system creates global pockets of enrichment and growth, while localising severe deprivation and suffering within the Global South.

**Key words:** - *International Trade, Labour mobility, Globalization, Exploitation, Human Rights*

## Globalisation's Cost in Human Dignity: The Paradoxical Relation of Migrant Labour and International Trade

### Problems of transnational globalisation

Globalization has started a race to form single and uniform economic market. Such market advocates for the free movement of capital. The Bretton Woods institutions were established as the intended vehicles for bringing such desired uniformity in the world market. The world economic order has witnessed transformation of nations from being the suppliers of raw products to that of finished goods. This economic transformation from resource exporter to goods exporter can be ascribed to numerous influences, like export-oriented





administrative interference, FDI through transcontinental corporations, judicious reorganization, and advancement of industries. This complex system systemically throws new challenges in the ever-evolving world. Some of these challenges are demographic, environmental, economic, and entrenched impediments to human rights.

Post World War-II globalization led to the emergence of contemporary international institutions. World bank, which is one of the Bretton Woods institutions, mandates "combating poverty" and "protecting environment". Structural adjustments suggested to developing countries, like pursuing hydroelectric power plants and agro-industrial projects, have aggravated serious externalities in deforestation and poverty. This enforced economic policy has further caused involuntary dislocation of millions of people. It is claimed that these macro-economic changes serve the needs of developed nations in the post-colonial world. In this paradigm, structural changes destroy state enterprise of developing nations, thereby continuing colonial exploitation. The mechanism of exploitation became stronger with formal inauguration of WTO in 1995. Thus, further infringement of sovereignty is evident in the guise of trade liberalization and creation of investment-friendly environment. The WTO regime facilitated such liberalization of economies as the agreement took "single undertaking approach."

The challenges related to globalization are transnational in nature. Municipal legal systems are incapacitated in coping with the resultant problems. Highly competitive environment of globalization has forced the national governments to dilute policy barriers that impede international trade. Such derogation is increasingly reflected with respect to policies that are specifically related to labour protection and wellbeing. Labour welfare is primarily enforced by the employers as per state laws within national borders. Labour laws are, therefore, considered as an index of human rights. Basic rights, like fixed working hours, weekly off, decent work environment and work-life balance are enforced through labour regulations. Supporters of international trade regime seek its justification in the 'tickle down effect' to ensure equality of status. Yet this supposedly equal regime is forcing working class into the depths of darkness. The whole regime of trade law is based on theories to explain and justify effects of reduced barriers on price, income, and employment but the enormous externalities indicate severe contradictions. Globalization may have made the world more integrated in terms of economy but working conditions of labourers are increasingly deteriorating.

### Schism of consumer-producer within global market

World economy is no longer based on traditional dichotomy of primary goods and manufactured goods. Under the WTO regime, manufacturing also predominantly shifted its base to developing nations. The reason behind such shift is to take advantage of cheap labour. The quantum of production increased due to availability of cheap labour coupled with free flow of capital. Domestic demand in these developing economies, however, largely remained static. These

countries do not constitute a significant portion of global demand. This condition perpetuates a class-based distinction between the manufacturer and the consumer nations. Small developing economies are not only competing with industrialised economies but also with big industries who possess wealth and choice of relocation to cheaper site. Free trade and fair competition along with overproduction further depress labour wages.

It becomes important to note that in case of unrest related to labour in one location, WTO regime allows firms to shift to an alternate cheap labour location. Therefore, wages for labour are not only dependent on national factors but also on quantum of "global reserve pool of cheap labour.[1] Thus, in terms of wage regulation, labour is in constant competition across countries. These factors result in joblessness and downgrading of people by supressing incomes, thereby continuing class struggle in disguised form.

Joblessness and miserable pay drag people out of their homes in search of better prospects. National and international migration, thereby, became a significant phenomenon in many parts of the world. Mobile and temporary work force are available around the world. But free movement of labour across international borders remains an issue of "political controversy" [2] Lack of legal instruments with low enforceability make no one accountable for migrant rights. Thus, the paper explores a normative paradigm for making labour rights enforceable at national as well as international level.

**Reserve Army of Workers**

International migration has always been a controlled phenomenon. Control is visible in the form of immigration policies, quotas, visa requirements, point-based system, and stringent border patrols in developed countries. Restricted movement of workers allows exploitation of natural and human resources of developing economies. Over a century ago, Marx spoke about 'reserve army of workers' as fundamental feature of capitalistic economies[3] Human beings are used at the convenience of economically superior nations. Moreover, Kalecki explains why capitalistic economies do not support full employment[4]. Full employment of workers may take away control over the conditionalities of workplace thereby restoring the bargaining powers of the workers. Equal bargain rights will erase scope of exploitation. Bargaining power of labour is

1 *Baafi Antwi, J., & Oppong Kwakye, F. (2010). Globalization and its influence on Economic Growth performance.*
2 *Dustmann, C., & Preston, I. P. (2019). Free movement, open borders, and the global gains from labor mobility. Annual review of economics, 11, 783-808.*





controlled through reduced investment spending. Less investment results in decreased job opportunities, higher job loss and thus significant control over wage margin. Control over wage margin is instrumental in maintenance of profitability. Thus, capitalistic economies and companies promote unemployment or employment under dehumanizing conditions.

Free mobility of capital under LPG model is making the scenario worse for working class. Developing countries, with surplus population, reveal two common trends[4] First, a large percentage of labour is unemployed or are employed in marginalised jobs. Second, a section of population exists that is ready to be relocated. Reasons of relocation may not be uniform. Such reasons can range among various factors like climate change, poverty, class, or caste struggle. Mobile population is willing to migrate. But mobility of human beings is controlled under international law. No international organization is advocating for free movement of labour across international borders. Interplay of these two scenarios is reflected in terms of deprivation of job opportunities within one's own national borders and lack of alternatives in foreign countries due to closed-door immigration policies. This gap led the economists and sociologists to explore possibilities for optimising international barriers for free movement of persons.[5] Emigration barrier imposes widest gap between "humankind's current welfare and potential welfare"[6] Labour is not just a factor of production; labour denotes human beings. Human beings need living wages which cannot be simply calculated based on profit. Neo-liberal institutions permit production houses to establish manufacturing units where cheap labour is available. The objective is to create a greater margin between cost of production and sales price which, in turn, creates higher profits. Thinking only in terms of profit and neglecting human welfare is not desirable for 'civilised nations' of modern world. It is indeed accepted that cross-border mobility of labour (migration) is beneficial and openness to further extent would be responsible in creating larger global economic gains for all. Most prominent economic benefit of free movement of labour will result out of relocation of labour. Labour will prefer to reallocate themselves across the world in such a manner that their skills will be valued highest at a specific point of time.[7] Therefore, workers will be more productive thereby increasing the value of global output.

3 *chapter 25 of Volume I of Capital (1967).*
4 *Kalecki, M. (1990). Collected works of Michal Kalecki: Volume I. Capitalism: Business cycles and full employment (Vol. 1). Collected Works of Micha Kalec.*
5 *Fan, C. S., & Stark, O. (2007). International migration and "educated unemployment". Journal of Development Economics, 83(1), 76-87.*
6 *Borjas, G. J. (2015). The slowdown in the economic assimilation of immigrants: Aging and cohort effects revisited again. Journal of Human Capital, 9(4), 483-517.*
7 *Clemens, M. A. (2011). Economics and emigration: Trillion-dollar bills on the sidewalk?. Journal of Economic perspectives, 25(3), 83-106.*

## Sectoral mobility and Choice Theory[8]

Concerns of cross-border mobility of labour is not new in global world. In fact, migration is an age-old concept. WTO also recognises mobility of labour under GATS. GATS categorizes services in four major modes- cross-border supply, commercial presence, consumption abroad, and presence of natural person. The fourth mode is 'presence of natural persons' which includes international migration where individuals are physically present to provide services in a foreign market. Physical presence of natural person is evidence of migratory movements.

Though meaning of the phrase 'presence of natural person' is unclear under GATS. Article I.2(d) of the agreement provides meaning for 'presence of natural person' as being "the supply of a service… by a service supplier of one member, through presence of natural persons of a member in the territory of another member." GATS annex further elaborates on the meaning by differentiating between 'measures affecting natural persons who are service suppliers of a member' and 'natural persons of a member who are. employed by a service supplier of a member.' The first category refers to the class of service providers who are directly interacting with customers, thereby being directly paid by the clients. But the second category creates a confusion. Does it include natural person providing services under employment from a foreign member or only those natural persons who are brought by the host nation for services?

Background notes on GATS suggest host country companies hiring natural persons from foreign state should be considered as independent service provider working on contractual basis. It is also said that when a natural person of foreign origin is in a local firm outside his home state, it is not a case covered under Mode 4 of GATS. The confusing meaning of Mode 4 is misused by employers and firms of foreign country while employing natural persons of other member nations. The situation becomes problematic in cases where receiving nations are eager for short-term employment. This eagerness of host nations further expands confusion to the scope related to Mode 4 of GATS.

[8] *Migration is considered as an investment to increase productivity of human resource. Like other investments, human capital also incurs cost and return (Sjaastad, 1962). These returns are based on difference between skill prices in different countries or region which affects productivity of human capita (Roy, 1951; Dustmann et al. 2011). Sjaastad, L. A. (1962). The costs and returns of human migration. Journal of political Economy, 70(5, Part 2), 80-93.*

[9] *Choice Theory was pronounced by Dr. William Glasser. The theory emphasizes on individual's control over one's actions. Problem arises as one can control only one's own behaviour. All behaviour is chosen and are deduced from need to be loved and accepted, need to possess power, to be free, to have fun and need to survive.*





Another interesting fact is that the host-countries (WTO members) try to include all categories of workforce as employees. This is intended to bring them under umbrella application of domestic labour laws[8]. Ironically, such workers are not provided social security at par with domestic workers. Moreover, Mode 4 specifically deals with temporary migration, but the agreement does not laydown any meaning for the word 'temporary'. The word is usually interpreted in a negative sense to exclude permanent migration. This exclusionary principle lays down the foundation of circular mobility of labour as per the need of the receiving countries. GATT/ WTO agreed on wages being an important factor to improve trade negotiations, but historical records suggest that the founders of GATT/ WTO did not attempt to fit modern human rights aspect to prevailing labour standards. All discussions were related to 'fair wages', and 'cost of production', which prioritised creation of free trade across the globe. However, on the contrary, free trade also requires free mobility of labour across international borders.

At this juncture, it is important to note that such movement of people across international borders is often associated with violation of basic human rights. For example, Mode 4 of Services discussed under GATS, deals with providing services via natural presence. There is a need to categorise sectors of production for reliable understanding of labour mobility in terms of trade. These could be, for instance, "mobile" and "immobile" sectors of production[9]. Mobile sectors are those which can freely move towards cheap labour economy, whereas immobile sectors include infrastructure, agriculture and other service areas which cannot be relocated to a suitable labour-intense area. 'Mobile' capital tends to move towards 'immobile labour reserve'[10]. As discussed above, movement of labour is not promoted under global regime, rather every nation wishes to retain control over human mobility. But interestingly, circular movement or seasonal movement of same labour is allowed under international trade to cater the need of immobile sectors.[11]

[10] *Kemekliene, G. (2007, April). Magnitude and possible consequences of labour migration under GATS. In Global Labour University Conference (pp. 1-3).*

[11] *Chossudovsky, M. (2003). The globalization of poverty and the new world order.*

[12] *Hammar, T., Brochmann, G., Tamas, K., & Faist, T. (Eds.). (2021). International migration, immobility and development: Multidisciplinary perspectives. Routledge.*

This reflects how labour rights are being manipulated for gaining in terms of international trade without considering well-being of labour. In the above-mentioned context, it is also essential to analyse whether migrants enjoy 'right to free choice of employment' in terms of location and employer. Choice theory highlights on one's ability to control over one's actions. Problem arises as one can control only one's own behaviour. Ability to control over one's own action is also affected by external factors. Thus, one's behaviour is chosen and are deduced from need to be accepted in the society at large, desire to possess power, to have freedom and the want for survival. Application of choice theory over migratory workers reflects effect of movement on workers. The incapacity to exercise choice, in turn, affects productivity, competition with local workforce, earnings and remittances.[12]

**Institutions galore without effective coordination**

Workers' rights are safeguarded by International Labour Organization. Formal attempts began as early as the establishment of ILO in 1919. ILO became responsible for improving labour conditions worldwide. ILO adopted a unique tripartism as functional approach. However, a shift has been observed with evolution of neo-liberal institutions. Institutions like the International Labour Organization (ILO) and United Nations Conference on Trade and Development (UNCTAD) lost their role and significance overnight. UNCTAD and WTO significantly differed in their methods and approaches. The conclusion of Marrakesh agreement further reduced the significance of ILO as an institution. WTO was formed with an inbuilt enforcement mechanism, whereas ILO relied upon dialogue between various stakeholders. Furthermore, as pointed out in previous chapter, cooperation among WTO, World Bank and IMF has further strengthened neoliberal characteristics of contemporary economic globalization, thereby reducing the role of deliberative process under the ILO and UNCTAD regimes.

[13] *Glasser, W. (1999). Choice theory: A new psychology of personal freedom. HarperPerennial.*

[14] *Ruhs, M. (2013). The price of rights: Regulating international labor migration. Princeton University Press.*





Critics argue that WTO, as an organization, legitimizes violation of human rights (Ala'i, 2000). Although such violations are not always direct but arise as externalities or consequences of other activity, and intellectual piracy by Multinational corporations (MNC). Thus, scholars are raising concerns about the consequences of globalization. While globalization and liberalization are promoting interconnection and interdependency via "trade, finance, people and ideas in global market", yet it disregards important matters like labour, human rights, and environment[13]. Silence over these important matters has resulted in a dehumanisation of rights.

Neo-liberal views advocate for smaller role of state thereby questioning national labour standards. The effect was visible in industrial countries as well as developing countries. Such views were entering developing nations through structural adjustment programmes. Ideological shift further attributed to significant changes, like promotion of international competitiveness which compelled governmental interference in cost-cutting to promote foreign direct investment. Such cost-cuttings weakened negotiating position of workers "in the face of the threat of relocation" of firms.[14]

Attempts to link labour standards and trade through social clause in trade agreements were futile. It was a pseudo attempt to show concern but, it is a new form of protectionism to create market distortions. Another set of literature claims that non-harmonization of labour standards through trade regime may lead to "a race to reach down" [15] This prediction can come true if burden to cut cost of production is not reduced. If trading partners compete to reduce production cost by labour exploitative practices, disadvantage will follow foreign investment patterns.

Significant past literature analyses these consequences.[16] Migrant workers contribute to the economic development of the destination country, whereas the country-of-origin benefits from their remittances and skills acquired as migrant workers. The home country can also solve unemployment pressure by way of labour migration. The current practice of circular mobility also led to violation

[15] *Pekarskiene, I., & Susniene, R. (2014). The assessment of the manifestation of economic globalization: the international trade factor. Procedia-Social and Behavioral Sciences, 156, 392-397.*

[16] *Eddy Lee, Globalization and Labour Standards: A Review of Issues, 136 INT'l LAB. REV. 173 (1997).*

[17] *Bhagwati, J. N., & Hudec, R. E. (Eds.). (1996). Fair trade and harmonization: Prerequisites for free trade? (Vol. 1). mit Press.*

[18] *Zinovijus, C. (2012). Making Sense of Their Own Mobile Identities in Internally Borderless Europe: Europeans, Poles,'Bread'Migrants, Catholics... Annales Universitatis Paedagogicae Cracoviensis. Studia Sociologica, 4(2), 56-71.*

of human rights of migrants. Basic labour rights extended by ILO and UN are not ensured to temporary migrant workers. Migrants are not protected under domestic laws of county-of-origin as they no longer work for the domestic labour market. Migrants are perceived adversely, as natives consider them a threat to the prospects of employability in the local markets. Therefore, neither the home country nor the host country considers itself responsible for the well-being of migrating labour force.

Although labour migration serves as a vehicle for development but often, the phenomenon of migration leads the families of migrant into vulnerable position. The result of migration on the labour class can be analysed based on their treatment, wages, and level of exploitation in the host country.[17].The phenomenon of migration degenerates into tragedy because it is "politicized before it had been analysed" [18] Although it is an economic process, yet it leads to complex challenges and conflicts. The economic paradigm, therefore, must be evaluated in terms of such complexities.

This is a significant issue as quality of life and livelihood of many are at stake. Currently, migration policies are country centric. Some countries of origin promote migration, whereas some countries of destination choose not to change their diasporas. For instance, countries like Saudi Arabia, Kuwait, UAE became rich with the efforts of foreign labour. On the other hand, Japan maintained complete closed-door policy to immigrants. In other words, nation-states and other agencies like WTO regulate free mobility of labour for narrow benefits. It is essential to take a labour-centric approach to provide free choice and exploitation-free environment to work for all.

[19] *Bosniak, L. S. (1991). Human rights, state sovereignty and the protection of undocumented migrants under the International Migrant Workers Convention. Int'l Migration Rev., 25, 737.*

[20] *Collier, P. (2013). Exodus: How migration is changing our world. Oxford University Press.*

[21] *Day, J. P. (1966). Locke on Property. The Philosophical Quarterly (1950-), 16(64), 207–220. https://doi.org/10.2307/2218464.*

[22] *Salam, S. N., Ashri, M., Magassing, A. M., & Hasrul, M. (2022). The Right to Work as Human Rights: State Protection of Indonesian Migrant Workers Abroad through a Memorandum of Agreement (MoA). ITALIENISCH, 12(2), 573-581.*





**Access to Work for Migrant Labour**

Work is an essential element of human life. Access to work provides a holistic evolution to human life. Locke has famously related property to labour by justifying one's ownership in something exclusively in terms of his labour being mixed with natural resource to formulate the product. Application of Locke's theory of property to migrant workers shows they are deprived of an option to own and possess things. Right to work is embodiment of human self [19] Thus, human beings realise purpose of life through work. Although governments of welfare states have a duty to provide suitable job prospects but internal and external factors like limited resources, economic backwardness and over population force native workers to migrate. But discriminatory treatment in host country is a common occurrence for migrant workers.

The crisis of migrant labour is further exacerbated when compared with similar movement of capital across international border. Like capital, labour also should be treated without nationality-based differentiation. Universal Declaration of Human Rights (UDHR) protects this right under Article 23. Moreover, Article 6 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) also reflects right of employment. The philosophical and material underpinnings of human right are instantiated through right to employment. Families of migrant workers cannot survive without reliable source of income. Basic rights should be extended unconditionally. The scenario can improve with active participation by host-home country. Rights are enforced through other person's duty. Thus, to extend right to work for migratory workers require establishing enforceable duties.

Status of migrant workers can be improved through two major steps. First, the home countries should build capabilities of workers. Efficient and skilled workers can find jobs based on simple dynamics of skill-wage margin[20]. Second, host countries should agree to accommodate foreign workers, provided they can earn a living based on skill sets they have without being treated unfairly. Host country's obligations are arising through international humanitarian law. Human rights have already achieved jus cogens status whereby, these basic obligations do not create new or unjust burdens for labour receiving countries. These obligations for the host country can be broadly categorised into three parts. First

[23] *Vecchio, G., & Martens, K. (2021). Accessibility and the Capabilities Approach: a review of the literature and proposal for conceptual advancements. Transport Reviews, 41(6), 833-854.*

[24] *Ager, A., & Strang, A. (2008). Understanding integration: A conceptual framework. Journal of refugee studies, 21(2), 166-191.*

part is related to 'respect'- such countries should not directly or indirectly practice or allow violation of equal rights for migrant workers. Second part is associated with 'protect'- violation of first obligation should lead to penalty for intervening party. Third part relates to 'support'- host states should facilitate means for realization of migrant workers right.

The combined effect of these steps will strengthen 'the right to work'. Right to work can reduce vulnerability, extend a sense of security and boost resilience. Integration of migrant workers into the local economy can also diversify skill set of native population. Seclusion of migrant and refugee workers is detrimental to the workers, receiving countries and sending countries. This isolation or exclusionary treatment is visible as they are not usually the 'preferred class', with high skill level and language proficiency. Employers are openly discriminating thereby depriving basic rights of workers. Often these workers are unable to access help as they are unable to speak in the native tongue. Thus, integration is not a linear process and does not naturally happen over the period[21]. In this context, Ager and Strang's model explains the challenges of labour integration in terms of markers such as means (employability, education, housing and health), social bonds (familiarity with language and culture) and stability (temporary stay or citizenship).

## Conclusion

Application of these markers against unskilled migrant workers of developing countries shows devastating outcomes. Such workers are forced in an abusive position. For example, South Asian international migration is dominated by unskilled or semi- skilled workers and a small portion of skilled professionals

[25] *Khadria, B. (2005). Migration in South and South-West Asia. Global Commission on International Migration, Geneva.*

[26] *Srivastava R and Pandey A. K. (2017). Migration in South Asia: Drivers, Interlinkage and Policy Issues (Discussion paper). UNESCO.*

[27] *Wickramasekara, P. (2011). Circular migration: A triple win or a dead end. Global Union Research Network Discussion Paper, (15).*

[28] *Sasikumar, S. K., & Thimothy, R. (2012). Migration of low skilled workers from India to the European Union.*

[29] *Castles, F. G., Leibfried, S., Lewis, J., Obinger, H., & Pierson, C. (Eds.). (2012). The Oxford handbook of the welfare state. OUP Oxford.*

[30] *Rees, P., Bell, M., Duke-Williams, O., & Blake, M. (2000). Problems and solutions in the measurement of migration intensities: Australia and Britain compared. Population Studies, 54(2), 207-222.*





migrate internationally in search of jobs.[22] Figures from 2015 show 66 percent of migration from South Asia were towards West Asian Countries primarily to Gulf Cooperation Council (GCC) Countries[23]. The Gulf corridor is generally filled with untrained provisional labourers working in domestic sector and construction[24]. India sends largest number of laborers to Middle East followed by Pakistan and Bangladesh[25]. South-Asian workers have lost bargaining power under this unfair situation. Thus, integration of these unskilled and semi-skilled workers has become a concern.

Many scholars have raised doubts related to the meaning of the word 'integration'. It has been argued that 'there is no single acceptable theory associated with the word 'integration of migrant workers'[25]. However, integration of immigrant workers remains a significant goal under international humanitarian law. Mere articulation of immigrant rights is not useful. In this context, such rights can be categorized as primary and secondary rights. Primary rights are those which are considered as bare minimum like human dignity, equality, and agency over one's life[26]. Although most studies are conducted in the light of these primary rights, effective integration, however, is possible through implementation of secondary rights or derivative rights. Secondary rights are family unification, education, and access to health care facilities.

Host states will never fail to classify between mine and thine, because the political concept of "state" is correlated to that of "citizen". Thus, one practical goal could be to provide exploitation-free environment for non-citizen working class without demanding for equal treatment in relation to the citizen class. Establishing strong foundations of secondary rights will ensure a journey towards a better integrated world.

**References:**

1. Castles, F. G., Leibfried, S., Lewis, J., Obinger, H., & Pierson, C. (Eds.). (2012). The Oxford handbook of the welfare state. OUP Oxford.
2. Rees, P., Bell, M., Duke-Williams, O., & Blake, M. (2000). Problems and solutions in the measurement of migration intensities: Australia and Britain compared. Population Studies, 54(2), 207-222.
3. Ager, A., & Strang, A. (2008). Understanding integration: A conceptual framework. Journal of refugee studies, 21(2), 166-191.
4. Khadria, B. (2005). Migration in South and South-West Asia. Global Commission on International Migration, Geneva.
5. Srivastava R and Pandey A. K. (2017). Migration in South Asia: Drivers, Interlinkage and Policy Issues (Discussion paper). UNESCO.
6. Wickramasekara, P. (2011). Circular migration: A triple win or a dead end. Global Union Research Network Discussion Paper, (15).

7. Sasikumar, S. K., & Thimothy, R. (2012). Migration of low skilled workers from India to the European Union.
8. Salam, S. N., Ashri, M., Magassing, A. M., & Hasrul, M. (2022). The Right to Work as Human Rights: State Protection of Indonesian Migrant Workers Abroad through a Memorandum of Agreement (MoA). ITALIENISCH, 12(2), 573-581.
9. Vecchio, G., & Martens, K. (2021). Accessibility and the Capabilities Approach: a review of the literature and proposal for conceptual advancements. Transport Reviews, 41(6), 833-854.
10. Bosniak, L. S. (1991). Human rights, state sovereignty and the protection of undocumented migrants under the International Migrant Workers Convention. Int'l Migration Rev., 25, 737.
11. Collier, P. (2013). Exodus: How migration is changing our world. Oxford University Press.
12. Day, J. P. (1966). Locke on Property. The Philosophical Quarterly (1950-), 16(64), 207–220. https://doi.org/10.2307/2218464.
13. Pekarskiene, I., & Susniene, R. (2014). The assessment of the manifestation of economic globalization: the international trade factor. Procedia-Social and Behavioral Sciences, 156, 392-397.
14. Eddy Lee, Globalization and Labour Standards: A Review of Issues, 136 INT'l LAB. REV. 173 (1997).
15. Bhagwati, J. N., & Hudec, R. E. (Eds.). (1996). Fair trade and harmonization: Prerequisites for free trade? (Vol. mit Press.
16. Zinovijus, C. (2012). Making Sense of Their Own Mobile Identities in Internally Borderless Europe: Europeans, Poles,'Bread'Migrants, Catholics... Annales Universitatis Paedagogicae Cracoviensis. Studia Sociologica, 4(2), 56-71.
17. Chossudovsky, M. (2003). The globalization of poverty and the new world order.
18. Hammar, T., Brochmann, G., Tamas, K., & Faist, T. (Eds.). (2021). International migration, immobility and development: Multidisciplinary perspectives. Routledge.
19. Glasser, W. (1999). Choice theory: A new psychology of personal freedom. HarperPerennial.
20. Ruhs, M. (2013). The price of rights: Regulating international labor migration. Princeton University Press.
21. Kemekliene, G. (2007, April). Magnitude and possible consequences of labour migration under GATS. In Global Labour University Conference (pp. 1-3).



*Globalisation's cost in human dignity: the paradoxical relation of migrant labour and international trade*

22. chapter 25 of Volume I of Capital (1967).
23. Kalecki, M. (1990). Collected works of Michal Kalecki: Volume I. Capitalism: Business cycles and full employment (Vol. 1). Collected Works of Micha Kalec.
24. Fan, C. S., & Stark, O. (2007). International migration and "educated unemployment". Journal of Development Economics, 83(1), 76-87.
25. Borjas, G. J. (2015). The slowdown in the economic assimilation of immigrants: Aging and cohort effects revisited again. Journal of Human Capital, 9(4), 483-517.

# Women empowerment through handloom industry: challenges, opportunities and way forward

***Dr. B. C Das[1], Mrs. Ruby Choudhury*** [2]
*Professor University of Science and Technology Meghalaya,* [1]
*Research Scholar, Department of Political Sciences*
*University of Science and Technology, Meghalaya,* [2]

**Abstract**

Handloom industry is the oldest and largest cottage industry in India with a standing ancient tradition .This is the second largest income oriented industry after agriculture, providing employment to over 6.5 million persons engaged in weaving and allied activities. Handloom weaving is a major labour intensive industry which has been playing a very important role in country's economy. Handloom Sector has a significant role in the socio-economic development of the people. Handloom industry of Assam encompasses cotton textile , silk textile , as well as khadi cloth. Assam is known for mulberry or muga silk . Handloom weaving is a way of life in Assam, widely dispersed in nook and corner of the State, supplementing the family income and self employment opportunities to the poor and margilised section of people. The Sualkuchi of Assam is highly regarded as the Manchester of the East as well as it is the Asia's largest silk weaving cluster. Sualkuchi has a rich cultural heritage with muga silk " the golden fibre" produced only in Assam and has enormous export potentiality. Sualkuchi through its age-old rich weaving culture, has been able to contribute tremendously towards the socio-economic upliftment of the people of Assam. The study is helpful for various stakeholders to improve the present conditions and provide better quality of living, and employment opportunities in handloom industry of India.

**Key words: -** *Handloom , Golden fibre , Weavers , Socio-economic development .*

## Introduction

Handloom industry is the oldest and largest cottage industry in India with a standing ancient tradition .This is the second largest income oriented industry after agriculture in rural India , providing direct employment to over 6.5 million persons engaged in weaving and allied activities. Its significance in agricultural economy is massive because of its linkages with imperatives and sensitive sectors like agriculture .They produces eco-friendly products .Raw materials are taken from agriculture therefore continuous market for agricultural products





.This shows the dexterity and artistic ability of weavers to produce attractive products. Handloom always promotes innovation in its products through experimentation and exhibitions. It also shows the role of women empowerment in the production process. Handloom weaving was functioning at a very high level of quality and was supplier of clothing needs of the Middle East and European countries before the Industrial Revolution.. It was only when modern textile industry developed in England, India was subjugated as a colonial country and that the textile Industry got assets back .

The Indian Government has set up Export Promotion Council as the nodal agency for export promotion efforts related to the cotton handloom textiles .Further Handloom weavers Comprehensive Welfare scheme is providing Life, accidental and disability insurance coverage to handloom weavers as well as workers under the components Pradhan Mantri Jivan Jyoti Bima Yojana, Pradhan Mantri Suraksha Bima Yojana and Converged Mahatma Gandhi Bunkar Bima Yojana. .Handloom sector contributes nearly 15 per cent of the cloth production in the country,also contributes to the exports earnings as 95 per cent of the World's hand-woven fabrics comes from India .It continues to be an important source of livelihood, especially for women , who form around 70 per cent of the weavers or allied workers in the sector according to the Ministry of the Textile statements . In recent times also in order to provide boost to the Aatma Nirvar Bharat the Textile Ministry decided to provide the weavers the chance to sell their product on online mood to give them a new exposure in this era of globalization. In Assam weaving of cotton and silk has been mainly done by women till the beginning of the 19th century .Francis Hamilton (1963) observed that the native women of all castes , i.e. from the queen down to the slave girls could weave all the varieties of silk to produce Dhoti , Riha , Mekhela , Chalang, Chadar , Gamocha , Mosari etc. Although originally the art of weaving was mainly practiced by the women folk, the increasing scope of gainful employment in this industry particularly during the recent decades is also attracting the male weavers to participate in it. Even then, women are still dominating this important industry. The culture and tradition of hand-loom weaving is best illustrated by the remark passed on Assamese woman by the Father of the Nation Mahatma Gandhi who said that, "every woman of Assam is a born weaver. No Assamese girl who does not know how to weave can expect to become wife. Sualkuchi is Asia's largest silk weaving cluster, known for its handloom, traditional mekhela-chadars, and saris, woven from mulberry, tassar and muga silk and has a rich cultural heritages of its own. Sualkuchi offers a unique experiences of silk weaving practices right from rearing to reeling to weaving .Weaving is of both gender centric ,both male and female occupation in Sualkuchi. Both are engaged in making fabrics. The weavers are migrated from the neighboring areas of states. Many of the weavers belong to the tribes of Bodos , Rabhas , Karbi, etc who are known for their exemplary skill in weaving industry. During the long history of silk production in Sualkuchi, rural women folk took part in the silk production process. Weaving was almost exclusive preserve of females. It was not unusual to find both men and women weaving but this may be because under the Ahom , Silk had become a specialized craft in

Sualkuchi undertaken by professional weavers catering to the demands of the state. Professional weavers manufacture the silk but the chief manufactures are women. An attractive feature of weaving at Sualkuchi is the engagement of the whole family in to the possession. The weavers mostly do not have any institutional background in handloom .

## 2. Background of the Study

Women of India are key player in the weaving industry .They are backbone for holding the vibrant Indian art and craft tradition and culture. But they are facing numerous problems. Handloom industry is a small cottage industry with various issues in the field of capital, raw-materials, marketing, and man-power. The cheapest silk product –popularly called as the mix-pat has been providing a very bad impression to the original Muga product of the available in the market in a very low cost and affordable to all easily. The problems facing by the handloom industry of study area Sualkuchi too include problems of Piracy, duplicity in the original products which has been reducing the original demand of the product in the markets, which also compromising in the original standards and quality of the product. There are other problems like unemployment ,poverty , lack of skill , lack of technology , lack of fund from government , lack of support from NGO, lack of implementation in the government policies and schemes and other health related problems. Proper attention is not given to the market, man-power, finance, skill, training, and raw-material and so on. The present study is an attempt to study women empowerment engaged in handloom industry and identify those problems facing by the Sualkuchi handloom industry and to suggest remedial measures to boost the Sualkuchi handloom industry in future .

## 3. Need and Significance of Study

The Handloom industry is a naturally grown industry. For people it has been a sources of income, a profession .Their sustainability depend on survival of this industry. The significance of this industry lies in the livelihood process of the people of study area Sualkuchi who takes it as a way of living. But this industry has been suffering from many problems. The socio-economic conditions of women weavers is a major concern of the development of handloom sector .But women weavers suffer from very depressed living standards and specially immigrants weavers .They chose to work due to pressure of poverty and therefore always ready to work for a very low wage. Work shed and housing are the serious problems faced by the weavers. Awareness for education among weavers , common weaving shed for weavers and technical training , financial support ,marketing, man-power ,raw-materials to fight against the adverse situation faced by the women weavers .So in this study present scenario of the handloom industry of India ,major challenges ,opportunities , and status of the women weavers will be studied and suggesting solutions to the finding of the study .





## 4. Objectives of Study

- To examine the present scenario of Indian handloom Industry at a glance.
- To identify the major challenges existing in the handloom industry in India.
- To explore the opportunities of handloom industries of India and abroad.

## 5. Review of Literature

Rangaswamy Eshwari (2011) in his thesis "Socio-Economic Dimensions of the Textile workers –A case study of Dindigul District in the state of Tamilnadu " held that the Indian textile industry has a significant presence in the International Textile Company. Its contribution to the Indian Economy is in terms of its contribution to the industrial production, employment generation and foreign exchange earrings. The Dindigul District is one of the largest Industrial district in then state of Tamilnadu .It has pioneered the growth of textile mills and its ancillary and auxiliary industries for their livelihood .He stated that socio-economic status of workers in textile mills, various problems faced by the workers and the extent of satisfaction derived and factors influencing the satisfaction of the workers on working conditions in the textile mills. He stated that there was inequality in per capita income. Permanent worker's per capita income is higher than contract workers. Every year there was a big problem in fixation of bonus. Further he stated that married workers have more socio-economic status than un-married workers . Permanent workers socio-economic status is more than the contract workers.

Gera, Ritu (2019) in her thesis" An Analytical study of Handloom Industry of Kota Region " held that handloom is an important traditional rural industry spread over many parts of the country and occupies a prominent position in maintaining the heritage and culture of India . It is also a largest employment provider next only to the agriculture. This industry is closely associated with the cultural heritage of the country. The products of the Handloom industry have the worldwide reputation since long time and it plays a very important role in Indian economy and has been an integral component of textile industry. As per recent statistics, the sector contributed 14 per cent to industrial production, 4 per cent to India's Gross Domestic Products (GDP) and constitutes 13 per cent of the country's export earnings. By now, the country supplies 95 per cent of world demand for hand woven fabric.

M.B. Ajithan (2006), in his thesis " Impact of Globalization on the village industries in Kerala – A study with Special reference to Handloom Industry in Ernakulum District." Held that unlike the neighbouring states , Kerala has a peculiar industrial structure marked by the higher shares of capital goods and modern industries . The major traditional industries of Kerala are Coir, Handlooms , Handicrafts and Cashew. He expressed that handloom is one of the important , ancient national , traditional industries of India . The history of Indian handloom industry dates back to the epic ages . Handloom industry is

still the largest employer in the country after agriculture .The industry gives employment to 120 lakh people in India. The sector accounts for 13.12 per cent of the total cloth produced in the country also contributes substantially to the export earnings.

Baruah and Kour ( 2015) in their article A Study on the Analysis of Economic of Weaver's Cooperative Society in Assam analyses the business operation of selected weaving unit in Assam .This sector is very significant for the economy of Assam but this sector also attracted by numerous problems, technology ,low productivity , un-organized production system ,low capital ,weak marketing link , conventional product range , overall stagnation of sales and above all competition from power loom and mill sector .

## 6. Research Methodology

The present study is descriptive and analytic in nature. It is prepared based on the existing published secondary databases and research studies including international reports , government surveys , websites , research articles etc. Primary data were collected from the 100 respondents of the study area which includes weavers , owners, cooperatives societies. The study examined the present condition of Indian handloom sector in a nutshell future of handloom industry , future prospects and challenges and governments initiatives..

## 7. Discussion and Analysis

The condition of the handloom sector in India is degrading day by day because of the cost of natural fiber. The cost of natural fiber is going up because people are not interested in buying the natural fibers of their country. A lot of synthetic fibers are preferred by the Indians owner today because of their cheap price. However, the higher cost of natural fibers does not mean that the weavers are also paid a very huge amount. The salary of weavers is frozen for a long decade.

Table – 1 : Gender of weavers

| Serial No | Category of weavers | Respondents | Percent |
|---|---|---|---|
| 1 | Female | 55 | 55 |
| 2 | Male | 45 | 45 |
| 3 | Total | 100 | 100 |

Source: Field Survey

The table 1 shows that the numbers of the female weavers are more than the male weavers with 55 percent and male weavers are 45 percent as per the data found .





Table –2 : Position of the weavers

| Serial No | Positions of the weavers | Respondents | Percent |
|---|---|---|---|
| 1 | Migrated | 60 | 60 |
| 2 | Non – migrated | 40 | 40 |
| 3 | Total | 100 | 100 |

Source: Field Survey

Table 2 shows the positions of the weavers with migratory and non-migratory status , who are engaged in handloom industry in Sualkuchi. The weavers in Sualkuchi comprises of hired migratory young women , coming mostly from the nearby districts of Assam like Nalbari, Morigaon , Karbi Anglong ,Kamrup Rural and areas like Rangia , Tihu , Pathsala , Naokata , Goreswar seeking employment in Sualkuchi to earn a living. The Table 2 shows that 60 percent of the weavers are migrated and 40 percent of the weavers are non-migrated .

Table 3- Age of Weavers

| Sl No | Age | Respondents | Percent |
|---|---|---|---|
| 1 | 18-40 | 55 | 55% |
| 2 | 40-60 | 35 | 35 |
| 3 | Above 60 | 10 | 10 |
| 4 | Total | 100 | 100 |

Source: Field Survey

Table 3 shows the age of the weavers. The weavers aged between 18 years to 40 years are more in number with percent 55percent. Weavers aged between 40 years to 60 years were found to be in second category that is 35 percent and aged above the age of 60 years are found to be less in comparison to the first two categories with only 10 percent.

Table -4: Category of weavers

| Serial no | Divisions | Respondents | Percent |
|---|---|---|---|
| 1 | Independent workers | 40 | 40 |
| 2 | Paid workers | 60 | 60 |
| 3 | Total | 100 | 100 |

Source : Field Survey

Table 4 shows the numbers of paid workers were more than the number of independent workers. The paid workers numbered as 60 percent, while the numbers of independent workers or owners were 40 percent.

Table 5 - Classification of Weavers

| Serial no | Divisions | Respondent | Percent |
|---|---|---|---|
| 1 | Married weavers | 60 | 60 |
| 2 | Un-married weavers | 40 | 40 |
| 3 | Total | 100 | 100 |

Source: Field Survey

Table 5 shows that 60 per cent of the weavers were married and 40 per cent of weavers were unmarried .

Table 6 - Education of Weavers

| Serial no | Level of education | Respondents | Percent |
|---|---|---|---|
| 1 | Primary | 45 | 45 |
| 2 | Secondary | 35 | 35 |
| 3 | Graduate | 20 | 20 |
| 4 | Total | 100 | 100 |

Source- Field Survey

Table 6 shows that almost 45percent of the weavers have passes primary level education, 35 percent have passed secondary level education,20 percent were graduate . Most of them are deprived of school education due to the poor economic condition.

Zone wise weavers and allied workers

| | | | |
|---|---|---|---|
| 1 | Chhattisgarh | 7426 | 14077 |
| 2 | Gujarat | 422 | 10179 |
| 3 | Goa | 4 | 22 |
| 4 | Madhya Pradesh | 5267 | 12805 |
| 4 | Maharashtra | 627 | 2882 |
| Total West Zone | 13746 | 39965 | |

Sources: Handloom Census (2019-20), Ministry of Textile , Government of India.





| Sl No | States of India | No. of allied workers | No. of weavers |
|---|---|---|---|
| 1 | Assam | 176453 | 1107428 |
| 2 | Arunachal Pradesh | 17016 | 77600 |
| 3 | Manipur | 12203212481 | 212481 |
| 4 | Meghalaya | 1553 | 41221 |
| 5 | Mizoram | 10242 | 17298 |
| 6 | Jharkhand | 10133 | 12364 |
| 7 | Bihar | 5631 | 7216 |
| 8 | Nagaland | 7534 | 35950 |
| 9 | Odisha | 64364 | 53472 |
| 10 | Sikkim | 65 | 2 |
| 11 | Tripura | 25712 | 111927 |
| 12 | West Bengal | 264791 | 366656 |
| Total East Zone | 595697 | 2044245 | |

Sources: Handloom Census (2019-20) , Ministry of Textile , Government of India.

| | | | |
|---|---|---|---|
| 1 | Delhi | 1049 | 3236 |
| 2 | Haryana | 11128 | 14414 |
| 3 | Himachal Pradesh | 477 | 13211 |
| 4 | Jammu & Kashmir | 7544 | 15784 |
| 5 | Punjab | 338 | 631 |
| 6 | Rajasthan | 1403 | 8687 |
| 7 | Uttarakhand | 4594 | 7967 |
| 8 | Uttar Pradesh | 60179 | 130778 |
| | Total North Zone | 86445 | 194708 |

Sources: Handloom Census(2019-20) Ministry of Textile , Government of India.

| | | | |
|---|---|---|---|
| **1** | **Andhra Pradesh** | **49785** | **127662** |
| **2** | **Karnataka** | **27616** | **27175** |
| **3** | **Kerala** | **6604** | **15480** |
| **4** | **Pondicherry** | **782** | **908** |
| **5** | **Tamil Nadu** | **45757** | **197818** |
| **6** | **Telengana** | **21922** | **25930** |
| **7** | **Total South Zone** | **152466** | **394973** |
| | **Grand Total** | **848621** | **2673891** |

Sources : Handloom Census(2019-20), Ministry of Textiles, Government of India.

Handloom Industry of India : At a glance

Table-1 – Number of Handloom workers by Gender

| Gender | Rural | Urban | Total |
|---|---|---|---|
| **Male** | **7,78,772<br>26%** | **1,96,961<br>42%** | **9,75,733<br>28%** |
| **Female** | **22,74, 516<br>74.5%** | **2,71,769<br>58.0%** | **25,46,285<br>72.3%** |
| **Transgender** | **403<br>0.<br>0%** | **91<br>0.0%** | **494<br>0.0%** |
| **Total** | **30,53,691** | **4,68,821** | **35,22,512** |

Source: Handloom Census 2019-2020

Table -2 – Handloom workers per household

| Type of workers | Rural | Urban | Total |
|---|---|---|---|
| **Weavers** | **0.86** | **0.80** | **0.85** |
| **Allied workers** | **0.25** | **0.38** | **0.27** |
| **Total workers** | **1.11** | **1.18** | **1.12** |

Source: Handloom Census 2019-2020





Table -3 Numbers of handloom workers by level of education

| Education | Rural | Urban | Total |
|---|---|---|---|
| **Never attended School** | **7,10,628<br>23.2%** | **1,09,705<br>23.4%** | **8,20,333<br>23.2%** |
| **Below Primary** | **4,43,880<br>14.5%** | **62,451<br>13.3%** | **5,06,331<br>14.3%** |
| **Primary** | **5,32,488<br>17.4%** | **1,05,031<br>22.4%** | **6,37,519<br>18.0%** |
| **Middle** | **6,56, 154<br>21.4%** | **78,674<br>16.8%** | **7,34,828<br>20.8%** |
| **High School/Secondary** | **3,99,922<br>13.0%** | **60,058<br>12.8%** | **4,59,980<br>13.0%** |
| **Higher Secondary** | **2,05,173<br>6.7%** | **30,590<br>6.5%** | **2,35,763<br>6.7%** |
| **Graduation & Above** | **1,05,446<br>3.4%** | **22,31<br>4.7%** | **1,27,758<br>3.6%** |
| **Total** | **30,53,691** | **4,68,821** | **35, 22, 512** |

Source: Handloom Census 2019-2020

Table-4 – Number of handloom worker households by type of dwelling unit

| Type of dwelling unit | Rural | Urban | Total |
|---|---|---|---|
| **Kuchha** | **17,73,151<br>64.5%** | **1,18,640<br>29.9%** | **18,91,791<br>60.2%** |
| **Semi-pucca** | **4,64,369<br>16.9%** | **1,22,317<br>30.9%** | **5,86,686<br>18.7%** |
| **Pucca** | **5,10,925<br>18.6%** | **1,55,437<br>39.2%** | **6,66,362<br>21.2%** |
| **Total** | **27,48, 445** | **3,96,394** | **31,44,839** |

Table -5-Number of handloom workers households by income

| By income | Rural | Urban | Total |
|---|---|---|---|
| **Less than 5000** | **18,83,747<br>68.5%** | **2,25,778<br>57.0%** | **21,09,525<br>67.1%** |
| **5001-10000** | **6,85,615<br>24.9%** | **1,38,406<br>34.9%** | **8,24,021<br>26.2%** |
| **100001-15000** | **1,24,456<br>4.5%** | **16,053<br>4.0%** | **1,40,509<br>4.5%** |
| **15001-200000** | **25,774<br>0.9%** | **4215<br>1.1%** | **29,989<br>1.0%** |
| **20001-25000** | **14,196<br>0.5%** | **3271<br>0.8%** | **17,467<br>0.6%** |
| **25001-50000** | **11,492<br>0.4%** | **8246<br>2.1%** | **19,738<br>0.6%** |
| **50000-1,00,000** | **2547<br>0.1%** | **316<br>0.1%** | **2863<br>0.1%** |
| **Above 1,00,000** | **618<br>0.0%** | **109<br>0.0%** | **727<br>0.0%** |
| **Total** | **27,48,445** | **3,96,394** | **31,44,839** |

Source: Handloom Census 2019-2020

**Findings of the Study**

- 68.5 Per cent weavers in rural area earn their monthly income less than 5000.
- 0.1 Per cent people in both rural – urban area earn their income between 50000-100000.
- 23.2 per cent in rural area and 23.4 per cent in urban area never attended school .
- 74.5 per cent female weavers belong to rural area while 58.0 per cent female weavers belong to urban area.
- 64.5 per cent live at kuchha house in rural area ,29.9 per cent in urban area .
- There is no investment made in sectoral development , and some locations require electricity , land for manufacturing .



*Women empowerment through handloom industry: challenges, opportunities and way forward*

**Suggestions**

- Weavers should be stimulated to accelerated market change by investors and the need to protect handloom designs.
- The handloom industry requires special measures for textile import and export .Handloom product need to be more visible and have a bigger market network.
- To protect rural jobs and implement new programmes that address the sector's difficulties , the budget must be increased.
- Utilizing organic cotton and yarn , using natural colours , boosting loom productivity via research and innovation are all necessary ways to increase the value of handloom products.
- With no home or assets , some groups of handloom weavers are living on the edge. The government needs to put the minimum Wages Act into action.

**Conclusion**

Role of women is very important in the socio- economic development of the society. There are various schemes to from Governments to promote the silk industry in the country with regard to handloom weavers .Women of study area in particular and of India in general seemed to be out of the direct focus of the scheme and other benefits .Time has now come to give due focus to the sector. Weaving not only offer alternatives ,but also enhances the traditional craft making skill of women with safe access to start small business development opportunities .It further provides way to empowering women against the backdrops of poverty , hunger , gender discrimination . Malnutrition and so on. Thus by providing marketing facilities, aid of Government, Training facilities those women weavers will be able to earn a livelihood, raising socio-economic status in the society.

**References**

1. Bahadur,K.L.1914. The Weaving Master: Letter to the Secondary Secretary. Government Of Assam.Shillong.Assam,1914 .
2. Bhuyan ,S.K. 1985. Studies in the History of Assam. New Delhi: 1985,P-70.
3. Bahadur ,B.V. 1915. The Silk Industry of Assam . Pp39 -41.
4. Mahapatra P.C. 1986. Economics of Cotton Handloom Industry in India.
5. Bhuyan, S.K.1985. Anglo –Assamese Relations.New Delhi: 1985,Pp54-55.
6. Baruah, B.K.1969. A Cultural History of Assam. Guwahati : Pp 112-113.
7. Lleotard. 1916. Memorandum on silk in India, Assam.1916,P1.
8. Baishya, P. 1989. Small and Cottage Industries: A Study in Assam. Manas Publications, Delhi.

9. Baishya, P. 2005. The Silk Industry of Assam: A Case Study of the Sualkuchi Cluster. Spectrum publications, Guwahati-781001,Assam.
10. Choudhury, P.C. 1959. The History of the Civilization of the People of Assam.
11. Darrah, H.Z.1884-1895. Notes on Some Industries of Assam.
12. Barpujari, H.K .1990. The Comprehensive History of Assam.Publication Board , 1990-Assam .
13. Goswami , P. 1999. Assam in the Nineteenth Century: Industrialization & Colonial Penetration,.
14. Goswami ,P. 2005. Indigenous Industries of Assam : Retrospect and Prospect.
15. Kalita ,N.R. 2018. Cloth Industries of Sualkuchi .
16. Sarmah , D. 2016. Status of Women Engaged in the Handloom Industry in Assam.
17. Rangaswamy ,E .,(2011) , Socio- Economic Dimensions of the Textile Workers – A case Study of Dindigul District in the State of Tamilnadu , A thesis submitted to University of Madraj, www.thesis abstracts.com
18. Gera, Ritu ,(2019), An Analytical Study of Industry of Kota Region. Retrieved from https//: Shodhganga.ac.in
19. M.B. Ajithan.(2006) , Impact Of Globalization on the Village Industries in Kerala –A Study with Special reference to Handloom Industry In Ernakulum District. Retrieved from Shodhganga.inflibnet.ac.in
20. Saikia ,,Jatindra Nath ., (2018) Handloom and Textile Sector of Assam : An Analysis , Southern Economist , Pp 41-44





# Sentencing disparities: a study of racial and socioeconomic factors in criminal justice system

***Mr. Waseem Akram[1], Dr. CLV Sivakuma[2]***
*Research Scholar, Vellore Institute of TechnologyAmaravati, Andhra Pradesh [1]*
*Professor of Law, Vellore Institute of Technology, Vellore, Tamil Nadu, India [2]*

**Abstract**

The escalating crime rates in society can be attributed to the prevailing societal framework regulated by the criminal justice system. Society's traditional approach to understanding and relating to others, based on factors such as sex, caste, class, colour, region, and religion, has fostered a culture of differentiation and discrimination. This ingrained mindset, coupled with societal stereotypes and myths, consistently undermines emerging jurisprudence that seeks justice in a rational, fair, and justifiable manner. The norms originating from society are now shaping the administration of justice. However, the societal structure, ingrained since time immemorial, has resulted in the unequal distribution of socio-economic, political, and cultural resources based on individual factors. This systemic inequality has a lasting impact, hindering the delivery of comprehensive justice to individuals of varying status. The societal influence on the criminal justice system manifests in sentencing inconsistencies, disparities, and inappropriate judgments in criminal cases. Indeed, this framework proves incompatible, leading to differential treatment in the administration of justice. The need for reform is evident, as societal norms continue to exert undue influence on a justice system that should be impartial and equitable. Addressing these issues is crucial to fostering a fair and just society where the criminal justice system operates without bias and treats every individual with the same measure of fairness and dignity, irrespective of their social standing. The pursuit of justice demands a recalibration of societal norms and an evolution of the criminal justice system towards a more equitable and just paradigm. Sentencing disparities in the criminal justice system, influenced by racial and socioeconomic factors have raised serious concerns regarding fairness and equity. This research study aims to investigate and analyse the presence of such disparities, delving into their underlying causes and consequences. The study utilizes a comprehensive literature review, statistical analysis of relevant data, and examines potential contributing factors to these disparities. Additionally, it seeks to explore the potential drivers behind these disparities, such as implicit bias, systemic inequalities, and varying legal practices. By shedding light on these issues, the research aims to foster awareness, initiate reform, and promote fair and equitable sentencing practices for all individuals, regardless of their background. Ultimately, this study strives to contribute to a more just and

unbiased criminal justice system and by understanding the underlying causes of these discrepancies, policymakers can work towards a more equitable and just criminal justice system.

**Key words: -** *Criminal Justice System, Punishment, Racial Bias, Socioeconomic Status, Sentencing Disparities*

## Introduction

The commission of crimes has evolved into a complex challenge within progressive societies worldwide. The advent of both conventional and novel forms of criminal behaviour presents significant challenges to the administration of justice. The roots of criminal activities are deeply embedded in societal structures and attitudes, shaping individual's behaviours and propelling them toward criminal acts. The relationship between crimes and societal frameworks proves more influential than theoretical and practical understandings of criminal laws. Societal structures that foster uncertainty and divisions based on sex, caste, class, colour, region, and religion contribute to the alienation of individuals, increasing the likelihood of criminal activities.

Conversely, the pursuit of individual freedoms and the humanization of justice principles can also fuel criminal behaviour. The dilemma lies in situations where society promotes preconceived notions, demystifying differentiation and fostering an inequitable mindset that directly impacts the administration of justice. Alternatively, a focus on the individualization of criminal justice, guided by international principles, sometimes results in the ignorance of theoretical and practical aspects of punishments, leading to unfair sentencing.

Societal divisions have reached a point where discriminatory treatment is enabled, evident in sentencing based on perceived societal notions and relevant socio-economic factors. This discrimination often results in a severe miscarriage of justice, eroding public faith in the criminal justice machinery. Studies have consistently shown that minorities and economically disadvantaged individuals often face harsher sentences than their counterparts. The implications of these disparities extend beyond the individual level, impacting communities and eroding trust in the justice system. The criminal justice system is designed to be fair and impartial, but there is a growing body of evidence that suggests that people of colour and those from low-socioeconomic backgrounds are more likely to be arrested, charged with crimes, and sentenced to harsher punishments than white people and those from high-socioeconomic backgrounds. This phenomenon is known as sentencing disparities. However, over the years, there have been mounting concerns about sentencing disparities that disproportionately affect certain racial and socioeconomic groups. Sentencing disparities can have a significant impact on the lives of individuals and communities. They can lead to mass incarceration, racial segregation, and economic inequality.





A comparative analysis between India and the United States highlights stark differences in societal attitudes and the efficacy of criminal courts in administering justice, particularly in the sentencing framework. The World Justice Project Rule of Law Index 2023 reveals that India ranks 93rd out of 140 countries in the Criminal Justice category, while the United States holds the 29th position. This data underscores that the Indian criminal justice system is significantly influenced by stereotyping mindsets and socio-economic factors, often lacking reasonable, fair, and justifiable considerations. This influence is manifested in issues such as sentencing disparity, sentencing inconsistency, and inappropriate sentencing. Comparatively, the United States demonstrates a more structured approach, guided by sentencing guidelines that mandate judges to follow predetermined criteria. Although the U.S. system is not immune to some external factors, the majority of cases adhere to a robust sentencing framework. This stark contrast underscores the need for reform in India, addressing societal influences and ensuring that the criminal justice system operates with impartiality, equity, and adherence to fair sentencing practices. As societies grapple with these challenges, fostering an understanding of justice that transcends societal prejudices is crucial for creating a system that upholds the principles of fairness and equity

This paper will examine the role of race and socioeconomic status in sentencing disparities. It will use number of judicial decisions to examine sentencing disparities in the India and United States. The paper will also discuss the implications of the findings for the criminal justice system. The primary objective of this study is to analyse sentencing disparities in relation to race and socioeconomic status and explore potential reasons for their existence.

## 1. Literature Review:

Numerous studies have addressed the issue of sentencing disparities, revealing a troubling pattern of unequal treatment. In USA the research conducted by Alexander (2010) has shed light on the mass incarceration of African Americans, illustrating how the War on Drugs disproportionately targeted minority communities, leading to harsher sentencing outcomes for drug-related offenses. Pager (2007) further examined the role of race and criminal records in employment opportunities, revealing that African American men with criminal records faced significant barriers to reintegration, perpetuating the cycle of inequality in sentencing. Harris (2018) delved into the complex interaction between race, socioeconomic status, and sentencing, revealing how Black and Latino defendants often received longer prison sentences than their White counterparts for similar offenses.

Western (2006) focused on the impact of socioeconomic factors, emphasizing how economic inequalities contribute to sentencing disparities. The study highlighted that individuals from disadvantaged backgrounds often receive harsher sentences due to limited access to legal resources and inadequate representation. Reiman (1998) extended this perspective, exploring the concept

of the 'rich get richer, poor get prison' phenomenon, wherein the privileged receive lenient treatment while the underprivileged face punitive measures.

In the context of India, Mohapatra (2014) examined the relationship between caste-based discrimination and sentencing, revealing that individuals from lower castes often experience bias within the criminal justice system, leading to unequal treatment. The study shed light on the entrenched social inequalities that affect sentencing outcomes. Baxi (2008) delved into the challenges faced by marginalized communities, particularly tribal populations, emphasizing how systemic discrimination and lack of legal awareness impact fair trial rights and contribute to sentencing disparities. Menon (2011) focused on economic disparities, revealing how poverty and inadequate access to legal representation affect the outcomes of criminal cases, leading to uneven sentencing.

From the literature review, it is evident that both countries grapple with sentencing disparities influenced by racial and socioeconomic factors. In the USA, racial minorities face discrimination within the criminal justice system, while in India, caste-based and economic disparities are prevalent. Common themes include inadequate legal representation, bias in decision-making, and the perpetuation of social inequalities. However, the challenges faced by each country differ. The USA struggles with addressing the legacy of racial discrimination and systemic biases, while India must confront deeply ingrained caste hierarchies and economic disparities.

## 2. Hypothesis:

There is a significant disparity in the severity of sentencing between racial and ethnic minority groups compared to their white counterparts within the criminal justice systems of the USA and India. Moreover, socioeconomic factors contribute to these sentencing disparities, further exacerbating the unequal treatment experienced by marginalized communities.

## 3. Research Objectives:

1. To quantify and analyse the extent of sentencing disparities in the criminal justice system based on race and socioeconomic factors.
2. To explore the relationship between implicit bias and sentencing decisions, aiming to understand its contribution to racial and socioeconomic disparities.

## 4. Research Questions:

1. How do sentencing disparities vary across different types of crimes, and what role does race and socioeconomic status play in these variations?
2. What are the potential interventions and reforms that could lead to more equitable sentencing practices and reduce sentencing disparities within the





criminal justice system?

## 5. Methodology:

In pursuit of its research objectives and the exploration of pertinent questions, this study employed a doctrinal legal research methodology. The approach adopted was qualitative in nature, entailing an in-depth analysis of library resources and personal experiences, ensuring a comprehensive understanding of facts, findings, and issues. Primary and secondary sources, including international instruments, domestic laws, case laws, books, journal articles, and commentaries by eminent scholars in the field, were extensively reviewed to support the research. The researcher employed content analysis as a key technique to conduct a meticulous examination of both cases and literature and arrived at conclusive remarks through meticulous examination.

## 6. International and Domestic laws prevailing in India and USA

International law and domestic legal perspectives in India and the USA play crucial roles in addressing and rectifying these disparities.

### 6.1. International Law to control sentencing disparities:

The international community recognizes that sentencing disparities rooted in racial and socioeconomic factors can lead to systemic injustice and human rights violations. International human rights instruments, such as the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the Convention on the Elimination of All Forms of Racial Discrimination, provide a comprehensive framework to safeguard against discriminatory practices in the administration of justice.

In the context of sentencing disparities, these international legal instruments emphasize the principles of non-discrimination, equality before the law, and fair trial rights. They also call for measures to eliminate any indirect or structural discrimination in the criminal justice system. Both India and the USA, being signatories to these conventions, are bound to respect and uphold these principles.

### 6.2. Domestic Legal Perspectives in India and USA:

India and the USA have their own legal frameworks to address sentencing disparities and uphold the principles of equality and fairness. In India, the Constitution guarantees fundamental rights to all citizens, including the right to equality and the right to life and personal liberty. The judiciary plays a crucial role in interpreting and safeguarding these rights and has the power of judicial review to strike down laws that are discriminatory.

In the USA, the Constitution's Fourteenth Amendment provides for equal

protection under the law, prohibiting states from denying any person within their jurisdiction the equal protection of the laws.

Both countries have various statutes, guidelines, and policy initiatives that aim to tackle sentencing disparities. However, challenges remain in ensuring that these measures are effectively implemented and that the criminal justice system functions in a manner consistent with international human rights standards. Collaboration and knowledge-sharing between countries can provide valuable insights in addressing these complex issues and promoting a more just and equitable criminal justice system for all.

## 7. Questionable verdicts on Sentencing Disparities by USA and Indian Courts:

### 7.1. US Court's Impactful Decisions

7.1.1.The Scottsboro Boys Case (1931-1937):

In 1931, nine African American teenagers, aged between 13 and 19, were falsely accused of raping two white women on a train in Scottsboro, Alabama. Despite weak and contradictory evidence, all were convicted by all-white juries and sentenced to death. The case drew national and international outrage, exposing racial bias in the justice system (Horne, 1997). After years of trials, some escaped the death penalty but still faced long prison terms. Not until 1937 were the last of the Scottsboro Boys released (Kindig, n.d.). The case spotlighted entrenched racism in the American South and the injustices endured by African Americans in the legal system.

7.1.2.The Central Park Five Case (1989):

In 1989, five teenagers four African American and one Hispanic were wrongfully accused of assaulting and raping a white female jogger in Central Park, New York City. The incident occurred during a time of heightened racial tensions, and the case became highly publicized, often sensationalized by the media (Burns, 2011).

The young men, aged between 14 and 16, were coerced into giving false confessions after prolonged police interrogations without legal representation. The lack of physical evidence tying them to the crime did not prevent their convictions. They were all sentenced to prison.

In 2002, after spending between 6 to 13 years behind bars, the Central Park Five's convictions were vacated when DNA evidence linked the crime to a different perpetrator, and he confessed (Smith, 2002). The case shed light on the dangers of rushed investigations, police misconduct, and the influence of racial bias in the criminal justice system.

7.1.3.The Tulia Drug Bust Case (1999):

In 1999, a drug bust in Tulia, Texas, led to the arrest and conviction of 38 individuals, the majority of whom were African American. The arrests were based on the testimony of a single undercover agent, Tom Coleman, who was





later revealed to be unreliable and dishonest.

There was a lack of physical evidence and corroborating witnesses, and many of the defendants received long prison sentences without a fair trial (Hunt, 2022). The case gained national attention, and civil rights organizations highlighted the racial discrimination inherent in the drug war and the criminal justice system.

In 2003, the Texas Court of Criminal Appeals overturned the convictions and ordered the release of the defendants (Gupta, 2005). The case exposed the vulnerability of minority communities to racial profiling and the urgent need for criminal justice reform.

7.1.4.The Terry v. Ohio Case (1968):

The case addressed stop-and-frisk encounters by law enforcement. John Terry, an African American man, was stopped and frisked by police, based on reasonable suspicion of carrying a concealed weapon, without a warrant or probable cause. The Supreme Court upheld stop-and-frisk as constitutional under the Fourth Amendment if there is reasonable suspicion of criminal activity and the person is armed and dangerous. Critics argue it has been used to justify racial profiling and unequal treatment of minorities. This case sparks debates on civil liberties, racial profiling, individual rights, and public safety, highlighting the need for reforms to address racial bias in policing and the criminal justice system.

7.1.5.Foster v. Chatman (2016):

In 1987, Timothy Tyrone Foster, an African American teenager, was convicted of the murder of an elderly white woman in Georgia. During the trial, the prosecution used peremptory strikes to exclude all potential African American jurors from the jury pool, resulting in an all-white jury. In the years following the trial, defence attorneys discovered documents suggesting that the prosecution had engaged in racially discriminatory practices during jury selection.

In 2016, the United States Supreme Court ruled that the prosecution's use of peremptory strikes based on race violated the defendant's constitutional rights (Liptak, 2016). The case highlighted the persistence of racial bias in jury selection and raised awareness about the need for fair and unbiased practices in the criminal justice system.

### 7.2. Indian Court's Impactful Decisions:

7.2.1.Yakub Memon Case (2015):

Yakub Memon was convicted for his role in the 1993 Bombay bombings, causing over 250 deaths. His defence argued that socioeconomic background and his brother Tiger Memon's alleged masterminding influenced the death sentence (Mint, 2015). They said Yakub was coerced into participating and his cooperation should have been considered as a mitigating factor. They emphasized his limited culpability and poor access to legal representation,

impacting the trial's outcome. Despite appeals, Yakub Memon was executed on July 30, 2015 (Racolb Legal, 2016). The case remains debated, illustrating challenges in fair trials and proportionate sentencing for the economically disadvantaged.

7.2.2.State v. Afzal Guru (2013)

Afzal Guru, a Kashmiri man, was convicted of aiding terrorists in the 2001 attack on the Indian Parliament. His trial faced criticism for procedural irregularities and inadequate legal representation. Public and political attention on the case raised concerns about potential biases influencing the sentencing decision, given the communal and regional context. Despite the debates, Guru was sentenced to death and executed in February 2013 (Roy, 2013). The handling of his case ignited discussions about fair trials, protection of accused rights, and the impact of public sentiment on sentencing outcomes.

7.2.3.Machhi Singh v. State of Punjab (1983):

This case is a pivotal Supreme Court decision that dealt with the constitutionality of the death penalty in India. The Court introduced the 'rarest of rare' doctrine, which held that the death penalty should only be imposed in the rarest of rare cases where the crime is exceptionally heinous and the alternative punishment of life imprisonment is inadequate.

While the case did not directly address racial or socioeconomic factors, the application of the 'rarest of rare' doctrine has been a subject of debate. Critics argue that this doctrine has been inconsistently applied, leading to potential disparities in sentencing. Concerns have been raised about how factors like the socioeconomic background of the accused, quality of legal representation, and social privilege might impact the classification of a crime as 'rarest of rare.'

7.2.4.Ram Jethmalani v. Union of India (2011):

Ram Jethmalani challenged the constitutionality of certain provisions in the NDPS Act, which mandated minimum sentences for drug offenses. He argued that these provisions disproportionately affected economically disadvantaged and marginalized individuals, leading to sentencing disparities. The Supreme Court upheld the Act but clarified that judges could use discretion in sentencing, considering factors like socioeconomic background and offense nature. This highlighted the importance of accounting for social and economic factors in drug-related offenses and the need for fairer sentencing practices.

7.2.5.Mohammad Ajmal Amir Kasab v. State of Maharashtra (2012)

The case involved the trial of Ajmal Kasab, the lone surviving gunman in the 2008 Mumbai attacks. The case garnered significant media and public interest, raising concerns about the fairness of the legal process and potential political influence on the sentencing decision. Kasab, a Pakistani national, was found guilty of multiple offenses, including murder and waging war against India, leading to a death sentence. Despite appeals for clemency, he was executed in November 2012 (Hangal, 2017). The case highlighted the challenges of ensuring fair trials and proportionate sentencing amid intense public scrutiny and the





importance of safeguarding against racial bias and political influence.

7.2.6.Manoharan v. State (2019):

In this case, the Supreme Court reviewed the sentencing guidelines and principles, emphasizing the need for proportionality in sentencing. The Court stressed the significance of taking into account the socioeconomic conditions and antecedents of the offender to avoid undue harshness in sentencing.

## 8. Data and Analysis

The research study on sentencing disparities based on racial and socioeconomic factors in the criminal justice system has yielded significant and thought-provoking findings. Through a comprehensive literature review and in-depth analysis of specific cases in both the United States and India, the study has shed light on the presence and complexities of sentencing disparities.

In the United States, the research has corroborated previous studies that demonstrated a disproportionately higher representation of racial minorities, particularly African Americans and Latinos, within the criminal justice system. The cases of The Scottsboro Boys, Central Park Five, and Tulia Drug Bust have exemplified the grave implications of racial bias on sentencing, showcasing the urgent need for reform.Although Black individuals comprise only 13.4 per cent of the United States' human population, they constitute 51 per cent of those arrested for murder and nonnegligent manslaughter as compare to white whose arrest is only 46 per cent in 2020 (see figure 1) Also, the Black individuals are four times more likely to be incarcerated than White individuals when evaluated for the same crimes (Estimated Number of Arrests, 2020). Black men receive federal prison sentences on average 19.1 per cent longer than White men for similar convictions (Demographic Differences in Sentencing, 2017). Studies reveal a disquieting disparity within the corridors of justice, for African-American prisoners convicted of murder stand enigmatically distinct. A staggering revelation emerges, indicating that they are approximately 50 per cent more likely to be innocent than their counterparts incarcerated for similar crimes (Race and Wrongful Convictions, 2017). The findings suggest that this overrepresentation contributes to harsher sentencing outcomes for these groups. Racial bias and systemic inequalities in policing, arrest rates, charging decisions, and jury composition have been identified as influential factors in the disparate sentencing of racial minorities.

Figure 1: Arrest in USA in 2020

Source: https://www.ojjdp.gov/ojstatbb/crime/ucr.asp?table_in=2

Similarly, the research in the context of India has highlighted caste-based and economic disparities as critical elements in sentencing discrepancies within the criminal justice system (Vishnu Prasad, 2018). The analysis of cases such as Yakub Memon, Afzal Guru, and Machhi Singh has underscored how socioeconomic backgrounds and legal representation can significantly impact sentencing outcomes. The findings suggest that individuals from economically disadvantaged backgrounds face increased vulnerability and inequality in the legal process, leading to disproportionate and unjust sentences.

The research has further revealed that sentencing disparities are not merely isolated incidents but rather deeply entrenched issues with profound social implications. The systemic nature of these disparities necessitates a multi-faceted approach towards addressing them. Raising awareness and understanding among criminal justice practitioners about the presence and consequences of implicit biases is crucial to promoting fair and equitable sentencing practices (Malhotra, 2021). Judicial decision-making can be influenced by a myriad of factors, including public sentiment, political considerations, and the pressure of high-profile cases. Safeguards must be put in place to prevent such external influences from tainting the sentencing process.

Moreover, the research findings have pointed towards the significance of data transparency and collection in understanding the extent and scope of sentencing disparities. Regular and comprehensive data reporting can aid policymakers in identifying trends and patterns, thus informing evidence-based reforms to rectify existing inequalities.

## 9. Discussion:

The research findings indicate that sentencing disparities based on race and socioeconomic status are prevalent in both the United States and India. These disparities have severe consequences, including mass incarceration, racial segregation, and erosion of public trust in the criminal justice system (Kovera, 2019). The overrepresentation of minorities and economically disadvantaged individuals in the criminal justice system reflects systemic issues that require urgent attention.





Racial bias and implicit biases within the criminal justice system contribute significantly to sentencing disparities. Stereotypes and prejudices influence decision-making at various stages, from police arrests to judicial sentencing (Beck & Blumenstein, 2018). The lack of adequate legal representation for economically disadvantaged individuals further exacerbates the disparities, as quality representation plays a crucial role in ensuring fair trials and equitable outcomes (Ferguson, 2017).

Mandatory minimum sentences and the "rarest of rare" doctrine are justified as a means to deter serious crimes and ensure uniformity in sentencing. Proponents argue that they enhance public safety and prevent judicial leniency. However, research suggests that these measures contribute to sentencing disparities. Mandatory minimums remove judicial discretion, leading to harsh penalties even for less severe cases (Nir & Liu, 2022). The subjective nature of the "rarest of rare" doctrine may result in inconsistent decisions, disproportionately affecting certain groups (Kale, 2017). Thus, while proponents emphasize deterrence, critics point out the inadvertent perpetuation of disparities, necessitating a re-evaluation of these sentencing practices. The discussion also revealed that sentencing disparities are not isolated incidents but are deeply embedded within the larger societal context. Historical biases, social attitudes, and political considerations can influence sentencing outcomes, making it essential to address the issue through comprehensive reforms.

While the research has provided valuable insights, it is important to acknowledge its limitations. Due to the complexity of the issue, further research is warranted to delve deeper into the interplay of various factors influencing sentencing disparities. Moreover, legal developments and policy changes may have occurred since the time of this study, requiring continuous monitoring and evaluation. The need of hour is that future research in this area focuses on exploring the effectiveness of specific interventions to reduce sentencing disparities, such as diversion programs, community-based sentencing alternatives, and bias-reducing strategies in legal decision-making. Additionally, comparative studies between countries with different legal systems and cultural contexts could provide valuable cross-cultural insights into addressing this pervasive issue.

Ultimately, addressing sentencing disparities is a collective responsibility that involves collaboration between policymakers, criminal justice practitioners, scholars, and the community at large. By taking evidence-based and proactive measures, societies can work towards creating a fairer and more equitable criminal justice system that upholds the principles of justice and equality for all.

## 10. Conclusion and Recommendation

The research study has demonstrated the existence of sentencing disparities based on racial and socioeconomic factors in the criminal justice systems of both the United States and India. These disparities pose significant challenges to the principles of fairness, equity, and equal treatment under the law.

Racial bias and implicit biases within the criminal justice system, coupled with the lack of access to quality legal representation for economically disadvantaged individuals, contribute to unequal treatment and harsher sentences for certain groups. Punitive measures and sentencing guidelines can exacerbate disparities because they often fail to consider the underlying socio-economic and racial inequalities that influence criminal behaviour. These guidelines may not adequately address the root causes of crime, resulting in harsher punishments for marginalized communities. Additionally, mandatory minimum sentences can limit judicial discretion and lead to unfair outcomes, disregarding individual circumstances. The focus on punitive approaches rather than restorative justice may perpetuate a cycle of criminality instead of addressing rehabilitation and societal reintegration. As a result, certain groups may face disproportionately severe sentences, reinforcing unjust imbalances within the criminal justice system. To address sentencing disparities, policymakers and criminal justice authorities must take immediate action. Evidence-based reforms that focus on training law enforcement officers and legal professionals to recognize and mitigate implicit biases are essential. Expanding access to quality legal representation for all individuals, regardless of their socioeconomic background, is crucial to ensuring fair trials and equitable sentencing.

In light of the research findings, several recommendations can be made to address sentencing disparities based on racial and socioeconomic factors:

a) Implement Implicit Bias Training: Criminal justice professionals, including judges, prosecutors, and law enforcement officers, should undergo regular training on recognizing and mitigating implicit biases. This will help reduce the influence of stereotypes and prejudices on decision-making.

b) Enhance Access to Legal Representation: Measures should be taken to ensure that all individuals, regardless of their socioeconomic status, have access to competent legal representation. This can be achieved through the provision of public defenders, legal aid programs, and other resources.

c) Reevaluate Mandatory Minimum Sentences: The effectiveness of mandatory minimum sentences in reducing crime and promoting justice is debated. They may deter crime but limit judicial discretion, leading to sentencing disparities. Re-evaluation doesn't mean abolishing them but finding a balance considering individual circumstances. More judicial discretion can lead to fairer outcomes, tailoring sentences to each case and minimizing unjust punishments.

d) Promote Data Transparency and Collection: Comprehensive data collection and transparency are essential in understanding and addressing sentencing disparities. Regular reporting of sentencing outcomes, disaggregated by race and socioeconomic status, can help identify trends and disparities that require attention.





e) Foster Community Engagement: Engaging with communities affected by sentencing disparities can provide valuable insights and feedback on criminal justice reforms. Community involvement is crucial in building trust and fostering cooperation between law enforcement and the public.

f) Encourage Restorative Justice Practices:Restorative justice practices programs aim to repair harm, foster accountability, and facilitate the offender's reintegration into society. By focusing on rehabilitation and providing support instead of solely punitive measures, restorative justice offers an opportunity for positive transformation and reduced recidivism rates. However, it is essential to acknowledge that certain punitive measures, like the criminal law amendments of 2013 and 2018 addressing crimes against women, can also play a role in deterring and combating specific offenses. A comprehensive approach that combines both restorative and punitive elements may yield the most effective and equitable outcomes in the criminal justice system.

g) Regular Evaluation of Sentencing Guidelines: Sentencing guidelines should be periodically evaluated and updated to ensure they align with principles of fairness, proportionality, and equal treatment. Consideration of social and economic factors in sentencing can contribute to more equitable outcomes.

By adopting these recommendations, policymakers can take significant strides towards creating a more equitable and just criminal justice system. Addressing sentencing disparities based on race and socioeconomic factors is essential for promoting individual justice and building public trust and confidence in the legal system. Ultimately, a fair and equitable criminal justice system is fundamental to upholding the principles of democracy and human rights in society.

**References:**

1. Alexander, M. (2010). The New Jim Crow: Mass Incarceration in the Age of Colour-blindness'. The New Press.
2. Admin, (2016) Analysis of Yakub Memon Case: Justice or Injustice. Racolb Legal, Retrieved July 26, 2023, from http://racolblegal.com/analysis-of-yakub-memon-case-justice-or-injustice/
3. Baxi, P. (2008). Justice, Judiciary, and Democracy: A Perspective from India. Oxford University Press.
4. Burns, S. (2011). The Central Park Five: A Chronicle of a City Wilding, Retrieved July 27, 2023, from http://www.worldcat.org/oclc/753625952
5. Beck, A. J., & Blumenstein, A. (2018). Racial disproportionality in U.S. state prisons: Accounting for the effects of racial and ethnic difference in criminal involvement, arrests, sentencing, and time served. Journal of Quantitative Criminology, 34, 853–883.

6. Demographic Differences in Sentencing: An Update to the 2012 Booker Report, (2017). U.S. Sentencing Commission, Retrieved July 26, 2023, from https://www.ussc.gov/research/research-reports/demographic-differences-sentencing
7. Estimated number of arrests by offense and race, (2020). U.S. Department of Justice, Retrieved July 26, 2023, from https://www.ojjdp.gov/ojstatbb/crime/ucr.asp?table_in=2
8. Ferguson, E.M. (2017). Race, Socioeconomics, Intelligence, and Criminal Offending: Accounting for Variation in Criminal Justice Outcomes. https://digitalrepository.unm.edu/soc_etds/75
9. Foster v. Chatman, 578 U.S. ___ (2016).
10. Gupta, V. (2005). Critical Race Lawyering in Tulia, Texas, Fordham Law Review 73
11. Harris, A. (2016). A Pound of Flesh: Monetary Sanctions as Punishment for the Poor. Russell Sage Foundation.
12. Hangal, L. (2017) Judicial Analysis on the case of Mohd. Ajmal Amir Kasab vs. State of Maharashtra AIR 2012 SC 3565, Lawyers Club India, Retrieved July 27, 2023, from https://www.lawyersclubindia.com/articles/Judicial-Analysis-on-the-case-of-Mohd-Ajmal-Amir-Kasab-vs-State-of-Maharashtra-AIR-2012-SC-3565-8013.asp
13. Horne, G. (1997). Powell v. Alabama: the Scottsboro boys and American justice. New York, Franklin Watts.
14. Hunt, A. (2022). The Tulia Drug Bust of 1999. Handbook of Texas.
15. Kindig, J. (n.d.). Scottsboro Boys Trial. Social Welfare History Project. Retrieved from https://socialwelfare.library.vcu.edu/eras/great-depression/scottsboro-boys-trial-defense-campaign-1931-1937/
16. Kale, K. R. (2017). Doctrine of "rarest of rare" and Indian Legal System, South Asian Law Review Journal, 3(1), 55-62.
17. Kovera, M.B. (2019). Racial Disparities in the Criminal Justice System: Prevalence, Causes, and a Search for Solutions, Journal of Social Issues, 75(4), 1139-1164.
18. Liptak, A. (2016). Supreme Court Finds Racial Bias in Jury Selection for Death Penalty Case, The New York Times, Retrieved July 29, 2023, from https://www.nytimes.com/2016/05/24/us/supreme-court-black-jurors-death-penalty-georgia.html
19. Manoharan v. State by Inspector of Police, (2019) 7 SCC 716
20. Mint (2015). Yakub Memon case: Death penalty in India, by the numbers, Retrieve July 26, 2023, from https://www.livemint.com/Politics/rqxfPevAj267VbqEHk66lO/Yakub-Memon-case-Death-penalty-in-India-by-the-numbers.html
21. Mohapatra, S. N. (2014). Criminal Justice Administration in India: An Analysis of Sentencing Trends. Vikas Publishing House.
22. Menon, N. (2011). The Practice of Crime: Gender, Difference, and Deviance in Urban India. Oxford University Press.
23. Mock, B. (2017). How Police Are Using Stop-and-Frisk Four Years After A Seminal Court Ruling. CityLab, Retrieved July 28, 2023, from https://www.citylab.com/equity/2017/08/stop-and-frisk-four-years-after-ruled-unconstitutional/537264/.
24. Machhi Singh and Others v. State of Punjab, 1983 AIR 957 1983
25. Malhotra, H. (2021). Sentencing Policy in Indian Criminal Justice System: An Analysis with Reference to Compoundable Offences https://ssrn.com/abstract=3873358 or http://dx.doi.org/10.2139/ssrn.3873358
26. Mohammed Ajmal Mohammad Amir Kasab @ Abu Mujahid v. State of Maharashtra, [2012] 8 S.C.R. 295
27. Nir, E., & Liu, S. (2022). The Challenge of Imposing Just Sentences Under Mandatory Minimum Statutes: A Qualitative Study of Judicial Perceptions. Criminal Justice Policy Review, 33(2), 177–205.
28. Pager, D. (2007). Marked: Race, Crime, and Finding Work in an Era of Mass Incarceration. University of Chicago Press.
29. Powell v. Alabama, 1932, 287 U.S. 45.
30. Roy, A. (2013). The hanging of Afzal Guru is a stain on India's democracy. The Guardian, Retrieved July 26, 2023, from https://www.theguardian.com/commentisfree/2013/feb/10/hanging-afzal-guru-india-democracy
31. Reiman, J. (1998). The Rich Get Richer and the Poor Get Prison: Ideology, Class, and Criminal Justice (8th ed.). Pearson.
32. Ram Jethmalani v. Union of India (UOI); (2011) 9 SCC 751
33. Rayman, G. (2018). Central Park Five Prosecutor Breaks Silence, Says It Was a Mistake to Vacate Convictions and Pay Off Accused Teens, Daily News, Retrieved July 27, 2023, from https://www.nydailynews.com/new-york/ny-news-tim-clements-central-park-five-20180713-story.html
34. Smith, C. (2002). Central Park Revisited, New York Magazine, Retrieved July 27, 2023, from https://nymag.com/nymetro/news/crimelaw/features/n_7836/index.html
35. State (N.C.T. Of Delhi) vs Navjot Sandhu@ Afsan Guru and Anothers (2003) 71 DRJ 178 (DB)
36. The Terry v. Ohio, 392 U.S. 1. (1968).

37. Vishnu Prasad, R. (2018) Issues Concerning Sentencing Policy in India, Journal on Contemporary Issues of Law 4(12), 33-45
38. Western, B. (2006). Punishment and inequality in America. New York, NY: Russell Sage Foundation.
39. Yakub Abdul Razak Memon v. State of Maharashtra and Anr., CDJ 2013 SC 230





# Oppression, exploitation and feminisation in alice walker's works

***Enamala Kalavathi[1], Dr. E.S. Sharmila Sigamany[2]***
*Ph.D. Research scholar Department of English Koneru Lakshmaiah Education Foundation Vaddeswaram, [1]*
*Associate Professor, Department of English Koneru Lakshmaiah Education Foundation Vaddeswaram, [2]*

**Abstract**

Alice Walker, a feminist, addresses the oppression of black women and men in this paper. Her goal is to help black women develop a new sense of self that will enable them to become independent on the social, emotional, and spiritual levels. The Civil Rights Movement, general violence, history and ancestry, and racial persecution make up the bulk of her writing. Womanism is a subset of black feminism that emphasizes and favors women's culture, flexibility, and strength. Alice Walker is credited with coining the phrase. According to Alice Walker, "womanism" does not have a narrowly defined definition; rather, it is dedicated to the survival and wholeness of all individuals, both male and female. In a galaxy of black American women writers, Alice Walker is by far the most prominent star.

**Key words: -** *Womanism, Civil Rights Movement, Black Feminism.*

## Literature Review

Black women keep themselves on the route of literature, according to Shalini (2014). They are not something bad. Women desire equal rights in their social, political, and economic lives; they don't want to have their dignity violated. Some authors are Zora Neal Huston, Toni Morrison, Harriet Jacobs, Deborah Gray-White, Maya Angelou, and Harriet Jacobs. These black women writers work to uphold their femininity, self-esteem, self-realization, and sexual consciousness while still preserving their dignity. In addition to giving black women a voice, Alice Walker's significance as a black writer also provides a voice for their independence.

The genuine worth of Walker's writings, which typically aim to offer the feminine their voice in order to stand together against all forms of offense, violence, cruelty, and inhumanity, is acknowledged and praised by another black writer, Koynucu (2014). This study, which focuses on Walker's protagonists in her chosen novels, reveals the extent of the suffering experienced by American black women. Celie, the protagonist of The Color Purple, is a poor, ugly black lady who was not a skilled soldier as a young girl. She destroyed battle for

survival in the idea of feminist criticism when she grew up in the light of her hearth.This study focuses on a few novels that deal with gender issues, such as The Color Purple (1982), Meridian (1976), and The Third Life of Grange Copeland (1970), in light of their well-known themes of sexism, racism, mistreatment of women, and male supremacy.

Padhi explains the protagonist of The Color Purple, Celie, is a black American woman who experiences racism from white people as well as persecution from her patriarchal family. It implies that women are merely more submissive and followers of men. Walker emphasized that although being a woman is challenging, being a black woman is particularly challenging. Men are expected to be superior and dominant, or arrogant as the study refers to it, but women are expected to do and obey all they are told by men. Celie is a very sad daughter in this book because, although being only fourteen years old, her stepfather abused her twice. She must adjust to it since she is unable to handle it (Padhi, 2015).

The Third Life of Grange Copeland, the American novelist Alice Walker's 1970 debut book, is a fine representation of an impoverished black sharecropping family in South America, according to Brown (2004). That book addressed a number of Walker's career-related topics, including the Civil Rights Movement, the maltreatment of black women by their fathers and spouses, and the need for women to be morally and financially independent.

Despite the fact that Walker herself has refuted this claim, some opponents have contended that the way Walker has employed the term "feminism" implies that black feminist women have more authority than white feminist women. Womanism, in her opinion, is an adjunct to the feminist movement. Additionally, the Womanist movement helps black women in ways that enable them to talk openly about gender issues without upsetting black men. Some issues, like as gender inequity and mistreatment of women, are totally addressed by womanism rather than feminism with regard to the survival of the black society.

Walker emphasizes the universality of human knowledge across Meridian and suggests that no one has monopolized the market on pain. While some people may come from various backgrounds, they might also share a history of oppression, guilt, suffering, violence, and eventually freedom, triumph, and acceptance as well as arrogance and haughtiness (Amrutha, 2017).

## Alice Walker's Works – Focus on Feminism

Alice Walker is one of the Afro American Woman Writer and a novelist in English. Her work focuses on the Civil Rights Movement, general violence, history and ancestry, and racial injustice. The term "Womanism" was first used by Alice Walker to describe a subset of black feminism that favors and affricates women's culture, flexibility, and strength. According to Alice Walker, "womanism" is not sexism; rather, it is a commitment to the survival and wholeness of all humans, both male and female.



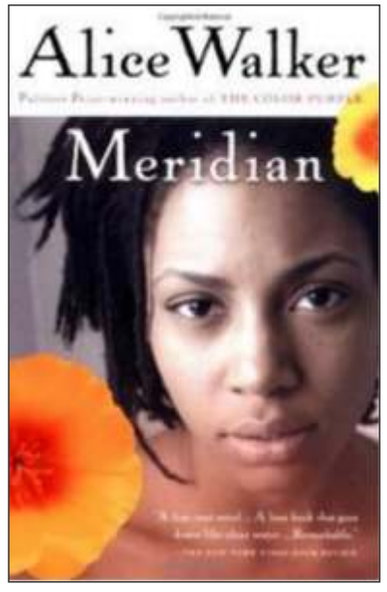


The most prominent Afro-American and black feminist is Alice Walker. Black 'womanism' consciousness in Alice Walker is characterized by sexual, racial, cultural, national, economic, and political factors. In her writing, Alice Walker addresses sexism, racism, and injustice in America. The classification of women by Alice Walker into three categories—"suspended," "part of the mainstream," and "awaken by political force"—is significant. Some Black and Indian women are content with their situation and the miscommunication between them and Others mistrust their situation but are powerless to rebel, so they surrender themselves ('part of mainstream'); their men ('suspended'). The third stage is the rebellious stage. This emergence of the awakened black women may be attributed to long periods of economic independence, the presence of three women homes, and a preference for a daughter in the family.

**Alice Walker's on Black Women:** According to Alice Walker, "Black Women now give diverse, real-life examples of how to live. We have created a new location for our new home, (as stated in Washington 1979:146).

However, Afro-American women, like Indian women, look to their children for emotional support and companionship in order to be able to communicate, laugh, and feel without worrying about their husbands' disapproval, which they frequently experience. They gain power through motherhood, even if it is lopsided power, which they lack in their married relationship.

## MERIDIAN



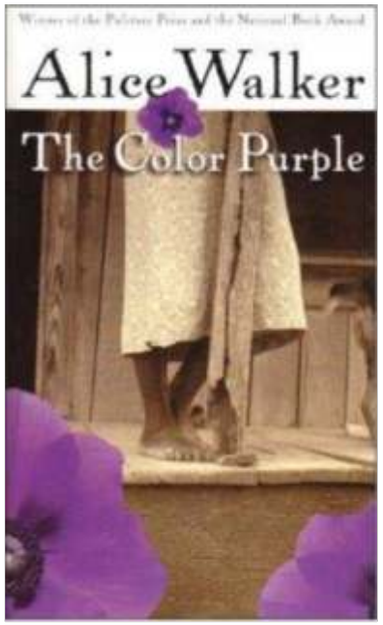

The main theme of Meridian is the creature sparks of the 'suspended' black women's survival culture. The character of Meridian provides a suitable vehicle for the theme. Meridian is a looney, insane woman who has experienced both physical and mental trauma. Meridian is given the chance to gain her own freedom through the Civil Rights Movement,initially she totally engages in a movement. However, as the Movement evolves into a violent revolution, she begins to doubt the legitimacy of using violent measures to further revolutionary goals. She believes that suffering is necessary for human development because it gives her a sense of perspective and proportion. Meridian becomes philosophical as a result of the oppression that extinguishes all of Margaret and Memm creative sparks and causes her to absorb the wisdom of her people.

**The Myth of Black Mother Hood:**

Alice Walker rejects the stereotype that Black motherhood is one of fortitude, self-sacrifice, and sacrifice. The sharecropping system gave birth to the abused moms Margaret and Mem. Although not stereotyped, their conception of parenting is constrictive. Mem's attempt to be a good and protective mother to Ruth falls short, and George Copeland ultimately fills the role. As stated by Alice Walker in "In search of our Mother's Gardens" (p. 66), Meridian's conception of motherhood is not constrained: "she is torn between her own personal desire to become a mother and the fact that motherhood seems to cut her off from the possibilities of life and love."

Her quest to become a mother—not in the biological meaning of the word, but in the philosophical sense—is prompted by this conflict in her desires, and she resorts to nonviolent resistance in order to protect children. Again, the handing over of her function to Truman and the resignation of her cell and sleeping bag are symbolic of the mother earth role she had previously fulfilled. Truman shabbily slips inside Meridian's bag and feels the dread of his new job as mother earth. She therefore transfers to them the fight to preserve life.

**Alice Walker's Narrative Technique:**




In order to have varied effects on the mind, she adopts a college's storytelling method to underline the contemplative aspect of her book. She refers to it as a "crazy quiet story" since it shifts back and forth in time and functions on numerous levels, including that of a myth (Barbara Christian Black womanNovelist, 220). This technique aids in the development of metaphor and symbolism as essential components of Meridian. Alice Walker prefers the term "womanist" to describe herself. According to her, a womanist is a woman who "views tears as a counterbalance to laughing, values women's emotional elasticity, and women's power in wanting to know more and in more depth than is considered 'appropriate' for one.





**The Color Purple:**

For creating a very strong black liberated woman character in Celie, who succeeds in the process of survival both at the level of self and community meaningfully in the context of the racist, sexist, and classist society of America, Alice Walker won the Pulitzer Prize and the American Book Award in 1983. The story follows the life of Celie, a black girl who overcomes hardships including poverty, illiteracy, and physical and emotional abuse by becoming self-aware and making an effort to mount the soft and sensitive reaches of womanly consciousness. In the form of letters, first to God and then to her sister Nettie, Walker relates Celie's story. Celie prays to God for strength to endure the spiritual battle.

**A womanist:**

Alice Walker identifies herself a "womanist." She came up with the phrase to describe the broad framework of Black Feminism. "A woman who appreciates and prefers women's culture and woman's strength" is what she means by a "womanist" (Culture, The Literature of the United States, 394). She continues by using the title of her Pulitzer Prize-winning book The Color Purple to illustrate the relationship between "womanist" and "feminist": "Womanist is to feminist as purple to lavender" (395), emphasizing the aesthetic aspect of Black feminism. Alice Walker is a womanist; hence she is more intrigued by heroines than heroes. Despite the fact that men are present in her book, they are merely incidental.This aided her in successfully recasting how blackness is portrayed in America. Alice Walker addresses black existence and expression in The Color

Purple (1982), with a focus on female oppression in a largely patriarchal society. She focuses on the formation of Celie's identity and sense of community because Celie is the main character of The Color Purple and is portrayed as a victim of both racial and sexual persecution. She is abused in a loveless marriage and sexually assaulted by the guy she believes to be her father. Gray notes that despite this, she gradually learns how to develop into a lady and find friendship. (697)

The Color Purple is a collection of letters that tells the tale of Celie's struggle for survival and personal development.

**Letters to God:** They are addressed to God. Celie writes to God after being cautioned by her stepfather, Alphonso, not to tell anyone about what he did to her. "You had better never tell anyone besides God. Her father tells her that it would "kill your mammy" (Walker 1). Celie's first letter to God describes how her step-father Alphonso exploits her sexual cravings when his advances go unanswered by her ailing mother. Alphonso stands for the patriarchal black society that sexually oppresses women. Women are supposed to submit mutely to men's advances in the bedroom, and they are not allowed to protest them. While her father is molesting Celie, she feels pain.Her father begins choking her

when she sobs and tells her to "get used to it" (2).

She is not aware that she is being coerced into parenthood. Since Alphonso took her infants, she is a mother who wants to have kids. After giving birth to two children, he would like Celie to look respectable. He looks to Celie for a replacement for his ill wife, although he has actually done so. Along with being subjected to sexual abuse, Celie also endured frequent beatings from her father. He beats Celie for no apparent reason; on one occasion, he does so because she winked at a boy in church, and on another, he does it because she was "dressing trampy".The justifications for the beatings in both situations are not tenable. The position of black women is represented by Celie in the book. While black men may be the victims of racism, sexism gives them the opportunity to mistreat and exploit [black] women (Ranveer, Black Feminists Consciousness 17).

**Oppression of Patriarchal and Sexist Society:**

Even after she marries a man named Albert, Celie's misery in the patriarchal and sexist society persists. Her head is injured after she is hit with a stone on the day of her wedding by her husband's son. By taking care of her husband's children, she is overworked in her husband's home. She is, however, sexually oppressed

rather than having her efforts recognized or having anyone care about her personally. "He never asks me nothing about myself. He clam on top of me and fuck, even my head bandaged" (Walker 117) Celie Writes.In her husband's home, she experiences the same terrible cycle of recurrent beatings and sexual harassment. "He beat me like he beat the children, cept he don't never hardly beat them. He say, Celie, git the belt. The Children be outside the room pecking through the cracks. It all I can do not to cry" (23).When Harpo questions his father Albert about the reason he beat Celie, he responds in the letter, "Cause she, my wife. Plus, she Stubborn" (23)She is reminded of her father's attitude toward women by this, and the reader is reminded of the white slave owner's attitude toward his slaves prior to the abolition of slavery. Celie should be respectful and submissive rather than "stubborn," according to Albert. He hits Celie for her character trait of being stubborn and even tells his older son Harpo to emulate him by later disobeying his wife's case. He tells Harpo, "Wives is like children. You have to let in know who got the upper hand. Nothing can do that better than a good sound beating." (37)Albert is saying that only men can have the upper hand over women and that the only way to do that is to physically assault them. Celie, who belongs to the same class of women who are victimized by men, surprisingly offers Harpo the same advice that Albert provides. Given how the patriarchal society has shaped Celie's thinking, her advice to Harpo to beat Sofia is hardly surprising. She is aware that submission is the proper response to such behavior.





**A Stereotype:**

The fact that Celie is compared in Sofia's thinking to her own mother further supports the idea that she represents the stereotypical black woman in patriarchal society. Celie makes Sofia think of her mother because of who she is and how she acts:

To tell the truth, you remind me of my mamma. She under my daddy thumb. Naw , she under my daddy foot. Anything he says, goes. She never says nothing back. She never stands up for herself. Try to make a little half stand sometimes for the children but that always backfire. More she stands up for us, the harder time he gives her. (43)

**Feminist Movement in U.S:**

The modern feminist movement in the United States was founded by white middle-class women who wanted to end sexism and achieve parity, or equality of opportunity, with white middle- or upper-class men. For a variety of factors, black women did not perceive this "as addressing their concerns" and felt cut off from "the main stream of the white feminist movement" (Powell, Indian Journal of American Studies, 1990, 2). They are worried about sexism as much as they are about ethnic and racial prejudice because being "black and female" puts one in "double jeopardy" (Beal, 90).Both black and white males and white men and women abuse them sexually and ethnically. As a result, they have forgotten who they truly are and have fallen into society's periphery in America. The task of fostering resistance to all forms of injustice fell to the black women writers. With the help of a dominant urge for self-aggrandizement they inherited from the 1960s cultural ethos, they quickly succeeded in making their identity a source of power. By returning the pride and self-assurance of black women to them, they changed the psychological climate.

**A Pioneer Celebrating Woman hood:**

One of the early writers who praised womanhood in her works was Alice Walker. She identifies as a "womanist" and believes that feminism does not adequately represent the problems of women. According to 1983: xi, it values and favors "women's culture, women's emotional flexibility, and women's strength." In Walker's make-believe universe, women no longer submit to men but instead fight against their patriarchal society and its institutions to establish their own unique identities. In her works, Walker deconstructs or subverts the traditional literary mythologies that focus on heroes and develops new representations of women. She is a womanist who cares about releasing all women from the mentality of oppression.According to Walker's 1973 interviews with black writers, she is more "committed to exploring the oppression, the insanities, the loyalties, and the triumphs of black woman" (Walker 1973: 192). Walker demonstrates unequivocally that they are victims of both racism and sexism in American society while also attempting to reshape them into emerging

black women. This essay aims to investigate how Meridian, one of her most well-known books, illustrates how strongly she adhered to the black womanist principles. It portrays the tale of a black woman going through a time of transition, the narrative of awakening, subsequent self-development, and search for authenticity.

**Conclusion**

To sum up what has been said, the researcher can say that Alice Walker, a contemporary black feminist author, has depicted the impact of various forms of oppression and prejudice against black women throughout American male-dominant society in her novels The Color Purple, Meridian, and The Third Life of Grange Copeland. Walker is successful in revealing the ills and suffering of colored women through her heroes Celie, Sofia, Meridian, and Margret. Walker's black characters make an effort to overlook sexual assault, racial views, patriarchal behaviors, and gender inequality. Walker is also the first radical feminist author to address taboo subjects like incest because she wants to shed light on the reality of black women's lives.

Walker, a black feminist writer, addressed the plight of black women in this study in her own unique manner while adhering to black feminist principles in an effort to denounce injustice. Walker also presented black culture as a new genre in American patriarchal society, particularly in the rural south of America. Walker's chosen works also provided alternatives and opportunities to some of the norms and practices that patriarchy had for ages imposed on society. Through several of her characters, such as the relationships between Albert and his wife and son (Harpo), Alphanso and his wife Celie, Grange and his wife Margret, and Truman Hill and Meridian,Walker tackles the patriarchal ideology and abuse of black women.

It is clear that the author, through her autobiographical works, was very successful and skilled in presenting a black culture and black female characters who are independent and who are increasingly able to shift from slavery and subjugation to resistance and empowerment. Black women learned how to resist male dominance even though the price they must pay is frequently extremely high. She also demonstrated effectively how racism and gender both serve as drivers of oppression against African American women.

**References:**


1. Alder, Alfred. Understanding Human Nature. Trans. Walter. B. Wolfe London: Allen, 1974.Print.
2. Alice Walker. Interviews with Black Writers. John Obrien, New York: Live right, 1973.Print.
3. Bradley, David. "Novelist Alice Walker Telling the black woman's Story". New York Times Magazine,8 Jan 1984.







4. Bronfen, Elisabeth and Misha Kavka. Feminist Consequences: Theory for the New Century. New York: Coumbia up, 2001.Print.
5. Brown, Sterling The negro in American Fiction. New York: Atheneum, 1937.Print.
6. Barnes, Hazel. E. trans. Being and Notheingness. Methuen & co.Ltd.,1957.
7. Bell, Bernard, W. The Afro-American Novel and Its Tradition. Amherst : Ui of Massachusetts,1987
8. Berlant , Lauren. 'Race, Gender and Nation in The Color Purple'. Gates and Appiah, 1989.
9. Butler , Robert James. "Alice Walker's Vision of the South in The Third Life Of Grange Copeland" African – American Review 27,1993.
10. Barksdale , Richard. " Castration Symbolism in Recent Black American Fiction".CLAJ29.4.1986
11. Davis.Angela.Women.Race and Class. New York: Random.1981.
12. De Brauvour , Simone The Second Sex. Trans. H.M.Parshley. London:Cape 1963.

# The conditions of prisoners and prison reforms: a comparative study with other commonwealth countries

***Kaushiki Roy[1], Prof. (Dr.) Beena Deewan***
*Research Scholar, Jayoti Vidyapeeth Women's University Jaipur, Rajasthan, [1]*
*Director, Faculty of Law and Management Jyoti Vidyapeeth Women's University Jaipur, Rajasthan, [2]*

**Abstract**

The efficacy of prisons as a facility for rehabilitating criminals and equipping them for reintegration into society has consistently been a subject of contention. According to Dr.Paripurnanand Verma, a jail represents wickedness, and as a result, wrongdoers find themselves in complete accord within the confines of the abode of malevolence. However, this assumption appears to be an overly simplistic representation of the facts, as it does not apply universally to all types of offenders. There is a significant population of individuals who are generally law-abiding and come from respectable social backgrounds. However, they succumb to criminal behaviour owing to temporary impulsiveness, provocation, or situational conditions. The primary objective of incarcerating criminals is to rehabilitate them into law-abiding individuals by instilling a strong aversion towards illegal behaviour. However, in reality, prison officials attempt to induce change in convicts through the implementation of coercion and compulsory techniques. As a result, the fluctuation in the number of prisoners is temporary and only lasts for the duration of their incarceration. However, upon their release, they frequently revert back to a life of crime. This article therefore, provides a comprehensive analysis of the comparison between India and other commonwealth countries about the conditions of prisons and the reform approach being implemented.

**Key words: -** *Prison Reforms, offenders, commonwealth countries, criminals, prisons.*

## Introduction

In civilised communities, punishment should not diminish the inherent worth and integrity of individuals, both physically and emotionally. The principle of legal governance has acknowledged in several cases the entitlement of impoverished detainees to be treated as individuals and their treatment must adhere to fundamental principles of compassion and equity.[1] The efficacy of prisons as a facility for rehabilitating criminals and equipping them for reintegration into society has consistently been a subject of contention.





According to Dr.Paripurnanand Verma, a jail represents wickedness, and as a result, wrongdoers find themselves in complete accord within the confines of this abode of malevolence. However, this claim appears to be an oversimplification as it does not apply to all types of criminals. There is a significant number of offenders who are generally law-abiding individuals from respectable social classes, but they succumb to criminal behaviour due to momentary impulsiveness, provocation, or situational circumstances.

Nevertheless, in real practise, the officials in charge of the prisons attempt to change the convicts by employing tactics that involve coercion and other forms of coercion. As a consequence of this, the transformation of convicts is fleeting and only occurs for the duration of their time spent in jail; once they are freed, they frequently revert back to their previous criminal behaviour.[2] As a result of this, the current tendency is to place a larger emphasis on the psychological problems of the convicts in order to facilitate their rehabilitation and return them to a normal life in the community. By utilising the strategies of probation and parole, it is possible to successfully accomplish this purpose. The sincerity, commitment, and tactfulness of the authorities working in the jail are also significant factors that contribute significantly to the process of rehabilitation for the inmates. If the problem of congestion in western prisons is due to permissiveness, loose marriage ties, and delightful values of violence and sex taboos of that society, then the Indian prisons are not any better.[3] This is because the economic conditions do not permit the development of better methods of prison management. As a result, the restructuring of prisons in India requires the utmost attention.

## The Indian Prison story

In addition to serving as the guardians of those who are incarcerated, prisons are an essential component of the criminal justice system. By itself, retribution and punitive methods of treatment of prisoners are neither relevant nor desirable in order to achieve the objective of reformation and rehabilitation of prison inmates. This is despite the fact that the purpose and justification of

1 *Nishant Krishna Adhikari, 'Prison and Prison Reforms in India' (2017) 4(4) Int'l J.L. Mgmt. & Human 2161, 2170.*
2 *J Shapland, P Duff and J Willmore, 'Victims in the Criminal Justice System' (1985) US Dept of Justice, 199.*
3 *Moti Ram v. State of Madhya Pradesh, (1978) 4 SCC 47.*

incarceration is to safeguard society from criminal activity. In recent years, the idea of Correction, Reformation, and Rehabilitation has gained prominence, and it is now demanded of the administration of correctional facilities that they also serve as centres for correctional and curative operations. Our mission is to transform the correctional facilities into correctional centres. As a result, our primary focus is on the reformation, correction, and rehabilitation of those who are incarcerated.[4] Our goal is to produce people who have been transformed and improved from their time in jail and who are capable of leading a life that is honourable and dignified once they are released.[5]

A provision for the management of prisons has been put on the State List in the Constitution of the Republic of India. Immediately following the country's independence, the decade that followed, 1951–1960,[6] was a decade that was filled with enthusiasm for jail changes. At the same time as some state governments were in the process of appointing local committees to make suggestions about prison reforms, the government of India called for the United Nations to provide support in the field of technical assistance. Dr. Walter C. Reckless, a prominent American criminologist, travelled to India in the capacity of a United Nations consultant between the years 1951 and 1952 in order to provide recommendations about the implementation of jail reforms in the nation. Another important document in the annals of our nation's history of jail reform is his paper titled "Jail Administration in India." Over the course of this decade, the nation has seen the introduction of a few novel concepts about prisons. From this point on, the inmates were eligible for parole and furlough. As compensation for the task that he had done, they were paid, albeit in a meagre amount. There was a little but noticeable improvement in the living conditions of convicts as a result of the implementation of the Panchayat system. The establishment of Jail Training Schools may be seen in all states. 1955 was the year that saw the abolition of the practise of whipping, while 1958 saw the passage of the Probation of Offenders Act.[7]

The voyage, which began in 1966, has achieved several significant milestones over the past three decades. However, it appears that there are veterinary commitments to fulfil and a considerable distance to go before one may rest. We must also be practical. The interpretation of inmates'. constitutional rights

[4] *Hussainara Khatoon (I) v. Home Secretary, Bihar, (1980) 1 SCC 81.*
[5] *Pratyay Amrit, Anshika Jaiswal and Ambar Srivastava, 'Prisoner's rights and prison reform in India: A legal critique' (2016) 6(S3) IJHS 10933, 10936.*
[6] *Jonah Kate, Prison Reform in Nineteenth-Century British-India (UCL, 2015).*
[7] *Sumer Singh Bhati, 'Probation of Offenders – An analysis' (2022) 3 Jus Corpus Law Journal 945.*





should prioritise the greater public interest without compromising on being compassionate and attentive towards the prisoners. To ensure that a prisoner does not suffer unnecessary harm, it is important to avoid causing excessive injury. Simultaneously, it is imperative to undertake endeavours aimed at rehabilitating him, so that upon his release from jail, he emerges as a reformed individual, rather than a recidivist. It would be beneficial to ascertain the current overall status of jails in our nation.

In order to support this statement, it is sufficient to observe the information provided in paragraph 4.17 on page 13 of the 1994-95 Annual Report of the National Human Rights Commission. The following is identical: "The conditions observed in the visited prisons were diverse and intricate." Several prisons, such Tihar Jail [8] in Delhi, were excessively populated, while others, such as the open jail in Hyderabad, were not fully utilised. Frequently, there were discrepancies in the circumstances between different jails within a certain State, indicating the necessity for a more logical and comprehensive utilisation of facilities at the statewide level. The Commission observed some prisons that were especially sanitary and provided inmates with a respectable food, such as the Central Jail in Vellore. Regrettably, it witnessed several more filthy establishments, including the recently built Central Jail in Patna. In other cases, the cuisine was substandard, and the convicts criticised the management as being both cruel and unscrupulous. Efforts were made to segregate adolescents from adults and minor offenders from more experienced criminals. Conversely, other individuals did not exhibit the same level of caution, resulting in an environment that seemed to foster aggression and unlawful behaviour. Several significant initiatives were underway to improve circumstances, create gainful work opportunities, promote education, and reinstate dignity. Amidst a lack of compassion, prisoners were observed restrained in chains, while mentally unstable individuals, regardless of their criminal status, were confined alongside others, without any genuine attempt to surpass the bare minimum necessary for basic existence.[9]

The existing body of literature on prison justice and prison reform highlights significant issues that plague the system and require urgent action. These issues include trial delays, instances of ill treatment and torture, inadequate food

[8] *S Manikandan and K Jaishankar, 'Recidivism among Prisoners in Tihar Jail and Contributing Factors:*
*A Qualitative Study' (2018) 46 IJC 46, 47.*
[9] *K Niranjana, 'A study on Prison Reformation System in India' (2022) 13(3) Journal of Algebraic Statistics 243.*

quality, overcrowding, and the management of open-air prisons. The reforms in India have been somewhat limited in comparison to other commonwealth countries. It is. crucial to examine each country individually in order to have a better understanding of their respective systems.[10]

## USA and the Prison Reforms

American society upholds the principle of retribution. Prisons and prisons have a significant role in modern punishment. Apart from capital punishment, incarceration is the most severe penalty employed by American courts. The notion of using imprisonment as a form of punishment originated in the United States of America and has since been embraced worldwide. The imprisonment rate in America, which stands at 743 per 100,000 people, is the highest in the world.[11]

The reformatory system was established with the aim of promoting positive transformation in institutions. These reformatories were designed to aid young adult offenders and prioritise educational and vocational programmes. In 1870, authorities in prison administration and penology convened in Cincinnati to strategize the development of an optimal prison system. During the early 1900s, the increasing populations of jails and reformatories led authorities to view work programmes as valuable resources for keeping convicts occupied and productive.

The establishment of the Federal Bureau of Prisons in 1930 aimed to improve the treatment of Federal detainees, enhance the professionalism of the prison service, and assure uniform and centralised management of the 11 existing Federal prisons. Presently, the Bureau is comprised of 118 facilities, 6 regional offices, a Central Office (headquarters), 2 staff training centres, and 22 residential re-entry management offices (formerly referred to as community correctional offices). The regional offices and Central Office offer administrative supervision and assistance to Bureau facilities and residential re-entry management offices. Residential re-entry management offices supervise both residential re-entry facilities and home confinement programmes. The Bureau is tasked with the responsibility of safeguarding and attending to over

[10] *Dr P Prathapan, Mahatma Gandhi on Prison Reforms (Patridge India 2015).*
[11] *Andrew Coyle, 'Prison Reform Efforts Around the World: The role of Prison Administrators' (2004) 24 Pace L Rev. 828.*





219,000 Federal offenders. Around 81 percent of these prisoners are incarcerated in institutions run by the Bureau, while the other individuals are held in privately managed or community-based prisons and municipal jails. Irrespective of the particular field in which a staff member is employed, all Bureau employees are primarily "correctional workers." This implies that every individual bears the responsibility for ensuring the security and maintaining the proper functioning of the organisation. It is required that all staff members be watchful and focused on inmate. responsibility and security concerns, promptly respond to crises, and possess expertise in custodial and security topics, as well as in their specific work specialisation.[12]

Federal Prison Industries (FPI) [13] is a crucial correctional programme under the Bureau. Engaging offenders in productive activities has a substantial impact on reducing recidivism rates and enhancing facility security and safety. The objective is to ensure that 25 percent of the Bureau's eligible convicted prisoners are employed in Federal Prison Industries (FPI) enterprises. They acquire work skills through targeted education in manufacturing activities pertaining to diverse product lines and services. Prisoners are remunerated for their labour and have the potential to get salary increases contingent upon their job performance. The Federal Bureau of Prisons is the primary agency responsible for managing the correctional system in the United States. Despite an increasing workload, the Bureau continues to provide exceptional public service by prioritising public safety and delivering effective, secure, and humane correctional services and programmes.

## Australian Reforms

Australia functioned as Britain's convict colony from 1787 until 1852. The discovery of gold in New South Wales and Victoria in 1851 made the idea of transporting convicts to this potentially prosperous region appear counterproductive. Simultaneously, it had become less economically viable for England to transport its incarcerated citizens to Australia. On January 26, 1788, the initial convict ship disembarked 750 criminals at Botany Bay. An estimated total of 187,000 prisoners were transported to Australia, with the majority occurring after 1815, following the conclusion of the Napoleonic Wars.[14]

[12] *Sahibnoor Singh Sidhu and Utkarsh Mishra, 'Prison reform In India: An incomplete saga' (2022) 6(7) Journal of Positive School Psychology 2235, 2248.*
[13] *Erolye P Loefton, Emerging Business Issues (Nove Business Publishers, New York 2008).*
[14] *T Alisha, 'Analysis of the Prison Justice Reforms Act' (2023) 8(1) IJLP 47, 54.*
[15] *PED Love, DM Wood and B Confoy, 'The privatisation of correctional facilities in Australia' (2000) 18(2) Facilities 57, 65.*

The administration of correctional systems in Australia[15] falls under the jurisdiction of the respective State and Territory governments. Australia is a federal nation consisting of six States and several Territories. The Northern Territories and the Australian Capital Territory, which are the primary land territories, possess autonomous governance and operate their own penitentiary systems. The position of constitutionally has been decided by Acts of the Commonwealth Parliament, which initially derived its power from Acts of the British Parliament.

Upon their decision to become a country, these six States granted certain powers to the Commonwealth Parliament. They assigned their responsibilities related to foreign affairs but maintained their powers related to criminal justice. The significance of this in relation to our conversation is that prisons is an issue that is specific to a particular area, and there are a minimum of eight distinct Acts passed by eight different parliaments that create and govern Australian correctional systems, resulting in significant differences between them.

Currently, Australia possesses 8 state correctional services.[15] The following is a compilation of 8 Australian Corrective services: The following are the correct names of the correctional services departments in different regions of Australia: Australian Capital Territory Corrective Services, Corrective Services New South Wales, the Department of Justice, Correctional Services, Northern Territory, Queensland Corrective Services, Department of Corrective Services, Western Australia, Corrections Victoria, Department of Correctional Services, South Australia, The Department of Justice, Corrective Service, Tasmania. The Australian Department of Justice has established standardised rules for prisons in Australia.

**The Russian Model**

On February 27, 1879, the Russian Ministry of the Interior established the Main Prison Administration, which was initially tasked with the security and maintenance of detention and prison facilities throughout the Russian Empire. The Department was incorporated into the Ministry of Justice of the Russian Empire on December 13, 1895. Subsequently, in April 1917, the penitentiary system was elevated to the status of the Main Administration Penalties Sites. The Prisons Administration, which was established on December 25, 1917, was renamed the Prisons Directorate in January 1918. The Main Administration and

[16] *Kevin Howells and Andrew Day, 'The Rehabilitation of Offenders: International Perspectives Applied to Australian Correctional Systems' (1999) 112 Australian Institute of Criminology 2, 4.*

[17] *VB Evdokimov, 'On the Role of the Ministry of Justice in the Legislative Activity of the Government of the Russian Federation' (2002) HeinOnline 23.*





Repair Labour Camps (the Gulag), which lasted until 1958, were established on April 7, 1930. The Main Administration for Punishments Executives was established within the Soviet Ministry of the Interior in 1960. The organisation was renamed the Federal Agency of Execution of Punishments (FSIN) and subordinate to the Russian Ministry of Justice in 2006.[16] The Federal Penitentiary Service (FPS) is a federal executive entity tasked with the enforcement, control, and supervision of operations pertaining to the punishment of convicted criminals, the custody, guarding, and escorting of individuals suspected or accused of committing crimes, the supervision of individuals on probation or serving a suspended sentence, and the monitoring of individuals under house arrest for the purpose of enforcing the law The Federal Agency of Execution of Punishments is a federal executive body that is in charge of law enforcement, control, and oversight of functions related to punishing people who have been found guilty of crimes; keeping people suspected or accused of crimes in custody and guarding and escorting them; keeping an eye on people on probation or a suspended sentence; keeping an eye on people suspected or accused of crimes who are being housed; and enforcing the law.

On behalf of the Russian Ministry of Justice, the Federal Penitentiary Service (FSIN) will participate in the preparation of the materials that are required for the consideration of applications for pardons of convicted individuals, in the development and implementation of legal examination of draught laws and other regulations relating to the activities of the correctional system, and in the development of federal programmes for the development and strengthening of the penal system, in accordance with the legislation of the Russian Federation. Additionally, the FSIN[17] will be responsible for the development of special equipment and tools that are utilised in the penal system, as well as the procurement, storage, maintenance, and disposal of these items.

As of the first of the year 2021, there were 819.2 thousand persons being kept in correctional facilities, including 755 prison colonies that housed 694.5 thousand individuals who were serving sentences. A total of 49.3 thousand people were serving their sentences in 160 settlement camps. There were a total of 118.9 thousand people housed in 228 remand prisons and 165 remand wings inside penal colonies. There were five penal colonies that housed individuals who had been condemned to life imprisonment. 1.8 thousand guilty individuals were housed in seven different prisons. Four thousand individuals between the ages of 14 and 19 were housed in 62 juvenile colonies. The number of women who were detained in correctional facilities was 66.4 thousand, with 55.4 thousand of them

[18] *Bettina Renz, 'Russia's "Force Structures" and the Study of Civil-Military Relations' (2005) 18(4) Journal of Slavic Military Studies 565.*

[19] *Florence Chukwudi, 'Challenges of reforms in the Nigerian Prison System: Lessons from USA and South Africa' Journal of Social Science and Public Policy 35.*

being kept in penal colonies for convicted individuals and 10.9 thousand being on remand. Within the women's penitentiary colonies, there are thirteen nurseries that can accommodate 863 infants who are up to three years old.[18]

There are 133 hospitals that specialise in providing medical treatment to convicted individuals and defendants. Additionally, medical units and medical stations within each institute, 59 medication-correctional facilities for TB patients, and 9 medication-correctional facilities for drug addicts are also responsible for providing medical care to these individuals. In addition, the organisation of the penal system includes the following components: 2,467 penal inspections that oversee 491.9 thousand. individuals who have been sentenced to non-custodial sentences; 182 state-run unitary enterprises at correctional institutions; 551 working adaptation centres for convicted individuals; 49 medication-production workshops; and 46 training and production workshops. There are 319 evening schools, 546 educational and consulting units, and 339 vocational schools located within penitentiary and juvenile colonies. Additionally, there are 523 churches and 705 prayer rooms. The number of individuals working in the correctional system on a full-time basis is 346.3 thousand. This number includes certified personnel, who number 257.1 thousand, as well as 7.1 thousand temporary staff members. There are 56 public health institutions that offer medical services to employees. These institutions include 34 social-medical centres, 14 hospitals, 5 military medical commissions, and 3 health resorts. The penal system also includes 74 education centres, an Institute of Advanced Studies, a Research Institute of the Penal System, and a Research Institute of Informational and Production Technologies (with three branches). Additionally, the penal system is comprised of eight higher schools of professional education, each of which has seven branches. These schools include the Academy of Law and Management.

### The United Kingdom system

The governance structure of the United Kingdom (UK)[19] is intricate. Although the UK is primarily administered from Westminster, some duties of the Home Secretary in England and Wales are delegated to the Secretaries of State for Scotland and Northern Ireland in their respective nations. The jurisdiction of Her Majesty's Prison Service (HMPS) extends to England and Wales, although Scotland and Northern Ireland each have their own independent Prison Services, which operate under distinct legislative frameworks.

[20] *Bevir Mark and Ben Krupicka, 'Police Reform, Governance, and Democracy' (2007) 8 Bingley 154, 159.*
[21] *KM Kapadia, 'The Criminal Tribes of India' (1952) 1(2) Sage 29.*





In the 1980s, the British Government created the first Executive Agencies. These were separate from the main policy-making Departments of State and made up of past Government Departments and organisations whose job it is to provide special services. In an official Framework Document, Executive Agencies are given a lot of power. Parent departments set funds and standards and give Executive Agencies the power and duty to provide the service. Ministers are still responsible to Parliament as a whole. The choice to turn the Prison Service into an agency was made in 1991. A National Offender Management Service (NOMS) was set up in 1993. The National Offender Management Service is part of the Ministry of Justice and is an Executive Agency.

The Jail Act of 1952[20] established Boards of Visitors comprised of lay persons from the local community. These members have unrestricted access to the jail and were designated as the Home Secretary's observers. They had the ability to address any issue, whether it pertained to the well-being of convicts or personnel, or the physical structure of structures. It was anticipated that they would make regular visits, engage in conversations with convicts, and listen to their grievances. They held frequent meetings with the Governor and sought to address issues at the local level. However, they also had the opportunity to communicate with the Home Secretary and were obligated to provide him with updates on any topics they deemed necessary. Regardless, they were obligated to present an Annual Report to Home Office Ministers encompassing their evaluation of the institution, matters of Board's concern, and a record of their endeavours.[21]

Until the late 1970s, the Courts had the power to oversee all the Prisons in the nation. However, throughout that time, there was a policy of refraining from involvement in public trials. Prisoners were restricted from contacting with anybody, even their legal advisors, without the authorization of the Secretary of State. Since 1977, when the Supreme Court eased the requirements for seeking redress through Judicial Review, there has been a rise in the Courts' involvement in the administration of Prisons, leading to the formation of a more proactive judiciary.

The Prison Service is now collaborating closely with the Commission to execute a Joint Action Plan aimed at advancing Race Equality and eliminating Race prejudice. Ensuring this is one of the Service's topmost concerns. Minority ethnic convicts constitute 17% of the prison population, which is higher than the 7% representation in the community. It is crucial to prioritise the equitable treatment of all prisoners and the promotion of positive race relations within the Prison Service.[22]

[22] *Sophie Angelis, 'Limits to Prison Reform' (2023) 13 UC Irvine L. Rev 2.*
[23] *Debarti Halder, 'A Critical Commentary on Rehabilitation of Offenders in India' (2022) Springer 143.*

## Conclusion

The global jail system has undergone daily modifications due to the growing global consciousness of individual rights. To ensure effective jail administration in India, it is imperative to do a comprehensive comparative examination of the prison systems and reforms in the United States, England, Russia, and Australia. Other nations have implemented important changes including as community service, inmate management, programmes, prison ombudsman, and initiatives to improve inmate well-being, post-release employment plans, and the establishment of private prisons. The issue of overcrowding is far more acute in the USA, England, Russia, and Australia in comparison to India. However, the organisational structure in all of the aforementioned nations is significantly robust, in contrast to India. Each enforcement authority in the aforementioned countries carries out its duties using highly scientific methods. The jail systems in the aforementioned countries have embraced technology advancements, and each law enforcement agency is highly dedicated to enacting reform initiatives in their respective nations.

Prison congestion threatens reformative prisons in the comparative study nations. Even if they're good at running prisons, inmates' lives are guaranteed as in regular life in every country. The different governments have taken all such efforts to improve jail administration, whereas India is doing so currently. India should push jail modernization at all levels, unlike the above nations. India must modernise its jails with new security, medical, women, and child care technologies to improve convict lives. India has a low overcrowding rate compared to other nations, but prison officials are less likely to modify prison administration. Even though the US has the greatest rate of overcrowding, the Federal Bureau of Prisons, the major prison administration agency, has done a great job integrating convicts into society. We can learn a few ideas that will be used in our jail system to improve man

## References :


1. Nishant Krishna Adhikari, ‘Prison and Prison Reforms in India’ (2017) 4(4) Int'l J.L. Mgmt. & Human 2161, 2170.
2. J Shapland, P Duff and J Willmore, ‘Victims in the Criminal Justice System’ (1985) US Dept of Justice, 199.
3. Moti Ram v. State of Madhya Pradesh, (1978) 4 SCC 47
4. Hussainara Khatoon (I) v. Home Secretary, Bihar, (1980) 1 SCC 81.
5. Pratyay Amrit, Anshika Jaiswal and Ambar Srivastava, ‘Prisoner’s rights and prison reform in India: A legal critique’ (2016) 6(S3) IJHS 10933, 10936.
6. Jonah Kate, Prison Reform in Nineteenth-Century British-India (UCL, 2015).
7. Sumer Singh Bhati, ‘Probation of Offenders – An analysis’ (2022) 3 Jus Corpus Law Journal 945.
8. S Manikandan and K Jaishankar, ‘Recidivism among Prisoners in Tihar Jail and Contributing Factors:
9. A Qualitative Study’ (2018) 46 IJC 46, 47.
10. K Niranjana, ‘A study on Prison Reformation System in India’ (2022) 13(3) Journal of Algebraic Statistics 243.
11. Dr P Prathapan, Mahatma Gandhi on Prison Reforms (Patridge India 2015).
12. Andrew Coyle, ‘Prison Reform Efforts Around the World: The role of Prison Administrators’ (2004) 24 Pace L Rev. 828.
13. Sahibnoor Singh Sidhu and Utkarsh Mishra, ‘Prison reform In India: An incomplete saga’ (2022) 6(7) Journal of Positive School Psychology 2235, 2248.
14. Erolye P Loefton, Emerging Business Issues (Nove Business Publishers, New York 2008).
15. T Alisha, ‘Analysis of the Prison Justice Reforms Act’ (2023) 8(1) IJLP 47, 54.
16. PED Love, DM Wood and B Confoy, ‘The privatisation of correctional facilities in Australia’ (2000) 18(2) Facilities 57, 65.
17. Kevin Howells and Andrew Day, ‘The Rehabilitation of Offenders: International Perspectives Applied to
18. Australian Correctional Systems’ (1999) 112 Australian Institute of Criminology 2, 4.
19. VB Evdokimov, ‘On the Role of the Ministry of Justice in the Legislative Activity of the Government of the Russian Federation’ (2002) HeinOnline 23.

# The legal paradox of male-directed sexual violence in India

***Dr.Meenakshi Punia[1], Miss. Heena Goyal[2]***
*Assistant Professor, Sardar Patel University of Police, Security and Criminal Justice, Jodhpur[1]*
*Final year Student of LL.M Sardar Patel University of Police, Security and Criminal Justice, Jodhpur,[2]*

**Abstract**

Male-directed sexual violence is an undocumented topic. In gender-based violence women, girls and children take the main attention when it comes down to humanitarian issues and vulnerable groups. There is either no representation or under-representation of male victims of sexual offences either on the international stage or in their respective municipal limits. Various factors need to be studied and taken into account to have a multi-dimensional approach towards victimhood of men in sexual offences. This paper tends to find cause and effect in this research problem via empirical research methodology. law, society, gender orientation sensitisation, and vulnerability, all needed to be taken into consideration while addressing this issue of male victimhood under the heading of unwanted non-consexual sex and sexual violence against men in a general adaptive sense. Criminal law Amendment Act of 2013 introduced various new offences relating to the human body as well as sexual offences. Stalking and voyeurism were the offences that were introduced in India through the Criminal law Amendment Act, 2013. The sad part from the year 2013 onwards is that instead of making our Criminal laws more gender accommodating we moved towards a singular approach to address issues of one gender. There is a stunning dichotomy of law and social standards for both genders. The paper examines these issues in light of law, psychology and sociology. The issues about Gender violence against males need to be researched and brought to the light of law so that we don't have a veiled group which is bleeding and in pain just because of legal disparity. This research paper through a questionnaire has tried to get responses on this issue although it is also to be taken into a note that males who suffer sexual violence are part of hard to reach population to collect data for the same

**Key words: -** *Hypermasculinity, Male-directed Sexual violence, Male victimisation, Masculinity, Patriarchy, Sexual, Violence.*





## Introduction

*"A woman simply is, but a man must become. Masculinity is risky and elusive. It is achieved by a revolt from women, and it is confirmed only by other men. Manhood coerced into sensitivity is no manhood at all."*

–Camille Paglia

Since time immemorial men have reigned on the throne as superior and strong gender against their counterparts. The quotations above tell a story of becoming 'the Man' who is not emotional or sensitive but forced to reckon with, the society sees them as dominant creatures of stoicism and toughness. Unfortunately, this also comes with a price and in recent times with women-centred laws the men have endured the victimisation for which there is less attention by law as well as by the society. The pain, the violence, the ripping off of bodily anatomy in form of unwanted nonconsensual sex and sexual violence against them.

As men and women are pillars of society and no society can make any progress without their equal participation in all the spheres of life. Men and women both are individuals and deserve respect and equality. We should eliminate any kind of contemplations and contrasts between them. It's not that only women and not men should be respected. Respect the person and not the Gender. Respect is not based on their quality of character, not their religion or not in their gender it's all the self-respect of an individual which decides his/her position in the society

A perpetrator generally uses violence as a tool to put forth his command and control over the victim. All the cultures across the globe have constructed masculinity in their peculiar idealised characteristics related to toughness, unemotional attitude, and heterosexuality. This amalgamation of pride 'manhood' is done by the socialisation of these ideals in young males.

Gender role socialisation is a social and psychological construction of various ideals given to particular gender. In men being in a patriarchal set-up, this is to acquire an aggressive, tough and dominant behaviour.

Men may feel the need to be silent about their abuse because of the internalized belief that men can't be victims, or that men should not express weakness. This type of socialization depicts victimization as feminine and uses shame as a tool to suppress behaviours and feelings associated with femininity. Avoiding femininity and practising stereotyped male gender roles helps men maintain power, or at least the perception of what power and safety might mean. When a man does want to reach out to ask for help related to his victimization and healing, he may not have the language to understand or talk about what happened. Men may even express an attitude of "no big deal" related to sexual violence.

Sexual violence and vulnerability towards such violence and itsvictimhood have been voiced and condemned against fairer sex but in the corners of the laws, the other gender that is the male finds few options when there is an urgency to get justice on similar grounds of violence. As in today's world, almost all victims

are female, but we never consider that males are the victims of a sexual offence. In dynamics of time gender bias in the laws dealing with sexual violence, especially in non-consensual experiences, is creating a void in society. Like women as victims of such experiences men too exhibit similar psychological trauma, post-traumatic stress disorder {PTSD}, and depression. So questions arise when the human body shows nearly similar post-traumatic expression after such unwanted and non-consensual sexual experience, why it is hard to judge the same crime, simulated in terms of gender and victimhood?

The right to equality and the right to a dignified life as embraced in Article 14 and Article 21 respectively under the Constitution of India portrays a serene picture of equality and dignity. The nexus of these along with Article 15 of the constitution of India protects and creates confidence towards the State that there wouldn't be discrimination and a person's right to life and equality will be protected. Unfortunately, this whole serene picture is tarnished if we start digging deep about male victims of sexual violence. The cruelty of law is in its derogatory prejudice to address the victimhood of men. Sexual violence and assault is not just a crime on one's body but mind and soul. The scars of sexual violence-hit deep to the victim of crime and it is utter hypocrisy to protect against sexual violence and on other hand make laws against it, leaving one very important group out of its remedial system and placing that group in the terminology of a perpetrator of the crime

Equality in terms of the human spirit, law,justice and equity can never be achieved if we ignore the better half of our society, family, community, and social group. The advent of Hyper masculine culture has led to some very distorted myths and societal standards which has carved a different unsettled macho psychology which disgusts feelings and experiences of various emotional-hood. Emotions and feelings are cast towards being more feminine and hence captioning as weakened gender. The Notion that Men don't feel pain or "Mard ko Kabhi dard nahi hota" "Aur Na hi Mard Kabhi Rote Hai" "Men are not frail" and " Men can't complain" has snowballed over the male gender itself. Unfortunately, this has also led to a disparity in law which is now harming society at large.

Male victims of sexual violence may have one way or other may have endured sexual violence in forms like assault, non-consensual unwanted sex, sexual coercion etc. The worst part of all this is that male victims are hard to reach a group/population. The toxicity of hyper-masculinity has led to such an unapproachable population of victimhood. It is hard to study and collect data for such a hard-to-reach group. Therefore for us, it was a hard task to collect data in such a scenario but whoever opened the questionnaire, led us towards hard truths about society, gender biases and psychological challenges faced by victims of study.

Since Indian society is a majorly patriarchal society (if we ignore certain areas where matriarchal set-up is still prevalent as in some parts of Southern India and North East )it has not only created problems for the female gender but has





fueled misconception of machismo and hyper-masculinity on the notion of unemotional superiority towards others and testosterone riddled egoism. This patriarchal approach can be seen in our laws too where we have to strive to make hard laws regarding sexual violence against women which is also having its legacy in the very setup. But losing gender neutrality in such laws has its long-drawn repercussions, some of which will be laid further in this research paper.

## Statistical Data of male-directed violence in India

Of those convicted of rape, the US Department of Justice has stated that 99percent are men, and 1percent are women. Ideally, India would be able to provide its owners with statistical comparisons. However, given that rape by legal definition cannot be committed against men, there is no good way of determining just how many male survivors exist in India.

In looking at child sexual abuse specifically, the Indian government did find in 2007 that, of surveyed children who reported experiencing severe sexual abuse, including rape or sodomy, 57.3percent were boys and 42.7percent were girls. More recently, the Delhi-based Centre for Civil Society found that approximately 18percent of Indian adult men surveyed reported being coerced or forced to have sex. Of those, 16percent claimed a female perpetrator and 2percent claimed a male perpetrator.[1] Male directed violence data is still discrete and non confirmed data. if Laws in India are in favour of male directed sexual violence then in coming year we may have that data.

The only way to bring any form of justice to these male survivors has at times been charges under Section 377 of the IPC, India's recently reinstated anti-sodomy law. Problematically, however, this law both does not consider "sodomy" as actual rape and makes no distinction between consensual and non-consensual sexual acts between two male adults; its conviction statistics tell us very little. For those who were violated in a non-penile manner, not even this recourse exists.[2]

Our society considers only women to be vulnerable and weak whereas men are powerful, dominating. Where there is presently an echo of feminism and gender specific legislation favoring women all over the world, men's rights have suffered a massive strike, which must be addressed in order to achieve ideological balance, removing all inequities, and advancing towards gender

1 *'India's law should recognise that men can be raped too' (Centre For Civil Society) <https://ccsindia.org/indias-law-should-recognise-men-can-be-raped-too> accessed 13 Feburary 2022*

neutral laws. The cacophony of women-centric regulations not only obscures challenges encountered by males in society and how they are forced to bow before gender-biased laws, but it also has an extensive impact on gender equality philosophy.

Indian Penal Code 1860 has dedicated sections  In India, some sections are only meant for girls, i.e. Chapter XVI (of offences affecting the Human Body) Section 354, Sec 354A, Sec 354B, Sec 354C, Sec 354D, Sec 375, Sec 376, Sec 376A, Sec 376B,Sec 376C, Sec 376D, Sec 376 DA, SEc 376 DB, Sec 376E, Chapter XXII (or criminal intimidation, insult and annoyance)Sec 509 of the Indian Penal Code, 1860. In these sections, Men are not taken as victim but as perpetrator of violence in these crimes . Only men can commit a crime against women, and if males and females can commit a crime against men, there is no provision for in-laws. It's like a privilege to women given bylaws. Its discrimination against men, and only men can be perpetrators of women's abuse. There are numerous cases where men are innocent and still are harassed by women of the same sex.

In the modern era, every human being is vulnerable according to the circumstances which they have endured every day. It's not like only females/women, children, older people, and LGBTQ+ are vulnerable but heterosexual males are also vulnerable in some parts. Example- Taunting about impotency, harassed for their unemployment, not earning enough money, not completing sexual desire of her partners. These are some of the examples where heterosexual males face the issue.

Like women, men who experience sexual assault may suffer from depression, posttraumatic stress disorder (PTSD), and other emotional problems as a result. However, because men and women have different life experiences due to their different gender roles, emotional symptoms following trauma can look different in men than they do in women.[3]

In the case of Madan Gopal kakkad Vs naval dubey,[4] the court held that the right to life includes the right to live with human dignity. A male rape victim's dignity is harmed during a non-consensual sexual act by his partner. A judge once said

[2] *Stokes J, "India's Law Should Recognise That Men Can Be Raped Too" (Scroll.in, September 10, 2014) <https://scroll.in/article/676510/India's-law-should-recognise-that-men-can-be-raped-too> accessed April 30, 2022*





that "a rape is a matter of "deathless shame". Our constitution of India provides everyone dignity. 'Woman Not Prosecuted If She Tricks Man With False Promise Of Marriage': Kerala High Court Says Rape Should Be Gender-Neutral Offence. The bench remarked that a woman's consent on a promise to marry is an 'enigma for the prosecution to prove' while pointing out that the statutory provisions of the offence of rape in the IPC are not gender-neutral.

A woman, on a false promise of marrying and having a sexual relationship with a man, with the consent of the latter obtained on such a false promise, cannot be punished for rape. However, a man on a false promise of marrying a woman and having a sexual relationship with the woman would lead to the prosecution's case of rape. The law, therefore, creates a fictitious assumption that the man is always in a position to dominate the will of the woman.[5]

'Men' generally feels less of a man when he has been sexually assaulted. They start ending their relationships with friends and relatives. It is a mind-set of people that Men who are raped are not the real man because of the only reason that a real man can save himself from sexual abuse, including even unwanted contact, an attempt to rape or even a force to commit sexual acts. The researcher is doing survey on sexual offence against men.

The issues relating to men's right have always been straggled and issues of women have always been glamorized, such as "me too movement", "feminist movement" etc., with all the woes of women right, men's have always suffered and their grievances have never been redressed much. The dilemma of feminist movement have been substantially surveyed and analysed by SIFF. An article namely "A MISDIRECT MOVEMENT CALLED FEMINISM", portrays the problem of fake feminism and compare feminism with 'dictatorship' and 'unjustified propaganda' by certain "hypocritical women" in the society. However, in the era, where we talk about gender neutral laws, such hypotheses reflect only an extremist view against females. Well, the present study reflects a

[3] *"VA.Gov | Veterans Affairs" (Sexual Assault: Males - PTSD: National Center for PTSD) <https://www.ptsd.va.gov/understand/types/sexual_trauma_male.asp> accessed April 15, 2022*

[4] *(1992) 3 SCC (204)*

[5] *Varghese HM, "'Woman Not Prosecuted If She Tricks Man With False Promise Of Marriage': Kerala High Court Says Rape Should Be Gender-Neutral Offence" ("Woman Not Prosecuted If She Tricks Man With False Promise Of Marriage": Kerala High Court Says Rape Should Be Gender-Neutral Offence, June 2, 2022) <https://www.livelaw.in/news-updates/kerala-high-court-bats-for-rape-to-be-gender-neutral-offence-200652?infinitescroll=1> accessed June 6, 2022*

gender-neutral approach rather than extremist approach taken up in the article aforementioned and wants to develop[6] a concern towards men's right so as to strike balance between both the ideologies

Researchers have shown that those men who strictly adhere to the hegemonic masculinity norms and don't come out in the open to tell their problems have worse mental health issues.

In the case of Vijay Nair who is a Mumbai based entrepreneur and founder of the Only Much Louder (OML) company. There was a female perpetrator who stalked him. He tweeted about the incident, but besides having sympathy towards him people said, "You're lucky A girl is stalking you and wants to talk to you". But what If he did the same thing as the women had done with him, people would say "NO". The police would have arrested him. But in his case, the girl was roaming free because India has an anti-stalking and anti-voyeurism law but not for men [7].

More than decade ago the Economic Times had conducted a Survey- ET-Synovate survey conducted in seven cities with 527 executives from across sectors such as telecom, FMCG, durables, banking, ITeS and others were polled. The executives were in three different age groups—25-35; 35-45; and over 45 years. According to it even men aren't safe from sexual harassment in the workplace. They conducted the survey between the metropolitan cities of India,. The results were shocking. Even the male employees were harassed by their bosses or colleagues of the same sex or female itself.

Report of the Prevalence, Incidence, and Consequences of Violence against Women (Patricia Tjaden Nancy Thoennes) in this report there are different survey conducted by the researcher on men and women or minor in every chapter there is huge difference between male and women as victim. It's also triggered in some reports male are more victims of the crime still there are lack of laws to file the cases. Men have traditionally been emotionally ignored. This separation between the males and females is unquestionable and most likely the

6 *Mark J S, heppner and P P, "Gender Role, Gender-Role Conflict, and Psychological Well-Being in Men." (APA PsycNet) <https://psycnet.apa.org/record/1991-33056-001> accessed April 15, 2022*

7 *Agarwal D, "Vijay Nair Sexual Harassment Case: Rising Incidents against Men Emphasise Need for Gender-Neutral Laws in India-India News , Firstpost" (Firstpost, May 17, 2017) <https://www.firstpost.com/india/vijay-nair-sexual-harassment-case-rising-incidents-against-men-emphasise-need-for-gender-neutral-laws-in-india-3452286.html> accessed April 16, 2022 <https://economictimes.indiatimes.com/special-report/even-men-arent-safe-from-sexual-harassment-at-workplace-survey/articleshow/6389438.cms> accessed April 15, 2022*





driving force behind global gender inequity. Gender equality, often known as sexual orientation uniformity, is a concept based on the belief that all genders have equal rights, are generally conscious, and have equal liberties. Gender disparity is a dubious basis for separation, leaving society even more helpless.[8]

In its 172nd report, dated March 25, 2000, the law commission had sought to widen the definition of rape under section 375 of the IPC. Owing to a substantial increase in the sexual abuse of boys, the commission attempted to alleviate the gender biasness in the rape laws. However, the amending of the existing legislation as per these recommendations is still awaited. 20 years down the line, and the gender biasness still exists in the laws, which has for a fact even risen in the recent past. Supreme Court lawyer Karnika Seth spoke about the rising number of cases involving men as victims of cyberstalking. She said that until a few years back, 75% of the cases she investigated involved women as victims. However, now, the ratio is 50 to 50.[9]

It has become a stigma when a man expresses his feelings and emotions which is another reason why sexual assault of men and boys has been ignored since time immemorial. This is one of the worst things we can do to a man, that is, not let him be himself because he has gender roles to fulfil. "Our patriarchal society holds males to be the stronger sex and expects men to be able to protect themselves. Many men who have survived child sexual abuse have been subjected to comments such as "Why didn't you beat him up? You are a man[10]

Siddhant Talwar has started a campaign related for Male i.e. Mardaangi which generally means Masculinity. In this campaign many male survivor have talked about their sexual assault and violence done by the same gender or opposite gender. Most of the male survivors have faced these things in their childhood and in their youth. And they talk about Rape, Abuse & Incest National Network (RAINN) and how they can help the male survivor. He tries to understand the need for gender neutrality and how he can help the male victim.[11]

8 *Dworkin R, "Ronald Dworkin, What Is Equality? Part 1: Equality of Welfare - PhilPapers" (Ronald Dworkin, What is equality? Part 1: Equality of welfare - PhilPapers) <https://philpapers.org/rec/DWOWIE> accessed April 17, 2022*

9 *Rai D, "Role of the Law Commission of India against Sexual Violence and Rape" (iPleaders, February 3, 2021) https://blog.ipleaders.in/role-law-commission-india-sexual-violence-rape/#:~:text=In%20its%20172nd%20report%2C%20dated,%20biasness%20in%20the%20rape%20laws accessed June 9, 2022*

10 *Pardhan S and Grover S, "Don't Boys Get Raped? Breaking the Silence on Sexual Abuse of the Male Child in India – Rostrum's Law Review" (Rostrum's Law Review, April 30, 2018) https://journal.rostrumlegal.com/dont-boys-get-raped-breaking-the-silence-on-sexual-abuse-of-the-male-child-in-india/ accessed April 18, 2022*

As in Indian society, only women are vulnerable for the last many decades, and society hasn't sensitized itself to come out of this patriarchal mind-set. At present the technology is affecting lives of men and women, making both in parity with various unforeseen experiences related to sexuality and their orientation . Even so, women seem to have more addressable remedies from law compared to male counterparts.

The sad fact as well as belief is that its the men at most times who are cause of grave sexual offences against women. Hence the law is made to see aggressor-victim complex when male is always taken on aggressor part. In dynamics of times in the society, men are also being sexually assaulted or harassed by same-sex or women, but we do not have appropriate laws to tackle sexual offences against men. Even men are equally prone to sexual offences. And there is an urgent need to address sexual violence against males.

The legal apathy toward masculinity is such that a guy might imagine himself chained against gender-biased legislation, with no way out of the terrible web of gender privilege laws unscathed. This current mindset has even made its way into the consciousness of society. When the prevailing assumption is maligned that men are always presumed as predators and females are always assumed as victims, the issues of men appear to have been shut up in the tombstone.

The scope of study revolves around the inception of difficulties and concerns surrounding men's or boys' linked Human Rights, mental health, and position in society being severely harmed by women who are brazenly exploiting the provisions of law, particularly those connected to sexual abuse designed in favour of female. The research methodology in this paper has adopted the empirical research method where both primary and secondary sources of research have been used, the researcher shall be Primary data was collected by piloting a questionnaire to targeted groups of various age groups.

[11] *Dave madhur, "Men Can't Talk About Sexual Assault; Siddhant Talwar Is Trying To Change That" (Women's Web: For Women Who Do, August 22, 2019) https://www.womensweb.in/2019/08/siddhant-talwar-is-talking-of-mardaangi-and-male-sexual-assault-one-man-at-a-time/ accessed April 18, 2022*





**Research Objective:-**

The aim of undertaking this study is to assess the need to address issues related to sexual offences against men in the context of India from a gender-specific to a gender-neutral law. Some major concerns in this respect are. Examination of various aspects relating to the problem relating to sexual offences against males provides the opportunity to analyse the concept of gender equality and how it impacted the life of the male gender in the society, What constitutes sexual offences against men?

**Gender Vulnerability and Victimhood**

Vulnerability cannot be just evaluated on the basis ofgenderethnicity, age group, geography etc. But in certain special cases it may be circumstantial and factors they are facing in their life. In recent times, the male gender has found themselves in situations and circumstances of vulnerability when dealing with theirsexuality, personal relationships, workplace relationships, and psychological factors. The stigma of being Hyper masculinehas let their vulnerability to being a closed-door subject also called as hard. The heard or embarrassment and depression caused is thrown on the basis of their superior masculinity. Technology and the evolving world of social media have increased such a circumstantial vulnerability.

The circumstantial vulnerability related to males regarding unwanted non-consensual sex needs to be addressed in various forums the law being the first and foremost. Many times women, children, elderly people etc. are taken as soft targets for various crimes. There, victimhood has been recognized in various legal spheres across the globe. But, the victimhood of men in situations like this is ignored or taken leniently. In terms of redressal of the situation, the attitude of society and even men go against them in getting proper justice compared to women facing the same situation. For example- Sarvjeetjasleen sexual harassment case, the Girls' locker room case and many more cases are there in which boys who were innocent still faced criminal charges on them. And girls escaped from any criminal charges neither getting punishment nor fine. Boys, young men, and teenagers share good numbers in the name of the victim. Bullying in cyberspace or the physical world around them. Even the state mechanisms are not wholly equipped to answer their distress and their agony. Leading a very wide, grey area in the field of law, execution of law addresses the situation. The data availability regarding a sexual offence against men is very limited and vague and ambiguous.

To address various issues about Sexual offences against men in India, a questionnaire was circulated among people of different age groupsranging from 15 to 55 & above. Most of the people from the age group of 15 to 25 and 26 to 35 years of agehave responded to the google form piloted online as due to Covid norms direct method for field response wasn't possible. Most of these respondents are eitherlawyers, law students, Accountants and professionals etc.

whohave replied to this form. A few years back the movement was started by males was #Metoomentoo no one cares about this movement but a good nu male has shared their experiences in this movement.

In today's generation, everyone will talk about women being victims of sexual crimes but there is a total void when it comes to male victims of sexual offences against them. In this questionnaire piloted online, a total of 296 people have participated from different age groups. From 15-25 years 211 people i.e. 71.3percent , in 26-35 years 74 people i.e. 25percent , 36-45 years 6 people i.e. 2percent, 46-55 years people 1.4percent and 55 & above only i.e. 0.3percent 1 people have participated in this survey. People from across India like Punjab, Haryana, Chandigarh, Delhi, Kerala etc have responded to the piloted questions.

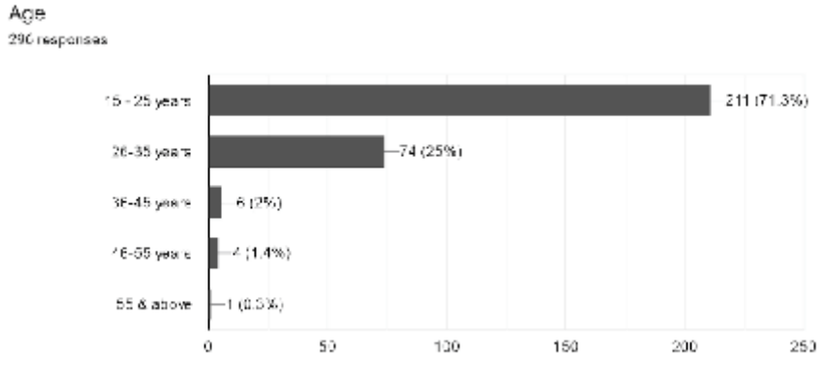



**Table No1. Age**

It was also found that mostly boys and young men were found to be vulnerable towards unwanted sexual advances as compared to grouping in age group above 25 years. For Young Boys in case of sexual assault and Gender wise division of respondents is shown below in Table No. 2

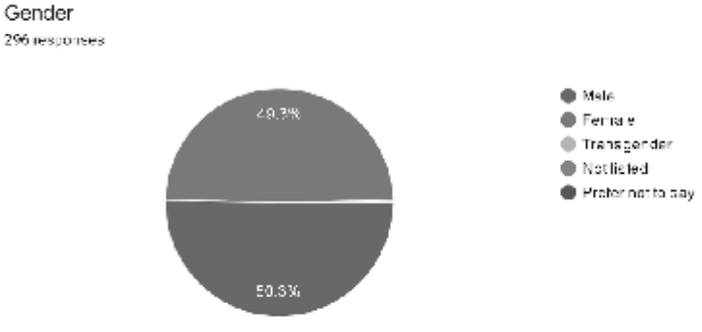







**Table No. 2 Gender**

In this survey, more than 50.3 percentof males have participated in this survey and 49.3 percent females have participated and only. one responded as transgender has participated in this survey.

In question, "what is covered under the sexual offences against men?" to know the common knowledge among various groups about their fair understanding of what they understand is taken under the umbrella of Sexual offences. Table No. 3d depicts the outcome of the response.

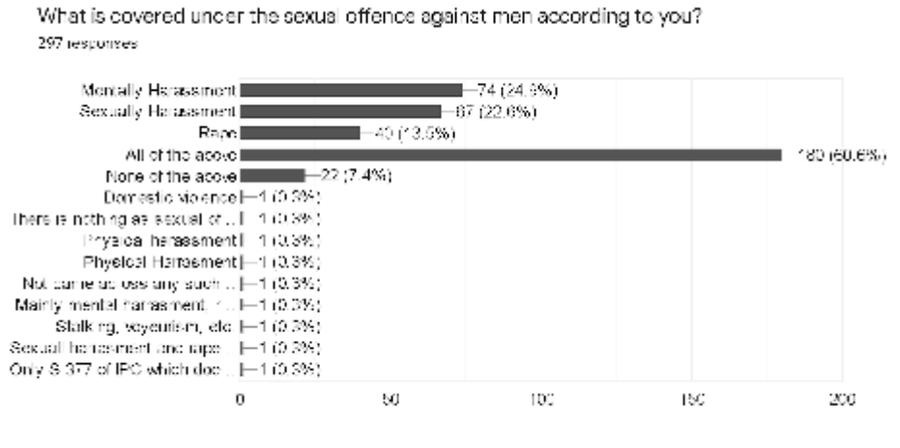



**Table No.3** Describing the term of a sexual offence against Men.

According to them, sexual offences against men include mental harassment 24.9% Sexually harassment 22.6 percent, rape 13.5percent, All of the Above 60.6% (Mentally harassment, Sexually harassment and Rape) Other than this 7.4percent of people said none of the above is part of a sexual offence against men. 1 person said there is nothing as a sexual offence against men in India. According to him, there is no term like this and men can't be sexually harassed in India. It's a myth. But some they said there are other offences also for men in India are physically Harassment, stalking and voyeurism also part of the sexual offence against men in India. Males are also vulnerable according to the circumstances and the facts of their life. Above picture no. 3 describe everything that is covered or not covered under the sexual offences against men in India. Some people even describe offences against men in India.

Because of their sexual abuse, some males who have been sexually abused are viewed as flawed and toxic. Perhaps people already believe they are imperfect and toxic before they are abused. That is what led to the abuse. Of course, neither of these beliefs is correct. However, some people still believe this.

**Sexual abuse/coercion faced by men**

Men too can experience sexual violence against them which can be perpetrated Men are sexually abused by their partner {Male or female or both MM, MF} some of the following situations can give an idea about what they may endure:

1. In a live-in-relationship, the female partner can control the man and withhold sex with him.
2. Non-consensual sex with the male partner
3. Sexual acts in order to get what she wants
4. Using Sexual flirtation against him
5. Grabbing his genitalia without his wish.

Manipulation or other tactics related to sex comes under the sex abuse which can't understand by the "Man". The response regarding a question about the sexual assault of men. The 82.4% of respondent replied yes to sexual assault of men as it is depicted as below in Table no. 4

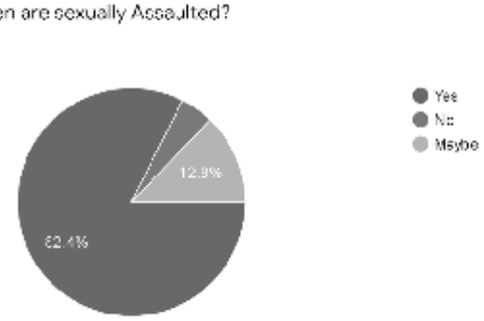



**Table no.4** Men are sexually Assualted

In this question, More than 245 people i.e. 82.4percent said Men are also sexually assaulted in their daily life but 14 people i.e. 4.7percent said there is no sexually assaulted against men in India. There is no term like this but we have to think why more than 245 people said men are also sexually assaulted but in our law there is term like assaulted and sexually assaulted but they don't cover about men. They only cover women in their definition according to our laws that offences are gender biased and women are vulnerable and all the offences are committed against them. But people's responses say even Male are also vulnerable too. 38 people i.e. 12.8 percent of people are not sure whether there is any term like men are sexually assaulted or not.





According to Indian Penal Code 1860, Section 354 [12] The IPC criminalises any act by a person that assaults or uses criminal force against a woman with the intention or knowledge that it will outrage her modesty. Such an act is punishable with either simple or rigorous imprisonment of up to 2 years, or a fine, or both.Indian courts have ruled that the essence of a woman's modesty is her sex, i.e.: a woman possesses modesty by virtue of being a woman.

**Psychology and their aspects related to Male:-**

Women can also employ psychological abuse tactics. These can be :

- Demeaning the man in their life
- Undermining the man's confidence
- Causing the man to feel isolated and dependent

These can manifest in a few ways for the man, including:

- Being socially cut off from friends and normal activities
- Calling names or intimidating
- Interfering in family relationships
- Making unfounded accusations of infidelity
- Constantly monitoring calls, texts, and social media
- Exerting financial control and manipulating or undermining behaviour — such as overspending. [13]

One study (focused on trauma in general rather than sex abuse in particular) found that survivors of chronic childhood abuse (four or more significantly traumatic experiences prior to age 18) are:

- .8 times as likely to smoke
- 1.9 times as likely to be obese

[12] *"India Code: Indian Penal Code, 1860" (India Code: Indian Penal Code, 1860, October 6, 1860) <https://www.indiacode.nic.in/handle/123456789/2263?sam_handle=123456789/1362> accessed April 19, 2022*

[13] *Smith, K. (2021, September 30). Invisible Victims: When Men Are Abused ( lori lawrenz, Ed.). Invisible Victims: When Men Are Abused. https://psychcentral.com/blog/invisible-victims-when-men-are-abused#signs-of-male-abuse*

- 2.4 times as likely to experience ongoing anxiety
- 2.5 times as likely to have panic reactions
- 3.6 times as likely to be depressed
- 3.6 times as likely to be promiscuous
- 6.6 times as likely to engage in early-life sexual intercourse
- 7.2 times as likely to become alcoholic
- 11.1 times as likely to become intravenous drug users.[14]

The criminal laws although address the vulnerability of certain groups with punishment and fine but totally ignore or have biased approach towards other gender to lives the society itself vulnerability and proven to broken because the recent various psychology have found that men and who experiences such abuse at high risk of:-

1. Abusing their own family (Domestic Violence)
2. Using Violence to saw their problems
3. Have emotional imbalance
4. Drugs and Alcohol intakes higher than usually among Male
5. Suicide Attempts
6. Trouble in learning
7. Highly Emotional
8. No socially contact in society
9. Mental Health issues
10. Seeing generally unwell
11. Traumatic Sexualisation
12. Betrayal

The response regarding stalking of any same or opposite gender?. The Responses depicted in Table no.5

[14] *Weless R, "Treating Male Survivors of Sexual Abuse | Psychology Today" (Psychology Today, June 2, 2016) https://www.psychologytoday.com/us/blog/love-and-sex-in-the-digital-age/201606/treating-male-survivors-sexual-abuse accessed April 25, 2022*





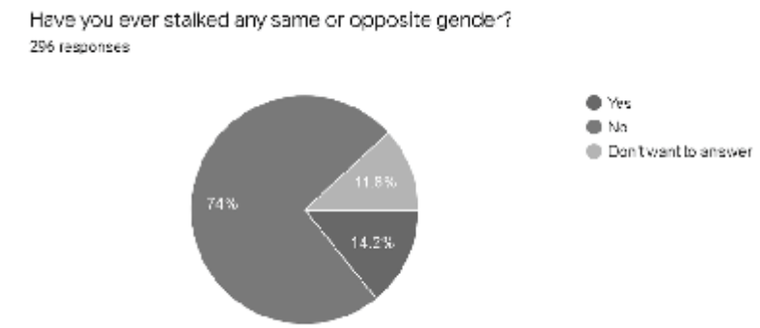



**Table No. 5** Have you ever stalked any same or Opposite gender.

Out of 296 responses 218 people responded that they haven't stalked the opposite gender, but the problem here is people are not even aware of what constitutes the offence of stalking and in what medium, as besides physical stalking there is cyber stalking. People generally don't want to accept or recognise that they too have stalked someone at least in cyberspace. But the problem with the legal notion of every offence of stalking is that the offence is extremely gender biased on face of it. The dichotomy under Section 354D in Indian Penal Code, 1860 is that it will only be the man who will be liable under law for such crime no reprieve for him for his suffering under this head of offence but. This Section [15] read as "[Any man who--

(i) Follows a woman and contacts, or attempts to contact such woman to foster personal interaction repeatedly despite a clear indication of disinterest by such woman; or

(ii) Monitors the use by a woman of the internet, email or any other form of electronic communication, commits the offence of stalking:

Provided that such conduct shall not amount to stalking if the man who pursued it proves that-

(i) It was pursued the purpose of preventing or detecting crime and the man accused of stalking had been entrusted with the responsibility of prevention and detection of crime by the State; or

[15] *"India Code: Indian Penal Code, 1860" (India Code: Indian Penal Code, 1860, October 6, 1860) <https://www.indiacode.nic.in/handle/123456789/2263?sam_handle=123456789/1362> accessed April 19, 2022*

(ii) It was pursued under any law or to comply with any condition or requirement imposed by any person under any law; or

(iii) In the particular circumstances such conduct was reasonable and justified.

(2) Whoever commits the offence of stalking shall be punished on first conviction with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine; and be punished on a second or subsequent conviction, with imprisonment of either description for a term which may extend to five years, and shall also be liable to fine.]"

43 people i.e.14.2percent responded that they have stalked the same sex or opposite gender and they have stalked them in different places like online, Malls, institutions, College, Market etc. and 35 people i.e. 11.8percent said they don't want to answer whether they stalked someone of same or opposite gender.

The response regarding whether you are a Victim of Sexual Offence or not. Respondent 209 replied to it and depicted Table no.6

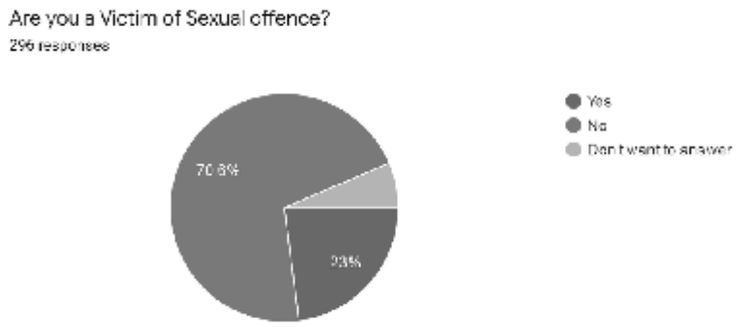



**Table No. 6** Are you a victim of a Sexual Offence.

In this question, 209 people i.e. 70.6percent said they are not victims of sexual offence but 68 people i.e. 23percent said they are victims of sexual offence and they have faced numerous things like inappropriate touching, Voyeurism, Bullying, the outrage of modesty, Body Shaming, Sexually and Mentally harassed by someone etc. And 19 people i.e. 6.4percent said they don't want to answer whether they are victims of a sexual offence or not.

Women are the main target of sexual violence but boys and men also face the same in various circumstances. Sexual violence can be conflict-based and gender-based for the male gender the stigma around masculine vulnerability, limited data and its underreporting cases are higher than reported cases. These men also include gay, bisexual or transgender women, and non-binary individuals, the heterosexual males also face the same issues as women. As it saw, it is hard for society to acknowledge that the male is a victim of rape or sexual vulnerability. Therefore, it is a stigma to think male gender as the "Victim of sexual" as a society still thinks of them as "Man". "Male dignity under Article





of Constitution of India, 1950 is to be taken as a secorcent right balancing it and mutually coexisting with Article 14 V/S Article 15(3).

The violence can be perpetrated by women towards the male who happens to be in a situation of manipulation/exploitation/vulnerability. The response regarding whether one knows about any victim of a sexual offence. The 57.8% of respondents replied to it and is depicted in Table no.7

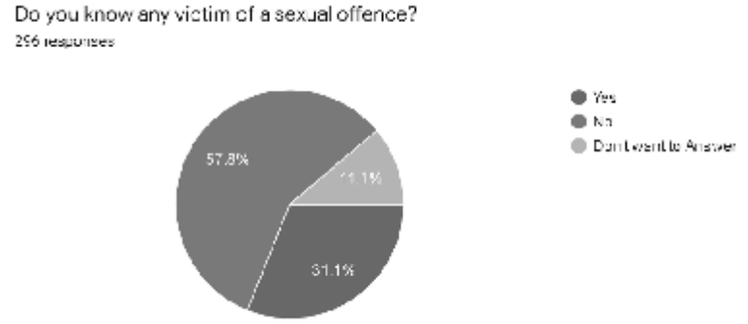



**Table no. 7** Do you know any victim of a sexual offence.

In this question, more than 57.8percent of people don't know about any victim of a sexual offence. Only 31.1percent of people said they know the victim of sexual offence and most of the people are friends, relatives, family members and strangers. And 11.1percent don't want to answer about the victim of a sexual offence.

The response to a question about whether one has shared the incident of being a victim of such a crime the response it depicted in Table no.8.

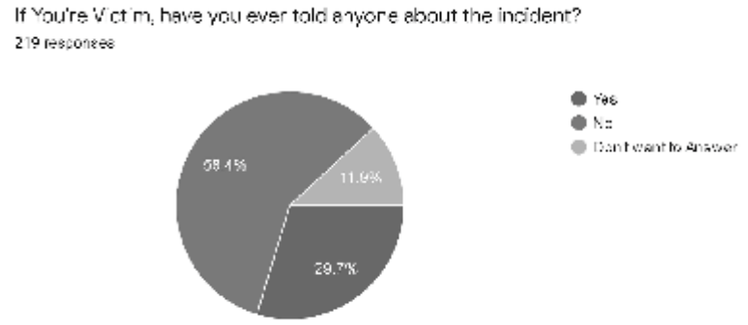


**Table No. 8** If you're the victim of any offence and you have talked about this incident to anyone.

In this survey, more than 58.4percent of people said they are not victims of any kind of sexual offence but 29.7percent of people said they are victims of sexual offence and they talked about this incident to their family members, stranger, relatives, acquaintances etc. and 11.9percent people said they don't want to talk about their incident and they don't feel comfortable to share the things with others.

As given by R.Weless (Psychology today,2016) "We tell men don't cry, don't show your emotions unless it's anger, be strong, don't ask for help, don't be vulnerable, be sexually aggressive, put work before relationships, put success before relationships. Basically we tell them that power and having power is central to being a man. [This means] it's against the rules for men to acknowledge trauma. So [as traumatized men] we spend a lot of time telling ourselves that whatever it is that happened to us wasn't painful, that we're not suffering." [16]

The response regarding have you ever been stalked by someone. The respondent 296 replied it depicted Table no.9.

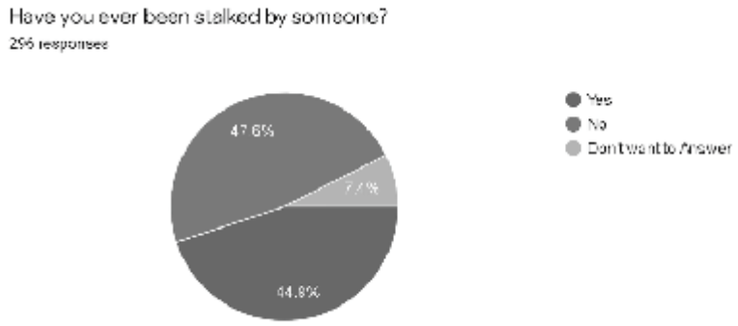



**Table no. 9** Have you ever stalked someone and if yes, where it is.

In this question, more than 44.9percent of people said they are stalked by someone in their daily life at Online, School, College, Market, etc. And 47.9percent of people said they were not stalked by anyone in their life and that it is impossible to say that maybe they never felt like that and 7.4percent of people said they don't want to answer this question.

[16] *Weless R, "Treating Male Survivors of Sexual Abuse | Psychology Today" (Psychology Today, June 2, 2016) https://www.psychologytoday.com/us/blog/love-and-sex-in-the-digital-age/201606/treating-male-survivors-sexual-abuse accessed April 25, 2022*





The response regarding whether do you considered that only girls or females can be a victim of Sexual Offence in this era. The respondent 83.8percent replied to it and depicted Table no.10.

**Table No. 10** Only girls or females can be a victim of a sexual offence and no other human being can be the victim of a sexual offence.

One of the interesting outcomes of the survey was that more than 83.8percent of people responded that girls and women are 'not' only the victims of sexual offences other but men too can be victims of the same crime related to a sexual offence. Out of this 15.5percent responded that women are generally the victims of sexual offences or more prone to the scale of vulnerability. And only a few per cent of people said they don't want to answer this question.

In response to a piloted query about whether women or girls are capable of Sexually Harassing Someone else. 86.1percent of respondent agreed that yes women too can be which is depicted in Table no.1

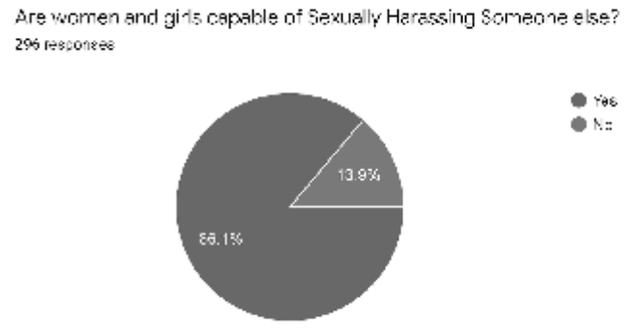



**Table No.11** whether any women and girls are capable of sexually harassing someone else ( any human being).

More than 86.1percent of people said yes Women are capable of sexually

harassing others. Out of this 13.9percent said women are not capable of harassing someone else because they are victims of sexual harassment in their life.

The response to the question of whether the laws relating to Sexual Offences in India are gender-biased or not. 86percentof the respondents agreed that the laws are gender-biased and the laws answer better towards women in situations of sexual violence as compared to male counterparts it shown in Table no.12.

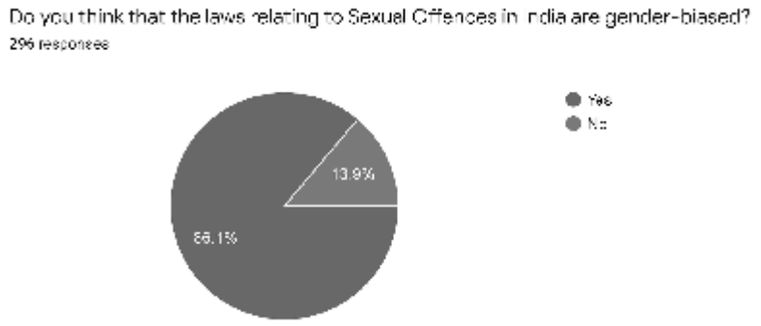



**Table No.12** Do you think that the laws relating to sexual offences in India are gender-biased.

In response to this, more than 86.1percent of people said Indian laws are gender-biased towards men in society. Most of the laws are therefore women-centric in our criminal system i.e. As we can find by bare Act reading of Section 354, 354A,354B, 354C, 354D, 375,376 and so on under Indian Penal code,1860 and also there are Special laws which to address crimes against women such as Domestic Violence Act,2005, Indecent representation of women act,1986 and so on. And in these laws there is only provision for addressing women victimhood. Although 13.9% of people responded that the Indian laws are sufficient and they are not gender biased towards society.

It will be a very odd and passive mistake to just downgrade the women centric laws on behalf that they give little advantage to women in times of victimization or violence. But, along with this the other gender male has found itself in dire and desperate of situation of sexual abuse, violence for which the redressal mechanism is either non-existence or options in it are very limited. Example- Section 377 {Unnatural offences.—whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with 1[imprisonment for life], or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine. Explanation.—Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section.}Section 377,[17] if a man forces sexual intercourse with another man, it is classified as sodomy and the rapist





may be imprisoned for it. However, if a man is raped by one or more women, it does not fall under Article 377 or any other law.

The continuous ignorance of the system towards such violence against men in putting society into/will lead to chaos. The state/legislature, executive and judiciary to answer towards such a grey area pertaining to sexual violence against a human being "Male gender."

(The common definition of gender neutrality to be taken or incorporated in Section 354,354A, 354B, 354C, 354D, 375,376 and so on under Indian Penal Code,1860)

Under Indian Penal Code, 1860, Need to clear the definition of the same when answering when regarding "HE or SHE" reading of Section. It may read the term "Man" as including Women and vice versa also when interpreting the section 354,354A, 354B, 354C, 354D, 375,376 and so on. The Section must be criminalizing, sexual violence against "Human Being"

## Legal Position in India

Boys and men are socialized to see themselves as strong, tough, and self-sufficient. Acknowledging feelings and disclosing vulnerabilities are in some ways antithetical to traditional masculine roles. Men also frequently wear thick coats of shame, having internalized the blame. When they do disclose, they are frequently met with disbelief, such as "That's impossible. A man can't be raped." Or they are met with invalidation and victim-blaming such as, "How could you let that happen?" [18]

In India there is no laws regarding for male victim only section 377 under Indian Penal Code, 1860 is there for male victim where the male predator do the sex with him get the punishment under this section but if any other gender i.e. Female or LGBTQ+ community do the same thing with man. It will not covered under the Section 377. There are no other sections and specials laws are there to protect man in India but in other countries are having their laws to protect all genders.

[17] *India Code: Indian Penal Code, 1860" (India Code: Indian Penal Code, 1860, October 6, 1860) <https://www.indiacode.nic.in/handle/123456789/2263?sam_handle=123456789/1362> accessed April 19, 2022*

[18] *E. Ellis Joan M. Cook PP, Cook, PhD JM and Ellis, PhD AE, "The Other #MeToo: Male Sexual Abuse Survivors" (Psychiatric Times, April 8, 2020) https://www.psychiatrictimes.com/view/other-me-too-male-sexual-abuse-survivors accessed April 27, 2022*

Section 66E of the Information Technology Act, 2000 talks about the private part of any person. This section is gender neutral but section 354C and 354 D inclined towards Women.

But in India the data regarding such is discrete and unattainable. Rape is not gender biased crime. It can be happened to anyone in our Indian Penal Code, 1860 (IPC, 1860) rape is defined under section 375 and the punishment is given under 376 and in these section the interpretation is "A man who can commit crime". No other human being can commit crime against any other human being. Only man can commit rape towards the female. Under the Section 377 of the Indian Penal Code 1860 unnatural sex is defined which is also used in term of sodomy. A women has non consensual forced sex against any of gender she would not be booked under the so called Rape laws of India( under section 376 of IPC, 1860). [19]

In India, male rape cases are most of the unreported because of there are not proper laws regarding this and there is no awareness among the society. Even they tried to open about the rape happened with them and then the society make fun of these things and that's the reason why men don't speak about the violence happened them. Around 77 rape cases are reported per day in India, which means in average around28,105 rape cases per year and 1, 67,000 cases reported in last 5 years. Majority of sexual assault are not reported. Government data in 2018 shows 99% cases of sexual assault are unreported. This is really shameful. These stats are those where victims are women, but what about male victims? In India sexual abuse with men is not considered as rape. Men can only be a molester not a victim, say sour society and even our laws. And thus Male rape cases in India are zero. [20]

In a cross-sectional study of gender-based violence against men in Haryana, 52.4 percent of men said they had experienced violence. Most probably, this is a low estimate since it doesn't include non-contact experiences, which can also have lasting negative effects, and these are just the 'reported' cases. [21]

Women can, of course, sexually assault men and other women. And their victims

[19] *"India Code: Indian Penal Code, 1860" (India Code: Indian Penal Code, 1860, October 6, 1860) https://www.indiacode.nic.in/handle/123456789/2263?sam_handle=123456789/1362 accessed April 19, 2022*

[20] *India Code: Indian Penal Code, 1860" (India Code: Indian Penal Code, 1860, October 6, 1860) https://www.indiacode.nic.in/handle/123456789/2263?sam_handle=123456789/1362 accessed April 19, 2022*

[21] *sanha jyoyi, "Male Rape Cases in India Are ZERO! - The Siliguri Journal" (The Siliguri Journal, December 22, 2021) https://siligurijournal.co.in/2021/12/22/male-rape-cases-in-india-are-zero/ accessed May 30, 2022*





might define their experiences, morally in terms of having been 'raped'. For example, this is the situation for men who, against their will, have been forced or compelled to have penetrative sexual intercourse with a woman. Such men have not been 'raped' by their female assailants; they have 'only' been sexually assaulted. [22]

In case of rape where there is a male victim and a male perpetrator, his perpetrator can be booked under sodomy U/S 377, which now has safeguards against non-consensual intercourse.

According to the Declaration of rights of the Man, Article 1 Men are born and remain free and equal in rights.Social distinctions may be founded only upon the general good. Article 2, The aim of all political association is the preservation of the natural and imprescriptible rights of man. These rights are liberty, property, security, and resistance to oppression. [23]

Indians can adopt the new laws and amend the existing laws for betterment of the modern society.

To overcome this sensitive issue the researchers have given some suggestions regarding the legal paradox of sexual offence against men in India are:-

- To change the laws on this issues a gender neutral effort be made and suggestions from men who have faced such issues be taken into notice in formulation of gender neutral law on sexual violence.
- Sex Education- In schools, there must be subject related to sex education. Where the child learns about the education and implements this education in future.
- Data on male victims- NCRB must publish data on male victims every year in their report so it is easy for the appropriate authority to take necessary action towards the male victim.
- Section 376 of Indian Penal Code 1860, related to punishment of rape, which is the most commonly known sexual offence, provides many

[22] *Pawar L, "I Am a Sexual Abuse Survivor. No, I Am Not a Woman" (ThePrint, April 18, 2021) <https://theprint.in/opinion/i-am-a-sexual-abuse-survivor-no-i-am-not-a-woman/641099/?amp> accessed May 31, 2022*

[23] *CMorris BL, "CAN A WOMAN RAPE A MAN? | Bastian Lloyd Morris" (CAN A WOMAN RAPE A MAN? | Bastian Lloyd Morris, February 8, 2021) https://www.blmsolicitors.co.uk/2021/02/can-a-woman-rape-a-man/ accessed June 1, 2022*

[24] *"Avalon Project - Declaration of the Rights of Man - 1789" (Avalon Project - Declaration of the Rights of Man - 1789) https://avalon.law.yale.edu/18th_century/rightsof.asp accessed June 1, 2022*

references to the word "woman". Similarly There are other Sections of IPC as well as some Special Acts which clearly put women on victim side.which are just interpreted for a particular gender. The law should be amended to the line of interpretation of such sections and should be strictlygender-neutral in its tome to punish the perpetrator of crime An alternative to this is a pronouncement of strong judgements from the judiciary where equivalent action is taken for offences against male and transgender as if the offence is committed against a woman.

- We need the 4th Wing in our federal system which is dedicated to managing law and order. The current design of "politicians legislating" is the fundamental flaw in the system. We have anarchy within a federal system which nobody wants to talk about.
- Laws which govern sexual assault, gender violence and nonconsensual sex need to be amended and made gender-neutral.
- Victimhood of men suffering from sexual violence and gender-based assault needs legal recognition so that they have remedial compensation for the same as women have.
- Laws and rules relating to Workplace sexual harassment need a strict change in interpretation of gender and its terminology.
- Recognition of male-directed sexual violence in form of law, victimhood, and support from the government.

**Conclusion:**

Masculinity often seems to be a force that tells men that their emotions are inadequate and they can't feel them. As Consentplays a vital rolem in finding the voluntariness or forcefulness of a sexual act, therefore the consent of human beings should be given importance, not its gender.

As it's a violation of one's privacy, body, mind and soul, therefore to differentiate one's pain and suffering on behalf of gender and sexual orientation is gross injustice towards human beings as well as the natural rights of a human being.

Gender sensitisation of both genders is to be taken seriously and workshops, online messages, and campaigns for such be run. As a lot of men tend to rework their sadness into anger, thus harming themselves and those around them. This is unhealthy to channel any kind of emotion therefore psychological and social helpline for such victims is the need of the hour.

As far as the current law is concerned, some relevant reforms are in urgent need of time. . The term "Women" is suggested to be changed to 'any person'. This makes the law gender-neutral and removes the indignant bias which causes suffering to various classes of rape victims, including men and transgender people. Rape laws in many countries, including many states in the United States,





have changed to be fair to changing societies.

It should also be noted that while systems do exist for female victims with male perpetrators, they are oftentimes inefficient. Thus, a lot of times they do not give victims adequate justice. Rule of law and equalitybefore the law is a balancing principle which should be implemented, imbibed and executed devoid of discrimination. Men too have a fundamental right to a dignified life and this can only be achieved when our laws address the crime in a gender-neutral way. Even 'Mard ko Bhi Dard Hota Hai' and 'Boys can also cry'. Everything seems to reinforce the notion that men can't feel hurt. But they also get from small things. 'No means No' for men.

**References :**


1. 'India's law should recognise that men can be raped too' (Centre For Civil Society)<https://ccsindia.org/indias-law-should-recognise-men-can-be-raped-too> accessed 22 April 2022
2. 'I was a victim of sexual abuse in IIT. This is my story' (Latest News Analysis, Top News Headlines, Viral Videos and News Updates) <www.dailyo.in/voices/iit-kanpursexual-abuse-ragging-iits-engineering-graduates/story/1/19654.html> accessed 13 Jan 2022
3. 'Toxic Masculinity study - sexual violence at university | The Book of Man' (The Book of Man) <https://thebookofman.com/mind/masculinity/toxic-masculinitystudy/> accessed 12 June 2022
4. Hales ST and Gannon TA, 'Understanding Sexual Aggression in UK Male University Students: An Empirical Assessment of Prevalence and Psychological Risk Factors' [2021] Sexual Abuse 107906322110516 <http://dx.doi.org/10.1177/10790632211051682> accessed 13 May 2022
5. 'Understanding Male Socialization, Stigma, and Reactions to Sexual Violence' (National Sexual Violence Resource Center) <www.nsvrc.org/working-malesurvivors-sexual-violence/Understanding> accessed 2 February 2022
6. 'Harmful masculinity and violence' (https://www.apa.org) <www.apa.org/pi/about/newsletter/2018/09/harmful-masculinity> accessed 8 June 2022
7. 'Breaking with Norms of Masculinity: Men Making Sense of Their Experience of Sexual Assault - Clinical Social Work Journal' (SpringerLink) <https://doi.org/10.1007/s10615-019-00699-y> accessed 28 November 2021

# Concept of right to health: National and International perspective

***Dr. Pankaj Dwivedi[1], Dr. Pramod Kumar [2] and Prateek Tomar [3]***
*Associate Professor, Department of Law (Atal Bihari Vajpayee School of Legal Studies), Chhatrapati Shau Ji Maharaj University, Kanpur, [1]*
*Assistant Professor, Department of Law (Atal Bihari Vajpayee School of Legal Studies), Chhatrapati Shau Ji Maharaj University, Kanpur, [2]*
*Advocate, High Court, Delhi, [3]*

**Abstract**

The concept of the right to health has evolved over time, finding its roots in international declarations and treaties. From the World Health Organization's Constitution to the International Covenant on Economic, Social and Cultural Rights, the right to health has been articulated as an essential component of human dignity. The historical trajectory of the right to health, shedding light on its conceptual development and the international legal frameworks that underpin it. Moreover, emerging global health threats, such as pandemics and infectious diseases, further underscore the need for a collective and comprehensive approach to safeguarding the right to health.

**Key words: -** *Human rights, Public health, International law, and Access to healthcare.*

## Introduction

**"Chittam Suchittam to BuddhimPrakashm"**

A Sanskrit proverb conveys the idea that wisdom flourishes in the presence of a healthy mind, emphasizing the fundamental role it plays in ensuring a high quality of life. Health emerges as a pivotal factor in driving the workforce essential for economic development. The well-being of an individual is intricately linked to various aspects of life, including the environmental surroundings, the purity of the water they utilize, and the quality of the food they consume. Conditions such as unhygienic living environments, consumption of adulterated food, exposure to unsafe drinking water, substandard sanitary conditions, and prolonged contact with pollutants, including noise pollution, can significantly impact an individual's health. Consequently, the health of an individual is not solely determined by personal choices but also by broader factors involving the state and its agencies.

The right to health can be construed as the entitlement to the highest achievable standard of both physical and mental well-being. It involves ensuring universal





access to medical care and facilities, creating living conditions conducive to maintaining good health, promoting the equitable distribution of food, and upholding the right to a safe and healthy environment and nourishment for all.

## International Aspect

The concept of the Right to Health has been underscored since well before the establishment of societal institutions or states. Even after the formation of states, the health of individuals remained a central concern for any civilized society. The organization of people into societal structures was primarily motivated by a collective interest in health and life. To comprehend the nature, content, and scope of this right, it becomes imperative to revisit international conventions, treaties, and obligations, along with other documents that establish the legal framework of the Right to Health. This exploration aims to construct a practical definition of the right, binding the parties to such agreements and providing a basis for holding them accountable. Additionally, it opens the possibility for one state to assert that another is neglecting its duties, potentially leading to sanctions.

For this process to be effective, the content of the right must be sufficiently precise to evaluate another state's conduct, and there must be a suitable forum for the assertion of claims. Subsequent sections of this paper will reveal that the current definition of the right is quite general, leaving room for incompleteness and gaps. To shed light on this matter, a significant international body, the World Health Organization (WHO), will be examined for insights. This examination will aid in identifying specific measures that can be taken to create conditions conducive to health. However, it will also reveal a lack of distinction between the core human right to health and the steps that states should take to the best of their abilities. Consequently, this section will analyze additional sources that contribute substance to the Right to Health..

## United Nations Charter

The United Nations Charter contains the seeds of sup-port of human rights, including economic, social and welfare rights. In addition to establishing the Economic and Social Council,' the Charter provides for the promotion of rights and development. Under Article 56 provides as follows:

"all Members pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55." [1]

And Article 55 provides as follows:

"With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples,

the United Nations shall promote:

a. higher standards of living, full employment, and conditions of economic and social progress and development;

b. solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; and

c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion." [2]

The Charter only commits the United Nations to promote solutions to health problems; the charter does not declare a right to health for individuals. Nonetheless, the inclusion of the reference to seeking solutions to "international... health ... problems" in the basic document of the United Nations, indicates the fundamental, deeply rooted nature of this right.

**Universal Declaration of Human Rights, 1948**

Under this declaration, Art. 25 includes right to health as part of a broader provision on right to an adequate standard living. Article 25 (1) says as follows:

"Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control." [3] Paragraph one articulates two related rights. First, is the right to a certain standard of living, that basic needs can be met. Included as basic needs are "health and well-being." Health is treated as a way to measure the extent to which the right is being met. [4] That is, the right is to a certain minimal standard of living, not to health directly. The point is that the right is not necessarily to directly receive food, clothing, shelter and medical care, but that the right can be, and typically is achieved through access to a job which pays well enough to allow the earner to acquire those things for the person's family. [5]

1 *Article 56, United Nations Charter, 1945.*
2 *Article 55, United Nations Charter, 1945.*
3 *Article 25, Universal declaration of Human Rights, 1948*





**Covenant on Social, Economic and Cultural Rights**

The most explicit right to health is under Art.12 of the covenant. Several differences (from ICCPR) may be noted once textual analysis is done. First is that unlike ICCPR where it uses words "everyone has the right", this document uses the word "States Parties to the present Covenant recognize the right of everyone". This shows that there is less "fundamentalness" in this right which depends on the variable "state's recognition" than the absolute nature of rights mentioned in ICCPR.[6] And it provides greater discretion to State in this matter. If only States Parties recognize the-right, then the claim to universality is lessened.[7] If the right exists or is enforceable only upon formal recognition by a State Party, then the right is less fundamental in some sense than a right which the treaty declares all people have regardless of what States Parties or non-parties to the convention recognize.

Further an issue which was debated during the construction of this document was whether to define the term health or not. Several drafters objected saying it is not right to put such definition in legal instrument and therefore we do not have one in the present document. The first paragraph of Article 12 recites the content of the right as "the enjoyment of the highest attainable standard of physical and mental health." [8]

So whatever the definition of health is, it will include highest attainable standard of both physical and mental well being. It implies that standard to be attained is not a minimum one but highest attainable standard. The word "attainable" implies progressive nature of obligation on part of the state. Further. Article 2 of the ESC each state agrees to "take steps ... to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by

**The Covenant on Civil and Political Rights**

It does not include a right to health, but it does include provisions which affect the right to health such as the right to life, to freedom from torture,

4 *Steven D. Jamar, International Human Right to Health, The Southern University Law Review*
5 *Jennifer Prah Ruger, Toward a Theory of Right to Health, Yale Journal of Law and Humanities.*
6 *Tony Evans, A Human Right to Health, hird World Quarterly, Vol. 23, No. 2, Global Health and Governance: HIV/AIDS (Apr., 2002), pp. 197-215.*
7 *Ibid.*
8 *Article 12, ICESCR, 1976.*

to liberty and the security of the person, to humane treatment of prisoners, to freedom of thought, conscience and religion," and to freedom to seek, receive and impart information.[9] These rights help everyone attain health or enjoy the right to health, but the right to health is not contained within or bound by these rights. The right to health, if it is to have meaning apart from these rights and other social and economic rights, must have some discrete domain. Certainly there can be overlap; indeed, the overlap is unavoidable.[10] A condition which leads to health is one which provides freedom from anti-health such as torture, and freedom of conscience is related to mental health. But there must remain some special aspect of health which is cognizable as a right distinct from the rest.

**Other Sources**

The first instrument to define health as right was **WHO (World Health Organization), 1946.** Striking is the absolute and broad definition that this provision contains: the provision includes not only physical but also mental and social well being. It defines health as a state of complete physical, mental and social well being and not merely absence of disease. Furthermore, it recognizes health as an individual human right. In relation to this it refers to the connection between health problems and unequal development in different countries, to the importance of the healthy development of the child, and to the importance of informed opinion and active cooperation on the part of the public.[11]

**Article 12** of **CEDAW** aims at providing women with additional protection and focuses primarily on access to health care for women.[12] And **Article 24** of **CRC** covers the broader right of children to health; the article refers not only to health care facilities but also to adequate food, drinking water and prohibition of harmful traditional practices. [13]

Many other treaties and declarations focuses on equal access to medical services. The first one is **the International Convention on protection of the rights of all migrant workers and members of their families, 1990** emphasizes on equal access to medical care for migrant workers. Second, **Convention on Elimination of All Forms of Racial Discrimination** prohibits

[9] *Steven D. Jamar, International Human Right to Health, The Southern University Law Review Fall, 1994, available at www.heinonline.com.*
[10] *Ibid.*
[11] *Brigit Toebes, Right to Health and Health care, Encyclopedia to Human Rights*
[12] *Supra 12.*
[13] *Article 24, Convention on Rights of Child, 1989.*





state parties and directs them to eliminate racial discrimination in the enjoyment of public health, medical care, social security and social services[14]. The conventions of International Labor Organization contain numerous references to a specific area of health i.e. occupational health. And **Article 25** of **ILO** explicitly recognizes right of indigenous and tribal people to health.[15]

**Regional Treaties:**

**The European Social Charter adopted in 1965** contains a right to the protection of health in its **Article 11**. It tries to bring the responsibility of governments into perspective by referring to the individual responsibility in matters of health and to cooperation with public and private organizations. The text does not refer to child health, occupational health and environmental health.[16]

**The Charter of Fundamental Rights of the E.U adopted in 2000** contains in its **Article 35** a provision on health care. It recognizes the right of access to preventive health care and the right to benefit from medical treatment, albeit under the conditions established by national laws and practices. This provision is also relevant for the EU bodies because it mandates that a high level of human health protection be ensured in the definition and implementation of all EU policies and activities. Therefore, should the charter enter into force, the Right to Health would bind both state parties and EU bodies.[17]

**Article 11** of the **American Declaration of the Rights and Duties of Man** contains a general provision resembling that of Art.25of UDHR. And in **Additional Protocol to the American Convention on Human Rights** contains a set of economic, social and cultural rights including rights to health[18] and a Right to Healthy Environment.[19] These provisions have clear undertakings of state.

The **African Charter on Human and People's Rights, 1981**, includes right to health in **Art. 16** but does not have state undertakings [20]. And special mention goes to **Universal Islamic Declaration of Human Rights**, adopted by Islamic

[14] *Brigit Toebes, Right to Health and Health care, Encyclopedia to Human Rights.*
[15] *Tom H Christoffel,The Right to Health Protection, available at www.heinonline.com.*
[16] *Steven D. Jamar, International Human Right to Health, The Southern University Law Review Fall, 1994, available at www.heinonline.com.*
[17] *Supra 17.*
[18] *Article. 10*
[19] *Article.11*
[20] *Aart Hendricks, The right to Health, available at www.heinonline.com.*

Council in **1981** which includes right to medical care as part of right to social security. But Arab charter on Human Rights does not have a reference to Health Rights.

It has also been seen by the scholar that right to health find mention in constitution of various countries, for example India's Directive Principle of State Policy provides state duty to improve health [21] whereas in some countries it get direct or indirect recognition.

## Constitutional Interpretation of Right to Health

Life without good health would be like a food packet without food inside it. That means of no use. Right to life in itself means right to good health. Right to life has been expressly secured by Constitution of India at the time of incorporation since then it has undergone vital changes. Extent of Right to life has been expended by vigorous judicial interventions. Nowadays its scope include right to housing,[22] medical treatment,[23] electricity [24] pollution free environment and water protection from public smoking etc.

In India, the right to health care[25] and protection has been recognized since early times. India is a founding member of UN, and has ratified various International Conventions promising to secure health care rights of individuals in society. In this context Art 51 of the constitution of India provides for fostering respect to international law.[26] The preamble in opening of the constitution strives to promote health care in sociological patterns. Later various articles of Constitution directly indirectly give place to health right of subjects.

### Right to Health as understood under Directive Principles of State Policies (DPSP):

Part IV of the Indian Constitution deals with certain principles known as Directive Principles of State Policy. Although the Directive Principles are asserted to be,, fundamental in the governance of the country , they are not

[21] *Eleanor D. Kinney, International Human Right to Health: What does it mean to our nation and world?, Indiana Law Review, 2001.*
[22] *Chameli Singh vs State Of U.P, 1996 (2) SCC 449.*
[23] *Paschim Banga Khet Mazdoorsamity ... vs State Of West Bengal & Anr, 1996 SCC (4) 37.*
[24] *Molay Kumar Acharya vs Electricity Distribution Company & Ors. AIR 2008 Cal 47.*
[25] *Dr. B. L. Wadhera v. Union of India, AIR 1996 SC 2969.*
[26] *Murli S. Deora vs Union Of India And Ors, (2001) 8 SCC 765.*
[27] *The meaning of word health are defined in Oxford Dictionary that 'soundness of body or mind, that condition in which its functions are duly and efficiently discharged'.*
[28] *Article 1 chaap do..*





legally enforceable. They are guidelines for creating a social order characterized by social, economic, and political justice, liberty, equality, and fraternity as enunciated in the Preamble.[27] These principles are fundamental in the governance of the country and the State is under the duty to apply these principles while exercising its law making power. The following directives are of relevance perspective of Right to Health.

**1. Article 39** [28] **Certain principles of policy to be followed by the State:** This Article secures health and strength of the workers, men and women. It also mandates that children be given the opportunities and facilities to develop in a healthy manner and in condition of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment.[29] It is true to say that Article 39 (e) and (f) indicates that the Constitution makers were rather anxious to protect and safeguard the interests and welfare of workers and children. It enunciates that the working class is important in nation building and therefore state government shall provide protection to their health.

In **Lakshami Kant Pandey v. Union of India**,[30] Bhagawati, J. while delivering the opinion of the court observed that:

"It is obvious that in civilized society the importance of child welfare cannot be over emphasized because the welfare of the entire community, its growth and development depends upon the health and well being of its children. Children are a ,,supremely important national asset and the future well being of the nation depends on how its children grow and develop."

Further, In **Sheela Barse v. Union of India**,[31] Supreme Court has held that "A child is a national asset and therefore, it is the duty of the State to look after the child with a view to ensuring full development of its Personality."

Clause (f) was modified by the Constitution 42nd Amendment Act, 1976 with a view to emphasizing the constructive role of the State with regard to children.[32]

**2. Article 42** [33] **: Provision for just and humane conditions of work and maternity relief:**

This Article necessitates that the State shall make provision for securing just and

[29] *Sood, Deepika, "Indian Perspective of Right to Health", available at http://www.legalindia.in/indian-perspective-of-right-to-health*
[30] *Article 39: Certain Principles of Policy to be Followed by the State: The State shall, in particular, direct its policy towards securing*
[31] *Article 39 (e) and (f)*
[32] *AIR 1984 SC 469*
[33] *AIR 1986 SC 1786: (1986) 3 SCC 596*
[34] *Pandey, Dr. J. N., "Constitutional law of India", Central Law Agency, Allahabad, 44th Ed. 2007, p. 380*

humane conditions of work and maternity relief.[34] In **U.P.S.C. Board v. Harishankar**,[35] Supreme Court has held that Article 42 provides the basis of the larger body of labor law in India. Further referring to Article 42 and 43, the Supreme Court has emphasized that the Constitution expresses a deep concern for the welfare of the workers. The Court may not enforce the Directive Principles as such, but they must interpret law so as to further and not hinder the goal set out in the Directive Principles. In **Bandhua Mukti Morcha v. Union of India,**[36] Bhagwati, J. observed:

"This right to live with human dignity enshrined in Article 21 derives its life breath from the Directive Principles of State Policy and Particularly clauses (e) and (f) of Article 39 and Article 41 and 42. Since the Directive Principles of State Policy are not enforceable in a Court of law, it may not be possible to compel the State through judicial process to make provision by statutory enactment or executive fiat for ensuring these basic essentials which go on to ensure a life of human dignity."

In **P Sivaswamy v. State of Andhra Pradesh**,[37] the Supreme Court has held that Article 42 of the Constitution makes it the obligation of the State to make provisions for securing just and humane conditions of work. There are several Articles in Part IV of the Constitution which indicate that it is the State's obligation to create a social atmosphere befitting human dignity for citizens to live in.

The gist of Article 42 is that it stands as the basis of the body of labor law and welfare of the workers. The Court must interpret law to achieve the goals set out in the DPSP.

**3. Article 47:**[38] **Duty of the State to raise the level of nutrition and the standard of living and to improve public health:** Article 47 enumerates that the State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties and, in particular, the State shall endeavour to bring about prohibition of the consumption except for medical purposes of intoxicating drinks and of drugs which are injurious to health.[39]

Art 47 is helpful for imposing stringent conditions on liquor trade with reference to Article 19(6). In **Vincent Panikurlangara v. Union of India**[40] the Court stated that "maintenance and improvement of public health have to rank high as these are indispensable to the very physical existence of the community and on the betterment of these depends, the building of the society of which the Constitution makers envisaged. Attending to public health, in our opinion, therefore is of high priority perhaps the one at the top".

The Supreme Court while interpreting Article 47 has rightly stated that public health is to be protected for the betterment of the society. Further it has been held that, in this welfare era raising the level of nutrition and improvement in standard of living of the people are primary duties of the State.

**4. Article 48-A:**[41] **Protection and improvement of environment and safeguarding of forests and wildlife:** Article 48-A requires that, the State shall endeavour to protect and improve the environment and to safeguard the forests and wildlife of the country.[42]

This article was inserted by the 42nd amendment Act 1976. It obligates the State to endeavour to protect and improve the environment and to safeguard the forest and wildlife of the country. In **M.C. Mehta V. Union of India**,[43] it was held that, "Art 39 (a), 47 and 48-A by themselves and collectively cast a duty on the State to secure the health of the people, improve public health and protect and improve the environment"

**Article 51- A:**[44] **Fundamental duties:** It shall be the duty of every citizen of India- (g) To protect and improve the natural environment including forests, lakes, rivers and wild life, and to have compassion for living creatures.

---

35 *Article 42. Provision for Just and Humane Conditions of Work and Maternity Relief: The State shall make provision for securing just and humane conditions of work and for maternity relief.*

36 *Jain, Prof. M. P., "Indian Constitutional law", Lexis Nexis Butterworths Wadhwa, Nagpur, 6th Ed. 2010, p. 1383*

37 *AIR 1979 SC 65: (1978) 4 SC 16*

38 *AIR 1984 SC 802*

39 *AIR 1988 SC 1863*

40 *Article 47: Duty of the State to Raise the Level of Nutrition and the Standard of Living and to Improve Public Health: The State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties and, in particular, the State shall endeavour to bring about prohibition of the consumption except for medicinal purposes of intoxicating drinks and of drugs which are injurious to health.*

41 *Bakshi, P. M., "The Constitution of India", Universal Law Publishing Co. Pvt. Ltd., New Delhi, 9th Ed, 2009, p. 90*

42 *AIR 1987 SC 990: (1987) 2 SCC 165*

43 *Article 48A. Protection and Improvement of Environment and Safeguarding of Forests and Wild Life: The State shall endeavor to protect and improve the environment and to safeguard the forests and wild life of the country.*

44 *Seervai, H. M., "Constitutional Law of India", 4th Edition, Universal Law Publication, New Delhi, 2006*

45 *JT 2002 (3) SC 527*

46 *Article 51A. Fundamental Duties: It shall be the duty of every citizen of India (a) to abide by the Constitution and respect its ideals and institutions, the national Flag and the National Anthem;*
*(b) to cherish and follow the noble ideals which inspired our national struggle for freedom;*
*(c) to uphold and protect the sovereignty, unity and integrity of India;*
*(d) to defend the country and render national service when called upon to do so;*

It shows that every citizen is under the fundamental duty to protect and improve natural environment since it is closely related to public health.

**Right to Health under Fundamental Rights:**

Part III of the Indian Constitution deals with fundamental rights. The fundamental rights are not absolute; they are subject to reasonable restrictions. The prime function of the Supreme Court is to interpret the law. The Constitution of India has not included right to health i. e. right to enjoy the highest attainable standard of physical and mental health under a specific provision. But it is the Indian judiciary who treat right to health an integral part of right to life which is fundamental for all human beings under Article 21 of the Constitution. The Supreme Court has given recognition to right to health vide different techniques of interpretation. "The government is under Constitutional obligation to provide health facilities." [45]

**1. Article 19 (1) (g) & (6):** According to Article 19 (1) (g) all citizens shall have the right to practice any profession, or carry on any occupation, trade or business subject to restrictions imposed in the interest of general public under clause (6) of Article 19.

*(e) to promote harmony and the spirit of common brotherhood amongst all the people of India transcending religious, linguistic and regional or sectional diversities; to renounce practices derogatory to the dignity of women;*
*(f) to value and preserve the rich heritage of our composite culture;*
*(g) to protect and improve the natural environment including forests, lakes, rivers and wild life, and to have compassion for living creatures;*
*(h) to develop the scientific temper, humanism and the spirit of inquiry and reform;*
*(i) to safeguard public property and to abjure violence;*
*(j) to strive towards excellence in all spheres of individual and collective activity so that the nation constantly rises to higher levels of endeavor and achievement.*

47 *State of Punjab v. Mahinder Singh Chawla AIR 1997 SC 1225*

48 *Article 19. Protection of Certain Rights Regarding Freedom of Speech etc:*
*(1) All citizens shall have the right (g) to practise any profession, or to carry on any occupation, trade or business……*

49 *(6) Nothing in sub clause (g) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the general public, reasonable restrictions on the exercise of the right conferred by the said sub clause, and, in particular, nothing in the said sub clause shall affect the operation of any existing law in so far as it relates to, or prevent the State from making any law relating to, (i) the professional or technical qualifications necessary for practising any profession or carrying on any occupation, trade or business, or (ii) the carrying on by the State, or by a corporation owned or controlled by the State, of any trade, business, industry or service, whether to the exclusion, complete or partial, of citizens or otherwise.*





In **Municipal Corporation v. Jan Mohammed**,[46] the Court held that the expression in the interest of the general public in clause (6) of Article 19 is of wide import comprehending public order, public health, public security , morals, economic welfare of the community and the objects mentioned in Part IV of the Constitution.

Further, In Burrabazar **Fire Works Dealers Association and Others v. Commissioner of Police, Calcutta**,[47] the Supreme Court has held that Article 19 (1) (g) does not guarantee the freedom which takes away that community's safety, health and peace.

It can be said that the reasonable restrictions as imposed on the freedoms are in wide in sense that Court has the power to interpret the same in the interest of general public. One must therefore consider Public health as pertinent while enjoying the freedoms under the Constitution. Also in recent times on many occasions the Supreme Court has highlighted the significance of public health while delivering many judgments.

**2. Article 21:**[48] **Protection of Life and Personal Liberty:** The multi-dimensional view of Article 21 is an important development in Indian Constitutional jurisprudence. The Supreme Court has come to impose positive obligations upon the State to take steps for ensuring for the individual a better enjoyment of his life and dignity under its comprehensive interpretation of Article 21. The right to health as extended under Article 21 relates with maintenance and improvement of public health, improvement of the environment etc.

The Supreme Court in **C.E.R.C. V. Union of India**,[49] held that right to health, medical aid to protect the health and vigour of a worker while in service or post-retirement is a fundamental right under Article 21. In this case J. K. Ramaswami in his minority judgment referred to Article 25(2) of the Universal Declaration of Human Rights, Article 7(b) of the International Covenant on Economic,

50 *AIR 1986 SC 1205: (1986) 3 SCC 20*

51 *AIR 1998 Cal. 121*

52 *Article 21. Protection of life and personal liberty: No person shall be deprived of his life or personal liberty except according to procedure established by law.*

53 *AIR 1995 SC 922*

Social and Cultural Rights, and Art 39(e) of the Constitution of India and held that Right to health and medical care is fundamental right. One other issue relating to medical care and health arose in **Mr. X. V. Hospital Z**,[50] in which the question before the court was can a doctor disclose to the would be wife (with whom the marriage is contracted) of a person that he is HIV positive or does it violate the right to privacy of the person concerned. The court answered both questions in negative. Further, the Court stated that the lady proposing to marry such a person is also entitled to all human rights which are available to any human being. Therefore it includes the right to be told that a person, with whom she was proposed to be married, was the victim of a deadly disease which is communicable. The Supreme Court in this instance gave primacy to the Right to Health over right to privacy.

In **Parmanand Katara v. Union of India**,[51] the Supreme Court has considered a very serious problem existing in medico-legal field such as cases of accident in which the doctors usually refuse to give immediate medical aid to the victim till, legal formalities are completed. In some cases the injured die for want for medical aid pending the completion of legal formalities. The Court stated that preservation of health is of paramount importance. Once life is lost it cannot be restored. Hence, it is the duty of doctors to preserve life without any kind of discrimination.

Similar was stand in case of **Consumer Education and Research Centre v. Union of India and ors**.[52] In which it was held that 'right to health and medical care is a fundamental right under article 21 read with articles 39©, 41 and 43 of the Constitution." Hon'ble Supreme Court expounded the nature and scope of the right to life under Article 21 and held that the right to health care and medical facilities is an integral aspect of right to life. The right to health, medical aid to protect the health and vigor a worker while in service or post retirement is a fundamental right under Article 21, r/w Art. 39(e), 41, 42, 43 all related to fundamental human right to make the life of the workmen meaningful and purposeful with dignity of person.

[54] *AIR 2003 SC 664*
[55] *AIR 1989 SC 2039*
[56] *AIR 1995 SC 636*
[57] *1996 (4) SCC 37*
[58] *AIR 1998 SC 1703*





In **Paschim Banga Khet Mazoor Samity v. State of W.B.**,[53] the Court ruled that under welfare State policy, the primary duty of the government is to provide adequate medical facilities for its people. The Govt. discharges this application by running hospitals and health centres to provide medical care to those who need it. In **State of Punjab v. Ram Lubhaya Bagga**,[54] the Supreme Court has recognized that provisions of health facilities cannot be unlimited. No country has unlimited resources to spend on any of its projects. The Supreme Court held that state could neither urge nor say that it has no obligation to provide medical facility. This opinion was later approved in N. D. Jayal v. Union of India and Confedration of ex-servicemen v. Union of India. [55]

The above judgments are the extended view of Article 21 through which Supreme Court held that 'Right to Health' is one of the fundamental rights. It is the liberal interpretation of the Article 21 that 'Right to Life' means something more than mere survival and mere existence.

3. **Article 25** [56] **and Article 26** [57]**: Freedom to Professor Practice Religion and Freedom to manage Religious Affairs:** Article 25 guarantees to every person and not citizen of India the right to profess and practice religion and Article 26 gives special protection to religious denominations. Both can be enjoyed by any person subject to public order, morality and health and other provisions of the respective part of the Constitution. The person has the right to enjoy these freedoms but it should not adversely affect the right of others including that of not being disturbed in their activities. [58]

[59] *(2004) 9 SCC 362*
[60] *(2006) 8 SCC 399*
[61] *Article 25. Freedom of Conscience and Free Profession, Practice and Propagation of Religion:*
*(1) Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practice and propagate religion*
*(2) Nothing in this article shall affect the operation of any existing law or prevent the State from making any law*
*(a) regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice;*
*(b) providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus.*
[62] *Explanation I The wearing and carrying of kirpans shall be deemed to be included in the profession of the Sikh religion Explanation II In sub clause (b) of clause reference to Hindus shall be construed as including a reference to persons professing the Sikh, Jaina or Buddhist religion, and the reference to Hindu religious institutions shall be construed accordingly.*
[63] *Article 26. Freedom to Manage Religious Affairs: Subject to public order, morality and health, every religious denomination or any section thereof shall have the right*
*(a) to establish and maintain institutions for religious and charitable purposes;*
*(b) to manage its own affairs in matters of religion;*
*(c) to own and acquire movable and immovable property; and*
*(d) to administer such property in accordance with law.*
[64] *Church of God in India v. K. K. R. Majestic Colony Welfare Association, (2000) 7 SCC 282.*

Besides Constitution a number of laws have been enacted to protect the health interest of people. These include: the Indian Penal Code 1860, the Fatal Accidents Act 1855, the Indian medical Degrees Act 1916,Dangeros Drugs Act 1930, the Drugs and Cosmetics Act 1940, the Dentist Act 1948, Drugs (Control) Act 1950, Pharmacy council of India Regulations 1952, Prevention of Food Adulteration Act 1954, Drugs and Magic Remedies (Objectionable Advertisements) Act 1954, the Indian medical Council Rules 1957, the Medical Termination of pregnancy Act 1975, the Dentist Code of Ethics and Regulations 1976, the Consumer protection Act 1986.

## Conclusion

In conclusion, the right to health stands as a cornerstone of human rights, reflecting the understanding that health is intrinsic to human dignity and well-being. Rooted in international agreements and declarations, this right carries both historical significance and contemporary relevance. However, the realization of the right to health is far from universal, as challenges ranging from socioeconomic disparities to inadequate healthcare infrastructure persist globally. Addressing these challenges requires a comprehensive and collaborative approach. Governments, non-governmental organizations, and the international community must work together to eliminate barriers to healthcare access and promote health equity. The right to health is interconnected with other human rights, emphasizing the indivisibility of rights in the pursuit of holistic well-being. Furthermore, the ongoing global health challenges, such as pandemics and infectious diseases, highlight the urgency of prioritizing and safeguarding the right to health. A resilient healthcare system, informed by principles of inclusivity and non-discrimination, is crucial for responding to emerging threats and ensuring the health and dignity of all individuals. In navigating the complex landscape of the right to health, it is essential to consider the broader implications and interdependencies with socio-economic factors. A rights-based approach to health policy and governance can contribute to the achievement of universal health coverage, fostering a world where everyone has the opportunity to attain the highest standard of physical and mental health.

## References:


1. Article. 10
2. Article.11
3. Aart Hendricks, The right to Health, available at www.heinonline.com.
4. Eleanor D. Kinney, International Human Right to Health: What does it mean to our nation and world?, Indiana Law Review, 2001.
5. Chameli Singh vs State Of U.P, 1996 (2) SCC 449.
6. Paschim Banga Khet Mazdoorsamity ... vs State Of West Bengal & Anr, 1996 SCC (4) 37.
7. Molay Kumar Acharya vs Electricity Distribution Company & Ors. AIR 2008 Cal 47.
8. Dr. B. L. Wadhera v. Union of India, AIR 1996 SC 2969.
9. Murli S. Deora vs Union Of India And Ors, (2001) 8 SCC 765.
10. The meaning of word health are defined in Oxford Dictionary that ‘soundness of body or mind, that condition in which its functions are duly and efficiently discharged’.
11. Brigit Toebes, Right to Health and Health care, Encyclopedia to Human Rights.
12. Tom H Christoffel,The Right to Health Protection, available at www.heinonline.com.
13. Steven D. Jamar, International Human Right to Health, The Southern University Law Review Fall, 1994, available at www.heinonline.com.
14. Article.11




*Concept of right to health: National and International perspective*

# One Nation One Election: The need of hour

***Prof. (Dr.) Rashmi Khorana Nagpal*** [1]***, Shubham Sharma*** [2]
*Additional Director, Dean, Law School, Delhi Metropolitan Education, GGSIPU,* [1]
*Research Scholar, School of Law and Constitutional Studies, SIET,* [2]

**Abstract**

"Say of the Individuals" in nation's decision-making is guaranteed by a democracy. India, being the torch-bearer of world's democracy with efficacious electoral management system and structured elections works on the principle of the adult franchise. The onus of free and fair elections at Union, regional and local level rests on Election Commission of India. The continuous debates for simultaneous elections need stringent actions. One Nation One elections attracts positives outcome of saving of public money and continuous working of governmental machinery. The challenges and constitutional reforms need a quick redressal for effective implementation of concept in electoral framework. The present paper discusses the federal structure of India along with benefits and basics of simultaneous election in a great detail.

**Key words: -** *Elections, Federalism, ECI, Constitution, ONOE.*

## Introduction

The growing population, diversity in people and changing modern politics has boosted the concept of democracy in the world. A democracy ensures "say of individuals" in decision making process of country. It promises good governance as per the needs and requirements of large mass of the population. A direct form of democracy involves citizens of the country directly while an indirect form of democracy gives power to people to choose their representatives for making rules, regulations and legislations. The concept of democracy is said to have originated in Greek during 507-508 BC. Democracy makes society equal through uniform participation by all the strata of society. Democracy of any nation is largely influenced by its political history, freedom struggle, traditions, culture, linguistic diversity, and civic education. It works on the majority rule where the political party with maximum votes share lead the nation as per the expectations and hopes of people at large. A democratic society conducts periodical elections in a competitive manner with fairness and transparency. Democracy makes human values and fundamental rights visible in





society. Democracy is regarded as the only means that give voice to the last man standing to hold an opinion in law making process. Democracy is a continues flexible process that opposes an autocratic rule by giving utmost power to the citizens of country. Democracy makes the elected government serve with zeal for retaining the power in future course of election. The change of power is an intrinsic feature of democracy that adds an accountability factor to the governmental machinery to perform with efficiency, effectiveness, and efficacy. A healthy democracy fills the office of president/ prime minister by a popular leader with a strong vision to uplift the country.

The present-day democratic system is not only limited to power-sharing but is seen as a major contributor in the development of a nation. It lays down a strong present and future of any nation. A healthy democracy leads to a stronger economy and better infrastructure in a country. Democracy even impacts the bureaucratic system leading to easy decision making and their quick implementation. In addition to economy and bureaucracy, another factor that holds a direct nexus with democracy is the freedom of press. A democratic form of government allows freedom to speech and expression in country. This freedom is practiced for keeping a check and balance on government through healthy criticism and dissent of governmental actions. Lastly democracy is seen as the biggest source of establishment of rule of law in the country. It gives law the supreme authority by directing law makers to protect and promote citizen's civil rights. At the global level, democracy promises cordial relations between nations. Thus, democracy of 21st century is a multi- dimensional concept that shape the nation in a progressive way leading to a just society.

## 1. India's Stand on Democracy

India being the pioneer of democracy in world holds periodical election on the basis of universal adult franchise where all individual above eighteen years of age cast their vote and participate in electoral process. The constitution of India enshrines country as a sovereign democratic republic. Inspired by the freedom struggles, the founding fathers of constitution were very much clear in creating India a truly democratic state by authorizing the citizens of country to participate and contest elections. Democracy is preached in India through a parliamentary system with Prime Minister and Council of Ministers aiding and advising the President of country who is the ceremonial head of state. India's democratic structure is highly influenced by the British Westminster's system, with legislative actions being performed by the parliament of country divided into two houses, the Lok Sabha and Rajya Sabha. The federal principle of Indian Constitution establishes a strong center-state relation for efficacious implantation of welfare policies in a country with diverse language, religion and casts. The regional machinery consists of legislative assemblies, legislative council, panchayat, and municipalities to carry out the welfare of people at large. This multi- government structure functions in a synchronized manner for achieving the common good. Political equality and justice form the core values

of Indian democracy with equal voting rights being shared by different sects of people. The political sovereignty rests in the citizens of country for choosing the best representatives who holds an accountability to the people for the work undertaken and delivered during their tenure of service. The Indian democracy is seen as liberal democracy with rule of law giving freedom of preference to people and promoting healthy electoral spirit. India for maintaining its democratic status work round the clock on people's wisdom for marking their successful say in the governance process. Recent democratic innovations through political awareness, educated voters, social media campaigns and active youth participation has made India' democracy better spirited. Today democracy promises strong independent institutions and social equality among marginalized sections of society.

## 2. Elections In India

A vibrant, growing, and active electoral system is hallmark of India's shining democratic arrangement. Election legitimizes democracy in the country. They are source of power-shift from one individual to another or from one political party to a new party. Democracy exists over Indian soil because of continues, transparent and free elections. The election commission holds the complete responsibility of conduct of elections in India. The commission works as an independent autonomous body to oversee the complete working of the electoral process. The election at each level is conducted through use of electronic voting machine and VVPAT for a productive elections. The nation follows first past the post system of elections through which each party gaining majority mark either solely or through coalition forms the government at national, regional level and local level. A series of democratic practices, regulations, guidelines, provisions, and dozens of workforce of ECI makes elections a great success.

### 3.1 General Elections in India

The general elections are the biggest elections in the country. These elections make way for political stability by choosing a steady Prime Minister and council of ministers. The exercise of general elections covers all 28 states and 9 union territories by choosing a total of 552 candidates for the lower house. The basic document that establishes and governs the working of lower house is the Constitution of India. Further The Representation of People's Act provides for legal framework for smooth conduct of Lok- Sabha polls by giving provisions as to qualification of candidates, preparation of electoral rolls, electoral offences and disputes in matter of elections. The country got its debut Lok Sabha in April 1952 with the first successful General Elections concluding in a timeframe of hundred and fifty days. The Indian National Congress (INC) stormed into power





in the first Lok Sabha elections with 245 seats in its kitty[1] The nation gave five consecutive chances to congress to control government with clear and loud support. To date the nation has witnessed seventeen Lok- Sabha elections. The period of 1970's witnessed the emergence of coalition and non- congress dominant government in country with Shri Morarji Desai swearing as prime minister in 1977. The period of 1980's and early 1990's saw sudden shift in transfer of power with short-term governments lead by Shri Charan Singh, Shri VP Singh, Shri Chandra Shekhar and Shri H.D Deva Gowda. The thirteenth Lok Sabha made Shri Atal Bihari Vajpayee of BJP the first non-congress Prime Minister to complete a full steady term of five years. The current government of National Democratic Alliance under the leadership of PM Modi assumed power in 2013 and holds presently 350 members in the lower house.

### 3.2 Elections to The Office of President And Vice-President

The constitution through part V creates the position of President and Vice-President and describes the manner of election to the positions. The President and Vice- President are not directly chosen by the citizens of country but are elected by the way of an electoral college through the means of secret ballot consisting of elected representatives of parliament, and state assembly for president and only the representatives of parliament for vice-president. To add in this, The President and Vice-President Election Act 1952 and President and Vice-President Election Rules 1974 are the supplementary provisions that give insight regarding process of nomination, counting of votes, participation of voters and offences attached to elections of President and Vice-President of country. The President of India is the first citizen of country while the vice president is the second in command to the president. The office of President and Vice-President are the apex portfolios that regulation the working of country. Till date India has witnessed fifteen President and fourteen Vice-Presidents so far.

### 3.3 State Politics in India

The federal structure of India makes state elections an important aspect for decentralization of power and representation of regional interests. The biggest advantage of state elections is advocacy of state-specific matters and policy implementation of state needs. The initial years of independence saw the formation of a series of interim governments and linguistic states. The real face of state politics came in 1980 with Telugu Desam party, a regional party from

[1] *History of Lok Sabha Elections available athttp://www.smetimes.in/smetimes/general-elections-2009/miscellaneous/2009/Mar/23/history-of-lok-sabha-elections5584.html/ (Last Visited on July 28, 2023)*

the state of Andhra Pradesh emerging as main opponent at union level. The regional politics impact the upper house (Rajya Sabha) with representatives from different states of different regional political parties raising local issues and agendas of state at the central level. These regional parties further add competition to national parties in states by giving a strong alternative to people to go beyond traditional national parties for better governance in specific states. For recognition of any party as state party, the party shall secure: - 1) at least 6% votes is state assembly or shall have two representatives in assembly or 2) at least 6% votes in LS polls or shall have one representative in lower house. At present fourteen Indian states have chief ministers from state recognized parties governing the government.

## 3. Politcal Parties in India

The political parties are an inseparable part of India's democratic electoral system. These parties field candidates for effective exercise of elections. Different political parties with unique symbols hold different ideologies based on caste, language, religion, region, ethnicity, and cultural diversity. Each party has a constitution for deciding the key central leadership positions and governance of the party. Further it is mandatory for each party to have an internal democratic system for fairness and translucency in the decision-making process of party. The symbol of a political party is regarded as the identity of the party. With more than 2000 registered political parties in the country these electoral symbols are regarded as the easiest way of recognition of a political party. The party symbol in India is largely inspired by common use daily items regularly used in human life. Some of the common party symbols in country are: -lotus flower (Bhartiya Janta party), elephant (Bahujan Samaj party), hand (Indian National Congress), Clock (National Congress party), Cycle (Samajwadi party), arrow (Janata Dal), broom (Aam Aadmi party), bow and arrow (Shiv Sena), flower & grass (All India Trinamool Congress). The placement of unique electoral symbols over on EVM, billboards, placards and pamphlets help in easy and convenient identification of candidate of a party.

The process of registration of association of persons as a political party's rests completely on ECI and is clearly defined under Part IV-A of Representation of People's Act 1951. The political parties are characterized as national or regional parties by Election commission based on their performance in elections at central, state and local level. To keep a check and balances over the contributions of party, eac

h political association through its treasurer has to make full disclosure of financial reports of funds received excess of twenty thousand through individuals/companies each year to the commission. The political parties in India holds the complete responsibility of giving a shape to the democratic fabric by advocating voice of interests' common mass in policy formulation of the country.





## 4. The Basics of One Nation One Election.

One nation One election means streamlining the election of parliament, state assembly and local government into single units for better efficacy in the conduct of electoral process. The basic rationale behind the idea is to stop multiple elections at different times and make the government at different levels work in synchronized way for public welfare and policy implementation. The federal structure of India creates a center-state relationship where elections are held at different intervals for different levels thus, disturbing the whole process of governance in the country. With elections of union and state at similar time, both the central and regional government will work in a better synchronized way leading to effectiveness in decisions and progressive development of all the regions. Thus, one nation one election will support the basic feature of federal character of constitution.

The idea of One Nation One Nation is not new to the Indian soil and was practiced in India from 1952 till 1967 however post the period different elections at different levels became a common norm due to dissolution of state assemblies on different occasions because of lack of majority mark and people's trust. This practice of different elections involves continuous and tireless working of ECI by spending crores of rupees to conduct Lok- Sabha and Vidhan Sabha elections at regular intervals. The elections of parliament, state assemblies and local government are a direct election that involves crores of voters directly choosing their representatives. The multiplicity of elections involves continuous campaign and involvement of popular leaders, thus disrupting the whole governance mechanism. Further to add, the logistic management and corrupt practices count bigger disadvantage to the fairness in electoral machinery.

The recent talks about the issue of One Nation One election by Hon'ble Prime Minister at Voter's Day in 2022 and earlier in All India Presiding Officers Conference at Constitutional Day in 2020 has made the issue in discussion at different political platforms. The 170th Law Commission report in 1999 talked in favor of one nation one election. This was further supported by 79th (2015) Parliamentary Standing Committee. A recent step in the line of simultaneous votes was the Election Commission decision dated 23rd December 2022 to ask AIADMK's opinion over conduct of simultaneous election of parliament and state.[2] In a petition by Ashwini Upadhyay in Delhi High Court in 2023, Hon'ble court made ECI the only authority to conduct simultaneous elections post amendments in constitutional machinery by the legislative body.

[2] *"Law Commission seeks AIADMK's views on One Nation, One Election", The Hindu, December 28 2022, available at https://www.thehindu.com/news/national/tamil-nadu/law-commission-seeks-aiadmks-view-on-one-nation-one-election/article66314308.ece ( Last Visited on July 29, 2023)*

Globally, South- Africa and Sweden allow one vote for multiple elections at federal and provincial level. The latest in the league is Indonesia that has initiated multiplicity of elections at same time post 2019. There have been fruitful results of adoption of one nation one vote in these nations making way for further democratic forums to adopt the system.

### 4.1 Benefits Attached to Simultaneous Elections

Some of the major advantages attached to one nation one election are follows:

- Cost Efficiency- One of the major advantages of simultaneous election is reduction in monetary expenditure for conduct of election. Every election involves hundreds of crores for success of elections. With simultaneous elections of different levels better funds utilization can be done leading to saving crores of taxpayer's money.
- Political Stability- With multiple elections and multi-party system, each political association tries to gain maximum with regular participation of party leaders in elections campaigns, rallies and political discussion. With one nation one vote, the political parties and politicians can better focus on policy formulation and implementation. Thus, leading to strong decision-making process in the country.
- Lower Electoral Corruption- Each election in India involves electoral corruption in form of buying of votes, free distribution of materialistic items, vote rigging etc. To keep a vigilant check over all these corrupt practices, simultaneous elections of different elections is the only possible solution. With single election better vigilance is possible by competent authority making transparent and fair elections possible in the country.
- Voter's ease and awareness- Lower voter's turnout in elections is a major hurdle in present day democratic arrangement in India. With simultaneous elections of different levels, increased participation by large mass of people will be possible. With frequency of elections every two years, voter's disinterest and fatigue is seen in recent elections in every part of country. Single elections will create a brighter picture of increased awareness and participation among all sections of society.
- Good Governance- With one nation one election, the continuity and stability of union and regional government at similar timeline will add to better governance process at both central and state level. Disruption due to regular elections hinders decision making process and implantation of policies leading to slow progress. Thus, uniformity and simultaneous elections at each level will foster fulfillment of promises and easy growth with steam-lining of decision-making process.
- Better Election Management- The Election Commission holds the complete responsibility of conduct of elections. From preparation of electoral rolls to





counting of votes, the onus rests on ECI. Regular elections make the working of commission a tiresome, complex, and expensive process. The implementation of simultaneous elections will add administrative simplicity and efficacious coordination in the conduct of election by commission. This will also make staffing of personnel and logistics management easy and less- expensive.

- Sustainable and Long-Term Goals- The long- term of periodical election cycle leads to futuristic planning for achievement of sustainable and long-term goals. Governments at different levels can institutionalize better democratic values and reforms for upcoming generations in nation.

### 4.2 Challenges Ahead

Implementation of the concept of one nation one election is not an easy process. The regional diversity and political party dynamism makes simultaneous election a long way journey. The biggest and major problem associated with one nation one election is the dissolution of governments at different levels in various states with the consent of elected representatives. The difference in timeline of elections makes different terms of regional and local representative in various parts of the country. A common consent by newly elected representative will be a tedious task. The second problem attached to the simultaneous elections will be overshadowing of local and regional issues with prioritization of national issues. The national parties will try to showcase national interests over regional issues making them weak and causing a confusion in the mind of voters the election at various levels will dilute small area specific issue adding a hinderance to progress and development of regions. The third concern in one nation one election is lack of education and awareness among voters. The political illiteracy is lacuna which needs a permanent solution. With single elections, many voters will remain uninformed about their importance and manner of voting. Furter a common national wide consent of pupils and political parties will be required for bringing this drastic change in the electoral framework. Lastly, the next big challenge that relates to the concept is burden attached to ECI in proper functioning of election with increased demands of resource.

Each of the above-mentioned problems has a feasible solution. The best suited solution to the first hurdle of dissolution of regional governments is extension of period of legislative assemblies across the nation for completion of minimum 2.5 years of service of each state assembly. For the second problem of diversion of local issues with national issues, legal framework shall be developed for separate manifesto by each political party for local and national interests. Thirdly, for addressing the awareness and education problem ECI, government, media houses, political parties, and NGO's needs to take responsibility of making the citizens realize the need and importance attached to simultaneous elections. The last problem of infrastructure and resources rests on election

commission. The commission needs to utilize funds for creation of resources like EVM's etc. Initially it will create an additional burden of public expenditure on ECI but in later years it will reform the whole electoral process.

### 4.3 Legal Framework Required for One Nation One Elections.

For implementation of ONOE, few amendments are required in The Constitution and The Representation of Peoples Act 1951. These modification required are as follows:

- Constitutional Changes: The first and foremost modification is required in Article 85 and 172(1) which deals with the term of Lok- Sabha and State Assemblies. Then the President and Governor of each State needs to dissolve houses at both union and regional levels by use of Article 85(2) (b) and 174(2) (b) respectively. These changes and usage of constitutional provisions will end the working of assembles making simultaneous elections possible in India.
- Representation of People Act 1951: By exercising power under Section 169 of act, the Election Commission of India needs to notify simultaneous election of union and state. Further the commission needs to use Section 14 and 15 for initiating elections of House of People and State Legislative Assemblies at same time. By utilization of these provisions, one nation one election commission will make a progressive step for ONOE.
- Representation of People Act 1950: The amendmentin Part II-B and III of act will lead to preparation of common electoral rolls for simultaneous elections. Through changes in Part II-B and III, Section 13D to 15 will be modified making way for one electoral roll for the whole of the country.

All these amendments with legislative support will give way for stream- lining of electoral process making one nation one election a reality in India. With these changes, Election Commission of India will become more powerful with expansion of its powers and functions in coordinating electoral process. The early years of ONOE will be tough for nation but the results in future will make democratic and federal structure robust and impactful.

## 5. Conclusion

In a nutshell, one nation one election will be a boon for India. Holding simaltaneous elections will lead to a fair democratic process with reduction in overall expenditure. Although initial difficulties needs a quick redressal but the streamlining of centre-state elections will secure a bright future of electoral mangement system in the country. The constitutional and legislatve amendment are also a mandatory condition for making simaltaneous elections possible on Indian soil. The raising voice of "one nation one election" and recommendation of law commission report needs an immediate implementation of concept for





maintaining continuity in working of governmental machinery and effective implementation of moral codes of election commission. The decision of simaltaneous elections will complete transform the electoral process and require support from every citizen of the country. The politicains, election commissions and welfare socities should take the initiative of spreading awarness on the issue. The initial step in direction of this major change can be conduct of simaltaneous election of state assembly with municipality and panchayat in few Indian states. This will give a real picture of underlying challeges for implementation of the big change of concurrent elections at federal and provincial level. The implementaion of "One Nation One Tax" in the form of GST and "One Nation Curriculum" under the banner of NEP 2020 has eventually cleared the road for successful execution of One Nation One Election in the country.

**Reference:**

1. History of Lok Sabha Elections available athttp://www.smetimes.in/smetimes/general-elections-2009/miscellaneous/2009/Mar/23/history-of-lok-sabha-elections5584.html/ (Last Visited on July 28, 2023)
2. Law Commission seeks AIADMK's views on One Nation, One Election", The Hindu, December 28 2022, available at https://www.thehindu.com/news/national/tamil-nadu/law-commission-seeks-aiadmks-view-on-one-nation-one-election/article66314308.ece ( Last Visited on July 29, 2023)
3. "Law Commission seeks AIADMK's views on One Nation, One Election", The Hindu, December 28 2022, available at https://www.thehindu.com/news/national/tamil-nadu/law-commission-seeks-aiadmks-view-on-one-nation-one-election/article66314308.ece ( Last Visited on July 29, 2023)
4. Parthasarathy, N. (2023). One nation one election–a critical analysis. DME Journal of Law, 4(01), 56-66.
5. Kumar, V. One nation one election: Indian perspective.
6. Quadagno, J. (2006). One nation, uninsured: Why the US has no national health insurance. Oxford University Press.

# Prison reforms in India vis-a-vis human rights: an analysis

***Dr. Jatin Sharma***
*Advocate, Delhi High Court, Delhi*

**Abstract**

Prisons are place where offenders are kept for serving their punishment after their conviction or during their pending trials. The concept of prison is not a new concept .It has its traces from ancient time. But during that time it was only used as detention cell which was used to segregate the wrongdoer from society. But the conditions of the cell were very pathetic. Same was the situation in medieval period too. There was no prison in modern sense. There were some rooms used for confining offenders. There were no measures for protecting the rights of prisoners. No one was bother to think that the offender which are kept in these detention cell were basically human beings .And this was followed till British period. When Britishers came India to rule they drew attention towards the miserable conditions of prisoners and prison .Prison reforms are the credit of British rule. Prison reforms have given new extension to article 21 of Indian constitution by protecting the rights of prisoners and give them feeling to realize that they are also human beings. The paper attempts to know the concept of prison, development of prison reforms and impact of these reforms on rights of prisoners.

**Key words:** - *Prison, Prison reform, Legislature, Judiciary, rights*

## Concept of Prison

The term prison has various names in common parlance. It is known as jail or gaol[1] , penitentiary centre[2] detention center ,correctioncentercorrec tional facility centre, lock-up or remand center[3] It is an institution where offenders are kept curtailing their right of freedom. Prison is the most important part of criminal justice system. The people charged with crimes and whose trials are going on are sent to prison until their trial is completed. The offenders who found guilty of crimes at trial are sent to jail for serving their imprisonment. There are total 1,350 jail in India. According to National Crime Record Bureau, there are 478 600 prisoners as on 31 Dec 2019[4] among which 4.2% were female prisoners.

## Historical background

Prison[5] is the part of penal system which has deep roots in our ancient culture. It was known as 'dandniti' which according to Manu was a derivative of Dharma. Various Indian literature like vedasmritishastra, Dharmashastra mention 'dandniti' in its texts. There were different penal situation according to the category of offender like when Brahmin commits crime it was in nature of fine but when Kshatriya, vaishya or sudra commits crime and not able to pay fine or do work due to old age or infirmity they were sent to prison. The only purpose was to give an opportunity to offender such environment where he can realize his guilt and never repeat the act again. Offender was punished or sent to jail for realisation of guilt to offender and set an example for the society. Thus, prison plays an important role in the criminal justice system. In Islamic jurisprudence in the middle age too, the prison system was there. During this period jail were divided in the categories one for royal class offenders and other was ordinary criminals. Akbar introduced the concept of imprisonment which was in way of the reformation approach in place of deterrence and retribution and this approach is still in practice. In late Mughal period, during Christian regime too prison was the important pillar of justice system and after that modern prison system exist with the arrival of Britishers.

## Prison Reforms in India

Before British period, retributive and deterrence method of inflicting punishment were in prevalence: 'An eye for an eye and tooth for the tooth', flogging,[6] branding[7] and starving to death. The purpose was to give the message that by such punishment, offender will think again and again in repeating the crime in future and fear would cause among rest of society in committing crime. Though methods adopted were very rigorous but object was to reform the prisoners. Similarly, during British period too purpose of prison system was to reform the prisoners as law abiding citizens.

1 *Jail was derived from word jaiole(old French)and gaol was derived from word gayole (anglo norman French).Both the term are used in UK*
2 *Used in America*
3 *https://en.wikipedia.org/wiki/Prisonz ret*
4 *https://www.prisonstudies.org/country/india retrieved on 1 July 2021*
5 *Prison is a under State List (Entry 4 of List II of the 7th Schedule to Indian Constitition).*
6 *a punishment in which the victim is hit repeatedly with a whip or stick.*

**(A)Various Committees**

**(I)Before Independence**

- **Prison Discipline Committee**

The credit for origin or evolution of the concept of Modern Prison System[7] in India goes to Thomas Babington Macaulay in the year 1835. He drew attention of British administration towards the pathetic and inhuman conditions of Indian jails. On his recommendations Legislative Council of India constituted a committee named as 'Prison Discipline Committee[8]' in the year 1836. The committee submitted its report in the year1838.The construction of number of central prisons[9] were started from the year 1846 in pursuance of committee's recommendations. IG of prison[10] was made as permanent post in the year 1950. In 1864 Sir John Lawrence[11] surveyed the conditions/status of Indian prisons and submitted his report. On his report, second commission for enquiry in Jail was appointed by Lord Dalhousie. The commission was constituted to minimize the death rates in prison and also to see the. other aspects of jail management system like overcrowding, bedding, fooding, health and hygiene. It also focused on juvenile deliquents and female prisoners and gave recommendations for codifications prison discipline in specific terms. Again in the year 1877, conference of experts was held to review the jail management and enactment of uniform law for Prison system. Lord Dufferin appointed Fourth Jail commission in the year 1888 which recommended for uniform Jail Statute. Thus, in the year 1894 Prison Act was constituted on which India's present jail management and administration is based.

- **Indian Jail Reform committees**

The Indian Jail Reforms Committee was constituted in the year 1919-20 to review the administration in Indian Jails and to suggest measures for prison reforms The committee was headed by Sir Alexender Cardew[12] He visited

7 *The punishment in which a permanent mark is inflicted on the skin of a living person by the use of iron rod(sometime very hot or sometimes very cold) legalserviceindia.com/legal/article-4501-system-of-prison-its-history-and-types-in-india.html retrived on 4 July at12:00 noon*

8 *H shakespere was the chairman of committee and TB Macaulay was the memeber*

9 *First central Jail was constructed at Agra in 1846*

10 *Firstly appointed in the year 1844 in North Western Province (UP)*

11 *He was a Viceroy of India from 1864 to 1869.*

12 *He was Inspector-General of Prison between 1892 and 1899*





number of prisons[13] apart from India to achieve the objective of committee. After analyzing the various prisons administration and status of prisoners there, committee reached to the conclusion that prisons are required to have a reforming effect on inmates apart from deterring influence. The committee is considered as corner stone of Modern Prison system. The Committee further recommended that inmates should be kept in jail according to the capacity of each jail depending upon its size and also stressed on intensive after-care programme for the released prisoners for their rehabilitation in the society.

**(II)Post Independence**

Number of committees were constituted to reform the prison system after independence .Some of them are as follows:

- **Pakwasa Committee**

The committee was constituted in the year 1949.The committee gave the suggestion that wages Inmate must be paid wages for their labour. It also adopted some measures to reduce the imprisonment of those offenders who behaved well and abide the rules and regulations. The objective of adopting these reforms was to reform the offenders.

- **All India Jail Manual Committee**

On the invitation of Indian government in 1951 Dr. W. C. Reckless did research on prison administration and suggested various recommendations to reform it . He recommended for transforming jails into reformation centers[14] and for revision of outdated jail manuals. His recommendations were also supported in the year 1952 in the Eighth Conference of the Inspectors General of Prisons. On the basis of the recommendation made by him, the Committee was constituted in the year 1957.The focus of the committee was to prepare an All India Jail Manual. The committee submitted its report in 1960 and suggested to make amendments in the Prison Act 1894 for making prison as correctional institute.[15]

13 *Jail of Burma, Japan, Phillipines, Honkong and Britain*

14 *His report was titled 'Jail Administration in India'*

15 *https://bprd.nic.in/WriteReadData/userfiles/file/5261991522-Part%20I.pdf retrieved on 28 June 2021*

- **All India Committee on Jail Reforms** [16]

Government of India constituted the committe in the year 1980 and Justice A. N. Mulla was appointed its chairman to review the existing laws, rules and regulations which was related to the reformation and rehabilitation of offenders[17] .The Committee submitted its report in 1983 and suggested to set up a 'National Prison Commission for regulating the modernization of prisons in India. Apart from it, committee recommended that adequate arrangements of food, clothing, sanitation and ventilation etc must be ensured in each prison. It further recommended for proper training of prison staff and officers and must be organized into different cadres for effective prison administration. Committee advocated for government funds for prison reforms. Committee was of the view that media can play a crucial role in reformation and rehabilitation work of prisoner so recommended for visit of media in jail. The crucial recommendation was that the under trial prisoners must be kept separately from prisons who was finally convicted.

- **National Expert Committee**[18] **on Women Prisoners**

India Government constituted this special Committee in the year 1987 to review the conditions of women prisoner in India Jail. The chairman of the committee was V.RKrishna Iyer The committee undertook an study and recommended in its report which he submitted in the year 1988 that there must be induction of more women officers and staff in the police administration.

**(B) International Documents: Prison as a Correctional Institute**

There are some international documents associated with prison reform .Among them some are directly related to prison reform while some are realed indirectly but all play important role in making prison as a correctional institute. Some of which are as:

- Universal Declaration of Human Rights,1948 [19]
- The European Convention on Human Rights (1953-69).
- The UN Standard Minimum Rules for the Treatment of Prisoners 1955
- The International Covenant on Civil and Political Rights, 1966 [20]

[16] *Popularly known as Mulla Committe*
[17] *Encyclopedea Britanica available at http://www.legalserviceindia.com/legal/article-4501-system-of-prison-its-history-and-types-in-india.htmlretrieved on 4 July 2021 at 8:35 PM*
[18] *popularly known as Krishn Iyer Committee*
[19] *Article 1 ,Article 3,Article 6,Article 1)are very important*
[20] *Article 7 , 9, 10 and 11 talks about welfare of prisoners*





- Declaration on Protection from Torture, 1975.[21]
- Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment 1984(known as Torture Convention) [22]
- Safeguards guaranteeing protection of the rights of those facing the death penalty adopted by The UN Economic and Social Council resolution(1984)
- Tokyo Rules(United Nations Standard Minimum Rules for Non-Custodial Measures) 1991 [23]
- Bangkok Rules (Treatment of women Prisoners)2010
- Nelson Mandela Rules(Extension of Rules adpted in the year 1955)2015

**(C)National Documents**

There are some national documents which play important role in making prison as a correctional institute. Some of which are as:

- Constitution of India [24]
- The Transfer of Prisoners Act, 1950
- Prisoners (Attendance in Courts) Act, 1955
- The Probation of Offenders Act, 1958.
- The Code of Criminal Procedure, 1973.
- The Mental Health Act, 1987.
- The Prisoners Act, 1990
- The Juvenile Justice (Care & Protection) Act, 2000.
- The Repatriation of Prisoners Act, 2003.
- Model Prison Manual ,2016.

**(D)Judicial Approch**

Apart from the legislation, judiciary also played a crucial role in reforming the prison reforms and protecting the rights of prisoners. The journey of prison

[21] *Article 2 and 3*
[22] *UN Resolution 39/46 of 10th Dec. 1984*
[23] *https://www.unodc.org/unodc/en/justice-and-prison-reform/prison-reform-and-alternatives-to-imprisonment.htm*
[24] *It nowhere expressly contains the provisions for welfare of prisoners but it guarantees fundamental rights which is applicable on prisoners too as prisoner comes under the category of person article 14, 19(1)c ,20(1) ,20(2), 21, and Article 22 are also available to them.*

reform by way of judicial approach was started from the **Giasuddin Case**[25] in 1977. The court was of opinion that every man is born good but circumstances made him/her criminal. The court said inmates should be reformed and rehabilitated and this will be possible when right to education and right to work should be provided to the inmates in jail. Then in the landmark case of **Ramamurthy case**[26] the Apex court has identified some major problems faced by prisoners which stressed on immediate implementation of prison reforms. Court upheld for implementation of prison reforms which was also approved in its next judgements too.[27] In **Rahmath Nisha v. Additional Director General of Prisoner and Others**, The Madras Court held that prisoners are also having right to privacy and dignity and it is the responsility of prison administration to protected their rights carefully. Supreme Court in the famous case of **Sunil Batra v. Delhi Administration** [28] held that solitary confinement is to be inflicted only in the those cases where inamtes's attitude is so violent that it affects the life and liberty of another inmates.In Prem Shukla v. Delhi administration it was held by Supreme court that handcuffing is violation of human rights of prisoners[29]. The Hon'ble Supreme Court in number of cases[30] ruled that the term "life" means the life more than mere animal existence The court reiterated in **Paschim Bengal Khet Mazdoor Samiti v. State of West Bengal**[31] that the medical care and treatment is fundamental right of every person which is equally available to person under the prison administration. **AR Antulay v. RS Nayak**[32] the court stated that an prisoners cannot be denied of his right to speedy trial. In the case of **M.H. Hoskotcase**[33] the Apex court held that free legal aid is also the fundamental right of prisoners. Justice Krishna Iyer empathetically said not it is not the government's charity but it is the duty of state. Thus the Apex court in several cases[34] has highlighted the cruel and the harsh treatments inflicted on prisoners in Indian jails. The court issued guidelines to state and prison authorities to check and regulate the same and ensure that instruments such as handcuffs, chains, irons and straitjackets will not be used for the prisoners.

---

25 *Mohd. Giasuddin v. State of A.P AIR 1977 SC 1926.*
26 *Ramamurthy v. State of Karnataka 1997(2)SCC 642*
27 *Charles Sobraj v. Suptd. Central Jail Tihar (1978)4 SCC 104*
28 *1980 AIR 1579, 1980 SCR (2) 557*
29 *1980 SCR (3)*
30 *Maneka Gandhi v. Union of India, Francis Coralie v. Delhi Administration, Pandit Parmanand v. Union of India, State of Andhra Pradesh v. Challa Ramakrishna Reddy*
31 *1996 AIR SC 2426 see also Rasikbhai Ramsing Rana v. State of Gujarat*
32 *1988 AIR 1531, 1988 SCR Supl. (1) see also Madheshwardhari Singh And Anr. v. State of Bihar*
33 *Madhav Hayawadanrao Hoskot v. the State Of MaharashtraAIR 1978 SCC 1548, (1978) 3 SCC 544.*
34 *Sunil Gupta v. the State of MP,1990 SCR (2) 871, 1990 SCC (3) 119,*



*Prison reforms in India vis-a-vis human rights: an analysis*

## Conclusion

Prison life has been improved in many material aspects like hygiene and sanitation has become better, the diet is more balanced and nutritious now. Visit of media in jail to know the conditions of inmates has become more frequent. There is reviewed emphasis on inspection and monitoring by local national bodies Life of Supreme and this is the result of priosn reforms. But still much more is needed. Whatever has been reformed has not universally applicable in Indian jail system. Still many lecunas are existing this is the reason still Court is constituting the committes in row of prison reform. The committee constituted by SC on September 25, 2018 under the chairmanship of former judge Justice Amitava Rao is the glaring examples to show still more is left to be done.

## References:


1. Madhav Hayawadanrao Hoskot v. the State Of MaharashtraAIR 1978 SCC 1548, (1978) 3 SCC 544.
2. Sunil Gupta v. the State of MP,1990 SCR (2) 871, 1990 SCC (3) 119,
3. Mohd. Giasuddin v. State of A.P AIR 1977 SC 1926.
4. Ramamurthy v. State of Karnataka 1997(2)SCC 642
5. Charles Sobraj v. Suptd. Central Jail Tihar (1978)4 SCC 104
6. 1980 AIR 1579, 1980 SCR (2) 557
7. 1980 SCR (3)
8. Maneka Gandhi v. Union of India, Francis Coralie v. Delhi Administration, Pandit Parmanand v. Union of India, State of Andhra Pradesh v. Challa Ramakrishna Reddy
9. 1996 AIR SC 2426 see also Rasikbhai Ramsing Rana v. State of Gujarat
10. 1988 AIR 1531, 1988 SCR Supl. (1) see also Madheshwardhari Singh And Anr. v. State of Bihar
11. Article 1 ,Article 3,Article 6,Article 1)are very important
12. Article 7 , 9, 10 and 11 talks about welfare of prisoners
13. Article 2 and 3
14. UN Resolution 39/46 of 10th Dec. 1984
15. https://www.unodc.org/unodc/en/justice-and-prison-reform/prison-reform-and-alternatives-to-imprisonment.htm It nowhere expressly contains the provisions for welfare of prisoners but it guarantees fundamental rights which is applicable on prisoners too as prisoner comes under the category of person article 14, 19(1)c ,20(1) ,20(2), 21, and Article 22 are also available to them

# Beyond legislation: a comprehensive analysis of Muslim women's human rights post triple Talaq Law in India

***Ms. Smirit Rai***
*Assistant Professor, Department of Law, Central University of Punjab*

**Abstract**

Empowering women is a prerequisite for empowering the nation, strengthening the economy, and revitalising society. In an era where the world cherishes these ideals, it's shameful that Indian Muslim women are doomed to live upon the whims and fancies of their husbands. Triple-Talaq i.e. Talaq-i-biddat is an instant divorce and irrevocable in nature which permits any Muslim man to unilaterally divorce his wife by stating the word talaq three times in any possible means of communication without even stating the reason for the same. According to 2011 census, Muslims constitute approximately 15 percent of India's total populationwhich amounts to approximately 170 million people. Thus, 'The Muslim Women (Protection ofRights on Marriage) Act, 2019' (hereinafter the Act) holds a direct impact on a largesection of society.

**Key words: -** *Empowerment, women, society and Marriage.*

## Introduction

Empowering women is a prerequisite for empowering the nation, strengthening the economy, and revitalising society. In an era where the world cherishes these ideals, it's shameful that Indian Muslim women are doomed to live upon the whims and fancies of their husbands. Triple-Talaq i.e. Talaq-i-biddat is an instant divorce and irrevocable in nature which permits any Muslim man to unilaterally divorce his wife by stating the word talaq three times in any possible means of communication without even stating the reason for the same. According to 2011 census, Muslims constitute approximately 15 percent of India's total populationwhich amounts to approximately 170 million people. Thus, 'The Muslim Women (Protection ofRights on Marriage) Act, 2019' (hereinafter the Act) holds a direct impact on a largesection of society.

The Act was an attempt rectify this civilisational error which was already been declared as unconstitutional by the Hon'ble Supreme Court in the Shayara Bano case. This research paper addresses the condemned practice of 'Triple-Talaq' and raises several outrageous questions about societal norms that are biased





against women. To map the nexus among the issues, the article proceeds as follows: in the light of the landmark judgment 'Shayara Bano v. Union of India' it scrutinizes the conceptualization of Triple-Talaq as a human rights violation and establishes that this practice is against the fundamental rights of Muslim women. The paper delves into the intricacies of the Triple-Talaq Act and examines its repercussions on women's status. It also analyses efficacy of the act and its impact on the lives of Muslim women and the journey that it has travelled through five years of its existence. In the end, the research paper will present some suggestions to make it more effective and inclusive.

## Review of Literature

Indian Personal laws have been extensively evaluated for various aspects like position of women in the legal framework, colonial vestiges in the laws based on the religion professed by the person and so on. Islamic laws and the numerous issues concerning with such as upliftment of women, recognition of women rights and gender equality in practices have been extensively researched and debated upon by scholars, jurists and legislators alike.

Initially the trend in research was to explain the differences in the various laws operating in the country. Subramanian (2014) in his book focused on the varied laws in the country regarding family based on various cultural and religious pluralistic ideas. The work of Abbasi (2014) focused on the influence of colonial systems in the framing of Islamic laws in India as well giving an insight on how change was introduced within the orthodox Islamic system.

Subsequently, the focus shifted on highlighting major aspects in the Islamic personal law regime which were discriminatory and out of place in the modern society. The work of Rani (2017) emphasized on the disparity between men and women in divorce laws in Muslim personal law. Similarly, Rahaman (2017) also highlighted how the divorce laws in Islam caused distress to women and infringed on their rights by depriving them of recourse to seek adequate help after divorce.

Following the Supreme Court judgment declaring the practice of triple talaq unconstitutional and void numerous works like those of Mandal (2018) and Qadri (2018) were focusing on analysing the judgment and its effect on Muslim women. The judgment resulted in the legislature passing a law to criminalise the pronouncement of triple talaq the rationale of which has been evaluated on a political front in the article by Sur (2018).

Furthermore, the articles of Siddiqui (2021), Fayiza (2021) and Kokal (2022) have highlighted the political undercurrents in the changing of the Islamic personal laws in India and how the subject has been viewed from the light of freedom of religion, women equality and safeguarding the rights of minority communities.

The review of the literature on the topic has revealed that the there has not been

significant research on the shortcomings of the laws enforced to protect Muslim women from the practice of triple talaq and how the same has impacted their lives for better or for worse. Therefore, based on this the researches in the present paper attempt to bridge this gap and evaluate the laws enforced to protect Muslim women from the unfair practice of triple talaq.

**Research Questions**

The researchers have delimited the following research questions in the paper:

1. What are the limitations of criminalisingTriple Talaq in the Muslim Women (Protection of Rights on Marriage) Act, 2019?
2. What are the social impacts of the Muslim Women (Protection of Rights on Marriage) Act, 2019 on the women victims of the practice of Triple Talaq?

**Research Methodology**

To achieve the initial objectives and identify the research gap a detailed literature review was conducted for the topic chosen. The researchers have primarily relied on the use of doctrinal legal research method to identify the laws governing the concept of Triple Talaq under Muslim personal law in India. A content analysis and impact assessment is also undertaken of the Shayara Bano verdict which made the pronouncement of the triple talaq void and subsequently the Act titled 'The Muslim Women (Protection of Rights on Marriage) Act, 2019' passed by the legislature which voids and criminalises the pronouncement of triple talaq by the husband and lays out punishment for the same.

**An Examination of Judicial Pronouncements on Triple Talaq In India**

The Indian Judiciary has been the avantgrande of change in the country and has acted significantly towards the upliftment and protection of women rights. Triple Talaq or talaq-ul-biddat has been one such practice which the Courts have condemned and recognized as an infringement on the fundamental rights of women. Many High Courts in the country while looking into the practice, despite upholding its validity have termed it as a "most sinful form of divorce" in a catena of cases recognizing the fact that the pronouncement of triple talaq by the husband is a unilateral act done unto the wife, leaving her helpless and without recourse. The practice of triple talaq was first declared illegal and unconstitutional by the Supreme Court of the country if done without any attempt of reconciliation by the husband in the case of Shamim Ara v State ofUttar Pradesh in 2002. But, despite this the practice continued unhindered and unaffected in the country.

The matter resurfaced in 2017 before the Apex Court in the case of Shayara Bano v Union of India, wherein a petition challenging the constitutional validity





of the practice was filed before the Court. The Court relying on the essential religious practices test as well as underling the injustice faced by the women owing to the practice declared it to be unconstitutional and the dissolution of the marriage done by using triple talaq to be void. This judgment highlighted that Islam did not mandate the practice as an integral part of the religion and therefore the continuance of it in lieu of religious freedom was unjustified.

**Dissectingthe "Triple Talaq" Act**

Despite the Shayara Bano verdict and the All India Muslim Personal Law Board's (hereinafter 'AIMPLB') assurances to issue directives, instances of triple talaq were widespread, implying that the measures taken had not served as adequate deterrents against the practice. Therefore, the State took the initiative to provide legislative backing to the verdict and protect the rights of married Muslim women. The Muslim Women (Protection of Rights on Marriage) Bill, 2019 was introduced in the Lok Sabha on June 21, 2019 by Mr. Ravi Shankar Prasad, Minister of Law and Justice, and it came into force on July 31, 2019. The Act replaces an Ordinance promulgated on February 21, 2019 as the Muslim Women (Protection of Rights on Marriage) Second Ordinance, 2019. (Ministry of Law and Justice, 2019) The Act gives legislative support to the judicial mandate pronounced by Hon'ble Supreme Court in the case of Shayara Bano v. Union of India. The Act is divided into three chapters, containing seven sections. The first chapter discusses the important terms. In the second chapter, the said act disapproves of all forms of divorce, resulting in an instant and irrevocable termination of marriage, as illegal and void and criminalizes such practices. The third chapter deals with the protection of the rights of Muslim women and declares a subsistence allowance for women divorced through an unapproved form of divorce and grants her custody of a minor child.

Section 3 of the Act specifies that the proclamation of an instant irrevocable divorce in any form, whether spoken or written, electronic or otherwise, is unlawful, void and illegal. (MuslimWomen(ProtectionofRightsonMarriage) Act,2019) It defines 'Talaq' as 'Talaq-i-biddat' or any other immediate and irrevocable form of divorce. (MuslimWomen(ProtectionofRightsonMarriage) Act,2019) Section 4 of the Act declares the pronouncement Instant Talaq as a criminal offence of cognizable (MuslimWomen(ProtectionofRightsonMarriage) Act,2019) and non-bailable nature & makes punishable with imprisonment up to 3 years, and fine. (MuslimWomen(ProtectionofRightsonMarriage) Act,2019) By doing so the intent of the legislature is to enhance the deterrence factor of the law so that the dignity of women can be protected and social evils such as Triple Talaq could be eradicated from the society. The act further states that information relating to the commission of an offence punishable under this Act must be provided to an officer in charge of a police station by the married Muslim woman upon whom Talaq is pronounced or by any person related to her by blood or marriage in order for the offence to be cognizable.

By making it a cognizable offence the state has empowered the police officers to arrest the accused without any warrant. The prescribed imprisonment for the offence is non-bailable in nature and it has been specifically mentioned in section 7©. It states that the accused shall not be granted on bail unless he files an application before the Magistrate and the victim i.e. the married Muslim Woman upon whom the divorce is pronounced has been given due opportunity to be heard. (Muslim Women (Protection of Right son Marriage) Act,2019)

Besides addressing the evil practice of Triple-Talaq, the government has also provided certain rights to the married Muslim women who are the victims of the aforementioned offence. The offences provided under this Act are compoundable in nature at the instance of the victim who has been divorced by Triple Talaq. The Act authorises the magistrate to formulate the requisite terms and conditions for the same. (Muslim Women (Protection of Right son Marriage) Act,2019) The Act also deals with the auxiliary problems linked to Talaq-i-biddat, such as alimony, maintenance and custody of minor children. As a result, any Muslim woman divorced by Talaq-i-biddat is entitled to subsistence allowance to support herself and her dependent children. (Muslim Women (Protection of Right son Marriage) Act,2019)

## Limitations of The Statute And Its Impact on The Social-Status of Muslim Women

### Ambiguity in the Status of Marriage after Pronouncement of Talaq-e-Biddat

Though it was passed with a very noble intention there are several lacunae in the Act. It declares pronouncement of instant and irrevocable Talaq as illegal and void. However, it does not clarify the status of the marriage after such pronouncement. It is ambiguous whether the marriage would subsist or dissolve. Even if we go by the golden rule of interpretation and assume that the legislature intends to protect the sanctity of marriage, the provisions for subsistence allowance and custody of children, which are typically enacted in divorce law, creates absurdity in the Act. (The Hindu, 2018) The most conspicuous contradictions are found in Sections 5 and Section 6 which discuss the post divorce matters. The Act provides for 'subsistence allowance' for the Muslim women upon whom Triple Talaq 'is pronounced'. (Muslim Women (Protection of Rights on Marriage) Act, 2019) Also, the 'custody of the minor children' is also provided unequivocally to the woman. (Muslim Women (Protection of Right son Marriage) Act,2019)All these provisions make an inference that marriage is considered as dissolved by the mere pronouncement of Talaq-i-Biddat. However, in the preceding section the practice of pronouncing Triple-Talaq has already been declared void. Meaning thereby the marriage is still subsisting in the eyes of law. It become esessential to revisit these provisions as they indicate a paradox situation. The in consistencyprevails throughout the fabric of the Act as it cannot be sufficiently explained as to how the Act could





deliberate upon the post-divorce matters ignoring that the pronouncement has already been declared void in Section 3 and therefore cannot result in a divorce. (Muslim Women (Protection of Right son Marriage) Act,2019) Therefore, the criminalisation of Triple-Talaq is neither necessary nor serving any greater cause. Criminalising Triple-Talaqon the other hand proves to be counter-productive and regressive.

### Criminalising Triple-Talaq: Unjust & Arbitrary

Marriage and divorce are both civil acts governed by personal laws in India. However, the present Act makes pronouncement of Talaq-i-biddat a criminal act. Marriage, in Islam, constitutes to be a sacred contract between men and women which is purely a personal matter and therefore should not be criminalised. However, the provisions of the Act have undergone a step further by declaring it acognizable and non-bailable offence. The statement of objects and reasons of the Act justifies the criminalization by considering it essential to prevent the practice of Triple-Talaq but in these provisions are arbitrary and invalidates the spiritofArticle14 ofthe Indian Constitution which mandates 'Equality before law' and "Equal protection of laws" irrespective of caste, race, religion, sex or place of birth. (Indian Const. art.14) This is because divorce law sunder Hindu Marriage Act are adjudicated as a civil matter. However, if a Muslim man pronounces Triple-Talaq he shall be subjected to criminal prosecution of cognizable and non-bailable nature even though the divorce has been declared null and void by the Apex Court it self in its verdict of Shayara Banocase (Shayara Banov Union of India, 2017) as unconstitutional. As a result, it is not avalid form of divorce and the marriage will remain intact even if pronounced by the Muslim husband. This suggests that the impairment that is sought to be remedied by Section 4 of the Act has already been rendered inconsequential.

### Negative Impact on Social Status of Muslim Women

At this juncture it is imperative to mention that talaq-i-biddat is generally pronounced upon the wife in a situation of sudden emotional outrage or anger and due to this, men often regret it within a short time as the intent was never to irrevocably divorce the wife. For suchmen, the Shayara Banojudgment provide sagreatreliefasit in validates the effect of Talaq-i-biddat by declaring such practice as unconstitutional and stating that the marriage still remainsintact. But at the same time if provisions of the Act are applied, they would be stigmatised with criminal liability which increases the chance of disintegration of marriage. The Act prescribes for an immediate arrest and imprisonment up to 3 years which would definitely hamper the continuity of marriage instead of allowing its continuity. It is a well-settled fact that rate of financial independence of Muslim women is verylow in our country. Indian Muslim women are dependent upon their husbands for fulfilling their financialneeds.

Problem with the Implementation of the Present Act According to the general rule of criminal law, the prosecution bears the burden of proof. (Indian Evidence Act, 1872) The accused is presumed innocent unless proven guilty beyond all reasonable doubt. (Vijayee Singhv. State of Uttar Pradesh, 1990) The likelihood of conviction will be very low because the proof of such an act may not always be backed by evidence. Consequently, the Muslim wife may be discouraged from reporting the act of pronouncing Talaq-i-biddat against her husband. (Bhattacharya, 2013) Inthefamous Shayara Bano verdict, Justice Nariman reiterated that 'arbitrariness has always been apremise to strike down a law as unconstitutional.' (Shayara Banov Union of India, 2017) The Act, in its current form, does not pass this test of arbitrariness and must be revisited so that it can be adequately amended to meet the objectives sought by the legislature.

## EVALUATING THE RAMIFICATIONS OF THE STATUTE FIVE YEAR DOWN THE LINE

The law criminalising Triple-Talaq has been enforced for about five years. The working of the same therefore should be assessed in order to understand the holistic impact of its provisions on the status of Muslim women in the country. The Ministry of Minority Affairs has reported an 82% decrease in the instances of Triple-Talaq since the enactment of the Act in 2019. (Press Information Bureau, 2020) Despite the sharp decline in the number of cases of Triple-Talaq, the situation of the women upon whom it has been pronounced is that of 'half-divorcees' (Salam, 2022) as they are legally married but are devoid of all marital rights as their husbands refuse to reconcile and neither provide maintenance to them. This leaves them living in abject poverty and no means of subsistence. (The Hindu, 2019)

Additionally, there is ambiguity as to the legality of any subsequent marriage undertaken by the woman on whom Triple-Talaq has been pronounced for there is no direct mentions of the status of the persisting marriage post such pronouncement in the verdict of the Shayara Bano case. The only available option for these women under Islamic law is that of khula, the inalienable right to divorce for women, which is not a straight forward exercise and is usually accompanied by taking the consent of the husband and the returning of the mahr (dower) given at the time of marriage.(The Islamic Sharia Council, n.d.) The women being financially dependent cannot readily exercise this option of divorce as they relinquish their right to maintenance in the process.

Furthermore, there has been no administrative action in terms of assuring reconciliation of marriages pronounced by means of Triple-Talaq and the provisions of the Act criminalising the practice serve as a hindrance to this objective. This has allowed the husbands to remarry after pronouncing Triple-Talaq, irrespective of the obligations towards the wife after such pronouncement and without any consequences concerning the validity of the subsequent marriage. (The Islamic Sharia Council, n.d.) This situation indicates that even





though the instances of Triple-Talaq have reduced in the country, the objective of safeguarding and ensuring the right to a dignified life of Muslim women subject to the unfair practice of talaq-i-biddat, has not been realized by the enactment of The Muslim Women (Protection of Rights on Marriage) Act, 2019.

## SUGGESTIONS

Critically analysing the provisions of the Act it was found that there is a need to revisit the act and certain amendments are needed. It is suggested that the woman should have the autonomy to decide upon the fate of her matrimonial affair and the status of such marriage ought to be clarified for in the present state of ambiguity the rights of the women are defeated post the pronouncement of Triple-Talaq upon them by their husband. The legislators should revisit the provision and amend the same as it is would nearly be impossible for the husband to arrange the said amount while being in jail. Also, it is highly possible that the husband and his family would not accept the women who lodged the report against him and divorce her after serving his term. Additionally, the Act ought to provide some administrative provisions for ensuring the reconciliation and restoration of the marital bond in the form of means like family counseling.

It is the responsibility of the Parliamentarians to solve the social problems and not to create them. The Act in its present form seems to be a bad law which must be declared ultra-vires to the extent it violates the Constitutional mandate of equality before law. Therefore, it is suggested that instead of penalizing triple-e-biddat, an attempt should be made to reconcile the disparity in the matrimonial affairs or if the marriage is irretrievable in nature, then it should be dissolved with mutual consent. The best solution universally would be to bring in a Uniform Civil Code in the domain of family law which would deal with issues of marriage and divorce in consonance with Constitution of India.

### Conclusion

Justice has become subtle and elusive for Muslim women in India not entirely because of the religion professed by them but, due to inadequacy of legal formalism resulting in exemption from law. Law is required to be allied with justice. The only solution to this quandary lies in the hands of the Parliament as it is entitled with the work of formulating a holistic and multifaceted law upon this purpose after duly considering comprehensibly the rights of women. The role of courts is to interpret law and advance justice on the interpretations. It is imperative that the present act should becom prehensibly deliberated and the provisions that have a tendency of causing more injustice rather than justice must be either amended by Parliament or declared unconstitutional by the Hon'ble Supreme Court. It is the utmost need of the hour that a comprehensive study should be done with regard to the existing laws governing the system of divorce in India as well as around the world. Then suitable steps should be taken

to resolve the problems of women existing due to the derogatory practice of 'Triple Talaq' and the predicament should be rectified as soon as possible. On the basis of the empirical study, new provisions should be added to govern the system of divorce in India which would duly conform to the principles enshrined in the Indian Constitution. The need for a Uniform Civil Code is the need of the hour and the concerned authorities such as legislators and the apex courts must take this matter into consideration and enact an unbiased code.

**References:**


1. Abbasi, M.Z. (2014, September). Islamic Law and Social Change: An Insight into the Making of Anglo-Muhammadan Law. Journal of Islamic Studies, 25(3), 325–349.
2. Bhattacharya, P. (2013, September 12). An epidemic of crimes against women?.Live Mint.https://www.livemint.com/Opinion/xvSrDvJQWT5Qd2KrhMRLgK/Anepidemicofcrimes-against-women.html
3. Fayiza, U. (2021) From Shah Bano to Shayara Bano (1985–2017): Changing Feminist Positions on the Politics of Muslim Personal Law, Women's Rights and Minority Rights in India. Journal of Muslim Minority Affairs, 41(1), 122-140.
4. Kokal, K. (2022) Living By Religion, Playing by Law: Early Glimpses of The Ban On Triple Talaq. Socio-Legal Review, 18(1), 1-22.
5. Mandal, S. (2018) Out of Shah Bano's shadow: Muslim women's rights and the Supreme Court's triple talaq verdict, Indian Law Review, 2(1), 89-107.
6. Ministry Of Law And Justice (Legislative Department). (2019, July 31). The Muslim Women (Protection Of Rights On Marriage) Act. http://egazette.nic.in/WriteReadData/2019/20 9473.pdf
7. Population Census. (2011). Hindu Muslim Population in India. https://www.census2011 .co.in/religion.php
8. Press Information Bureau. (2020, July 22). Triple Talaq- Big Reform, Better Result.https://pib.gov.in/Pressreleaseshare.aspx?PRID=1640352.
9. Qadri, N. (2018) Analysis of Triple Talaq Judgment Passed by Indian Supreme Court. SSRN.http://dx.doi.org/10.2139/ssrn.3483509
10. Rahaman, M.H. (2017) Triple Talaq: A Distress to Muslim Women in India. Asian Journal of Research in Social Sciences and Humanities, 7(8), 244-249.
11. Rani, B. (2017) Triple-Talaq And Judiciary In India: Reforms Of Sharia Law-Continuity Or Change?.International Journal of Innovative Research and Advanced Studies, 4(9), 60-73.
12. Sachar, R. et. al. (2006, November 30). Social, Economic and Educational Status of the Muslim Community of India A Report. Prime Minister's High Level Committee Cabinet SecretariatGovernmentofIndia. https://www.minorityaffairs.gov.in/WriteReadData/RTF1984/7830578798.pdf
13. Shamim Ara v. State of U.P. &Anr. [2002] 7 SCC 518.
14. Shayara Bano v Union of India [2017] 9 SCC 1.
15. https://main.sci.gov.in/supremecourt/2016/6716/6716_2016_Judgement_22-Aug-2017.pdf
16. Siddiqui, S.Z. (2021) Triple Divorce and the Political Context of Islamic Law in India. Journal of Islamic Law, 2(1). https://doi.org/10.53484/jil.v2.siddiqui
17. Subramanian, N. (2014). Nation and Family: Personal Law, Cultural Pluralism, and Gendered Citizenship in India. Redwood City: Stanford University Press. https://doi.org/10.1515/9780804790901
18. Sur, E. (2018) Triple Talaq Bill in India: Muslim Women as Political Subjects or Victims?,Space and Culture, India, 5(3), 5–12. https://doi.org/10.20896/saci.v5i3.299
19. The Constitution of India, Art. 14 (1950). https://legislative.gov.in/sites/default/files/COI...pdf.
20. The Hindu (n.d.). (2018, January 08), On triple talaq bill: Re-examine the Bill. The Hindu. https://www.thehindu.com/opinion/editorial/re-examine-the-bill/article22392015.ece
21. The Hindu (n.d.). (2019, April 14), Triple talaq crusaders continue to fight for survival.
22. The Hindu. https://www.thehindu.com/news/national/triple-talaq-crusaders-continue-to-fight-for-survival/article26834319.ece
23. The Indian Evidence Act, 34 § 103 (1872). https://legislative.gov.in/sites/default/files/A1872-01.pdf
24. The Islamic Sharia Council (n.d.). Khula. Retrieved on January 23, 2023, from https://www.islamic-sharia.org/downloads/khula/

# Gender influence on business startups: unveiling the challenges hindering female entrepreneurs' growth prospects

***Ms. Mahima Sharma***
*Assistant Professor, Maharaja Surajmal Institute,*
*New Delhi affiliated Guru Gobind Singh Indraprastha University,*

**Abstract**

This study delves into the impact of gender on business start-up dynamics, aiming to discern the presence of disparities that may influence entrepreneurial endeavors. In recent years, there has been a growing interest in understanding the role of gender in the entrepreneurial landscape, as women have made significant strides in breaking traditional barriers. Nevertheless, persistent gender-based challenges continue to shape the entrepreneurial experience, often leading to differential outcomes in terms of venture success, access to resources, and societal perceptions.

The research draws upon a comprehensive review of existing literature on entrepreneurship and gender. This research work critically examines the concept of gender roles within the context of the Indian start-up culture, focusing on how these roles have evolved and expanded over time. The study delves into the challenges encountered by female entrepreneurs in India, which often hinder their progress and potential for success. In the Indian entrepreneurial landscape, traditional gender norms have historically influenced the roles and expectations of men and women in business. However, as India undergoes socio-cultural changes and economic advancements, the concept of gender roles in start-ups has also undergone transformation. This research sheds light on how contemporary Indian start-up culture is experiencing a gradual shift towards embracing more inclusive and diverse perspectives.

Nevertheless, the research also highlights instances of positive change within the Indian start-up culture. By identifying the challenges faced by female entrepreneurs and acknowledging the changing dynamics of gender roles, this research emphasizes the need for targeted interventions to address gender disparities within the Indian start-up culture. Creating awareness, providing mentorship, and offering financial support can empower women entrepreneurs to overcome obstacles and unleash their full potential.

**Key words:** - *Gender Influence, Business Startup, Women in Business*



*Gender influence on business startups:*
*unveiling the challenges hindering female entrepreneurs' growth prospects*

## Introduction

According to the 4th All India census of Micro Small and Medium Enterprise (MSME, 2006-07), share of women enterprises was only 13.74 percent, of the total of 1.56 million units in the organized sector, where as it was 7.06 percent from a total of 34.612 million in unorganized sector. Recent statistics shows, women owned enterprises constitute 7.35 percent including both the sectors and of working enterprises (MSME Annual Report, 2014-15).This shows that over the years, the share of women enterprises has not grown significantly.

When a specific type of person is repeatedly seen engaging in a particular activity, like men in leadership positions, individuals tend to associate the abilities and attributes needed for that activity as typical of that specific type of person. A phenomenon referred to as a "think-leader, think-male" mindset has created obstacles for women owning and running their own business. Ex-role stereotyping happens when men are respected more in business leadership roles because they are believed to possess the masculine traits that are deemed necessary for leadership and are associated with high-growth entrepreneurial ventures, whereas women are associated with low-growth ventures. This particularly occurs and is reinforced in contexts where men are far often than women to be found in leadership positions and in entrepreneurship. To compensate for some of these challenges, women have developed keen skills for switching between different gender and leadership identities and styles, depending on different contexts, which in turn helps them to further develop their relationship building and diplomacy skills.

A supportive environment for women's entrepreneurship requires unified systems with reciprocal features and a entrepreneurially constructive culture. This includes investments and human and financial capital, opportunities for growth, and a mixture of innovative and progressive institutional and infrastructural provisions. The attractiveness of entrepreneurship to women can be altered by rules and policies that influence the regulations and costs associated with owning a business. Therefore, the professional networks that women assemble and an encouraging ecosystem are critical. Networking helps women overcome gender-based limitations to entrepreneurship by helping them access resources, financial information, and capital, and identify new business opportunities.

## Concept of business startup

Before understanding the role of gender in Business startup it is crucial to understand the concept of business startup, its nature, trend and pattern in modern time. A startup venture could be defined as, a new business that is in the initial stages of operation, beginning to grow and is typically financed by an individual or small group of individuals. It is a young entrepreneurial, scalable business model built on technology and innovation wherein the founders develop a product or service for which they foresee demand through disruption

of existing or by creating entirely new markets. Startups are nothing but an idea that manifests into a commercial undertaking. Start ups must not be confused with small business, as the biggest difference being is INNOVATION. Recently government of India has launched “Start up India” initiative to foster/support and encourage start up efforts in India. The results are very satisfactory with initiative being accepted with open arms in country, various state governments have also started the similar efforts. India stand at a very important cross road, India stood at number three in overall technology driven stat ups in the world (Top two positions are held by USA and UK respectively). The very nature of start ups in India is technology based which is fuelled by young IIT’s graduates as the patterns of start ups in India further suggests, they are undertaken in very unconventional terrain like medical etc.

The overall impact of startups is very visible initially then, only those ideas persist which are smartly implemented. In India government is constantly trying to create an environment which is both conducive and optimum for stat ups. The reason is very simple, start ups are necessary for the entrepreneurial and innovative growth of any nation. There are nations which are smaller than ours and less naturally equipped than ours, but made tremendous growth and advancements in the field of economy and overall development. The secret of their success is nothing but an appetite for innovation. If India wants to be in the front lines with developed nations in the world, innovation is the key to become so. Fortunately India is endowed with youngest population which is primarily required for setting up start ups. With the growing inclination towards “Having something of my own” attitude is also helping in bringing new ideas into successful implementation. India has produced some of the leading start ups in the world, which are working as the lighthouse for the rest. The prominent example being OYO Rooms and  Zomoto (both catering to a very different market segment and objectives). In short, the startup scenario is looking very convincing and bright as the investments is growing in India start ups from worldwide investing bodies both organized and individuals. The recent example of such investment being the huge multibillion dollar investments in various start ups functioning in India like ola and flipkart. In a way start up era has started in India and it is the time to give its due push.

## Indian start-up ecosystem

The story of Indian startups is an interesting one spanning at least four decades. Through the 80s, a handful of pioneering IT service companies such as TCS, Infosys and Wipro placed India firmly on the global economic map. These companies invested in technology and leveraged the country's young, English-speaking workforce to provide cost effective technology services to clients across the globe. The result is an industry that currently employs nearly four million people and generates $150 billion in revenue.

India has seen a dramatic acceleration in both the quantum and the diversity of





startups. Over the last 10 years, India has become one of the top five startup ecosystems in the world, alongside the US, China, the UK, and Israel. The country today is home to a strong angel investor network with the sector witnessing active participation from every major Venture Capitalist (VC) or Private Equity (PE) firm. Over the same period, the startup sector has made nearly $20 billion of capital inflows and today employs about 100,000 people, with that number doubling every two years. Furthermore, over 100 active incubators help entrepreneurs experiment with new ideas, by offering them functional expertise and resources.

This recent scale-up of the Indian startup ecosystem is the result of a confluence of multiple factors. On the demand side, there has been a massive explosion of consumers going online, driven by Smartphone penetration. The sheer number of these individuals and their ever-rising income levels, coupled with their desire for consumption, makes them a highly active consumer base. On the supply side, there has been a massive inflow of entrepreneurial and technology talent. The creation of marquee startups in India has made entrepreneurship a highly lucrative career beyond the traditional community. Nearly 40% of India's startup founders and leaders come from premier engineering colleges and business schools, such as the IITs, IIMs and ISBs. This trend has reversed the nations 'brain drain' by not only retaining the best and brightest in India, but also by bringing top-quality talent of Indian origin back into the country. Finally, large capital inflows from global investors have helped catalyze the entrepreneurial spark in our country. The vibrant startup ecosystem we see today is the result of all these positively reinforcing megatrends.

## Gender gap in business startup in India

Women have been at the receiving end of several atrocities since the beginning of time. The fight for gender equality came into being not more than a couple of centuries ago, and even though the movement has been roaring in most corners of the world now, we are far from the desired reality. It is true that women have come a long way since when the movements began but, gender discrimination and misogyny unfortunately still exist. Women of today have proven themselves in all fields, including those heavily dominated by men. However, even in today’s day and age, women rarely achieve victory without facing numerous challenges of gender-based and other related social biases.

It is no secret that the majority of start-ups in India have been set up by men. But this does not mean that women don’t aspire to entrepreneurship. It is just that it is far more difficult for women to make a go of it because they face so many more hurdles from domestic restrictions to lack of resources and training than men do . This is hurting the economy as IMF studies show that closing the gender gap could mean a 6.8% gain in GDP. More than economic figures, it means that women’s potential is being frittered away

Entrepreneurship is a challenge, and even more so if you are a woman. Despite

their efforts and expertise, female entrepreneurs often struggle a lot more than their male counterparts to make it big and get recognized within the business community. Out of 100 entrepreneurs in India, only 7 are female, says the Mastercard Index of Women Entrepreneurs. As per the Google-Bain report, only 20% of businesses in the country are owned by women, while the 2021 report by the World Economic Forum also shows a massive gender gap of 72% in India's labor market. This disparity may not come as a surprise to many, as women entrepreneurs in India are few compared to male entrepreneurs as country's startup ecosystem too has not been spared of gender bias.

**Problems faced by the female in making startups**

Problems faced by the women entrepreneurship while making a startup : Here are the common challenges and problems that every women entrepreneur faces while starting a business in India and how to overcome them:-

**1. Fewer sectors are Women friendly**

Despite the policies and measures to promote gender equality, men still dominate India's entrepreneurial ecosystem. According to a recent report, most women-owned businesses in the country operate in low-revenue sectors, while men control the more profitable sectors like manufacturing, construction, and the like.

The male-centric nature of many industries also forces women entrepreneurs to operate in sectors that are historically called "women-friendly", such as education, apparel, and beauty care, among others. It limits their experience, opportunities, and capabilities to a significant extent.

**2. Lack of Social and Institutional Support**

Most women business owners don't get the social support they require to kick start their business from families, peers, and immediate ecosystems. Lack of mentorship from the business community is also one of the main challenges faced by women entrepreneurs in the country.

The case is no different when it comes to institutional support. Though there are schemes for promoting female entrepreneurship, many women don't receive timely guidance or help from authorities. The absence of a proper support network adversely impacts their confidence and ability to take risks.

**3. Poor Funding Prospects**

As unfair as it might sound, the funding scene in India has massive gender biases. Women-led businesses in the country lack access to capital due to the prejudices of investors and other factors. According to a report by Innoven Capital, of all the companies that received funding in 2019, only 12% had at least one female founder.





Many VC firms and angel investors are reluctant to invest in women-led businesses, while banks and financial institutions consider women less credit-worthy. Moreover, many Indian women don't have property or assets in their name, which comes up as a problem while applying for collateral loans or private financing.

**4. Lack of Access to Professional Networks**

Limited access to professional networks is another one of the basic problems of women entrepreneurs in India. According to the Google-Bain survey, female business owners are less integrated with formal and informal networks. The survey further indicates that over 45% of urban small business owners suffer due to insufficient avenues of network development.

Studies also show that most of the existing professional networks are dominated by men, making it difficult for women to access or navigate such spaces. Consequently, they miss out on opportunities to grow their business, find collaborators and vendors, and build social capital.

**5. Pressure to Stick to Traditional Gender Roles**

Patriarchy conditions both men and women to play certain defined gender roles. Women are expected to cook, do domestic chores, raise kids, care for the elderly, and the like. Juggling familial and professional responsibilities is a challenge in itself, and even more so when you set out to build a brand.

The pressure to stick to traditional gender roles is among the main challenges faced by women entrepreneurs. Often, they are asked to give up entrepreneurship and take up an "easy" profession that helps them focus more on family and kids. What's more, a woman who chooses her career over other things is looked down upon.

**6. Lack of an Entrepreneurial Environment**

Entrepreneurship is a long journey that involves a lot of learning, un-learning, and upskilling. An environment that exudes a strong entrepreneurial spirit is crucial for a person to become a successful business owner. However, many women often suffer from the lack of such a productive environment.

To begin with, many women are forced to manage their businesses from home due to familial responsibilities. Consequently, they lose out on opportunities to go out, interact with the business community, and build their market access. It also impedes their learning opportunities, access to resources and mentors, and more.

**7. Limited Mobility**

Limited mobility is one of the basic problems of women entrepreneurs in India. They cannot travel alone or stay at hotels for business purposes without worrying about safety. What's more, many hotels in India still don't allow women to check-in unless accompanied by a man.

Though many financially independent women have started investing in vehicles,

the number of women owning motorized vehicles in India is still fewer than men. All these factors come together to restrict the mobility of female business owners.

**Data on Gender Gap**

The reports of Kauffman Foundation (2011) and OECD (2014) deliberate substantially on the gender gap and the reasons for the gender gap. The scenario is not much different for India either. According to the 4th All India census of Micro Small and Medium Enterprise (MSME, 2006-07), share of women enterprises was only 13.74 percent, of the total of 1.56 million units in the organized sector, where as it was 7.06 percent from a total of 34.612 million in unorganized sector. Recent statistics shows, women owned enterprises constitute 7.35 percent including both the sectors and of working enterprises (MSME Annual Report, 2014-15).This shows that over the years, the share of women enterprises has not grown significantly. The labor participation data of Ministry of Statistics, Planning and Implementation (MOSPI ), Govt. of India, for the year 2011, indicates that in case of Odisha, rural women have a participation rate of 29.7 percent compared to men at 56.5 percent, the total participation being 43.2 percent. In urban context, the female participation is 14.1 percent compared to male participation of 54.08 percent. The total female participation both urban and rural put together is 27.16 percent whereas male participation is 56.11 percent, putting the total participation of both the genders to 41.8 percent. The same report classifies the labor participation according to the broad employment status. It indicates that rural self-employment for women in Odisha is, 66.1 percent as compared to 60.6 percent for males. The data for rural wage/salaried female and male is 3.4 and 8.2 percent respectively. But the self-employment in case of urban Odisha is 58 percent for women as compared to 49.6 percent for men. Urban salaried women however constitute 27.1 percent compared to 36.4 percent for men . According to the cumulative entrepreneurship statistics till 2015, women entrepreneurs in MSME constitute about 7.8 percent of the total number of entrepreneurs. If the self-employment status is considered, then it is higher in percentage for women in rural as well as urban areas. The term “self-employed” has been defined to have the individuals who have worked in household enterprises as self-employed persons. At the same time, these persons are classified as “own-account workers”, as “employers” and as “helpers”. The persons are supposed to be involved in their own enterprise . Self-employed persons are defined as individuals who operated their own farm or non-farm enterprises or were engaged independently in a profession or trade on own-account or with one or a few partners. The distinctive features are indicated by having autonomy (decide how, where and when to produce) and economic independence (in respect of choice of market, scale of operation and finance). The remuneration is deemed to have components as reward for their labor and profit of their enterprise. The self-employment data, labor-force participation data and women owned MSME data indicate that the participation is much less





in case of women than men.

The presence of gender influence in business startup culture of India could be easily seen. Here are a list of ingredients that gives a clear picture about the presence of Gender Influence in Indian startup culture. Few of the important ingredients are mentioned below:

- Women entrepreneurs are given less recognition by other male entrepreneurs. Many a times it may be unintentional but however this has negative impact on the start-ups made by the females. Many a times it was reflected in the interviews given by the male entrepreneurs that they are least interested in recognising the start-ups by females unless and until that startup is successful enough
- The second and the most important aspect which clearly highlights the presence of gender gap in startup landscape is the raising of funds. It becomes extremely difficult for the female entrepreneurs to raise funds for her start-ups because most of the people have a notion that a women cannot carry on and build a business like a male do.
- The women entrepreneurs are generally offered investment for the women centric start-ups such as beauty parlour, boutique, designer stores etc., and when it comes to the male dominated fields such as IT Sector, they lack investors because it is still believed that women don’t have capabilities to handle techniquel field which requires more knowledge and skills.
- Products manufactured by the female entrepreneurs are also underrated in the market unless and until product proves itself well. When the new products are launched by the new female entrepreneurs, the product is underrated.
- The aspect that highlights about the presence of gender discrimination and gender influence is the more media coverage to the male entrepreneurs as compared to the female entrepreneurs. Whether it is the print media or electronic media, media is seen more inclined towards covering the stories of the male entrepreneurs. Lets take one example to understand this. If you search Google for images of famous entrepreneurs, you will immediately see some familiar faces such as Steve Jobs, Bill Gates and Warren Buffet. But to see an entrepreneur who is a woman — such as Oprah Winfrey, Martha Stewart or Mary Kay Ash—you will have to scroll further down. This search mirrors broad patterns of gender inequality in entrepreneurship.

**INTERPRETATION OF GENDER AND ENTREPRENEURSHIP IN LIGHT OF CONSTITUTIONAL RIGHTS IN INDIA**

Entrepreneurship as a cultural practice rests upon activities that are founded on embodied understanding and constitutional background. Its symbolic representation is rooted directly in the gendered body, too. Consequently, a gender analysis of entrepreneurship differs from an analysis of women

entrepreneurs because it examines the way in which gender is culturally constructed by these social practices that constitute the social phenomenon of entrepreneurship. Our objective in this section is to locate the constitutional rights and protection of the working women, while contextualizing them in the arena of 'gender and entrepreneurship'. In India, the Preamble of the Constitution unequivocally declares equality of status and opportunity of all its citizens irrespective of their sex. A number of Fundamental Rights guaranteed to the individuals in Part III of the Indian Constitution are similar to the provisions of the Universal Declaration of Human Rights. These include the Right to Equality, Right to Freedom, Right against Exploitation, Right to Freedom of Religion, Cultural Educational Rights and Right to Constitutional remedies. These Fundamental Rights will be applicable irrespective of sexes. Article 14 proclaims the general right of all persons to equality before the law, while Article 15 prohibits the State from discriminating against any citizen on grounds of religion, race, caste, sex or place of birth, and prohibits any restriction on any citizen's access to any public place. Equality of opportunity for all citizens in matters of public employment is guaranteed under Article 16, which reconfirms the equal rights of the women in work space. The right to freedom guaranteed to all citizens under Article 19 encompasses the right to freedom of speech and expression, the right to assemble peaceably without arms, the right to form associations or unions, the right to move freely throughout the territory of India, the right of residence, and the right to practice any profession, or to carry on any occupation, 4 trade or business. Thus the Fundamental Rights provides the ability to all citizens of the country to open his/her enterprise within geographical territory of the country. On the other hand, Directive Principles of State Policy in Part-IV of the Indian constitution offers equal opportunity for both men and women in matter of public employment and equal pay for equal jobs. The duties of the State encompass securing a social order with justice, social, economic and political, striving to minimize and eliminate all inequalities (Article 38), securing for the citizens, men and women equally, the right to an adequate means of livelihood (Article 39 (a)),distribution of ownership and control of community resources to subserve the common good (Article 39(b)), securing equal pay for equal work for both men and women (Article 39(d)), preventing abuse of labour, provision of the right to work, education and public assistance in case of unemployment, , provision of humane conditions of work (Article 42), living wage and a decent standard of life (Article 43), securing participation of workers in the management of industries (Article 43A).

## Conclusion

Regardless of gender, starting a business is a difficult prospect. Key challenges for startups in India include generating funding, limited understanding of customers, penetrating the market, hiring qualified employees, and the complex regulatory environment. For women entrepreneurs, however, there are additional barriers which are part of a broader and more pronounced gender gap in the





male-dominated Indian society. India has traditionally been a patriarchal society with low participation of women in the economy. But the fact remains that women represent nearly 50 percent of the total population, and it is crucial to encourage women's role in the economy at every level. At present women's entrepreneurial role is limited in the large scale industries and technology based businesses. But even in small scale industries, the women's participation is very low. As per the third all-India census of Small Scale Industries, only 10.11% of the micro and small enterprises were owned by women, and only 9.46% of them were managed by women.

## Refrences

### Books


- Alexander Nicolaus (2019) , Startup Culture, Candid Creation Publishing, New Delhi
- H. M. Seervai, Constitutional Law of India 567 (Law and Justice Publishing Company, India, 4th edn., 2023)


### Journal Articles


- Cornelius A. Rietveld, Gender Inequality and the Entrepreneurial Gender Gap: Evidence from 97 countries, vol. 32, No. 44, pp. 1205 – 1229
- Brajaballav Kar, Gender Gap in Entrepreneurship: A Study on Ideation, Efficacy, Planning Differentiation Measures, vol. 1, No. 1 pp. 49-61


### Websites


- https://www.forbes.com/sites/forbescommunicationscouncil/2023/06/06/closing-the-gender-gap-in-startups/#:~:text=The%20Gender%20Gap%20Worldwide,solutions%20brought%20to%20the%20market.
- https://www.businesstoday.in/magazine/deep-dive/story/how-to-bridge-the-gender-gap-in-start-ups-and-venture-capital-372552-2023-03-08
- https://hbr.org/2016/07/research-the-gender-gap-in-startup-success-disappears-when-women-fund-women
- https://www.mckinsey.com/featured-insights/diversity-and-inclusion/ten-things-to-know-about-gender-equality

# Unboxing human rights in the era of artificial intelligence

***Dr. Avinash Kumar Babu*[1] *Tanya Singh2***
*Assistant Professor, Amity Law School Ranchi, Amity University Jharkhand,* [1]
*Assistant Professor, Amity Law School Ranchi, Amity University Jharkhand,* [2]

**Abstract**

The rapid development of Artificial Intelligence (AI) has ushered in a new era of global connectivity and innovation. While AI offers tremendous opportunities for improving various aspects of our lives, it also presents significant challenges to the protection and promotion of human rights. This study aims to analyze the impact of AI on human rights in a globalized world, exploring the potential threats posed by AI systems and identifying strategies to safeguard fundamental human rights. The primary challenge posed by artificial intelligence revolves around the breach of privacy and the treats caused to personal data. While AI systems often require vast amounts of personal data for operating effectively, the assembly, storage, and use of personal information can potentially infringe the right to privacy. AI technologies can exacerbate existing inequalities, as their benefits may not be equally accessible to all individuals or communities. Limited access to AI tools, resources, and infrastructure can widen the digital divide and hinder marginalized groups from benefiting from AI advancements. One can not even overlook the discrimination and bias that AI can bring to the society. Automated decision-making systems can result in biased outcomes in areas such as hiring, lending, and criminal justice, potentially violating the principles of equal treatment and non-discrimination. While human rights hold freedom of expressions dear to its core, the same has not remained untouched from the blow of AI. Automated decision-making systems can limit individuals' autonomy, particularly in critical areas such as healthcare, where AI-driven diagnosis and treatment decisions may override human judgment. In a globalized world, addressing the impact of AI on human rights has become a primary concern. It requires a multidisciplinary approach involving policymakers, technology developers, human rights advocates, and civil society. With this, it has become essential to establish robust ethical guidelines, regulatory frameworks, and accountability mechanisms to ensure that AI development and deployment prioritize and respect human rights principles.

**Key words: -** *Globalization, Technology, Artificial Intelligence, Human Rights, Threats, Challenge*





## Introduction

Artificial intelligence is now being discussed in the highest echelons of academia, business, and government, moving it beyond the realm of science fiction. To date, scientists do not even appear to agree on what artificial intelligence entails, despite the fact that they have just recently started to examine how it may affect human rights. It is obvious that using machine learning and artificial intelligence technologies has the ability to bring about dramatic changes in the world. “After the atrocities of World War II, a strong global consensus arose calling for the protection of an individual human being by the international community. The atrocities perpetuated against specific ethnic groups have notably demonstrated how seriously national governments might fail in their responsibility to protect the life and liberty of their citizens(Tomuschat, 2008).Human rights cannot be taken away unless certain conditions are met and proper process has been followed. For instance, if a person is found convicted of an offense by a court of law, their right to liberty can be limited.”

The rise of technology has brought certain significant changes in the world. One such change is evident through the rise of artificial intelligence. Artificial Intelligence (AI) refers to the imitation of human intelligence in machines that are automated to think, reason, learn, and problem-solve like humans. AI systems are designed to mimic cognitive functions such as perception, reasoning, problem-solving, language understanding, and decision-making. While there are numerous definition of Artificial Intelligence, John McCarthy has defined the as “the science and engineering of making intelligent machines, especially intelligent computer programs. It is related to the similar task of using computers to understand human intelligence, but AI does not have to confine itself to methods that are biologically observable”(McCarthy, 2007).

AI is a multidisciplinary field that draws from various branches of computer science, “including machine learning, natural language processing, computer vision, robotics, and more. The goal of AI is to create machines that can perform tasks that typically require human intelligence and, in some cases, even surpass human capabilities. It has been observed that AI can automate repetitive and mundane tasks, freeing up human resources to focus on more creative and strategic endeavors.” This improves efficiency and productivity in various industries. AI algorithms can analyse large datasets quickly and accurately, revealing patterns and insights that can inform decision-making and drive innovations in areas such as healthcare, finance, and scientific research. AI enables personalized experiences for users in areas like e-commerce, entertainment, and online services. This leads to improved customer satisfaction and engagement.

Despite the growing role of AI to mankind, one must note that it is sharper than a double edged sword. AI has impacted almost sector of the society as well as individuals. Since human rights are crucial to the sustenance of beings, this paper dwells into investigating the impact of artificial intelligence in light of

various human rights such as right to liberty, privacy, religion, peaceful assembly, etc.

## Conceptualizing Human Rights under Legal Instruments

Human rights are a sensitive subject that has drawn plenty of attention because they concern every person's very existence, regardless of their location or cultural background. Human rights are every person's fundamental rights in every community. They are the unavoidable foundational prerequisite for a civilized human existence in any civilization. Human rights are a notion that can be largely characterized as the fundamental freedoms, equality, and respect that all people are entitled to. It includes a bundle of rights essential for existence of a person such as right to food, work, education, shelter, etc.(What are Human Rights?, n.d.) The UN has named nine of the several human rights documents created under its auspices as fundamental international human rights treaties.(The Core International Human Rights Instruments and their monitoring bodies, n.d.) "These treaties cover civil and political rights, economic, social, and cultural rights, the fight against racial and gender discrimination, the outlawing of torture and enforced disappearances, and the rights of children, migrant workers, and people with disabilities."

"The first legal declaration to outline the essential human rights that should be universally protected was the Universal Declaration of Human Rights (hereinafter referred to as UDHR), which was adopted by the UN General Assembly in 1948. International human rights law is built on the tenet of human rights' universality." This indicates that all the beings are entitled to human rights equally. This principle is reiterated in several international human rights agreements, declarations, and resolutions after being primarily highlighted in the UDHR. UDHR was created to define the "human rights" and "fundamental freedoms" mentioned in Article 55(c) of the UN Charter, that every member state of the United Nations are required to uphold and respect. However, it is not a legally binding document. The Declaration has demonstrated its tenacity and power. The Declaration's tenets have been integrated into the national constitutions of many UN member states. A lot of the fundamental human rights treaties that have since been created by the UN, as well as regional and national treaties and laws implemented to protect human rights, are based on these principles.

The International Covenant on Civil and Political Rights (hereinafter referred to as ICCPR) is another treaty that defines a group of human rights. The foundation of the ICCPR can be traced down to UDHR. The basic rights that are protected by this covenant can typically be enforced through the institution of legal action in democratic nations. Further, "International Covenant on Economic, Social and Cultural Rights (ICESCR) was adopted by the United Nations General Assembly through Resolution 2200 A (XXI)". It is one of the two international treaties that together comprise the "International Bill of Human Rights" and





provides the legal framework to safeguard the most fundamental economic, social, and cultural rights, including rights to work in fair and favourable conditions, to social security, to an adequate standard of living, to the highest standards of physical and mental health that are reasonably practicable, to education, and to enjoy cultural freedom(Preamble- International Covenant on Economic, 1966). With this, UDHR, ICCPR and ICESCR are collectively known as the 'International Bill of Human Rights'.(International Bill of Human Rights, n.d.)

The international instruments have laid down the minimum standards that every nation needs to incorporate within their domestic laws. In India, the Constitution of India assures the basic human rights. For this purpose, National Human Rights Commission (NHRC) has defined human rights as:

> *"rights relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution or embodied in the International Covenants and enforceable by courts in India;"*(Section 2(d) The Protection of Human Rights Act, 1993)

There are several provisions under the Constitution of India which directly or indirectly embody the various provisions of several universal human rights treaties. It is pertinent to note that Part III of the Constitution, which contains fundamental rights, is known as the Magna Carta. These are the rights that, in the event of a breach, the state must uphold directly. The state is not allowed to pass any laws that violate the Fundamental Rights, according to Article 13(2). It specifies that any portion of a law that disrupts fundamental rights would be considered void. The entire act can even be considered void if the void portion cannot be distinguished from the main act.

The Indian Judiciary from time to time has observed the importance of upholding the principles laid down in international instruments on protection of human rights. The Supreme Court stated in Keshvanand Bharti v. State of Kerala (AIR 1973 SC 1461), that although the UDHR is not a binding legal document, it demonstrates India's understanding of what human rights were at the time the Constitution was designed. Further, in the case of Chairman, Railway Board v. Chandrima Das &Ors (AIR 2000 SC 98), the Supreme Court noted that UDHR had been recognized as a Model code of conduct adopted by the United Nations General Assembly in

## Impact of AI on Human Rights

Human rights, which are considered be essential to every humans' survival have been called into doubt in light of the advancement of artificial intelligence. Opinions have been formed about its necessity and avoidance in light of the advancements. It's crucial to keep in mind that humans are the ones that design artificially intelligent systems. Due to the actions of man and AI's assistance in making these activities easier and faster, humans have developed AI. AI is not

being created in a vacuum.(Raso, 2018) Instead, certain social actors are using AI to automate decision-making in specialized sectors of endeavour.The development of some intelligent systems has made it simpler to monitor violations of human rights; as a result, the burden of proof for such violations in court has loosened. Digital technology has brought in the "golden age of surveillance" in the twenty-first century, which includes not just state actors but also corporations, corporations, and non-state players.(Steven Livingston, 2019) Artificial Intelligence impacts several aspects of human rights. Some of these can be highlighted on the spectrum of personal liberty, access to justice in terms of fair trial, personal liberty, freedom of expression, etc.

- **Right to Privacy and AI**

"The right to privacy is a fundamental human right that is recognized and protected under various international legal frameworks. The UDHR is a foundational document that proclaims the right to privacy as"

> *"No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence".* (Article 12 Universal Declaration of Human Rights)

Further, Article 17 of ICCPR elaborates further on the right to privacy which provides as:

> *"No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation."*(Article 17 International Covenant on Civil and Political Rights, 1976)

The provision of Indian Constitution equally embeds the inherent right of privacy and provides that:

> *"No person shall be deprived of his life or personal liberty except according to procedure established by law"* (Article 21 Constitution of India, 1948)

While the right to privacy is not explicitly stated as a fundamental right in the original text of the Indian Constitution, "the Hon'ble Supreme Court of India, in the landmark judgment of Justice K.S. Puttaswamy (Retd.) v. Union of India (2017) 10 SCC 1), recognized the right to privacy as a fundamental right under Article 21 (Right to Life and Personal Liberty) and Article 19 (Protection of certain rights regarding freedom of speech, etc.) of the Indian Constitution".

The rise of AI has a direct impact on the right to privacy. With the rise of AI, wide range of privacy-related concerns has become inevitable. Large-scale individual data is frequently used by AI systems to learn and make assumptions, which raises questions concerning the gathering, use, and storing of such data. The potential threats of AI on privacy have been noted by several tech experts. For instance, the Director of Mass Software Solutions, Bhaskar Ganguli has





noted that:

> "Artificial intelligence (AI) technology is becoming increasingly prevalent, from virtual assistants like Siri and Alexa to autonomous vehicles and facial recognition systems. However, using AI technology raises privacy concerns, mainly concerning personal data"(AI and Privacy: The privacy concerns surrounding AI, its potential impact on personal data, 2023)

Data in large amounts are frequently used by AI systems to improve algorithms and boost performance. "This information can include sensitive information comprising social security numbers and medical records, as well as sensitive personal information like names, residences, and financial data. Modern technology, such as CCTV, phones, and other devices, might pose a threat to an individual's right to privacy." The right to privacy of an individual may also be threatened by privately held, technologically advanced businesses like Amazon, Apple, Facebook, Google, and Yahoo that use and collect personal data. AI-driven personal assistants and smart devices like Amazon Alexa or Google Assistant may inadvertently record and store conversations or personal information, raising concerns about data security and unauthorized access to sensitive data. These concerns have been strengthened by instances wherein certain AI such as Siri, a voice assistance developed by Apple, has been accused of stealing personal data of the users. It has been found that as part of their role in evaluating or "grading" Apple's Siri voice assistant, contractors frequently hear recordings of couples having sex, drug trades, and private medical information.(Hern, 2019) The charges of privacy infringement of its customers are equally brought against other AI such as Amazon's Alexa which was accused of storing personal information of its users and using it to perform tasks not commanded by the users.(Lynskey, 2019)

- **Right against Discrimination and AI**

UDHR "proclaims that everyone is entitled to all the rights and freedoms set forth in the Declaration without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status (Article 2 UDHR, 1948)". Further, ICCPR provides that all individuals are entitled to enjoy rights:

> *"....without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status"* (Article 2(1) ICCPR, 1966)

Further, ICESCR provides that the various rights provided under the Covenant should be provided be:

> *"....exercised without discrimination of any kind as Sto race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status"* (Article 2(2) ICESCR, 1976)

Other than these conventions, there are several other provisions under "Convention on the Elimination of All Forms of Racial Discrimination, Convention on the Elimination of All Forms of Discrimination Against Women, Convention on the Rights of Persons with Disabilities, Convention on the Rights of the Child, International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, which prevent discrimination on various grounds".

Indian legislature is not oblivious of the mandate to protect its citizens against discrimination. Right against discrimination is further guaranteed under the Constitution of India. This right is primarily protected under Article 15 and Article 17 of the Indian Constitution. These articles are fundamental rights that ensure equality before the law and prohibit discrimination on specific grounds.

The subject of discrimination has grown more challenging to address with the development of artificial intelligence. With the advent of technology, individuals are now capable of developing intelligent systems whose foundation is based on discriminating. A recent MIT study evaluating the effectiveness of the technology on individuals of various racial and gender backgrounds discovered that facial recognition AI performed less accurately when recognizing the faces of those with darker skin(Maker, 2018). Meanwhile, Amazon discontinued its AI hiring tool after discovering that it was not evaluating applicants for technical positions such as software developers in a gender-neutral manner.(Dastin, Amazon scraps secret AI recruiting tool that showed bias against women, 2018)

The risk of social discrimination provoked by the algorithms of AI has been acknowledged from time to time. A report prepared by the European Commission under the title "Draft Ethics Guidelines for Trustworthy A.I."(The European Commission's High Level Expert Group on Artificial Intelligence, 2018) has acknowledged the necessity for an anthropocentric approach to artificial intelligence while also warning of the hazards connected with the technology in spite of its many benefits. The European Union has mandated that Data collection and AI algorithm training must be done without discrimination, manipulation, or negative profiling in order to prevent harm. With this, it has become equally crucial to develop and apply AI systems in a manner that shields civilizations from "ideological polarization and computational determinism"(The European Commission's High Level Expert Group on Artificial Intelligence, 2018).

- **Right to Freedom of Expression and AI**

UDHR enshrines the right to freedom in several articles. Article 3 states that "everyone has the right to life, liberty, and security of person," and Article 4 states that "no one shall be held in slavery or servitude". Additionally, Article 13 of the UDHR recognizes the right to freedom of movement and residence.

Further, ICCPR recognizes "the right to freedom of thought, conscience, and





religion"(Article 18 ICCPR, 1966), "freedom of expression" (Article 19 ICCPR, 1966), "freedom of assembly"(Article 21 ICCPR, 1966), and "freedom of association"(Article 22 ICCPR, 1966). Article 9 of the ICCPR further safeguards the right to liberty and security of person.

The Constitution of India equally protects the freedom of expression under Article 19(1)(a). This fundamental right ensures that citizens have the liberty to express their opinions, thoughts, beliefs, and ideas freely through various mediums, including speech, writing, printing, and electronic communication.

Concerns concerning the impact on a person's ability to form and develop opinions are raised by the prevalence of specific forms of AI(Nations, 2018). Despite the pace of information it gives, AI has opened doors for everyone in the world to express themselves more effectively. Many people have found it easier to communicate their ideas and opinions thanks to the development of social media software programs. However, research indicates that this has a negative impact. AI algorithms used by online platforms might unintentionally prioritize or suppress certain content based on user engagement metrics. This could lead to a "filter bubble" effect, where users are exposed only to content that aligns with their existing beliefs, hindering exposure to diverse perspectives(Prof. Dr. Natali Helberger, 2020).

- **Right to Assembly & Association and AI**

The right to assembly and association is protected and recognized in several international instruments and treaties including "Article 20 of UDHR which provides that:

1. *Everyone has the right to freedom of peaceful assembly and association.*
2. *No one may be compelled to belong to an association.*

Further, 21 of ICCPR recognizes the right to peaceful assembly." This right is also provided as a fundamental right by the Indian legislature under Article 19(1)(b) which guarantees to all citizens the right to peacefully assemble and without arms. This fundamental right ensures that individuals have the liberty to come together in groups, hold meetings, and participate in peaceful protests and demonstrations to express their views and advocate for their interests.

Artificial intelligence is essential to the surveillance function in authoritarian, hybrid, and democratic regimes. In the light of technological advancement, AI has potential impacts on right to assembly and association as the ability to observe and take action on someone's freedom to freely assemble has become possible through surveillance. AI-powered surveillance technologies, such as facial recognition systems and crowd monitoring algorithms, can be used to track and monitor individuals participating in assemblies or protests.

Recently, in the year 2019, Delhi Police used a technology that used facial recognition to identify the people who took part in the demonstrations against

the Citizenship Amendment Act and more recently, people taking part in the ongoing farmer protests(Gill, 2021). This level of monitoring might deter people from exercising their right to assembly, as they may fear being identified and facing repercussions, thus restricting an individual's right to assemble and form associations(The Impact of Artificial Intelligence Technologies on the Right to Privacy and Civic Freedoms, 2021)

- **Freedom of Religion and AI**

Freedom of Religion and conscious is a fundamental human right enshrined under several international treaties and conventions. This right is primarily evident under Article 18(1) of the UDHR which provides for

> *".the right to freedom of thought, conscience and religion. ....to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching."*

Article 18 of the ICCPR further elaborates on the right to freedom of religion or belief, emphasizing that this right may only be subject to restrictions that are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

The Constitution of India equally respects an individual's freedom to profess any religion of his/her choice. The freedom of religion is a fundamental right guaranteed by the Indian Constitution. It is enshrined in Article 25 to Article 28 of the Constitution of India. These articles collectively protect the right to freedom of religion and encompass several aspects related to religious freedom.

The rise of AI has posed challenges to religious freedom when AI algorithms are trained on religion biased data. For example, in areas like job hiring or financial services, if AI systems are inadvertently biased against certain religious groups, it could lead to unfair treatment and hinder religious freedom (Ashraf, 2022). Further, the governments or organizations using AI for surveillance purposes might intrude on religious practices or gatherings, raising concerns about privacy and the right to practice one's faith without interference. Not only this, AI-generated deepfake content could potentially be used to create false religious narratives or misrepresent religious leaders, leading to misinformation and harming religious communities.

## AI, Human Rights viz-a-viz Rule of Law

"Despite the fact that artificial intelligence has a demonstrably good effect on the world of today, there are still some drawbacks associated with its application, particularly in terms of human rights and democracy. Every legally functioning political system is built on the essential pillars of human rights,





democracy, and the rule of law". To accomplish social progress and to maintain political stability while upholding individual rights and fundamental freedoms, the rule of law is essential(Rule of Law and Human Rights, n.d.).

The functioning of public institutions and their attitude towards the public is an important milestone while upholding the rule of law. Their performance is expressed in concepts like justification, proportionality, and equality (Working with the Council of Europe: A Practical Guide for Civil Society, 2021). AI has the potential to improve institutional effectiveness, but it also has the potential to undermine democratic institutions' procedural legitimacy, public confidence in them, and the rule of law. Similar to how judges used to be the sole ones to decide what constitutes unlawful slander, today most social media networks base their decision on private AI systems. These AI systems de facto contend with judges, the law, and other authorities for authority. These AI systems de facto contend with judges, the law, and other authorities for authority. "In general, AI can help create judicial systems that function outside of the restrictions and safeguards rule of law. Private corporations' automated online dispute resolution services are governed by terms of service, not by the law, which does not grant consumers the same right and procedural safeguards as in public courts." AI systems have also been used by the Supreme Court (Mint, 2023). However, there are concerns about the fairness and transparency of these algorithms and their potential to perpetuate bias. In general, AI can help create judicial systems that function outside of the restrictions and safeguards rule of law (Reiling, 2020). Private corporations' automated online dispute resolution services are governed by terms of service, not by the law, which does not provide its consumers the same right and procedural safeguards as in public courts.

## Road Ahead and Conclusion

Human rights are every person's fundamental rights in every community. "They relate to people because people are human. They are the unavoidable minimal standards that all societies must meet for a civilized human existence". It's essential to recognize that while AI has the potential for both positive and negative impacts, its actual effect on religious freedom largely depends on how it is developed, deployed, and regulated. Addressing these concerns requires a multi-stakeholder approach involving policymakers, technologists, ethicists, religious leaders, and civil society to ensure that AI is used responsibly and that potential risks are mitigated. It's also crucial to develop AI technologies with fairness, transparency, and accountability to avoid unintended consequences that might harm fundamental human rights.

As a matter of observation, Governments or organizations using AI for surveillance purposes might intrude on religious practices or gatherings, raising concerns about privacy and the right to practice one's faith without interference. AI-powered algorithms used by social media platforms and other online services

might promote or amplify extremist content, potentially fuelling religious tensions and radicalization. In extreme cases, there could be attempts to misuse AI for destructive purposes that target specific religious groups, leading to violence and further infringement of religious freedom.

AI systems handling personal data related to an individual's religious beliefs could be misused or exploited, impacting religious privacy and freedom. AI-generated deepfake content could potentially be used to create false religious narratives or misrepresent religious leaders, leading to misinformation and harming religious communities. “It has been observed that AI can generate and disseminate deep fakes and misinformation in the form of text, images, audio, and video. Since these are difficult for individuals, journalists, or public institutions to recognize, it becomes simpler to deceive and manipulate the public, and the degree of veracity and trust of the media as well as democratic debate may decline”.

Although artificial intelligence makes information transfer quicker and easier, there are still difficulties involved. It's essential to recognize that while AI has the potential for both positive and negative impacts, its actual effect on religious freedom largely depends on how it is developed, deployed, and regulated. Addressing these concerns requires a multi-stakeholder approach involving policymakers, technologists, ethicists, religious leaders, and civil society to ensure that AI is used responsibly and that potential risks are mitigated. It's also crucial to develop AI technologies with fairness, transparency, and accountability to avoid unintended consequences that might harm religious freedom or any other fundamental human rights.

**References**


1. Legal Advice. (n.d.). Retrieved from Breach of Privacy and confidentiality under information Technology Act,2000: legalserviceindia.co/article/1288-Breach-of-confidentiality-html#: ~:text
2. Adam, M. (2017). Big Data and Individual Privacy in the Age of the Internet of Things. Technology Innovation Management Review, 12-24.
3. Agarwal, S. (2021, Feburary 5). Cyber security and human rights. Retrieved 2023, from Rising Kashmir: http://risingkashmir.com/cyber-security-and-human-rights#:~:text=Cyber%20crimes%20are%20unlawful%20acts,real%20threats%20to%20victims%20worldwide.
4. AI and Privacy: The privacy concerns surrounding AI, its potential impact on personal data. (2023, April 25). Retrieved from The Economic Times: https://economictimes.indiatimes.com/news/how-to/ai-and-privacy-the-privacy-concerns-surrounding-ai-its-potential-impact-on-personal-data/articleshow/99738234.cms?from=mdr
5. Alawida, M., Omolara, A. E., & Abiodun, O. I. (2022). A deeper look into cybersecurity issues in the wake of Covid-19: A survey. Journal of King Saud University - Computer and Information Sciences, 8176-8206.
6. Andanda, P. (2019). Towards a Paradigm Shift in Governing Data Access and Related Intellectual Property Rights in Big Data and Health-Related Research. International Review of Intellectual Property and Competition Law, 1052–1081.
7. Article 12 Universal declaration of Human Rights, 1. (n.d.).
8. Article 12 Universal Declaration of Human Rights, 1. (n.d.).
9. Article 17 International Covenant on Civil and Political Rights, 1. (1976).
10. Article 18 ICCPR, 1. (1966).
11. Article 19 ICCPR, 1. (1966).
12. Article 2 UDHR, 1. (1948).
13. Daryabar, F. e. (2013). A survey about impacts of cloud computing on digital forensics. International Journal of Cyber-Security and Digital Forensics, 77.
14. Dastin, J. (2018, October 11). Amazon scraps secret AI recruiting tool that showed bias against women. Retrieved from Thomson Reuters: https://www.reuters.com/article/us-amazon-com-jobs-automation-insight-idUSKCN1MK08G
15. Dastin, J. (2018, October 11). Amazon scraps secret AI recruiting tool that showed bias against women. Retrieved from Thomson Reuters: https://www.reuters.com/article/us-amazon-com-jobs-automation-insight-idUSKCN1MK08G
16. David, K. A., Al-Hadhrami, T., & Alazab, M. (2021). BCFL logging: An approach to acquire and preserve admissible digital forensics evidence in cloud ecosystem. Future Generation Computer Systems, 1-13.
17. Dobrygowski, D. (2021, Nov 23). Rebuilding Digital trust for inclusive future. Retrieved sep 25, 2023, from World Economic Forum: https://www.weforum.org/agenda/2022/12/losing-digital-trust-will-harm-technological-innovation/
18. European Union. (2016). Regulation (EU) 2016/679 of the European Parliament and of the Council on General Data Protection Regulation. Retrieved sep 29, 2023, from available at: https:/eur-lex.europa.eu/eli/reg/2016/679/oj
19. G. Zyskind, O. N. (2015). Decentralizing Privacy: Using Blockchain to Protect Personal Data. IEEE Security and Privacy Workshops, 180-184.
20. Garg, P. (2022, Aug 04). Cyber Crime with Repect to Rightto Privacy. International Journal of Trendy Research in Engineering and Technology, 6(4).

21. Gill, P. (2021, February 10). India is ramping up the use of facial recognition to track down individuals without any laws to keep track of how this technology is being used. Retrieved from Business Insider: https://www.businessinsider.in/tech/news/what-is-facial-recognition-technology-and-how-india-is-using-it-to-track-down-protestors-and-individuals/articleshow/80782606.cms
22. Haan, A. (2000). Migrants, Livelihoods, and Rights: The Relevance of Migration. Ottawa: International Development Research Centre.
23. Mosse, D., Gupta, S., & Shah, V. (2005, July). On the Margins in the City: Adivasi Seasonal Labour Migration in Western India. Economic and Political Weekly, 40(28 ), 3025-3038. Retrieved from URL: http://www.jstor.org/stable/4416873
24. Mouzakiti, F. (2020). Cooperation between Financial Intelligence Units in the European Union: Stuck in the middle between the General Data Protection Regulation and the Police Data Protection Directive. New Journal of European Criminal Law, 351–374.
25. National Information Centre(NIC). (2023, May 01). National Human Right Commission India. Retrieved 2023, from https://nhrc.nic.in/sites/default/files/Group%201%20April.pdf
26. Nations, U. (2018, August 29). United Nations General Assembly- Seventy Third Session. Retrieved from Promotion and Protection of the Rights to Freedom of Opinion and Expression: https://freedex.org/mapping-ais-impact-on-freedom-of-expression/
27. Norberg, P., & Horne, D. (2007). The Privacy Paradox: Personal Information Disclosure Intentions versus Behaviors. The Journal of Consumer Affairs, 100-126.
28. O. Baror, S., Venter, H., & Adeyemi, R. (2021). A natural human language framework for digital forensic readiness in the public cloud. Australian Journal of Forensic Sciences, 566-591.
29. Pandit, H. J. (2023). Making Sense of Solid for Data Governance and GDPR. Information, 114.
30. Parasar, P. (2000). Cyber Security and Cyber Crime Infringes Human Rights? Retrieved Sep 20, 2023, from https://www.legalserviceindia.com/legal/article-4724-cyber-security-and-cyber-crime-infringes-human-rights-.html
31. Pearson, S., & Benameur, A. (2010). Privacy, Security and Trust Issues Arising from Cloud Computing. IEEE Second International Conference on Cloud Computing Technology and Science, 693-702.
32. Personal Protection Data Bill. (2019). PRS Legislative Research. Retrieved March 21, 2023, from https://prsindia.org/billtrack/the-personal-data-protection-bill-2019







33. Preamble- International Covenant on Economic, S. a. (1966). Preamble.
34. Prof. Dr. Natali Helberger, S. E. (2020). Implications of AI Driven Tools in the Media for Freedom of Expression. Retrieved from Council of Europe: https://rm.coe.int/cyprus-2020-ai-and-freedom-of-expression/168097fa82
35. Raghav, M., & Marwaha, S. S. (2022, November 18). Indian Legal Framework on the Right to Privacy in Cyberspace-Issues and Challenges. Junal IImu Hukum.
36. Ramachandran, M., & Chang, V. (2016). Towards performance evaluation of cloud service providers for cloud data security. International Journal of Information Management, 618-625.
37. Raso, F. (2018, September 25). Artificial Intelligence & Human Rights: OPPORTUNITIES & RISKS. Retrieved from Berkman Klein Center: https://cyber.harvard.edu/publication/2018/artificial-intelligence-human-rights
38. Reiling, A. D. (2020). Courts and Artificial Intelligence. International Journal for Courts and Artificial Intelligence.
39. Reilly, C. A. (2021). Reading risk: Preparing students to develop critical digital literacies and advocate for privacy in digital spaces. Computers and Composition, 102652.
40. Reith, M. (2002). An Examination of Digital Forensic Models. International Journal of Digital Evidence, 1-12.
41. (2017). REPORT OF THE WORKING GROUP ON MIGRATION. Ministry of Housing and Urban Poverty Alleviation.
42. Rights, A. 1. (1948).
43. Rights, A. 1. (1948).
44. Rossini, C., & Green, N. (2015, June). CYBERSECURITY AND HUMAN RIGHTS. Retrieved sept 20, 2023, from Global Partners digital: file:///E:/Users/Administrator/Desktop/Human%20rights/GCCS2015-Webinar-Series-Introductory-Text.pdf
45. Rossinni, C., & Green, N. (2015, June). Cyber Security and Human Rights. Retrieved Aug 28, 2023, from Global Partners and Digital: https://www.gp-digital.org/wp-content/uploads/2015/06/GCCS2015-Webinar-Series-Introductory-Text.pdf
46. Rule of Law and Human Rights. (n.d.). Retrieved from United Nations: https://www.un.org/ruleoflaw/rule-of-law-and-human-rights/#:~:text=As%20defined%20by%20the%20Secretary,%2F2004%2F616%2C%20para.
47. S. Dawes, S., & A. Pardo, T. (2002). Building Collaborative Digital Government Systems. Advances in Digital Government, 259–273.
48. Section 2(d) The Protection of Human Rights Act, 1. (1993).

49. Shah, A. (2006). The labour of love: Seasonal migration from Jharkhand to the brick kilns of other states in India. Contributions to Indian sociology, 40(1), 92-118. doi: 10.1177/006996670504000104
50. Stallings, W. (2020). Handling of Personal Information and Deidentified, Aggregated, and Pseudonymized Information Under the California Consumer Privacy Act. IEEE Security & Privacy, 61-64.
51. Steven Livingston, M. R. (2019). The Future Impact of Artificial Intelligence on Humans and Human Rights. Ethics and International Affairs , 141-158.
52. The European Commission's High Level Expert Group on Artificial Intelligence. (2018, December 18). Retrieved from The European Commission: https://www.euractiv.com/wp-content/uploads/sites/2/2018/12/AIHLEGDraftAIEthicsGuidelinespdf.pdf
53. Tomuschat, C. (2008). INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS. Retrieved from United Nations Audiovisual Library of International Law: https://legal.un.org/avl/pdf/ha/iccpr/iccpr_e.pdf
54. 2023, from United Nations: https://www.ohchr.org/en/what-are-human-rights
55. United Nations Human Rights Office of High Commissioner. (2016, Nov). Universal Declaration of Human Rights. Retrieved sep 26, 2023, from Stand up for Human Rights: https://www.standup4humanrights.org/en/article.html
56. Universal Declaration of Human Rights. (2021, sep). Universal Declaration of Human Rights. Retrieved sep 25, 2023, from United Nations: https://www.un.org/en/about-us/universal-declaration-of-human-rights
57. Verma, R., Govindaraj, J., & Gupta, G. (2016). Data Privacy Perceptions About Digital Forensic Investigations in India. IFIP International Conference on Digital Forensics, 25-45.
58. W. Lee, T., & Mowday, R. (2017). Voluntarily Leaving an Organization: An Empirical Investigation of Steers and Mowday's Model of Turnover. Academy of Management Journal, 15-25.






# Understanding the role of data privacy in the investigation and prosecution of digital crimes and real crimes

***Sana Samdaan[1], Dr. Ausaf Ahmad Malik[2]***
*Research Scholar, School of Law, Raffles University, Neemrana, [1]*
*Associate Professor, School of Law, Raffles University, Neemrana, [2]*

**Abstract**

The swift development of digital technologies has created new difficulties in the fight against both online and offline crime. Data privacy preservation and protection have arisen as crucial issues in the investigation and prosecution processes among these difficulties. In order to handle both real crimes and digital crimes, this abstract intends to study and comprehend the essential function of data privacy, giving light on its effects on legal procedures and individual rights. The importance of data privacy in the context of digital crimes is covered in depth in the first section of this abstract. As the digital landscape develops, criminals increasingly use sophisticated methods to commit numerous cyber offenses, from data breaches and identity theft to ransomware attacks and online fraud. As a result, law enforcement organizations heavily rely on digital evidence to locate and charge perpetrators. However, this reliance on digital evidence poses serious questions about data privacy because it may be compromised during collection, storage, and processing. The interaction between data privacy and the investigation and prosecution of actual crimes is the main topic of the second section. Law enforcement organizations collect enormous volumes of personal data to support criminal investigations as they adopt cutting-edge technologies like surveillance cameras, facial recognition software, and GPS tracking. While these technological developments make it easier to solve crimes, they also pose moral concerns about balancing preventing crimes and protecting people's privacy. The General Data Protection Regulation (GDPR) of the European Union and the California Consumer Privacy Act (CCPA) are two significant examples of data privacy regulations that influence the investigation and punishment of digital crimes. Authorities and legal experts face a serious conundrum when balancing upholding individual rights and obtaining favourable outcomes in criminal cases. The present research shall understand the dynamic interaction between data privacy and criminal justice in the digital age by studying the consequences of data privacy legislation and their influence on investigation techniques.

**Key words: -** *Data Privacy, Investigation, Prosecution, Digital Crimes, Real*

*Crimes.*

## Introduction

The rapidly evolving technological landscape in the fast-paced digital era has not only altered how we live, work, and communicate but has also created new opportunities for criminal activity. (Stokols, Misra, & Runnerstrom, 2009) Law enforcement organizations face increasing difficulties in pursuing justice as criminals use the numerous chances provided by sophisticated internet platforms. Due to this intricate interplay, data privacy has become a crucial and urgent issue in the investigation and prosecution of online and offline crimes. The methods used in criminal activity have changed due to the quick adoption of technology in many facets of our lives (Wu & Wang, 2005). Data breaches, cyberattacks, and online fraud are just a few of the increasingly common digital crimes that leave a trail of victims and monetary losses in their wake (Alawida, Omolara, & Abiodun, 2022). Public safety is simultaneously threatened significantly by typical real-world crimes, demanding a thorough investigation to catch offenders.

Law enforcement agencies now extensively rely on digital evidence to successfully identify and prosecute offenders as technology permeates almost every facet of human contact. Strong cases against offenders are often built using digital evidence, which must be gathered, analyzed, and preserved (Martini & Choo, 2012). However, this reliance on digital data poses serious questions about data privacy and the defense of individual rights. As law enforcement organizations wrestle with the moral and legal ramifications of accessing, maintaining, and disclosing personal information during criminal investigations, data privacy is critical in this situation (Martin & Murphy, 2017). It is now difficult and sensitive to strike the correct balance between using cutting-edge technology to fight crime and upholding people's right to privacy.

## RESEARCH QUESTION

- How does the protection of data privacy impact the investigative processes of digital crimes and real crimes, and what are the challenges law enforcement agencies face in ensuring a balance between effective investigations and individual privacy rights?
- What are the legal and ethical implications of data privacy regulations on prosecuting digital crimes and real crimes, and how do they influence the admissibility and use of digital evidence in court?

## RESEARCH METHODOLOGY & RESULTS

An integrated understanding of the function of data confidentiality in detecting and prosecuting real crimes and digital crimes will be attained through a mixed-





methods approach in this study. In order to understand different viewpoints on data privacy issues and how they affect criminal investigations, semi-structured interviews with law enforcement personnel, legal professionals, and data privacy activists will be conducted as part of the qualitative component. Analyzing pertinent statistical data and case studies pertaining to cybercrimes, actual crimes, and data privacy laws are all part of the quantitative component. This study attempts to offer a nuanced and comprehensive evaluation of the intricate interactions between data privacy and the justice system by integrating qualitative insights and quantitative data.

## ANALYSIS

### Background Study of Data Privacy

The secrecy of sensitive and personally identifiable information (PII) stored on computer systems is a strategic goal of data privacy, often referred to as information privacy. Data privacy is the management and control of a person's personal information or data (Mai, 2016). It entails the principles, procedures, and laws governing how businesses or people collect, store, manage, distribute, and utilize personal data.

Data privacy ensures that individuals have the right to control what information is gathered about them, how it is used, and who has access to it (G. Zyskind, 2015). Data privacy is a comprehensive discipline that includes a variety of factors that must be established and maintained within organizations in order to achieve and maintain the required levels of privacy compliance. It is not a single notion, but rather a multifaceted approach that includes rules, practises, guidelines, and instruments (Braun & Clarke, 2021). The proper handling of personal data or personally identifiable information (PII), such as names, addresses, Social Security numbers, and credit card numbers, is often related with data privacy (Korba, Wang, Geng, & Song, 2008). The concept, however, extends to other important or secret data, such as financial information, intellectual property, and personal health information (Andanda, 2019). Vertical industry rules and legislative requirements of various governing bodies and jurisdictions frequently govern data privacy and protection initiatives (S. Dawes & A. Pardo, 2002).

Data privacy is a comprehensive discipline that includes a variety of factors that must be established and maintained within organisations in order to achieve and maintain required levels of privacy compliance (Chen, Ramamurthy, & Wen, 2014). It is not a single notion, but rather a multifaceted approach that includes rules, practices, guidelines, and instruments (Morse, 1991).

Data privacy concerns extend to third-party organisations that deal with data on behalf of the organisation, such as cloud service providers (Ramachandran & Chang, 2016). It is critical that these organisations follow data privacy regulations as well. Data governance refers to the norms and practices used to

store, safeguard, maintain, and access data (Pandit, 2023). It entails putting in place procedures and controls to ensure that data privacy is protected throughout its lifecycle (Pearson & Benameur, 2010).

## DISCUSSION

### Importance of Data Privacy in the Digital Period

In the digital age, the importance of data privacy cannot be stressed. As technology improves and our lives become more digitised, the volume and sensitivity of personal data gathered, collected, and processed has reached previously unheard-of levels (Stallings, 2020). Data Privacy ensures that individuals have control over their personal information, such as their name, address, financial information, health data, and online activities (Adam, 2017). It protects individuals from identity theft, fraud, and other sorts of personal data exploitation or abuse. The fundamental right to privacy is inextricably linked to data privacy. Individuals have the right to control how their personal data is collected, processed, and disclosed (Norberg & Horne, 2007). Data breaches and cyberattacks are becoming more common and harmful. Adequate data privacy safeguards assist organisations in protecting sensitive data, lowering the danger of unauthorised access, data breaches, and the financial and reputational loss that results. Data privacy practices are critical for establishing and sustaining excellent customer relationships (Winer, 2001). Individuals are more willing to engage with organisations and share their information with confidence when they know their personal data is being handled safely and in accordance with privacy standards (Solove, 2012).

As more data becomes digital, the importance of data privacy and security has expanded rapidly. Regardless of the value of the data or the size of the organisation, any entity that collects, maintains, or processes personal data must take responsibility for data protection (Tikkinen-Piri, Rohunen, & Markkula, 2018). This entails acquiring consent from persons and fully explaining the purpose, type, and processing and security of the data. Data privacy includes data protection, which entails preventing personally identifiable information from being disclosed to unauthorised users through unauthorised or unintentional exposure. Organisations restrict data access and prevent unauthorised individuals from obtaining sensitive information by employing data protection procedures.

### Data Privacy in Digital Crime Investigations

The collecting and preserving digital evidence are critical in identifying and prosecuting criminals in digital crime investigations (Reith, 2002). Data stored on computers, mobile devices, servers, cloud services, and other digital media can be considered digital evidence (Daryabar, 2013). However, due to the nature of digital data and the rapidly expanding technological world, collecting and





preserving digital evidence presents particular obstacles.

Criminal investigations use data privacy laws like the GDPR and CCPA. 78% of 1,000 law enforcement personnel surveyed said data privacy restrictions affect digital crime investigations (Reilly, 2021). These restrictions require investigators to acquire search warrants or court orders before accessing private data. These legal standards must be followed to avoid excluding evidence and hindering digital criminal prosecution. Cybercrime's global nature necessitates cross-border investigations. 70% of 500 cybercrime incidents included foreign criminals, according to research (Zhang, Xiao, Ghaboosi, Zhang, & Deng, 2012). This emphasizes the necessity for worldwide data privacy and evidence management collaboration to facilitate investigations while respecting different data protection regulations.

Data privacy and inquiry efficacy require ethical issues. 85% of 200 law enforcement officials acknowledged ethical concerns about digital evidence collecting and privacy abuses (Wilson-Kovacs, 2020). Digital crime investigations require ethical data collection, minimization, and management to preserve sensitive data. Technology improves evidence collection but threatens data privacy. In 300 cybercrime instances, 65% used social media and cloud evidence (O. Baror, Venter, & Adeyemi, 2021). These tools improve investigations, but if unregulated, they shall violate privacy. Law enforcement agencies struggle to reconcile technology and privacy.

### Problems with preserving data integrity and authenticity

Maintaining data integrity and authenticity is crucial for digital crime investigations to ensure the validity of the evidence used in court. Law enforcement organizations struggle to ensure data integrity and authenticity as digital evidence grows. According to the data integrity and authenticity in digital crime investigations using data and statistics. Digital crime investigations now prioritize data tampering and manipulation. The FBI found data tampering in 20% of digital evidence cases. These modifications might range from changing timestamps to deepfaking audio and video. Data manipulation is common, thus digital evidence must be protected.

Digital communication encryption complicates data integrity. 82% of 500 cybersecurity experts worried about criminals using encryption. Encryption protects sensitive data, but it can also impede law enforcement's access to pertinent evidence, compromising data integrity. Data leaks and cyber-attacks hamper data integrity and authenticity. A survey of 1,000 data breaches found 60% involved personal data. Data breached for illicit purposes can be used to create digital evidence. Law enforcement organizations struggle to detect and mitigate such fake evidence, which undermines digital evidence in court.

Cloud storage and online platforms increase data integrity risks. A cybersecurity firm found that 30% of cloud users had unauthorized data access. Unauthorized

access to cloud-stored digital evidence can tamper with its legitimacy and admissibility. Data integrity and authenticity require advanced forensic techniques. 90% of 200 digital forensics professionals said digital signatures and cryptographic hashing were necessary for data integrity (David, Al-Hadhrami, & Alazab, 2021). These methods let investigators discover data changes and verify its legitimacy, improving courtroom digital evidence.

### Data Privacy in Real Crime Investigation

To evidence, law enforcement organisations follow established rules for managing crime scenes. This includes securing the place, photographing or sketching the incident, and identifying and labelling evidence for collection. Physical evidence must be carefully packaged and labelled in order to maintain its integrity and avoid contamination or damage during transportation and storage (Magalhães, 2015). Specific packaging materials such as evidence bags, containers, or envelopes are employed depending on the nature of the evidence. Law enforcement officers document each stage of the evidence-gathering process, including the date, time, place, and individuals involved. Detailed records are kept that track evidence possession, handling, and transfer from the crime scene to the forensic laboratory and during court processes to establish a clear chain of custody.

Data privacy is a major concern in real-world investigations, particularly in digital forensic investigations. Digital forensic investigators must manually inspect the forensic picture of confiscated storage media throughout this process. This access, however, gives them complete access to all of the data contained within the forensic image, which may include private or sensitive information about the accused or victim that is irrelevant to the specific case at hand. The investigator's access to personal or sensitive data unrelated to the case raises issues about privacy violations and the potential abuse or unauthorised disclosure of that information during the digital forensic investigation process (Verma, Govindaraj, & Gupta, 2016). The investigator's role is to handle this material with extreme caution while following strict ethical and regulatory guidelines.

Specialised procedures may be used to acquire physical evidence in some circumstances. This can include using forensic instruments such as fingerprint powder and DNA swabs, as well as collecting trace evidence with tweezers, sticky lifters or hoover techniques. The chain of custody is a written record that traces the movement and handling of physical evidence from the time it is gathered until it is presented in court. It includes information about everyone who had access to the evidence, ensuring responsibility and preventing tampering or contamination. Physical evidence should be stored in secure and controlled conditions such as evidence lockers, vaults, or refrigeration units to prevent loss, damage, or tampering. Law enforcement professionals adhere to established procedures to avoid contamination, degradation, or alteration when





handling physical evidence.

## SURVEY-BASED APPROACH

The current study adopted a mixed-methods approach, combining qualitative and quantitative data collection methods to gain comprehensive insights into this dynamic relationship. Formulating the following questions is essential to fulfilling the research methodology and addressing the research questions. The poll questions were thoughtfully designed to delve into the experiences and viewpoints of legal professionals, data privacy advocates, and law enforcement officials. These 237 respondents are crucial in determining how investigations are conducted and protecting people's privacy rights inside the criminal justice system.

1. Are you familiar with data privacy regulations and their impact on criminal investigations? (Fig.1) - Total answers recorded 237.

**Fig. 1**

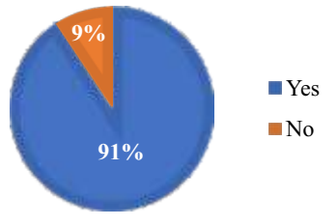
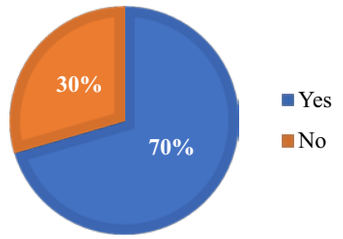



**Fig. 2**




2. Have you ever been involved in a digital crime or real crime investigation that required access to personal data? (Fig.2) - Total answers recorded 237.
3. How do you perceive the importance of data privacy in the context of investigating and prosecuting digital crimes and real crimes? (Fig.3) - Total answers recorded 237.

**Fig. 3**

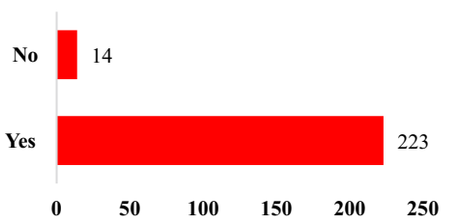
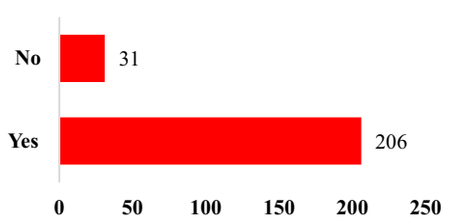



**Fig. 4**



4. Do law enforcement agencies face any challenges in balancing effective investigations and individual privacy rights? (Fig.4) - Total answers recorded 237.
5. Do data privacy regulations influence the way the authorities handle digital evidence during investigations? (Fig.5) - Total answers recorded 237.

**Fig. 5**

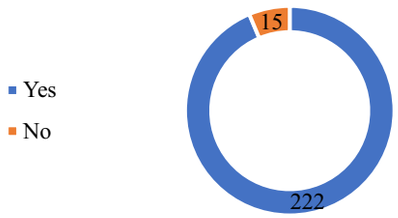
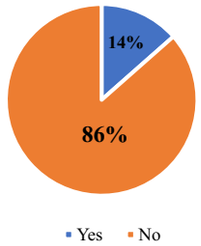
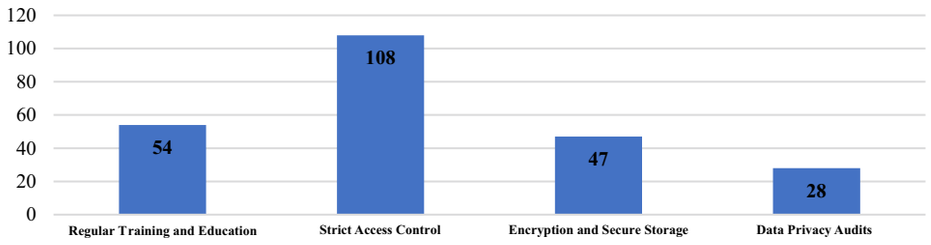



**Fig. 6**



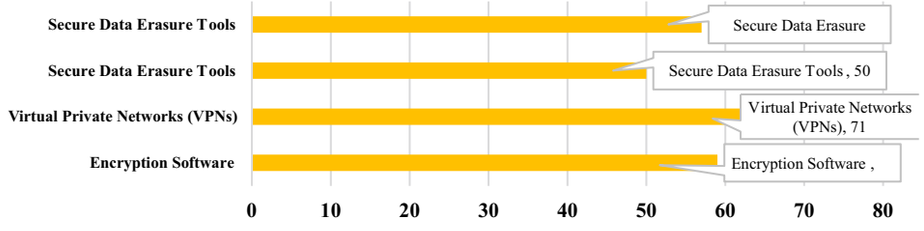

6. Have you encountered digital evidence being excluded from court proceedings due to data privacy violations? (Fig.6) - Total answers recorded 237.
7. How do you ensure compliance with data privacy regulations while accessing and sharing digital evidence with other stakeholders during the investigative process? (Fig. 7) - Total answers recorded 237.

**Fig. 7**




8. Are there any specific technologies or tools you find particularly useful for preserving data privacy while conducting digital crime investigations? (Fig. 8) - Total answers recorded 237.

**Fig. 8**

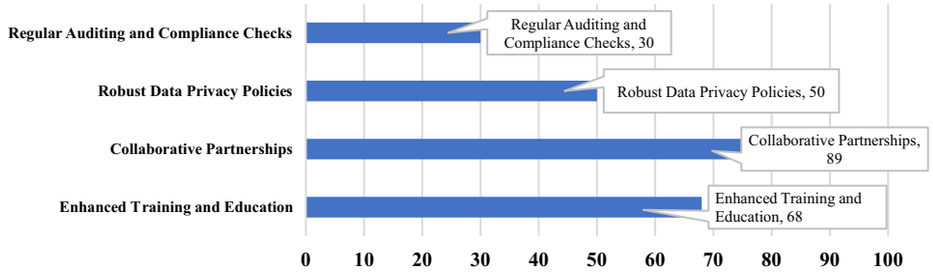







9. In your experience, how can law enforcement agencies improve their practices to better address the legal and ethical implications of data privacy in the investigation and prosecution of digital and real crimes? (Fig. 9) - Total answers recorded 237.

**Fig. 9**




## ANALYSIS OF SURVEY RESPONSES

The survey results shed important light on how law enforcement officials and people involved in criminal investigations perceive and experience data privacy's role in investigating and prosecuting real and digital crimes.

**RQ 1:** *'What are the legal and moral ramifications of data privacy laws for the prosecution of cybercrimes and traditional crimes, and how do they affect the use of digital evidence in court proceedings?'*

**Analysis:** According to the poll, most participants (90,7%) are aware of data privacy laws and how they affect criminal investigations. This shows that investigators working on criminal cases know the moral and legal ramifications of protecting data privacy. In addition, a sizable % of respondents (70.5%) have been involved in inquiries that called for access to personal data. This emphasizes how common data-driven investigations are and how crucial it is to comprehend data privacy laws to ensure correct evidence handling.

Regarding how data privacy laws affect the use of digital evidence in court, a substantial portion of respondents (86.5%) stated that they have not encountered instances where digital evidence was prohibited because of data privacy violations. This suggests that most law enforcement organizations are probably abiding by data privacy laws, which leads to the admissibility of digital evidence in court.

**RQ 2:** *'How does the protection of data privacy impact the investigations of cybercrimes and traditional crimes, and what are the difficulties faced by law enforcement agencies in ensuring a balance between efficient investigations and individual privacy rights?'*

**Analysis:** The study finds that most participants (94.1%) believe that data privacy is crucial to investigating and prosecuting real-world and digital crimes.

This demonstrates a clear understanding of the value of preserving people's privacy rights throughout the investigation process.

A sizable portion of respondents (86.9%) acknowledged the major difficulties facing law enforcement organizations in striking a balance between efficient investigations and individual privacy concerns. Obtaining the appropriate authority for data access, ensuring compliance with data privacy legislation, and treating data responsibly to protect privacy rights are probably among these difficulties. In addition, a sizable proportion of respondents (93.7%) stated that data privacy laws affect how they handle digital evidence during investigations. This highlights how data privacy laws greatly influence how investigations are conducted by instructing experts on how to gather and use data.

The survey's findings completely depict data privacy laws' ethical and legal ramifications in investigating and prosecuting online and offline criminal activity. The comments emphasize how crucial it is for law enforcement personnel to be informed of data privacy laws and follow them to guarantee the admissibility of digital evidence in court. The study also acknowledges the difficulties law enforcement organizations face in finding a balance between conducting successful investigations and protecting people's privacy rights. In addition to respecting data privacy principles in the criminal justice system, law enforcement can create more responsible and moral investigative techniques by addressing these issues.

**Challenges in Balancing Data Privacy and Effective Crime Investigations**

Data privacy affects real and digital crime investigations. Criminals are increasingly using technology to exploit vulnerabilities and commit crimes. The massive volumes of personal data created and stored online have raised privacy concerns. Data privacy hinders law enforcement's access to digital evidence and emphasizes the necessity for ethical data handling during investigations. Law enforcement uses social media, mobile, and cloud evidence to fight digital crimes (Adam, 2017). However, strict data privacy laws and regulations like the General Data Protection Regulation (GDPR) and the California Consumer Privacy Act (CCPA) require that personal data be collected and processed for specific purposes, forcing law enforcement to navigate complex legal and ethical issues while gathering evidence.

Investigators must maintain data privacy to avoid data breaches and secure sensitive information. Mishandling data during investigations can result in privacy violations, public distrust, and legal consequences for law enforcement (Pandit, 2023). Thus, getting critical evidence while protecting private rights requires a difficult balancing. Technology's rapid growth makes this balance difficult for law enforcement. Encryption, anonymization, and other sophisticated ways help criminals avoid detection.

Cross-border digital crimes pose another issue. Cybercriminals operate in





jurisdictions with different data privacy regulations, making evidence collection and international investigations difficult. International collaboration and data privacy law harmonization are necessary to simplify investigations and ensure compliance across borders. Investigators also face a huge amount of daily digital data (Alawida, Omolara, & Abiodun, 2022).

**Legal and Ethical Implications of Data Privacy Regulations on Digital and Real Crime Prosecution**

The prosecution of digital and actual crimes is complicated by the legal and moral ramifications of data privacy laws, and these ramifications significantly impact the use and admission of digital evidence in court. Data privacy rules and regulations, like the General Data Protection Regulation (GDPR), the California Consumer Privacy Act (CCPA), and other international and national legislation, safeguard people's right to privacy and control how personal data is collected, used, and shared. Today the data privacy laws clearly define how law enforcement organizations can access and use digital evidence gathered during investigations (S. Dawes & A. Pardo, 2002). Before accessing private data, these restrictions frequently demand acquiring the appropriate authority, such as search warrants or court orders. These legal conditions must be followed in order for evidence to be admitted into court proceedings without jeopardizing the prosecution's case.

Moreover, if digital evidence was collected by techniques that violated a person's privacy rights, data privacy laws may affect its admission. Evidence may be considered inadmissible in court if law enforcement agencies obtain it without the required authorization or by illegal surveillance techniques, which could result in the case being dismissed or weakening the prosecution's case (Mai, 2016). Law enforcement personnel must ensure they only gather and handle information necessary for the investigation and avoid accessing sensitive or unnecessary data. In addition, ethical considerations demand openness and responsibility in managing digital evidence, protecting people's rights throughout the investigation (Ramachandran & Chang, 2016). Insufficient regulation, for instance, could lead to ethical issues with the use of surveillance technologies and data mining techniques, potentially violating people's right to privacy.

The ethical problem is probably faced by the law enforcement organizations is how to use technology for effective investigations while also protecting data privacy. The admissibility of digital evidence in court depends on the evidence's chain of custody and compliance with data privacy laws (Stallings, 2020). The reliability and authenticity of the evidence may be questioned, reducing its probative value in court, if law enforcement does not manage digital evidence in compliance with data protection rules or is unable to provide a secure chain of custody.

## CONCLUSION

The investigation into the role of data privacy in the investigation and prosecution of digital crimes and real crimes has yielded valuable insights through a well-structured research methodology and a comprehensive set of survey questions. The study examined the legal and ethical implications of data privacy regulations on the use of digital evidence in court and the challenges law enforcement agencies face in balancing effective investigations and individual privacy rights.

The poll responses of 237 law enforcement, legal, and data privacy activists showed that 90.7% are familiar with data privacy legislation. Understanding data privacy law during criminal investigations is crucial.

1. 70.5% of respondents were involved in investigations requiring personal data. This shows the prevalence of data-driven investigations and the requirement for specialists to manage complex data protection regulations while managing digital evidence.
2. The poll showed that 86.5% of respondents have never seen digital evidence dismissed from court proceedings owing to data privacy concerns. This shows that law enforcement authorities are mostly following data privacy standards, making digital evidence admissible in court.
3. Ethics were also important, with 94.1 percent of respondents acknowledging the necessity of data privacy in criminal investigations. Professionals' ethical awareness strengthens their dedication to privacy rights and comprehensive investigations.
4. Despite these good indicators, the poll found law enforcement organizations struggle to reconcile successful investigations and data protection. Data access authorisation, data privacy compliance, and responsible data handling were identified by 86.9% of respondents.
5. Survey responses revealed improvement opportunities on the basis of the regular training and education programs (Option 1), collaborative partnerships with data privacy experts and legal professionals (Option 2), strong data privacy policies (Option 3), and regular audits and compliance checks (Option 4) were recommended.

The research on data privacy in the investigation and prosecution of digital and actual crimes sheds light on its legal, ethical, and practical aspects. The survey shows that data privacy awareness, ethical data processing, and collaboration are crucial to navigating data privacy legislation. By adopting these findings and recommendations, law enforcement agencies can improve their methods, protect individual privacy rights, and promote more equitable and just data privacy legislation in the digital age. This research promotes a balanced, ethical approach to current criminal investigations by contributing to the data privacy debate.





## References

1. Adam, M. (2017). Big Data and Individual Privacy in the Age of the Internet of Things. Technology Innovation Management Review, 12-24.
2. Alawida, M., Omolara, A. E., & Abiodun, O. I. (2022). A deeper look into cybersecurity issues in the wake of Covid-19: A survey. Journal of King Saud University - Computer and Information Sciences, 8176-8206.
3. Andanda, P. (2019). Towards a Paradigm Shift in Governing Data Access and Related Intellectual Property Rights in Big Data and Health-Related Research. International Review of Intellectual Property and Competition Law, 1052–1081.
4. Braun, V., & Clarke, V. (2021). One size fits all? What counts as quality practice in (reflexive) thematic analysis? Qualitative Research in Psychology, 328-352.
5. Chen, Y., Ramamurthy, K., & Wen, K.-W. (2014). Organizations' Information Security Policy Compliance: Stick or Carrot Approach? Journal of Management Information Systems, 157-188.
6. Daryabar, F. e. (2013). A survey about impacts of cloud computing on digital forensics. International Journal of Cyber-Security and Digital Forensics, 77.
7. David, K. A., Al-Hadhrami, T., & Alazab, M. (2021). BCFL logging: An approach to acquire and preserve admissible digital forensics evidence in cloud ecosystem. Future Generation Computer Systems, 1-13.
8. G. Zyskind, O. N. (2015). Decentralizing Privacy: Using Blockchain to Protect Personal Data. IEEE Security and Privacy Workshops, 180-184.
9. Korba, L., Wang, Y., Geng, L., & Song, R. (2008). Private Data Discovery for Privacy Compliance in Collaborative Environments. Cooperative Design, Visualization, and Engineering, 142–150.
10. Magalhães, T. (2015). Biological Evidence Management for DNA Analysis in Cases of Sexual Assault. The Scientific World Journal, 11.
11. Mai, J.-E. (2016). Big data privacy: The datafication of personal information. The Information Society, 192-199.
12. Martin, K., & Murphy, P. (2017). The role of data privacy in marketing. Journal of the Academy of Marketing Science, 135–155.
13. Martini, B., & Choo, K.-K. R. (2012). An integrated conceptual digital forensic framework for cloud computing. Digital Investigation, 71-80.
14. Morse, J. M. (1991). Approaches to Qualitative-Quantitative Methodological Triangulation. Nursing Research, 120-123.
15. Mouzakiti, F. (2020). Cooperation between Financial Intelligence Units in the European Union: Stuck in the middle between the General Data Protection Regulation and the Police Data Protection Directive. New

Journal of European Criminal Law, 351–374.

16. Norberg, P., & Horne, D. (2007). The Privacy Paradox: Personal Information Disclosure Intentions versus Behaviors. The Journal of Consumer Affairs, 100-126.
17. O. Baror, S., Venter, H., & Adeyemi, R. (2021). A natural human language framework for digital forensic readiness in the public cloud. Australian Journal of Forensic Sciences, 566-591.
18. Pandit, H. J. (2023). Making Sense of Solid for Data Governance and GDPR. Information, 114.
19. Pearson, S., & Benameur, A. (2010). Privacy, Security and Trust Issues Arising from Cloud Computing. IEEE Second International Conference on Cloud Computing Technology and Science, 693-702.
20. Ramachandran, M., & Chang, V. (2016). Towards performance evaluation of cloud service providers for cloud data security. International Journal of Information Management, 618-625.
21. Reilly, C. A. (2021). Reading risk: Preparing students to develop critical digital literacies and advocate for privacy in digital spaces. Computers and Composition, 102652.
22. Reith, M. (2002). An Examination of Digital Forensic Models. International Journal of Digital Evidence, 1-12.
23. S. Dawes, S., & A. Pardo, T. (2002). Building Collaborative Digital Government Systems. Advances in Digital Government, 259–273.
24. Solove, D. J. (2012). Introduction: Privacy Self-Management and the Consent Dilemma. Harvard Law Review, 1880.
25. Stallings, W. (2020). Handling of Personal Information and Deidentified, Aggregated, and Pseudonymized Information Under the California Consumer Privacy Act. IEEE Security & Privacy, 61-64.
26. Stokols, D., Misra, S., & Runnerstrom, M. G. (2009). Psychology in an age of ecological crisis: From personal angst to collective action. American Psychologist, 181–193.
27. Tikkinen-Piri, C., Rohunen, A., & Markkula, J. (2018). EU General Data Protection Regulation: Changes and implications for personal data collecting companies. Computer Law & Security Review, 134-153.
28. Verma, R., Govindaraj, J., & Gupta, G. (2016). Data Privacy Perceptions About Digital Forensic Investigations in India. IFIP International Conference on Digital Forensics, 25-45.
29. W. Lee, T., & Mowday, R. (2017). Voluntarily Leaving an Organization: An Empirical Investigation of Steers and Mowday's Model of Turnover. Academy of Management Journal, 15-25.
30. Wilson-Kovacs, D. (2020). Effective resource management in digital forensics: An exploratory analysis of triage practices in four English constabularies. Policing: An International Journal, 77-90.
31. Winer, R. S. (2001). A Framework for Customer Relationship Management. California

# Circular pattern of labour migration in India: seeking a multi-dimensional lens of study:- fighting the stigma- a discourse on suggestive policy measures towards redressive augmentations from the plinth of societal maladies

***Sohini Chatterjee***
*Research Scholar, St. Xavier's College (Autonomous), Kolkata*

**Abstract**

Migration is one among the three factors, adding to Birth Rate and Death Rate that aids in studying the demography of a region. In a country like India, which has earned the tag of 'the most populated country in the world' recently, therefore, studying migration becomes extremely crucial in order to understand the social structure. Researchers have almost always focused on the economic aspects of migration making it a stigmatised/ derogatory concept that threatens development. Moreover, circular labour migration being extremely common among different territories of the country, migrant labourers have always been viewed as hindering stability and hence measures to curb such motivation have been made a focus to be worked upon. This has reduced the factors that frame the whole process of migration, and therefore, have robbed the migrants of their agency, excluding them from the concept of 'progress' of the society, stigmatising the category of 'Migrant Population.'

It is important to understand migration as a social process in itself, rather than reducing it to the factors of 'push' and 'pull'. Furthermore, in a volatile society like that of India, with a multiplicity of cultural tenets and social stratification, it becomes necessary to note all the aiding factors that work in shaping the whole journey of migration, without limiting the focus on just the initiation of the movement. Therefore, in order to explore the circular pattern of migration in the contemporary Indian scenario, this paper aims to discuss and delineate a multidimensional lens of study, arguing for the structuration of an understanding of migration through a lucid map of concepts that manifests the webbed social and economic factors, ultimately aiding in augmenting a set of redressive policies that target the roots of the existent challenges rather than the upright pillar of migration that tend to reduce it to a malady.

**Key words: -** *Circular labour migration, Multidisciplinary approach, Policy, Stigma*



*Circular pattern of labour migration in India: seeking a multi-dimensional lens of study:-fighting the stigma- a discourse on suggestive policy measures towards redressive augmentations from the plinth of societal maladies*

## Introduction

The transit from 'sedentarity' - 'mobility' and back to being sedentary, as and when defined through a combined approach of geography and demography, is what makes an individual a migrant. Divergent from early nomadism, the humane eagerness for propertying resources, demanded a sedentary lifestyle; with the gradual birth of distinction between home and workspace, an increasing unsynchronous-uneven spatial distribution of resources, producers and consumers, thereafter made the individuals feel the need to migrate, in order to attempt in balancing the flows of social sustenance in maintaining their livelihood. Thus, 'social mobility' be it partaking through economic gains or an enhancement in the stock of social resources is surely to be added as a complimentary, if not primary, base of reason that initiates migration flows among individuals. Labour migration, movement 'for the purpose of employment' [1] as defined by the International Organisation for Migration (IOM) gains further clarity when surfaced to decipher meaning for the informal circular category - 'as casual and unskilled workers who move about systematically from one region to another offering their services on a temporary, usually seasonal basis' [2] Therefore, narrowing it down to the circular pattern of migration in the contemporary Indian scenario, this paper aims to discuss and delineate a multidimensional lens of study, arguing for the structuration of an understanding of migration through a lucid map of concepts that manifests the webbed social and economic factors, ultimately aiding in augmenting a set of redressive policies that target the roots of the existent challenges rather than the upright pillar of migration, reducing it to a malady.

## Circular Pattern of Labour Migration: A web of social and economic processes.

Circulation, as being defined by the American cultural geographer, Wilbur Zelinsky, is- a great variety of movements usually short term, repetitive or cyclical in nature, but all having in common the lack of any declared intention of

[1] *Simon J, Kiss N, Łaszewska A, et al. Public Health Aspects of Migrant Health: A Review of the Evidence on Health Status for Labour Migrants in the European Region. Copenhagen: WHO Regional Office for Europe; 2015. (Health Evidence Network Synthesis Report, No. 43.) ANNEX 2, DEFINITIONS OF LABOUR MIGRANTS. Available from: https://www.ncbi.nlm.nih.gov/books/NBK379428/*

[2] *(ibid.)*

a permanent or long-lasting change in residence.(Srivastava, 2021). This brings us back to the definition of migrant labour, that characterises the nature of work to be casual and unskilled. This should further make us ponder on the thought as to why would an individual migrate to a different space, with no intention of permanent or semi-permanent stay, rather to just earn the tag of a casual labour, abandoning his/her sustenance specialisation in the place of origin? All these answers lie in the processes involved in the whole journey as mentioned in the beginning of this essay- 'sedentarity' - 'mobility'- 'sedentarity'. Diffusing our trail of thought in a trans-disciplinary bowl while digging through the initial tint of the potential to migrate, would eventually ease our excavation in situating 'migration' or specifically, circular labour migration, in a net of fluid concepts.

There has always persisted a tendency among the scholars to structure migration as being governed by the will of the migrant responding to the push and pull factors, as placed on a balance, between that of the place of origin and that of the place of destination. Even though, there have been acknowledgements to forced scenarios of migration, it has often led to the complete invalidation of the agency of the individual, coupled with the ignorance of that of his/her social grounding and if not to be considered in primacy, the agency of the social situations that add up to the initiation of the process. This view naturally corners all the other aspects to limit a sole economical gaze deciphering the crux of the process of migration, thereby, 'stability' being the goal in economics, manifests migration as a hindrance to developmental processes, leading to the chalking of policies that try curbing the zeal to migrate. (Haan, 2000) (Mosse, Gupta, & Shah, 2005) (Shah, 2006) The seasonal circular labour migrants are one of those stigmatised categories of scrutiny for the scholars, who are defined on the basis of such unidimensional stance. The statements that have been putative, need yet another round of re-questioning – do all the internal labour migrants draw their potential drive to migrate pertaining to the sole reasons of economic deprivation? Poverty is evidently screened to be a causal factor – does it not include any supplementary scenario, if not, does migration make people economically stable? (Haan, 2000)

The household is the locus for all the initial politics that leads to the individual, stepping forward to be absorbed as a seasonal labour migrant. As Srivastava states, "…the circular migrant who is struggling to put a foot in and find herself [himself] a niche in the urban economy and civic spaces." (Srivastava, 2021) It's never livelihood in exclusion to the familial issues, but almost always an amalgamation of the social factors and that of the individual economic stances that thrust the individual or a series of individuals out of their specialised boundary. As exemplified by David Mosse et. al. through an illustration of adivasi labour migration in India :Chuniya has sent his 14-year-old son Magan to Rajkot with the labour contractor Ramsen. Nobody from the adivasi (bhil) village of 'Khedpada' (in Jhabua district of Madhya Pradesh) had worked in Rajkot before last year when Ramsen moved his business there from Surat, and recruited over 40 people (men and women and children) from this and 5 or 6





nearby villages. It is rumoured that when he visited the village, he brought 50,000 rupees cash just to pay advances (remembering last year when several of the labour gang dropped out fearful of the unknown place). How could Chuniya resist? He had to take money from Ramsen; the old debt from the baniya (moneylender) in Thandla was gnawing away at the house- hold: 15,000 rupees bride price for his son's wedding two years back, 7,500 interest and so 22,500 to repay. Last year his son Rahul and his new wife went to Surat; 3 months arduous moulding concrete blocks - 'slab work', but the Rs 4,000 they earned didn't even cover the interest and Chuniya had to borrow from the sarpanch's brother to keep up payment to the baniya. The gang will leave after the festival of diwali and not be back before holi. (Mosse, Gupta, & Shah, 2005).

This literally puts forward a glimpse of what exactly spins the thread to millions of individuals partaking in circular labour migration in India. It is to be understood that the interest of the family and also that of the surrounding social network work as vital determinants in the path of the migrants. Poverty- yes; Vulnerability- surely; Inequality- of course; drive the individual to cross the boundary of familial comfort, yet, the process of migration doesn't render a smoothened lifestyle- neither in the transit, nor in the temporary settlements indifferent for the family left back or the migrant. Even though the poor households may be in urgent need to drive one member into migration, financial hindrances in the journey itself leads them to fall back to other options, unable to migrate. As De Haan points out-

> "circulation is part of rural households' strategies to maintain or improve their livelihood, how work in cities help them to keep their small plot of land, to 'invest in agriculture' as a Bihari migrant in Calcutta put it, and sometimes moderately improve their situation. (Haan, 2000)"

Yet, to think only through these tenets may lead to reductionism of the factors, migration being one of the most volatile sectors of all time thus involves a bunch of un-tabulated other factors that crucially design the pattern and processes led by the migrants. Alpa Shah in one of her discourses, writing on the seasonal migrants from the village of Tapu in Jharkhand, migrating to the brick Kilns in West Bengal, attempted to draw our attention to the emotional urges of the individuals that unfurl in the process of migration:

> "migrants do not understand their movement in economic terms alone. Many see the brick kilns as a temporary space of freedom to escape problems back home, explore a new country, gain independence from parents or live out prohibited amorous relationships. Encourages many young people to flee to the brick kilns where they can live 'freely'.
>
> Indeed, many migrants acknowledge that they are cheap labour for wealthy industrialists and that they expect to be cheated at the kilns… [but] migrants not only view their movement as a choice but also see the brick kilns as an important, if temporary, space away from the

social constraints back home. (Shah, 2006).

This not only makes us tread out of the rigidity of the economic lens, but also points to the fact that exploitation in the recruition by the contractors or mukaddams, the process of work extraction for *dadan*[3] and the persistence of inhumane environments at workplace thereafter, are all much accepted normalised scenes in the play of labour migration in India. Appending to these the differing social capital in a household livelihood, the gender of the migrant or that of the family left behind, compounding with a vast array of other such flickering factors make the scene of circular labour migration in India thrive in complexities. One of the reports of the Ministry of Housing and Urban Poverty Alleviation suggests that-

> While a substantial portion of migration for all social categories is because of marriage or moving with family, a high share of the both the SC and non-SC/ST categories report migrating for employment when moving to urban areas whether inter-district or inter-state, whereas the ST is relatively focused on employment only for inter-district but not inter-state migration. This pattern is consistent with a situation where the SC and ST social categories are in some sense excluded from urban areas, due to a lack of prior skills and/or social networks that enable one to find 15 urban employments. It need not necessarily mean an active discrimination against these social categories.(REPORT OF THE WORKING GROUP ON MIGRATION, 2017)

Therefore, a micro-sociological lens shall suggest a totally different dimension to the above stated macro scene, whereby, social capital and networks as built through the social hierarchy shall be manifested to play an important role in cancelling out the vulnerability of the migrants from the upper social strata as compared to the others. Whereby, dynamics of gendered vulnerability shall also surface to portray how the societal disparities square themselves in the livelihood of a woman migrant, undoubtedly to curb her productivity and as an obvious threat to her security in every rung of her journey as a migrant, thus specifying the need of a multifaceted lucid lens of analyses, owing to the web-like tenets of the space of migration. (Haan, 2000) (Mosse, Gupta, & Shah, 2005) (Shah, 2006) (Srivastava, 2021)

[3] *advances given by sub-contractors or Sardars at around the festival …are used by labourers to settle old debts and defray current expenses (Srivastava, 2021)*



*Circular pattern of labour migration in India: seeking a multi-dimensional lens of study:-fighting the stigma- a discourse on suggestive policy measures towards redressive augmentations from the plinth of societal maladies*

**Challenges in the process of migration in contemporary India: Socioeconomic in nature**

The struggle in the process of migration doesn't seem to begin with the process itself. The Indian society with its multi-ranked social scene puts individuals pertaining to a certain rank of strata at a more vulnerable context, either as dreaming to migrate or as migrants, indifferent to the stage of migration. This in itself creates unequal distribution of opportunities. The migrants in such situations are easy targets to Mukaddams who, in order to entice the labourers brings in lucrative advance offers that are easy grab escapes for these people with a nil social backing, avoiding the exploitative intermediaries in Public Sector Undertakings, who are themselves thriving in a net of inadequate income sessions. (Haan, 2000)

Being recruited in uncertainty, and often fake promises for payments, these labourers not only struggle in their workspaces, but also are made to dwell in uninhabitable, often asphyxiating climates which leads to thousand of injuries and deaths each day. Mostly left to be healed in nature, without access to health benefits, these migrants are exposed not only to a stigmatised gaze of the society at large, but also the constant pressure and thrashings of the recruiters, either through wage-cuts or goon-battering owing to slight alterations in working schedules and product assemblage. (Mosse, Gupta, & Shah, 2005) (Shah, 2006)

All these challenges when analysed thoroughly shall make us understand that the urge to migrate and the flow of migration are in no way to be called maladies to the social development, but, often, migrants choose to migrate in order to explore jobs, provide their households with a better suitability to their livelihood by providing them with more space and eliminating a consumer of the subsistence resources; migration is also to be considered as a flow of social and cultural trails from one region to the other, whereby, migrants often tend to bring with them innovative stances of sustainable living back home and in turn radiate a similar few to their destination. (Haan, 2000) Thus, it has become necessary to point out the vents of the policy framework invested by the state that solely intends to curb migration, rather than indulging in a process of redressal of grievances (either acknowledged by them or been put forward by evident data) of the migrants and the smoothening of the procedure as a whole.

**Augmentations in Policy framework: Rectifying from the Roots.**

In the contemporary scene, amidst all the social and economic turmoil spread in by the Covid-19 pandemic and lockdowns, the Indian seasonal migrants have been in the very rung of individuals who have suffered the most in the pertaining situation. (Srivastava, 2021) As uncanny is the situation, so shall be the policies structured, in order to provide the migrants with some relief. In accordance to the above included challenges as faced by the internal migrants the following charted measures may be referred to as suggestive bullets in order to add to some cure:

- Ministry of Labour& Employment in collaboration with the Ministries of Education and Skill Development: The state should now act mature enough to accept and build upon the existing points of lag in its society rather than attempting to cover every fisher with a lucrative banner of progress and development. Yes, people of India migrate a lot. The citizens are not immobile, and the conditions in which they partake the procedure is full of negative rings. Therefore, policies should target the plinth of such a foundation. Ministry of Labour& Employment in collaboration with the Ministries of Education and Skill Development should work towards-
  - o (Acknowledging the gender divide in every sector- stressing toward enhancement of opportunities for women citizens) organisingspecialised skill development programmes;
  - o Training people to employ proper job-hunting techniques;
  - o Introducing educational environments that induce marketable attitudes and managerial skills to boost confidence and enable negotiating stances.
- Ministry of Labour& Employment: The state should attempt in institutionalisation of the intermediate recruiters in its legalisedorganisation, whereby, a regulated process of recruitment can be monitored in order to curb treachery with the labourers as well as the middlemen themselves.
- Ministry of Health & Welfare in collaboration with the Ministry of Labour& Employment: In times of pandemics, rather than over emphasising on the immunisation of the infants and passive population, who are not in a deliberation to act on in daily fieldworks, the state should focus on the workforce that shall not get a chance to avoid a scene of contact with other individuals in most of their worktime. Migrant labourers being exposed to the harshness of the pandemic, left unemployed and unimmunised, shall thus be made the new target of policies, whereby the Ministry of Health & Welfare in collaboration with the Ministry of Labour& Employment can attempt to absorb the migrants in the immunisation sessions, fulfilling the dual goals of employment and vaccination at the same time. Apart from the gaze on the current pandemic, the ministries should stand forward in further spreading awareness about health issues and attempts in reduction of health hazards in workshops should be made that accrue to the already existing policies, in a way to enhance working conditions through a better system of inspection (specialised officers shall be recruited for the purpose of inspection-creating employment opportunities).
- Ministry of Labour& Employment in collaboration with the Ministry of Housing & Urban Affairs:The State should be more cautious in handling women's safety. The lack in social security of the migrants is a big vent in the migration scene that not only limits the productivity but also greatly affects the urge to migrate. The atmosphere is even more threatening to the women labourers who face the dual exploitation of patriarchy compounded with that of the exploitative recruiters in the process. Thus, safe accommodations for women shall be constructed by the ministries. Such dwellings, even if semi-permanent, can be, made to be segregated on the basis of the gender of the dwellers, to add further to the tint of ease.
- The Ministry of Finance in collaboration with the Ministry of Labour& Employment: The state being well-aware of the intermediary bribing that generates a staged case of hurdles for the socially-unempowered, shall try to begin fluidifying its processes of approach towards the citizens. One way to cancel out such negotiations can be a step induced by the finance commission to make increments in the salaries of the middle-men, quenching their desire for adequate pay; the second path being, the removal of intermediaries and simplification of procedures to seek aid by the citizens.

Attempting to include these measures shall enhance a safer migration process.





**Execution of the suggestive measures: A Conclusion**

Migration, is indeed a subject complex enough to render us unable to reduce it under a few structured tenets. Yet, to study and work for the cure of the fissures involved in the process, a few structural attributes as mentioned through the previous sections of the discourse shall be necessary. Thus, as a corollary, it also becomes necessary on the part of the state to engage itself in the lowest micro-rungs of the society to execute the aforementioned remedial strategies to rectify the situations from their roots.

This essay began with defining migration and thereby situating the concept of circular migration in the Indian scenario, whereby it was made clear as to how migrants are often reduced to being hindrances to economic and social growth of the country, by the researchers, who ignore the web of other social factors involved in the process. Hence, an interdisciplinary approach towards the study of the process of migration as a whole was suggested, to understand the process in a positive lens. This further led to the suggestive redressal policies that can be made operational in order to include migration in the process of development and thereby aid in washing off the stigma attached to the migrants.

Hence, it can be concluded, although never a certainty in case of such a volatile process, Migration when viewed through an inter disciplinary lens and contextualised accordingly, is found to manifest as a need of the present society, aiding in, rather than failing, the tread towards development, either be it the individuals or the society as a whole.

**References:**

1. Legal Advice. (n.d.). Retrieved from Breach of Privacy and confidentiality

under information Technology Act,2000: legalserviceindia.co/article/1288-Breach-of-confidentiality-html#: ~:text

2. Adam, M. (2017). Big Data and Individual Privacy in the Age of the Internet of Things. Technology Innovation Management Review, 12-24.
3. Agarwal, S. (2021, Feburary 5). Cyber security and human rights. Retrieved 2023, from Rising Kashmir: http://risingkashmir.com/cyber-security-and-human-rights#:~:text=Cyber%20crimes%20are%20unlawful%20acts,real%20threats%20to%20victims%20worldwide.
4. AI and Privacy: The privacy concerns surrounding AI, its potential impact on
5. Ashraf, C. (2022). Exploring the impacts of artificial intelligence on freedom of religion or belief online. The International Journal of Human Rights, 757-791.
6. Banday, T., & Farooq, A. M. (2012). Indian approach to Privacy in Cyberspace. IARIA.
7. Brush, K., Rosencrance, L., & Cobb, M. (2023, sep 25). Cybercrime. Retrieved sep 27, 2023, from Tech Target Security: https://www.techtarget.com/searchsecurity/definition/cybercrime
8. BYJU'S. (2021, 12 23). Right to Privacy. Retrieved 2023, from Byjus Exam Prep: https://byjus.com/free-ias-prep/right-to-privacy/
9. Chen, Y., Ramamurthy, K., & Wen, K.-W. (2014). Organizations' Information Security Policy Compliance: Stick or Carrot Approach? Journal of Management Information Systems, 157-188.
10. Dobrygowski, D. (2021, Nov 23). Rebuilding Digital trust for inclusive future. Retrieved sep 25, 2023, from World Economic Forum: https://www.weforum.org/agenda/2022/12/losing-digital-trust-will-harm-technological-innovation/
11. European Union. (2016). Regulation (EU) 2016/679 of the European Parliament and of the Council on General Data Protection Regulation. Retrieved sep 29, 2023, from available at: https:/eur-lex.europa.eu/eli/reg/2016/679/oj
12. G. Zyskind, O. N. (2015). Decentralizing Privacy: Using Blockchain to Protect Personal Data. IEEE Security and Privacy Workshops, 180-184.
13. Garg, P. (2022, Aug 04). Cyber Crime with Repect to Rightto Privacy. International Journal of Trendy Research in Engineering and Technology, 6(4).
14. Gill, P. (2021, February 10). India is ramping up the use of facial recognition to track down individuals without any laws to keep track of how this technology is being used. Retrieved from Business Insider:





https://www.businessinsider.in/tech/news/what-is-facial-recognition-technology-and-how-india-is-using-it-to-track-down-protestors-and-individuals/articleshow/80782606.cms

15. Haan, A. (2000). Migrants, Livelihoods, and Rights: The Relevance of Migration. Ottawa: International Development Research Centre.
16. dfcoffee.com/right-to-privacy-and-its-infringement-in-cyberspace-pdf-free.html"
17. Korba, L., Wang, Y., Geng, L., & Song, R. (2008). Private Data Discovery for Privacy Compliance in Collaborative Environments. Cooperative Design, Visualization, and Engineering, 142–150.
18. https://www.weforum.org/agenda/2021/11/rebuilding-digital-trust-for-a-cyber-inclusive-future/
19. Mint, L. (2023, February 26). Bangalore Techie Bring AI to Supreme Court for the First Time. Retrieved from Live Mint: https://www.livemint.com/news/india/supreme-court-uses-ai-based-transcript-for-the-first-time-here-s-how-it-works-11677403522929.html
20. Morse, J. M. (1991). Approaches to Qualitative-Quantitative Methodological Triangulation. Nursing Research, 120-123.
21. Mosse, D., Gupta, S., & Shah, V. (2005, July). On the Margins in the City: Adivasi Seasonal Labour Migration in Western India. Economic and Political Weekly, 40(28 ), 3025-3038. Retrieved from URL: http://www.jstor.org/stable/4416873
22. Mouzakiti, F. (2020). Cooperation between Financial Intelligence Units in the European Union: Stuck in the middle between the General Data Protection Regulation and the Police Data Protection Directive. New Journal of European Criminal Law, 351–374.
23. National Information Centre(NIC). (2023, May 01). National Human Right Commission India. Retrieved 2023, from https://nhrc.nic.in/sites/default/files/Group%201%20April.pdf
24. Personal Protection Data Bill. (2019). PRS Legislative Research. Retrieved March 21, 2023, from https://prsindia.org/billtrack/the-personal-data-protection-bill-2019
25. Preamble- International Covenant on Economic, S. a. (1966). Preamble.
26. Prof. Dr. Natali Helberger, S. E. (2020). Implications of AI Driven Tools in the Media for Freedom of Expression. Retrieved from Council of Europe: https://rm.coe.int/cyprus-2020-ai-and-freedom-of-expression/168097fa82
27. Raghav, M., & Marwaha, S. S. (2022, November 18). Indian Legal Framework on the Right to Privacy in Cyberspace-Issues and Challenges. Junal IImu Hukum.
28. Ramachandran, M., & Chang, V. (2016). Towards performance evaluation

of cloud service providers for cloud data security. International Journal of Information Management, 618-625.

29. file:///E:/Users/Administrator/Desktop/Human%20rights/GCCS2015-Webinar-Series-Introductory-Text.pdf
30. Rossinni, C., & Green, N. (2015, June). Cyber Security and Human Rights. Retrieved Aug 28, 2023, from Global Partners and Digital: https://www.gp-digital.org/wp-content/uploads/2015/06/GCCS2015-Webinar-Series-Introductory-Text.pdf
31. Rule of Law and Human Rights. (n.d.). Retrieved from United Nations: https://www.un.org/ruleoflaw/rule-of-law-and-human-rights/#:~:text=As%20defined%20by%20the%20Secretary,%2F2004%2F616%2C%20para.
32. S. Dawes, S., & A. Pardo, T. (2002). Building Collaborative Digital Government Systems. Advances in Digital Government, 259–273.
33. Section 2(d) The Protection of Human Rights Act, 1. (1993).
34. Shah, A. (2006). The labour of love: Seasonal migration from Jharkhand to the brick kilns of other states in India. Contributions to Indian sociology, 40(1), 92-118. doi: 10.1177/006996670504000104
35. Sharma, R., & Kumar, P. (2016). Internet and Freedom of speech. Member of Parliament. Member Reference Services Larrdis.
36. Shireen. (2022, Jan 4). Violation Of Privacy Rights By Whatsapp With Relation To Cyber Crime: An Indian Outlook. Retrieved 2023, from Legal Service India: https://www.legalserviceindia.com/legal/article-7519-violation-of-privacy-rights-by-whatsapp-with-relation-to-cyber-crime-an-indian-outlook.html#:~:text=An%20person%20is%20violated%20when,privacy%20while%20using%20the%20internet.
37. The Core International Human Rights Instruments and their monitoring bodies. (n.d.). Retrieved from United Nations Human Rights Office of the High Commissioner: https://www.ohchr.org/en/core-international-human-rights-instruments-and-their-monitoring-bodies
38. The European Commission's High Level Expert Group on Artificial Intelligence. (2018, December 18). Retrieved from The European Commission: https://www.euractiv.com/wp-content/uploads/sites/2/2018/12/AIHLEGDraftAIEthicsGuidelinespdf.pdf
39. UK ICO Information Commissioner's Office. (2022, March). UK ICO Regulatory Sandbox Final Report: Global Cyber Alliance. Retrieved sep 25, 2023, from Global Cyber Alliance: https://ico.org.uk/media/for-organisations/documents/4019931/gca-sandbox-exit-202203.pdf?_gl=1*1i319s3*_gcl_au*MTU3NDI4MTQ0My4xNjk1NjE3ODA5



*Circular pattern of labour migration in India: seeking a multi-dimensional lens of study:-fighting the stigma- a discourse on suggestive policy measures towards redressive augmentations from the plinth of societal maladies*

40. UN News. (2016, Dec 10). 'Stand up for Someone's Rights Today', UN Urges on Human Rights Day. Retrieved sep 26, 2023, from Our World brought to yoy by United Nations University: https://ourworld.unu.edu/en/stand-up-for-someones-rights-today-un-urges-on-human-rights-day
41. United Nations Human Rights. (1996-2023). What are Human Rights. Retrieved 2023, from United Nations: https://www.ohchr.org/en/what-are-human-rights
42. United Nations Human Rights Office of High Commissioner. (2016, Nov). Universal Declaration of Human Rights. Retrieved sep 26, 2023, from Stand up for Human Rights: https://www.standup4humanrights.org/en/article.html
43. What are Human Rights? (n.d.). Retrieved from United Nations Office of the High Commissioner: https://www.ohchr.org/en/what-are-human-rights
44. Wilson-Kovacs, D. (2020). Effective resource management in digital forensics: An exploratory analysis of triage practices in four English constabularies. Policing: An International Journal, 77-90.
45. Winer, R. S. (2001). A Framework for Customer Relationship Management. California Management Review, 89-105.
46. Working with the Council of Europe: A Practical Guide for Civil Society. (2021). Retrieved from Council of Europe: https://www.coe.int/en/web/civil-society/rule-of-law-based-institutions
47. Wu, J.-H., & Wang, S.-C. (2005). What drives mobile commerce?: An empirical evaluation of the revised technology acceptance model. Information & Management, 719-729.
48. Zhang, Y., Xiao, Y., Ghaboosi, K., Zhang, J., & Deng, H. (2012). A survey of cyber crimes. Security and Communication Networks, 422-437.

# Sinicisation in Tibet, Tibetanisation in India: cultural preservation and restoration of human rights among Tibetan refugee institutions in India

***Dr. Joanna Pereira Coelho***
*Assistant Professor, Goa University*

**Abstract**

This paper examines the various social institutions that have been created by the Tibetan administration in exile in India. Unlike, many other refugee groups, the Tibetan polity including their spiritual and temporal head, the XIVth Dalai Lama, Tenzin Gyatso along with his Government were part of the thousands of Tibetans who fled to India seeking refuge in 1959. They fled what they perceived to be persecution to their life as well as threat to their religion once the Chinese Occupied Tibet in the 1950s. . The violation of human rights in China – occupied Tibet also included the persecution of religion and culture practices in Tibet. Once in exile, the Tibetan administration- guided by the Dalai Lama and supported by the Government as well as the people of India- sought to not only successfully rehabilitate the thousands of Tibetan refugees, but also endeavoured to nurture and sustain the social intuitions that facilitated the preservation of Tibetan culture. These efforts at Tibetanisation in exile was imperative given that in contemporary Tibet, there have been concerted efforts by the Chinese to culturallysinicise Tibetans. Sinicisation, which is also referred to as cultural genocide refers to the attempted to transfer large number of Han Chinese people into Tibet, combined with suppression of elements of Tibetan culture and religion. This paper documents the efforts made by the Tibetan administration and civil society in India to sustain the Tibetanisation of not just Tibetans, but even the Himalayan regions of India. It also examines the efforts by different civil society groups to engage with the Tibetan cause and protect human rights. Based on first hand data gathered from extensive fieldwork, this paper specifically focuses on cultural institutions civil society organisations as well as organisations catering to the needs of former political prisoners of Tibet.

**Key words:** - *social institutions, civil society, Tibetan refugees, Tibetanisation*

## Introduction

This paper seeks to discern the social institutions that have been created and





sustained by the Tibetan refugee community in India. The revolutionary nature of exodus and abrupt dismantling of all institutions, breakdown of the normative order of normalcy is a basic accompaniment of exodus. In this specific instance of the exodus of Tibetans from Tibet, not only the abstract normative order was dismantled, the concrete institutional structures were destroyed and the leaders and the masses were terrorised. Tibet and Tibetans were sinicised. Sinicisation, which is also referred to as cultural genocide refers to the attempted to transfer large number of Han Chinese people into Tibet, combined with suppression of elements of Tibetan culture and religion. Rebuilding institutions in exile was recognised as necessary for the survival of the culture of the people and reproducing it for posterity. This is because Tibetans fled as refugees not only fearing persecution of their lives but also persecution of Tibetan society and culture. There are allegedly concerted efforts made by the Chinese in Tibet, especially since the Cultural Revolution of 1967, to sinicise various aspects of Tibetan culture, including language. The sustenance of socio-cultural institutions is integral to the creation of Tibetan nationalism in exile. Most discussions on the Tibetan exile situation tend to focus more on the institution of religion. This paper seeks to address this lacuna. It specifically examines the organisations for the rehabilitation of former political prisoners, cultural institutions as well as the civil society organisations of Tibetan refugees in India. The data for this paper has been elicited from ethnographic fieldwork conducted in Tibetan settlements in Karnataka as well as the political nerve centre of Tibetans in exile- Dharamshala in Himachal Pradesh. The analysis of social institutions forms the bedrock of sociology. This paper discusses the sustenance of social institutions of Tibetan refugees in India using the theoretical framework of structural functionalism.

## Refuge and Rehabilitation

The political status of Tibet as has been a conflictual issue since the twentieth century. While China claims that Tibet was a part of its territory since the thirteenth century, its current stand on the issue took shape only after the formation of the People's Republic of China (PRC) (Sperling, 2004, p. 5). Though there may be no agreement on Tibet having been an independent political nation, a centuries old shared civilisation has made Tibet a cultural nation. The centuries- old dispute between China and Tibet over the political status of Tibet took an aggressive turn in 1949, when the People's Liberation Army (PLA) of China annexed Tibet in what it called an attempt to liberate Tibetans from the despotism of the Tibetan aristocracy and reunite the territory with the Motherland. Following nine years of futile attempts at negotiations between the Governments of China and Tibet, in March 1959, fearing kidnapping and assassination the Fourteenth Dalai Lama, Tenzin Gyatso who was the temporal and religious head of the Tibetan Government, fled to India. Since 1959, thousands of Tibetans, fearing persecution have been fleeing to India.

When a symbiotic national community with specific political and geo-cultural boundaries gets dismantled, it leads to the collective construction of a sense of community among the members of the former national community. The Dalai Lama - with the support of the Central Tibetan Administration (CTA), International aid, and the cooperation of the Indian Government and people - soon got on with the task of the creation and sustenance of unified Tibetan community. We can refer to it an enterprise in building 'a unified national community' which has to be collectively constructed in the face of disparity hat existed in the traditional theocratic Tibetan state. Given the hegemony of Tibetan Buddhism and the exalted religious as well as secular position of the Dalai Lama for centuries, Tibetan nationalism even in exile is suffused with religion.Religion, then, is not just a doctrine, a set of myths, a culture; it is an institutional space according to whose logic religious nationalists wish to remake the world ( Friedland, 2001, p.141). Religion is a network of sacred sites and ritual spaces, as well as community centres, associations, schools, hospitals, courts, and charities (Friedland, 2001). Thus all social institutions and organisations that have been established by Tibetans in exile are some way or the other, linked with religion. Even those organisations championing the cause of human rights, are influenced by religion.

## Gu Chu Sum- Organisation of former Political Prisoners

Tibetan former political prisoners escape to India after undertaking huge risks. If caught, the former political prisoner is taken back to Chinese jails for an extended period of time. Yet despite the risks involved, former political prisoners are constantly fleeing from Tibet in a bid to escape the persecution that they encounter in Tibet. In exile, especially in India, the former political prisoners can have a hope of overcoming the marginalisation that they experienced for being political prisoners. The former political prisoners then are a gold mine of information for collecting data on political prisoners in Tibet and the conditions of prisons in Tibet. While the former political prisoners derive a lot of confidence from the exile community their life conditions are largely improved by the institutions that are concerned with the welfare of former political prisoners. The most important of these organisations is a body called Gu Chu Sum based in Mcleodganj, Dharamsala, Himachal Pradesh.

The name of the Gu Chu Sum Movement was derived from the months, which witnessed the leading demonstrations of the young Tibetans inside Tibet against the Chinese communist totalitarian regime and its unjust suppression in Tibet. Gu, Chu and Sum are Tibetan numbers 9, 10 and 3 representing September and October of 1987 and March of 1988 which saw the three major pro-independence demonstrations suppressed in Lhasa, the capital city of Tibet. Many of those who took part were imprisoned, savagely beaten and inhumanly tortured and sentence to reform through labour camps. Several peaceful demonstrators were killed and many more were seriously injured.





One of the most important contributions of this organisation has been in the field of education. Most of these former political prisoners spent their crucial years of youth in jails. They have thus been deprived of much schooling. So education becomes one very important motivating force propelling former political prisoners to leave for exile. Also in Tibet, Tibetans are deprived of learning Tibetan language and culture. Some former Tibetan political prisoners also leave Tibet in an effort to learn English. Gu Chu Sum arranges for the educational requirements of former political prisoners by making schooling facilities available to these former political prisoners. Giving due importance to English language there is an hour to two special slot provided for English conversation class. It's an opportunity for the students to be able to interact with our various volunteers of native English speakers.

Gu Chu Sum also has a handicraft section that was established in 1991 as a way of making the Tibetan community self-reliant. The profit generated from the Handicraft Centre goes into overall welfare schemes of the former Tibetan prisoners of conscience and their family as well as the political activists inside Tibet who were able to escape to India.

## Cultural Institutions

The cultural institutions of Tibetans in exile are an important source of spreading national identity as well as promoting Tibetan culture to the non-Tibetan speaking world. In my examination on cultural institution I have focused on Tibetan Institute of Performing Arts, a Tibetan cultural institution which has got worldwide recognition.

After the Dalai Lama fled from Tibet to India, he had a vision on establishing a school of Tibetan drama. The disappearance of Tibetan culture in Tibet under Chinese occupation and the influence of the cultures of the host countries, i.e., India, Nepal and various others, were seen as legitimate threats to Tibetan culture in exile (Norbu, 1986). Also, he feared that in Tibet, the Chinese would attempt to wipe out Tibetan culture in an attempt to Sinicize Tibetans. The Dalai Lama visualized that through drama the world could be made aware of the Tibetan issue. Accordingly the Tibetan exile Government sent a four member team to Kalimpong. At that time, there were a large number of Tibetans living in Kalimpong. In fact, Tibetans were living in Kalimpong right from the nineteenth century. On 11th August1959, the Tibetan Music, Dance and Drama Company was established. But at that time, a large number of people were still fleeing from Tibet, and survival itself was a huge challenge. The team thought that for the common Tibetans earning a means of livelihood would be more important at that stage. Hence it would be better to enquire with families of Tibetan aristocrats who were already well settled in Kalimpong. They requested the families of Kalimpong Tibetans to send their children to the Institute. And so, the Institute was started in Kalimpong with students from aristocratic families. In 1960, the Central Tibetan Administration suggested that the Institute shift to

Dharamshala. Renamed Tibetan Institute of Performing Arts (TIPA), it now has its own sprawling campus at Dharamshala. The students of the TIPA come from Dharamshala.

Tibetan performing arts are classified in three divisions: 1. Gar ceremonial music and dance performed at the court of the Dalai Lama by young boys 2. 'Cham dances performed by monks at specific occasions in monasteries 3. Lha mo the classical Tibetan Opera (Ross 1995: 4) Subjects for studies and performance for students at TIPA are dance and opera such as Lha mo, Gar, and Nang ma stodgzhas (music of Lhasa and Shigatse) (Norbu, 2001,p. 5).

To get admission into the institution, the student has to first clear the auditions. Once they are selected, the student gets two-year training, at the end of which he/she has to clear an exam. On successful completion of the course and passing of exam, the student qualifies to become an artist and can perform on stage. The music taught in TIPA is original, traditional Tibetan music. Modern music is also taught but emphasis is given to preservation of traditional Tibetan music. Along with preserving traditional music and songs, TIPA also has its own original compositions mainly describing life in exile.

TIPA also stages a lot of folk dramas. The administration travels to various settlements scouting for elderly Tibetan who are familiar with Tibetan folk tales of different Tibetan communities. They also interview and record the voices of elders who are known for their singing abilities. TIPA then compiles these various folk tales representing different corners of Tibet and then scriptwriters write dramas based on those folktales. The costumes to be worn for the drama are also designed and stitched at TIPA. Of course, quality is not the same. In Tibet a lot of clothes were made by yak wolves but in India it is not possible to get the authentic material so TIPA uses Indian fabric which looks similar so we use to make it. The director of TIPA informed me that their costumes look very authentic keeping in mind the region which the costume is supposed to represent unlike today in Tibet where in traditional Tibetan performances the Chinese display Tibetan girls with short aprons and high heels.

In Tibet, different regions had their own costume, song and dance. At times, people from one region were not aware of the dance, music and costume of those from other regions, as distances were huge and interactions among people belonging to different regions were less. But here in exile in TIPA the members have to learn the music, dance and drama of all the regions. As the Tibetan script is the same, it helps the members learn the dialects of other regions. Many of the famous theatre artistes and singers who escaped to India after Chinese invasion of Tibet, came and became teachers. So the authentic cultural traditions of Tibet could be documented and passed down to the younger generation. One of the main aims of TIPA has been to promote Tibetan culture and history throughout the world. It also helps create awareness on the heterogeneity found in Tibet and among Tibetans. As TIPA troupes travelled to western countries, performing and teaching Tibetan performing arts, it helped also clear people's misconceptions and stereotypes about Tibetans. Although the tendency within





the exile community seems to be 'to stay the same" nonetheless given space to alter their performances to accommodate a Western audience by changing the eight-hour performances to a two-hour performance of the Tibetan Lha mo opera, this time span being more appealing to Western taste, as well as allowing the hero and heroine to embrace on-stage, which is quite unlike the traditional Lha mo opera (Calkowski, 1997, p. 55).

## Civil Society Institutions

Though the concept of civil society is often invoked in both academic as well popular writings, there is no consensus on its meaning. While Hegel wanted civil society to be subordinated to the state, Marx, wanted the state, which can turn tyrannical, to be subordinated to civil society (Oomenn,2004, p.145). Civil society has become a term, which is now increasingly used to encompass social activity and societal organizations that, directly, or indirectly, support, promote or struggle for democracy and democratization. In the Tibetan exile community, civil society has played a crucial role in promoting the democratic governance of the Tibetan Government in exile. I have highlighted two of the most prominent civil society organisations in the Tibetan exile community- Tibetan Women's Association and Tibetan Youth Congress as well as one civil society organisation consisting exclusively of monks.

## Tibetan Women's Association

The Tibetan Women's Association (TWA), the only organisation of Tibetan women in exile, represents this political assertion of the Tibetan women. Founded in 1959, during the Lhasa uprising, it was re-established in exile in 1984.Currently the TWA has fifty-six regional chapters the world over and seventeen thousand members. Since they are the only women NGO, besides being politically involved on various national or international levels, we also speak on domestic violence or human rights recovery, faced by the Tibetan women inside Tibet and also in the exile community. The TWA also has various projects like the 'Stitches of Tibet' project and the Fellowship project, which focus on training and empowering Tibetan women.

The TWA was originally formed in the Tibetan capital of Lhasa in 1959, and after the Chinese invasion, when many people fled to Nepal and India, a very small group of women's organization was formed in India. On 10 September1984, the official Central Tibetan Women's Association was reinstated with the blessings of the Dalai Lama. Currently there are fifty-six regional chapters the world over and seventeen thousand members. The TWA is the second largest NGO in the entire community and the only women NGO in the diaspora. And since it is the only women NGO, besides being politically involved, on various national or international levels, it also speaks on domestic violence or human rights recovery, faced by the Tibetan women inside Tibet and

also in the exile community.

The Bylakuppe chapter of TWA has around 555- 600 members. The term of the office bearers of TWA is three years. The office bearers are elected by the TWA members of Bylakuppe. The office bearers of TWA Bylakuppe are in constant touch with the main office of TWA in Dharamshala. The Bylakuppe chapter along with all other chapters have to go to Dharamshala after one and a half year of being elected to attend the General Body Meeting and elect the central committee members. They have to visit Dharamshala again at the end of their three-year term. The office bearers also visit Dharamshala if there is any other work that needs the intervention or advice of the main office.

The TWA Bylakuppe under the umbrella of TWA undertakes a number of projects. One successful project is called 'Stitches of Tibet'. This project is a tailoring Centre where the TWA gives training in tailoring for Tibetan women for eighteen months. Besides giving them training, the organisation also gives them basic education in English, Maths, and computer. In this particular project, eighty percent of the seat is reserved for newly arrived women from Tibet. When Tibetans come to India, they do not have a family, or they do not have someone to lean on. So the organisation aims to provide them with professional training so that they could earn their own living. Interestingly, at times Tibetan boys too take stitching classes at TWA. Sometimes boys too join it. The students are also given a stipend of two hundred rupees a day. On the completion of the course, the students can work for TWA, Bylakuppe. That is, they can sow for the TWA shops on a sixty-five, thirty five basis. The TWA provides the cloth, thread, machine, etc.

Currently the TWA also has another project called the Legal Empowerment of Tibetan Women project. The project focuses on providing legal workshops with context to the Indian Constitution. This project is needed because many Tibetans, even though they are born and brought up in India, they are not really aware of the Indian Constitution. And if there is a problem, for instance, if someone is a victim of domestic violence, where does one go for help. These are the things we educate the masses through these projects. The TWA also organises processions, marches and dharnas commemorating various Tibetan occasions. Many of these activities are organised in collaboration with Tibetan Youth Congress (TYC).

### Tibetan Youth Congress

The Tibetan Youth Congress (TYC) is the non-governmental organisation started on October 7, 1970 by some youth at that time. Influenced by the mix of both traditional as well as modern education they received in exile, these youth wanted to establish an organisation where Tibetan youth work together for the benefit of the Tibetan freedom struggle. So they held a meeting at that time wherein youth from about forty different Tibetan settlements participated. The Dalai Lama also attended three of those meetings. Also HH came for the





meeting for three times at that time. The founding members of TYC were: Tenzin GeycheTethong, Lodi G. Gyari, Sonam Topgyal and Tenzin N. Tethong. Tenzin GeycheTethong was the first President. Professor SamdhongRimpoche and the Dalai Lama's sister, Jetsun Pema were some of the earlier members of the TYC.

The TYC membership is open to anyone who is above the age of sixteen. There is no gender, sectarian, regional or religious restrictions to become a member of TYC. Currently, there are 87 regional TYC. The TYC has chapters all over the world, including Bhutan, Belgium, North America, and Taiwan. It is the largest and most active Tibetan NGO in exile. At present, it has thirty-five thousand members. One remarkable feature of being a member of the TYC, especially an executive member, is the courage that is required to undertake the risk. Since China has branded the TYC as a terrorist organisation, declaring oneself as a high ranking member of the TYC, endangers one's family who are still in Tibet. The president of the TYC explained to us the changes in his family life he had to make once he decided to become president of TYC.

TYC has two offices- central and regional. The core committee of the TYC is the Central Executive Committee (CENTREX. Its head office it is there in Dharamshala. In central head office, TYC has ten executive members. Out of the ten, five are based in Dharamshala and five are regional members that stay in the settlements and work as TYC executive members. TYC holds working committee meeting every year to discuss what has been done in the past year and to plan the activities of the coming year. The regional chapters they can have executive members from between three and ten. Mostly they have ten executive members like the Bylakuppe chapter.

TYC also has general body meeting every three years. At the General Body Meeting there is a review of what has been done in the last three years. They also chalk out the agenda for the coming three years. And we pass resolution for that discussion. And same like representative of TYC should attend it and also take part in the election of the executive members.

Currently the TYC has four main objectives:

1. To follow the direct instruction of HH
2. To work for the unity of Tibet regardless of class, gender, religious sect, whatever.
3. To preserve the unique culture of Tibet.
4. Struggle for complete independence.

Besides TYC also does lot of social service activities. They organise lots of political activities like hunger strikes, peach march, protest relay, candlelight vigil, and sometimes huge gathering of protest. The TYC also undertakes a lot of social responsibilities. These include building public toilets, road repair and clean up. The regional chapters of the TYC also help when those Tibetans who do not have families. They help make arrangements as well as collect money for

the needy when they have lost a family member. The TYC also plays an active role in social service during the Kala chakra rituals. During the ten-day ceremony, the TYC assists people who are unwell, those who do not know Hindi, those who need bus taxi etc.

Eight chapters of TYC, the TYC chapters in South India, including TYC Bailakuppe, as well as TYC Ladakh has recently have broken away from TYC on account of ideological differences. Despite the Chinese occupation for more than sixty years, the aspiration for freedom is very strong among the Tibetans. It is stronger now because they are now equipped for self-rule with democracy. The practice of democracy in exile, notwithstanding the absence of international political recognition for their government in exile, has three options according to Herzer (2003: 423): 1. Independence ( Ranzen) 2. Total integration into the Chinese state, and 3. Tibetan Self-governance through an autonomous arrangement with the Chinese state. Labelling the third option as the Middle Way approach the Dalai Lama is urging the Tibetans in exile to work towards that. One of the aims of the TYC when it began was to fight for Ranzen . But once the Dalai Lama chose autonomy over Ranzen, the objective of the TYC stood in opposition to the Dalai Lama. The eight regional chapters of the TYC hence wished that the TYC modify its stand of Ranzen. As the main TYC still unequivocally struggles for Ranzen as the future of Tibet, as a mark of unstinted support to the Dalai-Lama eight regional chapters severed ties with the main TYC. The Bylakuppe chapter is one among them. A member of the Central Executive Committee of the Bylakuppe chapter reiterates: “Because right now whatever we have, our position, our status our position, all this is the gratitude of His Holiness only”.

While most of the civil society organisations involve the lay Tibetan society, with monks and nuns only participating in rallies etc, there is one civil society organisation in Bylakuppe comprising only the monks.In Bylakuppe, the TYC tries to ensure political participation in the settlements. On 29 March 2013 when the Dalai-Lama after weighing the pros and cons of both Ranzen and Middle Way policy reiterated his belief in the Middle Way Policy towards the future of Tibet

**Tibetan Rights and Freedom Restoration Committee**

The Tibetan Rights and Freedom Restoration Committee (TRFRC) was established on 30 June 2006.The members of the organisation could not register the organisation because the name of the organisation was thought to be too controversial. TRFRC was founded by the monk. Until the early 2000s, the most prominent Tibetan organisations were the TYC and the TWA. It became very difficult for the monks to participate in the various rallies and protest marches organised by these groups, as the predefined schedule of the monasteries does not allow much flexibility.

Hence a group of monks at Sera monastery decided to start this organisation as





monks and monasteries are the main repositories of Tibetan culture. They also felt that there was a need to spread awareness among the members of the monasteries where people hardly get any information about the outside world. when other organisations like TYC, whenever they organize protests or sometimes they organize conferences, it is quite difficult for the monks to participate, all these, the protests and the conference because they have their own duties, regulations and so on. So this organisation is aimed at organizing protests for the monks to accord with their own day to day schedule and curriculum. This organisation does not focus on Tibetans in exile. Its focus is on Tibetans living in Tibet. Its aim is restoration of freedom in Tibet. Its goal is to see that China implements the seventeen-point programme in Tibet, an agreement which was the principle by which the Chinese took over Tibet in the 1950s but reneged upon, immediately thereafter.

**Conclusion**

The protection of human rights include within its ambit the right of an individual to follow and promote his/her religious and socio cultural practices. Post 1959, traditional institutions in Tibet have weathered many storms. The threat to Tibetan culture and identity is felt by systematic efforts at sinicisation. Sinicisation refers to the attempts to transfer large number of Han Chinese people into Tibet, combined with suppression of elements of Tibetan culture and religion ( Sahai, 2021). Scholars term this process as ‘sinicisation’ whereas Tibetan groups prefer calling it a ‘cultural genocide’ (Sahai , 2021). In a move to Sinisation, these have been either bent or destroyed, and at times they have been maintained only at a superficial level. The only hope for the preservation of these Tibetan institutions has been the exile community where they have been consciously nurtured by the Tibetan exile administration. But preservation of culture is not the only function of social institutions. Tibetan culture, like any other, is dynamic; calling for its ‘preservation’ automatically brings forth the need for it to be defined, and this in turn leads to a stuffed-and-mounted item fit for a museum (Sperling, 2000). The dynamic component of Tibetan culture is also reflected in the Tibetan institutions in exile. Every Tibetan institution in exile has been influenced by and also ironically empowered by exile. The Tibetan institutions in exile also play a crucial role in cultivating Tibetan nationalism and safeguarding human rights in exile.

**References:**

1. Calkowski, M. (1997). The Tibetan Diaspora and the Politics of Performance. Tibetan Culture and the Diaspora Proceedings of the 7thSeminar of the International Association of Tibetan Studies edited by Frank Korom. 30 -38.
2. Coelho, J. P., &Somayaji, G. ( 2022). Tibetan Nationalism and Cultural

Homogenisation in Exile: An Interpretation of Institutions and the Public Sphere. Sociological Bulletin, 71(2), 272–288. https://doi.org/10.1177/00380229221081988

3. Friedland, Roger. ( 2001). Religious Nationalism and the Problem of Collective Representation. Annual Review of Sociology 27: 125–52. http://www.jstor.org/stable/2678617.
4. Norbu, D. ( 2001). Refugees from Tibet: Structural Causes for Successful Settlements. In Sanjay, K. Roy (Ed.). Refugees and Human Rights., Rawat Publications.
5. Oommen, T. K. . (2004). Nation Civil Society and Social Movements : Essays in Political Sociology. Thousand Oaks.
6. Sahai, D. ( 2021). CCP and Sinication of Tibet,.https://tibetpolicy.net/ccp-and-sinicization-of-tibet/#:~:text=CCP%20and%20Sinicization,By%20%
7. Sperling, E . (2004).Some Considerations on the Tibet Issue. Statement to Congressional-Executive Commission on China, June 10, 2002 https://elliotsperling.org ›Sperling, Elliot,. The Tibet China Conflict: History and Polemics. In Policy Studies, 7, East-West Centre
8. Sullivan, A., (2002). Bourdieu and Education: How Useful Is Bourdieu's Theory for Researchers? The Netherlands'. Journal of Social Sciences, 38, 144-166.
9. Travers, A. (2016). Between Private and Public Initiatives? Private Schools in pre-1951 Tibet. Himalya. 35(2).





# Position of Transgenders in India: an analytical study

***Swarnima Singh Tomar[1], Dr.Jyoti Yadav[2]***
*Ph.D scholar, Amity University Lucknow, [1]*
*Co-Author; Assistant Professor, Amity University Lucknow[2]*

**Abstract**

We are part of a society that is based on the concept of Gender and Sex. They are characterised as 'Male' and 'female', and this concept is deeply rooted in our system. There exists a gender diversity system which is different from the binary system of the classification of gender and these groups have been questioning this gender-biased system of society. These varied socio- cultural groups divide transgenders into Hijras, Kinnars, and Jogappas etc. The transgender community is facing extreme discrimination and humiliation. The transgender community has always been a part of Indian society since the beginning; it was only during the British Colonial era that their status started deteriorating and they faced humiliation and were not considered a part of our society. Transgender persons face a lack of social acceptance, as they are not treated equally. They are being abandoned and have no means of livelihood. The social stigma has led parents to believe that if their child is transgender, then it will bring shame to the family. Their basic human rights are being hampered because of the treatment they get from society.

As the situation worsened, there was a need to enact laws to protect the transgender identity, even though they have the basic fundamental rights but due to lack of awareness they were unable to access them. Various measures have been taken from the year 2010, to empower the transgender community and to protect their rights. The judiciary has also stepped in and they have passed certain verdicts which paved the way for the protection and recognition of transgender's rights. In the year 2019, the transgender persons (Protection of Rights) Act, was passed with the objective of protecting the rights of the Transgender community in India and working towards their welfare. Currently, transgender people are considered as the 'Third Gender', equivalent to the other two genders. The government is still working towards the betterment of the transgender community and there is a need to develop a more effective system to curb the problem that the transgender community faces.

**Key words: -** *Gender, Human Rights, Sex, Society, Transgender Person*

## Introduction

The transgender community consist of Hijras, eunuchs, kothis, caravans, jogappas, shiv- shakti etc. Since the 9th century BC eunuchs have existed. The term Transgender has roots in Greek which means 'keeper of the bed', castrated men were always in popular demand to protect women's quarters of royal households. Hinduism, Jainism and Buddhism- and it can be inferred that Vedic culture recognised three genders. The Vedas (1500 BC - 500 BC) define individuals as belonging to one of three separate categories, according to one's nature or Prakriti. During pre-modern India, third-sex individuals were well known and they included male-bodied or female-bodied people as well as intersexual, also they could often be recognised from childhood. In ancient Hindu law, the third sex is discussed in medicine, linguistics and astrology. The Manu Smriti (200 BC - 200 AD) describes the biological origins of three sexes, which is a Male Child, who is produced by a greater quantity of the male seed; The second is a Female Child who is produced by a greater quantity of the female seed; And in case where both seeds are equal then a third sex is produced; if either are weak then the failure in conception results. The Tolkappiyam (3rd century BC) which is the earliest Tamil grammar, also refers to Hermaphrodites as the third neuter gender. The third gender, Tritiya- prakarti, is related to planets which are Mercury, Saturn and in particular Ketu; as per Vedic astrology and likewise all the planets are each assigned to one amongst the three genders. There have been references in the Puranas, to the three kinds of devas of 'music and dance' which were categorised as Apsaras (female), Gandharvas (male) and Kinnars (neuter).

## EVOLUTION OF TRANSGENDER COMMUNITY IN INDIA

The Indian Society has recognised Transgenders as a part of it for centuries. Near the beginning writings of Ancient India, there was various historical evidence of the recognition of the third sex or of the people who were not confirmed as male or female gender. 'Tritiyaprakarti' or 'Napumsaka' was a concept that was an integral part of Hindu Mythology and Puranic Literature. The term 'Napumsaka' was used to identify the absence of procreative ability, which signified the difference between male and female persons. There were texts which extensively used to deal with the problems of sexuality and the concept of the third gender which was an established thought. The term 'Psychological Sex', which is coined in the Jain text, stresses upon the psychological make-up of an individual, which is different from their sexual characteristics. In the epic Ramayana, Lord Rama left for the forest upon being banished from the kingdom for 14 years, during that time he requested all the 'Men and Women' to return to the city and among those followers, the hijras felt bound by this direction and hence they decided to stay back with lord Rama. Lord Rama was very happy with this gesture and therefore he sanctioned the power that they can bestow their blessings upon people on auspicious occasions like marriage and childbirth.





## HISTORICAL DEVELOPMENT OF THE TRANSGENDER COMMUNITY IN INDIA

Mughal Period: During the Mughal period, Hijras played a famous role in the royal court; mainly in Medieval India. They rose to power as they were given positions of utmost importance such as political advisors, guardians of the harems, administrators as well as generals. They were considered to be very clever, truthful and loyal and they had free access to all the sections of society, therefore they had a very crucial role to play during the Mughal era. The hijras also played a crucial role in guarding Mecca and Medina, the holy places, and eventually, they were able to influence the decisions of the state and also received huge amounts of money as they were closest to kings and queens.1 British Period: During the British Period, the hijras accepted the protection and benefits by getting entry into the Hijra community. These benefits included the provisions of Land, food and some amount of money.

## CRIMINALISATION UNDER THE COLONIAL ROLE

From the 18th century onwards, from the onset of colonial rule, the circumstances changed very excessively. There were instances which proved that the European Travellers were repulsed by the presence of hijras and could not register the fact that they were given utmost Respect in the royal courts and its institutions. During the second half of the 19th century, the Hijra community was criminalised by the British colonial administration who also sought to deny them civil rights. The colonial administration considered Hijras to be a separate caste or community in the different parts of the country. The hijras who were concerned with the offence of Kidnapping and castrating minors and who used to dress like females were covered in The Criminal Tribes Act, of 1871. Sentence for up to two years and a fine or both were given for such activities.

## DEFINITION

The term 'Transgender' has a wide scope and it recognises people who do not confirm the gender identity that was assigned to them during their birth. For example, a transgender person might identify as a female despite being born with male organs. Being transgender is not a disease and hence it cannot be cured with any sort of treatment. There is a term as 'Gender Dysphoria' which results in causing pain and stress in their lives. There is always a constant disconnect

1 Transgender History: the roots of today's evolution (Stryker, 2017) between the assigned sex and internal self for the Transgenders. There is a less popular term 'Transvestites', these are the people who like to wear clothes designed for the opposite gender or cross-dress.

## 1. SOCIAL EXCLUSION AND DISCONNECT FROM THE FAMILY

The Transgender Community faces Racism and poverty and is discriminated against at various levels of society which directly leads to a major negative impact on their mental health. Due to the social stigma of their sexual orientation, they are forced to the fringe of society as it differs from the non-transgender norm. The said oppression results in excluding the transgender people from the society and also from their own families and they are refrained from the basic amenities of society like health care, education, legal assistance etc.

## 2. HOMELESSNESS

The transgender community majorly faces the problem of lack of housing and other related services and is thus unable to meet their needs. They get evicted from places on account of their being a transgender. The community is being continuously harassed and are victims of abuse in shelter homes. In fact, there are many shelters which refuse to accommodate them. They are also not allowed to pick which shelter to live in as per their gender preference.

## 3. HARASSMENT AT EDUCATIONAL AND PROFESSIONAL INSTITUTIONS

In the area of education, the transgender community lags very significantly as they are excessively oppressed and harassed. They are unable to participate in any sort of activities such as social, economic or political, because they are either illiterate or undereducated. The community suffers from limited livelihood and employment due to the factors revolving around social exclusion and lack of education. The factors responsible for such deprivations are as follows:

- They are treated differently from society and family
- Harassment at workplace
- Limited opportunities
- No or zero awareness regarding vocational training skills.

## 4. VICTIMS OF HATE CRIME AND TRANSPHOBIA

The transgender community is more prone to the problems of intolerance, violence and harassment, because of the sexual orientation they possess. This concept results in transphobia. Because of the fear of transphobia, many transgender people tend to hide or conceal their identities and are unable to come out with their sexual orientation for fear of rejection by society and their own families. This directly negatively impacts their mental health. They become more vulnerable to bullying, and physical and verbal abuse at schools and





professional institutions.

For example:

- Rejection from society and family
- Bullying and threat of violence
- Negative comments on their sexual orientation
- No encouragement from educational or professional institutions
- Discrimination at work

## TRANSGENDER PERSONS (PROTECTION OF RIGHTS) ACT, 2019

The parliament has passed the Transgender Persons (protection rights) Bill 2019. On 26th November 2019, the Rajya Sabha passed it and it was passed by the 17th Lok Sabha on 5th August 2019. The primary objective of the Transgender Persons (Protection of Rights) Act, 2019 is to protect and recognise the identity of the transgender community and protect them from discrimination in the areas of education, property, employment, medical services, public services and their benefits, etc.

### Background

The 2011 census states that there are around four hundred and eighty eight thousand transgender people in India.3 In the renowned case of, the National Legal Services Authority v. Union of India,4 the Apex Court laid the foundation for the rights of transgender persons in India. The Hon'ble Court identified 'Transgender' as the 'Third Gender' and took various measures to prohibit discrimination against the transgender community and also took measures to protect their rights. The Apex court ruling firmly stated and argued that preference should be given to transgender people in the fields of education and occupation.

### Key features of the law

Definitions: The said act defines transgender persons and includes males and females, even though they have not undergone any surgery or treatment. People with intersex variations are also included in the act. 3 Census of India 2011, available at. https://www.census2011.co.in/transgender.php. 4 AIR 2014 SC 1863

Non-discrimination: The act strictly prohibits discrimination against transgender persons in any educational institutions, any professional institutions or any other public facilities, and facilitates their right to property, movement and office bearing. The literacy rate of transgender people as compared to the general population was 46%.5 Identity certificate: The act confers the responsibility for

the Issuance of a 'Certificate of Identity as a Transgender person' on the District Magistrate, without them undergoing any sort of medical assessment. And in case a person claims for a gender change, the act further provides for the change of gender.

Equal opportunities: The act provides for equal opportunities to Transgender persons regarding policy matters. The act mandates that transgender persons be included during the formulation of specific policy measures.

Complaint Officer: The act provides for the creation of a specific designation of Complaint Officer at every establishment. Healthcare and medical facilities: The act also directs to establish the HIV Surveillance centres for Transgender persons; and that it shall cover all medical expenses through insurance. Thmedical facilities also include hormone therapies, sex reassignment etc. The Pehchan Project is working towards increasing the access of transgenders to health and medical services across 18 states.6 National Council for Transgender Persons (NCT)7: The act also mandates the establishment of the NCT, which helps to guide and suggest to government officials, the policies that exist and also to make new policies for the redressal of grievances.

5 Rema Nagarajan, First count of third gender in census: 4.9 lakh, The Times of India, (May, 13, 2014), Accessed on 13 April 2021.

6 Shaikh, S. Empowering communities and strengthening systems to improve transgender health: Outcomes from the Pehchan programme in India, (2016) Journal of the International AIDS Society (Accessed on Apr, 17, 2021).

7 Ministry of Social Justice and Empowerment, established on 21st August, 2020 with its headquarters in Delhi. Offences and Penalties: The act includes the offences of forced labour; sexual and physical abuse; mental and emotional harassment; and refusal of public facility accessibility, and has made them punishable under the law. Any other offence relatable to the given offences is also punishable.

•Latest compliances for employers: The act lays down the norms upon which it mandates that professional institutions follow a new bundle of compliances which also covers private employers. The said requirements need to be met by updating the HR policies and striving to train employees to accommodate transgender people.

I. By prohibiting discrimination against transgender persons to provide them with a good working environment.

II. provide equal opportunities to transgender persons.

III. To establish facilities such as unisex toilets, transportation, hygiene facilities etc. for their welfare.

IV. A complaint officer is to be appointed at every establishment.





**Analysis of the law**

With time, there has been an urgent need to bring about awareness among the different communities in a way that they start recognising the rights of transgender people so that they are treated with the utmost dignity and are treated equally to other genders. The said act is a step forward for our country in reference to the rights of transgender people and their identity protection. To meet the international standards for the protection of human rights, India took the step for the enactment of the said law. The act has included the provision for medical screening and the issuance of identity certificates (which will also be mentioned in PAN and Aadhaar Card as 'third gender') to them in order to reduce the harassment that transgender people face.8

Shortcomings of the act:

Though, the act tends to cover all the possible provisions which are required for the protection of the rights of transgender people it still misses out on various aspects that need to be looked after. The act defines 'Transgender person' but it is very vague in the sense. The act has also mentioned the punishments for various acts against transgenders but these punishments happen to be very inappropriate and less as per the heinousness of the crimes. The act provides for only two years of imprisonment for the offences of rape, harassment etc, against the transgender persons. The act also fails to include other associated rights as well, such as Marriage and Adoption rights.

**Recent development of the law in India**

In recent times, there has been a lot of awareness regarding the rights of Transgender Persons and their protection. Various steps have been taken by the government to curb the problems faced by the community at large. The judiciary has also made efforts in delivering the judgements which made way for the Rights of Transgender in India. Following are the important judgements which have played a crucial role in reshaping the Transgender laws in the country.

1. NAZ Foundation v. Government of NCT Delhi, 20099

Also known as 'NAZ Judgement', it was held in the year 2009 by the Delhi High Court. Section 377 of The Indian Penal Code, was held to be unconstitutional for the first time in this case, by the Delhi High Court. Public interest litigation was filed in the Delhi High Court which said that section 377 is unconstitutional. In the battle for decriminalisation, they have been at the front. In the

8 Apporva Mandhani, Centre Amends rules to include transgender option in PAN Cards, Livelaw (Apr, 10, 2018) https:// www.livelaw.in/centre-amends-rules-include-transgender-option-pan-cards-read-notification/.

9 160 Delhi Law Times 277 year 2009, their battle ended and section 377 was declared to be unconstitutional as it violated articles 14,15 and 16 in the

constitution.

2. National Legal Service Authority v. Union of India10 light of this ruling, a series of bills were passed by the parliament that contained the rights of transgenders. The ruling also contains the principle of 'self-declaration' even without presenting any proof. The apex court has complied with the international standards in this ruling.

3. Justice (Retd) K S Puttaswamy v. Union of India, 201711 Also known as the Puttaswamy judgement, it was held in the year 2017, it is also popularly known as an integral judgement, as it deals with mainly Article 21, the right to privacy which is an integral part of the constitution of India as it provides the right of life and liberty. As the transgenders were given the status of third gender and identity, this ruling paved the way for them to recognise and practise their right to privacy while maintaining their identity.

4. Navtej Singh Johar v. Union of India, 201812 Also known as the Navtej Johar case, it was held in the year 2018 by the Supreme Court of India. This case played a major role in decriminalising Homosexuality in India. Different groups of transgender communities across the country filed various public interest litigations, as a result of

10 (2014) 5 SCC 438

11 (2017) 10 SCC 1

12 AIR 2018 SC 4321

Which this judgement was given. Section 377 of the Indian Penal Code13 was struck down by the Court in the said ruling. The court held that section 377 is violative of Articles 14, 15, 16 and 19(1) (a) of our constitution.

5. Arun Kumar v. Inspector General of Registration, 201914

This case is from the Madras High Court, passed in the year 2019. It started to include trans women in the category of brides, which is given under the Hindu Marriage Act, of 1955. The definition under this act only includes men and women. This case also talks about the NALSA Judgement where the transgender person has been given the identity of the third gender, and on this basis, a transgender person should be included in the category of brides.15 It stresses the ruling of NALSA Judgement, which talks about self-identification. If an individual is keen to be identified as a Tran's woman then they possess this right. And hence, this case lays down for the foundation of marriage between the transgender communities. Supporting Inclusion The transgender person (Protection of Rights) Act, of 2019 fails to consider and include the basic rights and the dignity of transgenders, which eventually violates the principles of the NALSA ruling.

To empower the transgender community, we need to provide them with the same rights as we possess and take steps to curb the social stigma that is there. There should be public consultation space where the victims can go for help, whenever





needed. The legislature must make laws to prevent social injustice, abuse of any kind and discrimination. The legislature must provide equal opportunities for the transgender community, to improve the social and economic status of the 13 Section 377: Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with [imprisonment for life], or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine. 14 W.P. (MD) NO. 4125 Of 201915 Shafin Jahan v. Asokan K.M. and Ors., (2018) 16 SCC 368 transgender community. The authorities must also make sure to consult the transgender people, before forming any rules or norms for their welfare. The state must also make efforts to make the consultation process easier and accessible so that they can express their views freely without any obstruction. To protect the rights of the community at large, the state and authorities must take effective steps and keep a regular check, on whether these steps are implemented to the utmost extent for the welfare of people.

## Conclusion

In recent times, even after the acknowledgement of the fact that, Gender Diversity was accepted in the colonial era, and that the proof of its existence could be traced in temples, sculptures and religious treaties, our country is still not able to overcome the social stigma against transgender people. To eliminate this discrimination, the government is required to take affirmative action for this community. Following are the actions which may help to improve the current situation:

1- To protect transgender adolescents in educational institutions, the awareness of gender variety needs to be introduced. There is a critical need to address the issues and concerns related to transgender people.

2- The state must include the transgender community in their pension programmes.

3- The law must be followed whenever there is any event of harassment or abuse against them.

The police must be informed about the issues faced by them.

4- The masses should be made aware of the problems faced by transgender people. To promote acceptance of children with gender differences, schools, families and policymakers need to be educated.

5- Transgender human rights should be given importance to promote their rights and to make them feel like a part of society. This will help them to realise their position as an individual and also it will improve their ability to understand the rights that are given to them.

6- The media must take steps to highlight the issues of the transgender community. And should avoid the stigmatisation in their reports. The media

is a powerful means to create awareness in the public and therefore it can help in overcoming the issues faced by transgenders

7- The profession involving the fiduciary relationship such as doctors and advocates must take steps to make the access easier for transgenders. They must try to meet the specific needs of the transgenders and these professional activities must be carried out with utmost precaution.

8- It should be the duty of the parents to pay attention to their child, in the case of gender non- confirmation. They must provide appropriate support to their child and should not treat them differently. They must be made aware of the stress that a transgender goes through upon attaining puberty and should be supportive of them.

9- If any transgender belongs to the poor or any other vulnerable group, then they must be included in the policies that the state aims to provide for such groups.

10- The authorities must take strict measures to overcome the cases of harassment, bullying and abuse in any educational or professional institutions. The students and professionals must be encouraged to create a healthy atmosphere for the transgenders.

11- He institutions must work towards including professionals who are experts in various fields related to human rights and diversity to provide consultation to employers and employees, which will further help in creating sensitivity towards transgender issues. Transgender people must be included in the sexual harassment policies at workplaces. In the process of recruitment and promotion anti-discrimination policies must be followed.

It is important to recognise the fight of the Transgender Community, and it is the duty of every individual to accept them into society. They must be treated equally with as much respect and dignity as anyone in the society.

**References:**


1. TRANSGENDER PERSONS BILL, 2014. (n.d.). Retrieved from THE RIGHTS OF TRANSGENDER PERSONS BILL, 2014 : http://164.100.47.4/billstexts/rsbilltexts/ AsIntroduced/trangder-E.pdf
2. (2011). Retrieved from India at Glance - Population Census 2011: https:// www.census2011.co.in/p/glance.php
3. Hsu, G. A. (August 2015). Govindasamy Agoramoorthy and Minna J. Hsu. Journal of Religion and Health, Vol. 54, 3-4.
4. Indian kanoon. (n.d.). Retrieved from Indiankanoon.org: https://indiankanoon.org/doc/367586/
5. johari, A. (2014). fcroll.in. Retrieved from Hijra, kothi, aravani: a quick guide to transgender terminology: https://scroll.in/article/662023/hijra-kothi-aravani-a-quick-guide-to-transgender- terminology
6. Sujita Sethi, &MadhusmitaBarwa. (2018). Transgender Health and Their Rights in India. International Journal of Research in Social Sciences, 2-3.
7. THE FIGHT TO DECRIMINALIZE HOMOSEXUALITY SINCE THE REPEAL OF SECTION 377. (n.d.). Retrieved from https://outrightinternational.org/: https:// outrightinternational.org/content/fight-decriminalize-homosexuality-repeal-section-377
8. TRANSGENDER PERSONS BILL, 2015. (n.d.). Retrieved from THE RIGHTS OF TRANSGENDER PERSONS BILL, 2015: https://www.prsindia.org/uploads/media/draft/ Draft%20Rights%20of%20Transgender%20Persons%20Bill%202015.pdf
9. United Nations. (n.d.). Retrieved from https://www.un.org/en/sections/issues-depth/human- rights/ https://blog.ipleaders.in/legal-rights-of-transgender-india/
10. https://timesofindia.indiatimes.com/india/Supreme-Court-recognizes-transgenders-as-third- gender/articleshow/33767900.cms

# Interdisciplinary perspectives on gender & related issues

***Ms. Anwesha Ghosh[1], Prof. (Dr.) Deepak Kumar Chauhan[2]***
*Research Scholar, Department of Law, School of Legal Studies, Central University of Punjab, Bathinda, [1]*
*Professor, Department of Law, School of Legal Studies, Central University of Punjab, Bathinda, [2]*

**Abstract**

Gender equality and women's empowerment have long been seen as the most crucial success factors in any progressive nation. Women have historically been underrepresented in positions of authority and frequently experience institutionalised bias and discrimination that impede their progress in society (Tabassum & Nayak, 2021). But over time, the situation has been progressively improving, and more women are taking on leadership positions. The positive effects of diversity at the highest levels of management have been recognised in the corporate sector today. Companies are becoming aware of the benefits of having diverse leadership teams, including women since they can provide unique perspectives and ideas that improve overall corporate performance and decision-making (Bourke & Titus, 2020; Dixon-Fyle et al., 2020). Globally, initiatives to encourage gender diversity in corporate boardrooms and executive roles have gained momentum. In light of the above, the book "30 Women in Power: Their Voices, Their Stories" (Kidwai, 2015) is a thoughtful and necessary addition to the celebration of women who have attained levels of accomplishment that many men would consider to be unattainable. A perspective on the varied lives of a few notable Indian women leaders is collected in the book. The book offers guiding ideas that have proven beneficial for female leaders. The thirty individuals featured in this book take us on a journey through their formative years, academic choices, and elevations through the corporate ladder.

**Key words: -** *Gender, equality, women and empowerment.*

## Introduction

Gender equality and women's empowerment have long been seen as the most crucial success factors in any progressive nation. Women have historically been underrepresented in positions of authority and frequently experience institutionalised bias and discrimination that impede their progress in society (Tabassum & Nayak, 2021). But over time, the situation has been progressively improving, and more women are taking on leadership positions. The positive effects of diversity at the highest levels of management have been recognised in the corporate sector today. Companies are becoming aware of the benefits of having diverse leadership teams, including women since they can provide unique perspectives and ideas that improve overall corporate performance and decision-making (Bourke & Titus, 2020; Dixon-Fyle et al., 2020). Globally, initiatives to encourage gender diversity in corporate boardrooms and executive roles have gained momentum. In light of the above, the book "30 Women in Power: Their Voices, Their Stories" (Kidwai, 2015) is a thoughtful and necessary addition to the celebration of women who have attained levels of accomplishment that many men would consider to be unattainable. A perspective on the varied lives of a few notable Indian women leaders is collected in the book. The book offers guiding ideas that have proven beneficial for female leaders. The thirty individuals featured in this book take us on a journey through their formative years, academic choices, and elevations through the corporate ladder.

Naina Lal Kidwai, who is currently the chairman of Max Financial Services Ltd., is the author/editor of the book. She has previously held the positions of Chairman of HSBC Invest Direct (India) Ltd. and HSBC Asset Management (India) Pvt. Ltd. The book is a compilation of 30 of India's most successful women's interviews. The sectors that are represented by these women include finance, law, the media, advertising, public administration, healthcare, consultancy, and fast-moving consumer goods. The book does not fit into any one pattern; rather, it tells the stories of young and old women who have no connection to any particular sector but who are passionate about seizing the possibilities that are given to them. The leading females address the best decisions they could have taken, which were not necessarily the finest ones but were probably necessary at the time, within the confines of the book. There are tales of women who received support from their devoted families and then there are tales of women who were given the responsibility of negotiating the biggest deal while having a sick child at home. Further, there are tales of women having to work side by side with males while serving as the sole member of the female clan. The book enables readers to eliminate gender bias. It demonstrates the power of strength and resolve to accomplish goals. It teaches us the value of role models, the support of families, and most importantly, the qualities that characterise effective leaders.

The book's chapters are each devoted to a different woman, allowing readers to dive into the particular events and hardships that formed each one's career. The author skillfully spins tales that perfectly express their determination, resiliency, and ambition. The book stands out because it focuses on female role models for aspiring leaders who have attained significant impact in their respective fields. The author gives a truthful account of the journey of these women, highlighting both their professional successes and the decisions and personal sacrifices they had to make along the way. The book also discusses social issues that women in

the workforce face, as well as gender inequities.

In the first chapter of the book, the author starts with a summary in which she addresses the themes she names as the keys to success, such as passion, ambition, humility, and integrity (p. 14). Kidwai also adds that there are no shortcuts to hard work and the importance of tackling problems head-on and coming out on top. Time management, selecting a partner who would support the woman's ambition, making family, extended family, or affordable domestic help the pillars of one's support network, carving out time to follow one's passion outside of professional or family responsibilities, working hard to break through any glass ceiling, nurturing new talent, and engaging in charitable work to give back to the community are some other strategies the author has discussed that can help ambitious women succeed (p. 21).

A series of interviews with the 30 successful women who were identified by the author are featured in the second chapter and subsequent chapters of the book. The first one is that of Anjali Bansal, (p. 30) who at that point served as managing director (MD) of Spencer Stuart, India. The interviewee says that the gender-neutral perspective that guides her professional approach is a product of her upbringing. Ms. Bansal also suggests several management practices that aid in keeping female talent which had been adopted in Spencer Stuart's India team, such as flexible work schedules and convenient office locations, so that working mothers can continue with their careers while also caring for their kids as they grow. Further, she discusses the necessity of having women in leadership positions who can act as role models and teach other women, particularly those who are just starting out or in the middle of their careers. In another interview, Aruna Jayanthi, (p. 40) the chief executive officer (CEO) of Capgemini India, expressed her concern about the issue of gender imbalance in the workplace. Arundhati Bhattacharya, (p. 49) the former chairperson of the State Bank of India, highlights in another interview that while maintaining a healthy work-life balance is difficult given the widespread use of technology, it is not an impossibility for working women. According to Bharti Gupta Ramola, (p. 64) the India Markets Leader for PwC and a former member of PwC Global Diversity and Inclusion Council states that the glass ceiling does exist, however, not precisely as an unbreakable rock set above women's heads by men. Ms. Ramola adds that women must also bear some of the blame for not breaking through the ceiling. Further, the former MD and CEO of ICICI Bank, Chanda Kochhar, (p. 75) in one of the interviews has the opinion that being a woman should neither help nor give one the right to demand benefits at work. One must complete the same obligations as males, whether they need to travel or work late if one expects to have access to the same opportunities and a level playing field. There can be no excuses based on gender. Based on Chitra Ramkrishna's interview, (p. 87) former CEO of the National Stock Exchange (NSE), any person, regardless of gender, demonstrates the qualities that make a successful leader, such as honesty, vision, steadfast dedication, even tenacity, and, enthusiasm. Debjani Ghosh, (p. 96) a veteran of the technology sector,





highlights the gender-based stereotypes that women professionals, particularly those in leadership roles, must contend with while outlining her own struggles. The woman holding such a position is expected to be more compassionate, emotional, and passive than her male counterparts. In the words of Kiran Mazumdar Shaw, (p. 124) the executive chairperson and founder of Biocon Limited and Biocon Biologics Limited, when a company employs a woman, people are more likely to doubt the company's stability, but as soon as the same woman begins to succeed, these credibility perceptions are rapidly dispelled. In an interview with the book's author herself, Naina Lal Kidwai, (p. 192) formerly a Group General Manager and the Country Head of HSBC India shares her own experience by stating that she is constantly scrutinised as a woman in a high position and that others are paying close attention to her, also any mistakes that she makes could be used by others. Nirupama Menon Rao, (p. 205) retired civil servant of the 1973 batch Indian Foreign Service cadre who served as India's Foreign Secretary from 2009 to 2011, as well as India's Ambassador to the United States, China, and Sri Lanka during her career, claims that women can bring feminine courage and resilience into the public sphere, as well as a concept of sisterhood that is focused on long-term solutions to issues. She goes on to say that these women can contribute to the construction of cross-border synergies for peace and reconciliation as well as the establishment of common ground. In a very intriguing interview, one of India's top corporate attorneys and co-founder of AZB & Partners, Zia Mody, (p. 340) reveals her experiences as a woman lawyer in the male-dominated Bombay High Court in 1984. She emphasises that women need to have ambition. She goes on to say that while women are prone to letting opportunities pass them due to their socially conditioned tendency to become overwhelmed by insecurities, only a passion for achievement can enable such women to overcome their insecurities. She also makes the point that women are extremely useful employees, especially in the legal profession, because they are outstanding multitaskers, natural debaters, and, unlike men, who occasionally engage in posturing, have a well-rounded approach to negotiations and settlement discussions (p. 346).

This book offers a novel perspective on Indian women, who are frequently represented as the underprivileged class in the country that is rapidly developing. The book proclaims to all women that they, too, can succeed in their chosen careers. The book makes a bold claim that women who have pursued their careers with a strict regimen are, and have always been, extremely good at what they do and that no one can pull them down. One could potentially be able to discover a personalised strategy for success by reading the way the author has blended the personal narratives of these women's life with motivational words (adequately underlined on almost every page). The author gives a precise narrative of these women's journey, highlighting not just their professional achievements but also the decisions and personal sacrifices they had to make along the way. The book provides insightful guidance on how to lead, persevere, and discover one's voice in a society that may not always value women in leadership roles. Those women who are looking for inspiration or seeking to

break down barriers in their careers will find value in reading the experiences and ideas given by these incredible women. Additionally, the book further explores gender inequities and societal difficulties experienced by working-class women. It promotes broader gender equality and gives women the chance to realise their full potential.

## Conclusion

Although the book unquestionably inspires and empowers readers, however, some readers may find the narratives to be a little superficial because so many different characters had to be covered in such a small amount of space. However, the book does a great job of introducing readers to these powerful women and urging them to learn more about the people who have the biggest impact on their lives. A noteworthy limitation of the book is that the author predominantly chose to focus on women from privileged backgrounds who had a strong network of family and friends. However, this picture does not accurately reflect most women who deal with practical challenges like conservatism, patriarchy, a lack of support and guidance, and a weak economic background. The main difficulties for a woman are societal standards and systemic barriers; however, coming from a stable economic and social background can undoubtedly make the route smoother. The author should have cited examples of successful women who came from underprivileged or normal families, or who overcame social and familial constraints to pursue their careers and succeed.

**References:**

1. Bourke, J., & Titus, A. (2020, March 6). The key to inclusive leadership. Harvard Business Review. Retrieved July 10, 2023, from https://hbr.org/2020/03/the-key-to-inclusive-leadership
2. Dixon-Fyle, S., Dolan, K., Hunt, D. V., & Prince, S. (2020). (rep.). Diversity wins: How inclusion matters. McKinsey & Company. Retrieved July 10, 2023, from https://www.mckinsey.com/featured-insights/diversity-and-inclusion/diversity-wins-how-inclusion-matters#/
3. Kidwai, N. L. (Ed.). (2015). 30 Women in Power: Their Voices, Their Stories. Rupa Publications India.
4. Tabassum, N., & Nayak, B. S. (2021a). Gender stereotypes and their impact on women's career progressions from a managerial perspective. IIM Kozhikode Society & Management Review, 10(2), 192–208. https://doi.org/10.1177/2277975220975513

## SCOPE, AIMS & OBJECTIVES

NIU International Journal of Human Rights, a UGC CARE listed, peer-reviewed annually published journal since 2014 seeks to provide a platform for engaging in multi-disciplinary discussions on themes of social sciences, law and humanities. The journal has a global reach and is widely read by scholars and practitioners across the world.

1. The purpose of the journal is to disseminate research results and the content supports high level learning, teaching and research in human rights & allied disciplines.
2. Articles accepted for publication in the journal are peer-reviewed.
3. More than 75% of contributions published in the journal emanate from multiple institutions.
4. The journal has an International Standard Serial Number (ISSN).
5. The journal is published annually.
6. The journal has an Advisory Board with more than two-thirds of the editorial board members beyond a single institution including international members, which is reflective of their expertise in the relevant subject area.
7. The journal is well circulated beyond a single institution; and has a wide range of audience from policy makers to academicians, researchers, and human rights experts.

**Accredited Indices**

1. UGC CARE listed (since 2018)
2. India Citation Index

It is a matter of great satisfaction that scholars, academicians, and writers from literature, social sciences, humanities, social work, law and health studies fields have been contributors to our annual journal which covers a spectrum of Human Rights issues broadly classified as follows-

- **Articles:** Research-based scholarly writings
- **Reviews:** Insightful surveys of the literature
- **Statements:** Opinions and thoughts
- **Whistleblowers:** Pioneering work with new dimensions
- **Reflections:** Anything worthy of sharing
- Other **general contributions** such as Book Reviews and Case Comments are also welcome.

We would be honored if you contribute to NIUIJHR 2022 as per your expertise and your interest. The articles will be published only after approval of our Editorial and Advisory Board (Peer-Review Committee).



NIU International Journal of Human Rights

A UGC CARE listed Journal (Volume 10, ISSN: 2394-0298)

## Guidelines for the Submission of Manuscripts

Only manuscripts of sufficient quality that meet the aims and scope of NIU IJHR will be reviewed. As part of the submission process, the author(s) will be required to warrant that they are submitting original work, that they are submitting the work for first publication in the Journal and that it is not being considered for publication elsewhere and has not already been published elsewhere, and that you have obtained and can supply all necessary permissions for the reproduction of any copyright works not owned by you.

**Article types**

Manuscripts must be in English and should be submitted via the peer-review and submission system. The preferred lengths for submissions are as follows –

i) Articles : 3000 – 5000 words.
ii) Notes/Comments : 2000 – 3000 words.
iii) Book Reviews : 1500 – 2500 words.

**ARTICLE FORMATTING**

**Articles/Manuscripts must be submitted in Microsoft Word only.**

1. **Title and Author Information:** following information should be included
   - Paper title
   - Author and all co-author(s) names
   - Affiliation of the institution
   - e-mail addresses and contact details of author and all co-authors.

2. **Abstract:** As mentioned earlier, the manuscript should contain an abstract, which is self-contained and citation-free, having a word limit of 250-300 words.

3. **Key words:** Add about four-five key words or phrases in alphabetical order, separated by comma.

4. **Introduction:** This section should be succinct, with no subheading and no references.

5. **Main Manuscript:** please ensure that the format of your manuscript adheres to these criteria:
   I. The articles should be double-spaced.
   II. The articles should include an abstract (300 – 500 words).
   III. Contains no more than 5,000 words (including references, notes, tables and figures).

IV. Does not contain page numbers.

V. Use single quotes throughout. Double quotes only to be used within single quotes. Spellings of words in quotations should not be changed. Quotations of 45 words or more should be separated from the text and indented with one space with a line space above and below.

VI. Use 'twentieth century', '1980s'. Spell out numbers from one to nine, 10 and above to remain in figures. However, for exact measurements, use only figures (3 km, 9 per cent, not %). Use thousands and millions, not lakhs and crores.

VII. Use of italics and diacritics should be minimized. Tables and figures to be indicated by numbers separately (see Table 1), not by placement (see Table below). All figures and tables should be cited in the text. Source for figures and tables should be mentioned irrespective of whether or not they require permissions.

6. **References:** NIUIJHR adheres to two methods of Citations.

- **APA** (American Psychological Association) citation Style for research papers in social sciences like psychology, anthropology, sociology, as well as education and other fields.

Authors are responsible for ensuring that the information in each reference is complete and accurate.

**Editorial Policies**

1. **Peer-review**

- NIUIJHR is a peer-reviewed journal, which follows a rigorous review process.
- Under the process, author's scholarly work and research is subjected to the scrutiny of other experts - at two different levels in the same field to check its validity and evaluate its suitability for publication.
- Article would then be accepted / rejected or accepted after modification which the author is required to carry out subsequently.

2. **Plagiarism**

NIU IJHR takes issues of copyright infringement, plagiarism or other breaches of best practice in publication very seriously.

- We seek to protect the rights of our authors and we always investigate claims of plagiarism or misuse of published articles.
- Equally, we seek to protect the reputation of the journal against malpractices.
- Submitted articles may be checked with duplication-checking software. Where an article, for example, is found to have plagiarized other work or included third- party copyright material without permission or with insufficient acknowledgement, or where the authorship of the article is contested, we reserve the right to take action including, but not limited to:
  a. publishing an erratum or corrigendum (correction); retracting the article;
  b. taking up the matter with the head of department or dean of the author's institution and/or relevant academic bodies or societies; or
  c. taking appropriate legal action.



Any correspondence, queries or additional requests for information on the manuscript submission process should be sent to the NIU IJHR editorial office as follows:

PROF. (DR.) APARNA SHARMA
*Editor – in – Chief*
NIU International Journal of Human Rights
Dean, School of Liberal Arts
Noida International University
Email: *editorinchiefniuijhr@niu.edu.in / dir.sla@niu.edu.in*
Phone: +91-9871251999

PROF. (DR.) MANU SINGH
*Associate Editor*
NIU International Journal of Human Rights
Dean, School of Law and Legal Affairs
Noida International University.
Email: *editorinchiefniuijhr@niu.edu.in / dir.slla@niu.edu.in*

**Website: niu.edu.in/niuijhr/**