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CONTENTS

AI and Criminal Law: Assessing the Adequacy of Existing Legal Frameworks

ABSTRACT

The rapid development of Artificial Intelligence (AI) in areas like healthcare, business, government, and digital communication has created many advantages, but also new legal and regulatory issues. Autonomous decision-making, large data processing, content creation, and complex task execution are all areas where AI systems are capable. These can be used in wrongful ways, such as committing fraud, stealing identities, making deepfakes, privacy abuse, spreading false information, and cyberattacks. These issues highlight the shortcomings of most legal systems. They have been created with the idea of trying to keep control over people's behaviour, as opposed to technologies that operate on their own. This paper analyses, the legal constructs of AI-related crimes with specific emphasis to India. It attempts to study the scope of coverage of the Indian Penal Code 1860, the Information Technology Act, 2000, and the Digital Personal Data Protection Act, 2023 in relation to crimes involving AI Systems. It also considers the different positions of the European Union, the United States of America, the United Kingdom, and the relevant case law and writings. The study attempts to conclude that the existing laws are partly sufficient and that with respect to AI, legislative reform is necessary in order to clarify the thresholds of liability and accountability for AI-related injuries.

Keywords: Artificial Intelligence, AI-related Crimes, Cybercrime, Data Protection, Privacy Rights, Digital Personal Data Protection Act, 2023, Information Technology Act, 2000, AI Regulation, Deepfakes, Identity Theft, Criminal Liability, Global AI Governance

INTRODUCTION

One of the most disruptive technologies in history is Artificial Intelligence (AI). AI has impacted many areas, including healthcare, finance, administration, transport, education and communication. Through automation, predictive analysis and machine learning, AI has enabled increased efficiency and innovation and improved decision-making throughout the public and private sectors.

However, AI also brings with it new kinds of legal risks and criminal misuse, such as automated fraud; identity theft; the production of manipulated media; algorithmic discrimination; intrusive surveillance and increasingly sophisticated cyber-attacks. Unlike traditional crime, AI-related crime often includes the involvement of autonomous/semi-autonomous systems, multiple participants, indirect control and complicated causal chains, which create significant challenges for traditional criminal law that is based on human intent, behaviour and individual culpability.

This study looks at whether the existing legal structures adequately address crimes associated with artificial intelligence (AI). It also reviews international systems and developments in court and explores potential methods for improving criminal laws pertaining to AI.

1. LEGAL FRAMEWORK GOVERNING AI-RELATED CRIMES

The legal framework governing AI-related crimes is still in a developing stage, as most existing laws were drafted long before the emergence of advanced Artificial Intelligence systems. Traditional criminal laws were designed to address human conduct and intentional wrongdoing, whereas AI-generated crimes involve complex interactions between algorithms, data systems, and varying levels of human supervision. As a result, there exists a significant gap between technological advancement and legal regulation, making it difficult to effectively address offences committed through or by AI systems within the current legal structure. [1]

In India, as well as in many other jurisdictions, AI-related criminal liability is indirectly governed through existing laws such as the Indian Penal Code, 1860 and the Information Technology Act, 2000. However, these statutes do not specifically define or regulate Artificial Intelligence as an independent source of liability. Instead, they rely on traditional legal principles such as intention, knowledge, and negligence to determine criminal responsibility.

[1] *Stuart Russell and Peter Norvig, Artificial Intelligence: A Modern Approach (4th edn, Pearson 2021) 27–30.*

This creates challenges in applying these provisions to [2] AI-generated acts, particularly in situations where harm is caused autonomously without direct human intent or real-time control. [2]

The Information Technology Act plays a particularly important role in addressing cyber-related offences that may involve AI systems, such as hacking, identity theft, data breaches, and online fraud. Nevertheless, the Act primarily focuses on human actors and intermediaries, rather than autonomous systems capable of independent decision-making. Similarly, emerging concerns related to deepfakes, algorithmic manipulation, and automated cyberattacks highlight the limitations of existing legal provisions in dealing with technologically advanced forms of criminal activity.[3]

Another significant aspect of the legal framework is the growing importance of data protection and privacy laws in regulating AI systems. Since AI relies heavily on large datasets for training and functioning, issues of consent, data misuse, and privacy violations become central to legal analysis. Although India's Digital Personal Data Protection Act, 2023 provides a framework for safeguarding personal data, it does not comprehensively address criminal liability arising specifically from AI-generated harm. [4]

At the international level, different jurisdictions have adopted varied approaches to regulating AI-related crimes. The European Union has introduced risk-based regulatory frameworks, while other countries rely on sector-specific guidelines or ethical AI principles. However, there is no uniform global standard for assigning criminal liability in cases involving AI systems, which creates additional complexity in cross-border digital offences. [5]

Judicial interpretation also plays a crucial role in shaping the legal understanding of AI-related crimes, as courts attempt to apply existing legal doctrines to new technological realities. However, in the absence of specific legislation, judicial responses remain largely interpretative and case-specific. This highlights the urgent need for comprehensive legal reform to establish a clear and consistent framework for addressing AI-generated crimes effectively. [6]

1.1 Applicability of Indian Penal Code to AI-Generated Crimes

The Indian Penal Code, 1860 remains the core criminal statute in India and governs a wide range of offences based on the principles of human intention, action, and culpability. However, since the IPC was enacted in a pre-digital era, it does not explicitly recognise Artificial

[2] *Indian Penal Code, 1860; Information Technology Act, 2000; Andrew Murray, Information Technology Law (4th edn, OUP 2019) 412.*

[3] *Information Technology Act, 2000, ss 43, 66, 66C, 66D, 67.*

[4] *Digital Personal Data Protection Act, 2023 (India); Daniel J Solove, Understanding Privacy (Harvard University Press 2008) 101.*

[5] *European Union, Artificial Intelligence Act (EU Regulation, 2024); OECD, OECD Principles on Artificial Intelligence (2019).*

[6] Woodrow Barfield and Ugo Pagallo (eds), *Research Handbook on the Law of Artificial Intelligence* (Edward Elgar 2018) 233–240.

Intelligence as a subject of criminal liability. As a result, its application to AI-generated crimes is indirect and interpretative in nature. Courts and law enforcement agencies must rely on

traditional provisions and extend them to modern technological contexts, which often creates conceptual and practical difficulties in cases involving autonomous systems.

Most IPC provisions can only be applied to AI-related offences when a human actor behind the AI system can be clearly identified. For example, offences such as cheating, forgery, defamation, and criminal intimidation may be invoked when AI is used as a tool to commit harm. However, this approach assumes that a human being has full control over the system, which is not always the case in advanced AI applications. In situations where AI systems independently generate harmful outputs, the direct application of IPC provisions becomes legally uncertain and challenging.

A major limitation of the IPC in the context of AI is its strong reliance on the doctrine of *mens rea*. Criminal liability under the IPC generally requires intention, knowledge, or at least negligence on the part of the accused. However, AI systems do not possess mental intent in the legal sense, and their outputs are based on data-driven algorithms rather than conscious decision-making. This creates a legal gap when harm is caused without any identifiable human intention, making it difficult to satisfy the essential ingredients of many IPC offences. The doctrines of abetment and criminal conspiracy under the IPC are sometimes used to extend liability to individuals involved in the creation or deployment of AI systems. If it can be proven that a developer or user knowingly facilitated the misuse of AI technology for illegal purposes, liability may be established. However, in many AI-generated crime scenarios, the connection between human conduct and the final harmful outcome is indirect or unclear, which limits the effectiveness of these provisions in ensuring accountability.

Another challenge arises in establishing causation under the IPC when AI systems are involved. Criminal law requires a clear link between the accused's conduct and the resulting harm. In AI related cases, especially those involving machine learning and autonomous decision-making, the causal chain is often complex and multi-layered. The system's behaviour may evolve over time based on training data, making it difficult to trace a specific human action as the direct cause of the offence. This weakens the traditional framework of liability under the IPC.

Overall, while the Indian Penal Code provides a broad foundation for criminal prosecution, its effectiveness in addressing AI-generated crimes remains limited. The statute was not designed to deal with autonomous technologies, and its reliance on human intention and control creates significant gaps in applicability. As AI systems become more advanced and independent, there is a growing need for legal reforms or supplementary legislation to ensure that criminal liability can be effectively assigned in cases involving Artificial Intelligence.

1.2 Information Technology Act and Cyber Offences

The Information Technology Act, 2000 serves as the primary legislation in India for addressing cybercrimes and regulating electronic commerce and digital activities. It provides a legal framework for offences such as hacking, identity theft, data theft, cyber fraud, and publication of obscene or offensive material online. Since Artificial Intelligence systems often operate within digital environments, many AI-generated crimes fall indirectly under the ambit of the IT Act. However, the Act was enacted before the widespread adoption of AI technologies, and

therefore it does not specifically address issues related to autonomous systems or algorithmic decision-making.

The IT Act primarily assumes human intervention behind cyber activities, meaning that liability is generally attributed to individuals or organisations rather than autonomous systems. Sections dealing with unauthorised access, data damage, and cyber fraud are based on the assumption of intentional human conduct. In cases where AI systems independently execute harmful actions, such as automated hacking tools or self-learning malware, identifying the responsible human actor becomes extremely difficult. This creates a significant enforcement challenge for investigative agencies and courts.

The role of intermediaries under the IT Act is particularly important in the context of AIgenerated content. Platforms that host or transmit AI-generated material may be held liable under Section 79, but only if they fail to observe due diligence requirements. However, with the rise of generative AI systems that automatically produce text, images, and videos, determining intermediary responsibility becomes increasingly complex. It is often unclear whether the platform is merely hosting content or actively contributing to its generation through AI tools.

Another limitation of the IT Act is its lack of provisions addressing algorithmic accountability and transparency. AI systems can generate harmful outcomes such as deepfakes, misinformation, and automated fraud without direct human input at the time of offence. The Act does not provide a clear mechanism to regulate or penalise such autonomous outputs, leading to ambiguity in enforcement. This gap becomes more pronounced in cases involving large-scale AI-driven cyberattacks or coordinated digital manipulation campaigns.

The evidentiary challenges under the IT Act also complicate AI-related prosecutions. Digital evidence must be traced back to a specific device, user, or account, but AI systems often operate across distributed networks and cloud-based infrastructures. This makes it difficult to establish ownership or control over the offending action. As a result, even when harm is clearly caused, linking it to a legally responsible entity under the IT Act becomes problematic.

Overall, while the Information Technology Act provides an essential framework for combating cybercrime in India, it is not adequately equipped to handle the complexities introduced by Artificial Intelligence. The absence of AI-specific provisions, combined with challenges of attribution, transparency, and causation, highlights the urgent need for legislative updates. Strengthening the IT Act or introducing dedicated AI regulation would be necessary to ensure effective legal control over emerging forms of cyber and AI-generated crimes.

1.3 Data Protection and Privacy Laws

Data protection and privacy laws play a crucial role in regulating Artificial Intelligence systems because AI fundamentally depends on large volumes of personal and non-personal data for training, learning, and decision-making. In India, the Digital Personal Data Protection Act, 2023 represents a significant step toward establishing a structured framework for safeguarding personal data.

However, while the Act addresses issues of consent, data processing, and data fiduciary responsibilities, it does not explicitly deal with criminal liability arising from AI-generated harm. This creates a gap between data governance and criminal accountability in cases where misuse of data by AI systems leads to unlawful outcomes.

Artificial Intelligence systems often process sensitive personal data, including biometric information, behavioural patterns, financial records, and location data. The misuse or unauthorised processing of such data can result in serious violations of privacy rights. However, when such violations occur through autonomous AI systems, determining liability becomes complex. It is often unclear whether responsibility lies with the data fiduciary, the AI developer, the deploying organisation, or the end user, especially when the system operates independently based on learned data patterns.

A major concern in AI-driven data processing is the issue of informed consent. Traditional data protection frameworks assume that individuals provide clear and informed consent for the use of their data. However, in AI systems, data is often collected indirectly, aggregated from multiple sources, and used for purposes beyond the original scope of consent. This raises legal and ethical concerns, particularly when AI systems generate outputs that harm individuals, such as profiling-based discrimination or identity misuse.

Another important aspect is data bias and algorithmic discrimination, which can lead to harmful consequences even without direct human intent. AI systems trained on biased datasets may produce discriminatory results affecting employment, credit scoring, law enforcement profiling, and access to services. While such outcomes may violate principles of fairness and equality, existing data protection laws do not clearly assign criminal liability for algorithmic bias, making enforcement difficult.

Cross-border data flows further complicate the application of privacy laws in AI-related contexts. Many AI systems operate on global cloud infrastructure, where data is processed in multiple jurisdictions. This raises questions about which legal system applies when a data breach or AI-generated harm occurs. The absence of harmonised international data protection standards increases uncertainty in assigning liability and enforcing legal remedies.

Overall, while data protection and privacy laws provide an essential regulatory foundation for safeguarding individual rights in the digital age, they are not sufficient to address the complexities of AI-generated crimes. The intersection of AI autonomy, large-scale data processing, and algorithmic decision-making requires more comprehensive legal mechanisms that integrate privacy protection with clear standards of criminal accountability.

1.4 International Legal Approaches to AI Liability

Internationally, there is no uniform legal framework specifically governing criminal liability for Artificial Intelligence, but several jurisdictions and regulatory bodies have developed different approaches to address AI-related risks. The European Union has taken a leading role through its proposed Artificial Intelligence Act, which adopts a risk-based classification system for AI applications. High-risk AI systems are subject to strict compliance requirements, including transparency, accountability, and human oversight. However, even in the EU framework, criminal liability is still largely dependent on national laws rather than a unified supranational criminal code.

The United States follows a sector-specific and innovation-driven approach, relying on existing legal frameworks such as tort law, consumer protection laws, and cybersecurity regulations to address AI-related harms. There is no comprehensive federal AI legislation that directly defines criminal liability for AI systems. Instead, liability is generally imposed on developers, companies, or users based on negligence, product liability, or intentional misuse. This

fragmented approach creates flexibility but also leads to inconsistency in enforcement across different states and sectors.

In the United Kingdom, regulatory efforts focus on principles such as fairness, accountability, and transparency, with regulatory guidance issued by agencies rather than strict legislative provisions. The UK approach emphasises adaptive regulation, allowing existing laws to be interpreted in the context of AI technologies. However, like other jurisdictions, it still relies on human-centric liability models and does not recognise AI as an independent legal subject for criminal responsibility.

International organisations such as the OECD and the United Nations have also contributed to the development of ethical guidelines and policy frameworks for Artificial Intelligence. These frameworks emphasise human rights protection, safety, transparency, and accountability in AI development and deployment. However, they remain non-binding in nature and do not establish enforceable criminal liability standards. As a result, their impact is limited to policy guidance rather than legal enforcement.

A common feature across most international approaches is the rejection of direct criminal liability for AI systems themselves. Instead, responsibility is consistently traced back to human actors such as developers, operators, or organizations deploying the technology. This reflects the global consensus that AI, at least in its current form, should not be treated as a legal person capable of bearing criminal responsibility. However, this approach also highlights the difficulty of addressing autonomous decision-making systems within traditional legal structures.

Overall, international legal approaches to AI liability reveal a fragmented and evolving regulatory landscape. While significant progress has been made in establishing ethical and riskbased guidelines, there remains a lack of uniformity in addressing criminal liability for AIgenerated harm. This reinforces the need for coordinated international legal standards that can effectively bridge the gap between technological advancement and criminal accountability.

1.5 Judicial Trends and Case Laws

The judicial approach toward Artificial Intelligence and AI-generated crimes is still evolving, as courts across jurisdictions are increasingly confronted with technological disputes that challenge traditional legal principles. Although there are limited direct judicial precedents specifically addressing AI-generated crimes, courts have played a significant role in interpreting existing legal doctrines in the context of emerging digital technologies. The judiciary generally relies on established principles of criminal liability, such as intention, causation, and foreseeability, to extend existing laws to new technological situations involving Artificial Intelligence systems.[7]

In India, courts have consistently adopted an interpretative and expansive approach when dealing with technology-driven disputes. In cases such as **Shreya Singhal v. Union of India (2015)**, the Supreme Court emphasized the importance of protecting fundamental rights in the digital space while also clarifying the limits of intermediary liability.

[7] *Shreya Singhal v. Union of India (2015) 5 SCC 1*

Although not an AI-specific case, it is relevant in understanding how courts deal with online platforms that may host algorithmically generated or user-driven content. Similarly, in **K.S. Puttaswamy v. Union of India (2017)**, the recognition of the right to privacy laid a strong foundation for regulating data-driven technologies, including AI systems that rely heavily on personal data processing. [8]

The principle of liability for hazardous or high-risk activities has also been judicially developed in cases such as **M.C. Mehta v. Union of India (Oleum Gas Leak Case, 1987)**, where the Supreme Court introduced the doctrine of absolute liability. This principle is particularly relevant in AI-related contexts, as it suggests that entities engaged in inherently risky technological activities may be held strictly responsible for harm caused, regardless of intent or negligence. This judicial reasoning provides a potential framework for addressing AI generated harm in the absence of specific legislation. [9]

Courts have also dealt with issues of causation and foreseeability in criminal law, which are central to AI liability debates. In **Jacob Mathew v. State of Punjab (2005)**, the Supreme Court clarified the standards for criminal negligence, emphasizing the need for a gross deviation f[2]rom reasonable care. This becomes relevant in AI cases where developers or operators may be held liable if they fail to exercise adequate caution in designing or deploying AI systems. However, applying these standards to autonomous systems remains challenging due to the unpredictable nature of AI decision-making. [10]

2. Critical Analysis on academic literature on Ai Criminal liability

Criminal liability in terms of Artificial Intelligence has also attracted considerable academic attention as far as the limitations of traditional approaches towards addressing issues associated with autonomous decision-making systems are concerned. The classical criminal law theory of actus reus and mens rea is applicable only to human beings who engage in illegal activity with intention. This poses challenges to applying criminal liability to Artificial Intelligence as this system does not possess consciousness or moral awareness.[11]

In one of the most discussed theories, the author presents three models of criminal liability: (i) perpetrator-via-another, in which Artificial Intelligence is an innocent agent, (ii) naturalprobable-consequence model, in which criminal liability arises in connection with expected results and (iii) direct criminal liability model, in which Artificial Intelligence is

[8] *K.S. Puttaswamy v. Union of India (2017) 10 SCC 1*

[9] *M.C. Mehta v. Union of India (Oleum Gas Leak Case, 1987) 1 SCC 395*

[10] *Jacob Mathew v. State of Punjab (2005) 6 SCC 1 precedents highlights the urgent need for legislative intervention to provide clear guidance on criminal liability in the context of Artificial Intelligence*.

[11] Andrew Ashworth, *Principles of Criminal Law* (9th edn, OUP 2021) 85–92

recognized as the offender.[12] Even though the suggested approach has a number of interesting ideas, it has

faced some criticism. Namely, the proposed framework was criticized as being too theoretical to be applied to real legal cases since punishment could hardly be applied to Artificial Intelligence.

However, some academics, such as Ugo Pagallo, oppose the notion of giving AI legal personalities. The stance is that legal systems should have a human focus since any liability would lie on those responsible for designing, creating, and implementing the technology.[13] This perspective is more consistent with the current laws and sidesteps the complications involved in recognizing AI as a separate legal personality.

Also essential is Ryan Calo's work on regulatory gaps caused by new technological advances. It holds that the law is typically unable to keep up with innovations, resulting in cases of illegal behavior that exist outside the legal purview.[14] This idea is significant regarding AI crimes committed since neither the Indian Penal Code nor the Information Technology Act is sufficient for handling autonomous technology.

Moreover, the concept of distributed responsibility has been extensively analyzed by scholars such as Thomas Weigend.

Despite these different positions, however, a general trend can be observed within the literature, suggesting that scrapping all traditional doctrines is neither feasible nor appropriate. Instead, what needs to prevail is the combination of traditional doctrines and AI-specific legislation. This way, continuity in law will be maintained while still ensuring adaptation and responsiveness to changes in technology.

Within the context of India, this issue gains even more significance given the lack of proper AI legislation. Although the Digital Personal Data Protection Act aims at solving the problem of data protection, it does not settle the matter of criminal responsibility. In light of this, the engagement with scholarly works shows how important it is to have the proper legislation in place.[15]

As far as I am concerned, following an entirely human-centered model of liability is neither feasible nor legally acceptable, especially in the context of an emerging legal jurisdiction such as India. Instead, what might work better is a mixed model whereby liability can remain humanfocused yet technologically backed.

[12] Gabriel Hallevy, *When Robots Kill: Artificial Intelligence under Criminal Law* (Northeastern University Press 2013) 45– 63.
[13] Ugo Pagallo, *The Laws of Robots* (Springer 2013) 117–125.

[14] *Ryan Calo, 'Robotics and the Lessons of Cyberlaw' (2015) 103 California Law Review 513.*

[15] *Digital Personal Data Protection Act, 2023* (India).

Conclusion

Artificial Intelligence is no longer a future concept; it has already become a part of everyday life, influencing decisions, systems, and even human behaviour in subtle but powerful ways. While it has brought efficiency and innovation across sectors, it has also created new forms of

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risk that the traditional legal system was never designed to handle. This study has shown that the existing legal framework, particularly laws such as the Indian Penal Code and the Information Technology Act, continues to rely heavily on human intention, control, and direct causation. These assumptions do not always hold true in the case of autonomous or semiautonomous AI systems.

One of the key issues that emerges is the difficulty in assigning criminal liability when harm is caused without clear human intent. Unlike traditional offences, AI-related crimes often involve multiple actors, indirect control, and evolving system behaviour. This makes it challenging to apply established principles such as mens rea in a straightforward manner. At the same time, completely shifting liability onto AI systems themselves is neither practical nor legally viable, as AI lacks consciousness, moral judgment, and the capacity to be punished.

The analysis of academic literature further highlights that there is no single agreed solution to this problem. While some scholars advocate for recognising AI as a legal entity, others strongly reject this idea and instead support a human-centric approach to liability. The more balanced view appears to be a hybrid model, where responsibility is primarily attributed to human actors—such as developers, operators, or organisations—while also introducing regulatory safeguards to address the unique risks posed by Artificial Intelligence.

From an Indian perspective, the situation becomes more pressing due to the absence of a dedicated legal framework addressing AI-related criminal liability. Although developments such as the Digital Personal Data Protection Act mark progress in the area of data governance, they do not fully resolve the challenges posed by autonomous systems. There is a clear need for legislative reform that goes beyond adapting existing laws and instead directly engages with the realities of AI-driven harm.

In conclusion, the law is currently trying to fit a rapidly evolving technology into an outdated framework. While judicial interpretation and existing statutes provide temporary solutions, they are not sufficient in the long run. What is required is a forward-looking approach that combines legal clarity, technological understanding, and policy innovation. In my view, the most practical path forward is not to replace traditional legal principles entirely, but to adapt them thoughtfully while introducing specific provisions that address accountability in the age of Artificial Intelligence. Only then can the legal system effectively balance innovation with responsibility and ensure justice in an increasingly automated world.

Consumer Protection Authorities

References

1. *Ashworth, Andrew, Principles of Criminal Law (9th edn, OUP 2021).*
2. *Hallevy, Gabriel, When Robots Kill (2013).*
3. *Pagallo, Ugo, The Laws of Robots (2013).*
4. *Calo, Ryan, Robotics and the Lessons of Cyberlaw (2015).*
5. *Digital Personal Data Protection Act, 2023.*
6. *K.S. Puttaswamy v Union of India (2017).*
7. *M.C. Mehta v Union of India (1987).*
8. *OECD AI Principles (2019)*
9. *Digital Personal Data Protection Act, 2023 (India).*

INSOLVENCY VS. ARBITRATION IN INDIA: JURISDICTIONAL CONFLICT AND THE PRIMACY OF COLLECTIVE PROCEEDINGS

Abstract

Few areas of Indian commercial law generate as much doctrinal friction as the overlap between insolvency and arbitration. When a creditor holds both a contractual arbitration clause and a claim that qualifies under the Insolvency and Bankruptcy Code, 2016 (IBC),[1] the question of which regime takes precedence becomes unavoidable. The IBC's overriding effect under Section 238 sits in direct tension with the party autonomy that animates the Arbitration and Conciliation Act, 1996 (A&C Act).[2] This paper traces that tension through the legislative texts, the competing theoretical frameworks, andmost criticallythrough the divergent rulings in *Indus Biotech Pvt. Ltd. v. Kotak India Venture Fund*[3] and *Vidarbha Industries Power Ltd. v. Axis Bank Ltd.*[4] The central argument is that insolvency proceedings are justified in overriding arbitration where collective creditor interests are genuinely at stake, but that neither the legislature nor the courts have yet articulated a principled boundary distinguishing the two regimes. Legislative intervention is long overdue.

Keywords: Insolvency and Bankruptcy Code; Arbitration; Section 14 Moratorium; Party Autonomy; Collective Creditor Proceedings; NCLT; Kompetenz-Kompetenz; Non-Arbitrability.

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[1]Insolvency and Bankruptcy Code, 2016, No. 31, Acts of Parliament, 2016 (India) [hereinafter IBC].

[2]Arbitration and Conciliation Act, 1996, No. 26, Acts of Parliament, 1996 (India) [hereinafter A&C Act].

[3]Indus Biotech Pvt. Ltd. v. Kotak India Venture Fund-I, (2021) 8 SCC 401 (India).

[4]Vidarbha Indus. Power Ltd. v. Axis Bank Ltd., (2022) 8 SCC 352 (India).

I. Introduction

There is an inherent tension in the co-existence of two legal regimes that pursue fundamentally different ends. Arbitration is built on contractual consent: the parties have agreed in advance that their disputes will be resolved privately, outside the ordinary court system. Insolvency, by contrast, is a statutory mechanism designed to address financial failure in a manner that is equitable to all creditors, rather than to whichever individual claimant moves fastest. When a creditor holds both an arbitration agreement and a claim that falls within the scope of the IBC,[5] these two systems collide, and the outcome is neither legally obvious nor practically settled.

India has been grappling with this collision since the IBC came into force in 2016. The volume of insolvency applications grew sharply in the years following enactment, and the disruption caused by COVID-19 accelerated that trend further. Against that background, the question of whether a creditor must honour an arbitration agreement or can instead proceed directly under

[5]IBC § 238.

the IBCand vice versa, whether a debtor can use pending arbitration to delay CIRP admissionhas moved from academic interest to practical urgency.

Arbitration, as a creature of contract, draws its authority from the voluntary agreement of the parties to take disputes outside the state court system. The Arbitration and Conciliation Act, inspired by the UNCITRAL Model Law, reflects a policy choice preferring minimum judicial intervention. It also ensures the enforceability of arbitration agreements and the tribunal's own authority to rule on its jurisdiction. Insolvency law operates on an entirely different logic. It is statutory rather than consensual, collective rather than bilateral, and is explicitly designed to halt individual creditor action when a debtor's financial position has crossed an irretrievable threshold.

Three questions sit at the centre of this paper. First, can insolvency proceedings lawfully displace an arbitration agreement, and if so, under what conditions? Second, at what stage of the process does arbitration become procedurally unavailable? Third, how should courts calibrate the balance between the contractual rights of parties and the statutory imperatives of the insolvency framework? Each of these questions is addressed in turn, with particular attention to the Supreme Court's rulings in

Three questions sit at the centre of this paper. First, can insolvency proceedings lawfully displace an arbitration agreement, and if so, under what conditions? Second, at what stage of the process does arbitration become procedurally unavailable? Third, how should courts calibrate the balance between the contractual rights of parties and the statutory imperatives of the insolvency framework? Each of these questions is addressed in turn, with particular attention to the Supreme Court's rulings in *Indus Biotech* and *Vidarbha Industries*two decisions that have complicated, rather than clarified, the doctrinal landscape.

II. Legislative Framework

2.1 The Arbitration and Conciliation Act, 1996

The Arbitration and Conciliation Act, 1996 provides the primary statutory framework for arbitration in India, drawing heavily on the UNCITRAL Model Law on International Commercial Arbitration. Its key principles are: courts must not intervene beyond what the Act permits (Section 5); they must refer parties to arbitration where a valid agreement exists (Section

8); and arbitral awards are enforceable as if they were court decrees (Section 36).[6] The 2015 and 2019 amendments introduced stricter timelines on arbitral proceedings (Section 29A)[7] and transferred appointment functions to designated arbitral institutions.

Notably, the Act contains no express carve-out for disputes that arise in an insolvency context. The doctrine of kompetenz-kompetenz, codified in Section 16,[8] gives the arbitral tribunal the authority to rule on its own jurisdiction, and the Supreme Court in *Vidya Drolia v. Durga Trading Corporation* (2021)[9] affirmed a strong presumption in favour of arbitrability. Taken together, these provisions indicate that courts have historically defaulted to referring parties to arbitration unless there are strong grounds for non-arbitrability.

2.2 The Insolvency and Bankruptcy Code, 2016

The IBC was enacted to consolidate India's fragmented insolvency framework and to introduce a time-bound resolution mechanism for financially distressed corporate entities. The legislation establishes a Corporate Insolvency Resolution Process (CIRP) of 180 days, extendable to 330 days in prescribed circumstances, directed by the National Company Law Tribunal (NCLT) and supervised by the Insolvency and Bankruptcy Board of India (IBBI).[10]

For the purposes of this paper, Section 14 is the most consequential provision. Once a CIRP application is admitted, the NCLT imposes a moratorium that stays: the institution or continuation of any suit or proceeding against the corporate debtor; the execution of outstanding judgments, decrees, or orders; the transfer or disposal of assets; and the recovery of any property by an owner or lessor.[11] Section 238 gives the IBC its overriding characterwhere the Code is inconsistent with any other law, the Code prevails.[12]

III. Theoretical Underpinnings: Party Autonomy vs. Collective Resolution

3.1 The Case for Party Autonomy

[6] A&C Act §§ 5, 8, 36.
[7] A&C Act § 29A (as amended by the Arbitration and Conciliation (Amendment) Act, 2019).
[8] A&C Act § 16.
[9] Vidya Drolia v. Durga Trading Corp., (2021) 2 SCC 1 (India).
[10] IBC §§ 7, 9, 14, 53, 238.
[11] IBC § 14.
[12] IBC § 238.

The philosophical foundation of arbitration is the idea that parties who have freely chosen a private dispute resolution mechanism should be held to that choice. Courts, on this view, are facilitators rather than gatekeeperstheir role is to give effect to the parties' bargain, not to second-guess it. The Supreme Court articulated this principle clearly in *Vidya Drolia*,[13] affirming that the presumption runs in favour of arbitrability, and that departure from it requires express statutory authority or clear public policy grounds.

Several arguments support honouring arbitration agreements even when insolvency is in the picture. The doctrine of separability means that the arbitration clause survives the main contract and remains enforceable even where the underlying agreement is challenged. The NCLT, as a specialist insolvency tribunal, may not be ideally placed to adjudicate complex contractual disputes involving, for instance, the terms of a convertible debenture or a project finance agreement. And where a debt is genuinely disputed, bilateral resolution through arbitration does not inherently harm the collective interests of other creditorsparticularly if the outcome of the arbitration will simply determine whether a particular claim exists at all.[14]

3.2 The Case for Collective Resolution

Insolvency law operates on a fundamentally different premise: once a debtor crosses the threshold of financial distress, individual creditor action must give way to a collective process. The logic is both protective and functional. Without a moratorium, aggressive creditors can strip assets before others have a chance to recover anythinga dynamic that benefits the fastest-moving party rather than producing a fair or economically rational outcome. A collective process, by contrast, preserves the entity as a going concern where possible, maximises the value available for distribution, and allocates losses according to a designated priority cascade under Section 53 of the IBC.[15]

Allowing arbitration to proceed during CIRP would undermine these objectives in practice. Individual arbitral awards, if executed while the moratorium is in place, deplete the estate available to all creditors. More structurally, if debts are resolved bilaterally, the Committee of Creditors (CoC) cannot form an accurate picture of the corporate debtor's total liabilitieswhich is

[13]Vidya Drolia v. Durga Trading Corp., (2021) 2 SCC 1 (India).
[14]A&C Act § 16 (kompetenz-kompetenz principle).
[15]IBC § 53.

essential for evaluating any resolution plan. The logic of collective resolution does not merely tolerate the displacement of arbitration when CIRP has been properly triggered; it demands it.

IV. Interaction Between IBC and Arbitration: Section 14 Moratorium

4.1 Scope of the Moratorium

The word 'proceedings' in Section 14(1)(a)[16] is deliberately broad. Whether it covers arbitration proceedings was authoritatively resolved by the Supreme Court in *Alchemist Asset Reconstruction Co. Ltd. v. Hotel Gaudavan Pvt. Ltd.* (2018),[17] where the Court confirmed that the moratorium bars the continuation of arbitration against the corporate debtor once CIRP is admitted. This position is now settled and not seriously contested.

There is, however, an important limitation on the moratorium's reach: it applies only to proceedings brought against the corporate debtor, not to proceedings initiated by it. Where the corporate debtor is a claimant in arbitration, the Resolution Professional (RP) who takes over from the management on admission may continue or even initiate arbitration on the company's behalf, where doing so serves the interests of the creditor body.

4.2 Pre-Existing Dispute Doctrine

One of the most consequential battlegrounds in this area is whether a creditor holding an arbitration agreement can bypass it and proceed directly under the IBC. The answer turns on whether the underlying debt is 'disputed'. For operational creditors under Sections 8 and 9, the existence of a pre-existing dispute is a complete defence to IBC proceedings. In *Mobilox Innovations Pvt. Ltd. v. Kirusa Software Pvt. Ltd.* (2018),[18] the Supreme Court specified that a qualifying dispute must be both: (a) pre-existingraised before the demand notice was served; and (b) bona fide. A dispute manufactured as a tactical response to a demand notice will not suffice.[19]

No similar dispute defence applies to financial creditors under Section 7. The NCLT need only satisfy itself that a financial debt exists and that there has been a default. This asymmetry has

[16]IBC § 14(1)(a).
[17]Alchemist Asset Reconstruction Co. Ltd. v. Hotel Gaudavan Pvt. Ltd., (2018) 16 SCC 94 (India).
[18]Mobilox Innovations Pvt. Ltd. v. Kirusa Software Pvt. Ltd., (2018) 1 SCC 353 (India).
[19]Consolidated Constr. Consortium Ltd. v. Hitro Energy Sols. Pvt. Ltd., (2023) SCC OnLine SC 1 (India).

survived constitutional challenge: in *Innoventive Industries v. ICICI Bank* (2018)[20] and *Swiss Ribbons v. Union of India* (2019),[21] the Supreme Court upheld the FC-OC distinction, reasoning that financial creditors occupy a qualitatively different position because of their involvement in loan covenants, credit monitoring, and restructuring decisions.

V. Key Case Analysis

5.1 Indus Biotech Pvt. Ltd. v. Kotak India Venture Fund-I & Ors. (2021) 8 SCC 401

Facts

Kotak India Venture Fund, acting as a financial creditor, filed a Section 7 application against Indus Biotech to initiate CIRP. Indus Biotech resisted, arguing that the underlying debt was subject to a valid arbitration clause and that the question of the precise amount owed was already before an arbitral tribunal. The NCLT admitted the application and the matter ultimately reached the Supreme Court.[22]

Issues

(i) Whether a Section 7 application can be maintained when the underlying dispute about the debt is already pending in arbitration.[23] (ii) Whether the NCLT should have referred the parties to arbitration under Section 8 of the A&C Act before proceeding with CIRP.[24]

Decision

The Supreme Court held that where the existence of a debt is genuinely contested in pending arbitral proceedings, the NCLT should refer the matter to arbitration under Section 8 of the A&C Act rather than admit CIRP. The underlying logic is straightforward: there can be no 'default' for the purposes of Section 7 where the debt itself has not yet been established. The NCLT must first be satisfied that the debt is undisputed; if it is not, arbitration must be allowed to run its course.

Significance

[20]Innoventive Indus. Ltd. v. ICICI Bank Ltd., (2018) 1 SCC 407 (India).
[21]Swiss Ribbons Pvt. Ltd. v. Union of India, (2019) 4 SCC 17 (India).
[22]Indus Biotech Pvt. Ltd. v. Kotak India Venture Fund-I, (2021) 8 SCC 401 (India).
[23]IBC § 7.
[24]A&C Act § 8.

Indus Biotech introduces a meaningful procedural safeguard for corporate debtors: if there is a live arbitration that goes to the root of the debtwhether it exists and how much is owedCIRP should be stayed until that determination is made. The ruling respects contractual autonomy and avoids the IBC being deployed to collect debts that are still in genuine legal dispute. Its limitations are equally notable, however. The judgment does not clarify whether it applies only to financial creditor applications or extends to operational creditors as well, and the threshold of what qualifies as a 'genuine' dispute is left to NCLT assessment without clear guidance.

5.2 Vidarbha Industries Power Ltd. v. Axis Bank Ltd. (2022) 8 SCC 352

Facts

Axis Bank filed a Section 7 application against Vidarbha Industries in respect of a financial debt exceeding ₹553 crore. Vidarbha Industries sought to persuade the NCLT to decline admission on the basis that a substantial award in its favour was pending before the Maharashtra Electricity Regulatory Commission (MERC) and APTELan award that, if and when executed, would be sufficient to extinguish the alleged debt entirely.[25]

Issues

(i) Whether the NCLT has any discretion to reject a Section 7 application even when the statutory threshold conditions of debt and default are both satisfied.[26] (ii) Whether the financial position of the corporate debtor and pending proceedings that might extinguish the debt are relevant factors at the admission stage.

Decision

In a ruling that has provoked sharp disagreement, the Supreme Court held that the word 'may' in Section 7(5)(a) confers a genuine discretion on the NCLTit is not required to admit every application in which debt and default can be demonstrated. The Court held that the NCLT may take into account the overall financial health and commercial viability of the corporate debtor, as well as pending proceedings that might extinguish the debt before CIRP achieves anything.

Significance and Controversy

[25]Vidarbha Indus. Power Ltd. v. Axis Bank Ltd., (2022) 8 SCC 352 (India).
[26]IBC § 7(5)(a).

Vidarbha Industries has proven divisive. Read one way, the ruling is a sensible corrective: the IBC was not designed to destroy commercially viable businesses on the basis of a temporary liquidity problem, and admitting CIRP in those circumstances causes real harm to employees, suppliers, and shareholders. Read another way, the ruling directly undermines the IBC's central promise of a predictable, rules-based process. If NCLT can refuse admission even after debt and default are established, the Code's time-bound framework loses its force. A coordinate bench of the Supreme Court expressed reservations about the ruling in *Maganlal Soni v. Canara Bank* (2023),[27] and the conflict has been referred to a larger bench. As of 2026, the position remains unsettled. For the purposes of this paper, the most significant aspect of *Vidarbha Industries* is the way it interacts with arbitration: if NCLT has discretion to defer admission where a pending proceedingwhether arbitral or regulatorymight extinguish the debt, then arbitration is no longer relevant merely as a bar to admission (the *Indus Biotech* position) but also as a discretionary factor in the admission calculus.

VI. Critical Analysis: The Doctrinal Gaps

6.1 Absence of a Principled Boundary

The most fundamental problem with the existing law is the absence of any coherent test for determining when arbitration must yield to insolvency. What currently exists is a patchwork. The moratorium under Section 14 is reasonably clear in its operation with respect to the enforcement of arbitral awards. The pre-existing dispute doctrine under Section 9 provides reasonable guidance for operational creditors. But for financial creditors, the interaction between the two regimes remains opaque. Indus Biotech creates a pathway for debtors whose debts are disputed in arbitration, but offers no guidance on how the NCLTa tribunal not equipped to resolve complex contractual controversiesshould assess whether a dispute is 'genuine' rather than manufactured.

6.2 The Asymmetry Between Financial and Operational Creditors

The constitutional validity of the distinction between financial creditors (FCs) and operational creditors (OCs) was upheld in *Swiss Ribbons*[28] on the ground that FCs are more deeply involved

[27]Maganlal Soni v. Canara Bank, (2023) SCC OnLine SC (India) (doubting Vidarbha Industries).
[28]Swiss Ribbons Pvt. Ltd. v. Union of India, (2019) 4 SCC 17 (India).

in the debtor's financial affairs through loan covenants and monitoring arrangements, whereas OCs supply goods and services at arm's length. Whatever the merits of that distinction in other contexts, it produces an anomalous result when arbitration is in the picture. An OC whose debt is subject to an arbitration clause has a clean dispute defence under Sections 8 to 9. An FC in an identical positionwith the same arbitration agreement and the same contested debtmust instead navigate the uncertain *Indus Biotech* route. There is no obvious doctrinal justification for this asymmetry where the only relevant fact is the existence of a pending arbitration on both sides.[29]

6.3 The 'Commercial Wisdom' Problem

The Supreme Court's ruling in *Committee of Creditors of Essar Steel v. Satish Kumar Gupta* (2019)[30] established that the commercial decisions of the CoC are not amenable to judicial review. This principle makes good sense in the context of resolution plan approval, where courts should not second-guess the creditor body's economic assessments. In the arbitration context, however, it creates a troubling paradox. If a creditor holding an arbitration agreement chooses to proceed under the IBC instead, and the CoC approves a resolution plan that extinguishes the debtor's arbitration claims against third parties, the debtor loses a contractual rightthe arbitration clausethrough a non-justiciable collective decision. This displacement of contractual autonomy by commercial judgment has attracted insufficient scrutiny.

6.4 Forum Shopping and Tactical Litigation

The current uncertainty actively incentivises strategic behaviour. Financially distressed debtors may initiate or artificially prolong arbitration proceedings as a delaying mechanism, exploiting the Indus Biotech principle to hold off CIRP admission while the arbitration drags on. Creditors, conversely, may prefer the IBC over arbitration precisely because it displaces management, imposes a moratorium that prevents asset dissipation, and gives them collective leverage through the CoC. A clear and principled doctrinal framework would reduce both forms of opportunistic conduct, which impose real costs on the legal system and on the other parties involved.

VII. Comparative Perspectives

7.1 United Kingdom

[29] Ananya Kumar, Section 14 Moratorium and Its Impact on Arbitral Proceedings, 7 Indian Arb. L. Rev. 11 (2021).
[30] Comm. of Creditors of Essar Steel India Ltd. v. Satish Kumar Gupta, (2020) 8 SCC 531 (India).

The interplay between insolvency and arbitration in the United Kingdom is governed by the Insolvency Act 1986 and the Arbitration Act 1996,[31] interpreted through a body of case law that offers a more settled framework than India currently possesses. The automatic stay in UK insolvency proceedings operates in broadly the same way as the Indian moratorium, but the courts retain discretion to lift the stay for arbitration where the nature of the dispute makes private resolution more appropriate than insolvency adjudication. The leading Court of Appeal decision in *Salford Estates (No. 2) Ltd. v. Altomart Ltd.* (2014)[32] established that where an arbitration clause governs the underlying debt and that debt is not undisputed on its face, a winding-up petition should ordinarily be stayed pending the arbitral outcome. The alignment between this approach and the logic in *Indus Biotech* is clear, and the UK framework could usefully serve as a reference point for Indian courts seeking to develop a more principled and coherent approach.

7.2 Singapore

Singapore's Insolvency, Restructuring and Dissolution Act 2018 (IRDA) and Arbitration Act 2001[33] address the overlap between the two regimes through a framework that has been described as nuanced and fact-sensitive. In *AnAn Group (Singapore) Pte. Ltd. v. VTB Bank (Public Joint Stock Company)* (2020),[34] the Singapore Court of Appeal held that even where a debt appears undisputed on its face, the existence of a genuine disputeincluding one that has been referred to arbitrationis sufficient to bar a winding-up petition. Critically, the court rejected a rigid, mechanical rule in favour of a flexible analysis that takes account of the specific circumstances of each case. This approach stands in contrast to the current Indian position, which oscillates between the categorical moratorium under Section 14 and the uncertain discretion introduced by *Vidarbha Industries*. A fact-sensitive framework of the kind developed in Singapore would represent a significant improvement on the status quo.

VIII. Conclusion and Recommendations

[31]Insolvency Act 1986, c. 45 (UK); Arbitration Act 1996, c. 23 (UK).
[32]Salford Estates (No. 2) Ltd. v. Altomart Ltd., [2014] EWCA Civ 1575 (Eng.).
[33]Insolvency, Restructuring and Dissolution Act 2018 (Sing.); Arbitration Act 2001 (Sing.).
[34]AnAn Grp. (Singapore) Pte. Ltd. v. VTB Bank (Pub. Joint Stock Co.), [2020] SGCA 33 (Sing.).

The analysis in this paper bears out the central thesis: insolvency proceedings are justified in overriding arbitration where genuine collective creditor interests are at stake, but the current jurisprudence does not provide a coherent or predictable framework for determining when that condition is satisfied. Indus Biotech and Vidarbha Industries represent two separate attempts by the Supreme Court to introduce nuance into a framework that, on its face, allows the IBC to displace contractual agreements with limited scrutiny. Indus Biotech restores arbitration as the appropriate forum where the debt itself is genuinely in dispute. Vidarbha Industries recognises the NCLT's discretion to decline admission where pending proceedings may extinguish the claimed debt. Both decisions reflect a judicial instinct to protect contractual autonomy within the insolvency context, but neither provides a stable or theoretically grounded foundation for doing so.

Four recommendations follow from this analysis:

1. Legislative Amendment

Section 7 of the IBC should be amended to provide expressly that where a financial debt is the subject of a pending arbitral proceeding and the existence or amount of the debt is genuinely in issue, the NCLT shall stay CIRP admission until the arbitral determination is concluded.[35]

2. Harmonising Jurisprudence

The larger bench constituted to resolve the *Vidarbha Industries* conflict should adopt the UK *Salford Estates* framework as a guiding principle, providing a clear and fact-sensitive test that courts can apply with reasonable consistency.[36]

3. FC-OC Parity

The unjustifiable asymmetry between financial and operational creditors in the treatment of disputed debts subject to arbitration should be addressed. A suitably modified interpretation of the pre-existing dispute doctrine should be extended to Section 7 applications where the debt is subject to a pre-existing arbitration agreement and a genuine dispute.

4. Specialist Division

[35]IBC § 7 (proposed amendment).

[36]Salford Estates (No. 2) Ltd. v. Altomart Ltd., [2014] EWCA Civ 1575 (Eng.).

A specialist division within the NCLT should be established to handle complex contractual disputes that arise incidentally within CIRP proceedings, reducing the current inefficiency of shuttling such disputes between the NCLT and arbitration tribunals.[37]

Ultimately, resolving the conflict between insolvency and arbitration requires more than further case law. It requires a deliberate legislative choice about the degree to which the collective insolvency framework should displace the contractual autonomy of parties who have expressly agreed to resolve their disputes by arbitration. Until that choice is made explicitlyby Parliament rather than incrementally by the courtsthe law in this area will continue to be uncertain, inconsistent, and exploitable by parties with sufficient resources and appetite for strategic conduct.

IX. Declaration of AI Use

During the preparation of this paper, Consensus and Claude was used for Research Work. The AI output was checked, edited, and integrated by the author. No AI-generated text was submitted without human review, and the author remain fully responsible for the accuracy and integrity of the manuscript.

X. Bibliography

Statutes

Insolvency and Bankruptcy Code, 2016, No. 31, Acts of Parliament, 2016 (India).

Arbitration and Conciliation Act, 1996, No. 26, Acts of Parliament, 1996 (India), as amended by the Arbitration and Conciliation (Amendment) Acts of 2015, 2019, and 2021.

Companies Act, 2013, No. 18, Acts of Parliament, 2013 (India).

Insolvency Act 1986, c. 45 (UK).

Arbitration Act 1996, c. 23 (UK).

Insolvency, Restructuring and Dissolution Act 2018 (Sing.).

Arbitration Act 2001 (Sing.).

Cases

[37]Law Commission of India, 246th Report on Amendments to the Arbitration and Conciliation Act, 1996 (Aug. 2014).

Innoventive Indus. Ltd. v. ICICI Bank Ltd., (2018) 1 SCC 407 (India).

Mobilox Innovations Pvt. Ltd. v. Kirusa Software Pvt. Ltd., (2018) 1 SCC 353 (India).

Alchemist Asset Reconstruction Co. Ltd. v. Hotel Gaudavan Pvt. Ltd., (2018) 16 SCC 94 (India).

Swiss Ribbons Pvt. Ltd. v. Union of India, (2019) 4 SCC 17 (India).

Comm. of Creditors of Essar Steel India Ltd. v. Satish Kumar Gupta, (2020) 8 SCC 531 (India).

Vidya Drolia v. Durga Trading Corp., (2021) 2 SCC 1 (India).

Indus Biotech Pvt. Ltd. v. Kotak India Venture Fund-I, (2021) 8 SCC 401 (India).

Vidarbha Indus. Power Ltd. v. Axis Bank Ltd., (2022) 8 SCC 352 (India).

Consolidated Constr. Consortium Ltd. v. Hitro Energy Sols. Pvt. Ltd., (2023) SCC OnLine SC 1 (India).

Maganlal Soni v. Canara Bank, (2023) SCC OnLine SC (India).

Salford Estates (No. 2) Ltd. v. Altomart Ltd., [2014] EWCA Civ 1575 (Eng.).

AnAn Grp. (Singapore) Pte. Ltd. v. VTB Bank (Pub. Joint Stock Co.), [2020] SGCA 33 (Sing.).

Books and Articles

Rajesh Ramachandran, Insolvency and Arbitration: Resolving the Conflict, 3 NLSIR 45 (2022).

Abhinav Chandrachud, The Informal Constitution: Unwritten Criteria in Selecting Judges for the Supreme Court of India (Oxford Univ. Press 2014).

Ananya Kumar, Section 14 Moratorium and Its Impact on Arbitral Proceedings, 7 Indian Arb. L. Rev. 11 (2021).

Insolvency and Bankruptcy Board of India, Annual Report 2023–24 (2024).

Law Commission of India, 246th Report on Amendments to the Arbitration and Conciliation Act, 1996 (Aug. 2014).

Decriminalised but not equal:A critical analysis of LGBTQ+ Rights in India

ABSTRACT

This paper looks into the concept of LGBTQ+ identities and socio-legal issues concerning them focusing on the scenario in India. It first defines the meanings of LGBTQ+ and homosexuality stating sexual orientation as an intrinsic and natural element of human life based on biological, psychological and social factors. Then it moves on to the overall discrimination, social ostracism and marginalization faced by the LGBTQ+ persons in education, employment, healthcare and familial acceptance.

The paper focuses on how heteronormative institutions, societal norms and cultural ethos continue to contribute to the stigma, violence, denial of basic rights and how same sex love and relationships were part of many old civilizations including India, were accepted and acknowledged by scriptural texts, literature and art till before the colonizers arrival. Critically analysing the effect of Section 377 which criminalized consensual homosexual acts and later the various judicial pronouncements like Navtej Singh Johar v. Union of India and National Legal Services Authority v. Union of India that decriminalized it in India. However, it points out a still present gap between legal recognition and lived realities of LGBTQ+ people.

The paper discusses how despite legal recognition their rights to marriage, adoption etc are not given and systemic discrimination against them continues. Using a socio-legal and comparative perspective the paper looks at current legislations, policies and their implementation in different parts of the world with an aim of determining how they are deficient in some aspects and can be improved so as to create inclusive and better law for the entire spectrum of sexual minorities.

It concludes that although the pronouncements by the judiciary have led to increased rights for the LGBTQ+ persons in India, much needs to be done with respect to societal acceptance, adequate policies, continued legal reforms to attain true dignity and equality.

Keywords: LGBTQ+ Rights, Sexual Orientation, Section 377, Socio-Legal Discrimination, Equality and Dignity

INTRODUCTION

WHAT IS LGBTQ+?

The term 'LGBTQ+' is employed to refer to following sects of individual's -

1. Lesbian: A lesbian means, a woman who is sexually drawn towards a woman.
2. Gay: A gay means, a man who is sexually drawn towards the man.
3. Bisexual: A bisexual individual is an individual who is sexually drawn towards individuals of both sexes.
4. Transgender: It is a term to describe individuals whose gender identity and gender expression is not the same as that typically assigned to their birth sex.
5. Queer: Queer is a term to describe sexual and gender identities who are not heterosexual or cisgender (reverse of transgender). The word 'Queer' itself is a community because they mostly opt for using pronouns rather than being limited to, He, She etc.
6. The '+' in 'LGBTQ+' indicates that the above list is not an exhaustive one it contains other categories as well such as Pansexual, asexual, Intersex etc.

The community encompasses a wide range of identities, experiences and expressions[1]. The community includes diversity of human sexuality and gender identity. The acronym is not exhaustive, and individuals may identify with other labels or none at all.

The lives of LGBTQ+ people are deeply shaped by the societal and cultural environments in which they live. In much of the world, deeply embedded heteronormative values and strict gender roles lead to the exclusion of those who do not conform to these norms. This marginalization may take many forms, such as social exclusion, discrimination, and restricted access to necessary services. In contrast, those cultures that are inclusive and supportive of diversity are more conducive settings, in which LGBTQ+ individuals can be free to express themselves more openly and honestly. The community has long been the subject of systemic marginalization, social stigmatization, and legal discrimination across societies and through time.

[1] National Alliance on Mental Illness, *LGBTQ+*,(NAMI 2024,June 26)

In the last few decades, however, there has been a dramatic shift in cultural storylines, public policy, and scholarly focus around LGBTQ+ identity and experience.

The members of these groups typically experience elaborate societal structures that have long excluded non-heteronormative and non-cisnormative expressions. The changing discourse on LGBTQ+ rights and identity has led to an increasing number of scholarly studies that seek to comprehend the intricacies of gender and sexuality in modern society. This involves exploring how LGBTQ+ individuals negotiate social, cultural, educational, and political spaces, as well as how their identities are represented and contested.

WHAT IS HOMOSEXUALITY AND HOW DOES GENDER AND SEX AFFECT IT?

Homosexuality is a sexual orientation in which there is romantic and/or sexual attraction between people of the same gender[2].For instance, a man who is physically and emotionally drawn to other men is known as gay, whereas a woman who is drawn to other women is commonly known as lesbian. Homosexuality is one of a variety of orientations in the overall arena of human sexuality, and it is symbolized by the "L" (Lesbian) and "G" (Gay) of the LGBTQ+ acronym.

It is defined according to one's gender identity, not necessarily their biological sex. For example, an individual who identifies as a man and is attracted to other men would be homosexual, regardless of what sex they were born as. Likewise, a transgender woman who is attracted to other women can identify as a lesbian.

This differentiation is particularly important in inclusive discourse regarding sexuality, particularly for the LGBTQ+ community, where gender diversity and sexual orientation overlap in a complex manner. Identifying these variations assists in repositioning reductive, binary perceptions of sex and gender and ratifies the authenticity of diverse identities and orientations.

FACTORS CONTRIBUTING TO HOMOSEXUALITY

The emergence of homosexuality, as with all sexual orientations, is a multi-factorial process that results from the interaction of genetics, biology, childhood experiences, and social

[2] Schmidt N., *Sexual Orientation: 4 Common Questions*, (WebMD, last accessed,25,march,2026)

environment. No one factor "causes" an individual to be gay or lesbian. Rather, sexual orientation is conceived as an inherent and long-standing component of human identity—one that arises naturally in all cultures, throughout history, and among all populations.

Contemporary science is behind the idea that homosexuality is not a disorder or deviation but rather a normal variation of human sexuality[3].

Biological factors

1. Genetic Contributions

Genetic contributions to sexual orientation have most commonly been explored using twin studies. Evidence has shown that identical twins are more likely to share a homosexual orientation than fraternal twins, implicating a genetic component. A landmark 2019 genome-wide association study (GWAS) of more than 500,000 people concluded that although no single "gay gene" can be identified, several genetic variants contribute to same-sex sexual behaviour. These genetic markers also correlate with such traits as openness to experience and risk-taking, implying an indirect relationship.[4]

But genes are not enough to establish sexual orientation. Rather, genetic predisposition is combined with other biological and environmental factors.

2. Prenatal Hormonal Environment

The prenatal hormone hypothesis suggests that sexual orientation can be shaped by exposure to hormones in the womb. For example, differences in the level of androgens (like testosterone) at times of fatal development critical to the organization of the brain, especially in areas concerned with sexual behaviour, can influence sexual orientation.

A similar effect is the fraternal birth order effect, where studies have determined that biological males with multiple older brothers are statistically more likely to be gay. The current theory is

[3] Kinney RL, *Homosexuality and scientific evidence: On suspect anecdotes, antiquated data, and broad generalizations.*(Linacre Quarterly, vol.82(4):- pg. 364-90, nov,2015)
[4] Wang, Joy Y., and Jennifer A. Doudna. "*CRISPR technology: A decade of genome editing is only the beginning.*"
(*Science*, vol. 379, no. 6629, eadd8643, 2023 January,23)

that the maternal immune system mounts a growing immune response to male-specific proteins in subsequent pregnancies, which may affect sexual differentiation in the fatal brain.

3. Brain Structure and Function

Neuroscientific studies have identified variations in brain structure and activity between homosexual and heterosexual people. For instance, a study by Simon LeVay in 1991 concluded that a particular nucleus in the hypothalamus (INAH-3) was, as an average, smaller in homosexual males compared to heterosexual males and more similar in size to that observed in females[5]. Other research has examined brain symmetry, amygdala connectivity, and brain activity in response to sexual stimuli with patterns indicating sexual orientation neurobiological correlates. While intriguing, these discoveries don't create causation but instead must be approached cautiously when interpreting.

Psychological and developmental factors

1. Child Gender Nonconformity

One of the best predictors of adult sexual orientation, especially in men, is childhood gender nonconformity[6]. This means behaviours, interests, or roles that are not in line with societal expectations for one's natal sex. Children who are interested in cross-sex roles, toys, or play are more likely statistically to be gay, lesbian, or bisexual as adults. Although not causal, this correlation lends evidence to the concept that early behaviour and temperament could be indicative of innate orientation.

2. Early Social and Emotional Experiences

Certain psychological models in the past suggested that sexual orientation could be influenced by early parent-child relationships (particularly an absent father or overbearing mother). These psychoanalytic frameworks (e.g., Freud) have since been discredited to a great extent and are no longer supported by contemporary empirical evidence. More recent perspectives focus on

[5] Votinov, M., Goerlich, K.S., Puiu, A.A. *et al. Brain structure changes associated with sexual orientation.* (Europe PMC,Sci Rep:11,art. No.: 5078,2021,March 3)
[6] Folkierska-Żukowska, M., Rahman, Q. & Dragan, W.Ł. *Childhood Gender Nonconformity and Recalled Perceived Parental and Peer Acceptance Thereof, Internalized Homophobia, and Psychological Well-Being Outcomes in Heterosexual and Gay Men from Poland. (*Arch Sex Behav Europe pmc vol no.5.,pg no.2199-2122,may 1,2022)

identity formation and affect awareness, wherein individuals start identifying and putting a name to their experience of attraction. Sexual orientation usually becomes apparent in adolescence, although most LGBTQ+ individuals have felt a sense of "difference" since childhood.

3. Trauma and Abuse

Some of the myths and harmful perceptions associate homosexuality with childhood sexual trauma or abuse. There is, however, no scientific evidence whatsoever to use abuse as a causative factor in homosexuality. Just like people from all orientations could be abused, abuse does not cause sexual orientation and should never be used in pathologizing LGBTQ+ identity.

Social and environmental factors

1. Cultural and Societal Influence

Cultural values, social norms, and acceptance levels can influence individuals in terms of how they perceive and articulate their sexual orientation. In open societies, it is easier for people to admit same-sex attraction as they feel more secure, but in conservative cultures, it may be suppressed or kept secret.

But culture does not produce homosexuality—it can at best affect its expression and visibility. Research indicates that homosexuality is present in all cultures, societies, and time periods, even in the strongest anti-LGBTQ+ cultures.

2. Peer and Media Exposure

While exposure to LGBTQ+ individuals and media representation may help people recognize and affirm their own orientation, there is no evidence to suggest that media or peer influence can “cause” someone to be homosexual. Such exposure may provide a sense of belonging or validation, especially for youth exploring their identities.

3. Religion and Internal Conflict

Religious teachings and moral beliefs can have a profound effect on one's views of sexual orientation, especially in settings where homosexuality is denigrated. This tends to result in

internalized homophobia, shame, or repression. Religious struggle is not a causative factor but may be central to the timing and process of coming out or self-acceptance.

THE LGBTQ:- STRUGGLES AND CONCERNS

LGBT persons have been fighting for their rights since many years. They face multiple marginalization and have been denied access to basic fundamental rights. Each of the identities that are encompassed within the spectrum of LGBT identities have specific concerns as well as problems that cuts across these identities. Broadly speaking LGBT persons are questioning assumptions of heterosexuality and conception of gender as a binary. These assumptions lead to a situation where they are forced into marriages, unable to continue or pursue their education, denied access to healthcare and are subjected to harassment by the police. The lives of LGBT persons are vulnerable and they live in constant fear of persecution and prosecution. Instances of police brutality and extortion highlight the problems faced by LGBT persons. In this chapter we will look into some of the broad sweeping concerns faced by LGBT persons. However, it is important to understand that identities are intersectional *i.e.* LGBT persons also belong to other marginalized groups. For instance, a person maybe lesbian and from the working class or a gay muslim man or a dalit transwoman. As a result LGBT persons may face double and triple marginalization as a result of intersectional identities.

Social exclusion is among the most prevalent and most destructive problems. LGBTQ+ people may be bullied or excluded in school environments at a young age because of their sexual orientation or gender identity.[7] Many are raised in homes where they are instructed to shame or fear who they are, which can result in low self-esteem and mental illness. Rejection by their family is a huge issue, with some being disowned, pushed into conversion therapy, or forced into heterosexual relationships. This discrimination can lead to **higher levels of homelessness** among LGBTQ+ youth, especially transgender youth, who are more vulnerable due to gender nonconformity.

Non-acceptance and violence from family, pressure to marry, hostile work environment and the constant fear of facing persecution or misuse of laws against them puts LGBT persons under tremendous **mental stress**.

[7] UN Free & Equal. (n.d.). *LGBTIQ+ youth: Bullying and violence at school*. (United Nations,2019,October 5)

Legal discrimination is still a bitter truth in most of the world. More than 60 nations continue to criminalize same-sex relationships, and in many of them, the penalty is life imprisonment or even death. Transgender people also encounter legal barriers to modifying their gender markers on identification documents, which can affect everything from work to travel. Where there are no sweeping anti-discrimination laws, LGBTQ+ people can be legally terminated from employment, evicted from housing, or denied services based solely on their identity. Even in those nations with protective laws, they can be poorly enforced, and cultural norms can continue to support climates of bigotry and hostility.

Healthcare discrimination is also a severe problem. LGBTQ+ individuals tend to have difficulty in finding healthcare professionals who are aware of or care about their requirements. Transgender individuals, especially, experience difficulties in accessing gender-affirming treatments like hormone therapy or surgeries, and a majority have reported being misgendered or being denied care altogether. Mental health care is often unavailable or not LGBTQ+-friendly, even though members of the community are statistically more likely to experience anxiety, depression, post-traumatic stress disorder (PTSD), and suicidal ideation because of chronic stress and social exclusion.

In the **workplace**, LGBTQ+ individuals are sometimes forced to keep their identity under wraps to escape harassment, discrimination, or dismissal. This repression can cause mental anguish and stunt career growth[8]. There is little or no LGBTQ+ representation at leadership levels, and corporate policies frequently do not cover the particular issues of LGBTQ+ employees[9]. In most countries, there still exist no laws providing equal opportunity or workplace protection for LGBTQ+ individuals. As per a research study by Nam Cam Trau and Hartel (2004), gay men were often subjected to harassment at their workplace more often than not in the form of veiled jokes from colleagues.[10] Such jokes invariably lower their self-esteem causing everlasting psychological damage. This in turn then impacts their performance and success at work. In order to escape from this form of harassment, an individual generally chooses not to disclose his or her sexual identity forcing them to hide behind secrecy.

[8] Patterson, Eric. "*What Is Repression?" Choosing Therapy*, (2022, August 29)
[9] Medina, Caroline, and Lindsay Mahowald. *"Discrimination and Barriers to Well-Being: The State of the LGBTQI+ Community in 2022*."(*Center for American Progress*, 2023 January 12)
[10] **Nam Cam Trau and Hartel, Charmine E. J.,** "Engendering Attitudinal Divergence toward Gay Men in the Workplace", (*Journal of Management & Organization,*Vol. 10, No. 2, 2004, pp. 15–29)

Hate crimes and violence against LGBTQ+ individuals are shockingly common, and police in most places do not safeguard victims or even perpetuate violence. Trans women of colour specifically experience exceptionally high levels of violence and homicide[11]. In other places, LGBTQ+ individuals are preyed upon by police, mobs, or the state itself. This breeds an atmosphere of intimidation where people feel compelled to keep their LGBTQ+ identities hidden for fear of becoming victims.

Another issue that members of transgender community have to grapple daily is **lack of separate public toilets or gender-neutral toilets**. As there are no separate toilet facilities they are prone to sexual assault and harassment inside these public facilities. Supreme Court has recognized this and has directed the Centre and State Governments to take proper measures to provide separate public toilets and other facilities for members from the community. Further, they have been directed to operate separate HIV/ Zero-surveillance measures for Transgender persons since they are susceptible to a number of sexually transmitted diseases and other ailments related to sexual health. Since most of these rules are still just on paper and have not yet reached the implementation stage, members of the transgender community have been left voiceless and defenceless, vulnerable and exposed to diseases and maladies.

Moreover, **representation in media** is highly important in reaffirming unhealthy stereotypes or helping to bring about acceptance. Throughout history, LGBTQ+ people have been negatively stereotyped or have been virtually absent from mass media. Progress has been seen in some parts of the world, but the majority of the population still remain without access to positive, fair, and representative depictions of LGBTQ+ life. Underrepresentation leads to lack of understanding, stigma, and a lack of empathy among the general public.

In addition, **education systems** do not incorporate LGBTQ+ issues in their education, so young people are deprived of the knowledge they require to know themselves or help their peers. High level of stigmatisation, insensitivity and apathy of the teachers and peers towards them coupled with physical, sexual and emotional violence leads to most of them slipping out of the educational system. Comprehensive sex education with LGBTQ+ content is not common, and

[11] Human Rights Campaign. *An Epidemic of Violence: The Epidemic of Violence Against the Transgender and Gender Non-Conforming Community in the United States* (Human rights commission, 2023,November)

in some areas, even a mention of LGBTQ+ identities in schools is illegal. Lack of exposure in school education perpetuates the belief that being LGBTQ+ is strange or embarrassing.

Generally, the LGBTQ+ community is confronted with a complex and interlinked set of issues that affect their freedom to live, live safely, and live equally. Though some advances have been achieved in some regions of the world, particularly in legal recognition and social acceptance, there are still millions of LGBTQ+ people who continue to face everyday struggles for dignity, justice, and inclusion.[12] Ongoing advocacy, education, legal reform, and cultural transformation are necessary to tackle these enduring inequalities

RESEARCH PROBLEM

Despite significant legal advancements, including the decriminalization of same-sex relationships and evolving judicial recognition of LGBTQ+ rights, individuals belonging to the LGBTQ+ community in India continue to face entrenched systemic discrimination, social exclusion, and marginalization in everyday life. This persistent disparity between formal legal recognition and the lived experiences of LGBTQ+ individuals highlights the complex interplay between law, society, and cultural norms. This study seeks to explore these dynamics through a socio-legal and comparative lens, examining how legal reforms intersect with social attitudes and institutional practices, and drawing parallels with other jurisdictions to understand both the progress and the limitations of India's journey toward LGBTQ+ equality.

RELEVANCE OF TOPIC

This research offers a comprehensive examination of the legal rights and protections afforded to LGBTQ+ individuals in India, with particular emphasis on critically analyzing the existing legal framework, landmark judicial rulings, and public policy initiatives that shape the experiences of sexual and gender minorities. Despite notable milestones—such as the decriminalization of homosexuality in *Navtej Singh Johar v. Union of India* (2018) and the recognition of transgender rights under the *Transgender Persons (Protection of Rights) Act, 2019*—many laws remain inadequate, ambiguous, or poorly implemented, leading to continued marginalization and systemic inequities.

[12] United Nations News. "*India's LGBTQIA+ Community Notches Legal Wins but Still Faces Societal Hurdles to Acceptance, Equal Rights.*" (*UN News*, 2024,May 17)

The study investigates how legal systems conceptualize and respond to issues related to sexual orientation and gender identity (SOGI), focusing on critical areas such as anti-discrimination legislation, marriage equality, adoption rights, healthcare access, and the legal recognition of self-identified gender. It interrogates the limitations of current laws in offering substantive equality, and considers how judicial interpretations have either advanced or hindered the broader movement for LGBTQ+ justice.

The research explores jurisdictions with both progressive and restrictive legal climates—including, but not limited to, countries in South Asia, Europe, and Latin America—in order to contextualize India's legal trajectory within a global discourse. Through this lens, the study identifies legal and institutional gaps, highlights best practices, and evaluates how different legal systems address similar challenges in ensuring dignity and rights for LGBTQ+ populations.

Moreover, the research integrates a socio-legal perspective by analyzing how legal advancements translate—or fail to translate—into tangible improvements in the everyday lives of LGBTQ+ individuals. It considers how law interacts with cultural norms, religious beliefs, political resistance, and societal stigma, thereby shaping not only legal outcomes but also public attitudes and policy enforcement. By bridging legal critique with lived realities, the study contributes to broader conversations on equality, social justice, and human rights, and aims to inform more inclusive and responsive legal and policy frameworks in India and beyond.

LITERATURE REVIEW

1. Arvind Narrain, The Queer Movement and the Reinstatement of Section 377, in Arvind Narrain & Gautam Bhan (eds.), Because I Have a Voice: Queer Politics in India 34 (Yoda Press, New Delhi, 2005).
2. Danish Sheikh, Law and Sexuality: Reading the Navtej Singh Johar Judgment, (2018) 10(2) NUJS Law Review 173.
3. Ratna Kapur, Out of the Colonial Closet: Unmasking the Legacy of the Indian Sodomy Law, (2009) 8(1) Sydney Law Review 38.
4. Alok Gupta, Section 377 and the Dignity of Indian Homosexuals, (2006) 41(46) Economic and Political Weekly 4815.
5. Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity, March 2007.

6. Devdutt Pattanaik, Shikhandi and Other Tales They Don't Tell You (Penguin Books, India, 2014).
7. Law Commission of India, 172nd Report on Review of Rape Laws, Govt. of India, 2000.
8. Law Commission of India, Consultation Paper on Reform of Family Law, Govt. of India, 2017.
9. National Human Rights Commission, Study on Human Rights of Transgender as Third Gender, 2018.
10. ILGA World, State-Sponsored Homophobia Report, various years; Amnesty International, Annual Human Rights Reports, various years.

RESEARCH OBJECTIVES

1. To understand the social and cultural problems LGBTQ+ people face in today's society this includes looking at how discrimination, stigma, family rejection, and lack of acceptance affect their everyday lives and relationships with others.
2. To study the legal rights and protections LGBTQ+ communities have in different countries

   This involves comparing laws around issues like discrimination, marriage, adoption, and gender identity to see how well different legal systems protect LGBTQ+ people.
3. To look at how society's attitudes affect the mental health of LGBTQ+ individuals This means exploring how negative treatment and lack of support can lead to stress, depression, or other mental health challenges.
4. To examine the influence of education and media on how people see LGBTQ+ identities

   this includes looking at what schools teach, how LGBTQ+ people are shown in the media, and whether these messages are positive or negative.
5. To find weaknesses in current policies and suggest ways to make society more equal and inclusive. This includes pointing out what's missing in government programs or services and giving ideas for how things can be improved to support LGBTQ+ communities better.

RESEARCH METHODOLOGY

In the processing of this work the doctrinal method of research was adopted. The work does not involve any field study as lot of relevant material is available in the printed form. For the purpose of this study extensive survey of textual materials, articles, newspapers and write-ups formed the basis of preliminary study which was then expanded to cover a deeper survey of the literature. Ancient texts, Constituent Assembly Debates, Parliamentary Debates, Legislative Assembly Debates, relevant statutes and landmark decisions have been scanned and analysed in a systematic manner. The present work is thus based on the above referred material and is an original contribution to the problem studied.

HISTORY OF HOMOSEXUALITY IN INDIA

Speaking from literary evidence

Homosexuality is basically a concept which is not new in India rather it has been prevalent in India from a very long term. The term "homosexuality" refers to sexual desires or attraction towards a person of a same gender which means that a person is attracted towards same gender to which he/she belongs.

There were more than fifty words in Sanskrit, Prakrit and Tamil for non-heterosexual genders and sexualities in ancient India, says acclaimed mythologist, Dr. Devdutta Pattanaik - napunsaka, kliba, kinnara, pedi, pandaka. These have been noted in Veda, Itihasa, Purana, Kama-shastra, Natya-shastra, Ayurveda, and in Jain Agamas and Buddhist Pitakas.[13]

There are various literary sources which clearly prove that the concept of homosexuality is not new to India but is a concept which is prevalent since ancient times.

Here are some instances highlighting the existence of homosexuality and acceptance of homoeroticism in India.

[13]Pattanaik, Devdutt. "*The LGBTQ Movement in India*." (*Seminar*, Issue 713, January 2019)

Hindu scriptures

1. Valmiki's Ramayana states that when Lord Hanuman returned from Lanka after visiting Goddess Sita, he saw rakshasa women kissing and embracing women.[14]
2. Ved Vyas' epic Mahabharat refers to a very significant character who was "neither a man nor a woman"- Shikhandi, one of the most renowned personalities related to LGBTQ+ community. Shikhandi was born with female genitalia but brought up as a son and trained in warfare and statecraft by their father King Dhrupad. Shikhandi's presence was crucial in Pandava's triumph in the great war of Mahabharat.[15]
3. Matsya Puran also has a very fascinating story wherein the lord vishnu transformed into a beautiful women 'Mohini'. Later on when lord shiva saw. Mohini he fell in love with her and it led to birth of Lord Ayyappa.
4. Kamasutra says that lesbians were known as "Swarinis", who frequently married and brought up children in common. In addition to this, Kamasutra has spoken of trittiya prakriti, or the third nature of individuals who can neither be characterized as men nor women[16]. Pali texts like Vinaya Pitaka talk about 'pandakas' who could not be housed either in the men's or the women's side of Buddhist monasteries.
5. The Rig Veda mentions the story of Varun and Mitra, always quoted as Mitra-Varun. They are a homosexual pair thought to be the embodiment of the two halves of the moon.
6. The famous Indian epic, Ramayana, is a rich source of evidence about various factions, especially the one called hijras, which are portrayed as a composite male-male & female-female gender in one. The story goes that when Rama was exiled with his wife Sita and brother Lakshmana due to his father's wishes, he was accompanied to the river area just outside the forest by his followers. When he reached the starting point of the river, he addressed the following to his subjects 'Men and women, it is time you all turned back and continued to carry out your obligations' . Justice was however returned to Rama after he had expelled Ravana and returned to Ayodhya after fourteen years of hardship[17]. When she found that people stood at the very same place they requested him to explain why that had done so. They told Rama that they were 'neither men nor women' and hence did not see the need to abide by his prohibition. For such an act of

[14] Paul, Sumit. "*Time to Destigmatise Homosexuality*." *(Deccan Herald, 2022,October 9)*
[15] Pattanaik, Devdutt. "*On Krishna's Chariot Stands Shikhandi*." *(Devdutt Pattanaik, 2009,July 12)*
[16] Yadav, Aditi. "*A Brief History of LGBTQ+ in India." (The CBS Post, 2025,March 17)*
[17] Turaga, RP. *"The Role Models from Ramayana: Bharata."*(*Kasarabada.org,*

sheer patriotism, they were promised the grace of Rama. Third gender people are generally referred to in literature as a tritiya prakriti, literally meaning 'not man nor woman' which is an excellent title for hijras. This conception also developed in the literatures of Jains where they explained about three kinds of genders and three types of sexual transgressions.

Muslim scriptures

1. The founder of the mughal emperor, Babur was not himself devoid of attraction towards same sex. In Baburnama he recites his attraction towards a boy named Baburi in Kabul[18]. He mentioned him in his memoir and wrote a poem on it.
2. Another tale involves story of Sarmad Kashni who was American merchant who later became a sufi saint. He fell in love with Hindu boy named Abhai Chand while travelling to India for trade.
3. Another Sufi Saint Shah Hussain asserts his affection for a Hindu boy named Madho Lal in his writings. Shah Hussain and Madho Lal were eventually buried side by side in Lahore. Their ashes in various works represent divine love that went beyond their lifetimes[19].
4. Johan Stavorinus, a Dutch traveller, has described male homosexuality among Mughals in Bengal in his Voyages to the East Indies. In his book, he has mentioned: "The sin of Sodom is not only universal in practice among them, but extends to a bestial communication with brutes, and in particular, sheep. Women even abandon themselves to the commission of unnatural crimes[20]."

LGBTQ+ COMMUNITY LEGAL STRUGGLE OVER TIME AND FIGHT AGAINST SECTION 377 IPC

Homosexuality is sexual or emotional desire for same-sex individual. An old diplomatic document – Arthasastra – does not approve homosexual sex. It was regarded as a terrible minor crime. In Manusmriti lesbianism was a serious crime and with punishments. Muslim Shariat law also considers homosexualism as a serious crime. History states that it was the 18th century

[18] Maldahiyar, Aabhas. "*Babur Fell Hopelessly in Love with a Boy Called Baburi. Roamed Love-Sick Like a Madman*." *(ThePrint,* 2024 February 23)
[19] Sharma, Saurabh. "*Book Review | The Sufi's Nightingale*." (*The Hindu*,2024,March)
[20] Yadav, Aditi. "*A Brief History of LGBTQ+ in India*." (*The CBS Post,* 2025,March 17)

British regime that criminalized and banned homosexual relationships in India under section 377 of IPC stating that it's against the order of nature.

The section reads that:

Offenses against nature: "***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 either with or without hard labour for a term extending to ten years, and shall also be liable to fine.***" [21]

The tyrannical law not only aimed at homosexuals, but also at all other types of non-traditional sexual intercourse, including heterosexual relationships. This resulted in a rapid fall in the tolerance of this group. It was a crime to have "carnal intercourse" voluntarily against the order of nature. This section criminalized all types of non-procreative sexual intercourses

Effects of criminalization

The criminalisation of homosexuality triggers discrimination. Access to health care is limited to LGBTQ individuals. It is an obstacle to getting access to HIV prevention, testing, and treatment. Public health evidence reveals their non-acceptance in society makes them drug addicts, indulge in violence, become isolated, and suffer mental illness.

The following are multiple arguments brought in opposition to IPC Section 377. They explain that the section violates human dignity. The Indian constitution compels us to treat all with equality and hence it is every individual's including the LGBT right to put forth their thoughts, desires, and preferences. The section ignited the problem of non-acceptance of the LGBT individuals which existed since ages. It serves as an obstruction to the upliftment of the community and economic development of the nation

Criminalization goes against the fundamental basic rights of the LGBT individuals as a citizen who is holding the Indian constitution.

1. Article 14 grants the right to equality. It reads that nobody shall be denied equality before the law and equal protection of law.[22]

[21] Indian Penal Code, 1860, S377 (India)
[22] Constitution of India, 1950, Art. 14 (India)

2. Article 15(1) and 20 forbids discrimination of an individual on any grounds such as sex, religion, race, caste, or place of birth. It is the discrimination based on sex that the LGBT section does not have educational and employment facilities and is deprived of equal pay for equal work. The Indian constitution says that even though the word 'sex' means male and female, it is wide enough for sexual orientations to encompass in it.[23]
3. Article 19 grants such freedom of expression and speech to all the citizens.[24]
4. Article 21 guarantees the right to life and private liberty which includes the right to privacy. The Indian Constitution does not specifically include the right to privacy as a fundamental right, but it has been stressed from time to time by the Supreme Court in certain cases so it is regarded as being in the vicinity of fundamental rights. Therefore, it must not be breached by the state's right to privacy.[25]

Section 377 appears to shorten these rights of the LGBT section and hence was indispensable to decriminalize homosexuality so that the LGBT individuals can live a life with dignity and respect.

The Law Commission of India in its 172nd report in 2000 suggested the repeal of IPC Section 377 stating that it directly affects homosexual's life and is injurious to the public. It further said that if homophile relations are prohibited then it can create illegal means of same sex acts in private.[26]

The Naz foundation V Government of NCT Delhi, commonly referred to as the Naz judgment of 2009[27] by Delhi high court, was the first instance where a court in India held section 377 as unconstitutional. This case was instituted as a PIL by a Delhi based NGO. The finding was on the grounds that the section is violative of Articles 14, 15, and 16 of the Indian constitution. This ruling was appealed at the Supreme Court in the case of *Suresh Kumar Kaushal V Union of India*[28].The High court ruling was set aside by the apex court and homosexuality was recriminalized again holding that the IPC Section 377 was not contravening any articles stated

[23] Constitution of India, 1950, Art. 15(1) & Art. 20 (India)
[24] Constitution of India, 1950, Art. 19 (India
[25] Constitution of India, 1950, Art. 21 (India)
[26] Dhananjay Mahapatra, *'Law Commission had recommended Section 377's deletion 13 yrs ago'*, (*The Times of India*, 13 December 2013)
[27] Writ Petition (C) No. 7455 of 2001, Del HC, 2 July 2009, 160 (2009) DLT 277 (India)
[28] (2013) 1 SCC 1

in the previous high court ruling. The court also ruled that the parliament is obligated to repeal the section or to modify it.

The landmark judgment that legalized homosexuality in India, *Navtej Singh Johar V Union of India was delivered in 2018*[29]. The ruling was the culmination of numerous PILs by the different LGBTQ communities and was largely based on an individual's independent right to select their own partner, irrespective of sex.

Judicial Approach Towards LGBTQ+ Rights in India

NAVTEJ SINGH JOHAR V. UNION OF INDIA (2018)

Background: After the overruling of the Delhi High Court judgement in 2013, homosexuals were again considered as criminals. As the LGBT rights protests intensified in India, particularly with the involvement of some notable names, including hotelier Keshav Suri, Ritu Dalmia, dancer Navtej Singh Johar, and many others, they agreed to file the petition filed before the Supreme Court to challenge the constitutional validity of section 377 of IPC.[30]

Arguments: The Supreme Court agreed that it will refer the issue to a larger bench and heard various petitions in this regard. The Government had said that it will not intervene and leave the matter to the wisdom of the court. Arguments were made that section 377 infringed the constitutional rights of the petitioners to privacy, freedom of expression, equality, human dignity and protection from discrimination.

Judgement: The Court pronounced its judgement on ***6th September 2018*** and it can be summarised as follows:

1. The Court found unanimously that Section 377 is unconstitutional as it violates the fundamental rights of autonomy, identity and intimacy, and decriminalised homosexuality by reading down Section 377 not to include consensual sex between consenting adults of the same sex/gender.
2. The Court explained its position by stating that Section 377 is vague and does not create intelligible and differentiation between what is "natural" and what is "unnatural". The

[29]WP(Crl) No. 76/2016, Supreme Court of India, decided on 6 September 2018, reported in (2018) 10 SCC 1.
[30] **Navtej Singh Johar v. Union of India**, (2018) 10 SCC 1 (India)

Court's position here was that it also restricts the freedom to express one's sexual identity, which is the right to freedom of expression protected under Article 19 of the Indian Constitution.

3. The Court went on to say that sexual orientation is a fundamental part of self-identity and denying it is denying their right to life, and that their demographic insignificance could not be a valid rationale for denying them this right.
4. The Court also very heavily and openly rejected the Koushal judgement and described it as irrational, arbitrary and clearly unconstitutional. The Court stated that discrimination based on sexual orientation is also unconstitutional in the sense that it operates as a natural occurrence reliant upon biological and scientific fact.
5. The Supreme Court also ordered the government to educate the public about LGBT rights and to eliminate the stigma against LGBT people. The judges also elaborated on the mental health issues, dignity, privacy, right for self-determination and transgenders.

NATIONAL LEGAL SERVICES AUTHORITY V. UNION OF INDIA

Background: The transgender community in India has been the most victimized group of the entire LGBT+ community in respect to the reverse social, educational and economic degradation. These individuals have never been included as part of society, they have always faced exploitation, discrimination, humiliation and violence at the hands of either society or authorities in power. Due to being constantly rejected and not having access to basic social resources, these individuals often turn to begging or prostitution making them more exposed to discrimination, STDs and act as prey to human traffickers. But in 2014 the Judgement of the Supreme Court changed all this and gave hope and euphoria to the transgender persons in that for the first time in history this group of individuals was recognized as a third gender.

Issue: In National Legal Services Authority v Union of India, the Supreme Court was tasked with the question of *whether there is a need to recognize hijra transgender individuals as a third gender to enable social justice in respect of the areas of public health, public education, employment, reservations and other welfare measures or schemes*.[31]

[31] **Human Rights Law Centre**, "*Indian Supreme Court Recognises Third Gender"*, (15 April 2014)

Judgement: In the Hon'ble Supreme Court of India's historic ruling it created the category, or status, of "third gender" for hijras or transgender persons[32]. Previously transgender persons had to identify themselves as either male or female. Now following this ruling they can identify themselves as transgender. But beyond this, what made this judgement special was that it laid out a framework to guarantee the transgender community a whole range of basic human rights which in summary was:

1. The court took the stance that the non-recognition of their identities was a violation o of Article 14,15,16 and 21 of the Constitution of India.
2. The Supreme court further ordered the Government of India to treat the members of "Third Gender" as socially and economically disadvantaged class.
3. It also put the responsibility on the government to make reasonable policy decisions for the transgender community in light of Articles 15(2) and 16(4) in order to assure equality of opportunity in education and employment, the third gender would be included in other backward classes (OBC) to give them the benefits of reservation in respect to government employment and educational institutions
4. The court also took into account the idea that a difference between one's gender at birth and the gender one identifies with is not necessarily disordered. Instead of a "treatment of the disorder" the focus is on "treating the distress of incongruity."

In simple words the court recognized the distinction between gender and biological things—biological and anatomical characteristics include one cannot ascribe to a genital, secondary sexual characteristics, the chromosomes you inherit from your parents etc. Gender attributes include everything about a person's self-image i.e. one's deep emotional or psychological sense of sexual identity and character which is not limited to the male-female binary but rather exists on a wide spectrum.

K.S. PUTTASWAMY V UNION OF INDIA

Background: In the Suresh Kumar Koushal V. Naz Foundation judgment when the Naz Foundation contended before the Supreme Court that Section 377 of IPC violated the right to privacy, the Supreme Court went to great length explaining the constitutional jurisprudence and evolution of the right to privacy. But having established the extreme importance of this

[32] **Associated Press,** "*India Recognises Transgender People as Third Gender*," (*The Guardian,* April 15, 2014)

right, the Supreme Court discounted the argument based on the right to privacy in relation to 377. The Supreme Court noted that while there has been some misuse of Section 377 against the LGBT+ community compromising their right to privacy and integrity for the purposes of blackmail, harassment or torture and in general, this is not the object of the section itself and Section 377 neither approves or authorises such treatment or laws and thus seems to not be the reason to show that such a law is way beyond the vires of constitution.

Judgment: However in K. Puttaswamy V. Union of India (popularly known as Aadhar judgment). Justice Chandrachud similarly had an opinion which included a sub-title "discordant notes". A section where there were two Supreme court judgments:-

The first was the well-known case of Additional District Magistrate, Jabalpur v. S.S. Shukla[33] which upheld the denial of fundamental rights, while the second part concerned the Koushal case rejecting the rhetoric of "so-called" rights of the LGBIQ+ community.

Justice Chandrachud noted that sexual orientation is also covered within the expansive right to privacy.[34] Also, notes of the Puttaswamy decision criticized the minimal hypothesis principle applied in the Koushal judgement, and stated that because the LGBT+ population is minuscule, this cannot be a reason to deny basic fundamental rights, and that even if there were only a few, and not a large number of people subjected to hostile treatment, the thrust of a fundamental right cannot be held tolerable.

The Supreme Court's constitutional principles in ruling that there is a right to privacy as an intrinsic fundamental right under Article 21 of the Indian Constitution, created anticipation among the queer community that the Court would eventually strike down Section 377.[35]

CONCLUSION AND RECCOMENDATIONS

CONCLUSION

This research, *"Decriminalised but not equal:A critical analysis of LGBTQ+ Rights in India,"* has undertaken a comprehensive and multidisciplinary exploration of the legal, socio-cultural,

[33] (1976) 2 SCC 521 (India)
[34] **Thyagarajan Narendran**, "*Privacy: A Recurring Theme in Justice Chandrachud's Landmark Judgments"*,(Supreme Court Observer, October 22, 2022)
[35] **Julie McCarthy**, "*Indian Supreme Court Declares Privacy a Fundamental Right"*, (NPR, August 24, 2017)

historical, and international dimensions of LGBTQ+ identity, with a primary focus on the Indian context. Through this study, it becomes evident that the struggle for LGBTQ+ rights is not merely a legal battle but a deeply embedded social and cultural challenge, shaped by both historical narratives and contemporary governance structures.

The trajectory of LGBTQ+ rights in India reveals a long arc of marginalization—beginning with the erasure and criminalization of non-normative sexualities during the colonial era, followed by decades of social invisibility and legal suppression. Post-independence, resistance and advocacy grew gradually, culminating in landmark judicial interventions such as the *Navtej Singh Johar v. Union of India* judgment, which decriminalized consensual same-sex relations. More recently, laws like the Transgender Persons (Protection of Rights) Act, 2019, have attempted to institutionalize rights for transgender individuals. However, these developments, while symbolically powerful, have not translated into comprehensive, lived equality.

The research underscores a key paradox: ancient Indian texts and cultural traditions often embraced gender fluidity and sexual diversity, yet modern Indian society—shaped heavily by colonial-era legal and moral frameworks—has come to reject these identities as alien or immoral. This dissonance points to the entrenched nature of societal stigma, which continues to marginalize LGBTQ+ individuals despite growing legal recognition.

When placed in a global context, India's progress appears uneven. Countries like the United States have advanced beyond decriminalization to affirm same-sex marriage, adoption rights, and protection from discrimination. In contrast, India’s journey remains largely judicially driven, with minimal proactive legislation or executive policy leadership. This over-reliance on the judiciary, while valuable, cannot substitute for the broad systemic reform that true equality demands.

Therefore, this study argues for a paradigm shift—from isolated legal reforms to a cohesive, cross-sectoral strategy involving legislative clarity, inclusive policy design, widespread sensitization, and genuine cultural change. True citizenship for LGBTQ+ individuals cannot be achieved through symbolic measures alone; it requires a fundamental rethinking of societal values and institutional practices. Without such a transformation, LGBTQ+ people will remain caught in an incomplete transition—decriminalized by law, yet not fully embraced by society

RECOMMENDATIONS

To fill the legal and social gaps and ensure inclusive integration of LGBTQ+ members in Indian society, the following specific recommendations are suggested:

General Principles for the Treatment of LGBTIQA+ Individuals

1) All LGBTIQA+ individuals must be treated with dignity and respect by state authorities, including police, judges, and prison staff.

2) No verbal, emotional, physical, or sexual abuse should be directed toward LGBTIQA+ persons.

3) Authorities must not:

    a) Ask intrusive or offensive questions about identity or sexuality.

    b) Demand proof of gender or sexual orientation.

    c) Make dehumanising remarks or gestures.

4) Discrimination is prohibited; authorities have a duty to create a safe and inclusive environment.

5) A neutral stance is not enough—positive measures (e.g., in-camera hearings, identity protection) may be required to ensure fair access to justice.

6) Complaints involving LGBTIQA+ persons must be handled sensitively, without moral judgment or unnecessary inquiry into personal relationships.

7) Police must avoid supporting false complaints from families against consenting adult LGBTIQA+ individuals.

8) FIRs should not be filed if adults have left home voluntarily; authorities must respect their autonomy.

9) Officials must not let personal beliefs (e.g., homophobia or transphobia) influence their actions.

10) Judicial processes involving LGBTIQA+ persons must be timely, sensitive, and just.

11) Courts and authorities should acknowledge and address structural barriers faced by the community.

12) Police stations, courtrooms, and prisons must provide inclusive and safe infrastructure.

13) Do not assume gender or sexual identity—ask individuals how they wish to be identified.

14) Criminal law should not be misused to target LGBTIQA+ individuals.

Action-Based Institutional Reforms for the Judiciary

1. **Supportive work environment -** Judicial institutions must strive to create a workplace culture that is inclusive and supportive of LGBTIQA+ employees. This includes ensuring non-discrimination, addressing bias in recruitment, and fostering a culture of respect and equality.

2. **Use of correct pronouns -** Judges, lawyers, and court staff must respect and use individuals' self-identified pronouns. Instead of assuming gender based on appearance or name, authorities should ask individuals how they prefer to be addressed, affirming their identity and dignity.

3. **Inclusion of judicial training -** All levels of judicial training—especially in national and state judicial academies—should include mandatory modules on LGBTIQA+ rights. These modules must address legal challenges, lived experiences, and strategies for inclusive adjudication.

4. **Diversity in judicial employment-** Employment of LGBTIQA+ individuals within the judicial system—across clerical, administrative, and judicial roles—is essential. Increased representation can help normalize queer presence in legal spaces and build trust among the community in accessing justice.

5. **Systematic data collection and review -**Judicial bodies should conduct data collection exercises involving judges, clerks, and staff to identify challenges in adjudicating LGBTIQA+ cases. This can guide the development of informed judicial guidelines and identify areas needing reform.

Development of judicial protocols

Based on common trends (e.g., denial of employment, identity recognition, family violence against queer couples), judicial academies should develop standardized protocols to guide judges on handling such cases with empathy and legal clarity.

Mandatory awareness workshop for staff

Beyond judges, all court staff must regularly attend sensitization workshops that focus on gender and sexual diversity. These workshops should highlight the lived experiences and unique challenges faced by individuals across the LGBTIQA+ spectrum.

Disciplinary Action against Misconduct

1. Courts should actively examine whether **disciplinary or penal action** is warranted in cases where police or state authorities are found to have **harassed or mistreated LGBTIQA+ individuals.**

2. This includes not only direct harassment of queer persons but **also targeting of activists, NGO workers, or allies** who support or assist them in exercising their legal rights.

3. Such accountability measures are essential to deter state overreach, reinforce legal protections, and signal that **discrimination or abuse based on gender or sexual identity will not be tolerated.**

4. Courts may recommend internal departmental inquiries, suspension, or criminal proceedings depending on the severity of the misconduct.

Sensitisation Programmes for Authorities

Courts should mandate regular **sensitisation and training programmes** for police, judicial officers, and court staff focused on LGBTIQA+ rights, identities, and legal protections.

These programmes must include:

a) Education on the **constitutional and legal rights** of LGBTIQA+ persons.

b) Training to eliminate **bias, stereotyping, and prejudiced behaviour** in handling complaints or providing services.

c) Sessions led by **community members, experts, and human rights organisations** to provide real-life perspectives and foster empathy.

Such programmes should be **institutionalised** within police academies and judicial training institutions to ensure **long-term attitudinal change**.

Periodic assessments should be conducted to measure the effectiveness of these programmes and update content based on evolving legal and social frameworks.

Executive & Policy-Level Recommendations for LGBTQ+ Inclusion

Inclusive Access to Government Welfare Schemes

Ensure explicit inclusion of LGBTQ+ individuals in flagship government programs such as Ayushman Bharat, Pradhan Mantri Awas Yojana (PMAY), Skill India, and MGNREGA. This should be accompanied by targeted outreach efforts and sensitization of implementation staff to eliminate discrimination and improve accessibility.

Formulation of a National Policy on LGBTQ+ Rights

Develop and implement a comprehensive National LGBTQ+ Equality Policy that aligns central and state efforts under a unified framework—modeled on best practices like Kerala's Transgender Policy. This should cover anti-discrimination measures, legal recognition, access to services, and socio-economic inclusion.

Adoption of Gender-Neutral Documentation Standards

Revise all government-issued forms and identity documentation to be gender-neutral, offering non-binary and self-identification options beyond "male" and "female." Procedures for changing gender markers should be simplified, non-intrusive, and based on self-declaration.

Inclusion in Census and National Surveys

Integrate LGBTQ+ identities into the decennial Census, National Sample Surveys (NSSO), and other official data collection mechanisms. Ensure disaggregated data by gender identity and sexual orientation to inform evidence-based policymaking and identify inclusion gaps.

Education and Sensitization: Policy Recommendations

Curriculum Reform

Integrate LGBTQ+ inclusive content into school and university syllabi to build understanding from an early age. Topics such as gender identity, sexual orientation, and human rights should be mandatory in subjects like civic education, social science, and health. Representation of LGBTQ+ individuals in literature and history should be normalized to counter stigma.

Mandatory Sensitization for Public-Facing Professionals

Introduce compulsory sensitivity training for teachers, police officers, healthcare workers, and government officials. Training should focus on respectful engagement, understanding LGBTQ+ identities, and upholding anti-discrimination laws. This will improve public service delivery and reduce institutional bias.

Anti-Bullying Policies in Schools

Establish and enforce anti-bullying policies in all schools, with specific protections for LGBTQ+ students. Ensure clear reporting mechanisms, consequences for bullying behavior, and support systems (e.g., counselors, safe spaces) for affected students. This will promote a safer, more inclusive learning environment.

International Commitments

1. Yogyakarta Principles Alignment
   India should clearly integrate the Yogyakarta Principles on the implementation of international human rights law with South Asia and sexual orientation and gender identity in its legislative and policy.
2. Active Participation in Global LGBTQ+ Forums

Engage actively in global human rights processes (such as the UN Independent Expert on SOGI) and regional cooperation on LGBTQ+ issues across South Asia.

In the end, while legal milestones—such as the reading down of Section 377—have laid an essential foundation, the journey toward full LGBTQ+ equality in India cannot rest solely on judicial achievements. True progress demands more than legal reform; it requires tangible inclusion, systemic overhaul, and a transformation in societal attitudes. This dissertation affirms that the rainbow does not end at decriminalization—it begins there. The path forward must be paved with sustained collective will, cross-sector collaboration, and the embracing of diverse identities. Only then can we envision and build a society that is not just lawful, but also truly
inclusive, equitable, and just.

BIBLIOGRAPHY

STATUTES AND LEGISLATIONS

1. The Constitution Of India
2. The Human Immunodeficiency Virus and Acquired Immune Deficiency Syndrome (Prevention and Control) Act, 2017
3. The Indian Penal Code,1860
4. The Mental Healthcare Act, 2017
5. Occupational Safety, Health and Working Conditions Code, 2020
6. The Transgender Rights Of Protection Act,2019
7. The Protection Of Women From Domestic Violence Act, 2005
8. The Sexual Harassment Of Women At Workplace (Prevention, Prohibition And Redressal) Act, 2013
9. The United Nations Convention Against Torture And Other Cruel Inhuman And Degrading Treatment Or Punishment, 2008
10. The Universal Declaration Of Human Rights, 1948
11. Yogyakarta Principles On The Application Of International Human Rights Law In Relation To Sexual Orientation And Gender Identity, 2006

BOOKS

1. JOHN RAWLS, JUSTICE AS FAIRNESS, The Philosophical Review (1958)
2. JUDIT BUTLER, GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY, 22 (Routledge 1999).
3. AMARTYA SEN, THE IDEA OF JUSTICE, MASS: BELKNAP PRESS OF HARVARD University Press, Cambridge 2009
4. GAUTAM BHAN, BECAUSE I HAVE A VOICE: QUEER POLITICS IN INDIA 468(2003)

REPORTS

1**.** Law Commission of India, 172nd Report on Review of Rape Laws, (2000).

2. Law Commission of India, Consultation Paper on Reform of Family Law, (2017).

3. National Human Rights Commission (NHRC), Human Rights of Transgender as Third Gender in India, (2018).

4. The Yogyakarta Principles: Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity, (2006)

5. United Nations General Assembly, Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 (1948)

6. Amnesty International, Annual Reports and LGBTQ+ Human Rights Campaigns,

7. ILGA World, State-Sponsored Homophobia Report, (latest ed.)

JOURNALS AND ARTICLES

1. Arvind Narrain, *The Queer Movement and the Reinstatement of Section 377*, 2 NUJS L. Rev. 2 (2009).
2. Danish Sheikh, *Law and Sexuality: Reading the Supreme Court's 377 Decision*, 9(2) NUJS L. Rev. 185 (2016).

3. Ratna Kapur, *Out of the Colonial Closet, but Still Thinking 'Inside the Box': Regulating 'Perversion' and the Role of Tolerance in Decriminalising Sodomy in India*, 2(2) NUJS L. Rev. 381 (2009).
4. Alok Gupta, *Section 377 and the Dignity of Indian Homosexuals*, 41(46) Economic and Political Weekly 4815 (2006).
5. Shruti Vidyasagar, *Beyond the Binary: Understanding Gender in Legal Discourse*, 4(1) Indian J. Const. L. 34 (2010).
6. Oishik Sircar, *Unframing the "Norm": Nation, Rights, and Sexuality in Contemporary India,* 3(2) Jindal Global L. Rev. 75 (2011).
7. Vikramaditya S. Khanna and Anurag K. Agarwal, *The Law and Economics of Marriage in India*, 5(1) Indian J. L. & Econ. 20 (2014).
8. Devdutt Pattanaik, *Queering Indian Mythology*, 6(1) Indian J. Gender Stud. 1 (2011).

WEBSITES

1. www.scconline.com
2. www.manupatra.com
3. www.feministlawarchieves.pldindia.org
4. www.economictimes.indiatimes.com
5. https://digiscr.sci.gov.in/
6. https://yogyakartaprinciples.org](https://yogyakartaprinciples.org)
7. https://www.un.org/en/about-us/universal-declaration-of-human-rights

Population Pressures: Urgency for Comprehensive Population Control Laws

Abstract

India with highly rich in its culture, economic potential faces the pressing challenge of population pressure by surpassing China to become the most populated country in the world. The over populated nation exacerbates various socio-economic issues, including poverty, unemployment, inadequate healthcare, and environmental degradation apart from these there is also rapid growth in crime rate. Increasing population leads to highly drainage of resources. Despite efforts to promote family planning and contraception, the population continues to surge, necessitating more stringent measures. This issue needs urgency to implement laws in India to have control on it. Before implementing the laws related to population control there should be proper measure and examine population control tactics and experiences from other nations to find lessons learned, best practices, and possible policy ramifications for India. Examine case studies of nations that have effectively implemented population stabilisation initiatives. Examine tactics for gaining support for policy initiatives and educating the public on the significance of population control. Take part in advocacy campaigns to encourage the adoption of evidence-based policy decisions and to inspire stakeholders to work together to achieve the goals of population stabilisation.

Key Words: India, Population, Control, Laws

Introduction

Population generally means number of people leaving in particular geographical area. Population is one of the key elements which for any sovereign nation. But high number of populations is also major problematic for any nation. India being rich in its culture and diversity faces an imminent challenge: population explosion. India stands at a pivotal juncture in its demographic trajectory, grappling with the paradox of a burgeoning population amid aspirations for economic prosperity and social development.[1] With current population more 1.3 billion and projecting further increment, the pressure on resources, economic development is increasing side by side. Access to a much younger population balances out by creating a possibility of economic growth, developing new ideas. A large young population will drain further on all resources, current and future, but drains even more on existing infrastructure and social service systems which are already stressed and create major roadblocks to long-term, sustainable development. Because of this situation, Government must now put population control as a top priority issue. Government has made multiple attempts at addressing the excessive growth in population with many various types of policy and programs, yet due to multiple factors, including socio-cultural barriers, disparities in accessing reproductive health services and the continued existence of gender inequalities; India has continued to find it difficult to reduce its total number of births, as a result of an excessive number of births, high and increasing birth rates.[2] As result, the need for comprehensive population control laws has become important to curb this issue, with proponents arguing that targeted legislative measures are indispensable in addressing the multifaceted dimension of India's population pressures.[3]

By critical analysing present existing policies, measures, initiatives and their efficiency to curb the population growth, the intervention of legislative body is proposed actionable strategies to provide the urgency of enacting comprehensive population control law for better humanitarian growth. In doing so, it aims to catalyse informed discourse, policy reform, and concerted action towards fostering a sustainable demographic trajectory for India in the 21st century.

Literature Review

Population control has vital subject in academic discourse and policy debates, particularly in the context of countries encountering rapid demographic expansion. In context of Indian scholars, they have mainly focused on how demographic expansion effected the social-economic growth, resources, environment, public health and sustainable development as well as status of effectiveness of current measures taken in population control.

There are various studies which show the relationship between growth in population and various social economic indicators. Gupta and Sahu (2018) highlight how high levels of population density

[1]U.N. Dep't of Econ. & Soc. Affairs, *World Population Prospects 2019: Highlights* (United Nations 2019).
[2]Indian Law Institute, Population Control: Socio-Legal Perspectives, 22 *J. Indian L.* 45 (2023).
[3]Id.

leads to poverty, educational attainment, and availability of essential services in India adversely. Jain et al. (2019) further supports the above finding by presenting how population pressures will negatively affect urban infrastructure and housing due to rapid populations in metropolitan regions.

Scholars who have focused on various socio-economic issues related to unchecked population growth have also mentioned the adverse effects an increase in urban population has on sustainable development, and, therefore, the environment. Singh and Sharma (2020) highlight that population pressure poses issues on natural resources, deforestation and the loss of biodiversity in India. Gupta and Verma (2017) consider how population control policies can help mitigate degradation of the environment and provide positive sustainable development..[4]

The concern of population growth is not limited to academic circle but also extend of governmental policy realms as there are lot of policy and measures introduced by governmental authorities. National Population Policy is initiative which is introduced by government and it is subject to cross-check and evaluation by researchers and policymakers alike. Bongaarts and Sinding (2015) provide a comprehensive assessment of the NPP's objectives, strategies, and outcomes, highlighting both its strengths and limitations.[5] Similarly, Dasgupta (2016) analyses the political dynamics and implementation challenges surrounding population control policies in India.[6]

Despite of various research on population pressured and control policies and measures there is remains in field of legislative intervention to address India's demographic challenges. Even though existing policy made wide change in concern of population growth but somewhere it lacks in addressing concern on socio-cultural barriers and disparities in access to healthcare service. Intervention of legislative in demographic challenge needs wide range of study and evaluate each aspect to cover ever base of issue which currently affecting the nation growth widely.

Research Gap

While mainly focusing on socio-economic and environmental consequence of population pressure in India, there is notable gap in understanding how cultural and gender dynamics shaping reproductive behaviour and attitude towards population control measures. There are various studies which extensively focus socio-cultural barriers to effective planning but they ignore factor and had limited research exploring nuanced intersections of cultural, gender and population control policies in India. Understanding this complex factor is necessary to design culturally sensitive and gender-responsive population control strategies that around the diverse communities.

Additionally, India needs empirical studies to evaluate the effectiveness and challenges in implementing population control laws. While theories and policy analyses are helpful, real-world

[4]S. Gupta & S. Verma, Population Control Policies and Environmental Sustainability: Insights from India, 2 *J. Population & Sustainability* 45 (2017).
[5]John Bongaarts & Steven Sinding, A Review of India's National Population Policy, 41 *Population & Dev. Rev.* 629 (2015).
[6]R. Dasgupta, Politics of Population Control in India: A Critical Analysis, 77 *Indian J. Pol. Sci.* 345 (2016).

studies on legislative interventions are crucial for making evidence-based policy decisions and enhancing population control efforts.

Research Objective

The main point of this study is to determine the necessity and possibility of implementing all-encompassing population control laws in India. Specifically, the research aims to:

1. Evaluate the consequences of uncontrolled population growth on socio-economic life, environment, and public health in India.
2. Evaluate current population control measures and policies in India; their effectiveness and weaknesses.
3. Analyse how cultural dynamics and gender affect attitudes towards reproductive behaviours and population control among Indian people.
4. Discuss the challenges that could be faced if comprehensive population controls were put into place across India.
5. Recommendations for legislation and policy changes derived from data analysis will help bring about social justice while addressing demographic challenges faced by India.

Thus, this research aim at contributing to existing literature on pressures of a large population in relation to policies used as tool for controlling populations within a particular country such as India thereby bringing out insights that are useful for policy makers.

Hypothesis

Enacting detailed laws to limit population growth in India, which include rewards for contraception, better reproductive healthcare access and gender equality, will cause significant decrease in population rise. This would consequently facilitate the socio-economic development by reducing the pressure on resources, offering more employment opportunities in the labor market as well as lowering poverty levels. Moreover, such family policies are meant to ensure that there is environmental sustainability since they hinder over harvesting of nature's bounty; forestall environmental degradation while promoting conservation activities. Finally, it is expected that better family planning initiatives and improved reproductive health care services will lead to positive health outcomes among individuals like reduced rates of maternal mortality and infant mortality, better child nutrition and even increased general wellness.

Methodology

This research will make use of both qualitative and quantitative research methods in order to understand the socio-economic, environmental, and public health implications of implementing comprehensive population control legislation in India.

1. Data Collection:

- Quantitative Data: Secondary data that involve national census data, demographic surveys, and reports from government agencies and international organizations will be selected so that details regarding population growth trends, socio-economic indicators, environmental indicators, and public health outcomes will be available.
- Qualitative Data: Data related to qualitative nature will be collected through semi-structured interviews and focus group discussions with various stakeholders. These comprise policymakers, healthcare personnel, community leaders, and the general public. These qualitative data will help in explaining cultural and gender dynamics related to population control measures and reproductive behavior.

2. Sampling Strategy:

- Quantitative Sampling: The research will use a stratified random sampling procedure to ensure that the study covers the different demographic groups and geographical regions of India.
- Qualitative Sampling: There will be a purposive sampling procedure in which various participants will be selected with diverse perspectives and experiences relevant to the research questions.

3. Data Analysis:

- Quantitative Analysis: Quantitative data will be analyzed using statistical methods such as descriptive statistics, regression analysis, and trend analysis to determine population growth patterns, socio-economic correlations, and public health indicators.
- Qualitative Analysis: Data from the interviews and focus group discussions will be transcribed and analyzed through the use of thematic analysis in order to determine recurring themes, patterns, and insights related to cultural, gender, and policy dynamics in relation to population control attitudes and behaviours.

4. Ethical Considerations:

These will be considered and will be guided by the relevant institutional review board. Informed consent will be obtained from all participants involved in the research and throughout the process of the research, confidentiality, and anonymity of their participants will be maintained.

Steps will also be taken to ensure that the process of the research is followed ethically, such as volunteer participation, private privacy, and protection of their rights.

5. Limitations:

The limitations in the study are due to the availability and reliability of sources of secondary data and also due to the scope of bias that might be present within the qualitative data collection and analysis techniques.

Generalizability of the findings might be constrained to the Indian specific context and also sample characteristics.

6. Data Triangulation:

Quantitative and qualitative data triangulation will be employed to validate the findings and make research conclusions more robust.

Population Pressures in India

India become most populated nation in world after surpassing China and it indicate further highly growth in its population. The significant growth in India's population has widely impacted the resources, infrastructure and economic development. According to the National Research Council, the real income consequences of population growth have long been a matter of policy concern, showing that as populations grow relative to resources, downward pressure on labor incomes and upward pressure on land rents will result.[7] This "dismal" prediction has been modified in modern analysis, recognizing that while a rise in incomes will lead to an increase in population growth, the associated rise in the price of labor time will generally induce a decrease in family size and population growth.[8]

Demographical rise not only effect the resources but also exacerbates socio-economic issues such as poverty, unemployment and income inequality. Apart from such issue the crime rate and other

[7]Nat'l Rsch. Council, *Population Growth and Economic Development: Policy Questions* (Nat'l Academies Press 1986).
[8]Id.

illegal activities have also grown. Furthermore, the uneven distribution of populations due to imbalanced sex ratios poses distinctive difficulties for policymakers.

The Indian population has shown significant growth, with the country's population reaching 1 billion shortly before 2000, up from 500 million in 1965.[9] The great heterogeneity of the Indian population, illustrated by the fertility rates in the early 1990s, has resulted in different human capital and development outcomes.[10]

The quality of life of human is highly hampered effecting birth rate and death rate. India's population growth has been accompanied by considerable progress in living standards and life expectancy, but the environment has worsened, and concerns about the quality of life and the links between population growth and natural resources are inevitable.[11]

In the last fifty years, India has experienced a decline in the percentage of people living in poverty, but the total number of poor individuals has nearly doubled. Additionally, the average number of children per couple has decreased from over 6 to approximately 3.2 today. Despite this, the economy has expanded and become more varied, and food production has managed to outstrip the rate of population growth. India's demographic dividend is not guaranteed, and the country needs to make serious investments in human capital if it is to maximize a demographic dividend. India is experiencing demographic change at a faster rate than Western Europe, leading to a shorter window of opportunity to leverage its demographic dividend. Despite India's global significance, urbanization has been slower than anticipated, limiting their economic growth potential.

Existing Population Control Laws and Policies

Government of nation have tried various ways to check and balance on growth of population. There are several policies and measures introduced.

1. The National Population Policy of 2000: This policy was an attempt on the part of the Indian government to work out the nation's population problems through a manifold of measures that include promotion of reproductive health, voluntary family planning, and universally accessible, affordable contraceptive services. The NPP emphasized the need to empower women, enhance male involvement in family planning, and integrate population concerns into various development programs.[12] Integration of population concern into various development is key aspect of NPP.[13]

[9]Tim Dyson, India's Demographic Transition: A Brief Overview of India's Population and Its History, 20 *Population & Dev. Rev.* 220 (1994).
[10]Id.
[11]Tim Dyson, Causes of India's Population Growth Slowdown, 510 *Annals Am. Acad. Pol. & Soc. Sci.* 128 (1990).
[12]Gov't of India, Ministry of Health & Fam. Welfare, *National Population Policy 2000* (Gov't of India 2000).
[13]Ministry of Health & Fam. Welfare, *National Population Policy 2000* (Gov't of India 2000).

2. Family Planning Programme: India has implemented a lot of family planning programmes over the years, including the one that has been in existence since 1952, popularly known as the Family Planning Programme. These programs focused on promoting small family norms, increasing contraceptive prevalence rates, and providing family planning services through a network of healthcare facilities and community workers.[14] This program focused on both rural and urban population with special look on marginalized and backward communities. Government have provided the contraceptive intrauterine devices (IUDs) and sterilization with minimum coast or free of cost.

3. The Medical Termination of Pregnancy Act, 1971: As a law, it legalized abortion in India under certain conditions to put a stop to maternal mortality and morbidity arising from unsafe abortions. The MTP Act allows for the termination of pregnancy up to 20 weeks gestation, with certain exceptions beyond this period.[15] This legislation mainly focused on women health and safeguard to them.

4. Contraceptive Laws and Policies: India has enacted many laws and policies that rule over the availability and use of contraceptives. These include the Drugs and Cosmetics Act, 1940, which acts as the authority under which the manufacturing, distribution, and sale of contraceptive drugs and devices are regulated. Additionally, the National Family Welfare Program provides free or subsidized contraceptives through government-run healthcare facilities and outreach programs.[16]

5. Incentive Programs: In some of the states of India some other incentive programs have been introduced to help family planning and control of the population. These programs offer financial incentives, healthcare benefits, or other rewards to individuals or couples who undergo sterilization procedures or adopt family planning methods.[17]

6. State-Specific Initiatives: Some states of India have initiated their own measures and initiatives on population control, adapted specifically to their demographic and socio-economic settings. These initiatives may include awareness campaigns, behaviour change communication strategies, and targeted interventions to address local population challenges.[18] Uttar Pradesh is one the example of State initiative. “Mission Parivar Vikas” (Mission Family Development) is launched of government of Uttar Pradesh in year 2017.[19]

[14]Office of the Registrar Gen. & Census Comm’r, India, Family Welfare Program, https://censusindia.gov.in/2011-Common/Aboutus.html (last visited Apr. 20, 2024).
[15]Gov’t of India, The Medical Termination of Pregnancy Act, 1971 (Act No. 34 of 1971).
[16]Ministry of Health & Fam. Welfare, National Family Welfare Program, https://nhm.gov.in/index1.php?lang=1&level=1&sublinkid=774&lid=159 (last visited Apr. 20, 2024).
[17]M.D. Gupta, The Effects of Transitions in Contraceptive Use on Fertility and Its Control: The Indian Experience, 56 *Population Stud.* 277 (2002).
[18]F. Ram, A. Singh & A. Raj, Explaining the Role of State-Level Policies in Shaping the Utilization of Reproductive and Child Health Services in India, 37 *Stud. in Fam. Planning* 297 (2006).
[19]Gov’t of Uttar Pradesh, Mission Parivar Vikas: Transforming Family Planning in Uttar Pradesh (2017).

Urgency for Comprehensive Population Control Laws

A number of issues that are manifestly related to population growth in India necessitate the enactment of comprehensive population control laws. A detailed elaboration on the urgency for comprehensive population control laws is as follows:

1. Socio-Economic Stability: The overpopulated state of India is fast becoming a major cause of poverty, unemployment and income inequality among other socio-economic challenges. The population explosion is stretching resources to their limits thereby rendering it almost impossible to provide sufficient infrastructure, employment opportunities as well as social amenities for all citizens uniformly. Integrated laws on population control should be enacted as soon as possible in order to stabilize the growth rate of numbers which will in turn help reduce pressure on limited resources besides creating a favourable environment for socio-economic growth.[20]
2. Environmental Sustainability: In India, if not checked the population growth may have grave implications on environmental sustainability. This is because with an increase in number there comes higher demand for resources which leads to degradation of environment, depletion of natural habitats and loss biodiversity. Also, pollution levels are bound to rise since more people means increased air and water pollution thereby aggravating these challenges further. All-inclusive laws that regulate population size can therefore address such environmental concerns through lessening strain on ecosystems besides controlling pollution whiles supporting sustainable management of resources.[21]
3. Public Health Improvement: Rural public health suffers most from high population concentration due to underserved healthcare owing to less availability and accessibilities quality medical services facilities particularly in rural areas with lower populations where there are few or none at all. The growing population also worsens public health problems like infectious diseases, maternal and child mortality, and malnutrition. Population control legislation that is comprehensive, along with improved health care facilities and family planning services, promotes public health better, by making such vital health services more accessible and further reducing the burden on health systems.[22]
4. Urban Infrastructure: Urbanization occurring too fast because of population growth stretches city infrastructure beyond its capacity and creates traffic jams as well as inadequate housing. With an aim to find better opportunities, more individuals are migrating into towns thereby making it hard for them to absorb these numbers which in turn leads to slum areas, traffic congestion and pollution among others. Sustainable

[20]A. Gupta & R. Sahu, Population Density, Poverty and Access to Basic Services in India, 12 J. Population & Dev. Stud. 57 (2018).

[21]Singh & Sharma, Population Pressure and Environmental Degradation in India: A District-Level Analysis, 19 Envtl. Monitoring & Assessment 24707 (2020).

[22]U.N. Population Fund, *State of the World Population 2019* (UNFPA 2019).

development can only take place if there are controls over people living in urban centers hence the need for such laws on a global scale.[23]

5. Gender Equality: Reproductive rights remain unequal between genders due to uneven access towards healthcare services concerning this matter in India where family planning is concerned. For women, they find themselves blocked from getting contraceptives or any other method related with birth control hence limiting their ability to make decisions about when or not have children at all. In addition comprehensive population control laws should promote equality by giving every woman equal opportunity of having access onto these health facilities so that she may be able choose wisely regarding what is best for her reproductive wellbeing.[24]
6. Long-Term Sustainability: If India wants to survive many years ahead then something needs doing urgently. It is imperative for the country's future survival that immediate steps be taken now lest we wait until it's too late. Such measures will ensure stability even when faced with such pressures thus there being no choice but enacting wide ranging population-control legislation throughout the land. They can pave the way toward a brighter, more sustainable future for India, by the promotion of responsible parenthood, enabling people to make informed reproductive choices and then nurturing a culture of sustainable development.[25]

Proposed Population Control Measure

The suggested population control measures include a multifaceted approach to overcoming the challenges of population growth. The measures include, for example, the promotion of family planning services and increases in contraceptives access, incentive programs to encourage voluntary sterilization and family planning adoption, campaigns of education and awareness on the advantages of having smaller families and reproductive health, access to quality reproductive care services through strengthened healthcare infrastructure, empowerment of women through education and economic empowerment, empowering men to make family planning decisions, policy reforms to regulate fertility clinics and incorporating population issues into policy-making and development planning, community involvement through local leadership and community-based interventions, investment in research and innovation in new contraceptive methods, and international cooperation for knowledge and resource sharing. These interventions aim at addressing the challenges of population growth in ways that promote sustainable development and improve the well-being of individuals and communities worldwide.

[23]Nat'l Inst. of Urban Affairs, *India Urbanization Review: Policies and Progress* (NIUA 2020).
[24]A. Chaurasia & D. Pal, Gender Bias in Healthcare Utilization in India: Empirical Evidence from National Health Survey III, 27 *J. Pub. Health* 307 (2019).
[25]U.N., *Transforming Our World: The 2030 Agenda for Sustainable Development*, G.A. Res. 70/1, U.N. Doc. A/RES/70/1 (Oct. 21, 2015).

Challenges and Consideration

A list of population control challenges and considerations. Here they are:

1. Ethical Issues: Issues of population control always have connotations of ethics relating to individual rights and autonomy, especially about the reproductive freedom of an individual. The policies and programs have to be consistent with human rights, including the right to informed choices of family size and reproductive health, while the broad societal concerns about population growth find expression.
2. Cultural and Religious Issues: Policy provisions for population control will spark controversy and resistance because of cultural and religious beliefs favoured by larger families or discouraging certain methods of contraception. Unless active consultation with local communities, religious leaders, and influential cultural opinion-makers is carried out, population control efforts will likely face scepticism and suspicion.
3. Healthcare Access and Quality: Population control requires quality reproductive healthcare services, including information on family planning and access to contraceptive supplies and maternal healthcare. Adequate infrastructural provisions of healthcare facilities, availability of resources in short supply, and inequity in the availability of healthcare facilities, especially to women, mean that for most people in any given community, many might not be able to make informed decisions about the services available to them about their reproductive health.
4. Gender Equality: Insufficient gender equality, whereby inequities in education, employment opportunities, and decision-making power occur, hinders women's ability to take control of their fertility or make informed decisions about family planning. Any population control policy should expressly foster gender equality and facilitate women's empowerment through education, employment, and access to healthcare.
5. Socio-economic Challenges: Population control policies can be effective only if accompanied by efforts to address some of the underlying socioeconomic factors that drive fertility rates and population growth. Issues of poverty, unemployment, and limited access to education are all pervasive drivers of population growth and have to be addressed if population control policies are to be effective.
6. Demographic Transition: Demographic change must be part of any population control strategy, considering the demographic transition stage that has affected any country or region. Population control may be a problem in some countries; in others, however, there is aging, decline in fertility, and a host of other problems. Policies and programs designed will have to be fitted into the demographic dynamics and requirements of each context.
7. Environmental Sustainability: Population growth strains the consumption of natural resources and the ecosystems; therefore, it contributes to environmental degradation and climate change. Population control should be integrated into approaches that empower

environmental sustainability and reduce the environmental consequences of human activities.

8. Data Collection and Monitoring: Population control needs accurate demographic indicators, including information on fertility rates, contraceptive use, and other relevant indicators. For such reasons, data collection systems and monitoring mechanisms have to be invested in for evaluation of impact from population control measures and informing evidence-based policy and program decisions.

These challenges and considerations require a whole-of-the-spectrum approach of consideration: one that considers interactions between population dynamics, social factors, economic development, and environmental sustainability. It requires close collaboration between governments, civil society organizations, international agencies, and local communities in the design of population control strategies that respect human rights, are equitable, and further sustainable development.

Suggestion

1. Comprehensive Sex Education: Implement comprehensive sex education programs in schools and communities, which adequately feed people with correct information on reproductive health, contraception, and family planning. These programs should work toward gender equity and protect human rights and will support informed decision-making regarding sexual and reproductive matters.
2. Expand Access to Reproductive Healthcare Services: Strengthen the healthcare system and infrastructure to ensure that everyone has access to quality reproductive healthcare services, including family planning counseling, access to contraceptives, maternal healthcare, and safe abortion services. There should be investment in training and equipping healthcare providers and community health workers to provide culturally sensitive and client-centered care.
3. Empower Women and Girls: Promote the empowerment of women through education, economic opportunities, and access to health care services. Support initiatives that help to overcome gender inequalities and ensure that women have their rights and make informed decisions about their reproductive health and family planning.[26]
4. Engage Men and Boys: Encourage the participation of men and boys in family planning and reproductive health through education, counselling, and support services tailored to their needs. Changing harmful gender norms and stereotypes that contribute to unequal power dynamics and male exclusion from reproductive decision-making should be challenged.

[26]U.N. Population Fund, *Family Planning: Empowering People, Developing Nations* (UNFPA 2018).

5. Address Socioeconomic Inequalities: Implement policies and programs that address the underlying socioeconomic factors leading to high fertility rates, such as poverty and inequality in education and access to economic opportunities. Investment should be made in poverty alleviation programs, job creation, education initiatives, and social safety nets to improve the standards of living and reduce fertility rates.
6. Ethical and Rights-Based Approaches: Ensure that population control measures respect human rights, including the right to reproductive autonomy, privacy, and dignity. Ethical and rights-based approaches will prioritize individual agency, informed consent, and non-coercive practices in the provision of family planning programs and policies.
7. Link Population and Development Goals: Incorporate population concerns in more general development frameworks and policies such as the Sustainable Development Goals. Increase multi-sectoral collaboration and coordination on explaining the interlinkages between population dynamics and poverty, health, education, gender equality, and environmental sustainability.[27]
8. Support Research and Innovation: Invest in research and innovation for new contraceptive methods, technologies, and approaches in population control. Promote interdisciplinary research projects that consider complex relationships between population dynamics, social factors, and environmental sustainability.
9. Promote International Cooperation: Develop international cooperation and collaboration toward addressing global challenges concerning population dynamics. Promote partnerships among national governments, civil society organizations, international institutions, and the private sector toward sharing best practices, resources, and expertise in population control and sustainable development.
10. Monitor and Evaluate Impact: Develop robust mechanisms for monitoring and evaluating impact in order to assess whether population control measures are actually being effective in their abilities to support the attainment of sustainable development goals and reproductive rights. Demographic trend and contraceptive use pattern as well as access to health care should be considered to track the progress of population stabilization and sustainability in development.

Through these recommendations, nations will be able to formulate comprehensive and efficient population control strategies that will help advance reproductive rights and gender equality, social justice, and sustainable development for all.

[27]Id.

Conclusion

It is in the light of all this and more that addressing population pressures by comprehensive population control measures is a need for promoting sustainable development, improving public health, and safeguarding human rights. Despite the fact that challenges such as ethical concerns, cultural beliefs, and socio-economic inequalities may present barriers, it is quite possible to mitigate these challenges and ensure positive outcomes through proactive efforts. This will promote comprehensive sex education, the expansion of access to reproductive healthcare services, empower women and girls, engage men and boys, address issues of socioeconomic inequalities, and promote ethical and rights-based approaches. In so doing, countries can come up with effective population control strategies that respect individual autonomy and promote social justice. Integrating the concerns of population within broader development frameworks, support for research and innovation, and international cooperation also are critical for the achievement of global challenges in population. By implementing these strategies collaboratively across sectors and borders, we may ensure sustainable population growth that respects human rights, promotes social equity, and ensures a healthy and prosperous future for all.

References

1. Gov't of India, Ministry of Health & Fam. Welfare, National Population Policy 2000 (Gov't of India 2000).

2. Office of the Registrar Gen. & Census Comm'r, India, Family Welfare Program, https://censusindia.gov.in/2011-Common/Aboutus.html (last visited Apr. 20, 2024).

3. Gov't of India, The Medical Termination of Pregnancy Act, 1971 (Act No. 34 of 1971).

4. Ministry of Health & Fam. Welfare, National Family Welfare Program, https://nhm.gov.in/index1.php?lang=1&level=1&sublinkid=774&lid=159 (last visited Apr. 20, 2024).

5. F. Ram, A. Singh & A. Raj, Explaining the Role of State-Level Policies in Shaping the Utilization of Reproductive and Child Health Services in India, 37 Stud. in Fam. Planning 297 (2006).

6. U.N. Population Fund, Family Planning: Empowering People, Developing Nations (UNFPA 2018).

7. Nat'l Rsch. Council, Population Growth and Economic Development: Policy Questions (Nat'l Academies Press 1986).

8. T. Dyson, India's Demographic Transition: A Brief Overview of India's Population and Its History, 20 Population & Dev. Rev. 220 (1994).

9. T. Dyson, Causes of India's Population Growth Slowdown, 510 Annals Am. Acad. Pol. & Soc. Sci. 128 (1990).

10. M.D. Gupta, The Effects of Transitions in Contraceptive Use on Fertility and Its Control: The Indian Experience, 56 Population Stud. 277 (2002).

11. Gov't of Uttar Pradesh, Mission Parivar Vikas: Transforming Family Planning in Uttar Pradesh (2017).

12. A. Gupta & R. Sahu, Population Density, Poverty and Access to Basic Services in India, 12 J. Population & Dev. Stud. 57 (2018).

13. R. Singh & P. Sharma, Population Pressure and Environmental Degradation in India: A District-Level Analysis, 19 Envtl. Monitoring & Assessment 24707 (2020).

14. U.N. Population Fund, State of the World Population 2019 (UNFPA 2019).

15. Nat'l Inst. of Urban Affairs, India Urbanization Review: Policies and Progress (NIUA 2020).

16. A. Chaurasia & D. Pal, Gender Bias in Healthcare Utilization in India: Empirical Evidence from National Health Survey III, 27 J. Pub. Health 307 (2019).

17. U.N., Transforming Our World: The 2030 Agenda for Sustainable Development, G.A. Res. 70/1, U.N. Doc. A/RES/70/1 (Oct. 21, 2015).

18. U.N. Population Fund, Family Planning: Empowering People, Developing Nations (UNFPA 2018).

19. S. Gupta & S. Verma, Population Control Policies and Environmental Sustainability: Insights from India, 2 J. Population & Sustainability 45 (2017).

20. Indian Law Institute, Population Control: Socio-Legal Perspectives, 22 J. Indian L. 45 (2023).

Should Marital Rape Be Recognised as a Criminal Offence in India: A Comparative Analysis of Domestic Law and International Human Rights Standards?

Abstract

India is one of the few democracies in the world that does not make marital rape a crime. Exception 2 to Section 63 of the Bharatiya Nyaya Sanhita, 2023, which replaces the previous Exception 2 to Section 375 of the Indian Penal Code, 1860, clearly exempts a husband from being prosecuted for raping his wife. This paper questions the constitutional validity and moral grounds of this exemption. By analysing Indian constitutional law, looking at laws in countries like the United Kingdom, the United States, and Australia, and reviewing India's responsibilities under international human rights agreements like CEDAW and the UN Declaration on the Elimination of Violence Against Women. This paper argues that the marital rape exemption cannot stand constitutionally, lacks support in evidence, and is morally wrong. It also suggests that the Indian government's decision to keep this exemption in BNS 2023 shows a deep-rooted bias in favour of patriarchal policies disguised as neutral legislation. The paper ends with specific legislative and judicial recommendations to recognize marital rape as a crime in India.

Keywords: Marital Rape, Bharatiya Nyaya Sanhita, Article 14, Article 21, CEDAW, Comparative Criminal Law, Gender Justice

Introduction

In 1736, the English jurist Sir Matthew Hale put forward a claim that would influence legal thought for centuries: a husband cannot be guilty of raping his wife, since, through their mutual marriage agreement, the wife has given herself to her husband in a way that she cannot take back[1]. This idea of "implied consent," rooted in a legal system that viewed married women as their husbands' property, persisted in Indian law well into the twenty-first century and it continues to exist today.

The Indian Penal Code of 1860 included Exception 2 to Section 375, which stated that sexual intercourse or acts by a man with his wife, as long as she is not under fifteen years old, is not considered rape[2]. When India began a major reform of its criminal law with the Bharatiya Nyaya Sanhita, 2023 the legislature had a unique chance to remove this outdated colonial law. It chose not to. Exception 2 to Section 63 of the BNS keeps the marital rape exemption almost the same, only changing the age of the wife to eighteen years to match the Supreme Court's decision in *Independent Thought v. Union of India*[3], but it does not change the essence of the exemption.

The debate over whether to criminalize marital rape in India goes beyond just a legislative issue. It brings up important questions about the meaning and extent of fundamental rights in Part III of the Constitution of India, 1950, India's duties under international human rights law, and the judiciary's role in addressing legislative failures on significant constitutional matters. This paper aims to explore these questions.

The paper is organized as follows. Part II looks at the historical and legal roots of the marital rape exemption in India. Part III reviews the current legal situation, including the significant split ruling of the Delhi High Court in *RIT Foundation v. Union of India*[4] and ongoing Supreme Court cases. Part IV discusses the constitutional issues with the exemption. Part V provides a comparative look at how the United Kingdom, the United States, and Australia handle this issue. Part VI considers India's responsibilities under international human rights agreements. Part VII tackles the most common arguments against making marital rape a crime. Part VIII concludes with final thoughts and suggestions.

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[1] *Matthew Hale, History of the Pleas of the Crown (1736).*
[2] *Indian Penal Code 1860, s 375, Exception 2 (repealed and replaced by BNS 2023).*
[3] *Independent Thought v. Union of India, (2017) 10 SCC 800.*
[4] *RIT Foundation v. Union of India,W.P.(C) 284/2015 (Delhi HC, 11 May 2022).*

Historical And Doctrinal Origins of the Exemption

The marital rape exemption in Indian law has colonial origins and strong patriarchal roots. When the Indian Penal Code was drafted by Thomas Babington Macaulay and enacted in 1860, it included the Halean doctrine without question. This reflected the Victorian view of marriage as a contract where a wife surrendered her bodily autonomy to her husband. The exemption did not arise from Indian social or legal idea it was imposed by a colonial legislature based on English common law principles that were already being questioned in England at that time.

The theoretical basis for the exemption rests on three main ideas: first, the doctrine of implied consent assumes that a wife's consent to intercourse is permanently given at marriage; second, the doctrine of marital unity claims that husband and wife are considered one legal person, meaning a husband cannot rape "himself"; and third, the importance of marriage creates a private space free from state interference. Despite significant legal and social changes that have undermined each of these ideas, the exemption has remained.

The Law Commission of India's 172nd Report (2000) looked at the exemption[5]. While it did not fully recommend criminalizing it, the report acknowledged that the legal stance was hard to justify on principled grounds. It was not until the Justice J.S. Verma Committee Report in January 2013 created in response to the brutal gang-rape of a young woman in Delhi in December 2012 that a formal governmental body clearly called for the criminalization of marital rape[6]. The Committee noted that marriage should not give a husband the right to have sex with his wife without her consent. The Criminal Law (Amendment) Act, 2013, passed after the Verma Committee Report, changed the definition of rape in important ways but notably did not remove the marital rape exemption.[7]

[5] Law Commission of India, Report No. 172: Review of Rape Laws (2000).
[6] Justice J.S. Verma Committee Report on Amendments to Criminal Laws (January 2013).
[7] Criminal Law (Amendment) Act 2013 (India).

The Current Legal Position in India

- Bhartiya Nyaya Sanhita ,2023

The BNS, which took effect on 1 July 2024, replaces the IPC. Section 63 of the BNS defines rape in ways that are very similar to Section 375 of the IPC, including the broader definition added by the 2013 Amendment. Exception 2 to Section 63 states: "Sexual intercourse or sexual acts by a man with his own wife, the wife not being under eighteen years of age, is not rape." The Statement of Objects and Reasons that comes with the BNS Bill does not mention the marital rape exemption. It neither justifies keeping it nor acknowledges the significant criticism aimed at it.[8]

Keeping the exemption in the BNS is a major missed chance for change. The BNS was shown as a complete update and decolonization of Indian criminal law. However, on this crucial issue of bodily rights and gender equality, the legislature has decided to keep a colonial rule based on an outdated view of marriage. This view does not align with the constitutional values of dignity, equality, and personal liberty.

- The Delhi High Court Split Verdict*: RIT Foundation v. Union of India*

The most prominent case concerning the marital rape exemption has come from the Delhi High Court's split ruling in *RIT Foundation v. Union of India*. This case was decided on May 11, 2022, by a division bench consisting of Justice Rajiv Shakdher and Justice C. Hari Shankar, both of whom have provided separate opinions on this case.

Justice Shakdher's opinion was the majority opinion. In his opinion, he concluded that the marital rape exemption was unconstitutional because it violated Articles 14, 15 and 21 of the Constitution[9]. He found that the exemption creates arbitrary and irrational distinctions between married and unmarried women, taking away the married woman's fundamental right to both bodily integrity and sexual autonomy. He further held that the marital rape exemption cannot

[8] Statement of Objects and reasons, Bharatiya Nyaya Sanhita Bill 2023.
[9] Rajiv Shakdher J (majority opinion) in RIT Foundation v. Union of India, W.P.(C) 284/2015

pass constitutional muster under the scrutiny requirement of a country that operates within the confines of the rule of law and is committed to gender justice.

Justice C. Hari Shankar's opinion was the dissenting opinion. He found that the marital rape exemption is constitutionally valid. He found that the institution of marriage occupies a distinctive place in Indian society and law; therefore, the marital rape exemption reflects the decision of the legislature to protect the institution of marriage and that the judiciary must, at a minimum, give deference to that decision based on the evolving mores of society. The dissent also expressed concern about the potential for misuse of a marital rape law and the difficulties of proof in the marital context. The matter has been appealed to the Supreme Court of India, where it remains pending.

- *Independent Thought v. Union of India*

Before the BNS judgment in *Independent Thought v. Union of India* (2017), the Supreme Court had partially removed the long-standing marital rape exception by reading the age of the wife of 15 years to the legal age of 18 years for purposes of consent. It stated that the provision allowing for sexual intercourse with a married woman of 15-18 years was in violation of her constitutional rights under Articles 14, 15 and 21. Although this was a significant step, the Court refused to consider for the time being the broader issue of marital rape involving adult women. Thus, leaving the exception to the marital rape law still mostly intact.

Constitutional analysis of Marital Rape Exemption

1. **Violation of article 14: right to equality**

The Constitution of India has Article 14 that says the State cannot deny anyone equality before the law or the same protection of the laws in India[10]. The Supreme Court has always said that to classify something under Article 14 it needs to meet two conditions: it has to be based on a difference and this difference has to have a logical connection to what the law is trying to achieve.

[10]Constitution of India 1950, art 14.

The law that says a husband cannot be charged with raping his wife creates a difference between unmarried women. If a man forces himself on a woman who's not his wife she is protected by the law. If a husband does the same thing to his wife she is not protected in the same way. The difference here is that they are married. We need to ask if this difference makes sense when it comes to the goal of the law.

It does not make sense. A married woman who is forced into sex by her husband suffers the kind of harm as an unmarried woman who goes through the same thing. The pain, the feeling of being violated the attack on her self-respect. None of these are lessened just because she is married. In fact the trust that is broken when someone you love hurts you can make the pain even worse. If the law protects women but not married women just because they are married it does not make sense when it comes to protecting people from sexual violence, which is what the law against rape is supposed to do. So this exemption does not meet the requirements of Article 14.

2. Violation of Article 21: Right to Life and Personal Liberty

Article 21 says that no person can be deprived of their life or personal liberty unless it is done according to the law[11]. The Supreme Court has given a broad interpretation of Article 21 starting with the case of *Maneka Gandhi versus Union of India*[12]. This interpretation has given people a lot of rights including the right to be treated with dignity, the right to privacy and the right to control their body.

In the case of *K.S. Puttaswamy versus Union of India*[13] the Supreme Court said that the right to privacy is a right under Article 21. The Court said that privacy includes being able to make choices about your body and being free from people interfering with you. The right to decide who you want to have sex with and when is an important part of this right to privacy.

The law that says a husband cannot be punished for raping his wife is very wrong. It takes away the wife's right to say no to sex. That is not fair. The law is saying that what the wife wants or does not want is not important. This is taking away her right to control her body and make her

[11] *Constitution of India 1950, art 21.*
[12] *Maneka Gandhi v. Union of India, AIR 1978 SC 597.*
[13] *K.S. Puttaswamy v. Union of India, (2017) 10 SCC 1.*

own choices, which is something that the Supreme Court has said is a fundamental right under Article 21.

The Supreme Court has also said that the right to life includes the right to live with dignity. In the case of *Francis Coralie Mullin versus Administrator, Union Territory of Delhi* the Court said that people have the right to be treated with respect[14]. In another case *State of Karnataka versus Krishnappa* the Court said that sexual violence is a violation of a person's right to privacy[15]. In the case of *Suchita Srivastava versus Chandigarh Administration* the Court said that people have the right to make their choices about having children[16]. All these cases show that the law that says a husband cannot be punished for raping his wife is not compatible with Article 21.

The Supreme Court has given rights to people under Article 21 including the right to privacy and the right to control their own body. The marital rape exemption is not fair. It takes away the rights that the Supreme Court has given to people. Article 21 is very important. It says that people have the right to life and personal liberty. The marital rape exemption is not compatible, with Article 21. It needs to be changed.

3. The Doctrine of Reasonable Classification and the Protective Scope of Article 15

Article 15(1) says the State cannot treat citizens unfairly based on their religion, race, caste, sex, place of birth or any of these. The exemption on rape is unfair to women because of their sex and marital status.

Marital status is not directly mentioned in Article 15(1). The discrimination is actually based on sex. The exemption works this way because the victim is a woman who's married.

When we read Article 15 with Article 14 which says arbitrary classification is not allowed it becomes clear that the exemption is not constitutional.

Comparative Analysis

[14] *Francis Coralie Mullin v. Administrator, Union Territory of Delhi, AIR 1981 SC 746.*
[15] *State of Karnataka v. Krishnappa, (2000) 4 SCC 75.*
[16] *Suchita Srivastava v. Chandigarh Administration, (2009) 9 SCC 1.*

A. The United Kingdom

The United Kingdom provides an example for comparison. This is because the marital rape exemption in law came from English common law.

In England for a time the marital rape exemption was part of the common law. This exemption originated from a statement made by Hale[17]. The position changed in 1992 when the House of Lords made a ruling in the case of *R v. R(1992)*[18]

All the judges in the House of Lords agreed that the marital rape exemption was not suitable for modern English law. Lord Keith of Kinkel stated that the idea of implied consent was no longer useful. He said that marriage does not give a husband the right to have intercourse with his wife if she does not want to. The Sexual Offences Act 2003 confirmed this position. It defined rape in a way that applies to both men and women. There is no exception for intercourse in this law. The marital rape exemption was removed from law.[19]

B. The United States

In the United States people have worked to get rid of the marital rape exemption. This has happened because of state laws and court decisions. One important case was *People v. Liberta* in 1984. The New York Court of Appeals made a decision. They said the marital rape exemption in the New York Penal Law was not fair. It went against the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.[20]

The Court said there is no reason to treat marital rape and non-marital rape differently. So they said the exemption was not valid. By the 1990s all fifty states had made marital rape a crime in some way. The Violence Against Women Act in 1994 showed that the federal government was committed to stopping violence, against women, including rape. The marital rape exemption is no longer accepted because marital rape is a crime. The United States has made progress in getting rid of the marital rape exemption.

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[17] *Sexual Offences Act 1956 (UK); R v. R [1992] 1 AC 599 (HL).*
[18] *R v. R [1992] 1 AC 599 (HL), per Lord Keith of Kinkel.*
[19] *Sexual Offences Act 2003 (UK), s 1.*
[20] *New York Penal Law § 130.35 (McKinney 1984); People v. Liberta, 64 N.Y.2d 152 (1984).*

C. Australia

Australia got rid of the rule that said a husband could not rape his wife. This happened because of changes to the law and court decisions. South Australia was the place to make marital rape a crime in 1976. Then the other states and territories did the thing. Now in Australia marital rape is considered a crime just like rape when the people are not married. The law in Australia is clear: It has to be a choice, made at the time and it has to be voluntary. Just because someone said yes before in general does not mean they said yes this time. Australian law says that marital rape is a crime, like any other kind of rape. Australia makes sure that people understand that consent is important whether you are married or not.[21]

D. Comparative Lessons for India

The survey shows that people around the world think the same way. In countries with different laws, such as common law, civil law and mixed laws people believe that marriage does not mean a woman cannot say no to sexual intercourse. If a husband ignores her refusal he is committing rape. India still has a law that says something and this puts India in a small group of countries that think this way. More and more people around the world think this law is not fair to women and does not follow human rights rules.

What happened in the United Kingdom is an example. The House of Lords made a decision in a case called *R v. R*. They said that getting rid of the old law was a good thing. They said it was a way for judges to update the laws to fit the changing times and what people think is right. This is something the Supreme Court of India should think about because they are dealing with this issue now. The Supreme Court of India is looking at the marriage law and the idea that a woman has the right to refuse intercourse and they should consider what the United Kingdom did. The marriage law and the right to refuse intercourse are important issues that the Supreme Court of India is considering.

International Human Rights Obligations

- **CEDAW and the Obligation to Eliminate Gender-Based Violence**

[21] Violence Against Women Act 1994, Pub. L. No. 103-322 (USA).

India agreed to follow the Convention on the Elimination of All Forms of Discrimination Against Women also known as CEDAW in 1993. CEDAW says that countries must change or get rid of laws that're not fair to women. The CEDAW Committee says that countries must make sure husbands can be charged with rape if they force their wives to have sex.[22]

The CEDAW Committee also said that countries must make sure their laws against violence towards women are applied to everyone even if they are married. They said that countries should get rid of laws that allow or accept violence, towards women. India still has a law that says a husband cannot be charged with rape if he forces his wife to have sex. This goes against what India agreed to when it signed CEDAW.

- **The UN Declaration on the Elimination of Violence Against Women**

The United Nations Declaration on the Elimination of Violence Against Women that was made in 1993 says that violence against women includes things like marital rape and other types of sexual violence that happen in the family.[23]

The United Nations Declaration on the Elimination of Violence Against Women tells countries that they have to do everything they can to stop violence against women from happening to look into it when it does happen and to punish the people who do these things. It also tells countries that they have to make laws to punish people who hurt women and to help women who have been hurt by violence.

These laws should be very strong so that women are protected from violence against women. The laws should also help women who have been victims of violence, against women to get the help they need.

Addressing the Objections to Criminalisation

[22] CEDAW, art 2(f), opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981).
[23] UN Declaration on the Elimination of Violence Against Women, GA Res 48/104, UN Doc A/RES/48/104 (20 December 1993), art 2.

A. The "Sanctity of Marriage" Argument

The most common argument against criminalising marital rape is that it would interfere with the institution of marriage and undermine marital harmony. This argument begins with a category error. The institution of marriage, correctly understood, is one of mutual respect, affection, and consent. Such a marital harmony is not worth preserving by exemptions from the criminal law. Criminal law does not protect institutions, but it protects persons. The argument from the sanctity of marriage is, at bottom, an argument for according greater legal protection to an institution than to the human beings – overwhelmingly women – who suffer within it.

B. The “misuse” Argument

A second objection that proponents against marital rape law constantly raised is that it would be subject to widespread misuse by wives as a weapon in matrimonial wrangles. This argument, if accepted, would logically require repeal of the law of rape altogether, since any penal provision can be misused. Misuse is not a principled basis for denying legal protection to a class of victims. The criminal justice system has a number of procedural safeguards corroboration requirements, judicial scrutiny, the standard of proof beyond reasonable doubt that ensure false complaints are filtered out. This would also be true for marital rape prosecutions. Also, the Protection of Women from Domestic Violence Act, 2005 already acknowledges sexual violence within marriage as domestic violence; hence, the objection that a criminal law would be misused is an argument over the sufficiency of existing safeguards rather than the criminalisation principle.

C. The “proof” Argument

A related point that some people make is that it is difficult to prove marital rape due to the private nature of the marriage and the lack of witnesses who could back up either side's account of what happened. However, difficulty of proof does not mean there was no injury to the victim. There are many crimes, such as fraud, corruption and perjury, which are also hard to prove. If the difficulty in proving something is the reason for eliminating the offence, then we need to look at improving our methods of gathering evidence and standards of admissibility of that evidence. Courts in both the UK and the USA have been able to convict people who raped their spouse. There is no reason to assume that it is impossible to provide evidence of perpetration of a spousal rape or to assume that the difficulty in providing

evidence of spousal rape is somehow so unique that we can exempt spousal rape from prosecution as a crime.

D. The "Private Sphere" Argument

The fourth objection is that the bedroom is a private place and the criminal law should not intrude on it. This argument demonstrates a fundamental misunderstanding of how privacy and liberty are related to one another. Privacy protects people from government intrusion upon their private decisions; it does not provide protection for someone who commits a criminal act against another person. As stated by the Supreme Court in K.S. Puttaswamy, “Privacy is an individual right, not a relational right that one partner can use against another.” The criminal law has been used to regulate behaviour in the home for many years; for example: domestic abuse, domestic cruelty, bigamy, etc., and there is no sound reason for treating sexual assault within marriage differently from other crimes.

Recommendations

A. Legislative Reform

The most direct and comprehensive solution is legislative. Parliament should amend Section 63 of the BNS to delete Exception 2, thereby bringing the definition of rape in India into conformity with the constitutional values of equality and dignity and with India's international human rights obligations. This reform should be accompanied by appropriate consequential amendments to ensure consistency with the remainder of the BNS and with related legislation such as the Protection of Women from Domestic Violence Act, 2005.

In framing the amendment, the legislature should also consider enacting a standalone provision dealing with domestic sexual violence, which would permit courts to take into account the specific vulnerabilities and dynamics of intimate partner relationships in assessing issues of consent, evidence, and sentencing. This approach, which has been adopted in several Australian jurisdictions, would address concerns about the adequacy of existing evidential and procedural frameworks without compromising the principle of criminalisation.

B. Judicial reforms

When there is no law made by Parliament on this matter, the Supreme Court of India should use its power to declare the second exception to section sixty-three of the BNS as unconstitutional by virtue of article thirty-two. The constitutionality argument can be made with great clarity

through the use of the power of the Supreme Court. The Supreme Court has provided a precedent of striking down colonial statutes that deprive individuals of their basic human rights, including decriminalizing sex between men at the age of consent in *Navtej Singh Johar v. Union of India* (2018), and therefore, there cannot be a good reason for this to be treated differently than those colonial laws or to use a different standard.

Conclusion

The marital rape exemption under the Bharatiya Nyaya Sanhita, 2023, is a throwback to outdated laws. It is based on a legal idea the wife's implied consent that has been completely rejected by the development of constitutional law, social norms, and international human rights standards. This exemption clashes with the fundamental rights of married women under Articles 14, 15, and 21 of the Constitution of India. It puts India in violation of its obligations under CEDAW and other international human rights agreements. Every major comparable common law jurisdiction has rejected it as a matter of principle. It also reinforces, with state approval, a form of gender-based violence that affects millions of women across the country. The legislature's decision to keep this exemption in the BNS 2023, despite over a decade of persistent calls for its removal, the Justice Verma Committee's strong recommendation for criminalization, and a constitutional court's ruling declaring it unconstitutional, shows not neutrality, but an active choice to prioritize a patriarchal view of marriage over women's fundamental rights. This decision cannot be justified constitutionally and is unacceptable.

The Supreme Court of India now has the chance and the paper argues, the constitutional obligation to correct this injustice. Whether this correction comes from the judiciary or the legislature is clear. The real question is not if marital rape will be recognized as a crime in India, but rather how long that recognition will be postponed and how many women will suffer in the meantime. The answer to this question will reveal much about Indian law's commitment to the values of equality, dignity, and the rule of law.

BIBLIOGRAPHY

Legislation

Bharatiya Nyaya Sanhita 2023 (India)

Constitution of India 1950

Criminal Law (Amendment) Act 2013 (India)

Indian Penal Code 1860 (India)

Protection of Women from Domestic Violence Act 2005 (India)

Sexual Offences Act 2003 (UK)

Violence Against Women Act 1994, Pub. L. No. 103-322 (USA)

Crimes Act 1900 (NSW, Australia)

Cases

Francis Coralie Mullin v. Administrator, Union Territory of Delhi, AIR 1981 SC 746 (India)

Independent Thought v. Union of India, (2017) 10 SCC 800 (India)

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

Maneka Gandhi v. Union of India, AIR 1978 SC 597 (India)

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

People v. Liberta, 64 N.Y.2d 152 (1984) (USA)

R v. R [1992] 1 AC 599 (HL) (UK)

RIT Foundation v. Union of India, W.P.(C) 284/2015 (Delhi HC, 11 May 2022) (India)

State of Karnataka v. Krishnappa, (2000) 4 SCC 75 (India)

Suchita Srivastava v. Chandigarh Administration, (2009) 9 SCC 1 (India)

International Instruments

Convention on the Elimination of All Forms of Discrimination Against Women, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981)

UN Declaration on the Elimination of Violence Against Women, GA Res 48/104, UN Doc A/RES/48/104 (20 December 1993)

AI and Indian Law

ABSTRACT

This paper provides an assessment of the developing relationship between artificial intelligence (AI) and Indian law, including the regulatory, ethical and practical problems associated with this technology. It does so by evaluating the existing regulatory framework for intellectual property and technology across India, as well as identifying some of the major legal gaps and ambiguities in applying the current laws to AI specific problems. The use of AI raises new concerns in relation to established legal concepts. The legislation that governs data protection is assessed and indicates that legislation specifically for the protection of personal data needs to be developed. The ethical challenges include: privacy, transparency, accountability and fairness; all require clear benchmarks for developing and deploying AI in a responsible manner. This paper discusses how AI will affect governance, the administration of justice, and the judiciary. Key issues facing Indian AI development include the fast pace of technological change; the shortage of expertise in AI; and the requirement for flexible regulatory frameworks. However, there are also many opportunities for AI to be used to improve the legal process, provide greater access to justice and create efficiencies in the judicial process. The final recommendation of the paper is to continue to explore ways to establish a forward-looking regulatory regime for AI in India, which includes cooperation between stakeholders and building capacity to ensure accountable and inclusive AI governance in India.

KEY WORDS- ***Artificial Intelligence, Ethics, Data Privacy, Cyber Law, AI Governance.***

INTRODUCTION

Artificial intelligence or AI is a term used in computer science to describe one way we might code our machines so they think and learn similar to how people do while also assuming there exist no limits for it being considered truly intelligent; so that means all areas under this heading such as machine learning or word processing fall under these categories too while taking into consideration other examples such as computer vision along with robotics. The development of artificial intelligence, along with the main points of its development, has been a subject of interest for decades. Today, artificial intelligence is used in many areas from health to finance, from transportation to entertainment. Its revolutionary potential lies in its ability to streamline operations, improve decision-making processes, increase efficiency and stimulate innovation, making it an integral part of daily life. The importance of artificial intelligence in today's society cannot be overstated due to its versatility and wide range of applications. Artificial intelligence technology has revolutionized many industries by providing solutions that were once thought impossible or difficult. In healthcare, AI-powered diagnostic tools and personalized treatment recommendations are improving patient outcomes and outcomes. In finance, algorithms are used to detect fraud, perform algorithmic trading, and provide personal financial services. Autonomous vehicles, traffic management and intelligence-driven predictive maintenance are revolutionizing transportation. Additionally, the entertainment industry is also taking advantage of artificial intelligence through content recommendations, augmented reality and advanced gaming. Artificial intelligence in education facilitates learning transformation, self-directed learning, and learning analysis to improve student learning. The Indian legal system is a complex framework for governing the country, involving many laws, regulations and courts. It has its roots in the legal system inherited from the British colonial period and is supported by laws enacted by Parliament and state legislatures and judicial decisions by the courts. As AI technology continues to advance and integrate into society, the need for governance to ensure fair use, accountability, and transparency will increase. Indian law plays an important role in creating and implementing these laws. Intellectual property rights (IPR) are important to protect AI innovations and encourage investment in R&D. The Indian legal system provides mechanisms to protect and manage intellectual property related to AI technology. Data protection and privacy have become important issues with the proliferation of AI-driven applications and services that rely heavily on data. Laws such as the Privacy Act aim to protect individual privacy and regulate the collection, storage and processing of personal data by Indian intelligence systems.

REVIEW OF LITERATURE

The exponential growth of Artificial Intelligence (AI) has catalysed extensive scholarly research and legal discourse on its implications globally. Ethical considerations have been at the forefront of this discussion, with scholars highlighting concerns about algorithmic bias, decision-making transparency, and accountability[1]. Regulatory issues related to AI deployment and management are also increasingly scrutinized, highlighting the need for regulatory reforms to address the unique challenges posed by AI technology.

[1] Smith, A., Ethical Considerations in AI: A Global Perspective, 12 *J. ARTIFICIAL INTELLIGENCE RES.* 45 (2020).

Intellectual property (IPR) has emerged as another important area of focus as researchers explore the complexities of patenting AI innovations and interacting with AI-generated content. Data protection and privacy have always been at the centre of legal debates about artificial intelligence, especially in the context of improving the capabilities of artificial intelligence systems to collect, store and process information.

Specific Focus on AI in India

The literature on AI and its legal implications in India is relatively new but growing rapidly. Researchers and legal experts have begun exploring the intersection of AI and Indian law, focusing on understanding existing legal systems to change or not solve the problems caused by AI technologies. AI law in India continues to evolve, with important decisions providing insight into the judiciary's interpretation and application of existing AI laws on issues.

The Indian government and regulatory bodies have also started to recognize the importance of AI and are in the process of developing policies and guidelines to govern its use and deployment[2]. However, there is a consensus among scholars that there is a need for more comprehensive and tailored legal and regulatory frameworks to address the unique socio cultural, economic, and technological landscape of India[3].

RESEARCH OBJECTIVE

❖ To Analyze the Current Legal Landscape of AI in India

The first objective is to conduct a comprehensive assessment of the existing legal framework regarding intellectual property in India. This includes identifying and reviewing laws, regulations and policies regarding the development, deployment and use of artificial intelligence technology. The analysis will focus on understanding Indian policy alignment to the challenges and opportunities presented by AI, including issues related to governance, respect for governance, intellectual property rights, data protection and privacy.

❖ To Evaluate the Ethical and Societal Implications of AI in India

The second objective is to evaluate the application and impact of intellectual property in India. This includes investigating the benefits and risks associated with AI technology, such as human rights issues such as bias, transparency, accountability, job change, and more. The assessment will also consider cultural, economic and social factors influencing the adoption and use of AI in India, as well as ethical factors guiding the development and use of AI technology.

❖ To Propose Recommendations for Future Policy and Regulatory Frameworks

The third objective is to propose recommendations for future policy and regulatory frameworks to guide the responsible development and deployment of AI in India. Based on the analysis and evaluation conducted, this objective aims to identify gaps in the current

[2] Ministry of Electronics & Information Technology, *National AI Strategy and Policy Framework* (Government of India 2020).
[3] N. Verma & S. Kapoor, *AI Governance in India: Towards a Comprehensive Legal Framework* 78 (Journal of Governance and Policy 2022)

legal landscape and suggest reforms, policy initiatives, and best practices that can help address the challenges and maximize the benefits of AI for India. The recommendations will be designed to promote innovation, protect individual rights, ensure fairness and transparency, and foster trust in AI technologies among stakeholders in India.

HYPOTHESES

H1: Current Legal Frameworks in India Are Insufficient to Address the Rapid Advancements in AI Technology

This hypothesis posits that the existing legal frameworks governing AI in India may be inadequate or outdated to effectively address the rapid advancements and complexities of AI technology. It suggests that there may be gaps, ambiguities, or inconsistencies in the laws and regulations that need to be addressed to ensure ethical use, accountability, and transparency in the development and deployment of AI technologies.

H2: Ethical and Societal Implications of AI in India Are Not Adequately Addressed by Existing Policies and Regulations

This view argues that the existing rules and regulations of AI in India are not appropriate in terms of ethical and social aspects of AI such as neutrality, transparency, accountability, functioning and impact on human rights. It suggests that a more comprehensive and nuanced approach is needed to understand and mitigate the risks and challenges associated with AI technology in the Indian context.

H3: Strategic Reforms and Policy Initiatives Can Foster Responsible and Inclusive AI Innovation in India

This hypothesis argues that strategic reforms, policy initiatives, and best practices can play a crucial role in fostering responsible and inclusive AI innovation in India. It suggests that by addressing the identified gaps and challenges in the legal and regulatory landscape, and by promoting collaboration between government, industry, academia, and civil society, India can create a conducive environment for innovation, protect individual rights, ensure fairness and transparency, and build trust in AI technologies among stakeholders.

RESEARCH METHODOLOGY

Qualitative Analysis: The research primarily employed qualitative analysis to explore the complex and multifaceted relationship between AI and Indian law. Qualitative analysis allows an in-depth study of existing literature, research data, and regulatory frameworks to understand the issues, opportunities, and trends of AI in India. This method facilitated a nuanced understanding of the subject matter, enabling the identification of key themes, patterns, and trends that emerged from the literature and case studies.

Case Studies: Case studies were a central component of the research methodology, providing real-world examples and insights into how AI technologies are being governed and regulated in India. The case studies involved an in-depth analysis of landmark judgments, policy documents, and regulatory initiatives related to AI in India. These case studies offered valuable perspectives on the judiciary's approach, regulatory challenges, and the evolving legal landscape surrounding AI in India.

Data Collection and Analysis Methods: Data collection for this research primarily involved a comprehensive review of existing literature, including books, articles, and scholarly publications, related to AI and its legal implications globally and specifically in India. The literature review encompassed a wide range of sources, such as academic journals, conference proceedings, government reports, and policy documents, to ensure a holistic and multidisciplinary approach to the research.

The data analysis process involved a systematic examination and interpretation of the collected literature and case studies. This included identifying key themes, summarizing findings, comparing and contrasting different perspectives, and synthesizing insights to develop a coherent and comprehensive understanding of the research topic. The analysis was iterative, allowing for the refinement of themes and the integration of new insights as the research progressed.

AI AND INDIAN LEGAL LANDSCAPE

Artificial intelligence (AI) policy in India continues to evolve to reflect the rapid evolution of AI technology and its impact on society. So far, there is no law specific to artificial intelligence. However, many existing laws and regulations relate to intellectual property, such as data protection, intellectual property rights, cybersecurity and privacy.

• **Data Protection and Privacy:** The Personal Data Protection Bill, 2019 (PDP Bill) aims to regulate the collection, storage, and processing of personal data by defining data protection principles, establishing a Data Protection Authority, and imposing obligations on data fiduciaries and data processors[4].

• **Intellectual Property Rights (IPR):** The Indian Patent Act, 1970, and the Copyright Act, 1957, provide the legal framework for protecting AI innovations and AI-generated content, respectively[5].

• **Cybersecurity:** The Information Technology Act, 2000, and the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, address cybersecurity concerns related to AI by regulating intermediaries, ensuring data security, and imposing obligations on entities to protect against cyber threats[6].

Analysis of How Indian Laws Are Adapting to the Challenges and Opportunities Posed by AI

While the existing legal framework in India provides a foundation for addressing some of the challenges and opportunities posed by AI, there are several areas that require further adaptation and refinement to ensure effective regulation and governance of AI technologies.

• **Regulatory Adaptability:** The dynamic and rapidly evolving nature of AI necessitates a

[4] *Personal Data Protection Bill*, No. 373 of 2019, India (2019).
[5] Controller General of Patents, Designs & Trade Marks, *Guidelines for Examination of Computer-Related Inventions (CRIs)* (Intellectual Property India 2020).
[6] *Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules*, 2021, India Code (2021).

flexible and adaptive regulatory approach that can keep pace with technological advancements. There is a need for the government and regulatory bodies to proactively engage with stakeholders, including industry experts, academia, and civil society, to develop comprehensive and forward-looking policies and guidelines that address the unique challenges and opportunities presented by AI[7].

• **Ethical and Societal Implications:** The ethical and societal implications of AI, such as bias, transparency, accountability, and impact on human rights, are increasingly becoming a focal point of the global AI discourse. Indian laws need to incorporate ethical considerations and principles to ensure responsible and inclusive AI innovation that respects and protects individual rights and promotes societal well-being.

• **Capacity Building and Awareness:** Enhancing the legal and regulatory capacity, promoting awareness, and fostering a culture of responsible AI use among stakeholders, including policymakers, legal professionals, and the general public, are essential to effectively navigate the complex legal landscape of AI in India. Capacity building initiatives, training programs, and educational campaigns can play a pivotal role in building the necessary expertise and fostering a shared understanding of AI-related legal and ethical issues.

CASE STUDIES

Justice K.S. Puttaswamy v. Union of India (2017) marked a transformative moment in Indian constitutional jurisprudence by recognizing the right to privacy as a fundamental right under Article 21. The Supreme Court emphasized that privacy is not merely a negative right against state intrusion but also includes positive obligations on the state to protect personal data. In the context of artificial intelligence, this judgment assumes immense importance because AI systems rely extensively on the collection and processing of personal information. The Court's articulation of privacy as encompassing informational self-determination directly limits the manner in which AI technologies can operate. It requires that any data-driven system must adhere to principles such as consent, necessity, and proportionality. Thus, this case provides the constitutional backbone for regulating AI technologies that engage in profiling, surveillance, or predictive analysis[8].

K.S. Puttaswamy (Aadhaar) v. Union of India (2018) further developed the principles laid down in the earlier privacy judgment by applying them to a large-scale biometric identification system. While the Supreme Court upheld the Aadhaar scheme, it imposed significant restrictions on the use and storage of personal data. The judgment introduced a structured proportionality test, requiring that any infringement of privacy must pursue a legitimate state aim and adopt the least restrictive means. This reasoning is particularly relevant for AI technologies such as facial recognition systems and automated surveillance tools, which similarly involve the large-scale processing of sensitive personal data. The decision highlights that technological efficiency cannot override constitutional safeguards and that state use of AI must remain accountable and limited[9].

Shreya Singhal v. Union of India (2015) represents a significant development in the protection of freedom of speech in the digital age. By striking down Section 66A of the Information Technology Act, the Supreme Court held that vague and overbroad restrictions on online

[7] NITI Aayog, *National Strategy for Artificial Intelligence* (Government of India 2018).
[8] *Justice K.S. Puttaswamy (Retd.) v. Union of India*, (2017) 10 SCC 1.
[9] *K.S. Puttaswamy (Aadhaar-5J.) v. Union of India*, (2019) 1 SCC 1.

expression are unconstitutional. The Court also clarified the scope of intermediary liability, stating that online platforms are only required to act upon receiving actual knowledge through lawful orders. In the context of AI, this judgment is highly relevant to algorithmic content moderation systems that automatically filter or remove online content. It raises concerns about the risk of over-censorship and highlights the need for transparency in automated decision-making processes. The ruling reinforces that even AI-driven governance of digital platforms must operate within constitutional limits and cannot result in arbitrary suppression of speech[10].

Anvar P.V. v. P.K. Basheer (2014) addressed the admissibility of electronic evidence and established that such evidence is only valid if it complies with the requirements of Section 65B of the Indian Evidence Act. The Supreme Court underscored the vulnerability of electronic data to manipulation and therefore insisted on strict procedural safeguards to ensure authenticity. This principle becomes particularly significant in the context of artificial intelligence, where algorithmically generated outputs may be used as evidence in legal proceedings. Whether it is predictive analytics, automated reports, or AI-generated documents, their admissibility depends on meeting established evidentiary standards. The judgment highlights the importance of maintaining trust in digital systems and ensuring that technological advancements do not compromise the integrity of the judicial process.[11]

Arjun Panditrao Khotkar v. Kailash Kushanrao Gorantyal (2020) clarified the legal position on electronic evidence by reaffirming that compliance with Section 65B is mandatory. The Court resolved earlier inconsistencies and emphasized that procedural requirements cannot be relaxed even in the face of technological complexity. For AI systems, this judgment has significant implications, as it requires that any data processed or generated through automated means must be properly certified before being relied upon in court. This ensures accountability and prevents misuse of AI-generated evidence, while also reinforcing the importance of procedural rigor in the digital age.[12]

People's Union for Civil Liberties v. Union of India (1997) laid down important safeguards against arbitrary state surveillance, particularly in the context of telephone tapping. The Supreme Court recognized that unchecked surveillance poses a serious threat to individual privacy and therefore established procedural requirements, including authorization and periodic review. Although the case predates modern AI technologies, its principles are directly applicable to AI-enabled surveillance systems such as facial recognition and predictive policing. These technologies significantly enhance the state's surveillance capabilities, making it essential to ensure that they are deployed within a framework of legality and accountability.[13]

Anuradha Bhasin v. Union of India (2020) addressed the legality of internet shutdowns and their impact on fundamental rights. The Supreme Court held that access to the internet is integral to freedom of speech and expression and that any restrictions must satisfy the tests of necessity and proportionality. This judgment has important implications for AI governance, as many AI systems depend on digital infrastructure and continuous internet connectivity. Arbitrary restrictions on internet access can hinder innovation and limit the effective deployment of AI technologies. The decision underscores that governance in the digital era must balance state interests with individual freedoms, ensuring that technological regulation

[10] *Shreya Singhal v. Union of India*, (2015) 5 SCC 1.
[11] *Anvar P.V. v. P.K. Basheer*, (2014) 10 SCC 473.
[12] *Arjun Panditrao Khotkar v. Kailash Kushanrao Gorantyal*, (2020) 7 SCC 1.
[13] *People's Union for Civil Liberties (PUCL) v. Union of India*, (1997) 1 SCC 301

does not undermine constitutional rights.[14]

CHALLENGES

1. Lack of Specific Legislation: One of the primary challenges faced by the Indian legal system in regulating AI is the absence of specific legislation dedicated solely to AI. The current legal framework is fragmented and lacks clarity on various aspects related to AI, such as data protection, intellectual property rights, ethical considerations, and accountability.

2. Rapid Technological Advancements: The rapid pace of technological advancements in AI outpaces the ability of the legal system to adapt and formulate effective regulations. This dynamic nature of AI technologies poses challenges in anticipating and addressing the potential risks, challenges, and ethical dilemmas associated with AI.

3. Ethical and Societal Implications: AI raises complex ethical and societal implications, including issues related to bias, transparency, accountability, privacy, and human rights. The Indian legal system faces challenges in incorporating ethical considerations and principles into the regulatory framework to ensure responsible and ethical AI development.

4. Capacity and Expertise: There is a lack of adequate legal expertise, technical knowledge, and capacity within the Indian legal system to understand, interpret, and regulate AI technologies effectively. This poses challenges in developing comprehensive, balanced, and forward-looking regulatory frameworks for AI.

OPPRTUNITIES

1. Legal Research and Analysis: AI-powered tools and technologies can be used to enhance legal research, analysis, and legal predictions; thus allowing legal professionals to more accurately access and verify more legal documents.

2. Legal Automation and Efficiency: Artificial intelligence can enhance and improve many legal processes, such as document analysis, contract analysis, due diligence and legal research, thereby increasing the efficiency, cost savings and productivity of legal practices.

3. Predictive Analytics and Decision Support: AI-driven predictive analytics and decision support systems can assist judges, lawyers, and legal professionals in predicting case outcomes, assessing legal risks, and making informed decisions, thereby improving the quality, consistency, and fairness of judicial decisions.

4. Enhancing Access to Justice: AI-powered legal chatbots and virtual assistants can provide information, guidance, and assistance to individuals, especially those from marginalized and underserved communities, enhancing access to legal information, services, and justice.

5. Ethical and Regulatory Compliance: AI can help in monitoring, analyzing, and ensuring compliance with legal and regulatory requirements, identifying potential risks, violations, and non-compliance issues, and facilitating timely interventions and remedial actions.

[14] *Anuradha Bhasin v. Union of India*, (2020) 3 SCC 637.

ETHICAL CONSIDERATIONS IN AI

Artificial intelligence (AI) raises many ethical issues and attracts great attention from researchers, policymakers, and citizens worldwide. One of the most serious ethical problems is bias in the intellectual process, which can lead to injustice and discrimination. AI algorithms are trained on large amounts of data, and if that data is unfair or unrepresentative, it can be harmful and reveal social inequalities Another important ethical issue is privacy, as AI technology often relies on data collection and processing; This raises concerns about data security, consent and individual privacy rights. and understanding of users, but the sophistication and sophistication of many AI systems make it difficult to achieve the value of complexity[15].

Analysis of How Indian Laws Address These Ethical Concerns

In the Indian context, the legal framework addressing the ethical considerations of AI is still evolving and faces several challenges in effectively addressing the complex and multifaceted ethical issues associated with AI technologies.

• **Bias:** The Indian legal system has begun to recognize the importance of addressing bias in AI systems. The principles of non-discrimination and equality enshrined in the Indian Constitution provide a foundation for addressing bias in AI. Additionally, the Personal Data Protection Bill, 2019, emphasizes the importance of fair and non-discriminatory data processing practices, which can help mitigate bias in AI algorithms[16].

• **Privacy:** The Personal Data Protection Bill, 2019, aims to regulate the collection, storage, and processing of personal data and provides individuals with rights to access, correct, and delete their personal data. While the Bill emphasizes the importance of data privacy and protection, there are concerns about its effectiveness in addressing the privacy implications of AI technologies, especially in the context of pervasive data collection and surveillance[17].

• **Transparency:** The Indian legal system recognizes the importance of transparency in AI systems to ensure accountability and trustworthiness. However, there is a lack of specific regulations and guidelines addressing transparency requirements for AI algorithms and decision-making processes. The need for transparency in AI is acknowledged in various policy documents and initiatives, but there is a gap in translating these principles into actionable legal requirements and standards[18].

CONCLUSION

The intersection of artificial intelligence (AI) and Indian politics offers many possibilities, both promising and challenging. This study lays out several key areas that India needs to focus on in the challenging AI policy task. First, India's current legal framework for intellectual property is still in its infancy. Although AI-related laws exist, such as data protection, intellectual

[15] R. Mittal & S. Kapoor, *Bias in AI: Challenges and Solutions* 210 (Journal of Artificial Intelligence Research 2020).
[16] A. Sharma & M. Gupta, *Privacy Implications of AI: A Legal Perspective* 150 (Indian Journal of Law and Technology 2021).
[17] N. Verma & P. Singh, *Transparency in AI: Legal and Ethical Considerations* 50 (AI and Ethics 2022).
[18] NITI Aayog, *National Strategy for Artificial Intelligence* (Government of India 2018).

property rights and cybersecurity, there is a need to clarify and expand the law specifically on AI technology. This law should address the complexities of intelligence, including data integrity, algorithmic accountability, and the impact of autonomous decision-making, creating a good environment for innovation while protecting human rights and social values. In particular, bias, privacy and transparency are the most important issues that require urgent and strict attention2. The ubiquity of AI systems that rely heavily on data collection, analysis, and algorithmic decision-making gives rise to ethical dilemmas and traditional problems based on policy paradigms. AI algorithms and decision-making processes can lead to unfair outcomes, privacy violations, and lack of transparency; therefore, strict governance and ethics are needed to enable responsible AI development and deployment. Looking ahead, the future of AI and Indian law is contingent on collaborative efforts, informed decision-making, ethical considerations, and adaptive governance strategies. There is an imperative need for sustained dialogue, research, and innovation in AI regulation to harness the transformative potential of AI technologies, mitigate risks, and foster a responsible, inclusive, and equitable AI-powered future for India. As AI continues to revolutionize various sectors and reshape societal norms and practices, the legal system must evolve, innovate, and adapt to ensure alignment with ethical principles, human values, and the evolving needs and aspirations of Indian society.

REFERENCES

1. Menon, R., AI and Indian Law: Emerging Issues and Challenges, 15 *INDIAN J. LEGAL STUD.* 34 (2022).
2. Sharma, A., Case Law on AI in India: An Analysis, 9 *INDIAN L. REV.* 200 (2021).
3. Ministry of Electronics & Information Technology, *National AI Strategy and Policy Framework* (Gov't of India 2020).
4. Jones, B. & Kumar, S., Regulatory Challenges in the Age of AI: A Comparative Analysis, 8 *INT'L J. L. & TECH.* 123 (2019).
5. Rao, S. & Desai, P., Data Protection and Privacy in the Era of AI: Global Trends and Challenges, 7 *PRIVACY & DATA PROT. J.* 234 (2020).
6. Smith, A., Ethical Considerations in AI: A Global Perspective, 12 *J. ARTIFICIAL INTELLIGENCE RES.* 45 (2020).
7. Patel, R. & Gupta, M., Intellectual Property Rights and AI: A Legal Perspective, 10 *J. INTELL. PROP. L.* 89 (2021).
8. Controller Gen. of Patents, Designs & Trade Marks, *Guidelines for Examination of Computer-Related Inventions (CRIs)* (Intellectual Prop. India 2020).
9. Ministry of Electronics & Information Technology, *Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021* (Gov't of India 2021).
10. NITI Aayog, *National Strategy for Artificial Intelligence* (Gov't of India 2018).
11. Singh, A., Regulating AI in India: Challenges and Prospects, 20 *J. LEGAL STUD.* 150 (2020).
12. Mittal, R. & Kapoor, S., Bias in AI: Challenges and Solutions, 25 *J. ARTIFICIAL INTELLIGENCE RES.* 210 (2020).
13. Verma, N. & Singh, P., Transparency in AI: Legal and Ethical Considerations, 3 *AI & ETHICS* 50 (2022).
14. Ministry of Electronics & Information Technology, *Personal Data Protection Bill, 2019* (Gov't of India 2019).
15. Mathur, A. & Sharma, P., Ethical Considerations in AI Regulation: A Legal Perspective, 14 *INDIAN L. REV.* 200 (2022).
16. Gupta, S. & Kumar, R., Building Legal Capacity for AI Governance in India, 15 *J. GOVERNANCE & POL'Y* 80 (2021).

WRONGFUL IMPLICATION OF INNOCENT PERSONS IN CYBERCRIME CASES:

A Study of Digital Identity Misuse and Investigative Lapses in Light of Article 21 of the Constitution of India

ABSTRACT

Digital technology's rapid proliferation across India has generated a troubling pattern: innocent individuals are routinely prosecuted as cybercriminals as a consequence of digital identity misuse and systemic investigative deficiencies. This paper examines how victims of IP address spoofing, SIM cloning, phishing, and account hijacking come to bear criminal liability for offences perpetrated by others using their stolen digital identities. Grounded in the constitutional guarantee of personal liberty under Article 21, this study critically evaluates the legislative gaps within the Information Technology Act, 2000 (IT Act), the IT (Amendment) Act, 2008, and the Bharatiya Nagarik Suraksha Sanhita, 2023 (BNSS), which together render innocent persons vulnerable to wrongful prosecution. Through analysis of judicial decisions and documented investigative failures, the paper demonstrates that the existing legal framework inadequately addresses the forensic complexities of digital attribution. Structural reform is urgently required, encompassing mandatory digital forensic standards, statutory safeguards against premature arrest, independent oversight of cyber investigations, and legislative recognition of digital identity theft as a discrete serious offence. Without such reform, the constitutional promise of Article 21 remains unrealised for those caught in the failures of the digital criminal justice system.

Keywords: Article 21, cybercrime, digital identity theft, wrongful prosecution, forensic lapses, IT Act, criminal justice reform, Bharatiya Nagarik Suraksha Sanhita.

I. INTRODUCTION

India's digital revolution has transformed the landscape of crime and criminal justice alike. With over 900 million internet users and one of the fastest-growing digital economies globally, the country has witnessed a steep surge in cybercrime. According to the National Crime Records Bureau (NCRB), cybercrime incidents increased by more than twenty-four percent in 2022, with upwards of 65,893 cases registered under the IT Act and allied provisions.[1] Embedded within these figures is a distressing reality: a significant proportion of those implicated are not perpetrators but victims — persons whose digital identities have been stolen, cloned, or falsely attributed by the actual offender.

Wrongful implication in cybercrime cases constitutes one of the gravest failures of contemporary criminal justice. Unlike traditional crime, where physical evidence and witness testimony anchor attribution, cybercrime investigation depends almost entirely on digital evidence — IP addresses, device identifiers, metadata, and authentication logs — all of which are susceptible to manipulation and misattribution. A skilled offender can route criminal activity through an unsuspecting person's IP address, clone a SIM card to execute financial fraud, or exploit stolen credentials to commit offences that law enforcement will then wrongly attribute to the identity holder.

The consequences for the wrongly accused are severe and often permanent. Article 21 of the Constitution of India guarantees that no person shall be deprived of life or personal liberty except in accordance with a procedure established by law. The Supreme Court of India has interpreted this provision expansively to include the rights to dignity, privacy, reputation, and a fair trial.[2] When an innocent person is arrested, publicly named as a cybercriminal, dismissed from employment, and subjected to protracted criminal proceedings — all on the basis of a defective IP lookup or inadequate forensic investigation — each of these rights stands violated. The state, paradoxically, becomes the instrument of harm against the very citizen it is constitutionally bound to protect.

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[1] Nat'l Crime Recs. Bureau, Crime in India 2022, Ministry of Home Affs., Gov't of India 47 (2023).

[2] K.S. Puttaswamy v. Union of India, (2017) 10 SCC 1 [hereinafter *Puttaswamy*].

This paper proceeds in the following order. Part II contextualises the nature of digital identity and its mechanisms of misuse. Part III analyses structural weaknesses in India's investigative and legal framework. Part IV examines the constitutional framework under Article 21. Part V identifies legislative gaps in existing statutes. Part VI analyses relevant judicial decisions. Part VII surveys comparative international frameworks. Part VIII proposes a set of targeted reforms, and Part IX concludes.

II. DIGITAL IDENTITY AND THE MECHANISMS OF ITS MISUSE

A. The Concept of Digital Identity

Digital identity comprises the aggregate of information that identifies a person or entity within the online environment: IP addresses, email addresses, device identifiers (MAC addresses and IMEI numbers), social media accounts, digital certificates, biometric data, and authentication credentials.[3] In cybercrime investigation, digital identity functions as the primary basis for attribution — it is the trail connecting a criminal act to its alleged perpetrator. The reliability of that attribution depends entirely on the integrity of the underlying identity, which cannot be assumed.

Indian law has not yet developed a comprehensive statutory definition of digital identity. The IT Act addresses discrete aspects — digital signatures under Section 3, electronic records under Section 4, and unauthorised access under Section 43 — but articulates no holistic legal framework for digital identity protection. The Digital Personal Data Protection Act, 2023 (DPDPA) marks a step forward in recognising individual data rights but falls short of directly addressing the forensic misattribution of digital identity in criminal proceedings.

B. Principal Mechanisms of Digital Identity Misuse

1. IP Address Spoofing and Proxy Routing

[3]Ravi Shankar Prasad, Digital Identity and Governance Framework, NASSCOM Policy Report 12 (2021).

Internet Protocol addresses are numerical labels assigned to network-connected devices. Law enforcement agencies routinely rely upon IP address logs as the initial step in identifying cybercrime suspects. However, IP addresses can be manipulated through Virtual Private Networks (VPNs), Tor networks, proxy servers, and botnet infrastructure, enabling offenders to route criminal activity through the IP address of an innocent third party.[4] Where investigators retrieve IP logs without further analysis — without examining metadata layers, device fingerprints, or network topology — an innocent subscriber whose IP address served merely as a conduit becomes the suspect.

A Lucknow case from 2021 illustrates this pattern. A school teacher was arrested by Uttar Pradesh Police on charges of transmitting obscene content online, solely on the basis of IP records obtained from an Internet Service Provider. The actual offender had routed traffic through the teacher's broadband connection via a compromised router. High Court intervention and an independent forensic audit established that the device used for transmission had never been in the teacher's possession.[5]

2. SIM Card Cloning and Mobile Identity Theft

SIM card cloning involves duplicating a subscriber's SIM to intercept communications and conduct fraudulent transactions under the subscriber's mobile identity. In India, mobile numbers are linked to Aadhaar, bank accounts, and UPI payment systems, making mobile identity theft a gateway to a wide range of financial and communicative offences. When fraud is committed using a cloned SIM, the subscriber whose number was cloned becomes the primary suspect in the digital trail — unless law enforcement possesses both the capability and the motivation to investigate further.

Sections 66C and 66D of the IT Act criminalise identity theft and cheating by impersonation using computer resources respectively. These provisions are, however, primarily invoked against perpetrators once apprehended, rather than to exonerate victims already wrongly implicated. The

[4]Internet Security Alliance, Cyber Threats and Digital Identity Misuse: A Global Overview 34 (2022).

[5]Lucknow Teacher Wrongly Arrested for Cybercrime Based on IP Address, The Wire (Mar. 15, 2021), https://thewire.in/law/lucknow-teacher-cybercrime-ip-address (last visited Apr. 20, 2025).

absence of a mandatory forensic verification step — requiring investigators to confirm exclusive possession and use before arrest — creates a structural vulnerability that recurrently harms innocent persons.

3. Phishing, Account Hijacking, and Credential Theft

Phishing involves the use of deceptive communications to induce users to surrender their login credentials, enabling attackers to operate under the victim's digital identity. Account hijacking through phishing has been used to publish unlawful content, commit financial fraud, and transmit threats — all appearing to originate from the registered account holder. Law enforcement, upon receiving complaints, frequently obtains activity logs from platforms and proceeds against the registered user without considering the possibility of account compromise.

This investigative shortcut violates the foundational precept of criminal law that liability must be personal and must rest on culpable individual conduct. The Supreme Court affirmed in *K.S. Puttaswamy v. Union of India*[6] that informational privacy is a fundamental right and that any state action threatening a person's data must be proportionate and procedurally fair. Treating account ownership as conclusive evidence of criminal activity — without adequate forensic investigation — is precisely the kind of disproportionate and arbitrary state conduct that Article 21 prohibits.

4. Deepfakes and Synthetic Digital Identity

An increasingly pernicious form of digital identity misuse is the creation of synthetic content — deepfakes — that places an innocent person's face, voice, or digital likeness in criminal or defamatory contexts. Artificial intelligence-powered deepfake technology can produce highly convincing fabricated videos and audio recordings appearing to show a person committing an offence. Indian courts and law enforcement agencies are only beginning to grapple with this challenge, and no specific statutory provision yet addresses deepfake-based identity misuse in the context of wrongful criminal implication.

[6]Puttaswamy, *supra* note 2.

III. INVESTIGATIVE LAPSES: STRUCTURAL FAILURES IN INDIA'S CYBERCRIME ENFORCEMENT

A. Inadequate Forensic Capacity

The most fundamental structural failure in India's cybercrime enforcement apparatus is the acute shortage of trained digital forensic personnel. As of 2023, India had only approximately one thousand certified digital forensic examiners across all law enforcement agencies — a ratio starkly insufficient relative to the volume and complexity of cybercrime cases.[7] Most police stations, particularly at district and sub-divisional levels, lack access to forensic cyber laboratories. Investigations are therefore conducted by officers who, at best, possess a rudimentary understanding of digital evidence and, at worst, display a dangerously overconfident familiarity with surface-level tools such as IP lookup services.

The consequence of this forensic deficit is well-documented. Officers frequently rely on first-order digital evidence — an IP address, a phone number, a registered email — without conducting the deeper analysis that would reveal whether the identified device was actually used for the alleged offence, whether the account was accessed by someone other than the registered user, or whether the digital trail had been deliberately manipulated. This shallow investigative methodology creates a direct pathway from digital identity to wrongful arrest.

B. Over-Reliance on Subscriber Data Without Corroboration

Law enforcement agencies routinely obtain subscriber data from Internet Service Providers and telecom operators under Sections 94 to 99 of the BNSS and Section 69B of the IT Act. This data identifies the registered subscriber of a particular IP address or mobile number at the material time.

[7] Ctr. for Internet & Soc'y, State of Digital Forensics in India 8 (2023).

The critical error lies in equating subscriber identity with offender identity — a conflation that is forensically indefensible.

A registered subscriber is merely a contractual party to a service agreement. Multiple family members may share a broadband connection; a mobile phone may be borrowed, stolen, or remotely compromised. Without device-level forensic analysis — examination of the actual device for logs, browser history, metadata, authentication records, and location data — subscriber identity alone is insufficient to establish personal culpability. Yet the arrest of subscribers on the basis of IP logs alone remains a routine practice.

C. Absence of Enforceable Digital Evidence Standards

India has no mandatory, legally enforceable standard for the collection, preservation, and analysis of digital evidence in cybercrime investigations. The Cyber Crime Investigation Manual issued by the Ministry of Home Affairs provides guidelines, but these are advisory rather than statutory. The result is significant variation in investigative quality, with many investigations proceeding without basic forensic principles such as chain of custody documentation, hash verification, and the use of write-blocking tools to prevent alteration of original evidence.

Section 63 of the Bharatiya Sakshya Adhiniyam, 2023 (BSA) — carrying forward Section 65B of the Indian Evidence Act, 1872 — requires certification to authenticate electronic records produced as evidence. The Supreme Court in *Arjun Panditrao Khotkar v. Kailash Kushanrao Gorantyal*[8] held that this requirement is mandatory and non-waivable. While this decision strengthens the evidentiary standard at trial, it does not correct the investigative process upstream, where defective digital evidence is gathered and used to justify arrest and detention long before any judicial scrutiny is applied.

D. Premature Arrest and Misuse of Custodial Powers

[8] Arjun Panditrao Khotkar v. Kailash Kushanrao Gorantyal, (2020) 7 SCC 1.

One of the most constitutionally consequential investigative lapses is the tendency to arrest cybercrime suspects at the earliest opportunity, before investigations are complete and before the accused have had any opportunity to establish their innocence. The Supreme Court's directions in *Arnesh Kumar v. State of Bihar*[9] require police officers to satisfy themselves of the necessity of arrest before proceeding, and Magistrates to apply independent consideration before remanding accused persons to custody. These guidelines are routinely disregarded in cybercrime cases, where technical complexity is used to justify extended custodial interrogation that amounts to punishment before verdict.

IV. CONSTITUTIONAL FRAMEWORK: ARTICLE 21 AND THE RIGHTS OF THE WRONGLY ACCUSED

A. The Expansive Scope of Article 21

Article 21 of the Constitution of India provides that no person shall be deprived of life or personal liberty except according to procedure established by law. Decades of judicial interpretation have transformed this provision into the most expansive guarantee in the constitutional order. The Supreme Court has recognised that Article 21 encompasses not merely freedom from arbitrary detention, but a constellation of substantive rights including the right to dignity,[10] privacy,[11] reputation,[12] a fair trial,[13] and compensation for state-inflicted injury.[14]

Each of these rights is directly engaged when an innocent person is wrongly implicated in a cybercrime case. Personal liberty is violated by unlawful arrest. Dignity is violated by public identification as a criminal. Privacy is violated by the unregulated seizure and examination of personal devices and data. Reputation is violated by the social and professional consequences of a

[9]Arnesh Kumar v. State of Bihar, (2014) 8 SCC 273.
[10]Francis Coralie Mullin v. Adm'r, Union Territory of Delhi, (1981) 1 SCC 608.
[11]Puttaswamy, *supra* note 2.
[12]Kiran Bedi v. Comm. of Inquiry, (1989) 1 SCC 542.
[13]Maneka Gandhi v. Union of India, (1978) 1 SCC 248.
[14]Nilabati Behera v. State of Orissa, (1993) 2 SCC 746.

criminal accusation. And the right to a fair trial is undermined when the investigative foundation of the case is structurally defective.

B. The Right to Privacy in the Digital Age

The nine-judge Constitution Bench in *Justice K.S. Puttaswamy (Retd.) v. Union of India*[15] held unequivocally that privacy is a fundamental right under Article 21, encompassing informational privacy — the right of persons to control information about themselves. In the cybercrime investigation context, this right is implicated when law enforcement accesses digital communications without adequate legal authority, when subscriber data is disclosed to investigators without judicial oversight, and when personal devices are seized and examined without proportionate justification.

The *Puttaswamy* framework requires that any infringement of privacy satisfy a tripartite test: legality (authorisation by law), legitimate aim (a pressing public purpose), and proportionality (the least intrusive means of achieving that aim). Applied to cybercrime investigations, this demands that investigative techniques — data collection, device seizure, digital surveillance — be proportionate to the offence under investigation and accompanied by adequate procedural safeguards. The current framework falls short of this standard in critical respects.

C. The Right Against Arbitrary Arrest and Detention

Article 21, read with Article 22, guarantees that no person may be arrested without a valid legal basis and that every arrested person must be produced before a Magistrate within twenty-four hours. The Supreme Court in *D.K. Basu v. State of West Bengal*[16] prescribed comprehensive guidelines for lawful arrest, requiring documentation, communication of grounds, and notification of family members. In cybercrime cases, where the evidentiary basis for arrest is technical and opaque, the accused frequently lacks any immediate means to challenge the foundation of their detention.

[15]Puttaswamy, *supra* note 2.
[16]D.K. Basu v. State of West Bengal, (1997) 1 SCC 416.

D. The Right to Compensation for State Wrongdoing

The Supreme Court has recognised, in a line of decisions beginning with *Rudul Sah v. State of Bihar*[17] and developed in *Nilabati Behera v. State of Orissa*[18] and *D.K. Basu*, that victims of unlawful state action — including wrongful arrest and detention — are entitled to monetary compensation as a constitutional remedy under Article 21, enforceable through writ jurisdiction. This remedy remains largely inaccessible in practice given the difficulty of establishing that an investigating agency acted with malice or gross negligence rather than merely poor judgment. A robust statutory compensation framework, shifting the burden to the state to demonstrate investigative adequacy, would both provide meaningful redress and create strong institutional incentives for investigative rigour.

V. LEGISLATIVE GAPS: AN ANALYSIS OF THE EXISTING LEGAL FRAMEWORK

A. The Information Technology Act, 2000 and Its Amendments

The IT Act, enacted to regulate electronic commerce and cybercrime, was significantly amended by the IT (Amendment) Act, 2008. The Act creates offences ranging from unauthorised access (Sections 43 and 66) to identity theft (Section 66C), cheating by impersonation (Section 66D), and publication of obscene material (Section 67). It also empowers governmental authorities to intercept and decrypt information (Section 69) and to monitor and collect traffic data (Section 69B).

Despite this breadth, the IT Act contains critical gaps from the perspective of protecting innocent accused persons. It establishes no mandatory pre-arrest verification procedure for cybercrime cases, leaving it entirely to investigating officers to determine when a suspect has been sufficiently identified. It requires no forensic corroboration of digital evidence before arrest. The definition of identity theft under Section 66C — limited to dishonest use of electronic signatures, passwords, or unique identification features — does not address the broader phenomenon of digital identity misattribution that leads to wrongful prosecution. And the Act creates no civil or criminal liability

[17]Rudul Sah v. State of Bihar, (1983) 4 SCC 141.
[18]Nilabati Behera*, supra* note 14.

for investigating agencies that wrongfully implicate innocent persons through negligent digital forensics.

B. The Bharatiya Nagarik Suraksha Sanhita, 2023

The BNSS, which replaced the Code of Criminal Procedure, 1973, introduces certain reforms to arrest procedure and electronic evidence. Section 173 incorporates provisions concerning electronic records in investigations; Sections 94 to 99 govern the production of documents, including electronic records. The BNSS also introduces a requirement for mandatory forensic examination in relation to serious offences.

These provisions represent incremental progress, but fall short of what is required. The mandatory forensic examination requirement applies only to offences punishable by seven years or more — a threshold that excludes many common cybercrime offences under the IT Act. The BNSS does not establish a mandatory pre-arrest digital identity verification protocol, does not define standards for the collection and analysis of digital evidence, and creates no mechanism for independent review of digital evidence before arrest in cybercrime cases.

C. The Bharatiya Sakshya Adhiniyam, 2023

The BSA, replacing the Indian Evidence Act, 1872, carries forward the essential structure of Section 65B in its Section 63, requiring certification for the admissibility of electronic records. The Supreme Court's authoritative interpretation in *Arjun Panditrao Khotkar* reinstated the mandatory certification requirement and significantly raised the evidentiary bar for electronic records.

The BSA does not, however, address the pre-trial or investigative phase. The certification requirement governs admissibility at trial — it does not govern the quality of forensic analysis that must precede arrest. An investigating officer may arrest a person based on an IP address log that would be inadmissible at trial, subjecting the innocent accused to the full ordeal of arrest, detention, and public accusation before any evidentiary standard is applied. This disconnect between the

investigative and evidentiary frameworks is a fundamental gap that legislative reform must address.

D. The Digital Personal Data Protection Act, 2023

The DPDPA establishes rights for data principals and obligations for data fiduciaries in the processing of personal data. While it represents India's most comprehensive engagement with data rights, it is primarily a data governance statute. Law enforcement agencies are largely exempt from its provisions when acting in furtherance of an investigation — an exemption that reflects a legitimate tension between privacy rights and investigative necessity, but leaves a significant gap. No legal framework specifically regulates how law enforcement may collect, use, and rely upon personal data in cybercrime investigations in a manner that protects innocent persons from wrongful attribution.

VI. JUDICIAL ANALYSIS: LANDMARK AND RECENT CASE LAW

A. Foundational Constitutional Decisions

The constitutional foundation for the rights of the wrongly accused in cybercrime cases rests upon landmark decisions spanning several decades. In *Maneka Gandhi v. Union of India*,[19] the Supreme Court held that the procedure established by law for deprivation of life or personal liberty must be fair, just, and reasonable — not merely technically authorised. Applied to cybercrime investigation, this principle demands that the process leading to arrest be substantively adequate.

In *Francis Coralie Mullin v. The Administrator, Union Territory of Delhi*,[20] the Court held that the right to life includes the right to live with basic human dignity. The public humiliation attending wrongful arrest — media coverage identifying a person as a cybercriminal, the social consequences of criminal charges — constitutes a violation of this constitutionally protected dignity.

[19]Maneka Gandhi, *supra* note 13.
[20]Francis Coralie Mullin, *supra* note 10.

B. Decisions on Digital Evidence and Wrongful Attribution

In *Shafhi Mohammad v. State of Himachal Pradesh*,[21] a two-judge bench had held that the Section 65B certification requirement could be relaxed in certain circumstances. The Constitution Bench in *Arjun Panditrao Khotkar* overruled this position, reinstating the mandatory requirement and establishing that electronic records must satisfy a stringent authenticity standard — a standard which, if consistently applied at the investigative stage, would prevent many wrongful implications.

In *Srikantiah v. State of Karnataka*,[22] the Karnataka High Court quashed the arrest of a software engineer detained solely on the basis of an IP address log, holding that the investigating agency had failed to conduct adequate forensic analysis to establish that the accused had personally carried out the offending activity. The Court observed that an IP address is a necessary but not sufficient basis for arrest and directed a full device-level forensic examination before the investigation could proceed further.

The Bombay High Court in *Anand Teltumbde v. Union of India*[23] addressed, inter alia, the forensic integrity of electronic evidence and the need for independent examination of devices alleged to contain incriminating material — observations directly relevant to the broader problem of wrongful digital attribution.

C. Recent Judicial Developments

In *Vinod Dua v. Union of India*,[24] the Delhi High Court reaffirmed that the rights under Articles 19 and 21 impose obligations on the state to exercise restraint in initiating criminal proceedings, particularly where digital communications form the subject of a complaint. The Court's insistence on a higher threshold for FIR registration in cases involving digital expression is consistent with the principle that digital identity must be carefully scrutinised before it is treated as evidence of personal culpability.

[21] Shafhi Mohammad v. State of Himachal Pradesh, (2018) 2 SCC 801.
[22] Srikantiah v. State of Karnataka, CRL.P. No. 4827/2019 (Karnataka H.C. 2019).
[23] Anand Teltumbde v. Union of India, 2020 SCC OnLine Bom 575.
[24] Vinod Dua v. Union of India, (2021) 4 SCC 1.

The Supreme Court's decision in *Prabir Purkayastha v. State (NCT of Delhi)*[25] is particularly significant. The Court held that grounds of arrest must be communicated to the arrested person in writing and that this obligation cannot be discharged by a mere recitation of statutory provisions. In cybercrime cases — where arrest grounds are typically framed in technical language the accused cannot meaningfully contest — this ruling meaningfully strengthens the procedural protections available to the wrongly accused.

VII. COMPARATIVE PERSPECTIVES

A. United States: Fourth Amendment Protections and Digital Evidence

In the United States, the Fourth Amendment's protection against unreasonable searches and seizures has been applied to digital evidence in landmark decisions. In *Riley v. California*,[26] the Supreme Court held that law enforcement must obtain a warrant before searching the digital contents of a mobile phone seized incident to arrest, recognising that digital devices contain so comprehensive a record of a person's life that their examination constitutes a qualitatively different intrusion from physical search.

In *Carpenter v. United States*,[27] the Court held that government acquisition of cell-site location information from a wireless carrier constituted a Fourth Amendment search requiring a warrant supported by probable cause, rejecting the application of the third-party doctrine to comprehensive digital records. The *Carpenter* reasoning has significant implications for Indian law, where the absence of an equivalent judicial warrant requirement for subscriber data collection represents a major gap.

B. European Union: GDPR and the Law Enforcement Directive

The European Union's General Data Protection Regulation and the Law Enforcement Directive (LED) establish a comprehensive framework for personal data processing by both private entities

[25]Prabir Purkayastha v. State (NCT of Delhi), (2024) SCC OnLine SC 1146.
[26]Riley v. California, 573 U.S. 373 (2014).
[27]Carpenter v. United States, 585 U.S. 296 (2018).

and law enforcement. The LED imposes obligations of data minimisation, purpose limitation, and accuracy on law enforcement agencies processing personal data for investigative purposes. Article 4 of the LED requires that personal data processed in criminal investigations be adequate, relevant, and not excessive relative to the purposes for which it is processed — a standard that, if applied to IP-based suspect identification in India, would necessitate far more rigorous pre-arrest verification.

C. United Kingdom: Digital Forensic Standards

The College of Policing in the United Kingdom has developed mandatory Authorised Professional Practice standards for digital evidence handling, establishing protocols for the seizure, examination, and reporting of electronic material. These standards require investigators to document their methodology, apply forensically sound examination techniques, and consider alternative explanations for digital evidence before drawing conclusions about a suspect's personal involvement. India's equivalent guidance — the Cyber Crime Investigation Manual — lacks both the specificity and the mandatory authority of the United Kingdom's framework.

VIII. PROPOSED REFORMS: TOWARDS A CONSTITUTIONALLY COMPLIANT FRAMEWORK

A. Legislative Reforms

1. Mandatory Pre-Arrest Forensic Verification

The IT Act should be amended to require that, before any arrest on the basis of digital evidence in a cybercrime case, the investigating officer must obtain a forensic verification report from a certified digital forensic examiner confirming that the evidence establishes the personal involvement of the accused — not merely the use of an account, device, or network connection associated with the accused. This requirement should be non-waivable except where the accused is caught in the commission of the offence or where there is documented urgent necessity to prevent destruction of evidence, subject to Magistrate review within twenty-four hours.

2. Statutory Recognition of Digital Identity Theft

The IT Act should be amended to introduce a specific, aggravated offence of digital identity theft encompassing the full range of conduct by which criminals misuse another person's digital identity — including IP spoofing, SIM cloning, credential theft, account hijacking, and deepfake misuse. The penalty should reflect the severity of the offence: it not only enables harm to individuals but undermines the integrity of the digital criminal justice system by displacing criminal liability onto innocent persons.

3. A Statutory Compensation Scheme for the Wrongly Accused

Parliament should enact a statutory compensation scheme for persons wrongly implicated in cybercrime cases due to investigative negligence. The scheme should establish a presumption of compensation entitlement for any person against whom charges are ultimately dropped or who is acquitted following a finding that the digital evidence relied upon for arrest was inadequate, misattributed, or forensically unsound. The burden of demonstrating investigative adequacy should rest with the state.

B. Institutional Reforms

1. Independent Cyber Forensic Review Boards

India should establish independent Cyber Forensic Review Boards at the state level, with jurisdiction to assess the adequacy of digital forensic evidence before arrest warrants are executed in cybercrime cases. These Boards should comprise technical experts, legal practitioners, and civil society representatives, with authority to direct additional investigation before an arrest proceeds. Modelled on review mechanisms in financial crime enforcement, such Boards would provide a critical check on investigative overreach.

2. Mandatory Digital Forensic Training

All officers investigating cybercrime should be required to complete a certified digital forensics training programme before being authorised to conduct such investigations, covering IP attribution, device forensics, cloud evidence, chain of custody, and the limitations of first-order digital evidence. A tiered certification system — along the lines of those operating in the United

Kingdom and the United States — should be established, with senior investigative roles requiring higher certification levels.

3. Judicial Specialisation in Cybercrime Cases

Dedicated cyber courts, presided over by judges with specialised training in digital evidence and cybercrime law, should be established in all major jurisdictions. Magistrates reviewing remand applications in cybercrime cases should be required to apply a heightened scrutiny standard — examining not merely whether an FIR has been registered, but whether the digital evidence supporting arrest meets the minimum forensic standard prescribed by the amended IT Act.

C. Procedural Reforms

1. Written Grounds of Arrest in Plain Language

Consistent with the Supreme Court's direction in *Prabir Purkayastha*, grounds of arrest in cybercrime cases should include a plain-language explanation of the digital evidence relied upon, the forensic methodology used to identify the accused, and the specific nexus between the accused's personal conduct and the alleged offence. This would both inform the accused and create a documented record against which the adequacy of the investigation may be judicially reviewed.

2. Independent Forensic Audit Rights for the Accused

The accused in cybercrime cases should be granted a statutory right to commission an independent forensic examination of the digital evidence relied upon by the prosecution, by a certified examiner of their choosing. The prosecution should be required to make all original digital evidence available for this purpose, subject to appropriate chain of custody protocols. This right would partially address the informational asymmetry between the state and the accused in technically complex cybercrime cases, enabling the accused to effectively challenge forensically unsound investigative conclusions.

IX. CONCLUSION

Wrongful implication of innocent persons in cybercrime cases is not an occasional aberration in India's criminal justice system: it is a structural consequence of the mismatch between the technical complexity of digital crime and the investigative capacity, legal framework, and institutional culture of the agencies responsible for enforcement. At its heart, this failure is a constitutional failure — a systemic violation of the rights guaranteed by Article 21 to every person who stands falsely accused.

The analysis in this paper reveals that the problem operates at multiple levels simultaneously. At the technical level, digital identity is inherently susceptible to misuse through mechanisms that are sophisticated and rapidly evolving. At the investigative level, law enforcement agencies lack the forensic capacity to reliably distinguish between the perpetrator of a cybercrime and the person whose digital identity was weaponised to commit it. At the legislative level, the IT Act, the BNSS, the BSA, and the DPDPA contain critical gaps that leave innocent accused without adequate protection. And at the institutional level, a culture of premature arrest and superficial investigation replicates itself in the cybercrime context — with the added danger that technical opacity makes it harder still for the wrongly accused to challenge the case against them.

The reform agenda proposed in this paper — mandatory pre-arrest forensic verification, statutory recognition of digital identity theft, independent Cyber Forensic Review Boards, a statutory compensation scheme, mandatory judicial training, and a right to independent forensic audit — is ambitious but necessary. Each element is grounded in constitutional principle, supported by comparative experience, and responsive to specific structural failures identified in the analysis.

India stands at a critical juncture. Digital technology will grow more pervasive, cybercrime more sophisticated, and the potential for digital identity misuse ever greater. The legal system must evolve in step — not merely to punish cybercriminals more effectively, but to ensure that the constitutional guarantee of personal liberty and dignity remains meaningful for every person accused of a digital offence. The innocent must be protected, the state must be accountable, and the promise of Article 21 must be made real — not only in the courtroom but in the police station and the forensic laboratory where the fate of the accused is so often determined long before any judge is involved.

BIBLIOGRAPHY

I. Cases

Anand Teltumbde v. Union of India, 2020 SCC 575.

Arnesh Kumar v. State of Bihar, (2014) 8 SCC 273.

Arjun Panditrao Khotkar v. Kailash Kushanrao Gorantyal, (2020) 7 SCC 1.

Carpenter v. United States, 585 U.S. 296 (2018).

D.K. Basu v. State of West Bengal, (1997) 1 SCC 416.

Francis Coralie Mullin v. Administrator, Union Territory of Delhi, (1981) 1 SCC 608.

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

Kiran Bedi v. Committee of Inquiry, (1989) 1 SCC 542.

Maneka Gandhi v. Union of India, (1978) 1 SCC 248.

Nilabati Behera v. State of Orissa, (1993) 2 SCC 746.

Prabir Purkayastha v. State (NCT of Delhi), (2024) SCC OnLine SC 1146.

Riley v. California, 573 U.S. 373 (2014).

Rudul Sah v. State of Bihar, (1983) 4 SCC 141.

Shafhi Mohammad v. State of Himachal Pradesh, (2018) 2 SCC 801.

Srikantiah v. State of Karnataka, CRL.P. No. 4827/2019 (Karnataka H.C. 2019).

Vinod Dua v. Union of India, (2021) 4 SCC 1.

II. Legislation

Bharatiya Nagarik Suraksha Sanhita, 2023 (India).

Bharatiya Sakshya Adhiniyam, 2023 (India).

Constitution of India, 1950.

Digital Personal Data Protection Act, 2023 (India).

European Union Law Enforcement Directive 2016/680.

General Data Protection Regulation 2016/679 (EU).

Information Technology Act, 2000 (India).

Information Technology (Amendment) Act, 2008 (India).

III. Books and Articles

Aparna Viswanathan, Cyber Law: Indian & International Perspectives (LexisNexis 2012).

Centre for Internet and Society, State of Digital Forensics in India (2023).

Internet Security Alliance, Cyber Threats and Digital Identity Misuse: A Global Overview (2022).

Nandan Kamath, Law Relating to Computers, Internet and E-Commerce (Universal Law Publishing 2014).

NASSCOM, Digital Identity and Governance Framework (2021).

National Crime Records Bureau, Crime in India 2022, Ministry of Home Affairs, Government of India (2023).

Pavan Duggal, Cybercrime Investigation in India: Issues and Challenges, 3 Indian J. Criminology 45 (2019).

Rohas Nagpal, Cyber Crime & Cyber Laws in India (Asian School of Cyber Laws 2008).

Usha Ramanathan, A Jurisprudence of Identity, 42 Econ. & Pol. Wkly. 18 (2007).