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POWER STRUCTURE IN UNITED STATES: WHO HAS THE SUPREMACY – THE CONSTITUTION, CONGRESS OR THE PRESIDENT

Dr. Shridul Gupta*

The whole world knows that the U.S. President is the most powerful person and has tremendous powers, and may be called the most powerful individual. But few know that the President draws all of his powers from the law of Presidential power. However, there are endless questions about what the law of Presidential power does, and does not, allow the United States President to do. This article offers some answers. It explains laws that govern Presidential power by describing what the President can do, and how he can do it. The article also addresses the opposite side of the question, concerning what the President cannot do, and who has the legal power to stop him. The article explains that the United States Constitution makes it very difficult for any President to introduce significant reforms on his own. The article will take you on a journey through the text of the U.S. Constitution as well as many other sources of authority that empower, yet at the same time limit, the presidential power. Though the significance of these legal sources is complex and sometimes disputed, embarking on this journey is vital in a democracy.

Keywords- Checks and balances, tyranny, president's nomination, veto power, executive power

Introduction

Donald Trump, in his 2016 Republican National Convention speech before millions of viewers, claimed that “Nobody knows the system better than me, which is why I alone can fix it.”¹ Trump’s election campaign promised many reforms, including constructing a wall on the Mexico border, completely stopping the entry of Muslims into the United States, repealing the Affordable Care Act (Obamacare), and dismantling various other

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1 Convention Speech of Donald Trump, available at <https://www.politico.com/story/2016/07/full-transcript-donald-trump-nomination-acceptance-speech-at-rnc-225974>

regulations.² Trump promised that he would do all these things alone. But within two weeks of his Presidency, Trump got a rude shock from the United States' constitutional doctrine of checks and balances between Congress, the President, and the Executive.

On 3rd February, 2017, the President's lawyers appeared before the District Court to defend the legality of Trump's order banning Muslim travelers from seven countries from entering the U.S. The suit, named *Washington v. Trump*, was filed by the State of Washington. Judge Robart held that the State of Washington had demonstrated a substantial likelihood that the travel ban violated U.S. law. As a result, travel bans could no longer be enforced anywhere in the United States.³

Shocked, President Trump questioned whether a federal district judge could single-handedly put his travel ban on hold. He said on Twitter, "The opinion of this so-called Judge, which essentially takes law-enforcement away from our Country, is ridiculous and will be overturned!"⁴ Thereafter, on 6th February, 2017, the President again tweeted, "just cannot believe a judge would put our country in such peril. If something happens blame him and Court System. People pouring in. Bad!"⁵ But when the Appellate Court also upheld Trump's order, President Trump withdrew his first travel ban order and issued a revised travel ban. However, the federal court again put even the revised restrictions on hold.

In another court, when a different federal judge froze another executive order, the White House again questioned the legitimacy of the federal judiciary and called the court's order "egregious overreach by a single, unelected district judge."⁶ Thus, in the first 100 days of Trump's Presidency, his major campaign promises, the "100-day Action Plan to Make America

2 Jenna Johnson, Donald Trump Calls for 'Total and Complete Shutdown' of Muslims Entering the United States, *Washington Post* (Dec. 7, 2015), available at <https://www.washingtonpost.com/news/post-politics/wp/2015/12/07/donald-trump-calls-for-total-and-complete-shutdown-of-muslims-entering-the-united-states/>

3 *Washington v. Trump* (2017) WL 462040 (W.D. Wash).

4 Donald J. Trump (@realDonaldTrump), February 4, 2017, available at <https://twitter.com/realdonaldtrump/status/827867311054974976?lang=en>

5 Donald J. Trump (@realDonaldTrump), February 6, 2017, available at <https://twitter.com/realdonaldtrump/status/828342202174668800>

6 The White House Statement on Sanctuary Cities Ruling, 25th April, 2017, available at <https://www.whitehouse.gov/briefings-statements/statement-sanctuary-cities-ruling/>

Great Again,” remained unfulfilled.⁷ It happened because President Trump overlooked that the U.S. Constitution creates a checks-and-balances system for dividing powers, to prevent too much authority from concentrating in one person’s hands. The U.S. Constitution intentionally created this division between the different branches, as well as between the States and the Federal Government.⁸ But these judicial rulings gave President Trump a public lesson in civics. These judicial rulings confirm that while the law grants the President immense power, it also imposes significant limits, and that the “President is not above the law.”

The Limit of President Power

The limit of the President’s power had already been explained in 1952 by President Harry S. Truman, while observing the situation that incoming President-elect Dwight D. Eisenhower, a former Army general, was likely to face. Truman said: “He’ll sit here, and he’ll say, ‘Do this! Do that!’ And nothing will happen. Poor Ike! - It won’t be a bit like the Army. He’ll find it very frustrating.”⁹

The U.S. Constitution makes it impossible for a President to make significant changes alone. U.S. constitutional history confirms that Presidents attempting major reforms alone have failed. The obstacles to such unilateral reforms come not only from the courts but also from the U.S. Congress, the States, and many other important forces. Only those Presidents who secured the cooperation of all the affected parties, both political and legal, succeeded in enacting dramatic change.¹⁰ President Obama explained that one reason for the delays in fulfilling his campaign promises was that “a President is not a king,” but “rather he is only the head of the executive branch of government and is required to follow the

7 Donald J. Trump, 2016, Donald Trump’s Contract with American voters, available at <https://apps.washingtonpost.com/g/documents/politics/donald-trumps-contract-with-the-american-voter/2268/>

8 Sanford Levinson & Jack M. Balkin, Constitutional Crises, 157 U. Pa. L. Rev. 2009 p. 707 & 711, available at https://scholarship.law.upenn.edu/penn_law_review/vol157/iss3/1/

9 Robert H. Ferrell, Harry S. Truman: A Life, University of Missouri Press, 1997 U.S.A, P. 379.

10 William G. Howell, Power without Persuasion: The Politics of Direct Presidential Action, Princeton University Press, 2003.

law.”¹¹ The Constitution imposes a powerful checks-and-balances doctrine and grants the President authority to hold office for a term of four years. The U.S. Constitution does not vest authority in a dictator.¹²

An important consequence of this “checks and balances” doctrine is that it gives every citizen the power to keep a check on the President. Democracy in the United States survives on it. Benjamin Franklin recognized the reality of “checks and balances” from the very start. One day in the year 1787, he was asked by a woman, “Well Doctor, what have we got, a Republic or a Monarchy?” Franklin gave her a very crisp answer, “A Republic, if you can keep it.”¹³

How Does the Doctrine of Checks and Balances Create Roadblocks for U.S. Presidents?

John Adams, in his letter to Thomas Jefferson, observed that “power must never be trusted without a check.”¹⁴ The founders of the United States preferred conflict over harmony. According to them, conflict is a sign of good government. The absence of conflict leads to an accumulation of authority. “The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.”¹⁵

For preventing this threat of tyranny, the founders drafted the Constitution by defining powers and distributing them among different governmental actors, whether appointed or elected. Because of this system of checks and balances, no one in the U.S. Government, or even the President, can have an unchecked ability to make or revise the law.¹⁶

“Checks and balances” in the U.S. constitutional structure operate as a very powerful roadblock. There are many examples of when this doctrine caused difficulty for U.S. Presidents. For example, it caused the first U.S.

11 Univision news. (Jan. 31, 2013) President Obama’s interview with Univision, ABC NEWS, available at https://abcnews.go.com/ABC_Univision/Politics/transcript-president-barack-obama-interview-univisions-maria-elena/story?id=18365068

12 U.S Constitution Article II, Section 1.

13 Max Farrand, Records of the Federal Convention of 1787, at 85, available at http://oll-resources.s3.amazonaws.com/titles/1787/0544-03_Bk.pdf

14 Lester J. Cappon, Adams-Jefferson Letters: The Complete Correspondence Between Thomas Jefferson, Abigail & John Adams, 1987, p. 463.

15 In Federalist No. 47 by James Madison, 1788, available at <https://www.taraross.com/post/the-federalist-papers-no-47>.

16 James Madison, Federalist No. 51, 1788, available at <https://www.taraross.com/post/the-federalist-papers-no-51>.

President, George Washington, to fail to appoint his preferred nominee for a position in the Navy, because the Senate blocked it. President Washington was angry but succumbed to the Senate's decision. The law gives the Senate the legal authority to reject the President's nominees for certain high-level positions.¹⁷ Even George W. Bush, after his re-election in 2004, threw his full weight behind his project to privatize social security, saying, "I earned capital through this campaign and now intend to spend it." But Congress refused any help, and without its support, Bush's proposal remained only a proposal.¹⁸

Similarly, when President Barack Obama took office, he signed an executive order instructing the Government to close Guantanamo Bay, an American-run detention camp in Cuba, no later than January 2010.¹⁹ This order triggered resistance and legal roadblocks from Congress, because Congress had enacted a statute barring the transfer of such prisoners into the U.S.²⁰ It thwarted Obama's efforts. Even over his two terms as President, Obama could not fulfill this campaign promise.

Legal Structure of United States Government

The Constitution creates the National Government and thereafter divides its powers among its branches. These include the Legislative, Executive, and Judicial Branches. The Constitution also imposes a separate division of power between the U.S. States and the National Government. Additionally, it gives citizens certain protections against the Federal Government or the State Governments. Thus, the Constitution does not concentrate power in one person, in one branch of government, or even in one government. Thus, it is described as "a government of laws and not of men."²¹

17 Origins of Senatorial Courtesy, U.S. Senate Historical Office, Senate Stories, July 5, 2022, available at <https://www.senate.gov/artandhistory/senate-stories/origins-of-senatorial-courtesy.htm>.

18 William A. Galston, 21st September, 2007, Why the 2005 Social Security Initiative Failed, and What it Means for Future, available at <https://www.brookings.edu/research/why-the-2005-social-security-initiative-failed-and-what-it-means-for-the-future/>

19 Exec. Order No. 13,492, 74 Fed. Reg. 4897 (Jan. 22, 2009), available at <https://www.presidency.ucsb.edu/documents/executive-order-13492-review-and-disposition-individuals-detained-the-guantanamo-bay-naval>.

20 National Defense Authorization Act for Fiscal Year 2011, Pub. L. No. 111-383, § 1032, 124 Stat. 4137 (2011); Statement by the President on H.R. 6523, Jan. 7, 2011, available at <https://obamawhitehouse.archives.gov/realitycheck/node/24934>.

21 Marbury vs Madison. (1803) 5 U.S 137, 163.

Division of Power Among the Branches of Government

The Constitution divides the powers of the U.S. Government among three equal branches. First, the Constitution creates the Legislative Branch, which consists of the U.S. Senate, made up of 100 members, two from each of the fifty States. Each Senator is elected for a term of six years through an election that involves all voters of the State. The number of members representing a State depends upon the number of people living in that State.

The second branch is the Executive Branch, which is headed by the U.S. President. It is a very large branch, comprising over 100 federal agencies, including, among others, the Department of Labor, the Social Security Administration, the Department of Justice, and the Environmental Protection Agency. Each of these agencies is created by Congress, not established by the Constitution. Millions of people working in the Executive Branch help the President exercise the power the Constitution calls “Executive Power,” a power that carries out and enforces all the laws enacted by Congress.²²

The third and final branch is the Judicial Branch. This Judicial Branch interprets the law in deciding lawsuits that come before the courts. The design of the Judicial Branch is such that the Constitution creates the Supreme Court and the federal courts.

Congress created two layers of federal courts. The first layer is the district courts, in which cases are filed and decided. The second layer is the Courts of Appeals, in which judges review the district courts’ decisions. Thus, in the judicial hierarchy, the district courts are at the lowest level, and the appellate courts are in the middle.²³

But even though they sit at the bottom, federal district courts possess tremendous power. If a judge of a federal district court finds an executive branch action unlawful, he or she might issue an order halting the action nationwide, not just within that judge’s own district. The ability to issue this type of injunction is an extraordinary power.²⁴ Yet, unless and until an appellate court overturns the district court’s ruling, a nationwide injunction will block the executive branch action across the entire country. President Trump experienced this firsthand when Judge Robart put the

22 U.S. Const. Article II, Section 1.

23 28 U.S.C. § 41 (establishing the courts of appeals); 28 U.S.C. § 132 (creation and composition of the district courts), available at <https://www.law.cornell.edu/uscode/text/28/41> and <https://www.law.cornell.edu/uscode/text/28/132>.

24 Samuel L. Bray, Multiple Chancellors: Reforming the National Injunction, 131 Harv. L. Rev. 417 (2017), available at <https://ssrn.com/abstract=2864175>.

first travel ban on hold. Each judge is appointed through a President's nomination and the Senate's confirmation. Once they are seated, the Constitution guarantees them lifetime tenure and salary safeguards.²⁵ As a result, most of these judges remain in office long after the end of the term of the President who nominated them. Constitutional protections shield judges from political pressure, allowing the Judicial Branch to operate independently of the Government.

Power Division between State Government and Federal Government

In reference to the division of powers between the Federal Government and State Governments, Justice Kennedy explained that the founders of the Nation "split the atom of sovereignty." "It was the genius of their idea that U.S. citizens enjoy two political capacities, one of State and another of Federal, each protected from incursion by the other."²⁶

The Founders created an innovative political arrangement in the United States, where two sets of governments governed the people in the same place, yet no one was entirely in charge of the other. This phenomenon was called federalism. In the United States, fifty State Governments had control over their own affairs. Each State Government consists of a Legislative, an Executive, and a Judicial Branch. Each State has its own system for appointing judges.

The Constitution gives the Federal Government only limited powers, and expressly provides that those powers not given to the Federal Government may be exercised by the States, or by the people in those States.²⁷

People's Rights

The U.S. Constitution grants individuals certain rights that no government can infringe. These rights are "beyond the reach of majorities and officials" and cannot be violated by the Government, even if politicians (or their voting constituents) want them to do so.²⁸

1. The Government has no right to violate an individual's right to free speech.
2. It also protects an individual's right to engage in religious exercise.

25 U.S Constitution, Article III, Section 1.

26 U.S Term Limits, Inc. v. Thornton, 1995, 514 U.S 779, 838

27 U.S Constitution, Xth Amendment

28 West Virginia State Board of Education v. Barnette, 1943, 319 U.S 624, 638

3. It also stops the Government from establishing a national religion.²⁹
4. The Fifth and Fourteenth Amendments provide due process clauses. This means that the Government is prevented from taking a person's life, liberty, or property without proper due process.³⁰

Powers of the President of the U.S.

Despite all these restraints and roadblocks, this does not mean that the U.S. President lacks power. Rather, each President enjoys sweeping powers in international affairs. In the year 1952, in the case of *Youngstown Sheet & Tube Company v. Sawyer*, the Supreme Court issued a significant decision on the powers of the President.³¹

The facts of the case were as follows. During the Korean War, the U.S. Army needed a continuous supply of steel, but the Steelworkers' Union threatened that its members would strike unless they received an increase in wages. The steel companies' management refused to increase the steelworkers' wages until the Government increased the price of steel. The U.S. President, Harry S. Truman, asked the union and the companies to resolve their disagreements. But in April 1952, fearing that a strike could lead to a steel shortage, the President, just hours before the steelworkers' strike, ordered government officials to seize control of private steel mills and operate them. In response, steel mill company owners filed a case before a federal judge to block Truman's order. The steel companies' cases led to a series of cases that culminated in the *Youngstown Sheet Co.* case, addressing the legal limits of the President's powers. The Supreme Court held that the President had acted beyond his powers, because the President's power to issue an executive order arises from Congress or from the Constitution. The Supreme Court held that neither the Constitution nor any law passed by Congress gave the President the power to nationalize private steel mills, so control of the mills was returned. This decision sent a clear message to the President: there are limits on presidential power, and the law defines those limits. Justice Hugo Black, in this case, said, "The President's power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself." The President's power is grounded in two sources: (1) the Constitution, and (2) laws passed by Congress. However, the Constitution provides a wide range of powers to the President, including the "power to veto bills" passed by the U.S. Congress.³²

29 U.S Constitution, Amendment I.

30 U.S Constitution, Amendments V, XIV.

31 1952, 343 U.S. 579, 585

32 Patricia L. Bellia, *The Story of the Steel Seizure Case*, in *Presidential Powers Stories*, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1147039

What Does the Constitution Say About Presidential Powers?

The Constitution establishes the office of the President and grants the President the following powers:

- Recommend laws to Congress
- Veto or sign bills passed by the Houses of the U.S. Congress
- Appoint Supreme Court Justices and other government officials, subject to Senate approval
- Enter into international treaties, subject to Senate approval
- Pardon federal criminal offenses³³

Despite the brevity of this list, the Constitution grants the President a great deal of authority, set forth in its explicit text or implied from its language and structure.

The Power to Recommend and Veto Legislation

Only the Congress has the power to make law. This power is not given to the U.S. President. Article I, Section 1 of the Constitution states, “All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.” However, the Constitution gives the President two express powers that enable him to influence the legislative process:

First, the Constitution empowers the President to recommend laws to Congress that he deems “necessary and expedient.”³⁴ However, the Constitution does not require Congress to accept what the President recommends. For example, in 1993, President Bill Clinton delivered to Congress a legislative blueprint for universal health insurance, but very few members were willing to support it, so the President’s proposal never became law.³⁵

However, this constitutionally conferred power can help a President persuade Congress to enact major legislative reform. For example, President Lyndon B. Johnson pushed the Civil Rights Bill through Congress, and it ultimately became law. Today, the Civil Rights Act is considered one of the landmark pieces of legislation in the field of civil rights.³⁶

33 U.S Constitution, Article II, Section 2, clause 1.

34 U.S Constitution, Article II, Section 3

35 Robert Pear, Clinton’s Health Plan: The Overview, 28th October, 1993; available at <https://www.nytimes.com/1993/10/28/us/clinton-s-health-plan-overview-congress-given-clinton-proposal-for-health-care.html?pagewanted=all>

36 Richard E. Neustadt, Presidential Power and Modern Presidents: Politics of Leadership from Roosevelt to Regan, 1990

Second, in addition to recommending laws to Congress, the Constitution also allows him to veto legislation, meaning he can block its passage.³⁷ Through this veto power, the President can forcefully push back against Congress's agenda.³⁸

However, there is a condition: when Congress submits a bill to the President for his consideration, he must either approve the entire bill as passed by both Houses of Congress for it to become law, or veto the whole bill. He cannot sign only part of a bill into law.³⁹ If the President chooses to veto a bill instead of signing it into law, he usually returns the entire bill to Congress with an explanation. Even after a bill has been vetoed, Congress can enact it into law with a two-thirds majority of both Houses of Congress.⁴⁰ The Constitution provides only to the President the power to appoint high-ranking officials and federal judges. However, this power is limited by the requirement of "the advice and consent of the Senate."⁴¹

The Power of the U.S. President to Remove Officials

The Constitution gives the President a contrasting set of powers. The President is never able, under any circumstances, to remove a federal judge from office. Federal judges can be impeached only if they are impeached by the House and convicted by the Senate. Thus, judges have powerful protections against political reprisal. But, in contrast, the Constitution provides the President significant authority to fire officials who help execute the laws. It means that the President can fire high-ranking officials for any reason.⁴²

However, even the President's authority to remove high-ranking officials is not without limits. If Congress wants to limit this power, it can do so by passing a statute. The U.S. Supreme Court held this limitation to be constitutionally permissible.⁴³ Congress generally imposes these kinds of limits on the President's removal power when it wants to protect certain high-level officials from presidential influence.⁴⁴

37 U.S Constitution, Article I, Section 7, clause 2

38 Vetoes, United States Senate available at <https://www.senate.gov/legislative/vetoes/vetoCounts.htm>

39 Clinton v. City of New York, 524 U.S. 417 (1998).

40 U.S Constitution, Article I, Section 7, clause 3

41 U.S Constitution, Article II, Section 2, clause 2

42 Free Enterprise Fund v. Public Company Accounting Oversight Board, 2010, 561 U.S 477, 514

43 Humphrey's Executor v. United States, 1935, 295 U.S 602, 632

44 Morrison v. Olson, 1988, 487 U.S 654

The President's Power to Execute the Laws

The Constitution states that “the executive Power shall be vested in a President of the United States” and that “he shall take Care that the Laws be faithfully executed.”⁴⁵ This authority makes the President responsible for implementing and enforcing the nation’s many laws, which govern everything from air quality to Social Security benefits, from drug laws to national safety.

The President is the Commander-in-Chief of the armed forces. However, this clause has given rise to many interpretations. One view is to interpret the clause broadly, to provide legal authority for “any Presidential action in relation to the armed forces.” Such an interpretation gives sweeping powers to the U.S. President.⁴⁶ Another view interprets the clause narrowly, meaning “that the country’s armed forces ultimately remain under the supervision of the President, rather than a military leader or a dictator.”⁴⁷

In the context of this clause, the Youngstown case reflects, among other things, the fact that the Constitution expressly grants some military-related powers not to the President but instead to the U.S. Congress. The Constitution expressly contemplates that both the President and Congress shall be responsible for the country’s military-related decisions. The Youngstown case explains why the President has such sweeping legal authority to conduct military operations if Congress gives him express authority to do so. A current example is the 2001 terrorist attacks. After the terrorist attacks, the U.S. Congress passed a bill that authorized the President to take action against those whom the President determined had committed or aided terrorist activities.⁴⁸

Based on these powers, President Bush ordered military operations in Afghanistan. After President Bush, Presidents Obama and Trump also used this statute to take military action against ISIS. Before this statute, Congress had passed the War Powers Resolution in 1973, which imposed various consulting and reporting requirements on the President, requiring him to engage with Congress when the nation is at war. It also restricts the President’s ability to commit armed forces to military action for more

45 U.S Constitution, Article II, Section 1, clause 1; Section 3

46 Youngstown, 343 U.S at 637

47 Michael D. Ramsey & Stephen I. Vladeck, Commander in Chief Clause, available at <https://constitutioncenter.org/interactive-constitution/interpretation/article-ii/clauses/345>

48 Authorization for use of Military Force, Public Law. No. 107-40, 2001 available at <https://www.congress.gov/107/plaws/publ40/PLAW-107publ40.pdf>

than 60 days without obtaining congressional authorization.⁴⁹ However, the War Powers Resolution did not end the power struggle between the U.S. President and Congress in international affairs. Members of Congress still want to clarify the law on the use of nuclear weapons, specifically whether, as Commander-in-Chief, a President is allowed to order a nuclear attack without the approval of Congress.

Some legislators proposed a bill providing that if Congress has not declared war, the President has no authority to order a nuclear attack. The stated rationale was that nuclear weapons are extremely powerful, and that the Constitution places the “monumental decision to go to the war” in the hands of the people’s representatives, meaning Congress, rather than in the hands of a single President.⁵⁰ However, this legislation has not been enacted.

The President’s Power to Negotiate International Treaties

The President is empowered by the Constitution to negotiate international treaties.⁵¹ However, a treaty can be ratified only if two-thirds of the Senators vote in support. After ratification, a treaty becomes the law of the land. The U.S. Senate, in its first 200 years, approved more than 1,500 treaties and rejected only 21.⁵²

Conclusion

Thus, at face value, the President of the United States wields tremendous power. Yet, the President has power only because some source of law grants that power. The U.S. Constitution is a major source that gives the President the ability to perform specific tasks. In addition to the constitutional provisions, the statutes enacted by Congress provide vast powers to the President. Thus, the conclusion is that, whether constitutional or statutory in origin, the President’s power comes from a source of law. And the same source of law defines limits on power.

49 War Powers Resolution, Public Law No. 93-148, 87 Stat. 555 (1973), available at <https://uscode.house.gov/view.xhtml?path=/prelim@title50/chapter33&edition=prelim>

50 Restricting First Use of Nuclear Weapons Act of 2017, 115th Congress

51 U.S. Constitution, Article II, Section 2, clause 2.

52 Treaties, U.S. Senate, available at <https://www.senate.gov/artandhistory/history/common/briefing/Treaties.html>

DIGITAL SOVEREIGNTY: BALANCING NATIONAL INTERESTS AND GLOBAL INTERCONNECTIVITY

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As the world progresses towards a digital era, the idea of digital sovereignty has never been more critical in landscapes pertaining to international law, global governance, geopolitics, and national security. Digital sovereignty means a country has the ultimate authority over its digital assets and the flow of information within its borders. The rapid growth of the internet, social media, and cloud computing has created new challenges for states seeking to assert their authority over digital space. This study analyses the evolution of digital sovereignty, its relationship with traditional notions of sovereignty, and the legal framework that governs digital activities. The paper also points out various implication that private individuals might come across when Acts and Bills related to personal data and digital privacy laws are presented either at national or international levels. This paper aims to enable a deeper understanding of the complex and ever-evolving concept of digital sovereignty and its relevance in the near future of governance, geopolitics, and legal framework. For the study, the information has been gathered from various primary as well as secondary sources in the form of statutes, articles, research papers, and opinions of jurists and people working in the fields of law, governance, geopolitics, digital eco-system etc.

Keywords- Governance, Digital Sovereignty, Geopolitics, Data Protection

Introduction

Digital sovereignty refers to a country or organization's ability to control its digital future. With respect to business houses, digital sovereignty can be interpreted as an enterprise's ability to control and manage its digital assets, data, technological infrastructure by reducing dependency on external factors. It is an ever-evolving complex concept tracing its roots from the broader notion of state sovereignty, which traditionally is referred to as a nation's authority to govern itself without foreign or external interferences. As we understand the concept digital sovereignty

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and the legalities related to the same, the entire population has been split into not only two but various segments and each of these segments having its own opinions which they feel is right. But every segment has a common belief that a shift from theoretical understanding to practical application is the key to realize the benefits of digital sovereignty thereby protecting data, privacy and strengthening democratic values.

However, in the current digital era, the traditional definition has taken a new form which extends to the control over digital infrastructure, technologies, data, and internet. Although playing such a pivotal role in the current generation, the concept of digital sovereignty lacks a universally accepted definitions, as its interpretation varies depending on the context.¹ Today India is the world's second biggest market for smartphones, and has among the most users on social media platforms. Many big tech firms have increasingly been caught in the government's crosshair- from a Facebook plan from free internet access being blocked, to content takedown requests to ordering google to change how it markets its android operating system (OS). Tech experts and right-wing members have raised concerns over increased state surveillance and tightening of freedoms in online spaces, stating that such actions on government's behalf will have enormous repercussions for the country's 1.4 billion population. The concept has proved itself to be of great concern for many policymakers across the globe as they feel that too much control is ceded in very few places, very less options in the tech market, and too much power in the hands of a few big tech giants, who control massive amounts of data about their users. Every country implements a differed approach to digital sovereignty. Due to such varied approach being opted by different states the geopolitical competition around the same has deepened between China, USA, and the EU.

In this paper the concept of digital sovereignty aims to enable enterprises to re-attain and to take calculated decision regarding their digital footprints as they face various dynamic limitations. The same provides countries and corporations to:

- Improve data protection, security and minimizing unauthorised access of information to very best ability

1 Philanthropy Communications. (2024, October 3). *What's Digital Sovereignty? Lessons from Brazil to the World: Implications, Risks, and Global Insights* | Internet Society Foundation. Internet Society Foundation. <https://www.isocfoundation.org/2024/10/whats-digital-sovereignty-lessons-from-brazil-to-the-world-implications-risks-and-global-insights/>

- Enhancing the compliances regarding the data privacy regulations that dictates location where the data is stored and the method by which it is being processed.
- Decreasing the amount of support that is taken from third-parties.

Role of Digital Sovereignty in State autonomy and the security of National infrastructures

As global networks emerged, countries have become more aware of their vulnerabilities and have expressed their voice in the matters of infrastructural control. European governments and policymakers are raising concerns, they want stronger parameters in place to use and store data locally, which will ensure European countries can manage their own data, improve their digital ecosystem, and increase digital sustainability. In India, there is a need to build and maintain Strong Data Centres (SDCs). Following are some of the suggestions that can be applied towards policy measures:

- Application of legal and regulatory frameworks to the systems of cloud computing and data sovereignty
- Restricting the transfer of crucial information such as health records, financial transaction would deem countries to be unsafe and implying a lack of data protection laws
- Licence regimes could be implemented over the cloud providers on the conditions that if the foreign based MNCs want to provide their service in the nation, they will be compelled to set-up local data centres.

The Ministry of Electronics and Information Technology (MEITY)² have expressed their intent for development of a State Data Centre (SDC)³ as part of core infrastructural development, which shall be playing a vital role in supporting the National E-Governance Plan (NeGP).⁴ The cloud providers have been requested by the government to create an “E-Discover” system

2 The Ministry of Electronics and Information Technology (MeitY) is responsible for formulating and implementing policies relating to information technology, electronics manufacturing, internet governance, and digital services in India. Available at <https://www.mygov.in/group/ministry-electronics-and-information-technology>

3 SDCs are multiple data centers set up in various states of India to provide fundamental IT infrastructure for various eGovernance programs.

4 NeGP aims at improving delivery of Government services to citizens and businesses with the following vision: “Make all Government services accessible to the common man in his locality, through common service delivery outlets and ensure efficiency, transparency & reliability of such services at affordable costs to realise the basic needs of the common man.”

which shall allow only a government entity to search and retrieve data stored in cloud system. The ministry has mandated data encryption as a 'standard security process' for all the digital data stored by the government in the cloud. MEITY has also asked the cloud providers to report any incidents related to unauthorized access of data by any government office holder or by the cloud provider. Ministry also stated that information stored on cloud should not be advertised or published by the provider to any other person or any organization without the permission of the government entity.⁵

Digital Sovereignty & Fundamental Right of individuals

In the current generation of digitalisation, in order to protect and safeguard fundamental rights of individuals, the current legal system need to adapt itself. Today, freedom of expression and privacy is closely interlinked with digital rights that allow people to access and use computers, other electronic devices and communications network. Digital technologies are not only transforming basic fundamental rights such as freedom of expression and access to information are exercised, protected, and violated but is also leading to the recognition of new rights. Hence, the law is shaping itself to embrace the new era with the development of digital rights and citizenship, allowing and regulating access to online information in a secure and transparent manner. As per UN Digital rights are just an extension of the already existing Universal Declaration of human Right. Despite this, supranational bodies such as the European Union (EU) are proposing a common framework, at least with respect to the right to personal data protection. For example, the General Data Protection Regulation (GDPR), which came into force in 2018, obliges member countries both to preserve citizens' personal data and to allow the free movement of data. In the USA, by contrast, there is no federal data protection law and each state applies different regulations. There are more than 100 countries in the world that have some kind of legislation protecting personal data and access to information on the Internet. In 2022, the European Commission made a Declaration on the protection of the rights of its citizens in the digital world, which covers the rights of all European citizens.⁶

5 Anushka. (2017, April 23), Digital Sovereignty: Meaning, Importance and Issues available at <https://www.gktoday.in/digital-sovereignty-meaning-importance-and-issues/>

6 Iberdrola. (2024). Digital rights, essential in the Internet age, available at <https://www.iberdrola.com/innovation/what-are-digital-rights>

Some instances where positive digital sovereignty involves states implementing the concept on behalf of their citizens. While sovereignty is generally associated with the rights of states, the very same concept has been applied by indigenous communities to assert control over resources and heritage that they argue should rightfully be theirs.

Impact on Business

The measure taken by governments to ensure application of data sovereignty is not only to ensure user sovereignty in digital space but also to constrain platform powers from big tech corporation which are most of the times foreign entities. A common manner in which such constraints can be imposed is through industrial policy and infrastructure building, thus making the private companies redundant. A prime example can be of the GAIA-X project of EU, which declared its objective to create a federated secure data infrastructure for the whole of Europe to compete with countries like US and China that house globe's most powerful tech giants. However, at the end of the day such projects end up involving US & Chinese players or their European subsidiaries, portraying the difficulty in pursuing the digital autonomy of citizens and states without a competitive digital market. Finally, countries fitting this model are likely to fine big corporations and put forward or at least debate strong market and *content regulations* to preserve competition and prevent hate speech, like France, Germany, the UK, and Brazil. Platform liability can also be enforced with more robust measures, such as Brazil's ban on Telegram because the company refused to cooperate with an investigation into neo-Nazi groups.⁷

National Perspective

The Indian government's path to digital sovereignty is primarily focused on data sovereignty – ensuring adequate protections for Indian users and ensuring that personal data is stored in-country. The Indian government started a consultation process with the key stakeholders to come up with a data protection policy. The objectives of this policy were to unlock the potential of the digital economy for India, to protect the data of Indian citizens, and to protect them from the state's unregulated control of their data. India has not reached its much-awaited stop in relation to digital sovereignty and that is the draft of Digital Personal Data Protection (DPDP)

7 Fratini, S., Hine, E., Novelli, C., Roberts, H., & Floridi, L. (2024). Digital Sovereignty: A Descriptive Analysis and a Critical Evaluation of Existing Models available at <https://doi.org/10.1007/s44206-024-00146-7>

Rules⁸ release by MEITY. The DPDP Act, has been formulated after years of recommendations and judicial decisions that shaped the landscape of data protection. The start of this journey was the Justice A.P. Shah committee of 2011, which laid out the foundation for privacy laws to protect digital rights of individuals. The privacy laws in India reached new heights with the passing of the landmark judgement of *K.S. Puttaswamy (Retd.) Vs. Union of India*,⁹ where the judgement recognised right to privacy as a fundamental right. The current bill governs the processing of personal data by government companies incorporated in India, foreign companies dealing with personal data of individuals in India.¹⁰ These entities are obliged to process the collected data only with prior individual consent and for a specific and lawful purpose. They are also tasked to set up transparency and accountability measures to address individual complaints. The bill also includes a requirement for data localisation of sensitive personal data. The bill explains that information such as financial, biometric, caste, religious, political beliefs data is to fall under the category of sensitive personal data. As per the bill, all the earlier stated data should be stored in India and shall only be communicated outside the country having the explicit authorization of the person whose data is sent. The Indian government views the data localisation requirements as a necessity to respond to foreign tech companies generating revenue from the data of the Indian citizens. This phenomenon is also referred to as data colonialism by some local industrialists, academics, and politicians. This stance is supported by domestic civil society and big private players in India like the Reliance Jio and Paytm. However, there has been criticism from smaller digital players that data localisation would mean increased compliance costs. Data localisation could also have trade policy implications if other countries impose reciprocal measures

Global Perspective

As India wants to increase state power and access to data, but considers economic, rather than purely security interests. Its draft data localization law has recently been shelved, and the government's approach is broadly

8 These Rules mark the full operationalisation of the Digital Personal Data Protection Act, 2023 (DPDP Act). They place equal weight on individual rights and lawful data processing.

9 AIR 2018 SC (SUPP) 1841

10 Singh Khyati, Data Protection Frameworks of India and the US: Data Sovereignty vs Market Flexibility - MP-IDSA. (2025, March). Available at <https://www.idsa.in/publisher/issuebrief/data-protection-frameworks-of-india-and-the-us-data-sovereignty-vs-market-flexibility/>

framed as protecting critical infrastructure and data as an uprising in data breach is being noticed, and bolstering hosting capacity and the digital economy.

* **Asia-Pacific Countries**

The main drivers of measure of digital sovereignty in the countries like Australia, China, India, and Vietnam are to protect national security, citizens, and social stability; and economic protectionism to bolster domestic industry. Other motivations include safeguarding social and cultural norms and values (as defined by the state) and helping people control their data.

- China is a regional and global first-mover in defining, implementing, and exporting a state centred methodology to digital sovereignty, characterized by greater state control of the Internet and data localization. Other governments — for instance, Viet Nam — appear to be attracted to this model, and to the opportunities for greater investment in state capacity and the economy offered by China's Belt and Road Initiative.
- Australia's Cyber Security Strategy 2020 aims to spur "new sovereign Australian cyber capabilities and companies" and "promote innovation in sovereign cyber security research and development," yet the overall picture is an effort to balance national security interests with a liberalized trade agenda. Australia has yet to require data localization: Its national hosting strategy does not prescribe domestic ownership and control or localization of government data and was recently changed so that non-Australian-owned and based companies may qualify.¹¹

* **Europe**

EU and its member, France, Germany, and Italy — frame digital sovereignty primarily in the context of economic competitiveness, developing local industry, and protecting against cyberattacks. Although, EU has a great number of strong assets consisting of world-leading AI research community and a strong industry, it possesses certain detrimental weaknesses that is holding it back in the global race to develop new technologies. For instance, in the sector of AI technology EU is lacking behind US and China in terms of private investments. Also, the level at which companies and general public are adopting AI technologies, is significantly lower

11 CC BY-NC-SA 4.0 Navigating Digital Sovereignty and its Impact on the Internet. (2022) available at <https://www.internetsociety.org/wp-content/uploads/2022/11/Digital-Sovereignty.pdf>

than what is seen in US. US also attracts higher amount of AI talent and researchers and is also leading the race of patent applications. On the other hand, China is leading the race on data collection and access and has made monumental progress in developing latest hardware equipment such as supercomputers. Furthermore, the US and China are leading in regards patents on quantum-computing technologies, while Europe's level of investment in blockchain technologies and IoT is comparatively low

EU policymakers are designing measures to adapt EU industrial and technological capacity to the competitive environment. In February 20 the European Data Strategy was adopted which was a blueprint towards creation of data spaces to make sure that every possible data is made available for the betterment of economy and society, while also protecting the interests of individuals and organisations. EU has also adopted an approach for developing AI technologies that shall assure adherence to highest level of ethical standards and aims to lead the AI technologies race.¹²

* USA

The US has long been at the forefront of digital technologies. It has maintained its hegemony through industrial policy aimed at developing critical technologies, especially when faced with potential competitors, such as Japan in the 1980s. More recently, industrial policy has made a strong comeback in the US with the Inflation Reduction Act (IRA) and the Creating Helpful Incentives to Produce Semiconductors and Science (CHIPS) Act. Pushing the rhetoric of a “free and open internet” on the global stage, the American tech industry has largely relied on corporate self-regulation in their harvesting and use of data. The government-supported multi-stakeholder approach to global internet governance through organisations like the Internet Corporation for Assigned Names and Numbers (ICANN) has given its tech giants an outsized role in formulating global standards till this date.¹³

12 Madiega, T. (2020). *BRIEFING EPRS Ideas Paper Towards a more resilient EU*. Available at [https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/651992/EPRS_BRI\(2020\)651992_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/651992/EPRS_BRI(2020)651992_EN.pdf)

13 Musoni, M., Karkare, P., Teevan, C., & Domingo, E. (2023). *Global approaches to digital sovereignty: Competing definitions and contrasting policy*. <https://ecdpm.org/application/files/7816/8485/0476/Global-approaches-digital-sovereignty-competing-definitions-contrasting-policy-ECDPM-Discussion-Paper-344-2023.pdf>

International Cooperation for Digital Sovereignty

On September 29, 2021, the United States and the European Union's (EU) new Trade and Technology Council (TTC) held their first summit. Following the meeting, the U.S. and the EU declared their opposition to artificial intelligence (AI) that does not respect human rights and referenced rights-infringing systems, such as social scoring systems. During the meeting, the TTC clarified that *"The United States and European Union have significant concerns that authoritarian governments are piloting social scoring systems with an aim to implement social control at scale. These systems pose threats to fundamental freedoms and the rule of law, including through silencing speech, punishing peaceful assembly and other expressive activities, and reinforcing arbitrary or unlawful surveillance systems."*

Historically, with the development of the world wide web opportunities were created for the world to be interconnected as one large global digital ecosystem. Unfortunately, with the increasing mistrust among nations has caused for a rise in digital sovereignty, referring to a nation's ability to lay footwork to its digital destiny, which may as well include taking control over the entire AI supply chain, from data to hardware and software. A consequence of the trend toward greater digital sovereignty—which then drives the trend further—is increasing fear of being cut off from critical digital components such as computer chips and a lack of control over the international flow of citizens' data. These developments threaten existing forms of interconnectivity, causing markets for high technology to fragment and, to varying degrees, retrench back into the nation state.

Conclusion

The concept of digital sovereignty has emerged as a pivotal element in the global digital landscape, emphasizing a nation's authority over its digital assets and data privacy. As countries navigate the complexities of the digital era, the balance between national interests and global interconnectivity becomes increasingly essential. The need for robust legal frameworks, as seen in various approaches from major regions including the proactive stance of China, the EU's focus on economic competitiveness, and India's efforts to safeguard personal data highlights a growing awareness of vulnerabilities in digital infrastructure and the implications for national security. Digital sovereignty empowers individuals and organizations to control their digital environments while simultaneously confronting the challenges posed by dominant tech giants. The diversity of interpretations and implementations of digital sovereignty across the globe illustrates

the lack of a universal definition, further complicating engagements in an interconnected world. Continued prioritization of individual rights, data protection, and regulatory oversight is vital as governments seek to reclaim digital autonomy while fostering a competitive technological ecosystem. Ultimately, ensuring that digital sovereignty is exercised responsibly involves recognizing the fundamental rights of individuals and adapting legal systems to evolving digital realities, thereby reinforcing democratic values against the backdrop of increasing global digital interdependencies.

MUCH NEEDED REFORMS IN POST-COVID HEALTHCARE SYSTEM IN INDIA

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India ranks 66th position as per the 2021 Global Health Security Index. This rank is much lower than that of the USA, UK, Brazil and other countries. Therefore, our country is more prone to face high figures in mortality as compared to other countries. India's total health expenditure stands at only around 3.8% of its GDP, which is still lower than Bhutan and South Korea. According to the National Medical Commission, as of November 2024, the doctor-population ratio in the country was approximately one doctor for every 811 persons --a ratio the Government claims is now better than what WHO mandates, though this figure includes AYUSH practitioners and an assumed availability rate. This paper will try to analyze what needs to be done by the government of India to ensure that our healthcare system doesn't collapse post pandemic. The paper also strives to highlight measures that can be taken to improve the overall healthcare system in this country post-COVID-19.

Key Words: Health, Indian Govt., Pandemic, GDP

Introduction

Health is one of the key ingredients of personal growth. People feel empowered only when they are away from poverty, malnutrition, hunger, and are living a healthy life. For this, the most important aspect is easy and affordable healthcare. This not only improves the overall well-being of the citizens but also improves their productivity and financial security. All over the world it is the primary responsibility of the incumbent governments to provide good healthcare facilities to their citizens, especially in the case of developing countries like India.¹ In India, there are approximately 13.86 lakh doctors who are registered medical practitioners and we have a huge number of unregistered practitioners or Quacks. Rural areas have as low as 18.8% of registered doctors while urban areas are on a better footing with having approximately 58% of qualified doctors.²

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1 Healthcare financing reforms in India, available at; https://www.nipfp.org.in/media/medialibrary/2013/04/wp_2012_100.pdf (Visited on July 05, 2020).

2 National Medical Commission data as cited in Doctor-Patient Ratio in India Is Better Than WHO's Standard: Centre, available at; <https://www.etvbharat.com/en/!bharat/doctor-patient-ratio-in-india-is-better-than-who-standard-centre-enn24080206126> (Visited on September 17, 2026).

The sorry state of affairs in the health sector could also be understood from the fact that the doctor-population ratio is only about one doctor for every 811 people (even by the Government's own, more favourable count that includes AYUSH practitioners), and there is only about one Government hospital bed for every 1,266 people (0.79 beds per 1,000 population), well short of the National Health Policy's own target of two beds per 1,000 people, as per the Ministry of Health and Family Welfare. Government hospitals lack dedicated staff, proper management, and good infrastructure - leaving the poor and deprived (i.e. 11.28% of India's population classified as multidimensionally poor, as per NITI Aayog's National Multidimensional Poverty Index data for 2022-23) at the mercy of such hospitals, since they can't afford private healthcare.³ As per recent estimates, around 70% of India's population is now covered by public or private health insurance schemes, and out-of-pocket personal spending, though it has fallen considerably, still accounts for close to 39% of total expenditure on healthcare in India, as per the National Health Accounts Estimates 2021-22. There have been some recent initiatives to augment public spending on health care, but achieved only limited success. The National Rural Health Mission (NRHM), established in 2005 (now subsumed within the broader National Health Mission), and Rashtriya Swasthya Bima Yojana (RSBY), a national health insurance scheme for people below the poverty line, were among the most important initiatives by the Central government; RSBY has since been replaced by the far more expansive Ayushman Bharat-Pradhan Mantri Jan Arogya Yojana (AB-PMJAY), launched in 2018. Several state governments have also come up with their own insurance and health-related schemes. Following these initiatives, public spending on health has shown a marked increase in recent years, though it still remains short of the Government's own target. These two above-mentioned major schemes are noble initiatives by the Government to provide healthcare facilities to poor people at affordable rates. But if we look at the total expenditure of the Government on healthcare, it hasn't improved much over a couple of decades, and that is the main cause of the deplorable state of healthcare in India. Being the second-most populous

³ *Doctor-population ratio in country is better than WHO standard: Nadda*, available at; <https://deccanchronicle.com/nation/doctor-population-ratio-in-country-is-better-than-who-standard-nadda-1842451> (Visited on September 17, 2026); Ministry of Health and Family Welfare, Press Release on hospital bed availability, available at; <https://mohfw.gov.in/press-info/7905> (Visited on September 17, 2026); NITI Aayog, Multidimensional Poverty in India since 2005-06 (Discussion Paper, January 2024), available at; <https://static.pib.gov.in/WriteReadData/specificdocs/documents/2024/jan/doc2024119300101.pdf> (Visited on September 17, 2026).

country in the world, we Indians need to spend more on healthcare.⁴ We somehow survived pandemic barely, hence urgent measures are needed more than ever before, to ensure that our health-sector does not collapse if we ever face such type of challenge in the future. Also, at the same time, such measures should be on a long-term basis so that we could be ready for similar contingency and the government should avoid patchwork and short-term measures.

*** Measures that can be taken by the Government post-COVID 19 crisis, to improve public healthcare facilities**

Low public spending on the health-sector

Public-spending on the health-sector has always been very low. During 1996-97 and 2005-06, the overall public spending was approx. 1% of GDP, which was even lower when compared to underdeveloped countries. If we look at the public spending from 1990 till 2009, it was almost stagnant, moving from 0.9 to 1.2 % of GDP. Despite several attempts to boost public spending by introducing NRHM and other schemes, the total outlay remained only 1.2% of GDP in 2009-2010. In the case of India, due to poor public healthcare, citizens are forced to take recourse to the private sector, thereby causing high 'Out-of-Pocket' (OOP) spending. For long, OOP spending in this country was several times higher than Government expenditure on healthcare, though this gap has narrowed considerably in recent years, with Government spending now accounting for a slightly larger share (48%) of total health expenditure than OOP spending (39.4%), as per the latest National Health Accounts Estimates (2021-22).

The Constitution of India tries to overcome the problem of horizontal and vertical imbalances, and it also attempts to sort out the disparity regarding sharing of central taxes with the states. Similar concerns present themselves when there is a situation of providing grants-in-aid to backward States. These allocations and aids are provided by the Central Government, based on the recommendations by the NITI Aayog (previously known as the Planning Commission). The Central Government also provides grants to various States for implementing its schemes (like Swachh Bharat Abhiyan). Despite all these mechanisms, the poor and backward States are left with a stringent financial budget, as the aid provided by the Central Government is not enough, leading to poor implementations of these policies by the States, and deplorable condition of healthcare in these areas.

Under the Constitution, the State Governments have the primary responsibility to provide for services relating to healthcare. Entry 6 of List II of Seventh Schedule i.e. “State list” clearly provides for “Public health and sanitation, hospitals and dispensaries”, meaning thereby that it is the primary duty of the States to provide for healthcare to its citizens, and not the direct duty of the Central Government. On the other hand, “Population control and family planning”, “Medical, legal and other professions”, “Mental deficiency and lunacy”, etc., come under “Concurrent List”, putting all these matters within the ambit of both Central and State Governments. Low public spending on the health sector has led to increased OOP expenditure by the citizens. The total expenditure on health in India during 2007 was approx. 4.1% of GDP, which was even higher when compared to other countries like China, Sri Lanka, and Thailand. Due to high OOP expenditure, poorer sections of the population in India are under a lot of financial stress. From 1986-87 till 2004-05, the number of patients not getting the necessary treatment due to reasons of financial constraints, has risen from 15% to 28% in rural areas. This phenomenon is because of the rapid growth of private players in the healthcare sector, as also due to the deplorable state of the existing public health infrastructure and system that is forcing people to opt for private healthcare instead of public healthcare.⁵

On the brighter side, the over-all Government spending on healthcare has seen a consistent rise from 1.13 percent in 2014-15 to 1.84 percent in 2021-22, and further to around 1.9 percent of GDP in 2023-24, as per the Economic Survey 2023-24. It just not the Government’s lack of concern that has made our health sector almost incapable of handling COVID pandemic crises, but it is also because India’s elite class channel their funding more to the private sector than to the public sector, since private hospitals offers more profitable prospects than those available in Government hospitals. In the financial year, 2017, out of the total spending on healthcare, only 7% was seen to have been spent on preventive healthcare, while the rest was spent on treatment and cure of diseases and infirmities. However, now, during the lockdown, the entire spending has almost shifted to preventive measures. Had it been the priority earlier, we could have avoided such a

5 *Supra* Note 1 at 16.

catastrophic situation and smoothly sailed through the pandemic. More spending on healthcare is the need-of-the-hour, and the pandemic-situation in our country has been an eye-opener.⁶

On May 12th, an economic stimulus package of 20 lakh crore was announced by the Government, and it is expected that it would be enough to handle the situation of economic slowdown and unemployment in our country. Also, at the same time, it is expected that it would provide some relief to the health sector which is currently reeling under a lot of pressure. A commendable step taken by the Government is, donations to the PM care fund, and any activity relating to the COVID 19 prevention and cure done by the companies would come under CSR activity. Also, the companies would get tax benefits, due to which a lot of companies have donated and came forward to help the Government in the fight against COVID-19. In the stimulus package, an amount of only 15,000 crore is allocated for healthcare, out of 20 lakh crore, which is quite less a figure considering that this is a health emergency. The Government should reconsider its allocation of funds if they don't want to further put more pressure on the health sector. The Government had taken sufficient steps during pandemic (like ordering more PPE's and testing kit, ventilators, etc.), but as we know it wasn't sufficient at that time. The funds allocated for other health programs like family-planning etc. could have been diverted for treatment and identifying of COVID-19 patients; since without extensive testing, a country would face high difficulty in coming out of any such crisis like pandemic. Many media personnel have reported that private hospitals are charging exorbitant prices from COVID patients; and most of the time, these private hospitals are denying admission to the patients by citing various flimsy reasons. The Government should have encouraged and promoted private hospitals by providing subsidies and grants for treating COVID patients; and at the same time, taken strict action against those who are denying to treat COVID patients or are charging sky-rocketed prices.

*** Putting a cap on pricing for various healthcare services offered by the private players**

In the past couple of decades, India has become a hotspot for medical tourism, with patients pouring in from all over the world (especially from the Middle East and Southeast Asian countries). The main reason for this

⁶ Health expenditure now at 1.84% of GDP, moving steadily to 2.5%: Nadda, available at: <https://www.deccanherald.com/amp/story/india%2Fhealth-expenditure-now-at-184-of-gdp-moving-steadily-to-25-nadda-3453460> (Visited on September 17, 2026); see also COVID 19 shows why we need a healthcare reboot for India, available at: <https://www.livemint.com/politics/policy/will-covid-19-prompt-health-reboot-11585497828527>. (Visited on June 08, 2020).

influx of patients is - comparatively cheaper private healthcare. Ironically, what seems to be cheaper for foreign patients is way too expensive for people of this country. Post-independence private hospitals provided service to approximately 5 to 10% patients, but now they serve almost 58% of in-patients and 82% of out-patients. This sharp rise is partially due to the abysmal state of public healthcare in India and also due to the support provided to these private hospitals by the Government by way of providing cheap lands, infrastructure, and exemptions from taxes and duties. Now, the private hospitals have focused their attention more on profiteering than on providing affordable healthcare by providing five-star level hospitals and by recruiting foreign doctors in their panel, due to which the overall medical expense has gone beyond the reach of most of the 'main janta' or people of India. Citizens are forced to opt for such costly treatment since there is no alternative available in the form of viable public sector healthcare. 40% of patients who are admitted to the private hospital either have to sell their property or borrow money to bear such hefty expenses which push them below the poverty line. The need-of-the-hour is to fix the pricing of services provided by these private hospitals, as there are a lot of disparities in pricing; various hospitals charge different prices for the same treatment or service. Various countries like Japan, U.K., and Thailand have already done that where prices are fixed by the Government after discussing with the stakeholders. The Government must also guarantee that overbilling by private hospitals attract severe penalties. The cost of healthcare will come down if the Government changes its perception of looking at poor patients as a liability and burden on the exchequer. It must be remembered that if a patient pays Rs. 1000, almost Rs. 250 goes to the Government in the form of various taxes. Tax-exemptions for hospitals will incentivize the hospitals to provide affordable healthcare to all its patients.⁷

Lack of Medical Personnel

This is a very basic problem faced by our country. There is an acute shortage of nurses, doctors, and other medical staff, which is more visible in the rural areas where majority of the Indian population resides. While medical staffs are generally quite reluctant to serve in rural areas, health personnel are employed in the private sector in majority of the urban areas. The scarcity of medical experts in rural areas is up to 90% in Jharkhand, Rajasthan, and Chhattisgarh, while in Odisha and Uttarakhand, it is up to 86%. Even after several years of the introduction of NRHM (National Rural Health Mission), the gap between the availability of allopathic doctors

7 *Supra* Note. 2 at 10

in rural areas of socio-economically backward states like Bihar, Uttar Pradesh, Jharkhand, Chhattisgarh, Orissa, Rajasthan, etc., and other states is very wide.⁸

‘Elitist Medical Education’

If we see a trend of students admitted to AIIMS medical institute for medical training, we would find that many students, after completing their education, head to western countries for a job rather than staying in their own country. From 1989 to 2000 almost 54% of students left the country after completing MBBS. Amongst the remaining students, almost 74% live in urban areas and serve only 29% of the Indian population. Since medical education is very costly in India if it's done through private institutions (since Government medical colleges are less in number, most of the medical graduates are from private medical colleges and have paid hefty fees to get the degree. These students mostly belong to the elite class of our society, in big cities. Also, the medical courses which are being imparted come from western countries. Due to such factors, these freshers are least interested to leave the comforts in urban areas and practice in rural and backward areas instead. If we had more Government medical colleges catering to all students of medical science, this situation would not have arisen, since private medical colleges have commercialized the entire education-system – by charging donations and capitations-fees which runs into lakhs, of rupees thereby discouraging those hailing from a humble and poor background who may aspire to join this noble profession. Government must regulate the fee-structure and occasional fee-hike of the private medical colleges.⁹

Need to improve healthcare infrastructure

Health- Infrastructure is a key factor in comprehending the healthcare policy of any country. India has the second-largest population in the world, with almost 11.28% of its population classified as multidimensionally poor,

8 Challenges confronting public hospitals in India, their origin and possible solutions, *available at*: <https://www.hindawi.com/journals/aph/2014/898502/> (Visited on June 10, 2020).

9 *Ibid.*

which poses a humongous challenge before the Government.¹⁰ There are currently only about 7.9 Government hospital beds per 10,000 population and around twelve doctors per 10,000 citizens. The health sector of our country still remains considerably under-equipped to handle a crisis on the scale of the COVID-19 Pandemic again. In the public sector, there lies dysfunctioning, inefficiency, and a severe shortage of healthcare facilities and infrastructure, due to which it struggles to cater to a huge influx of patients in any similar emergency. Additionally, close to 30% of the citizens of this country still don't have access to any health insurance, and a large share have no or limited access to essential medicines. Moreover, in the past couple of decades, accessibility of free medicines in the public sector has fallen from 17.8% to 5.9% for outpatients, and from 31.2% to 8.9% for inpatients as reported by the rating agency Public Health Foundation of India.

It is also said that our government's efforts to push for Universal Health Care (as a part of its commitment, due to the fact of India being a member of United Nations, where every member state agreed to achieve universal healthcare worldwide by 2030) would promote the rapid growth of pharmaceutical sector in our country, along with the healthcare market. Since COVID 19 has put a lot of stress on the health sector for achieving universal healthcare, it still seems like a distant dream. Planned healthcare reform, with special emphasis on improving the overall infrastructure, is the need-of-the-hour. Serving in rural areas will help our country to improve our ranking in the Human Development Index (which is currently 130 out of 193 countries, as per the UNDP's Human Development Report 2025).¹¹

10 Health infrastructure in India: Critical Analysis of policy Gaps in the Indian Health Care Delivery, available at: <https://www.vifindia.org/sites/default/files/health-infrastructure-in-india-critical-analysis-of-policy-gaps-in-the-indian-healthcare-delivery.pdf> (Visited on June 08, 2020); NITI Aayog, Multidimensional Poverty in India since 2005-06 (Discussion Paper, January 2024), available at: <https://static.pib.gov.in/WriteReadData/specificdocs/documents/2024/jan/doc2024119300101.pdf> (Visited on September 17, 2026).

11 India's human development continues to make progress, ranks 130 out of 193 countries, UNDP Press Release (6 May 2025), available at: <https://www.undp.org/india/press-releases/indias-human-development-continues-make-progress-ranks-130-out-193-countries> (Visited on September 17, 2026); see also Lack of medical investment healthcare infra big challenges for India's COVID - 19 fight: Fitch, available at: <https://health.economictimes.indiatimes.com/news/industry/lack-of-medical-investment-healthcare-infra-big-challenges-for-indias-covid-19-fight-fitch/75737892> (Visited on June 07, 2020).

Lack of political will

Since 1947, no Government in our country has truly tried to solve the fundamental problems like poor healthcare facilities. In 1977, the newly elected Janata Party set the aim to achieve "Healthcare for All by the year 2000" by adopting the policy of "primary health care". In 2002, BJP came into power, and they came up with the idea of "National Health Policy ". Soon, it was followed by the "National Common Minimum Program" when the Congress party came into power in 2004. Both these programs promised to the people of India that public spending on healthcare would be increased to up to 3% of the GDP by 2010. Later, in 2005, NRHM was launched to achieve a renewal of rural healthcare. After finishing its first phase, the NRHM program entered its second phase in 2012, but even this could not achieve its target as was set by the incumbent Government. Since 1977 till today, India has witnessed several programs and policies on healthcare, designed by various Governments - but in reality, none of them has been able to make a considerable impact on the health sector - the main reason for which is the lack of political will. Had such a policy been present, the health sector of our country would have been of world-class level by now. The people of India must rise to make the Government answerable for the promises which they make during their political campaigns. Till the time this happens, our country will never get the circumstances to witness sound healthcare facilities at par with the developed countries.

Conclusion

In India, due to poor healthcare facilities in the public sector and high cost of treatment in private hospitals, the accessibility to adequate and affordable healthcare facilities has become a distant dream for the majority of the Indian population. The COVID-19 pandemic had put our healthcare sector to ultimate challenge which at that time was on the verge of complete collapse. The government must give a serious thought on increasing the share of healthcare in the total GDP of our nation. It should at least be increased to 3% of GDP, considering the population.

At the same time, since healthcare is the primary responsibility of States, they should also allocate more funds for healthcare, especially the backward States like Bihar, Jharkhand, etc. The twin goal of Central as well as State Governments must be to provide easy and accessible healthcare facilities to its citizens, while also striving to ensure that the standard of healthcare is constantly being raised in tune with the current times. Mainly, there are two sectors i.e., health, and education - which must be given utmost importance by the Government, since the Indian economy is now heavily dependent on the service sector. The service sector depends on

human resources, and better healthcare facilities ensure an uninterrupted flow of human resources, which is extremely necessary for the service sector. There is no magic formula to improve the healthcare facilities in our country in a fortnight. It requires positive and assertive actions on the part of the Government for a considerable amount of time for any kind of visible changes in this sector, which would later be worth mentioning.

There is also a regular need to revisit the health policy of this country by the Government, preferably for every two years, to ascertain the progress and lacunae of various programs and schemes. The Government also needs to identify more backward areas lagging in healthcare, and must provide an immediate incentive package and grant aid to such areas on a priority basis. During COVID pandemic, such backward areas needed more such governmental attention and support. As we have seen during pandemic how the number of casualties in those backward areas rose to a catastrophic level, after the return of migrant workers to their homes in those states.¹²

The deplorable state of public healthcare is not only due to lack of sound policies or skills or due to paucity of the latest technologies, but it is because it furthers interests of the dominant class of our society which has hold not only on the medical education aspects, but also on healthcare. To rectify this situation, people must rise against their petty differences and demand basic rights from the government. Unless the masses are sensitized towards these issues, things will not change for the good anytime soon.

In the era of post pandemic, our health sector stands at crossroads, and it might need to conquer multiple challenges. It is not only the duty of our government but also of the 'people of India' to provide assistance and support, in whatever manner possible, to help our country emerge out of this deplorable state as a winner. Sensitization of the people on these key issues will certainly push the Governments to take measures to improve the healthcare of India not on paper but in reality.¹³

¹² *Supra* Note 11 at 4.

¹³ *Supra* Note 9 at 3.

SURROGACY AND REPRODUCTIVE RIGHTS: AN ANALYSIS IN INDIAN AND INTERNATIONAL CONTEXT

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Surrogacy and reproductivity are burning issues of our society. Political actions, mobilizations, consent of surrogated mother, contraception, maternal mortality and caring of infertility for example ICD programme give rise to a debate over the aim and goals of surrogacy practices in India. This article will discuss in detail the Surrogacy, kinds of surrogacy, reproductive rights and related issues with the help of national and international laws, case studies of India and abroad.

Key words: Surrogacy, ART, Commercial, Reproductive Rights

Introduction

The most widespread and prevalent problem in India is infertility and motherhood. Women are expected to become mothers and carry forward the family lineage. Infertility is a general reproductive health problem. It creates sadness and despair. It lowers one's self esteem and creates tension within the marriage. Around 80 million people around the globe are infertile. It may be due to late marriage, hypertension, stressed life, other biological disorders, hormonal imbalances, etc. Women have to face trauma, stigmatization, discrimination in the family and society. A change was witnessed with a solution to overcome infertility problems through ART (Assisted Reproductive Technology) through surrogates and sperm or embryo donors. Surrogacy is a blessing in disguise for the childless couple as the intending parents can have their biological child. Many questions are being put on the use of Surrogacy through ART to have a child. Other problems being moral, legal, and ethical issues in surrogate motherhood and a baby born out of that Surrogacy. Historically, policies and laws in India related to women's health and hygiene are designed looking at the acknowledgment of women's rights and scenarios related to them. Rather,

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we find them more bent towards the poll targets like population control. This more or less snatches away women's autonomy on reproduction matters.¹

Surrogacy in Ancient India: Surrogacy was practiced in India since time immemorial. According to Bhagwad Gita, “Even Lord Krishna is understood to have born without a sexual union. This is in regard to the seventh pregnancy of Devaki, by the will of the Lord; this embryo was then transferred to the womb of Rohini, the 1st wife of Vasudev, to prevent the baby being killed by Kansa”.

Meaning: Surrogacy

Black's Law Dictionary defines surrogacy as a process where a woman carries and delivers the child for another couple, who because of some medical reasons fails to beget a child. Surrogacy can be broadly classified into two classes, i.e., Traditional and Gestational surrogacy. On the grounds that whether the surrogate mother has received any monetary compensation or not, surrogacy can further be classified into commercial or altruistic surrogacy.

The Apex Court of India has defined Surrogacy as:

“A method of reproduction, in which a woman agrees to become pregnant to gestate and give birth to a child whom she will not raise but hand over to a contracting party.”²

Meaning of Reproductive Rights

Black's Law Dictionary “Reproductive Rights are the rights of individuals to decide whether to reproduce and have good reproductive health. This may include rights like an individual's right to plan a family, terminating a pregnancy, using contraceptives, learning about sex education in public schools, and gain access to reproductive health services”.

As per Section 3 (65) of the General Clauses Act, 1897, 'reproducing' means 'producing again.' According to Dorland's Illustrated Medical Dictionary, Reproduction means “production of offspring by organized bodies; the creation of a similar object or situation, duplication, replication.”

In *Alka Sharma v. Abhinesh Chandra Sharma*,³ it was held by the court that 'procreation' means 'to produce an offspring' and 'procreate' means 'the capacity of a spouse to give birth as also rear up and bring up children.

1 Reproductive rights, available at; <https://reproductiverights.org/sites/default/files/documents/Reproductive-Rights-In-Indian-Courts.pdf> (visited on 9.7.2023).

2 *Baby Manji Yamada v. Union of India*, AIR 2009 SC 84.

3 AIR 1991 MP 205

Hon'ble Supreme Court in *Devika Biswas v. Union of India and Ors.*,⁴ held unequivocally that Article-21 of the Constitution includes the 'reproductive rights of a person. It recognizes Personal Liberty and Health under Article- 21 of the Indian Constitution. The Supreme Court found "the freedom to exercise these reproductive rights would include the right to choose sterilization based on informed consent and free from any form of coercion."

Kinds of Surrogacy

Traditional Surrogacy: It can also be known as Natural or Straight Surrogacy, where a surrogate mother, through artificial insemination, by the intending father or by an anonymous donor, carries the baby for 9 months. The child is genetically associated with the surrogate mother, as she provides the egg, and the intending father or donor donates his sperm artificially via intrauterine insemination (IUI), intracervical insemination (ICI), or sexual intercourse.

Gestational Surrogacy (Host Method): In Gestational Surrogacy, the surrogate mother acts only as the baby's carrier and isn't biologically or genetically related. In this process, an egg is hereby removed from intended mother or the donor and fertilized with the sperm of the intending father or unknown donor. The fertilized embryo, or egg, is then transferred in the surrogate mother who will carry the baby. The child belongs genetically to the woman who donated the egg along with the intended father or sperm donor, but not the surrogate women". In the abovementioned type of surrogacy, the surrogate mother is often referred as the gestational carrier.

Commercial Surrogacy: Under this Surrogacy process, the female acting as Surrogate is being paid to bear a child and is then required to hand over the baby after the delivery to the contracting parents. This is usually reported by the financially sound couples, who are infertile and can afford the expenses of fulfilling their dreams of becoming parents. Commercial Surrogacy is often referred to by some potentially and sensitive offensive terms like "wombs for rent," "outsourced pregnancies," or even "baby farms." The surrogate mother in Commercial Surrogacy is provided with benefit (monetary) or rewards (Cash/Kind) in addition to the basic medical expenses and insurance.

Altruistic Surrogacy: Surrogate conceives or carries a child with no financial transactions other than pregnancy and birth costs.⁵ Altruistic surrogacy can be generally referred as an arrangement between the surrogate mother and the intended parents, in which the surrogate mother out of compassion and in order to help the intended parents carries and delivers the child for them in return of no compensatory benefits except the medical expenses, clothing, maternity and other related expenses.

Right to Procreate with the Surrogacy Route: Reproductive right of an infertile couple and surrogate mother

Over the period of time, surrogacy has become a recognized and well-known method / procedure for reproducing a child with the help of the surrogate mother. It can be defined as a process whereby the woman agrees to carry the child and after delivery hand over the child to the intended parents. Intending parents may arrange for a surrogate as the woman who intends to become a parent is either not willing to be pregnant or is infertile. Surrogacy arrangement can also be about fulfilling the parental needs of a same-sex couple (gays or lesbians) through the various kinds of Surrogacy discussed above. In addition, the question is, do infertile couples have a right to have children? The Judiciary has also documented the fact that reproductive right of humans is their Basic Right. If an individual has a reproductive right that can be constitutionally protected, then Surrogacy acts as a ray of hope for the infertile couple which enables them to exercise their reproductive right endowed upon the individuals by the Constitution. If the fruitlessness is the reason for marital discord, then the introduction of posterity unites a couple. In the present situation, where Live in Relationships are legal, and Same-Sex relationships are given legitimate acknowledgment, the right to multiply must additionally be reached out to Gays, Lesbians, single men, or ladies. Accordingly, the idea of "lease a uterus" might be promptly acknowledged in a more logical temper with the contention "at any rate the infant is made with our gametes, even though sustained in a leased body". As propagation is one of the fundamental points of marriage and the kid is the primary and nostalgic interest of a couple, surrogacy goes about as a facilitator, not a destructor. On one hand, an infertile couple has a fundamental right to have a family under various articles and conventions nationally and internationally, and on the other hand, what about the rights of the women who have agreed to carry the baby for the intending couple, i.e., the Surrogate Mother. The

5 Dennis P. Hollinger, *The Meaning of Sex: Christian Ethics and the Moral Life*. Michigan, USA: Baker Academic 2009.

Surrogate mother too has a right to make and take decisions with respect to her body, including carrying a pregnancy to full term, conceiving an offspring, and raising children subsequently. A woman has the right to procreate, then what's the harm if she produces and delivers the baby to somebody else. Why such hypocrisy on our fundamental Human rights? To give birth to a child and handing it over to the intending parents is a 'win-win' situation for both of them. It is the dire need of the hour to balance the rights of the Surrogate mother and also the Infertile couple. It is evident from various national and international laws that Reproductive rights are inherent to human rights. Some of them are stated as follows:

1. Right to Life, Security, and Liberty
2. The fundamental right to health, reproductive health, and family planning.
3. The right to choose upon the number, spacing of children.
4. The right to consent and equality in marriage.
5. Right to Privacy.
6. Right to be safe from practice that harms women and girls.

*** International provisions on the Right to Reproduce (Right to Procreate)**

The World Health Organizations (WHO) Preamble to the Constitution states that: Every human being has the fundamental right to enjoy the uppermost attainable standard of health. The term 'health,' here, encompasses within its ambit right of women to reproductive health. The health right carries significant importance concerning women, more particularly, keeping in view their biological structure and child-bearing capacity. Following provisions are relevant:

- **Article 16 (1) of the Universal Declaration of Human Rights, 1948;**⁶
- **Article 25 of the Universal Declaration of Human Rights, 1948** lays down that without any discrimination, every person is entitled to have a right to standard of living, which encompasses the right to health and well-being of the person himself and his family;

⁶ It states that 'Men and women of full age, without limitation due to race, nationality or religion, have found to marry and found a family. They are entitled to all rights equally as to marriage, during the wedding, and at its dissolution. The Universal Declaration of Human Rights, available at; <https://www.un.org/en/universal-declaration-human-rights/index.html> (visited on 03.07.2024).

- **Article-11, Article-12, and Article-14 of “Convention on the Elimination of All Forms of Discrimination against Women, 1979”;**⁷
- **Article 12 of the International Covenant on Economic, Social and Cultural Rights, 1966;**⁸
- **The Convention for the Protection of Human Rights and Fundamental Freedoms, 1950 under Article 12;**⁹

The **Cairo’s Programme of Action 1994** categorically states, in regards to the right to procreate, as follows: *“Reproductive rights embrace a certain number of human rights that are already recognized in national laws, international human rights documents and other relevant United Nations consensus documents. These rights rest on recognizing the basic right of all couples and individuals to decide freely and responsibly the number, the spacing, and timing of giving birth to their children and to have the information and means to do so, and the rights to attain the highest standard of sexual and reproductive health. In the exercise of this right, they should take into account the needs of their living and future children and their responsibilities towards the community.”*¹⁰;

7 “The States shall take necessary measures to eliminate discrimination against women in the field of health-care, to ensure that access to information, counseling, and services qua family planning is available to all women on equal terms, in parity with men.” Available at; The Convention on the Elimination of All Forms of Discrimination against Women, 1979, <https://www.ohchr.org/Documents/ProfessionalInterest/cedaw.pdf> (visited on 03.07.2025).

8 Sec.12(1) Member States have agreed to recognize everyone’s right to the enjoyment of the highest attainable standard of physical and mental health. S.12(2) The Protocol provides that the steps to achieve this right, in particular in regards to the right to reproductive health, shall include those stated in, Article 12 (2)(a), that is, the provision for the reduction of the still-birth rate and of infant mortality and for the healthy development of the child; and Article 12 (2)(d), that is, the creation of conditions, which will assure to all medical service and medical attention in the event of sickness. Available at; The International Covenant on Economic, Social and Cultural Rights <https://www.ohchr.org/Documents/ProfessionalInterest/cescr.pdf> (visited on 03.07.2020).

9 “Men and women of marriageable age have the right to marry and to have a family, according to the national laws which govern the exercise of this right.” Available at; The Convention for the Protection of Human Rights and Fundamental Freedoms, <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005> (visited on 03.07.2020).

10 The **Cairo’s Programme of Action 1994**, Available at; https://www.un.org/en/development/desa/population/events/pdf/expert/27/SupportingDocuments/A_CONF.171_13_Rev.1.pdf (visited on 3.7.2020).

Principle 24 of the Yogyakarta Principles¹¹

* The Legality of Surrogacy in India

In India, Surrogacy was itself legalized in 2002 to boost the medical industry, and soon India became the most opted centre of Surrogacy. According to the 2002 **"Indian Council of Medical Research" (ICMR)** guidelines for Surrogacy, which researched Surrogacy legally but did not give it any legislative backing, commercial and philanthropic Surrogacy were considered lawful. However, in the 228th Report "Need for Legislation to Regulate Assisted Reproductive Technology Clinics as well as Rights and Obligations of Parties to a surrogacy," the Law Commission of India (LCI) has strongly recommended against Commercial Surrogacy. According to **Assisted Reproductive Technology (ART) Regulation Bill, 2010**.¹² The followings are the characteristics of the 2010 Bill:

1. Heterosexual couples, heterosexual individuals, and closet homosexuals with closet partners are eligible to commission surrogacy.
2. For Surrogacy commissioning infertility marks out the sole reason.
3. The surrogate mother should have less than 5 children including her own and age should be between 21 to 35 years.
4. Permission to act as a Surrogate will be granted only to Indian citizens, and no ART banks or clinics shall get or send an Indian for Surrogacy out of the country. The ART Clinics have to keep a database at central level having confidential records of clients, donors, and surrogates.
5. The choice recognizing with the amount to be paid for the Surrogacy is exclusively inside the watchfulness of the appointing parents and also the substitute mother.

11 Right to find a Family. This principle states that all States should take necessary legislative, administrative, and other measures to ensure the right to see a family, including access to adoption or **assisted procreation (including donor insemination)**, without discrimination based on sexual orientation or gender identity. The Yogyakarta Principles, available at; <https://yogyakartaprinciples.org/principle-24/> (visited on 3.7.2020).

12 The Central Government themselves was not clear on the provision that should be in the legislation to regulate Surrogacy. At the same time, the Ministry of Home Affairs considers that gay couples and single foreigners not eligible to have a child via Surrogacy in India, the Ministry of Health and Family welfare and the Women and Child Development ministry have put forward their opinion that Surrogacy should be allowed for everyone without discrimination. Available at; <https://jilsblognujs.wordpress.com/2014/07/17/the-assisted-reproductive-technologies-regulation-bill-2010-a-case-of-misplaced-priorities/> (visited on 6.07.2024).

The Surrogacy (Regulation) Bill, 2016¹³ - The Ministry of Health and Family Welfare in Lok Sabha on July 15, 2019 introduced The **Surrogacy (Regulation) Bill, 2019** which was passed on August 5, 2019.

Study of the Surrogacy (Regulation) Bill, 2019 is as follows:

1. The Bill allows altruistic Surrogacy and puts a ban on commercial Surrogacy. It can be opted by one who is suffering from infertility. The bill adopts some stringent measures in order to restrain activities relating to sale, prostitution, or any other mode of exploitation of the children.
2. The appropriate authority must have issued the following for the intending couple:
 - 2(a) **“Certificate of Essentiality**-A certificate of infertility for one or both of the intending parents from a District Medical Board; Magistrate Court must pass an order of parentage and custody of the surrogate child; Insurance cover for sixteen months that cover post-delivery complications for the surrogate”.
 - 2(b) **“Certificate of Eligibility**- The couple should be Indians and married for minimum five years; the age of wife should be between 23 and 50 years, and the husband should be between 26 and 55 years. The couples should not have any surviving child (either natural, adopted, or surrogate); this does not include a mentally retarded or physically affected child or suffers from dreadful disorder or illness;”
3. In order to meet the eligibility criteria, the surrogate mother should be a close relative of the intending parents, she should be married with her own biological child; age of the surrogate mother should be between 25 to 35 years; A woman can become a surrogate mother only once in her lifetime; she should possess medical certificate and mental fitness certificate.
4. Various offences according to the Bill are as follows: (i) to practice or advertise commercial Surrogacy in any form; (ii) exploitation of the surrogate mother; (iii) abandoning, exploiting, or not owning a

13 “It regulates Surrogacy by establishing National Surrogacy Board at the Central level, State Surrogacy Boards, and Appropriate Authorities in States and Union Territories. The proposed legislation ensures effective Surrogacy regulation, prohibits commercial Surrogacy, and allows ethical Surrogacy to needy infertile couples.”

surrogate child (iv) selling or importing human embryo or gametes for Surrogacy, the fine for such offenses is imprisonment upto ten years and a fine upto ten lakh rupees.

Another recent legislation to protect and safeguard women's reproductive rights are as follows:

- a) Assisted Reproductive Technology Regulation Bill 2020
- b) **Surrogacy Regulation Bill 2020**
- c) **Medical Termination of Pregnancy Amendment Bill 2020**

The aforementioned bill has been proposed to expand the horizons of access to safe and lawful abortion. This bill has been approved by the Union Cabinet.

The Assisted Reproductive Technology Regulation Bill 2020 along with the Surrogacy Regulation Bill 2020 and the approval of the Medical Termination of Pregnancy Amendment Bill 2020 have provided a robust system for the protection of reproductive rights of women. The Bill establishes the National board, The State Boards, and the National Registry to control and monitor Assisted Reproductive Technology (ART) clinics. The National Board will set down implicit rules to be followed by persons working at clinics and set the principles for basic infrastructure, equipment under the laboratories, and other human resources expertise hired by either ART clinics or banks. The Registration Authority at National level shall also maintain a Central Database to assist National Board in its work. The Bill makes provisions for the safe practice of ART services across the country by regulating and supervising ART Clinics and Banks. The Bill also proposes harsh punishment for those who attempt to control the sex of the offspring, sell embryos or gametes. The Assisted Reproductive Technology Bill, 2020 is being considered Government's best input to culminate exploitation in the required area.

The Surrogacy Regulation Bill, 2020- The Bill proposes to set up National Board, State Boards, and Appropriate Authorities in the States and Union Territories of India to direct and regulate Surrogacy in India. Some of the noticeable features of the bill is that it will regulate the surrogacy administrations across the country. The bill seeks to put a blanket ban on commercial surrogacy and opt for measures to curb the practice of sale and purchase of embryos and gametes. The bill also incorporates provision which will not only allow the Indian married couple but also the Indian single woman (only widow or divorcee) to opt for surrogacy upon

fulfilment of certain conditions. The bill also adopts provisions to prevent the exploitation of the surrogate mother and the child born through the process of surrogacy.

Medical Termination of Pregnancy Amendment Bill, 2020- The Medical Termination of Pregnancy Act, 1971 was enacted with a view to recognize the importance of safe & affordable termination or abortion services under certain specified circumstances by the registered medical practitioners. Other than this, few Writ Petitions are documented in the Apex Court and different High Courts of states for authorization of termination of pregnancies on the grounds of fetal abnormalities or pregnancies. Taken together, all the three proposed enactments establish a protecting environment for women's conceptive rights, tending to change social settings and mechanical development.

Together, the ART Regulation Bill, the Surrogacy Bill, and the amendment to the Medical Termination of Pregnancy Act, and also Pre-Conception and Pre-Natal Diagnostic Techniques Act will positively impact the reproductive choices and rights of females in India. Over the past one-decade, Indian courts have given important and substantial verdicts representing women's reproductive choices and rights for their equality and respect in their autonomous decisions concerning pregnancy along with the "inalienable survival rights" implicitly given protection under the fundamental Right to Life. The fact that court verdicts are not fixed and there are several rulings that have been recognized under **Article 21** of India's Constitution in which women's reproductive rights are a fundamental Right to Life and also embody 'Right to have a family and offspring.'

The legal scenario on Surrogacy and Reproductive rights of women in India is being thrown light upon through the following case laws: -

Baby Louise Joy Brown Case (1st IVF Baby)¹⁴

The first-ever successful 'test-tube baby of Lesley and John Brown named "Louise Joy Brown" was born on July 25, 1978, in Great Britain by two British doctors who performed this In-Vitro Fertilization. They created history and eventually won Nobel Prizes in 2010 for the development of human IVF therapy.

¹⁴ July 25, 1978.

Baby Durga alias Kanu Priya Agarwal (Indian 1st IVF Baby)- Dr. Subhash Mukhopadhyay was the 1st Indian Physician to create history for performing IVF, resulting in the first test-tube baby DURGA (and world's second after British physicians Patrick Steptoe and Robert Edwards) on October 3, 1978.

Jan Balaz vs. UOI¹⁵

This case talks about Twin Children's Right, wherein a German couple agreed with Marthaben Immanuel Khrishti (Surrogate Mother). The German couple place of work was United Kingdom. As their citizenship was litigated in U.S. courts, they required passports to travel to India which was seized by the passport authorities. The Supreme Court clearly denied to grant the visas but granted an exit permit to the kids. The German authorities allowed the couple to adopt the children and take legal actions for their rights through the court as Germany did not recognize Surrogacy.

Baby Dev Case¹⁶

In this case, through Surrogacy, two twins were born at the instance of an Australian couple. However, the Australian couple took back only one child, i.e., baby girl, amongst the twins, and left-back the baby boy 'Dev' behind in India. The birth of Dev had been registered, and the commissioning parents allegedly gave him up in adoption to somebody known to them. The documentary made by Ms. Aarti Betigeri reveals the sad plight of 'Dev' who could not be traced so far. In India, the infants' rights are nowhere placed above the rights of parents; but many political briefs allow cases, such as Dev case, to fall between the cracks.

Baby Gammy Case¹⁷

It is a controversial case that was set to rest by Justice Thackeray. In the present case, David Farnell along with wife Wendy had abandoned the baby Gammy as the baby was diagnosed with Downsyndrome and took away his sister Pipah to Australia. Further, it was also alleged that they were trying to lay their hands on the unclaimed money deposited by Thailand's people for baby Gammy.

15 AIR 2010 Guj 21

16 Aarti Betigeri, Where is Dev, The child born through Surrogacy but left behind by his parents? Available at; 12.7.2020, from <https://scroll.in/pulse/817116/where-is-dev-the-child-born-through-surrogacy-but-left-behind-by-his-parents> (visited on 12.02.24).

17 FLC 93-700(2016)

Justice Thackray held that *“the Farnells did not abandon Gammy, and they did want to keep him. However, at some unspecified time during the pregnancy, it was clear that Mrs. Chanbua (surrogate mother) had fallen in love with the pair of twins she was carrying and had decided that she was going to keep the male child.”* Justice Thackray also made a remarkable observation that *“surrogate mothers are not baby-growing machines or ‘gestational carriers.’ They are flesh and blood of the women who can develop bonds with their unborn children”*.

Dan Goldberg Case¹⁸

In this case, the Jerusalem Judge prevented a Gay Israeli restaurateur from taking his twins Itai and Liron back to their hometown, born with the help of a Surrogate in Mumbai. In this case, family court judge of Jerusalem, Phillip Marcus, refused to allow Paternity Test, which was to be done to prove their parenthood and acquire citizenship for their infants. On an appeal being filed against the family court's decision, the Jerusalem District Court decided that the family court had the jurisdiction to settle the case and be the one to rule in the case. It was a grand victory for the gay couple as the twins were issued passports and were allowed to return with them after struggling in Mumbai for around three months.

K.S Puttaswamy v. Union of India¹⁹

On August 24, 2017, nine-judge bench of India's top most Court collectively held: Privacy as a fundamental right mentioned under the Indian Constitution. Though the judges gave the different conceptions of privacy, the bench still had included personal autonomy relating to our body and mind. A very essential and critical aspect of this personal autonomy is human reproductive rights, that gives the liberty to an individual to make sexual and reproductive decisions, as also recognized by the United Nations International Conference on Population and Development. These rights have been explained to include access to contraception, the right to abort, the right to take decisions regarding discrimination, coercion, reproduction free from violence, and the right not to be subject to infants' coerced bearing. The judgment explicitly perceived women's sacred right to settle on conceptive decisions as a piece of individual freedom under Article 21 of the Constitution.

Skinner v. Oklahoma²⁰

“The Supreme Court of The United Kingdom characterized the right to reproduce as one of the basic civil rights of man.”

18 February 2010.

19 On August 24, 2017

20 316 U.S. 535

B.K. Parthasarathi v. Government of Andhra Pradesh²¹

The High Court of Andhra Pradesh in this case held that “the right to decide about reproduction is essentially a very personal decision which can be made by the man or the woman; necessarily, such a right even includes the right not to reproduce.”

Bandhua Mukti Morcha v. Union of India²²

The Apex Court of India, relying on **Francis Coralie v. Union Territory of Delhi²³** has held that Article 21 has within its sweep the right of women to maternity relief.

Suchita Srivastava & Anr v. Chandigarh Administration²⁴

The Hon’ble Supreme Court in this case reiterated the fact that a woman’s right to make reproductive choices is a part of Article 21 of the Constitution. It is also very important to note that reproductive choices can be exercised to procreate as well as abstain from procreating. While giving effect to the reproductive rights, it is of utmost priority to respect the dignity, privacy and bodily integrity of every woman. This means that nothing should act as a hindrance for woman to make a choice either to abstain from a sexual activity, to use any contraceptive means, or undergoing sterilization methods i.e. full reproductive choice should be given. To conclude logically, reproductive rights would include a women's entitlement to carry a pregnancy, give birth to a child, and subsequently raise them. However, in cases involving pregnant women, there is also duty of the State to protect the prospective child's life. Hence, the pregnancy can be terminated keeping in mind the legal constraints and the conditions which have to be fulfilled for the same. Hence, the provision of the Medical Termination of Pregnancy Act of 1971 can also be considered as constraint upon the exercise of reproductive choices. The abovementioned judicial pronouncements illustrate the major role played by judiciary in recognizing and eliminating the barriers which has been acting as a hindrance for the women and girls to make their reproductive choices on their own. Over the period of time there has been a significant shift from the ideas and mechanism for population control towards the need to protect the reproductive rights of women including the right to dignity, autonomy and other related rights.

21 Para 15, MANU/AP/0043/2000

22 (1984) 3 SCC 161: AIR 1984 SC 802 42

23 (1981) 1 SCC 608: AIR 1981 SC 746

24 (2009) 9 SCC 1

Conclusion

As reproduction is one of the fundamental points of marriage, the child is an imperative and sentimental need. The rights endowed by the constitution upon the woman in respect of their reproductive health provides liberty to a woman to make free choice to beget a child. These rights are intrinsic part of a woman's right to privacy, dignity, and bodily integrity.²⁵ It is guaranteed by various international human rights laws and policies and is also recognized under Article 21 of India's Constitution. Procreation is an indispensable part of one's life, and everyone has a right to procreate one's own biological child. All people are not lucky to fulfil their dream of parenthood because of infertility issues. Recent scientific and technological development provides a platform for infertile couples to have their biological child under Assisted Reproductive Technology (ART) and Surrogacy. Globally, India has been the largest centers of the fertility trade, with procreative medical tourism becoming a notable activity. Assisted reproductive technology (ART) has developed recently which has given hope to millions of people who are not fertile but at the same time, it has also announced a plethora of ethical, social, and other legal issues.²⁶ Instead of criticizing the demerits of ART's, there should be a check on technology so that it cannot be misused. It is asserted that the practice of Surrogacy is mind-boggling in nature and includes different issues like social, ethical, legal, emotional, and moral issues relating to the commercialization of Surrogacy, baby commoditization, etc.; still, it is the hard fact that the Reproductive Rights and Surrogacy complement and supplement each other. The misuse can be minimized by having a proper check on the government's technology, policies, and guidelines. The Researchers believes that asserting the Reproductive Right of an infertile and surrogate mother will act as a facilitator and not destructor in our society. Reproductive Rights have to be protected without any unfairness. In the modern era, where S.377 of IPC has been abolished where gay and lesbian marriages are allowed, where artificial medical technology like Pace Maker etc. is being used, adoption is permitted the right to appreciate the advantages of science and innovation using ART techniques and helping a childless couple is also one of the critical reproductive rights of every citizen. Problems faced because of Surrogacy determined by factors such as less cost, no legislation, and other policies became a booming business in the country. Corrupt practices, exploitation of surrogate

25 *Supra* note 13

26 Path Breaking measures to be taken to Protect Women's Reproductive Rights. Available at; <https://pib.gov.in/PressReleaseDetail.aspx?PRID=1603649> (visited on 6.7.2025).

mothers and abandonment of children prompt the need for a stringent law on Surrogacy. Amongst Asian countries India's ART market comes at third position. The Reproductive Right of a surrogate mother to conceive a child for intending parents, as it is her body, her choice. The creation of a balance between the both is a win-win situation for both the surrogate and the infertile couple. It's also a question of every woman's reproductive autonomy as she has the right to have control over her body and has a right to use her body as she likes. However, despite so much of misuse in India, there is no standardization of protocols, with inadequate reporting of the cases. The oocyte donor needs to be protected by an insurance cover and from multiple embryo implantations. Equal rights should be conferred to the children born through Assisted Reproductive Technology or born Biologically. The cryopreservation of sperm, oocytes and incipient organism by the ART Banks should be directed and monitored. The Bill means making pre-Genetic Implantation Testing required to serve the child brought into the world through ART. The researcher is of the view that ART clinics must be regulated and their misuse should be prevented; surrogacy contract should be drafted with the utmost caution, and proper legislation for ensuring equal protection to rights of the surrogate and child should be drafted at the National, and international level, provision for penalty and compensation clause in the agreement and it should be included as the social service scheme of the government. So, it is correct to say that the Reproductive Right is the Fundamental Human Right of each individual.

ONLINE VICTIMISATION OF MINORS: SEARCH FOR AN INTEGRATED PROTECTION MODEL

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Abstract

For a child, the internet is at once a classroom and a hazard. On one hand, it provides opportunities for self-directed learning and independence; on the other hand, it exposes children to the perils of the virtual world. Due to a lack of parental control, curiosity, whether conscious or unconscious, leads children to engage in negative internet use. Social media platforms let strangers reach minors across borders, and traffickers have adapted quickly; recruitment, grooming, and exploitation frequently begin online. The paper studies how child trafficking has migrated to cyberspaces and analyses whether the present statutory framework in India is well equipped to respond. It further analyses the legislative/statutory framework against the prevailing international mechanisms. Furthermore, it studies online predators' modus operandi and concludes with legislative and regulatory suggestions, including criminalisation of online grooming.

Keywords: Online grooming, trafficking of minors, online victimisation of minors, child rights, technology.

Introduction: Trafficking of Minors on Social Media

On an average, children begin to access the internet even before they turn six,¹ and many times children are exposed to content that may be disturbing and may require censorship. Social media platforms have changed the manner in which people - particularly minors- communicate, engage and participate with the world around them. Behind the appeal of virtual connectedness, however, lies a harder truth: children are increasingly exposed to unsuitable content, cyberbullying, online sexual abuse,

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1 Minors at Risk Of Cyber Trafficking. MARRI RESOURCE CENTRE, <https://toolboxes.marrirc.org.mk/tips/minors-at-risk-of-cyber-trafficking/>

harassment, and the patient, calculated strategies of online predators.² Social media platforms and their accessibility have unintentionally created channels for manipulation and abuse, which further endanger the safety and well-being of children everywhere. A very large proportion of users on these platforms are below eighteen – an age at which children do not yet possess the maturity or judgement to decide whom they should trust or confide in online. And because social media now penetrates nearly every corner of a young person's life, its risks touch every corner too: friendships, self-image, schooling, and mental health. Exploitation in these spaces can permanently damage a child's sense of security and leave psychological scars that outlast the abuse itself.

Lately, while one can say that the internet platforms have become an integral part of the lives of the minors, and further provides them with opportunities for communication with people across borders, a platform to express themselves, and engagement with peer groups. The difficulty is that the very features which make these platforms attractive to children – reach, anonymity, immediacy, and negligible cost make them equally attractive to offenders. Social media today intersects with every stage of the trafficking process and has become a fresh recruiting ground for offences such as cyber grooming³ and trafficking of minors, etc. Hence, preventing child trafficking should be the topmost priority in a developing nation such as India, and therefore, to achieve this goal, utilizing various media forms and to raise awareness among the public is very necessary. Technology cuts both ways here: it has expanded the trafficker's toolkit, but it has also placed new instruments of awareness, detection, and enforcement in the hands of the State and civil society. This paper examines both dimensions of this issue.

Why Children are Trafficked: The Root Causes

Traffickers do not choose victims at random; they look for individuals who display visible signs of vulnerability. One recurring source of such vulnerabilities is political instability. This instability hampers the government's ability to effectively combat such criminal activities. In regions experiencing conflict, a considerable number of children are frequently trafficked, either coerced into becoming victims or forced into the harrowing life of sex work. Economic deprivation is the second and perhaps the most powerful driver. The UNODC has observed in regions

2 Nicholas B. Maitland, & Jennifer Lynch, Social Media, in *SECURITY AND PRIVACY FROM A LEGAL, ETHICAL, AND TECHNICAL PERSPECTIVE* (IntechOpen, 2020).

3 *Cyber Grooming*. CHILDSAFENET, <https://www.childsafenet.org/new-page-15> (last visited February 10, 2024).

from which trafficked persons are recruited, “50 to 60 per cent of the population survives on US\$1 a day”.⁴ It has been increasingly noticed that vulnerabilities indicators like poverty, unemployment, food insecurity, illness and disease, and illiteracy remain widespread, while access to employment, education, vocational training, and economic opportunities continues to be limited; unemployed youth and school dropouts become easy prey. Children and adolescents who migrate from villages to cities in search of work – because opportunities at home are scarce or non-existent – are especially vulnerable during the journey and upon arrival. A third strand of causation lies in entrenched gender inequality. In societies where women and girls face systematic disadvantage in education, employment, and social standing, they are disproportionately represented among trafficking victim's, caste and class discrimination compound this exposure in several countries.⁵ Violent conflict, humanitarian disasters, and the displacement that follows them add yet another layer of risk.⁶ Finally, globalisation and technology have altered the economics of the crime itself. The movement of people, goods, and services across international borders has increased, providing traffickers with opportunities to exploit migration flows to conceal their operations.⁷

The digital revolution has made it remarkably easy to harvest personal information about potential victims, to advertise and recruit online, and to coordinate demand and supply across jurisdictions in real time.⁸

Definition and Meaning of the term “Trafficking in Persons (Tip)”

At the outset, addressing the term trafficking as a complex and constantly evolving form of crime presents significant challenges, particularly because there is no universally accepted definition exists.⁹ This uncertainty about

4 Human Trafficking FAQs, U.N. Office on Drugs and Crime, <https://www.unodc.org/unodc/en/human-trafficking/faqs.html> (last visited Mar 02, 2024)

5 The Sexual Trafficking of Women: Representations of Illegality and Victimisation, RCCS ANNUAL REVIEW, <https://journals.openedition.org/rccsar/247> (last visited Mar 3, 2024)

6 Human Trafficking FAQs, Supra note 4.

7 Academy of Science of South Africa (ASSAf), Climate Change and Extreme Heat: Strengthening Resilience and Adaptive Capacity in the Southern African Development Community (SADC) (2026), <https://doi.org/10.17159/assaf.2026/125>

8 The role of technology in Human Trafficking U.N. OFFICE ON DRUGS AND CRIME, (2021), <https://www.unodc.org/unodc/en/human-trafficking/Webstories2021/the-role-of-technology-in-human-trafficking.html> (last visited Feb 11, 2024)

9 Kevin J. Kerr, Anthony R. Beech & David Murphy, Sexual Homicide: Definition, Motivation and Comparison with Other Forms of Sexual Offending, 18 *Aggression & Violent Behav.* 1, 1–10 (2013).

the concept can hinder the formulation of uniform policies, guidelines, and preventive measures to combat trafficking. Broadly, trafficking can be viewed as the illegal movement, recruitment or exploitation of individuals, whether within a country or across international borders. Although considerable international efforts have been undertaken to combat trafficking, the meaning and scope of “TIP” continue to vary across different legal systems. Various international and regional instruments have therefore adopted multiple approaches to defining and understanding the concept. The preamble to the **“Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others** (“Whereas prostitution and the accompanying evil of the traffic in persons for the purpose of prostitution are incompatible with the dignity and worth of the human person and endanger the welfare of the individual, the family and the community, ...”)¹⁰ assimilates trafficking with prostitution. The Convention, in its very first article, makes trafficking punishable, defining it in terms of procurement, enticement, or leading away of a person for prostitution or sexual gratification of another person.¹¹

The **“United Nations General Assembly, 1994 (Resolution 49/166)”** defined trafficking as- “The illicit and clandestine movements of persons across national borders, largely from developing countries with economics in transition, with the end goal of forcing women and girls into sexually or economically oppressive and exploitative situations for profit of recruiters, traffickers and syndicates, as well as other illegal activities related to trafficking, such a forced domestic labour, false marriages, clandestine employment and false adoption.”¹²

The **“World Congress Against Commercial Sexual Exploitation of Children”**¹³ defines Trafficking” as an - ‘unlawful movement and sale of people across national borders in return for cash or other benefits.’ While the **Global Alliance Against the Trafficking of Women**,¹⁴ defined “trafficking” as “the recruitment and transportation of (a) person(s) within and across national borders, by means of violence or threat of violence, abuse of actual

10 Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others art. 1, Mar. 21, 1950, 96 U.N.T.S. 271.

11 Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, Dec. 2, 1949, 96 U.N.T.S. 271

12 G.A. Res. 49/166, Traffic in Women and Girls (Dec. 23, 1994).

13 Maureen Jaffe & Sonia Rosen eds., Forced Labor: The Prostitution of Children (U.S. Dep’t of Lab., Bureau of Int’l Lab. Affs. 1996).

14 HAQ: CENTRE FOR CHILD RIGHTS, CHILD TRAFFICKING IN INDIA: A SITUATIONAL ANALYSIS (2016), <https://haqcrc.org/wp-content/uploads/2016/07/child-trafficking-in-india-A-situational-analysis.pdf>.

or perceived authority arising from a relationship, or deception, in order to subject them to the actual and unlawful power of (an) other person(s)". The debate lost much of its force in 2000, when the Palermo Protocol was adopted alongside the UN Convention against Transnational Organised Crime and gave the world a working definition. Under Article 3, the offence is built from three ingredients: a prohibited act (recruiting, transportation, transfer, harbouring, or receiving a person), a wrongful means (coercion, abduction, fraud, abuse of power or of a position of vulnerability, and a purpose of exploitation. Where the victim is a child, however, the "means" ingredient falls away entirely – harbouring or recruiting a child in order to exploit that child is trafficking even where no force or deception is shown, and the child's apparent consent does not negate the offence.¹⁵ Indian law similarly adopts the same architecture as discussed in Part VI below.

Child Trafficking and its Forms

Children are among the easiest candidates for traffickers everywhere, regardless of their gender or age. They are bought, sold, and exchanged, frequently drawn in by promises of better work and a brighter future, and thereafter subjected to emotional abuse, sexual violence, and other dangers. UNICEF's working definition captures the breadth of the crime: "A child (below 18 years old) has been trafficked if he or she has been moved within a country, or across borders, whether by force or not, with the purpose of exploiting the child."¹⁶ Increasingly, the seduction of minors through attractive futures and false promises begins on social media platforms.

- (a) **Forced labour:** children lured by dreams of a better life and income are routinely reduced to bonded labour. The **International Labour Organization (ILO)** describes forced labour as work extracted "through the use of violence or intimidation, or by more subtle means such as accumulated debt, retention of identity papers, or threats of denunciation to immigration authorities" (International Labour Organization, 1996).¹⁷ Trafficked children are put to domestic work, agricultural labourers in rural belts, and construction work in urban areas, and are absorbed into carpet-weaving and apparel industries, fish and shrimp processing, and a range of other formal and informal workplaces.

15 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime, art. 3, Nov. 15, 2000, 2237 U.N.T.S. 319.

16 HAQ: CENTRE FOR CHILD RIGHTS, *supra* note 14.

17 HAQ: CENTRE FOR CHILD RIGHTS, *Supra* note 14 (citing INT'L LABOUR ORG.(1996)).

- (b) **Sexual Exploitation:** Minors are trafficked for the purpose of being sexually exploited in multiple ways, which includes forced prostitution and forms of exploitation that shelter behind social or religious sanction. Sexual exploitation has been defined as “the act of coercing, luring or engaging a child, under the age of 18, into a sexual act, and involvement in the sex trade or pornography, with or without the child's consent, in exchange for money, drugs, shelter, food, protection or other necessities”¹⁸ Children are also particularly exposed to sex tourism, and the growth of the internet has fuelled a market for child abuse material, drawing ever-younger victims into its production.
- (c) **Exploitation in illegal activities:** A third category involves the use of children in criminal enterprises. Trafficked children are forced into organised begging; some become victims of organ trafficking, in which organs are removed from them without genuine consent and sold for profit. Children are also employed at various points of the narcotics trade- a setting in which they face heightened maltreatment and frequently develop early substance dependence, with lasting damage to their physical and mental development, education, and social functioning.

From Street to Screen: Online Grooming and the Modus Operandi of Digital Traffickers

Globalisation and technological progress have made knowledge more accessible, collapsed distances, and connected people across cultures – achievements that need no elaboration. But the same connective tissue serves the offender as efficiently as it serves everyone else. Social media's ease of use and friendly interface allow a trafficker or abuser to reach a far larger pool of potential victims, in far less time, than street-level recruitment ever permitted, while observing and monitoring those victims behind a screen.¹⁹ Digital platforms now sit at the centre of daily life for adults and children alike. Sites such as YouTube, X (formerly Twitter), and Facebook host vast interactive communities,²⁰ and a message that once took days to deliver now travels in a click. The same qualities that make these spaces valuable global reach, informality, constant availability also make them fertile ground for crime, because an offender can locate, observe, and cultivate a vulnerable child without ever stepping away from the screen.²¹

18 HAQ: CENTRE FOR CHILD RIGHTS, Supra note 10 (citing Tonkin (2004)).

19 Cyber Grooming, supra note 3

20 Cyber Grooming, supra note 3

21 Cyber Grooming, supra note 3

One danger demanding immediate attention is the online grooming of minors- conduct in which an adult uses electronic communication to win a child's trust with the intention of sexually abusing or exploiting the child. The ***“Terminology Guidelines for the Protection of Children from Sexual Exploitation released by the Interagency Working Group on Sexual Exploitation of Children (“Terminology Guidelines”)*** in Luxembourg in 2016, defines the act of grooming as process of establishing/building a relationship with a child, either in person or through the use of the Internet or other digital technologies, to facilitate either online or offline sexual contact with that person”.²² “The National Commission for Protection of Child Rights (NCPCR) has similarly described the term online grooming of children as the process of building of an emotional connect with a minor to gain their trust for the purposes of sexual abuse or exploitation”.²³ Although each case has its own texture, a study of reported incidents reveals a recognizable modus operandi that typically proceeds in stages:

- First, victim selection. The perpetrators scan profiles available in the public domain, as well as comment sections, gaming lobbies, and follower lists, for signs of vulnerability—loneliness, family conflict, economic distress, or signs of hunger for validation.
- Secondly, the offenders approach the target under a false identity. The groomer/perpetrator poses as a peer of similar age or as a talent scout, employer, or benefactor and initiates what appears to be an innocent conversation.²⁴
- Third, trust-building. The offender/perpetrator uses flattery, sustained undivided attention, small gifts, mobile recharges, or in-game currency to create a sense of a special relationship/bond and, often, of obligation.
- Fourth, isolation and secrecy. The conversation is moved to private or encrypted channels, and the child is persuaded that the relationship must be concealed from parents and friends, severing precisely the supervision that could interrupt the abuse.

22 INTERAGENCY WORKING GROUP ON SEXUAL EXPLOITATION OF CHILDREN, TERMINOLOGY GUIDELINES FOR THE PROTECTION OF CHILDREN FROM SEXUAL EXPLOITATION AND SEXUAL ABUSE (Luxembourg, 2016).

23 Cyber Grooming, supra note 3.

24 UNICEF INNOCENTI RESEARCH CENTRE, CHILD SAFETY ONLINE: GLOBAL CHALLENGES AND STRATEGIES (2011), https://www.unicef-irc.org/publications/pdf/ict_techreport3_eng.pdf.

- Fifth, desensitisation and acquisition of material. Sexual topics and imagery are introduced gradually until they seem normal, and the child is induced to share compromising photographs or videos, whether taken by webcam, phone camera, or otherwise.
- Sixth, leverage and exploitation. The material so obtained becomes an instrument of blackmail – commonly described as sextortion – used to extract further material, money, or compliance. Where the grooming culminates in a physical meeting, the child faces sexual assault; in other cases, the same leverage is used to recruit the child into trafficking networks, forced criminality, or continued online exploitation.²⁵

Any child, regardless of gender, can be groomed. The documented consequences include anxiety, depression, post-traumatic stress, difficulties with trust and relationships, and other serious harms to health – injuries that permeate the child's family life, schooling, and later adulthood. Given the gravity of the threat, the adequacy of the existing legislative framework demands close attention.

The Legal Framework

The legal framework concerning trafficking is deliberated in the following part:

- A. **Constitutional Provisions:** The constitutional framework provides an important foundation for addressing trafficking and the exploitation of children in India. Article 23 expressly prohibits trafficking in human beings, begging, and other similar forms of forced labour and makes their contravention punishable.²⁶ Article 24 bars children below the age of fourteen years from employment in factories, mines, or other hazardous occupations.²⁷ These guarantees draw further strength from Article 21's promise of life and personal dignity, and from Articles 39 (e) and 39(f) of the Directive Principles of State Policy, which direct the State to shield children from abuse and exploitation and to ensure that childhood is protected against conditions that may adversely affect their development.
- B. **The Bharatiya Nyaya Sanhita, 2023:** The BNS came in force since 1 July 2024, has taken the place of the Indian Penal Code, 1860 as India's general penal statute and now houses the principal trafficking offences.²⁸ Section 143, which substantially succeeds Section 370 of the

25 UNICEF INNOCENTI RESEARCH CENTRE, *supra* note 24.

26 INDIA CONST. art.23.

27 INDIA CONST. art.24.

28 Bharatiya Nyaya Sanhita, 2023, No.45, Acts of Parliament, 2023 (India).

IPC, retains the Palermo architecture of act, means, and exploitative purpose and, importantly, makes the consent of the victim irrelevant where the statutory elements of trafficking are established. The punishment is enhanced where the victim is a child, and trafficking involving more than one child may attract life imprisonment. Section 144 separately addresses the exploitation of a trafficked person, including a trafficked child. The BNS also contains several other provisions that may become relevant in cases involving the trafficking and sexual exploitation of children. Section 96, for instance, deals with the procurement of a child and is now gender-neutral. It thereby departs from the old Section 366A of the Indian Penal Code, which had protected only the minor girl. Sections 98 and 99 criminalise the selling and buying of a child for the purpose of prostitution. Section 141 penalises importing a girl under twenty-one or a boy for compulsory labour. Section 95 deserves separate mention: it punishes whoever hires, employs, or engages a child to commit an offence. The wording was drafted with no particular technology in mind – which is precisely why it may stretch to cover children recruited through gaming lobbies, chat groups, or social media pages into unlawful work.

- C. **The POCSO Act, 2012:** The Protection of Children from Sexual Offences Act, 2012 (POCSO Act) is the principal legislation governing sexual offences against minor children in India²⁹ irrespective of their gender. The Act covers penetrative and non-penetrative forms of sexual assault, sexual harassment, and the use of children for pornographic purposes. The POCSO Act also recognises increased vulnerability of children where the accused occupies a position of trust, authority, or responsibility. It also emphasises child-sensitive procedures governing reporting, recording of statements and evidence, investigation, and trial before Special Courts.

Several provisions under the Act are relevant particularly to online abuse and grooming. Section 11(iv) of the Act, discusses - repeatedly or constantly following, watching, or contacting a child, either directly or through electronic, digital, or other means, within the definition of sexual harassment. The Section also covers enticing a child for pornographic purposes. These provisions can therefore address certain forms of conduct that commonly occur during online grooming, although the Act does not presently recognise grooming as an independent offence. The 2019 amendment, sharpened Sections 13 to 15 which addresses the use of children for pornographic purposes

29 The Protection of Children from Sexual Offences Act, 2012, No 32, Acts of Parliament, 2012 (India).

and the storage, possession, transmission, or related handling of such material. The same was clarified by the Supreme Court of India in the case titled ***“Just Rights for Children Alliance v. S. Harish”***, wherein clarification was laid down concerning the legal consequences associated with viewing, possessing, or storing child sexual abuse material, including circumstances where the material has not been transmitted.³⁰ The Court also emphasised the importance of using terminology that accurately reflects the exploitative nature of such material and endorsed the expression “child sexual exploitative and abuse material” (CSEAM) in place of the misleading expression “child pornography”.

The framework under the POCSO Act is therefore capable of addressing several forms of online sexual exploitation. However, its application to grooming largely depends on whether the conduct falls within an existing offence. This creates a gap in which online interactions are deliberately designed to establish trust and manipulate a child, but have not yet culminated in conduct that clearly satisfies an existing offence.

- D. The Information Technology Act, 2000 and the 2021 Rules:** The Information Technology Act, 2000 provides the cyber specific arm of the legal response. another.³¹ Section 67B specifically deals with electronic material depicting children in sexually explicit acts or conduct and prescribes imprisonment and fines for such offences. The provision is relevant to online grooming because clause (c) addresses conduct involving the cultivation, enticement, or inducement of children into online relationships for sexually explicit conduct or in manner that may offend a reasonable adult. The Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 reinforce the statutory framework by imposing due diligence obligations on intermediaries.³² These obligations include - removal of material pertaining to child sexual abuse and, for significant social media intermediaries, the implementation of appropriate technological measures to identify such content. This framework is critical because online trafficking and exploitation typically involve multiple interactions throughout social media accounts, messaging applications, image-sharing services, and other electronic platforms.

30 Just Rights for Children Alliance v. S. Harish, 2024 INSC 716 (India).

31 The Information Technology Act, 2000, No. 21, Acts of Parliament, 2000 (India), Sec.67B.

32 The Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 (India).

Therefore, the effectiveness of the law relies not only on criminal prosecution but also on platforms' capacity to identify, report, and prevent harmful activity at an early stage.

- E. **Allied Statutes: ITPA, 1956 and the JJ Act, 2015:** The Immoral Traffic (Prevention) Act, 1956 takes into consideration commercial side of sexual exploitation. The Act penalises conduct such as procuring or inducing persons for prostitution, detaining persons in premises where prostitution is carried on, maintaining or allowing premises to be used as brothels, living on the earnings of prostitution, and soliciting. Although enacted in a very different technological and social context, the statute may still become relevant where trafficking ultimately results in commercial sexual exploitation. The Juvenile Justice (Care and Protection of Children) Act, 2015 adopts a broader child-protection and rehabilitation perspective. Trafficked and exploited children may fall within the category of children in need of care and protection and are entitled for appropriate care, protection, rehabilitation, and social reintegration. The Juvenile Justice (Care and Protection of Children) Act creates specific offences relating to cruelty towards children, the sale or procurement of children, and other forms of exploitation. Its importance lies in recognising that the legal response to trafficking cannot end with prosecution; the protection and long-term rehabilitation and well-being of the child must remain central to the process.
- F. **The Digital Personal Data Protection Act, 2023:** The DPDP Act, 2023 introduces a new dimension to child protection by regulating the processing of minor's personal data. Section 9 obliges every data fiduciary to secure verifiable parental consent from a parent or lawful guardian before processing or handling a child's personal data and places restrictions on tracking, behavioural monitoring, and targeted advertising directed at children.³³ The Act prohibits processing of any data which is likely to have a detrimental effect on a child's well-being. These safeguards as laid down under the Act have a particular relevance in the digital cyberspace. Online platforms captures substantial information about children's interests, behaviour, interactions, and online activities. If such data is inadequately protected, it may contribute to identification and targeting of vulnerable children, as well as to tracking. Effective implementation of Section 9 can therefore form part of a preventive approach to online exploitation. At the

33 The Digital Personal Data Protection Act, 2023, No. 22, Acts of Parliament, 2023 (India), sec. 9.

same time, age verification and parental consent mechanisms must be carefully designed so that protecting children does not lead to excessive collection or disclosure of their personal data.

- G. **The International Framework:** India's legal framework for addressing trafficking and the exploitation of children is informed by a broader international framework. Key relevant instruments runs from the 1949 Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the Convention on the Elimination of All Forms of Discrimination against Women, the Convention on the Rights of the Child (CRC), the ILO Worst Forms of Child Labour Convention, 1999, and the Palermo Protocol. The CRC provides a significant framework for the protection of children. Articles 34 and 35 oblige States Parties to safeguard children against sexual exploitation and abuse and to adopt appropriate national, bilateral, and multilateral measures to prevent the abduction, sale, and trafficking of children irrespective of the purpose or form in which such acts occur.³⁴ Their importance has grown in the digital age because recruitment and exploitation can take place without involving physical movement, which has been traditionally associated with trafficking. This scale of the offence of trafficking is constantly changing and the speed at which its methods are evolving, explains what have led to the creation of this thorough legal framework. It is generally acknowledged that trafficking constitutes a major type of organised criminal activity and one which produces large amounts of illegal profit. Earlier estimates placed the number of women and children trafficked across international borders each year in the range of six to eight lakh, although such figures did not account for trafficking occurring entirely within national boundaries.³⁵ Children and adults may be exploited for a range of purposes, including begging, forced labour, domestic work, agriculture, construction, sexual exploitation, pornography, drug-related activities, and other forms of organised exploitation.³⁶ The Global Report on Trafficking in

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

35 Human Trafficking in India, LOK SABHA SECRETARIAT, MEMBERS' REFERENCE SERVICE, https://loksabhadocs.nic.in/Refinput/New_Reference_Notes/English/Human%20trafficking%20in%20india.pdf (last visited Feb. 19, 2024).

36 P.M. NAIR, A REPORT ON TRAFFICKING IN WOMEN AND CHILDREN IN INDIA 2002-2003 (NHRC-UNIFEM-ISS, 2004), <https://nhrc.nic.in/sites/default/files/ReportonTrafficking.pdf>.

Persons 2022³⁷ published by the United Nations Office on Drugs and Crime also demonstrates that the consequences of trafficking are not experienced equally. Female victims face a substantially greater risk of physical or extreme violence than male victims, while children are more vulnerable to such violence than adults. Minor and Adolescent Girls, in particular, face increased risks of sexual and other forms of exploitation.³⁸ Age and gender, in short, shape both the likelihood and the severity of victimisation – a strong argument against treating trafficking as one undifferentiated offence. Trafficking is also expressly addressed within the 2030 Agenda for Sustainable Development. Sustainable Development Goal Target 5.2 seeks to eliminate violence against women and girls, including trafficking and sexual exploitation; Target 8.7 calls for effective measures against forced labour, modern slavery, and human trafficking; and Target 16.2 focuses specifically on ending abuse, exploitation, trafficking, and all forms of violence against children.³⁹

At the regional level, India has ratified the United Nations Convention against Transnational Organized Crime and its Trafficking Protocol. It is also a party to the SAARC Convention on Preventing and Combating Trafficking in Women and Children for Prostitution, under which regional cooperation mechanisms have been established.⁴⁰ Further, India entered into a Memorandum of Understanding with Bangladesh in June 2015 concerning cooperation in the prevention of trafficking and the rescue, recovery, repatriation, and reintegration of victims.⁴¹ Taken together, these constitutional, statutory, and international instruments demonstrate that India does not lack legal provisions addressing trafficking and child exploitation. The more difficult question is whether these provisions, many of which were framed before the rapid expansion of social media and digitally mediated communication, are sufficiently responsive to the ways in which trafficking now occurs. Online recruitment, grooming,

37 U.N. OFFICE ON DRUGS AND CRIME, GLOBAL REPORT ON TRAFFICKING IN PERSONS 2022 (2023), https://www.unodc.org/documents/data-and-analysis/glotip/2022/GLOTiP_2022_web.pdf.

38 U.N. OFFICE ON DRUGS AND CRIME, GLOBAL REPORT ON TRAFFICKING IN PERSONS 2022 (2023), https://www.unodc.org/documents/data-and-analysis/glotip/2022/GLOTiP_2022_web.pdf.

39 G.A. Res. 70/1, Transforming Our World: The 2030 Agenda for Sustainable Development (Sept. 25, 2015).

40 SAARC Convention on Preventing and Combating Trafficking in Women and Children for Prostitution, Jan. 5, 2002.

41 Human Trafficking in India, *supra* note 35.

manipulation, and exploitation can develop long before a child is physically moved or conventional forms of abuse become apparent. The effectiveness of the existing framework must therefore be assessed not merely by the number of offences it criminalises, but by its ability to identify and interrupt the digital pathways through which exploitation increasingly begins.

Legal Gaps- A Need for Strict Regulations

Measured against the *modus operandi* described in Part V, the framework set out above is impressive on paper but reveals real gaps.

- First, and most importantly, no Indian statute expressly defines or criminalises online grooming. A groomer can, depending on the facts, be prosecuted u/s 11 of the POCSO Act, Section 67B(c) of the IT Act, or for trafficking and procurement provisions under BNS; but each of these captures only a fragment of the conduct. Section 11 (iv) requires repeated or constant contact with sexual intent, leaving the early, deliberately innocuous stages of grooming untouched. Section 67B(c) punishes inducement into an online relationship “ for a sexually explicit act”, but the statute nowhere addresses the facilitation of abuse or identifies the ingredients of grooming as a course of conduct, producing uncertainty about which preparatory acts fall within it. As the offence is not named, prosecutors must assemble it from provisions designed for other conduct – and cases can fail in the gaps between them.
- Secondly, the gender deficit that long disfigured this field has been only partly cured. The replacement of Section 366A of the IPC by the gender- neutral Section 96 of the BNS is a welcome correction, but the Immoral Traffic (Prevention) Act remains structured around prostitution and does not address exploitation that never touches commercial sex, while Section 141 of the BNS still draws distinctions by age and sex in cross- border importation.
- Thirdly, the legislative effort to consolidate the law has stalled. The Bill of 2021, namely, the Trafficking in Persons (Prevention, Care and Rehabilitation) Bill, 2021, which was proposed as a comprehensive statute spanning prevention, investigation, rehabilitation, and cross-border cooperation, was never enacted.⁴²

42 The Trafficking in Persons (Prevention, Care and Rehabilitation) Bill, 2021 (India) (draft published for public comments; not enacted).

- Fourthly, the enforcement capacity to curb this offence lags behind. The AHTUs remain unevenly staffed, unequipped and trained; digital forensics capability thins out quickly beyond the metropolitan centres; and evidence held by platforms abroad must be obtained through slow mutual legal assistance processes, during which accounts vanish and material migrates. Beneath all this runs under-reporting: shame, threats, and the child's own manipulated loyalty to the groomer keeps most cases from ever reaching a police station.

Suggestions

Six practical measures follow from the analysis above:

- (a) **Recognise grooming as a separate offence.** Parliament should consider introducing a specific offence of grooming under the POCSO Act, 2012. The definition should reach sexually motivated communication with a child, arranging meetings, and obtaining intimate material – and it should be framed as a course of conduct, so that police can step in before the abuse turns physical. Section 15 of the UK Sexual Offences Act 2003⁴³ offers a workable template.
- (b) **Pass comprehensive anti-trafficking legislation.** The Parliament may revisit the 2021 Bill or may consider for development a separate comprehensive law that provides clear and consistent definitions, which complements Section 143 of the BNS, strengthens victim-centred rehabilitation, and establishes mechanisms specifically equipped to address online recruitment and exploitation.
- (c) **Make child safety a platform responsibility.** Platforms should carry a clear responsibility/duty for preventing harm to children on their services. This should include stronger safety-by-design measures, such as stronger default privacy settings for children, effective age-assurance systems, safeguards against unsolicited contact between adults and children, and prompt action on complaints involving grooming. Platforms should also be transparent about how they identify, report, and remove child sexual abuse material.
- (d) **Ensure effective implementation of Section 9 of the DPDP Act.** The provision will shield children from tracking, profiling, and targeted advertising only if it is actually enforced – and only if age verification and consent mechanics it requires do not themselves force children to hand over more personal information just to get online.

43 Sexual Offences Act 2003, c.42,sec.15(U.K.)

- (e) **Equip the enforcers - Strengthen enforcement capacity.** District Cyber cells and AHTU's need specialised personnel, appropriate digital-forensic capabilities, and clearly defined procedures for responding to cases involving online grooming, sextortion, and trafficking. Building of institutional capacity is required to secure digital evidence located outside India, including more effective cross-border cooperation mechanisms.
- (f) **Teach before harm occurs.** Enforcement alone cannot carry online safety: Digital literacy and age-appropriate online safety measures should be incorporated into school curricula, while parents and caregivers should be given practical guidance on recognising the warning signs and stages of online grooming. Early awareness can help children and families identify risky interactions before they progress into coercion, exploitation, or trafficking.

Conclusion

This paper examines the changing nature of the offence of trafficking of minors from its more conventional forms to the new age forms of exploitation emerging via social media. The underlying vulnerabilities, however, largely remains the same. Poverty, conflict, gender-based disadvantage, and the absence of stable family and school environments continue to place children at risk. What has changed is the point at which exploitation of a minor begins. It is now largely seen that the first contact between the perpetrator and the victim no longer takes place on a street, railway platform, or workplace, but occurs through phone screen. With increase in the easy accessibility to social media, coupled with limited guidance and supervision, can expose children to unrealistic aspirations, deceptive relationships, and the desire to escape difficult circumstances. The Indian statutory framework has undergone significant development in the recent years. The erstwhile Penal law which is the Indian Penal Code, 1860 has been revised, modernised and partially de-gendered the penal provisions under the new Code i.e. Bharatiya Nyaya Sanhita, 2024; the Supreme Court has clarified that even possession of child sexual abuse material can attract criminal liability; and the DPDP Act has introduced an additional layer of protection concerning children's personal data. Yet important gaps remain to be addressed. There is still no comprehensive statutory framework that specifically addresses grooming as a method through which children are targeted, manipulated, and drawn into exploitation. Enforcement mechanisms also need to become more responsive to crimes that can develop through a series of messages within hours or even minutes.

Hence, the responsibility, cannot rest with any one institution. Parents and legal guardians must remain attentive to children's online interactions and provide appropriate guidance. Social media platforms must take greater responsibility for designing safer digital environments rather than relying primarily on complaints after harm has occurred. The State, in turn, must ensure that the legal and enforcement framework keeps pace with the changing methodology's used by the perpetrators. Protecting minor children in the digital era necessitates the continuous development of legal and regulatory frameworks to cater to the realities of how exploitation now occurs, while ensuring that prevention, accountability, and the best interests of the child remain the centre of that response.

ARTIFICIAL INTELLIGENCE AS A LEGAL FRAMEWORK: RETHINKING THE SHIFT FROM HUMAN EXPERTISE TO MACHINE INTELLIGENCE

Ms. Simran Chhabra
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Abstract

Artificial Intelligence (AI) is changing the way how any work is done. In India, AI is rapidly being used in areas such as research, marketing, law, education, healthcare banking, business and many other fields. Many tasks that earlier required a lot of time and highly trained and experienced people can now be performed or assisted by AI by just a click. It can complete these tasks with more efficiency, in less time, more accuracy and often at a comparatively lower cost. This shift from human intellect or expertise to machine intelligence is changing the nature of the work done and creating new issues for law and society. This paper aims to explore whether AI can evolve as a new legal framework in a world where machines are becoming capable of performing complex tasks that were earlier done exclusively by humans. It examines the shifting role of professional expertise, now depending on AI for everyday activities. The paper also discusses the benefits and limitations of AI, such as increasing efficiency, reduction in cost, more accuracy, reduced time and effort and wider access to specialised services, along with concerns relating to accuracy, lack of human element of understanding emotions, responsibility, accountability, employment, and human control. The paper focuses on the Indian context and examines how the increasing use of AI may change the way legal responsibility and human involvement are understood. It explores the need to maintain a balance between technological development and the importance of human judgment, responsibility and control.

Keywords: Artificial Intelligence, Lawyers, Machine Intelligence, Human Expertise, Automated Service

Introduction

With ever increasing impact of Artificial intelligence across various fields, it is likely to bring an evolution in the legal frameworks across the world. Especially, to the laws relating to intellectual property rights, Information

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technology, data privacy, the liability of platforms for their software products or services, contract drafting and legal research.¹ AI has the ability to bring changes to the practice of law across the world. Legal field has been constantly making efforts for evolving with the technology driven changes since ages, and the recent development of AI based system such as ChatGPT, Claude etc marks the developing era where technology can perform the legal writing and research tasks with such expertise and efficiency that earlier required more time and efforts by highly qualified and trained people in the required field.

With the constant advancement in this sector, changes are being brought in for providing fully automated legal services by adoption of this latest technology to ease the legal tasks that earlier could only be done by highly qualified professionals, consuming a lot of time. But to bring that evolution, legal framework needs to be updated as per the current requirement and policies need to be formulated to promote innovation in this sphere, while also protecting against the associated risks.

Effect of AI in Legal Profession

With the advent of AI in all industries, notable effect can be seen in the legal profession as well. Though in reality AI would assist the lawyers than replacing them in the coming times as AI is already being used in conducting legal research, predict legal outcomes, to review and formulate contracts and even to recommend judicial decisions about various aspects such as bails and sentencing.²

For legal fraternity, using the best of AI tools to their maximum advantage and getting the most out of them will involve a lot more skill than just a click on the mouse. AI would be useful when it would be used to compliment human intelligence and skills as an assistive tool, so it should be construed as an assistance tool rather than replacement of the human lawyers.³ The people who would learn the skills to use this technology well,

- 1 Shahid, A., Qureshi, G. M., & Chaudhary, F. (2023). Transforming legal practice: The role of AI in modern law. *Journal of Strategic Policy and Global Affairs*, 4(01), 36-42.
Available at: <https://doi.org/10.58669/jspga.v04.i01.04>
- 2 Wang, Weiyuan. (2023). An Analysis of the Feasibility of Artificial Intelligence to Replace Lawyers. *Advances in Politics and Economics*, 6(2), p161.
Available at: <http://dx.doi.org/10.22158/ape.v6n2p161>
- 3 Kilic, M. (2021). Ethical-juridical inquiry regarding the effect of artificial intelligence applications on legal profession and legal practices. *J. MARSHALL LJ*, 14, 202-211.
Available at: <https://www.johnmarshall.edu/lawreview/wp-content/uploads/2021-AJMLS-Spring-Journal-XIV2-Muharrem-Kilic.pdf>

will get the most benefit out of this AI tool. This will require learning about these tools, learning about the technicalities to give prompts, developing new skills, choosing the appropriate AI tool as per the requirement of a specific task, raising the right questions and evaluating the outcome or responses as per their relevancy and then reconstructing the query as needed for an appropriate response.⁴ It would also require the knowledge to corroborate and synthesis the result into cohesive outcome ensuring to protect the confidentiality while using the AI tools.

For this law firms and law schools would be required to provide training programmes to the practicing lawyers and law students respectively so that they can adapt to this new technology and make the best use of it, while ensuring the ethical implications. Law schools should provide students with the knowledge of using AI tools for writing and research work as they would help enhance their skill set as per the industrial requirement but they have to make sure students or users in the legal fraternity understand the ethical implications of it and use it wisely.⁵

It is quite evident that AI would be imperatively used in legal field. But even with widespread adoption of this technology, lawyers will still be very important as AI cannot make a convincing argument before the judge nor can it weight the multiple factors that would required to be considered during the course of an ongoing litigation process while arriving at the complex decisions. Despite being so competent and advanced, it still lacks the ability to understand the emotions and replace the human element of relationships.⁶

Practically, usage of such advancements cannot be ignored altogether nor can be given the leverage to overpower the importance of human element. It has to be used to the best advantage of legal fraternity, clients, judiciary and society at large. It can help fundamentally reshape the legal arena.

4 Hu, T., & Lu, H. (2020, January). Study on the influence of artificial intelligence on legal profession. In *5th International conference on economics, management, law and education (EMLE 2019)* (pp. 964-968). Atlantis Press.
Available at: <http://dx.doi.org/10.2991/aebmr.k.191225.184>

5 Ehirim, U. G. (2025). Ethical Legal Practice and the Integration of AI into Legal Profession: Striking the Balance. *Open J. Legal Stud.*, 8, 13.

6 King, D. (2024). How to Retain Being a Human Lawyer While Using Generative AI. *Cal. WL Rev.*, 61, 331.
Available at: <https://scholarlycommons.law.cwsl.edu/cwlr/vol61/iss2/4>

There is a widespread assumption in the legal fraternity like many other professions nowadays that AI is a threat to the existence of the lawyers and the law firms.⁷ With the help of factual evidences from other sectors or industries it has been quite evident that AI will enable law firms and lawyers to be way more efficient by putting in lesser time and efforts. It would make them more productive and would help them adopt the policy of smart work over hard work with better proficiency and accuracy.

The goal of AI in legal industry is its widespread adoption from Bar to Bench enabling advocates, legal researchers and even the judges to utilize the power and ease of technology which would help them summarise the contentions and deduce the relevant factors quickly as per the merits of the case and according to the law in practice and relevant precedents suggest a probable outcome.

Use of AI in Legal Profession

Currently with the extensive adoption of AI in all spheres of life, there is a constant fear amongst the lawyers as prevalent in the other sectors as well, that if AI would replace the lawyers and researchers or if the AI tools and services would prove to be beneficial for the efficiency and productivity of the lawyers and law firms. In simple terms, whether AI would be a replacement or an assistive tool.

The legal justice delivery system has witnessed the introduction of many tools and services where technology has made the lawyers more proficient in their work and eased their efforts and time like, online filing, analysis of documents, existing trademark search software, tools providing for legal research, drafting and much more. However, till date as per the current scenario and technology, AI tool are being used as an assistant for legal research, drafting, analysis etc. rather than being able to replace an advocate's or researcher's job, increasing the efficiency, accuracy and authenticity of drafting, research and analysis and the same are more appropriate and result oriented now if used properly.⁸

7 El Maknouzi, M. E. H., Sadok, H., Sakka, F., Jadalhaq, I. M., & Alqodsi, E. M. (2026). Artificial intelligence competing with legal professionals: sketching a multidimensional approach towards an integrated response. *SN Social Sciences*, 6(6), 188.

Available at: <https://link.springer.com/article/10.1007/s43545-026-01439-z>

8 Shahid, A., Qureshi, G. M., & Chaudhary, F. (2023). Transforming legal practice: The role of AI in modern law. *Journal of Strategic Policy and Global Affairs*, 4(01), 36-42.

Despite the widespread adoption and usage of AI based system in legal sector, it is also true that legal profession cannot be fully automated as it is highly driven by the imprompt decision making, representation and analysis, which cannot be automated. But at the same time it has proved to be providing great assistance to lawyer's by reducing their time and effort considerably and it also helps the lawyers and law firms to give a more accurate and result oriented suggestion to their clients.

Today, this industry is constantly developing in India and its seeking to advance constantly by adoption of new age technology and assistive tools that could facilitate in providing better legal services to the clients and which may also help lawyers and judges in their respective jobs. The legal industry is looking forward to explore more automated AI based assisting software and tools. However, these are not going to take over an advocate's job where comprehension, analysis, oral presentations, decision making and accuracy is required along with the element of human intelligence and understanding but in reality it would automate the clerical tasks and actually make the lawyers and law firms more competent and efficient.

AI can automate the following tasks reducing the lawyer's time and efforts, while bringing in more accuracy and precision.

- AI can be effectively used to do due diligence, review contract or other documents, to conduct legal research and also to perform electronic discovery functions so as to facilitate due diligence process. The software can be really effective and helpful.
- Another feature of AI tools that helps in law is the prediction of the probable outcome of the case being adjudged which gives a validation to the human judgment and can also provide direction to the adjudicator before the court of law.
- AI tools have been proved to be very effective in providing precedents and case laws to be used by advocates in pleading their cases. It has been very helpful in finding out the appropriate judgments for the legal issue in question with much more accuracy and by consuming considerably less time and efforts of the lawyers, sparing them time and energy to invest in other core areas which requires their expertise.
- AI tools have also been coherent in providing insights into registration process and search mechanism of the existing intellectual property portfolios.

- The drafting and documentation of legal documents have been automated to a great extent with the help of AI. Just by putting in the required files and content, you can instantly get your legal documents ready.
- It also helps in keeping proper records of legal files, preparation of invoices within minutes and finding the requisite files whenever required with few clicks.

Law firms will be able to offer favourable and efficient outcomes in litigation with the help of AI technologies as they will be able to acquire higher accuracy, more productivity and would be able to offer services at more competitive prices as a lot of time and effort would be saved without compromising the output.⁹

Law firms that would fail to grasp and move forward with the pace of AI will fail to gain benefits of AI as litigation involves many time-consuming tasks if done entirely by human efforts like extracting relevant information, from a large set of documents produced during drafting, discovery, research and building structure for the further development of the case.¹⁰

On the other hand, AI would evidently accelerate this process by doing this work with just a click in seconds which would otherwise might take days or rather weeks. AI can also be used for the convenience of drafting pleadings and other documents with ease to be filed with the court as it would help in quick and efficient research work, to produce initial drafts, researching the relevant case law, preparing arguments, and rebuttals and also it would help in anticipating arguments that could be advanced by opposing counsel. Though human intervention would still be needed to review, verify and produce the final draft, but the process will be much faster with the help of AI tools. So, AI would not act as a replacement but as a facilitator that would ease the tasks of humans in litigation and other legal tasks. It would make the task of litigators that requires high level of customization and personalisation much easier. For instance, updating the documents as per every subsequent recent development, responses to queries, drafting of documents and vetting contracts as per requirements of the clients, discovery of documents, preparation of summaries and help

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- 9 Rodriguez, X. (2023, September). Artificial intelligence (AI) and the practice of law. In *Sedona Conf. J.* (Vol. 24, p. 783). Available at: https://www.thesedonaconference.org/sites/default/files/meeting_paper/83_AI%2520and%2520Practice%2520of%2520Law_0.pdf
- 10 Segal, P. (2018). Legal jobs in the age of artificial intelligence: moving from today's limited universe of data toward the great beyond. *Savannah L. Rev.*, 5, 211.

with visual aids that can assist in trials and can also help with drafting pitches to land new clients anticipating the outcomes of their queries. It can also help in preparing for cross questioning the witnesses by helping them analyse the documents and trial transcript and help frame the relevant or effective questions.

Lawyers will be able to create documents requiring a high level of research work much more efficiently thanks to AI. AI also has the potential to increase the number of people who have access to legal services, which are now costly for many individuals and small enterprises because litigation currently requires a great deal of time, effort, and labour.

Litigation will be far more affordable and practical thanks to AI. For example, you may now instantly create a 1000-word lawsuit against spammers or telecallers with just one click. Law companies will find it considerably simpler to extend their services to clients with lesser incomes as a result of these reforms. Insofar as AI can be used to create and organise content, translate texts, and forecast the results of legal cases or any social events using prior similarities or jurisdictions, it could have very positive commercial implications for fields that depend on information and content, like journalism and law practice. This could lead to greater chances for improved AI development and application, as well as facilitate and elevate the value of human creative input. AI has a lot of potential advantages for the legal industry. It can help solicitors work more efficiently and steer clear of expensive errors. In certain instances, it can also speed up research and decision-making by lubricating the justice system. However, because AI lacks the complexity of the human brain and the ability to comprehend and take into account the aspects of human emotions and empathy, it is not yet trustworthy and capable of fully replacing people in the legal profession. Using this technology in different sectors of the legal sector, such as those involving consciousness and emotions, carries a high degree of risk. Decisions made by AI are determined by the algorithm system or the outcome of the input that is provided to it. This issue must be addressed in order to broaden its application in the legal field. AI can prove to be a very efficient and effective way to predict outcomes without any moral hazards. It can make the process of law faster and free from error. It can be really helpful to solve cases by analyzing the correct facts and proceedings and giving immediate solutions.¹¹

11 Kluttz, D. N., & Mulligan, D. K. (2019). Automated decision support technologies and the legal profession. *Berkeley technology law journal*, 34(3), 853-890
 Available at: <https://doi.org/10.15779/Z38154DPK>

In the last few years, there has been a drastic change in operations of legal sector from automation in trade mark search, contract drafting to E-Discovery models. There has been a significant shift to AI based solutions that are aiming to make legal sector more client friendly and more efficient for legal fraternity. There has been introduction of various startups to improve the services and efficiency of layers, at the same time making their lives easier. Artificial intelligence-based legal solutions make law firms more productive, potentially lowering expenses and increasing profits. In the future, law firms would not only rely more on these technology-based solutions, but they would also collaborate with other tech businesses to develop AI solutions that are best suited for them and the legal community as a whole, which would advance the legal industry.

Limitations of Artificial Intelligence in Legal Field

Every coin has two sides. As the litigation costs would go down with AI based solutions, this would have a downside as well. This would result in flooding of court systems in multiple jurisdictions with legal complaints automatically generated by people using frictionless ability of AI to automatically generate lawsuits that would also include frivolous written lawsuits by AI. It would be necessary to update the laws to safeguard the system from vexatious litigants and to impede these kind of abuses in the system.¹²

With increasing dependence on tech based solutions like ChatGPT for research, report writing and drafting work, the knowledge of the workers would be adversely affected. This would also affect the cognitive and learning abilities of students accessing this tool for all their tasks.¹³

Despite being so versatile and useful, it's impossible for a computer to replace humans in totality. AI cannot be a replacement for human judgment, which would create more problem, especially in the context of criminal law there may exist bias in the training data or there can be an error in judgment in the results derived autonomously by AI using its algorithms. This problem can be overcome to a great extent by the process of driving bias out of our training data to the best of one's knowledge and judgment. But there would always be a risk associated with the result which

12 Remus, D., & Levy, F. (2017). Can robots be lawyers: Computers, lawyers, and the practice of law. *Geo. J. Legal Ethics*, 30, 501.
Available at: <https://dx.doi.org/10.2139/ssrn.2701092>

13 Wendel, W. B. (2019). The promise and limitations of artificial intelligence in the practice of law. *Okla. L. Rev.*, 72, 21.
Available at: https://digitalcommons.law.ou.edu/cgi/viewcontent.cgi?params=/context/olr/article/1376/&path_info=02_wendel_article_blu7.pdf

are based on the input fed by the user related to some personal issues rather than universal facts.¹⁴ Another drawback is lack of explanations and transparency on which results would be derived by AI. A machine learning software can't be yet questioned or asked reasons for its result that works on a neural network.¹⁵ Allowing liberty depriving outcomes produced independently by AI or with the aid of algorithms might just be unacceptable. Although it has not yet been developed, but it is not impossible that machine learning algorithms will start to accurately anticipate when a person is likely to commit a crime in the future. Another reason to use AI sparingly, particularly in criminal cases, is that judges, solicitors, and society at large may come to rely too much on these algorithms, which are unable to comprehend human psychology and emotions and are unlikely to produce accurate results in cases where life and liberty are at stake. It is not unusual for humans to become unduly dependent on AI-based recommendations and judgements for their convenience and ease of work, even if they do not entirely rely on these legal tech tools and maintain ultimate decision authority. This would result in the phenomenon known as automation bias.¹⁶ The true potential of AI and other machine learning technologies might not be as "intelligent" as they appear.

Effect of AI on Copyright as a Legal Framework

These days, conducting legal research requires a great deal of time and effort, which drastically lowers a law firm's capacity to make money. Nonetheless, legal research is one area where AI has the potential to have the greatest impact on the legal industry. AI can give attorneys unmatched insight into the legal field with a single click in a matter of seconds. India's legal system is extensive and ever-evolving. The entire legal community can be balanced with artificial intelligence. Whether a large law firm with 400 attorneys or a single practicing professional in research uniform, an artificially intelligent platform would balance the expense needed for legal research equally. It can offer high efficiency and

14 Pasquale, F. (2019). A rule of persons, not machines: the limits of legal automation. *Geo. Wash. L. Rev.*, 87, 1.

Available at: <https://www.gwlr.org/wp-content/uploads/2019/01/87-Geo.-Wash.-L.-Rev.-1.pdf>

15 Kapoor, S., Henderson, P., & Narayanan, A. (2024). Promises and pitfalls of artificial intelligence for legal applications. *arXiv preprint arXiv:2402.01656*.

Available at: <https://arxiv.org/abs/2402.01656>

16 Gans-Combe, C. (2022). Automated justice: Issues, benefits and risks in the use of artificial intelligence and its algorithms in access to justice and law enforcement. *Ethics, integrity and policymaking: the value of the case study*, 175-194.

Available at: <https://doi.org/10.1016/j.giq.2024.101953>

advancement, which would enable lawyers to supply their clients with superior services. Numerous legal tech businesses, such as SpotDraft, CaseMine, NearLaw, Pensieve, Practice League, and others, are developing legal tech platforms that will enable attorneys and law firms to do more than just keyword-based research, saving time and money. Even though the laws are becoming out of date due to the rapid advancement of technology, Indian lawyers continue to rely on the traditionally crafted laws and are easily adjusting to those solutions and regulations. There hasn't been much technological innovation or improvement in the Indian legal system. Artificial intelligence has the potential to significantly alter the nature of the legal profession, the application of the law, and the practices of Indian lawyers.

Artificial intelligence is not mentioned in India's data protection legislation. It makes no explicit mention of machine learning or artificial intelligence in general. Technology is not a factor in the information technology law. Evaluating the impact on an individual's interests is part of the question about the fair use of our data privacy. It is probably unfair if an AI-derived decision is made about someone without any justification or foundation.

AI is subject to data protection laws when it uses personal data. This can occur when an AI system is trained, tested, or implemented using personal data. AI is not covered by data privacy laws when it does not use personal data. However, AI frequently uses or generates personal data on its own. These days, AI models are trained and tested using enormous volumes of personal data. This is accomplished either by deploying more personal data that is gathered and passed through the model to make judgements about specific people or by using software that is designed to watch user behaviour and then provide results based on it. Even if those decisions are merely predictions or assumptions, they are nonetheless personal information that may be covered by Indian data protection laws.

AI as a Person

AI must fit the concept of "person" in order to be protected as an author of a work generated or produced by it under Indian copyright law. According to the Copyright Act of 1957, a "person" who employs computer-generated programs to create literary, musical, artistic, or dramatic works is considered a "author."¹⁷ Artificial and juristic individuals are included in the legal concept of "person." There are differing opinions in various nations about the idea that AI is an artificial human. However, unlike other nations like Saudi Arabia, which recognised the AI-driven robot Sophia as a

17 The Copyright Act, 1957(14 of 1957)

legal person and granted it citizenship, India has not given AI the status of an artificial person. However, other nations, like the USA, have approached the registration of AI-generated work in different ways. For such works to be given copyright registration, "human intervention" is necessary. Ankit Sahni, the applicant, and the "Raghav Artificial Intelligence Painting App" were given co-authorship in an Indian copyright registration request for a piece of art. But later on, the copyright office revoked the co-author position, citing AI's lack of legal personality. Therefore, the Indian legislative and courts' interpretation of a "person" determines authorship by AI.¹⁸

The type of work and the input used to produce it are additional factors that need to be taken into account. whether AI produced the work on its own or if humans had any involvement. AI is able to produce both original and derivative works thanks to its built-in algorithms and the data it receives for programming. It can learn from the data inputs thanks to its built-in algorithm. However, the Indian legal system is still unsure on how to preserve and assign authorship to such works.

Copyright Ownership

The topic of AI-generated content liability is one of the most contentious. AI is still not specifically included in Indian law pertaining to technology or intellectual property rights. Currently, AI-related issues are handled under traditional technology legislation, which creates ambiguity and confusion. AI may fall under the definition of a "intermediary" under the Information Technology Act of 2000 since it is typically utilised like a search engine, where users enter data into the AI tool.¹⁹ As a result, it will be eligible for the safe harbour protection that intermediaries are legally entitled to. Liability for the content used to train AI is another facet of this as it is unclear how such content would be protected and how compensation for such access would be handled.²⁰ However, the intricacy of the issues surrounding the copyrighted content needed to design AI will increase as its use grows. Additionally, as more people use and engage with AI products, the corresponding software companies are probably

18 Graves, M. (2023). What does it mean to consider AI a person?. *Theology and Science*, 21(3), 348-353.

Available at: <https://doi.org/10.1080/14746700.2023.2230424>

19 Sec 2(1)(w), The Information Technology Act 2000

20 Pasquale, F., Malone, T. W., & Ting, A. (2025). Copyright, Learnright, and Fair Use: Rethinking Compensation for AI Model Training. *Nw. J. Tech. & Intell. Prop.*, 23, 205.

Available at: <https://scholarlycommons.law.northwestern.edu/njtip/vol23/iss1/3/>

gathering more personal data in order to provide AI with better results based on user-specific reactions, which would again violate people's right to privacy. Although there is currently little information on the privacy models used by some AI companies, such as OpenAI, it is said to have signed data protection agreements with corporations who have expressed interest in order to allay worries about data extraction and retention.²¹

Conclusion

AI is completely changing the way professional work is done. It can complete any task that earlier required highly qualified and skilled professional much faster and at a much lower cost. In the legal field, AI can assist with many routine tasks such as legal research, drafting, discovery, document analysis and other routine tasks. However, replacing the way a task is done does not mean replacing the entire profession. AI cannot completely replace lawyers because legal practice also requires human element of emotions, judgment, accountability, ethics, strategic decision-making, advocacy, empathy etc, which AI lacks. The future is therefore more likely to be about lawyers using AI as an assistive tool rather than AI replacing lawyers completely as a new legal system. Infact, lawyers who would use AI may replace lawyers who do not. AI can become an important part of the legal system, but it cannot become the entire legal system by replacing professional human beings. Human element will always be necessary wherever emotions, responsibility, judgment and understanding of human circumstances are involved.

India should encourage ethical and responsible use of AI in the legal field to improve accuracy and efficiency, reduce costs and assist lawyers in routine work which otherwise takes days and weeks. At the same time, important legal tasks should continue to involve human expertise and professional judgment. Lawyers and law students should be trained to use AI ethically and efficiently and to be well versed with their work to be able to identify and verify AI generated information. Clear responsibility and accountability should also be maintained when AI produces incorrect or harmful results. AI should therefore be treated as a tool to assist human expertise, to reduce time and effort and not used as a complete replacement for it. The future should focus on a balanced approach for human and AI partnership where technology improves legal work while humans retain responsibility, judgment and accountability.

21 Curzon, J., Kosa, T. A., Akalu, R., & El-Khatib, K. (2021). Privacy and artificial intelligence. *IEEE Transactions on Artificial Intelligence*, 2(2), 96-108.
Available at: 10.1109/TAI.2021.3088084

OFFENCES AGAINST WOMEN AND VULNERABILITY: AN OVERVIEW OF NEW CRIMINAL LAWS 2023

Kanksha*

Abstract

This paper traces the legal architecture built around crimes against women in India — rape, marital rape, acid attacks, domestic violence, and dowry death — and situates it within the Bharatiya Nyaya Sanhita, 2023, which replaced the Indian Penal Code, 1860 with effect from July 1, 2024. It examines why women continue to be disproportionately targeted, the effects such crimes leave behind, and the wave of judicial course-correction running through 2025 and 2026 — fresh guidelines on the trial of sexual offences, time-bound monitoring of dowry, cruelty and acid-attack prosecutions, and the batch of petitions on the marital rape exception, now finally posted for hearing before the Supreme Court of India. It argues that renumbering and exhortation alone cannot cure a problem that is, at its root, a problem of mindset, and that speedy, sensitive and certain justice remains the only real deterrent.

Keywords: Crimes against women, Bharatiya Nyaya Sanhita, 2023, Marital rape, Domestic violence; dowry death.

Introduction

“यत्र नार्यस्तु पूज्यन्ते रमन्ते तत्र देवताः ।
यत्रैतास्तु न पूज्यन्ते सर्वास्तत्ताफलाः क्रियाः ।”

This means heavenliness blooms where women are respected, and where they are disrespected, all endeavours, however honourable, stay unfruitful. (Manusmriti, ch. III, verse 56.)

India is a country of gods and goddesses, where even cows are worshipped, yet, to my continuing surprise, in a land of such divine imagery, women remain unsafe — be it a family gathering, a workplace, public transport, or their own home. We cannot forget the Ramayana and the Mahabharata, where Goddess Sita and Draupadi were, respectively, subjected to grave wrongs, yet the presence of Lord Rama and Lord Krishna not only rescued them but also delivered justice; in today's era, hardly

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anyone steps forward to protect a woman against whom a crime is being committed, and “Satyamev Jayate” truth alone triumphs has become a line confined to books rather than a lived reality.

Every day is believed to be new day evidence suggests that once a day passes, it is forgotten. But sometimes only the dates change and not the circumstances. In 2012, the heart-wrenching ‘Nirbhaya Rape Case’ shook the nation to a point where it seemed the whole country had come onto the streets to protest for the poor soul, yet, as is so often believed, the pain eventually settled with time. To my dismay, that was not the last such incident; rape cases have only multiplied since, until, disturbingly, nobody considers rape an aberration any longer people have grown familiar with the offence. The attitude that once said ‘this needs to be stopped’ has quietly changed to ‘this happens all the time, nobody can change it’, an attitude that, sustained over a long run, only pushes a nation further toward becoming what I can only call a ‘broken’ one. Not only rape, but hundreds of offences little and big happen to women nearly every minute. Right now, as this paper is being written, somewhere a woman is being raped; a newly-wed may be getting burnt because her family could not meet a dowry demand; a young girl may be getting molested inside her own home; a female foetus may be eliminated because the family did not want a daughter; a little girl, instead of going to school, may be getting readied for marriage; a poor woman may be being forced into prostitution. Somewhere in this beautiful world, a woman may be losing herself for the rest of her life.

Does it not disturb us that, despite women across the world suffering so much, so little effective action follows? Measures are indeed being taken and small initiatives are indeed being introduced some legislative, some judicial, some administrative but almost none of them, taken alone, have proven sufficient to protect the women of this world. What has changed, as this paper will show, is that the judiciary itself has, through 2025 and 2026, grown visibly impatient with the gap between paper protection and lived safety, and has begun issuing time-bound, monitorable directions rather than mere observations. Whether that impatience translates into safer streets and safer homes is the question this paper keeps returning to.

What do you understand by Crimes Against Women?

A crime is a crime, whether physical or mental. Although offences occur against both human beings and animals, and against both men and women, offences that have only ‘women’ as victims are described as ‘crimes against women’. A crime is distinct from violence, since violence connotes a violent act having actually taken place domestic violence, for instance, includes

beating by family or relatives, sexual abuse, rape by a family member, threats, dowry death, maltreatment of a widow, and coercing a woman toward foeticide.

The United Nations Declaration on the Elimination of Violence against Women, 1993, defines ‘violence against women’ as *“any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or private life.”*¹

Types of Crimes Against Women

Every woman, at least once in her lifetime, has gone through some form of offence or violence sometimes without even recognising it as one. Rape, molestation, sexual assault, sexual harassment, marital rape, acid attacks, domestic violence, persecution for dowry, dowry death, female foeticide, trafficking, workplace offences, cruelty by an intimate partner or relative, pornography, child pornography, kidnapping, abduction, outraging a woman’s modesty, child marriage, attempted rape, stalking, voyeurism, and indecent representation are only some of an endless list. Some are defined under statute; others, such as marital rape between adult spouses, still have no criminal consequence at all under Indian law. Since July 1, 2024, most of these offences have moved out of the colonial-era Indian Penal Code, 1860 and into Chapter V (‘Of Offences against Woman and Child’) of the Bharatiya Nyaya Sanhita, 2023 a renumbering that is important to get right, because a lawyer, police officer, or litigant citing the old IPC sections today is, quite literally, citing a repealed law. What 2025 and 2026 have added to this picture is not a fresh set of offences, but a fairly relentless run of Supreme Court orders insisting that these renumbered offences actually be *tried* differently faster, more sensitively, and with less room for the systemic delay that has historically been the real enemy of a woman seeking justice.

An explanation of the major offences against women, updated to the current statutory and judicial position, follows below.

1. Rape

The act of having sexual intercourse with a woman without her consent is known as rape. Rape is now defined under Section 63 of the Bharatiya Nyaya Sanhita, 2023, which carries forward, almost verbatim, the definition

1 Declaration on the Elimination of Violence Against Women, G.A. Res. 48/104, art. 1, U.N. Doc. A/RES/48/104 (Dec. 20, 1993).

that formerly stood at Section 375 of the Indian Penal Code, 1860.² In layman's terms, a man is said to have committed rape if he penetrates, to any extent, into a woman's body by force, fraud, or fear, against her will. Rape is as heinous as murdering a person a hundred times over here, the soul dies, and the body may or may not follow. It completely outrages the modesty, honour, dignity, reputation, and self-esteem of a woman, causing humiliation not only to her but to her family; the scars may fade from the body but stay engraved on the soul forever.

The punishment for rape is now provided under Section 64 of the Bharatiya Nyaya Sanhita, 2023, which prescribes a minimum sentence of ten years' rigorous imprisonment, extendable to imprisonment for life, along with a fine, for the basic offence, with enhanced punishment under Section 64(2) where the offence is committed by a police officer, a public servant, a member of the armed forces or a person in a position of trust or authority. The death penalty is not available under Section 64: it arises under Section 65(2), for the rape of a woman under twelve years of age, and under Section 70(2), for the gang rape of a woman under eighteen years of age. Section 65(1) separately prescribes rigorous imprisonment of not less than twenty years, extendable to imprisonment for the remainder of the offender's natural life, for the rape of a woman under sixteen years of age.³ Section 70 lays down the punishment for gang rape: where a woman is raped by more than one person acting with common intention, each offender is deemed to have committed rape and is liable for rigorous imprisonment of not less than twenty years, extendable to life imprisonment, along with a fine that must be paid to the victim toward her medical treatment and rehabilitation.⁴

2 The Bharatiya Nyaya Sanhita, 2023, No. 45, Acts of Parliament, 2023, Sec. 63 (India) (corresponding to The Indian Penal Code, 1860, No. 45, Acts of Parliament, 1860, Sec. 375 (India), repealed with effect from July 1, 2024).

3 Bharatiya Nyaya Sanhita, *supra* note 2, Sec. Sec. 64–65, 70(2) (corresponding to Indian Penal Code, *supra* note 2, Sec. Sec. 376, 376AB, 376DB). The death penalty is available under Sec. 65(2) (rape of a woman under twelve years of age) and Sec. 70(2) (gang rape of a woman under eighteen years of age), and not under Sec. 64.

4 Bharatiya Nyaya Sanhita, *supra* note 2, Sec. 70 (corresponding to Indian Penal Code, *supra* note 2, Sec. 376D).

Most heart-wrenching judgment

Mukesh v. State (NCT of Delhi)⁵, popularly known as the “Nirbhaya Rape Case”

This case needs no introduction, but those unfamiliar with it may find it heavy to read. A woman and her friend, on their way home from a movie, boarded an off-duty charter bus carrying six men, including the driver. The driver took the bus off-route; when the friend objected, he was beaten with an iron rod, and the woman was dragged to the back of the bus and gang-raped repeatedly for over an hour, after which an iron rod was inserted into her body, tearing her intestines. Both victims were thrown out of the moving bus. The woman succumbed to her injuries a fortnight later. The incident occurred in 2012; the Supreme Court affirmed the conviction and death sentence of four of the accused in 2017, one accused had earlier died by suicide in custody, the juvenile offender was released after three years in a correction facility, and the four adult convicts were finally hanged on March 20, 2020 nearly eight years after the crime.

A course-correction on how such cases are tried

If Nirbhaya changed the law on paper, the years 2025 and 2026 have seen the Supreme Court turn its attention to how sexual-offence cases actually move through the courts. On March 17, 2025, the Allahabad High Court, in *Akash v. State of Uttar Pradesh*, a case involving allegations against a minor girl, had downgraded the trial court’s summons from rape under Section 376 of the erstwhile Indian Penal Code to the comparatively lesser offence of assault with intent to disrobe, correspondingly lowering the applicable provision of the Protection of Children from Sexual Offences Act, 2012 as well.⁶ Acting on a letter addressed by a women’s rights group, the Supreme Court took up the matter *suo motu*, staying the offending paragraphs of the High Court’s judgment on March 26, 2025 and, later, the judgment in

5 Mukesh v. State (NCT of Delhi), (2017) 6 S.C.C. 1 (India) (affirming the conviction and death sentence of the accused); *see also* State v. Ram Singh, Sessions Case No. 114/2013 (Sessions Ct., Saket, Delhi, Sept. 10, 2013) (India) (trial court judgment).

6 Akash v. State of Uttar Pradesh, 2025 SCC OnLine All 1476 (Allahabad H.C. Mar. 17, 2025) (India) (Ram Manohar Narayan Mishra, J.) (downgrading the summons from Indian Penal Code, *supra* note 2, Sec. 376, and The Protection of Children from Sexual Offences Act, 2012, No. 32, Acts of Parliament, 2012, Sec. 18 (India), to Indian Penal Code, *supra* note 2, Sec. 354B, read with Protection of Children from Sexual Offences Act, Sec. 9–10); *discussed in* V. Venkatesan, Why the Supreme Court Wants New Rules for Sexual Offence Trials, SUPREME COURT OBSERVER (Feb. 19, 2026), <https://www.scobserver.in/journal/why-the-supreme-court-wants-new-rules-for-sexual-offence-trials/>.

its entirety on December 8, 2025.⁷ On February 10, 2026, a Bench of Chief Justice of India Surya Kant and Justices Joymalya Bagchi and N.V. Anjaria restored the trial court's original summons, holding that the allegations disclosed, at least *prima facie*, an “attempt” to commit rape rather than mere “preparation” for it — a distinction that, in the ordinary run of a criminal trial, can be the difference between a woman's complaint being taken seriously and its being quietly diluted at the very first stage.⁸ Significantly, the Court went further and set in motion the drafting of fresh, more consistent guidelines for the conduct of sexual-offence trials, setting aside, in the process, its own 2023 Handbook on Combating Gender Stereotypes. The Chief Justice's description of that Handbook as too “Harvard-oriented” drew published criticism from legal commentators, who argued that dismissing gender-sensitive language as a foreign import missed the point that the Handbook needed better dissemination rather than dilution, even as the Court defended the need for a framework better suited to Indian courtrooms. That exercise has since been completed: the Court asked the National Judicial Academy, Bhopal to constitute an expert committee chaired by former Supreme Court judge Justice Aniruddha Bose, and that committee's report, *Judgments and Gender*, submitted in August 2026, now stands in place of the 2023 Handbook.⁹

7 *In re* Order Dated 17.03.2025 Passed by the High Court of Judicature at Allahabad in Criminal Revision No. 1449/2024 and Ancillary Issues, S.M.W. (Crl.) No. 1 of 2025, orders of Mar. 26, 2025 (Gavai & Masih, JJ.) & Dec. 8, 2025 (S.C.) (India) (staying paras. 21, 24 and 26 of the High Court's judgment and, later, the judgment in its entirety, acting on a letter dated Mar. 20, 2025 from “We the Women of India”); *see also* Venkatesan, *supra* note 6.

8 *In re* Order Dated 17.03.2025 Passed by the High Court of Judicature at Allahabad in Criminal Revision No. 1449/2024 and Ancillary Issues, S.M.W. (Crl.) No. 1 of 2025, judgment of Feb. 10, 2026 (S.C.) (India) (Surya Kant, C.J.I., Bagchi & Anjaria, JJ.) (restoring the trial court's summons, describing the High Court's reasoning as “patently erroneous”, and directing the framing of fresh guidelines for sexual-offence trials), https://api.sci.gov.in/supremecourt/2025/15681/15681_2025_1_22_68511_Judgement_10-Feb-2026.pdf; *see also* Venkatesan, *supra* note 6.

9 *Id.* (setting aside the Supreme Court's 2023 Handbook on Combating Gender Stereotypes and requesting the National Judicial Academy, Bhopal to constitute an expert committee chaired by Justice Aniruddha Bose (former Judge, Supreme Court of India) to draft comprehensive guidelines); *see also* NAT'L JUD. ACAD., EXPERT COMM., JUDGMENTS AND GENDER (2026) (the resulting report, submitted in August 2026, which now stands in place of the 2023 Handbook). On the criticism, *see* Indira Jaising, The Supreme Court's Move Towards Gender Justice Wasn't “Harvard-Oriented”, INDIAN EXPRESS (Feb. 2026).

The Court has, separately, had to grapple with the harder question of how the Protection of Children from Sexual Offences Act's strict, consent-blind framework should apply to genuinely consensual adolescent relationships, an issue it took up *suo motu* in 2023 and in which, in 2024, it set aside a Calcutta High Court judgment admonishing adolescent girls to control their sexual urges; the hearings continued through 2026, with the Court cautioning against the reflexive use of criminal law to police adolescent romance at a parent's instance.¹⁰ And in one unusual instance, in those same proceedings, on May 23, 2025, the Court invoked its extraordinary powers under Article 142 of the Constitution to spare a convicted person further incarceration on the ground that continued imprisonment would, on the facts before it, cause further harm to the child victim herself a ruling the Bench was careful to describe as turning on its own facts and not as a precedent for future sentencing.¹¹ Read together, these developments show a judiciary less content than before to leave the fate of a rape trial to procedure alone.

2. Marital Rape

Imagine a woman raped by a stranger traumatic enough. Now imagine that the person doing this to her is someone she has agreed to spend her life with, someone she knows inside out. Sleeping every night beside a person who has shown he is capable of forcing himself upon her, knowing full well that the law offers her no recourse, is a fear peculiar to a wife trapped in such a marriage. Marital rape refers to a husband having sexual intercourse with his wife without her consent. It remains a non-criminalised act in India: women silently endure it, and Parliament has still not moved to protect them. A husband must understand that his wife is not a commodity marriage does not entitle him to her body without consent, every single time. Evidence of such acts, occurring within the four walls of a home shared with the very person a woman is presumed to be in an intimate

10 *In re Right to Privacy of Adolescents (Suo Motu Proceedings) (S.C.) (India)* (proceedings registered in 2023 following a judgment of the Calcutta High Court that the Supreme Court set aside in 2024; observations of July 2026 by Nagarathna & Mahadevan, JJ.; proceedings pending); see also POC SO Act Consensual Teen Relationships: Supreme Court's Landmark Observations Explained, LEGAL SERVICE INDIA (July 21, 2026), <https://www.legalserviceindia.com/Legal-Articles/pocso-act-consensual-teen-relationships/>.

11 *In re Right to Privacy of Adolescents (S.C. May 23, 2025) (India) (Oka & Bhuyan, JJ.)* (exercising powers under INDIA CONST. art. 142); see also Gauri Kashyap, "Not a Precedent": Supreme Court Holds Back from Sentencing POC SO Convict, SUPREME COURT OBSERVER (May 29, 2025), <https://www.scobserver.in/journal/in-re-right-to-privacy-of-adolescents-not-a-precedent-supreme-court-holds-back-from-sentencing-pocso-convict/>.

relationship with, is also notoriously difficult to establish. Exception 2 to Section 63 of the Bharatiya Nyaya Sanhita, 2023 continues to exclude non-consensual sexual intercourse between a husband and his wife from the definition of rape, so long as the wife is not under eighteen years of age¹² — the only difference from the erstwhile Exception 2 to Section 375 of the Indian Penal Code, 1860 being the threshold of eighteen rather than fifteen years. Even that was not the new Code's innovation: the Supreme Court had already read "fifteen" down to "eighteen" in *Independent Thought v. Union of India*, (2017) 10 S.C.C. 800, so that the Bharatiya Nyaya Sanhita did no more than codify a position settled judicially in 2017. A wife is, in effect, still presumed to have given standing consent to her husband, at odds with the position in most of the world; India remains among a minority of countries that have not criminalised marital rape.¹³

The issue is, however, no longer static, and the last eighteen months have moved it further than at any point since it first reached a constitutional court. In May 2022, a Division Bench of the Delhi High Court delivered a split verdict on the constitutional validity of the marital rape exception in *RIT Foundation v. Union of India* Justice Rajiv Shakti struck it down as arbitrary and discriminatory, while Justice C. Hari Shankar upheld it, holding the distinction to rest on an intelligible differentia, and leave to appeal to the Supreme Court was granted on account of the substantial questions of law involved.¹⁴ A separate, equally significant challenge reached the Supreme Court through *Hrishikesh Sahoo v. State of Karnataka*: a husband, facing a 2017 complaint by his wife alleging rape and cruelty (and separately facing charges concerning their daughter under the Protection of Children from Sexual Offences Act, 2012), had invoked the marital rape exception before the Karnataka High Court to quash the rape charge against him. On March 23, 2022, Justice M. Nagaprasanna declined to interfere, relying in part on the Justice J.S. Verma Committee's 2013 recommendation for removing the exception, and holding that no exception under the criminal law could

12 Bharatiya Nyaya Sanhita, *supra* note 2, Sec. 63, Exception 2.

13 Marital Rape in India: 36 Countries Where Marital Rape Is Not a Crime, INDIA TODAY (Mar. 12, 2016), [https://www.indiatoday.in/education-today/gk-current-affairs/story/marital-rape-312955-2016-03-12\(country count as of 2016; a current comparative source should be substituted before publication\)](https://www.indiatoday.in/education-today/gk-current-affairs/story/marital-rape-312955-2016-03-12(country%20count%20as%20of%202016;a%20current%20comparative%20source%20should%20be%20substituted%20before%20publication)).

14 *RIT Foundation v. Union of India*, 2022 SCC OnLine Del 1404 (India) (split verdict of May 11, 2022 by a Division Bench of the Delhi High Court on the constitutional validity of the marital rape exception).

operate as a licence for a crime.¹⁵ On the husband's special leave petition, filed on May 10, 2022, a three-judge Bench of Chief Justice N.V. Ramana and Justices Krishna Murari and Hima Kohli stayed the High Court's judgment, and the trial before the Sessions Court, on July 19, 2022; that petition is one of eight connected matters now before the Supreme Court.

Through much of 2026, the matter has moved briskly. On September 7, 2026, a Bench headed by Chief Justice of India Surya Kant, sitting with Justices Joymalya Bagchi and V. Mohana, declined to defer the hearing to a later date and asked to be told the Union Government's stand before fixing dates for final arguments; Senior Advocate Indira Jaising, appearing for the petitioners, sought a hearing in November on the ground that pleadings across the eight matters had not yet been exchanged, while Senior Advocates Karuna Nundy and Siddharth Dave appeared in connected petitions.¹⁶ Two days later, on September 9, 2026, the Union Government placed its reply on record, and the Bench directed that pleadings be compiled and the matters be posted for final hearing after three weeks, on Wednesdays and Thursdays. The Court indicated that it would take up two questions: whether a prosecution can be maintained while the exception stands, and whether the exception is itself constitutionally valid.¹⁷ During the hearing, Justice Bagchi made observations that will likely be quoted for years regardless of how the case is ultimately decided: he recorded that the Bench fully appreciated the submission that marriage cannot result in the extinction of a woman's individual autonomy, while also noting the special

15 *Hrishikesh Sahoo v. State of Karnataka*, 2022 LiveLaw (Kar) 89, W.P. No. 48367 of 2018 (Kar. Mar. 23, 2022) (India) (Nagaprasanna, J.) (holding that no exception under law can be so absolute as to become a licence for the commission of a crime against society); *Hrishikesh Sahoo v. State of Karnataka*, S.L.P. (Crl.) Nos. 4063-4064 of 2022 (S.C. filed May 10, 2022) (India) (ad-interim stay of the High Court's judgment and of the trial granted on July 19, 2022 by Ramana, C.J.I., Krishna Murari & Hima Kohli, JJ.); *see also* *Challenge to the Marital Rape Exception*, SUPREME COURT OBSERVER (last updated July 8, 2025), <https://www.scobserver.in/cases/challenge-to-the-marital-rape-exception-hrishikesh-sahoo-v-state-of-karnataka/> (which gives the High Court's date as Feb. 23, 2022; the judgment itself is dated Mar. 23, 2022).

16 Debayan Roy, *Marital Rape Case: Supreme Court to Decide Hearing Date on September 9*, BAR & BENCH (Sept. 7, 2026), <https://www.barandbench.com/news/litigation/marital-rape-case-supreme-court-to-decide-hearing-date-on-september-9>.

17 "Marriage Cannot Result in Extinction of Individual Autonomy," Supreme Court During Marital Rape Criminalization Hearing, LAWBEAT (Sept. 9, 2026), <https://lawbeat.in/top-stories/marriage-cannot-result-in-extinction-of-individual-autonomy-supreme-court-during-marital-rape-criminalization-hearing-1630123>.

caution a constitutional court must exercise before a penal provision can expose a person to prosecution remarking that the State might, in an appropriate case, be given a window to correct a provision itself before a court declares it unconstitutional.¹⁸ The Union's own affidavit continues to oppose criminalisation, arguing that marriage creates reciprocal legal and social obligations amounting to an intelligible differentia, and that striking down the exception would have wider ramifications for the institution of marriage requiring a holistic legislative, rather than a purely judicial, response.¹⁹

Whichever way it is ultimately decided, the fact that the Court has now framed the central question whether a husband can be prosecuted at all while a clear statutory exception continues to stand on the books, and what a constitutional court must first do before that prosecution can proceed²⁰— is itself the most significant development in this area since this paper was first written. Readers of this paper should watch the outcome of the Wednesday–Thursday hearings as the single most important marker of where Indian law on marital rape is finally headed.

3. Acid Attack

Acid is a particularly vicious weapon of offence, and while not every victim of an acid attack is a woman, the offence is overwhelmingly committed against women. Such attacks not only disfigure the face or body of the victim but leave her in a state of enduring shock and trauma. Accused persons frequently aim at the victim's face specifically to shatter her confidence — there are countless cases of men who approached women for a relationship or marriage and, upon rejection, threw acid at them. The scars acid leaves can neither be healed nor forgotten, and the victims must additionally contend with a society that is, all too often, unkind to survivors of visible disfigurement.

18 *Id.* (observations of Bagchi, J.).

19 Supreme Court to Hear Pleas Against Marital Rape Exception; Centre Says Striking It Down May Impact Marriage, INDIA LEGAL (Sept. 2026), <https://indialegallive.com/constitutional-law-news/courts-news/supreme-court-to-hear-pleas-against-marital-rape-exception-centre-says-striking-it-down-may-impact-marriage/>.

20 Debayan Roy, Marriage Doesn't Mean Extinction of Individual Autonomy but Can Marital Rape Be Prosecuted? Supreme Court, BAR & BENCH (Sept. 9, 2026), <https://www.barandbench.com/news/marriage-doesnt-mean-extinction-of-individual-autonomy-but-can-marital-rape-be-prosecuted-supreme-court>.

Provisions specifically punishing acid attacks were first inserted into the Indian Penal Code as Sections 326A and 326B by the Criminal Law (Amendment) Act, 2013; that framework now stands consolidated as Section 124 of the Bharatiya Nyaya Sanhita, 2023, which punishes voluntarily causing grievous hurt by acid permanently or partially damaging, disfiguring, burning, or disabling any part of a person's body with imprisonment of not less than ten years, extendable to life imprisonment, along with a fine, and separately punishes the throwing or attempted throwing of acid with intent to cause such hurt with imprisonment of not less than five years, extendable to seven years, along with a fine.²¹

Landmark judgment

*Laxmi v. Union of India*²²

A public interest litigation was filed by an acid attack survivor, Laxmi. The Supreme Court directed the States and Union Territories to regulate the over-the-counter sale of acid, and, for the first time, laid down a compensation framework for victims of acid attacks and their families, directing that a minimum of Rs. 3 lakh be paid as compensation by the State or Union Territory concerned, of which Rs. 1 lakh was to be paid within fifteen days of the incident. This judicial framework continues to inform the victim-compensation schemes operated by States under the successor provisions to Section 357A of the Code of Criminal Procedure now found in the Bharatiya Nagarik Suraksha Sanhita, 2023.

More than a decade on, the *Laxmi* framework has had to be revisited, not because its principles were wrong, but because implementation has lagged badly behind them. On December 4, 2025, hearing *Shaheen Malik v. Union of India*, a public interest litigation brought by a survivor whose own trial had been pending since 2009, the Supreme Court called that delay “a mockery of the system” and a “national shame”, directed the Registrars General of all High Courts to furnish details of pending acid attack trials in their jurisdictions within four weeks, and mooted both special courts and day-to-day hearings in such cases. Delays of this order have persisted

21 Bharatiya Nyaya Sanhita, supra note 2, Sec. 124 (corresponding to Indian Penal Code, supra note 2, Sec. Sec. 326A-326B, as inserted by The Criminal Law (Amendment) Act, 2013, No. 13, Acts of Parliament, 2013 (India)).

22 *Laxmi v. Union of India*, (2014) 4 S.C.C. 427 (India) (order of July 18, 2013 regulating the over-the-counter sale of acid and directing payment of compensation of not less than Rs. 3 lakh by the State or Union Territory concerned, Rs. 1 lakh of it within fifteen days of the incident).

in the years since the Laxmi directions were first issued.²³ On January 27, 2026, continuing in the same matter, the Bench observed orally that reformative theory has little place in acid attack cases and asked why, if a convict cannot pay compensation, his assets should not be attached and auctioned to compensate the victim; it directed all States and Union Territories to place on record year-wise data on such cases together with the rehabilitation and compensation measures available to survivors. These were observations in the course of hearing rather than binding directions, but they indicate the direction of the Court's thinking.²⁴ Then, on May 4, 2026, deciding the same petition brought by a survivor of a thrown-acid attack on behalf of those forced to ingest acid the Court broadened the definition of an acid attack victim in the Schedule to the Rights of Persons with Disabilities Act, 2016 to cover forced ingestion and internal injury even where there is no visible external disfigurement, holding that the resulting impairment is no less disabling than a scarred face. The clarification was made to operate retrospectively from 2016, and the Union Ministry of Social Justice and Empowerment was directed to notify the amendment within two weeks, the Court's order standing as a deemed amendment in the meantime so that medical boards may issue disability certificates at once.²⁵ Taken together, this run of orders shows

23 Shaheen Malik v. Union of India (S.C. Dec. 4, 2025) (India) (Surya Kant, C.J.I. & Bagchi, J.) (directing the Registrars General of all High Courts to furnish details of pending acid attack trials within four weeks); *see also* SC Asks All High Courts to Submit Details of Pending Acid Attack Cases in 4 Weeks, DECCAN HERALD (Dec. 4, 2025), <https://www.deccanherald.com/india/sc-asks-all-high-courts-to-submit-details-of-pending-acid-attack-cases-in-4-weeks-3819661>; CJP Team, Acid Attack Jurisprudence in India: Constitutional Promise and Persistent Institutional Failure, CJP (Dec. 30, 2025), <https://cjp.org.in/acid-attack-jurisprudence-in-india-constitutional-promise-and-persistent-institutional-failure/>.

24 Shaheen Malik v. Union of India (S.C. Jan. 27, 2026) (India) (oral observations in the course of hearing; not directions); *see also* SC Considers Attachment of Offenders' Property to Ensure Compensation for Acid Attack Survivors, THE STATESMAN (Jan. 27, 2026), <https://www.thestatesman.com/india/sc-considers-attachment-of-offenders-property-to-ensure-compensation-for-acid-attack-survivors-1503547460.html>.

25 Shaheen Malik v. Union of India (S.C. May 4, 2026) (India) (reading the Schedule to the Rights of Persons with Disabilities Act, 2016 to cover forced ingestion of acid and internal injury, with retrospective effect from 2016, and directing notification of the amendment within two weeks); *see also* Supreme Court Expands Disability Rights, Includes Acid Attack Victims and Internal Injuries Under RPwD Act, THE LOGICAL INDIAN (May 5, 2026), <https://thelogicalindian.com/supreme-court-expands-disability-rights-includes-acid-attack-victims-and-internal-injuries-under-rpww-act/>; *see also* The Rights of Persons with Disabilities Act, 2016, No. 49, Acts of Parliament, 2016 (India).

the same pattern that recurs across every offence surveyed in this paper: a sound legal framework, built up patiently over a decade, still straining against slow trials and uneven implementation on the ground.

4. Domestic Violence

Have you ever noticed a woman who seems frightened of her husband or in-laws, or one with scars on her neck, body, or face that she has spent a long time trying to hide? These may be signs of an abusive relationship. Beating, physical or mental hurt, sexual assault, name-calling, constant insults, preventing a woman from working, studying, or seeing her family and friends, controlling how she spends money or what she wears, possessiveness, baseless accusations of infidelity, controlling her access to healthcare, threatening her with violence or a weapon, and forcing her into sexual acts against her will all constitute domestic violence — whether inflicted by a spouse or by the spouse's family and relatives.

What was Section 498A of the Indian Penal Code the principal criminal provision protecting married women from cruelty by their husbands or in-laws — is now found in Sections 85 and 86 of the Bharatiya Nyaya Sanhita, 2023, Section 85 defining the offence and Section 86 defining what constitutes 'cruelty', in substantially the same terms as before.²⁶ According to the delayed but now-released 'Crime in India 2023' report of the National Crime Records Bureau, 4,48,211 cases of crime against women were registered in 2023, a further, if marginal, rise over the 4,45,256 cases recorded in 2022, at a national rate of 66.2 incidents per lakh female population and a charge-sheeting rate of 77.6 per cent 'cruelty by husband or his relatives' continuing to be, by a wide margin, the single largest category, and the national capital again recording the highest number of such cases among India's metropolitan cities.²⁷ Domestic violence remains, by most accounts, significantly under-reported on account of shame, financial dependence, fear of retaliation, victim-blaming, and cumbersome bureaucratic procedures, so official figures almost certainly understate the true scale of the problem. The National Family Health Survey continues to serve as an independent, complementary source of self-reported data on the prevalence of domestic violence in India, alongside the NCRB's compilation of police-registered cases.

26 Bharatiya Nyaya Sanhita, *supra* note 2, Sec. Sec. 85-86 (corresponding to Indian Penal Code, *supra* note 2, Sec. 498A).

27 NAT'L CRIME RECS. BUREAU, MINISTRY OF HOME AFFS., CRIME IN INDIA 2023 (2025).

The provision has, at the same time, remained one of the most contested in the criminal statute book, and 2025 brought that tension squarely before the Supreme Court. RTI data drawn from five district courts in Delhi showed that, of 9,950 trials under Section 498A/Section 85 BNS between 2021 and 2024, only twenty-three barely 0.2 per cent ended in conviction, while nearly 47 per cent were quashed and hundreds more resulted in acquittal, figures that have fuelled a long-running debate about the gap between the provision's protective purpose and its practical misuse against extended family members with no real role in the alleged cruelty.²⁸ In *Shivangi Bansal v. Sahib Bansal*, decided on July 22, 2025, the Supreme Court endorsed guidelines earlier framed by the Allahabad High Court for the constitution of Family Welfare Committees and a two-month "cooling-off" period before arrest in such cases, aimed at filtering out non-serious or vague complaints. That endorsement is itself contested. A larger Bench had held in *Social Action Forum for Manav Adhikar v. Union of India* in 2018 that directions to constitute such committees lay outside the judicial domain, and critics argue that a blanket bar on arrest for two months postpones protection for precisely those women who most urgently need it.²⁹ That effort at calibration was carried further on August 20, 2026, when the Supreme Court, monitoring compliance in *State of Uttar Pradesh v. Ajmal Beg*, directed that charges in cruelty and dowry prosecutions ordinarily be framed within sixty to ninety days, that trials be treated as priority matters, that district judiciaries identify and periodically review cases pending beyond three years, and that mediation or counselling be explored only in matters arising from ordinary matrimonial discord expressly

28 Cooling-Off and Committees: New Path for Section 85 BNS Reform, LIVELAW (Aug. 10, 2025), <https://www.livelaw.in/articles/coolingoff-committees-new-path-section85-bns-reform-300442> (citing RTI data from five Delhi district courts, 2021-2024).

29 *Shivangi Bansal v. Sahib Bansal*, 2025 INSC 883, 2025 LiveLaw (SC) 735 (India) (decided July 22, 2025) (Gavai, C.J.I. & Masih, J.) (endorsing, under INDIA CONST. art. 142, the guidelines at paras. 32-38 of *Mukesh Bansal v. State of U.P.*, 2022 SCC OnLine All 395 (India) (Crim. Rev. No. 1126 of 2022, decided June 13, 2022)). But see *Social Action Forum for Manav Adhikar v. Union of India*, (2018) 10 S.C.C. 443 (India) (holding that a direction for the constitution of Family Welfare Committees lies outside the judicial domain).

excluding cases involving death or grievous violence while preserving the High Courts' power to quash proceedings that are vague, omnibus, or legally unsustainable.³⁰

5. Persecution for Dowry and Dowry Death

Marriage in India carries the weight of tradition and deeply rooted custom passed down across generations, and one custom that has proved stubbornly resistant to reform is the practice of dowry — property, gifts, or money given by a bride's family, historically framed as ensuring her independence within her marital home but, in practice, frequently weaponised into a running demand upon her and her natal family. The Dowry Prohibition Act, 1961 was enacted to prohibit the giving and taking of dowry and the offences connected with it.³¹

Where cruelty or harassment for dowry culminates in the death of a woman by burns, bodily injury, or otherwise than under normal circumstances, within seven years of her marriage the offence is 'dowry death', formerly punished under Section 304B of the Indian Penal Code and now under Section 80 of the Bharatiya Nyaya Sanhita, 2023, a markedly more stringent provision than Sections 85–86, carrying a minimum sentence of seven years' imprisonment extendable to life.³² The Supreme Court has repeatedly had occasion to interpret the statutory phrase 'soon before her death' that links the harassment to the death; in *Kans Raj v. State of Punjab*, the Court held that 'soon before' is a relative term incapable of a straitjacket, fixed-period definition, and is to be understood through the lens of proximity between the harassment and the death on the facts of each case³³ a test restated in *Satvir Singh v. State of Punjab* and reaffirmed by a three-judge Bench in *State of Haryana v. Satbir Singh*, which requires the prosecution to establish a "proximate and live link" between the dowry-related cruelty and the death, the sufficiency of the interval being

30 *State of Uttar Pradesh v. Ajmal Beg*, Misc. App. Nos. 2689-90 of 2025 in Crim. App. Nos. 132-133 of 2017 (S.C. Aug. 20, 2026) (India) (Karol & Masih, JJ.); see also Supreme Court Issues Ten Directions to Speed Up Dowry, Cruelty Trials, BUSINESS STANDARD (Aug. 27, 2026), https://www.business-standard.com/india-news/supreme-court-issues-ten-directions-to-speed-up-dowry-cruelty-trials-126082700723_1.html.

31 The Dowry Prohibition Act, 1961, No. 28, Acts of Parliament, 1961 (India).

32 Bharatiya Nyaya Sanhita, *supra* note 2, Sec. 80 (corresponding to Indian Penal Code, *supra* note 2, Sec. 304B).

33 *Kans Raj v. State of Punjab*, (2000) 5 S.C.C. 207 (India).

left to the court on the facts of each case.³⁴ On bail, the Court has been equally firm: in *Shabeen Ahmad v. State of Uttar Pradesh*, decided on March 3, 2025, it cancelled the bail granted by the High Court to the father-in-law and mother-in-law of the deceased, holding that the stringent standard attaching to Section 304B/Section 80 BNS, given the grave nature of the offence, requires considerable caution where the facts point to direct involvement in the fatal events. It nonetheless left undisturbed the bail granted to two sisters-in-law, against whom the material was thinner – a reminder that the same judgment can be firm on the principal accused and careful about omnibus implication of the wider family.³⁵

Enforcement, once again, has proved harder than definition. The Supreme Court's own record in *State of Uttar Pradesh v. Ajmal Beg* is instructive: the underlying prosecution, arising from the dowry death of a twenty-year-old woman within a year of her marriage over demands for a television, a motorcycle, and Rs. 15,000 in cash, took roughly twenty-four years to reach finality before the Court, on December 15, 2025, set aside the High Court's acquittal and restored the convictions of the husband and the mother-in-law – though the mother-in-law, then aged ninety-four, had her conviction restored but was spared imprisonment on humanitarian grounds.³⁶ Dissatisfied with treating that as an isolated correction, the Court, on August 20, 2026, issued ten further directions aimed at the systemic delay it had observed – covering institutional support for victims' families, public awareness of dowry law, mandatory identification and monitoring of cases pending beyond three years, realistic trial timelines, and periodic compliance reporting by the district judiciary back to the High

34 *Satvir Singh v. State of Punjab*, (2001) 8 S.C.C. 633 (India); *State of Haryana v. Satbir Singh*, (2021) 6 S.C.C. 1 (India) (three-judge Bench) (requiring a “proximate and live link” between the dowry-related cruelty and the death).

35 *Shabeen Ahmad v. State of Uttar Pradesh*, 2025 INSC 307, [2025] 3 S.C.R. 367 (India) (decided Mar. 3, 2025) (Vikram Nath & Sandeep Mehta, JJ.) (cancelling the bail granted to the father-in-law and mother-in-law while declining to disturb the bail granted to two sisters-in-law).

36 *State of Uttar Pradesh v. Ajmal Beg*, 2025 INSC 1435, Crim. App. Nos. 132-133 of 2017 (India) (decided Dec. 15, 2025) (Karol & Kotiswar Singh, JJ.) (setting aside the High Court's acquittal and restoring the convictions of the husband and the mother-in-law, the latter, aged 94, being spared incarceration on humanitarian grounds).

Courts.³⁷ It is difficult to read that timeline a death in 2001, a conviction that took a quarter of a century to survive appeal without concluding that certainty of punishment, not merely its severity on paper, remains the harder half of the deterrence this paper keeps returning to.

Why are Women more Prone to Crimes?

We are, as a very young nation, said to have developed a great deal but have we developed our mindset to match? Deep down, many of us, on seeing a woman in a mini-skirt, still hear an inner voice say ‘this is why women are not safe, look how she is dressed’, or, if not quite that, ‘doesn’t she know how dangerous it is to dress this way?’. Accept it or deny it, but many of us think, at least momentarily, along these lines without pausing to recognise that clothing is a woman’s personal choice. The pattern of reported cases bears this out: women in mini-skirts, in sarees, in burqas and hijabs, and even infant girls in diapers have all been victims of these inhuman offences. Clothing, plainly, is not the variable. So why women? Are they simply easier to target? The answer is no it is the mentality that must be blamed. Deeply ingrained across generations is the notion that women are a commodity, and that a woman cannot be equal to a man; the fact that women now excel in fields once thought the exclusive preserve of men is still resisted by many men and by many women too. Domestic violence, rape, child abuse, stalking, eve-teasing, and every act calculated to make a woman feel unsafe fall within ‘violence against women’, yet society, increasingly, takes these matters lightly ‘nobody cares’ remains, all too often, the operative truth, as videos of bystanders filming rather than intervening in attacks on women continue to surface with depressing regularity.

Nor is it reassuring to hear women themselves ask, ‘not all men beat their wives’, or ‘isn’t that the husband’s right?’ if that is what some women are taught, one can only imagine what some men are taught. Women are not an easy target by nature; but everything they already endure, day after day, makes them easier for offenders to prey upon.

Effects of such Crimes on the Victim

The consequences of violence against women are rarely confined to the moment of the offence. Physically, injuries range from bruises and fractures to chronic disability; violence during pregnancy poses documented risks

37 Ajmal Beg, *supra* note 30 (Karol & Masih, JJ.); see also Supreme Court Sets 60-90 Day Deadline for Framing Charges in Dowry Death Cases, Issues 10-Point Nationwide Directive, LAWBEAT (Aug. 2026), <https://lawbeat.in/top-stories/supreme-court-sets-60-90-day-deadline-for-framing-charges-in-dowry-death-cases-issues-10-point-nationwide-directive-1625920>.

to both mother and foetus; unwanted pregnancies resulting from rape can push women toward unsafe abortions where legal access is difficult; and exposure to sexually transmitted infections, including HIV, is heightened both by an inability to negotiate safe sex within an abusive relationship and by the physical trauma of a violent sexual assault. Psychologically, survivors of sexual violence and domestic abuse report disproportionately high rates of depression, anxiety, and post-traumatic stress, along with chronic fatigue, insomnia, disordered eating, and, in some cases, turning to alcohol or substances to cope. A single incident of sexual violence in childhood can leave lasting harm well into adulthood, particularly where the child-victim never receives appropriate support. Children who merely witness domestic violence at home often carry many of the same symptoms as children who are directly abused; girls who witness abuse are statistically more likely to normalise violence within their own future marriages, while boys who witness it are more likely to replicate it as adults. The costs extend to society at large the direct costs of policing, prosecution, and healthcare for survivors, and the indirect costs of lost education and employment. Fear of sexual harassment continues, in parts of the country, to keep girls out of school or to see them married off early rather than sent to complete their education, curtailing both their own life outcomes and their contribution to their communities.

From the Indian Penal Code to the Bharatiya Nyaya Sanhita: What has actually changed

When this paper was first written, in 2021, every provision discussed above sat within the Indian Penal Code, 1860, a code drafted under colonial rule and carried forward, with amendments, for over 160 years. That code stands repealed. Since July 1, 2024, the Bharatiya Nyaya Sanhita, 2023 governs offences committed on or after that date, while offences committed earlier continue to be tried under the old numbering as a matter of criminal law's ordinary rule against retrospective application which means that, for some years yet, courtrooms, textbooks, and complaints will have to speak both languages at once.

For the crimes surveyed in this paper, the substance has changed far less than the numbering: rape (old Sec. 375/376, now Sec. Sec. 63–64), gang rape (old Sec. 376D, now Sec. 70), acid attacks (old Sec. Sec. 326A–326B, now Sec. 124), cruelty by a husband or his relatives (old Sec. 498A, now Sec. Sec. 85–86), and dowry death (old Sec. 304B, now Sec. 80) have all been substantially carried forward rather than reimagined, generally with the same ingredients, the same or marginally enhanced punishments, and crucially the same marital rape exception. Even the one apparent

change of substance in this cluster the raising, from fifteen to eighteen years, of the age below which sexual intercourse with one's wife will still amount to rape was not the new Code's doing. The Supreme Court had already read "fifteen" down to "eighteen" in Exception 2 to Section 375 in *Independent Thought v. Union of India*, (2017) 10 S.C.C. 800, and the Bharatiya Nyaya Sanhita did no more than write that reading into the text. What 2025 and 2026 have added is not further renumbering but a distinct, procedural layer of reform, driven almost entirely by the judiciary rather than the legislature: fresh guidelines for the trial of sexual offences, the setting aside of the Supreme Court's own 2023 Handbook on Combating Gender Stereotypes and its replacement in August 2026 by the National Judicial Academy expert committee's report; a "cooling-off" and Family Welfare Committee mechanism for cruelty complaints; sixty-to-ninety-day charge-framing timelines and three-year pendency reviews for cruelty and dowry prosecutions; and asset-seizure recommendations and a broadened definition of injury for acid attack survivors. None of this required Parliament to amend a single section of the Bharatiya Nyaya Sanhita it is the higher judiciary, largely through its supervisory and Article 142 powers, doing the work that renumbering alone could not. Which is precisely why the pending Supreme Court challenge to the marital rape exception, now finally posted for hearing, carries so much weight: it is the one live fault-line still capable of producing a genuinely new *substantive* legal protection for women, rather than a renamed old one or a faster route to the same old destination.

Conclusion

Once a woman is victimised by an offence, its scars remain on her soul for the rest of her life, and, on the NCRB's most recent count for 2023, a woman in India is the victim of some registered crime roughly once every seventy seconds a rate that has barely moved, if at all, since the last edition of this paper.³⁸ This is evidence enough that no measure taken thus far by the government or the judiciary has been fully successful in safeguarding women's dignity in society.

Even the imposition of capital punishment in the Nirbhaya case did not deter other offenders from committing similarly heinous crimes perhaps because it took over seven years for the judiciary to finally deliver that justice, and a very similar arithmetic of delay resurfaces in *Ajmal Beg*, where a dowry death took a quarter of a century to reach finality. The 2025-2026 run of orders surveyed in this paper the sexual-offence trial guidelines, the cooling-off mechanism for cruelty complaints, the charge-

38 NAT'L CRIME RECS. BUREAU, *supra* note 27.

framing timelines, the acid-attack asset-seizure recommendation reads, at its most hopeful, as the judiciary finally treating *delay itself* as the primary accused. But orders monitoring pendency are still, at bottom, procedural fixes layered onto a substantive law that has barely moved since 2021. The most credible answer to crimes against women remains strict, certain, and swift punishment, delivered through dedicated fast-track courts where verdicts arrive in months rather than years, and where victims are able to speak freely without fear of further harassment. It was well said by Prime Minister Jawaharlal Nehru, speaking in Parliament on the Dowry Prohibition Bill on May 6, 1961, that: *“Legislation cannot by itself normally solve deep-rooted social problems. One has to approach them in other ways too, but legislation is necessary and essential, so that it may give that push and have that educative factor as well as the legal sanctions behind it which help public opinion to be formed or public opinion which is being formed to be given a certain shape.”* That, in essence, is what the transition from the Indian Penal Code to the Bharatiya Nyaya Sanhita has attempted, what the judiciary’s 2025–2026 procedural reforms have tried to accelerate, and what the pending challenge to the marital rape exception now attempts to finish legislation and adjudication giving that push, while the harder work of changing mindsets continues outside any courtroom.

These offences remain a great termite gnawing at the world, and no single person can remove it alone; it will take the entire world coming forward together to stop crimes against women, and to make this a better, safer place for them to live.

CALL CENTRES/BPO INDUSTRY: A CURSE OF ANXIETY AND DEPRESSION

Alok*

One of the fastest-growing industries in India, the call centre sector is driving employment and growth in the country. While working in the business process outsourcing (BPO) industry has allowed young adults to reach their financial and professional milestones much earlier than in the past, surveys and anecdotal evidence indicate that BPO employees suffer from high levels of stress and related disorders, mostly as a result of their modern work environments. Public health professionals have an occupational health issue in protecting the health of young people working in this new and expanding sector. This paper is based on multi-disciplinary studies that range from occupational health psychology, industrial sociology, neurobiology and organizational ethnography, and examines the systemic aetiology of psychological morbidity in the tele-service sector. It examines the intersection of various reinforcing occupational risks, such as the digital Taylorization of white-collar professions through the use of automated call distribution and customer mistreatment, and the neurobiological dysregulation caused by night shifts, and the confinement of the working body. Finally, the treatise uses the Job Demands-Resources framework to highlight the systemic structural, technological and legislative changes needed to rectify this growing public health threat.

Keywords: Call Centres, Business Process Outsourcing (BPO), Emotional Labour, Electronic Performance Monitoring and Occupational Anxiety.

Introduction

The global service economy has experienced a similar structural shift in the last 40 years to what was seen during the Industrial Revolution of the 19th century, one of the most dramatic and significant changes in industrial history. In advanced capitalist economies, corporations increasingly began to resort to tele-mediated service delivery to merge customer service, technical support, telemarketing, debt collection, and back-office administrative tasks. This shift created the modern-day contact centre industry and larger Business Process Outsourcing (BPO) sector overall. The job-producing and middle-class-building promise of these sectors has been celebrated in Global South destinations like India and the Philippines, while the social dynamics of this labour have created an unprecedented

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public health emergency characterized by occupational stress, affective disorders, and chronic anxiety. Individualistic explanations, such as “an employee is vulnerable” or “he/she has poor coping mechanisms,” are not sufficient to explain the negative effects of tele-service work on human psychology. Rather, any psychological distress among the call center employees needs to be understood in the context of the structure of the labour process. It can be said that call center jobs are an “assembly line in the head” as described by industrial sociologists Phil Taylor and Peter Bain.¹ This formulation encapsulates an historiographic continuum between classical factory production and today’s office work.²

In his work *Labour and Monopoly Capital*, Harry Braverman traced the evolution of principles of scientific management that were originally developed by Frederick Winslow Taylor and how they systematically attacked and destroyed artisanal and manual labour processes.³ By dividing the conception of tasks from their execution, and breaking down the intricate craft into repetitive micro-tasks, by inserting a full-scale administrative regime over the worker’s body, Taylorism brought about both cost savings and managerial dominance. The tacit nature of human speech, the subjectivity attached to it, and the interpersonal nature of spoken communication were thought to mean that the job of a white-collared, clerical or communicative worker would not be subject to such extreme rationalization processes as those for other occupations. But the convergence of modern computing and advanced telecommunications, namely Computer-Telephony Integration (CTI), Automatic Call Distribution (ACD) and Interactive Voice Response (IVR) architectures, toppled this barrier. It did so and thus impose a strict economic discipline on communicative interaction.

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- 1 Peter Bain Et Al., *An Assembly Line In The Head: Work And Employee Relations In The Call Centre*, Researchgate (2002), https://www.researchgate.net/publication/227613143_An_Assembly_Line_In_The_Head_Work_And_Employee_Relations_Inthe_Call_Centre.
 - 2 Phil Taylor & Peter Bain, *Taylorism, Targets, And The Pursuit Of Quantity And Quality By Call Centre Management*, Researchgate (2001), https://www.researchgate.net/publication/227630515_Taylorism_Targets_And_The_Pursuit_Of_Quantity_And_Quality_By_Call_Centre_Management.
 - 3 *Developments In The Call Centre Industry: Analysis, Changes And Challenges* (John Burgess & Julia Connell Eds., Routledge 2006).

The technological architecture of a modern call center is like a digital pacemaker, just like the conveyor belts of early motor car assembly plants. In the traditional office, clerks had control over their own their work; they could decide, for example, when to write a letter, file a document, answer a phone call, or take a short mental break.

This configuration represents a way to extinguish natural IPs that humans use to manage emotional stress, shift cognitive attention, and defuse physiological stress reactions. The communicative medium of speech itself, the traditional one of human interaction, creativity, and social interaction, is deeply industrialized, weighed, monitored, and standardized. The scholarly research into this labour process reveals an occupational context in which the human brain is required to function as a fast data processor but also must tackle the challenging interpersonal dynamics, software interfaces and organizational procedures. To really understand the scale of this occupational health problem, a closer look at specific empirical data gathered in key outsourcing areas around the world is needed. Case-control epidemiological evaluations of psychiatric morbidity have been performed in India, one of the world's epicenters of voice-based outsourcing and revealed significant differences between psychiatric morbidity rates of BPO employees and age-matched and socioeconomically similar employees not working in the BPO sector. Clinical evaluations show BPO employees have an average clinical stress rate from 58.3% to 66.0%, which is a much higher rate than the non-BPO control group of 19.3%. Moreover, the rates of clinical depression are extremely high among Indian BPO workers (62.9%) as compared to those of non-BPO control groups (4.6%). The generalized anxiety and clinical panic symptoms also showed a similar pattern, with a prevalence between 33.9% and 45.0% in BPO workers versus 1.4% in non-BPO control subjects.⁴

The trends of severe psychiatric disorders across the region are confirmed by further evaluations in the NCR of Delhi. The overall prevalence of stress, anxiety and depression in Delhi was 46.7%, 57.1% and 62.9%, respectively, from a comprehensive cross-sectional survey of call handlers across all countries.⁵ These high rates of psychiatric morbidity

4 Dinesh Raja Jeyapal Et Al., *Stress, Anxiety, And Depression Among Call Handlers Employed In International Call Centers In The National Capital Region Of Delhi*, 59 Indian J. Pub. Health 95, 95-101 (2015), https://www.researchgate.net/publication/277408830_Stress_Anxiety_And_Depression_Among_Call_Handlers_Employed_In_International_Call_Centers_In_The_National_Capital_Region_Of_Delhi.

5 Jeyapal Dinesh Raja & Sanjiv Kumar Bhasin, *Health Issues Amongst Call Center Employees, An Emerging Occupational Group In India*, 39 Indian J. Community Med. 175 (2014), <https://pmc.ncbi.nlm.nih.gov/articles/PMC4134534/>.

were directly associated with chronic sleep problems, long journeys to work, short- or insecure-term working situations, and the near-complete lack of relaxation facilities at work. Cross-sectional studies in Pakistan that examined the stress levels of contact center agents in urban industrial centres of the country such as Karachi, using the DASS-42 scale, found that 63.3% had moderate to severe stress, 48.8% had clinical anxiety and 52.2% had clinical depression. Among these factors, the researchers identified sleep deprivation, longer shifts that lasted longer than 9 hours, less relative wage increases, and no signs of any structured opportunity for rest at work as the main predictive variables in this population.⁶

Voice-based customer support operations support millions of people in psychiatric crisis across Southeast Asia. In Malaysia, Singapore, Indonesia, and the Philippines, workers from various countries were surveyed at a national level across multiple businesses, and the results indicate that the prevalence of occupational burnout is 62.91% overall among full-time workers in the service sector. In the Philippines, the country is one of the biggest contact center destinations; the rate of burnout is 70.71% for full-time agents.⁷ In a public health multivariate logistic regression, call center workers with severe occupational burnout were at tremendous psychiatric risk, with 6.48 times higher adjusted odds ratio for severe clinical depression and 2.22 times higher odds for generalized anxiety disorder compared to those with low occupational burnout. Factors that were found to be key risk drivers in these multi-country studies are: routine working hours over 50 hours, high levels of job dissatisfaction, and high demands for working time throughout the day.

Meta-analytic evaluations and industry-wide workplace mental health audits on a global benchmark level suggest that the overall level of burnout in the worldwide customer support sector is approximately 74%. Constant turnover due to such pervasive burnout represents a remarkable employee turnover rate of 30% to 58% per year for major contact center enterprises. The psychological conditions of the call center agents lead to severe downstream organizational consequences such as high rates of sickness absenteeism, cognitive withdrawal, reduction in call accuracy, and increased error rates during customer transactions. The operational failures only add to the pressures and strain on the remaining staff,

6 Amani Fadzlina Abdul Aziz & Tiffanie Ong, *Prevalence And Associated Factors Of Burnout Among Working Adults In Southeast Asia: Results From A Public Health Assessment*, 12 *Frontiers Pub. Health* (2024), <https://Pmc.Ncbi.Nlm.Nih.Gov/Articles/Pmc10972957/>.

7 *Ibid*

encourage further management of staff workload and result in further staff attrition, creating a vicious circle of stress, exhaustion, and further attrition.

Structural Organization, Digital Taylorism, and Electronic Panopticon

The organizational mechanics of contact centers today are based on invasive measures of operational efficiency. In classical sociological theory, Jeremy Bentham's 18th-century architectural design for what he called the 'Panopticon' was later popularised and philosophically developed by Michel Foucault, who described it as an institutional structure in which an unseen inspector was able to monitor the inmates at all times. They were forced to adopt continuous self-policing with regard to active supervision in order not to know where they were being actively looked after. In their analysis of tele-service workplaces, industrial relations scholars Sue Fernie and David Metcalf suggested that the contact center is a full realization of the ultimate dream of the Panopticon. This 'electronic panopticon' is a computer screen and a telephony headset which act as a constant form of 'surveillance', making the worker's operational output and their 'vocal demeanor' visible to management in real time.

In a contact center, Electronic Performance Monitoring (EPM) goes beyond simply recording output. It is a comprehensive system of total workflow surveillance that is able to capture, classify, and rate all the employees' actions during the working time period. Telephony platforms and workforce management software collect granular telemetry continuously and measure staff with a host of key performance indicators (KPIs) that are extremely demanding.

- **Average Handling Time (AHT):** AHT is a metric that requires a complete customer interaction from greeting to identity verification, diagnostic troubleshooting, resolution, and scripted sign-off to be completed within a tightly regulated window that is typically set between 180 and 300 seconds. Anything above this threshold, even a bit more, lowers a representative's performance level, which directly affects compensation and tenure.⁸
- **After Call Work (ACW) and Wrap-Up Time:** Representatives need to take notes and issue refunds, adjust billing codes, and flag accounts in internal databases after a call is terminated. This administrative

8 Sushma Suri & Saba Rizvi, *Mental Health And Stress Among Call Center Employees*, 34 J. Indian Acad. Applied Psychol. 215, 215-220 (2008), https://www.researchgate.net/publication/295548586_Mental_Health_And_Stress_Among_Call_Center_Employee.

time is typically condensed to fifteen to thirty seconds, requiring individuals to juggle a number of tasks and get ready for the next caller to appear in the headset.

- Telephony Systems will keep track of the condition of an employee's system for the entire working day, including status and auxiliary codes. There must be specific auxiliary codes for the time allocated to the employee that is not spent on taking calls, such as training the system, attending to his or her biological needs, etc., or bathroom breaks. Standard adherence rules typically call for people to be in queue 95% to 98% of the time during their shift. An additional 2 minutes on the toilet is automatically reported as software and is counted as unscheduled non-adherence.⁹
- Since frontline is not an organization with much power to change the system, the two metrics used to gauge their performance are First Call Resolution (FCR) and Customer Satisfaction (CSAT).
- Advanced EPM systems now utilize algorithmic Voice and Speech Analytics, which uses artificial intelligence to measure and monitor vocal pitch, cadence, latency, and sentiment, among other variables, as "dead air," while punishing representatives for vocal inflections considered insufficiently enthusiastic, and even scanning audio files to ensure verbatim delivery of statutory and brand statements.¹⁰

The psychological effect on human cognitive and emotional functions from constant digital surveillance is serious. The results of comprehensive meta-analytic analyses of 94 independent worker samples of 23,461 individual workers demonstrate that electronic monitoring directly enhances worker stress, anxiety, and overall psychological load. Importantly, this meta-analysis showed that negative mental health outcomes of electronic monitoring are independent of technical features, delivery methods, or monitoring system settings. This level of digital monitoring creates the industrial sociologists' "paradox of quantity vs.

9 Diane Banks & Gert Roodt, *The Efficiency And Quality Dilemma: What Drives South African Call Centre Management Performance Indicators?*, 9 S. Afr. J. Hum. Resource Mgmt. 1, 1-12 (2011), <https://Sajhrm.Co.Za/Index.Php/Sajhrm/Article/View/331/306>.

10 Johanna Woydack & Ben Rampton, *Text Trajectories In A Multilingual Call Centre: The Linguistic Ethnography Of A Calling Script*, 45 Lang. In Soc. 709, 709-732 (2016), <https://www.cambridge.org/core/journals/language-in-society/article/abs/text-trajectories-in-a-multilingual-call-centre-the-linguistic-ethnography-of-a-calling-script/69dde58245738603f5860d4c5c752d64>.

quality. It's a truth that's borne out by the call center industry's challenge to deliver personalized, highly empathetic, and quality customer experiences in its management manuals and marketing brochures.

Supervisors regularly remind staff to be engaged listeners and show empathy and warmth. At the same time, however, automated distribution systems and compensation formulas analyze and reward processors for their speed of processing, number of calls, and compliance with strict time limits. It is a contradiction that puts frontline workers into a psychological "double bind" condition, first identified by anthropologist Gregory Bateson as a condition in which a person is subject to contradictory demands and can not escape or win. A representative is placed in a dilemma when he is dealing with an emotionally upset, old, and confused customer. If they need to take too long to comfort the caller, to deal with intricate account histories, and to obtain a comprehensive resolution, their AHT increases, and they could face disciplinary action or even a team leader performance demotion. On the other hand, if they rigidly enforce their time quotas by turning a customer away, skipping steps in diagnostics, and pushing a customer out the door, their Customer Satisfaction scores drop, they may fall short of their First Call Resolution goals, and they're likely to provoke negative customer responses.¹¹ The mental price of functioning in this structural paradox is enormous. Decades of occupational health research are guided by Robert Karasek's model of "Job Demands-Control", which has identified the highest level of psychological and physical strain to take place in: "high-strain" jobs, those with high operational demands and low decision latitude and control. Call center/BPO is an extreme form of this high-strain matrix, and the individual handling the call assumes full responsibility for the outcome of the interaction, while having little control over the workflow, script, technology, or time given to resolve the issue. The ongoing, invisible surveillance of an employee by a supervisor (such as when a supervisor is actively working on a call or watching an employee's screen without either party realizing it) locks the sympathetic nervous system in perpetual high alert, which causes a continuous release of adrenaline and cortisol and consequently a gradual decrease in cognitive function, emotional wellbeing, and neurochemical balance.

11 Ursula Huws, *Service Work Restructuring And The Mass Production Model*, Taylor & Francis (2003), <https://api.taylorfrancis.com/content/chapters/Oa-Edit/Download?Identifiername=Doi&Identifiervalue=10.4324/9780203003008-12&Type=Chapterpdf>.

Epidemiological Dimensions: Empirical Rates of Anxiety, Depression, and Morbidity

The empirical epidemiological and clinical surveys conducted globally among the tele-service sector demonstrate psychological distress due to these work conditions. Contact center workers report psychiatric morbidity levels that are consistently significantly higher than the general population baseline and than scores of other service and office workers on multiple self-report measures across multiple diagnostic instruments: Depression Anxiety Stress Scale (DASS), Occupational Stress Index (OSI), Korean Occupational Stress Scale (KOSS), and Hospital Anxiety and Depression Scale (HADS). This workplace difference was highlighted in a comprehensive, comparative study conducted by occupational health researchers of 600 white-collar knowledge workers (n=300 call center employees; n=300 software engineers), all with the same level of education, and in the same economic context. The resulting comparative data showed that, on each dimension of occupational experience evaluated, call center operators reported a statistically significant, higher stress profile than did software professionals, indicating high levels of occupational strain ($p < 0.001$) in the call center group.¹² In order to better appreciate specific factors contributing to scores, it is useful to review sub-scale scores of the Occupational Stress Index, which reflect a multi-dimensional construct of stress in the workplace: The mean score for role overload among operators of call centers was alarming at 23.28 ± 4.23 , significantly higher than the 19.38 ± 2.87 in the software profession ($p < 0.001$). This is due to a continuous incoming call queue, compression of wrap-up buffers, and the impossibility of catching one's breath during interaction after interaction.

Role Ambiguity: Operators registered a mean score of 12.80 ± 3.85 versus 9.66 ± 2.11 for software engineers ($t(598) = 4.488$, $p < 0.001$). This is due directly to conflicting requirements for handling speed and call quality. The mean score for tele-service personnel (16.48 ± 4.00) was higher than the score for their technical peers (13.56 ± 2.92) in the case of Role Conflict. It shows the daily challenge of being a customer advocate and, at the same time, implementing restrictive corporate policies to minimise service costs.

Hyper-competitive floor environments, stacked performance reviews, and forced management of performance were among the factors that drove workers at the call center to score 14.22 ± 3.03 compared to 11.28 ± 2.15 in the

12 Dr. Hita Claudia Rao, *Levels Of Occupational Stress In Call Center Employees And Software Professionals: A Comparative Analysis*, Researchgate (Apr. 8, 2025), https://www.researchgate.net/publication/390586033_L Levels_Of_Occupational_Stress_In_Call_Center_Employees_And_Software_Professionals_A_Comparative_Analysis.

software cohort.¹³ Others, including under participation, showed significant elevations among call handlers as compared to software engineers ($t(598)=3.601$, $p<0.001$): (13.92 ± 2.99) versus (11.82 ± 2.84) . This highlights the fact that there is almost no discretion or authority in making decisions for a front-line phone agent. There is a high level of agreement on the epidemiological status in both developed and developing countries. Tele-service workers are not having minor frustrations in their place of work; they are having high rates of psychiatric and psychosomatic illness. The International Labour Organization (ILO) researchers Jon Messenger and Naj Ghosheh noted that severe psychological stress is directly linked to unsustainable worker turnover in their global research about offshoring and working conditions in India, the Philippines, Argentina, and Brazil.¹⁴ Turnover is a regular occurrence in major BPO centers, often hitting 40% to 50% a year, and it can even exceed 100% a year in high-volume customer-facing and international-facing departments in customer support.¹⁵ In sociological and management literature, this turnover is often interpreted as a form of employment attitudes or disloyalty of young employees. As Premilla D'Cruz and Ernesto Noronha show, in reality, quitting is an institutionalized "exit coping response".¹⁶ The call center is a revolving door, exhausting one generation of educated young workers after another, as their physical and mental well-being and emotional health suffer from prolonged employment.

Psychosocial Pathologies

In addition to structural surveillance and metric enforcement, call center agents have to perform intensive emotional labour on a daily basis. From the perspective of Job Demands-Resources (JD-R) theory, call centers are characterized as having high workloads and low job control, little decision latitude, and little job social support resources. Commodification and control of human emotions are key factors in the BPO sector that cause anxiety and affective exhaustion. However, in her groundbreaking sociological work *Managed Heart*, Hochschild coined the term emotional labour to refer to the practice of "bringing" and "bidding" up a "feeling"

13 *Ibid.*

14 **International Labour Organization (Executive Briefing)** Int'l Labour Org., Offshoring And Working Conditions In Remote Work (Executive Briefing & Data), <https://www.ilo.org/Media/291801/Download>.

15 *Ibid.*

16 Premilla D'Cruz Et Al., *Workplace Bullying, Emotional Abuse, And Harassment*, Researchgate (2025), https://www.researchgate.net/publication/395467764_D'Cruz_Et_Al_Forthcoming_Workplace_Bullying_1_Workplace_Bullying_Emotional_Abuse_And_Harassment.

to create a state of mind in a person.¹⁷ Emotional labour, however, in the context of a contact center is not something that is simply left up to individual choice, but is required, formalized, and regulated by the organization’s “display rules. Contractually, tele-service representatives are expected to be enthusiastic, cheerful, warm, deferential and suppress any negative emotions such as anxiety, frustration, anger, and fatigue.¹⁸

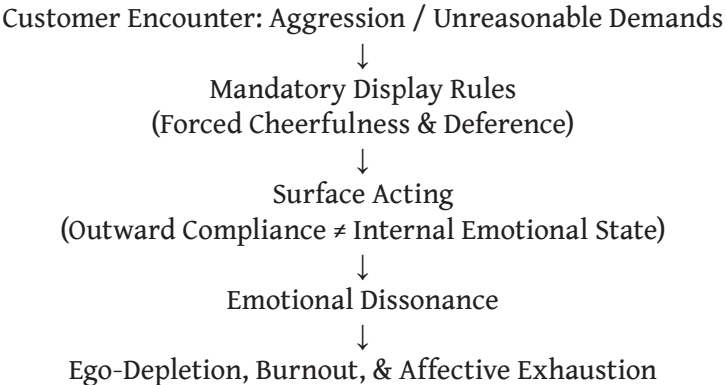


Figure No. 1: Customer Encounter

In organizational psychology, there are two main ways in which employees perform emotional labour:

- * **Deep Acting:** Internal strategy for regulating one’s own affective responses by consciously attempting to change one’s internal feelings to match the desired organizational response. A representative may engage in active cognitive reappraisal, actively imagining that the customer who is abusing them is an “emotionally out of control” person in need of assistance, thus feeling real compassion for the customer. Deep acting is cognitively challenging, but it maintains some degree of internal ‘authenticity ‘ and does not have a strong relationship with lasting psychological harm.
- * **Surface Acting:** When a worker is outwardly manipulated into displaying a prescribed emotion, covering up his or her inner feelings with a false smile, an artificially high vocal pitch and the use of empathy statements. Contact center calls are typically about 100

17 Jung-In Kim & Jin-Wook Kim, *Occupational Stress And Emotional Labor Moderation In Call Center Employees*, Mdpi Sustainability (Apr. 2, 2019), <https://www.mdpi.com/2071-1050/11/7/1886>.

18 Hyeon Park, Hyunjin Oh & Sunjoo Boo, *The Role Of Occupational Stress In The Association Between Emotional Labor And Mental Health: A Moderated Mediation Model*, 11 Sustainability 1886 (2019), <https://www.mdpi.com/2071-1050/11/7/1886>.

to 200 per shift with few breaks in between, making it impossible for staff to have the cognitive time and mental energy to be able to perform at a high level of deep acting. In this way, the majority of call center agents practice surface acting during their working hours.¹⁹ This ongoing, surface-level emotional dissonance, or psychological conflict, between what is felt within and what is required to be expressed, is profound. Organisational psychologists mediated the relationship between surface acting and acute psychological distress with emotional dissonance as an active mediator, supporting the hypothesis. Emotional dissonance is highly positively associated with high DASS levels in depression, generalised anxiety and somatisation.

This effect is explained by a psychological mechanism called “ego depletion” and “self-regulation” theory. Repeatedly suppressing spontaneous emotional responses (for example, when someone insults you, you have to fight it; when you feel confused, you have to suppress it; when you are exhausted, you have to suppress it) takes a tremendous amount of conscious effort and uses up limited glucose and neurochemical reserves in the prefrontal cortex.²⁰ This self-regulatory capacity of a representative starts to gradually drain after a shift of 8-10 hours and when their self-regulatory capacity is depleted, a representative’s brain loses the ability to regulate mood and emotional responses, leading to depersonalization, extreme emotional numbness, loss of personal identity, and an increased susceptibility to panic and depressive states.

This emotional fatigue is further worsened by the repeated experience of customer mistreatment, verbal abuse and hostility. In the absence of the visual cues that are typically present in the traditional office setting, callers tend to be less inhibited and can vent their frustration over service failures, hidden costs, technical issues, etc., directly at the agent. agent is then responsible for absorbing the shock in order to minimize the damage to the organization because of a failure that is beyond the agent’s control. Shouting, using profanity, making personal insults, and threats of violence. Premilla D’Cruz and Ernesto Noronha, in their in-depth ethnographic research on Indian BPOs, presented this structural phenomenon as depersonalized bullying.²¹ A common definition of workplace bullying in regular occupational sociology is that it is a form of harassment carried out by an individual bully from one of the two company groups: an individual

19 *Supra* 10

20 *Supra* 20

21 Premilla D’cruz & Ernesto Noronha, *The Exit Coping Response To Workplace Bullying: The Contribution Of Hrm Strategies*, Empl. Rel., 2010, <https://www.emerald.com/er/article/32/2/102/26422/The-Exit-Coping-Response-To-Workplace-Bullyingthe>.

supervisor or an individual unpleasant colleague. In tele-service work, D'Cruz and Noronha show that the culture of bullying is embedded in the workflow, technical architecture, and operations of the firm.

Depersonalized bullying works in tandem with three different types of pressures:

External Customer Aggression: Callers often use abusive or intimidating language or use a call agent as an anonymous outlet for their anger, treating the agent like a target.

Systemic Managerial Coercion: The floor managers and team leaders who are under pressure from the service level agreement (SLA) to meet the strict time targets in the contract are constantly pushing employees through electronic monitoring dashboards to work at or exceed extremely high handling speeds, to shorten breaks, and to achieve metric scores. Customer abuse is not viewed as a safety violation, but as an operational variable that agents are expected to take on as part of their job.

Institutional display of HR Complicity: When employees find themselves in need of support from Human Resources departments when they report psychological burnout or harassment, organizations may minimise their experience. Rather than tackle structural problems such as too many calls, too rigid a script, or too many abusive callers, HR teams often debate issues of personal resilience, giving glib stress-management advice or assuring the employee that he or she “is not cut out to work with customers under stress.”²²

The organisation's validation of workers' lived reality is denied as it frames structural and institutional failures as personal psychological weaknesses, leaving employees to be coerced into a labour process with no mental security and no internal redress. The depersonalization of bullying creates devastating psychological effects, including increased hypervigilance, social withdrawal, loss of self-esteem, and generalized free-floating anxiety.

Transnational Alienation, Linguistic Subjugation, and Identity Disruption

Offshore outsourcing is located in countries such as India and the Philippines, where psychological stresses associated with tele-service work are compounded by the cultural and linguistic demands. Multinational companies need offshore personnel to disguise their geographical and cultural origins to offer hassle-free customer service to consumers

22 *Ibid*

in the United States, United Kingdom, and Australia. In his thorough ethnographic account, *Dead Ringers: How Outsourcing is Changing Ourselves*, Shehzad Nadeem illustrates institutional systems that BPOs use to make locals into cultural replicas of Western consumers.²³

This process is focused around intensive “accent neutralization” programs. New recruits must learn their native speech patterns, cadences and Mor Tongue Influence (MTI). They are trained to speak standard, flat, mid-Atlantic, or a generic British accent, rather than their own natural speech. Linguistic trainers conduct exercises focusing on regional phonetics, with the aim of getting the workers to change the placement of their tongue, the mouth, and how they breathe so that the callers in the West can hear them as they intend. This linguistic engineering carries over to the commodification of personal identity. Westernized names like “Sean”, “David”, “Jennifer” or “Chloe” are regularly given to workers to use on phones.²⁴

Some BPOs develop complex backstories for the pseudonymous brands, training employees to recall local weather patterns, top sports games in towns such as Dallas, Chicago, Manchester, and more. Representatives are made to believe that they are in domestic call centres in the home country of the callers and will deliberately lie about their true location.

This institutionalized deception creates a tremendous burden of cognition and psychology:

- The language with which workers speak is heavily monitored and regulated and is used in an artificial accent, separating workers from their true selves, psycholinguistic Alienation and Self-Estrangement.
- Temporal and Cultural Duality: The Transnational staff operates in transnational space, which means that the employees live as citizens of a country one day, and as foreigners the next. This has been described by sociologist Shehzad Nadeem as an “imitative counterpoint”: the young worker’s consumption habits, jargon, and lifestyle become foreign to them, making them less involved in their local communities and families.

23 Shehzad Nadeem, *Dead Ringers: How Outsourcing Is Changing The Way Indians Understand Themselves* (Princeton Univ. Press 2011), Dokumen.Pub, <https://Dokumen.Pub/Download/Dead-Ringers-How-Outsourcing-Is-Changing-The-Way-Indians-Understand-Themselves-Course-Booknbsped-9781400836697.Html>.

24 *Supra* 5

- Class and Educational Irony: In India, most of the BPO employees are college-educated engineering, commerce, science, humanities and so on graduates. You're stuck in a calling script, or a catch-all cycle of troubleshooting, instead of meaningful work that makes use of their education. Along with critical post-colonialists, Nadeem points out that these workers are regarded as the vanguard of the modern knowledge economy, but the working conditions of these workers compare with those of "cyber-coolies" carrying out rote-like digital tasks for the eyes of foreign corporate interests.
- As an agent learns a second language and perfects his accent, his synthetic voice is prone to slipping during tougher technical inquiries, where software freezes, or during heated customer disputes. The moment an international customer catches an accent that's not from their country, the interaction often becomes hostile. Representatives get xenophobic rants, racial slurs, and hard demands to be moved to a local agent.²⁵

Agents find themselves in a dilemma that company policy mandates that they keep calm, respond appropriately, and not end the call, and caller satisfaction algorithms reward callers for being angry. Transnational tele-service labour takes a huge psychological price: workers are isolated from their own local community timings, but are regularly disparaged by consumers in the host country whom they are supposed to emulate.

Physiological Correlates

The business need to provide services to Western companies during their working hours brings a significant number of international BPO workers to permanent or alternate graveyard shifts. Biphase effects of working at night on the master circadian pacemaker in the anterior hypothalamus (suprachiasmatic nucleus, SCN). SCN coordinates transcription of circadian clock genes, controls nocturnal melatonin synthesis in the pineal gland, and coordinates systemic cortisol secretion, core body temperature, and autonomic tone.²⁶

Bright fluorescent light in the workplace, combined with eating meals at night, disrupts the circadian apparatus greatly. This leads to reduced melatonin levels and disrupted sleep at night from environmental noise, temperature, and natural light, creating what is known as a biological

25 Premilla D'cruz & Ernesto Noronha, *Customer Cyberbullying: The Experiences Of India's International-Facing Call Centre Agents*, In *Boundary Spanning Elements And The Marketing Function In Organizations* 9, 9-12, 2015.

26 *Supra* 5

"sleep debt" that cannot be made up for during the day. This is shown by occupational health surveys in the key tech and outsourcing centers. The study done in Bangalore showed that 83 per cent of the call centre employees on the permanent night shift had a diagnosed sleep disorder, while 39.5 per cent of the general day shift IT employees had a sleep disorder. A parallel study in Delhi-NCR found 51.4% of BPO workers to have excessive daytime sleepiness (EDS) versus 20.5% among workers in the daytime sector.²⁷

Underlying this chronic sleep disruption is the Burnout Stress Syndrome (BOSS), which is a clinical profile that is prevalent within the call center industry and is defined by constant fatigue, lapses in attention, emotional instability, and dysregulated cortisol production. Disruption of the hypothalamic-pituitary-adrenal (HPA) axis strips the central nervous system of its neurochemical buffers. The ability to regulate functional connectivity between the prefrontal cortex and amygdala is impaired by sleep deprivation, making the brain more susceptible to panic reactions, increased irritability, and depression in response to common stressors in the work environment.

In addition to chronobiological damage, tele-service workers are subject to serious physical and sensory occupational hazards. Call center agents are seated for 8-10 hours per shift with static postures, and work at workstations supported by their headsets, which are prone to causing Static Postural Strain and Musculoskeletal Disorders (MSDs). This lack of mobility, combined with repetitive keyboard entry and not-so- ergonomic chairs, leads to chronic musculoskeletal disorders. There is a high prevalence of cervical myofascial pain, lumbar disc compression, and tension headache among workers. In the study of call centre agents conducted in Mumbai, 70.4% of the female agents had daily tension headaches, mostly due to eye strain, poor workstation design, and neck tension, while 55.6% of the male agents had the same.²⁸

The high incidence of physical morbidity among female BPO workers, such as chronic hypertension (60%), persistent sleep disorders (60%), menstrual and endocrine disorders (50%), digestive disorders (50%), and respiratory disorders (45%), observed in the patterns, is a result of the interplay of chronic mental stress and the disruption of shift-work

27 Suri Jc, Sen Mk, Singh P, Kumar R, Aggarwal P. Sleep Patterns And Their Impact On Lifestyle, Anxiety And Depression In Bpo Workers. *Indian J Sleep Med.* 2007;2:64–70.

28 Chavan Sr, Potdar B. A Critical Study On Work-Life Balance Of Bpo Employees In India, 2011, www.trikal.org/Ictbm11/Pdf/Ob/D1241-Done.Pdf.

patterns.²⁹ Frontline agents are exposed to a particular sensory danger, known as Acoustic Shock Injury (ASI), and another is called Tonic Tensor Tympani Syndrome (TTTS). All day long, staff are subjected to the unpredictable acoustic spikes that can occur in a telephone line, such as line feedback, high-pitched signaling shrieks, auto-fax tones, and people screaming or blowing whistles into the phone.

Audiological specialist Myriam Westcott has found that loud unexpected noises can cause an involuntary hypercontraction of the tensor tympani muscle in the middle ear. This prolonged muscle spasm can cause Acoustic Shock Disorder (ASD) and Tonic Tensor Tympani Syndrome (TTTS). Symptoms include acute ear pain (otalgia), numbness and/or burning around the ear and jaw, aural fullness, tinnitus, vestibular imbalance, and extreme sensitivity to everyday sounds (hyperacusis) due to trigeminal nerve irritability. Agents often have to raise the volume of the headset in noisy, open-plan call centers to overcome background noise, making them more susceptible to acoustic incidents.

If there is an unexpected acoustic shock superimposed on an already stressful workplace, it can produce an extreme autonomic startle reaction that results in conditioned phonophobia (the brain pairs the headset with unexpected pain). Anticipatory anxiety for workers towards their headsets, with increased heart rates and panic reactions when they put on their headsets. This is a physical injury that frequently leaves individuals disabled, withdrawn, and absent from the workplace. The physical trauma, coupled with corporate denial of injury, can lead to chronic disability, depression, and psychiatric absenteeism.

Behavioural Adaptation

The combination of atypical work hours, high operational demands, and low autonomy negatively affects an employee's personal life and social support networks. Human beings need social engagement to help them withstand psychological stress; with the advent of tele-service work, the disruption of their social structures further contributes to psychological morbidity.

Inverted working hours separate BPO workers from their family and society. Working in graveyard shifts entails a schedule at odds with the typical family routine, family dinners, childcare duties, and weekend events. As many as 90% of the call centre staff have stated that they are incapable of balancing work commitments and family life, as per the

29 Gupta A. Health, Social And Psychological Problems Of Women Employees In Bpo: A Study In [India] 2012. <http://Paa2012.Princeton.Edu/Papers/121676> .

survey carried out in various locations of Delhi-NCR.³⁰ Women have some unique challenges as well: they have to work long, hard hours at night and at the same time take on traditional duties at home in the daytime, which cuts down their chances of getting a good night's rest.³¹ To deal with this isolation and with their inverted sleep cycles, workers often resort to chemical coping, such as:

Regular use of chemical substances is made by employees to artificially alter their ir energy and sleep cycles (Stimulant-Sedative Cycle). At night time, workers drink a lot of caffeine and nicotine to reduce the sleep pressure of their natural circadian rhythm. During the day, they resort to alcohol, over-the-counter sleeping pills, or prescription drugs to induce sleep in an overly bright room.

In an occupational study conducted in Kolkata, 63% of the workers of BPO reported multiple substance dependencies. In the comparative study, 56% of heavy smokers (more than one pack a day) and 61% of frequent drinkers were call center workers.³² Call Center staff may live in a community that is different from the people they work with in the call center due to the different hours of their work, and so they may only interact with those who work with them in the call center during unusual hours, and so have limited interaction with other people in their community. There are lots of unhealthy lifestyle habits that can be reinforced by this peer group, such as late-night drinking, compulsive consumer spending, and irregular rest-day sleep habits. Alternating between night shifts and daytime during days off results in chronic "social jetlag" of the central nervous system, which does not allow the nervous system to recover and exacerbates baseline anxiety and depressive vulnerability.

The Influence of Structural interventions, Organizational redesign and Policy frameworks

It is essential to take a more proactive approach to mental health risks associated with call center and BPO operations, rather than focusing on individual coping strategies, by changing the way work is done. Wellness programs, mindfulness seminars, and stress management apps on-site are frequently unsuccessful because you believe that you are merely guilty

30 *Ibid*

31 Assocham Survey, *Challenges And Health Issues Of Women Working In Bpo*, Int'l J. Econ. Mgmt. & Soc. Sci., Jan. 2021, <https://ijemr.in/Wp-Content/Uploads/2021/01/Challenges-Of-Women-Working-In-Bpo.Pdf>.

32 Jha A, Sadhukhan Sk, Velusamy S, Banerjee G, Banerjee A, Saha A, Et Al. Exploring The Quality Of Life In The Indian Software Industry: A Public Health Viewpoint. *Int J Public Health*. 2012;57:371–81. Doi: 10.1007/S00038-011-0295-Z.

of a personal lifestyle issue. Traditionally, corporate wellness programs have been centered around individual-level experiences that include an Employee Assistance Program (EAP) hotline, one-on-one mindfulness mobile apps, small resilience training sessions or yoga breaks, and even confidential access to help centers.

There are individual coping resources that provide short-term relief; however, systematic reviews and meta-analyses indicate that individual coping experiences have little effectiveness when structural hazards in the workplace are not addressed. Reviews of stress and ICT and telework environments are all in favour of the need for structural and organizational-level reform to realistically aid in improving employee mental health, reducing stress and preventing employee burnout. Rather, effective interventions must offer sufficient job resources, procedural discretion and structural protection to counter high demands on the job, grounded in the Job Demands-Resources (JD-R) theoretical framework.

*** Intervention Level 1: Metric & Algorithmic Reform**

- Eliminate punitive Average Handling Time (AHT)
- Expand post-call wrap-up buffers (>60s)
- Implement algorithmic transparency and privacy protections

*** Intervention Level 2: Task Latitude & Emotional Protection**

- Replace rigid scripts with consultative guidelines
- Grant unilateral rights to terminate abusive calls
- Institutionalize post-incident psychological pauses

*** Intervention Level 3: Environmental & Ergonomic Standards**

- Deploy binaural noise-cancelling headsets with peak limiters (<85 dB)
- Acoustic zoning to bring ambient floor noise below 45 dBA
- Provide dark, soundproof rest environments for circadian workers

*** Intervention Level 4: Labour Protections & Shift Design**

- Enforce forward-rotating, predictable shift schedules
- Cap mandatory graveyard-shift rotations
- Establish independent dispute resolution and collective voice

But there are multiple operational areas that meaningful organizational reform must attempt to address, such as:

- **Get rid of punitive Average Handling Time (AHT):** AHT should not be a key metric used to measure performance. Rather, it is important to evaluate it from a holistic perspective of First Call Resolution (FCR) and customer satisfaction and long-term resolution of client issues. Representatives should have enough time to complete administrative tasks and to mentally relax and prepare for another call by increasing the after-call work buffers. Removing continuous call delivery de-escalates the constant pressure on the nervous system, decreases baseline arousal of the autonomic nervous system and reduces anticipatory anxiety.
- **Add more Procedural Autonomy:** BPOs should remove the word-for-word calling scripts and be more flexible with the conversational guidance. Empowering front-line staff with the authority to refund, alter account settings, and resolve billing disputes directly takes back the sense of control and empowerment. This autonomy diminishes emotional dissonance, as representatives can engage in authentic dialogue, thus limiting psychological exhaustion, which can be triggered by superficial surface acting.³³
- **Protecting Workers from Abusive Customers:** Businesses should have established policies that prescribe a zero-tolerance approach to customer mistreatment. Explicit permission for frontline workers to warn and end calls if the customer is profane, personally insulting, or using discriminatory words.

If an abusive interaction is happening, recovery breaks for the employee should be mandatory and offered, and the employee should be given a minimum of 5 minutes but not more than 10 minutes to recover physiologically before being returned to the queue. Human resource policies should stop pointing the finger at employees when there is conflict with customers and set a true example of psychological safety, which safeguards workers from structural depersonalized bullying.

Further, workspace redesign can be a major factor. Biophilic design, better natural light, high-quality acoustic damping panels, ambient white noise masking systems, and quiet break rooms help to eliminate sensory overload and a high level of autonomic stress. Finally, educating frontline supervisors on identifying early indicators of psychological distress and

33 Johanna Woydack & Ben Rampton, *Text Trajectories In A Multilingual Call Centre: The Linguistic Ethnography Of A Calling Script*, 45 Lang. In Soc. 709, 709–732 (2016), <https://www.cambridge.org/core/journals/language-in-society/article/abs/text-trajectories-in-a-multilingual-call-centre-the-linguistic-ethnography-of-a-calling-script/69dde58245738603f5860d4c5c752d64>.

implementing psychological supports for workers promotes a culture of mental health, decreasing mental health stigma and encouraging earlier seeking of supports. Companies can put in place contact center environments that will manage time according to biological rhythms, provide autonomy in tasks, and prevent workers from being exposed to hostile situations to reduce unsustainable turnover rates as well as reduce the risk of an urgent occupational health crisis.

Conclusion

It is thus evident that poor mental health, including high rates of clinical anxiety, major depression, sleep disorders, and emotional exhaustion, documented throughout the BPO and contact center industries is not an accidental byproduct of modern office employment. Nor is it indicative of a lack of resilience in the frontline staff. Rather, these outcomes are direct, predictable consequences of a rationalized lab process that imposes a pace of communication, algorithmic surveillance, and a constant disruption of the biological system that is extreme. Tele-service operations have taken out the recovery pauses and interpersonal authenticity necessary for psychological recovery through the application of Taylorist techniques to human discourse. They are constantly watched by electronic surveillance, often in an impossible double bind, forced to do 'emotional work', and are required to deal with hostility from customers and linguistic isolation and all this on schedules that are utterly disruptive of human circadian functions. Structural reform is the only solution to this problem of occupational health. Digital Taylorism is not a sustainable model for contact center operations and must shift toward a sustainable human-centered approach to work design. That means breaking free from punitive measurement systems, limiting invasive electronic monitoring, granting procedural discretion and enforcing robust safeguards against customer misuse. To preserve the human sleep and health of workers, shift patterns need to be reconfigured according to known chronobiological principles. Personalized programs, whether they be brief stress management courses or wellness apps, are not enough to solve the underlying causes of this occupational health problem. If contact center mental health is to be improved, then it must be done structurally at work. Systemic changes, such as humanising performance indicators, changing the nature of monitoring to a supportive feedback model, designing shift patterns that take account of human chronobiology, robust measures to prevent customer abuse and the ergonomics of physical offices, should be a key focus for industry leaders, policy makers and public health authorities.

भारतीय ज्ञान प्रणाली के दृष्टिकोण से मध्यस्थता की उभरती भूमिका: आधुनिक भारत के लिए सीख

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प्रोफेसर डॉ. निशा धनराज देवानी**
श्री सिद्धांत सोती***

सारांश

वैकल्पिक विवाद समाधान (एडीआर), और विशेषतः मध्यस्थता, भारत की न्यायपालिका पर लंबित मामलों के भारी बोझ के मद्देनज़र नई प्रासंगिकता प्राप्त कर चुकी है। यह आलेख सर्वप्रथम 'वैकल्पिक' शब्द को लेकर व्याप्त भ्रम को स्पष्ट करता है और तर्क देता है कि एडीआर न्यायालयों का प्रतिस्थापन नहीं, अपितु उनका पूरक है। इसके पश्चात आलेख मध्यस्थता की जड़ों को भारतीय ज्ञान परंपरा—वैदिक-कालीन पंचायत व्यवस्था, बौद्ध दर्शन तथा पतंजलि के विधिशास्त्र—में खोजता है, और इनकी तुलना समकालीन विधायी ढाँचे से करता है, जिसमें औद्योगिक विवाद अधिनियम 1947, सिविल प्रक्रिया संहिता की धारा 89, मध्यस्थता एवं सुलह अधिनियम 1996 तथा हाल में अधिसूचित मध्यस्थता अधिनियम 2023 सम्मिलित हैं। न्यायालय और अस्पताल की सुपरिचित उपमा के माध्यम से मध्यस्थता की सीमाओं तथा उपयोगिता, दोनों को रेखांकित किया गया है। अंततः आलेख ऑनलाइन मध्यस्थता, सामुदायिक मध्यस्थता तथा नवगठित भारतीय मध्यस्थता परिषद की भूमिका की समीक्षा करते हुए यह निष्कर्ष निकालता है कि सुदृढ़ प्रशिक्षण, प्रमाणन और संस्थागत समर्थन के अभाव में मध्यस्थता की वास्तविक क्षमता अधूरी रह जाएगी।

मुख्य शब्द: मध्यस्थता; वैकल्पिक विवाद समाधान; पंचायत व्यवस्था; धारा 89, सिविल प्रक्रिया संहिता; मध्यस्थता अधिनियम, 2023; ऑनलाइन विवाद समाधान।

१. प्रस्तावना

वैकल्पिक विवाद समाधान (एडीआर) ने हाल के वर्षों में विशेष महत्व प्राप्त किया है, विशेषतः बढ़ती मुकदमेबाज़ी और न्यायालयों के समक्ष लंबित मामलों की उस विशाल संख्या के मद्देनज़र, जिसे निपटाने में अदालतें संघर्षरत हैं। 'वैकल्पिक' शब्द का प्रायः यह गलत अर्थ लगाया जाता है मानो यह विद्यमान न्यायिक प्रणाली में किसी कमी का द्योतक हो अथवा उसका प्रतिस्थापन हो। वस्तुतः न्यायपालिका और विधिव्यवसायियों द्वारा इस शब्द का यह अर्थ लगाया जाना उचित नहीं है; इसके स्थान पर 'उचित विवाद समाधान', 'प्रभावी विवाद समाधान' अथवा 'अनुकूल विवाद समाधान' जैसे पद निस्संदेह किसी भी भ्रांति को दूर करेंगे और दृष्टिकोण में वांछित परिवर्तन लाने में सहायक होंगे।¹ यह ध्यान रखना आवश्यक है कि विधिक न्यायालयों का कोई स्थानापन्न नहीं हो सकता, और औपचारिक न्यायिक संस्था के रूप में अदालतें सदैव बनी रहेंगी।

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1 Law Commission of India, Report No. 129, Urban Litigation: Mediation as Alternative to Adjudication (1988)। इस रिपोर्ट ने सर्वप्रथम भारत में न्यायालयों के पूरक के रूप में सुलह/मध्यस्थता-तंत्र की अनुशंसा की थी।

एडीआर का उद्देश्य न्यायालयों की भूमिका को प्रतिस्थापित करना नहीं, अपितु उसे पूरक बनाना है, जिसके लिए दोनों के मध्य एक सहयोगात्मक संबंध आवश्यक है। वर्तमान युग में यह विशेष रूप से महत्वपूर्ण है, क्योंकि भारत लगभग 5.6 करोड़ लंबित मामलों के बोझ से जूझ रहा है;² विद्यमान गति से इन्हें पूर्णतः निपटाने में वर्षों, यहाँ तक कि दशकों का समय लग सकता है। इस दीर्घकालिक प्रक्रिया के परिणामस्वरूप समय, धन और संसाधनों की पर्याप्त क्षति होती है, जिससे जनसाधारण में असंतोष उत्पन्न होता है और न्यायिक प्रणाली के प्रति विश्वास क्षीण होता है। एडीआर का प्राथमिक लक्ष्य त्वरित न्याय है, जिससे लंबित मामलों में कमी आए और न्यायाधीशों को उन महत्वपूर्ण वादों—रिट याचिकाओं, जनहित याचिकाओं तथा गंभीर आपराधिक मामलों—पर ध्यान केंद्रित करने का अवसर मिले, जिनमें विलंब के कारण साक्ष्य नष्ट हो जाते हैं और अपराधी प्रायः दंड से बच निकलते हैं। कारागारों में हज़ारों विचाराधीन बंदी केवल इसलिए बंद हैं क्योंकि वे ज़मानत की राशि नहीं जुटा पाए, और कई बार उनकी हिरासत की अवधि संभावित सज़ा से भी अधिक हो जाती है, जिससे उनके व्यवसाय, परिवार और सामाजिक संबंध छिन्न-भिन्न हो जाते हैं। भारत की तीव्र गति से विस्तार करती अर्थव्यवस्था के लिए एक सुदृढ़ विधिक ढाँचा अपरिहार्य है; यदि विवाद-निपटान तंत्र अपने ही बोझ तले चरमराता रहा, तो इसका सीधा प्रभाव आर्थिक विकास तथा देश की अंतरराष्ट्रीय विश्वसनीयता पर पड़ेगा। यहाँ यह स्पष्ट करना उपयोगी होगा कि एडीआर की छत्रछाया में मध्यस्थता, सुलह, माध्यस्थता तथा लोक अदालत जैसी भिन्न-भिन्न प्रक्रियाएँ सम्मिलित हैं, जो पारस्परिक सहमति, तृतीय पक्ष की भूमिका की प्रकृति तथा परिणाम की बाध्यकारिता की दृष्टि से एक-दूसरे से भिन्न हैं। मध्यस्थता में मध्यस्थ पक्षों को समाधान तक पहुँचाने में सहायता करता है किंतु निर्णय स्वयं नहीं सुनाता, जबकि माध्यस्थता में मध्यस्थाधिकरण एक बाध्यकारी निर्णय (अधिनिर्णय) पारित करता है इस अर्थ में मध्यस्थता संवाद-केंद्रित और सहयोगमूलक बनी रहती है। किसी भी सभ्य समाज की पहचान इसी बात से होती है कि वह अपने आंतरिक विवादों का समाधान शांतिपूर्ण और सौहार्दपूर्ण ढंग से करने में सक्षम है; इस दृष्टि से मध्यस्थता केवल एक प्रक्रियागत उपकरण नहीं, अपितु एक सामाजिक मूल्य भी है।

२. भारतीय ज्ञान परंपरा में मध्यस्थता की जड़ें

भारत की सुदीर्घ पंचायत प्रणाली को प्रायः इस क्षेत्र में मध्यस्थता के अग्रदूत के रूप में उद्धृत किया जाता है। विवाद-समाधान की यह सदियों पुरानी ग्राम-आधारित व्यवस्था ब्रिटिश शासन की स्थापना तक प्रचलित रही, जिसके पश्चात साम्राज्य की न्यायिक अदालतें अस्तित्व में आईं। एक खुले सार्वजनिक मंच पर विवादों को समाज अथवा क्षेत्र के वयोवृद्ध जनों के समक्ष प्रस्तुत किया जाता था, जहाँ दोनों पक्ष अपने-अपने तर्क रखने हेतु उपस्थित होते थे। मूलतः 'पंच' की उपाधि को 'पंच परमेश्वर' के रूप में संबोधित किया जाता था, जो इस संस्था को एक प्रकार की दैवीय प्रामाणिकता प्रदान करता था। मुल्ला के हिंदू विधि-ग्रंथ के अनुसार, प्राचीन भारत में विधि की खोज वैदिक काल में आरंभ हुई मानी जाती है, जो लगभग 4000 से 1000 वर्ष ईसा-पूर्व तक विस्तृत था।³ आरंभिक आर्य समाज जीवन के प्रति उत्साह से परिपूर्ण था और सभ्यता तथा बौद्धिक अन्वेषण की एक दीर्घ परंपरा का वाहक था। यह समाज मुख्यतः दैवीय ज्ञान, तर्क और विवेक के अंतर्निहित सिद्धांतों पर आश्रित था, जिन्हें स्वर्ग और पृथ्वी दोनों पर शासक माना जाता था। ज्ञान, तर्क और विवेक के इस समन्वित दर्शन को मध्यस्थता के आरंभिक स्रोतों में गिना जा सकता है, और यह दर्शन आज भी पाश्चात्य जगत

2 राज्यसभा में विधि एवं न्याय मंत्रालय का लिखित उत्तर (23 जुलाई 2026), नेशनल ज्यूडिशियल डेटा ग्रिड (NJDG) के आँकड़ों पर आधारित; कुल लंबित मामले लगभग 5.64 करोड़।

3 दिनशाह फर्दूनजी मुल्ला, प्रिंसिपल्स ऑफ हिंदू लॉ (मुल्लाज़ हिंदू लॉ) (LexisNexis, नवीनतम संस्करण)।

में व्यापक रूप से प्रचलित है। परिषद की यह व्यवस्था विवाद-समाधान के सहभागी दृष्टिकोण—स्वैच्छिक भागीदारी की एक उल्लेखनीय माला सहित—का समर्थन करती थी, जो समकालीन मध्यस्थता का एक मौलिक सिद्धांत है।

बौद्ध दर्शन संघर्ष-समाधान के सर्वाधिक प्रभावी साधन के रूप में ध्यान की वकालत करता है। बुद्ध के अनुसार ध्यान ज्ञान की ओर ले जाता है, जबकि उसका अभाव अज्ञानता उत्पन्न करता है—यह जानना आवश्यक है कि क्या हमें आगे बढ़ाता है और क्या प्रगति में बाधक है, तथा वह मार्ग चुनना चाहिए जो अंततः ज्ञान की ओर ले जाए। यह बौद्ध उक्ति इस विचार को प्रतिबिंबित करती है कि मध्यस्थता भूतकाल के विवादों पर केंद्रित होने के बजाय भविष्य-उन्मुख होती है। प्राचीन विधिवेत्ता पतंजलि के अनुसार, मध्यस्थता में औपचारिक रूप से सही और गलत का निर्धारण करने के बजाय, सर्वाधिक ईमानदार प्रयासों के माध्यम से त्वरित प्रगति प्राप्त की जाती है। यह एक प्रलेखित ऐतिहासिक तथ्य है कि जटिल विवाद प्रायः राजा के औपचारिक न्यायालयों के बाहर, राजा द्वारा नियुक्त मध्यस्थों के माध्यम से सुलझाए जाते थे। धर्मशास्त्रीय परंपरा में भी विवाद-समाधान के विविध स्तर मान्य थे: कुल (परिवार), श्रेणी (व्यापारिक संघ), गण (सामाजिक समूह) और अंततः राजा का न्यायालय—इस क्रम में प्रत्येक उच्चतर स्तर पर तभी पहुँचा जाता था जब निम्नतर स्तर पर समाधान संभव न हो सके। यह व्यवस्था इस आधुनिक सिद्धांत की पूर्वछाया प्रस्तुत करती है कि विवाद को उसकी प्रकृति के अनुरूप सर्वाधिक उपयुक्त और न्यूनतम औपचारिक मंच पर ही पहले सुलझाने का प्रयास किया जाना चाहिए, तथा न्यायालय अंतिम उपाय के रूप में सुरक्षित रहे। यही तर्क-सूत्र आज सिविल प्रक्रिया संहिता की धारा 89 तथा मध्यस्थता अधिनियम, 2023 के अंतर्गत मुकदमा-पूर्व मध्यस्थता के प्रावधानों में भी प्रतिध्वनित होता है।

३. न्यायालय एवं मध्यस्थता: 'अस्पताल की उपमा'

वैश्वीकरण, उदारीकरण और तीव्र आर्थिक विकास के प्रभावस्वरूप भारत में मुकदमों की संख्या में नाटकीय वृद्धि हुई है। विश्व की श्रेष्ठतम न्यायिक प्रणालियों में गिने जाने के बावजूद, हमारी अदालतें प्रायः आलोचना का सामना करती हैं क्योंकि विवाद-निपटान में असाधारण रूप से लंबा समय लग जाता है, जिस कारण मुकदमे का एक सम्मानित पक्ष भी अब न्यायिक प्रक्रिया के माध्यम से समाधान चाहने में हिचकिचाता है। इसी के मद्देनज़र भारतीय समाज विवाद-समाधान की वैकल्पिक विधियों की ओर उन्मुख हुआ है। पारंपरिक पंचायत प्रणाली में पंच पक्षों के मध्य समझौता करने का ठोस प्रयास करते थे, किंतु असफल होने पर वे एक ऐसा निर्णय सुनाते थे जो संबंधित पक्षों और व्यापक समुदाय, दोनों के लिए बाध्यकारी होता था। पंचायत में सहभागिता पूर्णतः स्वैच्छिक नहीं होती थी, क्योंकि अनुपस्थिति अथवा एकतरफा वापसी पर पक्षों को सामाजिक परिणामों का सामना करना पड़ता था। न्यायालयों की तुलना में मध्यस्थता की उपयोगिता को एक सुपरिचित उपमा से स्पष्ट किया जा सकता है, जिसमें अदालत जाने वाले व्यक्ति की तुलना चिकित्सा-सहायता खोजते रोगी से की जाती है। कल्पना कीजिए कि स्थानीय प्रशासन किसी नगर में दस-शय्याओं वाला एक छोटा अस्पताल स्थापित करता है, जिसमें केवल एक शल्य-चिकित्सा कक्ष और एक शल्य-चिकित्सक नियुक्त है, किंतु कोई बहिरंग रोगी-विभाग (आउटपैशेंट क्लिनिक) नहीं है। ऐसी स्थिति में सभी रोगियों को चाहे उनकी व्याधि कितनी ही मामूली क्यों न हो भर्ती कर शल्य-चिकित्सा हेतु बाध्य किया जाएगा, क्योंकि उनका उपचार करने वाला कोई सामान्य चिकित्सक उपलब्ध नहीं। न्यायालय भी, मध्यस्थता-केंद्रों के अभाव में, ठीक ऐसे ही अस्पताल के समान हैं जिनमें बहिरंग विभाग और सामान्य चिकित्सक न हों। भारत के विधि आयोग ने अपनी 129वीं रिपोर्ट में 1988 में ही इस समस्या को रेखांकित करते हुए नगरीय मुकदमेबाज़ी के भार को कम

करने हेतु सुलह-न्यायालयों की स्थापना की अनुशंसा की थी,⁴ और तत्पश्चात् न्यायमूर्ति मालीमठ की अध्यक्षता वाली शेष-मामला समिति ने भी 1990 में इसी दिशा में सिफ़ारिश दोहराई।⁵ जिस प्रकार आहार के एक अंग के रूप में योग का अभ्यास शारीरिक स्वास्थ्य के लिए लाभकारी होने पर भी अस्पतालों और शल्य-प्रक्रियाओं को अप्रचलित नहीं बनाता, उसी प्रकार मध्यस्थता के गुण गिनाना अथवा मुकदमेबाज़ी की हानियाँ बताना यह सिद्ध नहीं करता कि मध्यस्थता सदैव न्यायालयीन निर्णय से श्रेष्ठ है। मध्यस्थता एक पृथक प्रक्रिया है जो विशिष्ट प्रकार के विवादों के लिए उपयुक्त है; जहाँ मध्यस्थता उपयुक्त होते हुए भी असफल रहती है, वहाँ न्यायालय ही अंतिम और एकमात्र सहारा बने रहते हैं। दूरगामी सार्वजनिक निहितार्थ वाले आपराधिक मामले, बड़ी संख्या में लोगों को प्रभावित करने वाले वाद, तथा कराधान और प्रशासनिक विधि से संबद्ध विषय इन सबका निर्णय न्यायिक प्रक्रिया के माध्यम से ही होना चाहिए; इसी प्रकार धोखाधड़ी, जालसाज़ी अथवा प्रपीड़न से जुड़े सिविल विवादों में भी औपचारिक न्यायालयीन हस्तक्षेप आवश्यक रहता है। इसके विपरीत, पारिवारिक और वैवाहिक विवाद विशेषतः संतान की अभिरक्षा तथा भरण-पोषण से संबंधित प्रश्न मध्यस्थता के लिए सर्वाधिक उपयुक्त श्रेणी में आते हैं। सर्वोच्च न्यायालय ने के. श्रीनिवास राव बनाम डी.ए. दीपा मामले में स्पष्ट किया कि मध्यस्थता को विवाद-समाधान की एक विधि के रूप में विधिक मान्यता प्राप्त है, और पारिवारिक न्यायालय अधिनियम, 1984 की धारा 9 के अनुसार पारिवारिक न्यायालयों का यह कर्तव्य है कि वे प्रथम सुनवाई के चरण में ही वैवाहिक विवादों को मध्यस्थता केंद्रों के पास भेजने का प्रयास करें।⁶ यह निर्णय इस लेख के केंद्रीय तर्क को पुनः पुष्ट करता है: विवाद की प्रकृति ही यह निर्धारित करती है कि वह न्यायालय के लिए उपयुक्त है अथवा मध्यस्थता के लिए—यह विकल्प दोनों में से किसी एक को सार्वभौमिक रूप से श्रेष्ठ मानने का नहीं, अपितु उपयुक्तता के सूक्ष्म विवेचन का है।

४. मध्यस्थता और बातचीत (नेगोशिएशन)

जब कोई विवाद उत्पन्न होता है, तो पक्षों के समक्ष उपलब्ध प्रथम विकल्प बातचीत होता है एक ऐसी प्रक्रिया जिसमें कोई तृतीय पक्ष सम्मिलित हुए बिना पक्ष स्वयं अपने मतभेद सौहार्दपूर्ण ढंग से सुलझाते हैं। बातचीत के माध्यम से निर्मित अनुबंध कानूनी रूप से बाध्यकारी और प्रवर्तनीय होता है। मध्यस्थता में, इसके विपरीत, एक तटस्थ मध्यस्थ पक्षों को उनके मतभेद दूर करने और पारस्परिक रूप से स्वीकार्य समझौते तक पहुँचने में सहायता करता है। बातचीत और मध्यस्थता, दोनों ही सामान्यतः अनौपचारिक एवं गैर-बाध्यकारी प्रकृति के होते हैं, तथा दोनों तब सर्वाधिक उपयुक्त सिद्ध होते हैं जब पक्षों को अपनी गोपनीयता अथवा सार्वजनिक छवि की सुरक्षा करनी हो, अथवा अत्यधिक व्यय व समय के बिना त्वरित समाधान अपेक्षित हो। बातचीत के मूल्य को सुदृढ़ करने की कई तकनीकें प्रचलित हैं:

- प्रथम, पारस्परिकता के सिद्धांत का उपयोग—विरोधी पक्ष को उपयोगी सूचना प्रदान कर सकारात्मक प्रतिक्रिया की संभावना बढ़ाना;
- द्वितीय, बहु-मुद्दा विनिमय दोनों पक्ष अल्प-मूल्य की वस्तुओं का त्याग कर अधिक-मूल्य की वस्तुएँ प्राप्त करते हैं;

4 सुप्रा नोट 1।

5 न्यायमूर्ति बी.एस. मालीमठ, प्रतिवेदन, शेष-मामला समिति (Arrears Committee Report) (भारत सरकार, 1990)।

6 K. Srinivas Rao v. D.A. Deepa, (2013) 5 SCC 226; पारिवारिक न्यायालय अधिनियम, 1984, धारा 9।

- तृतीय, बहु-विकल्प प्रस्तुत करना, जिससे यह संकेत मिलता है कि मूल्य-सृजनकारी विनिमय कहाँ संभव है; और
- चतुर्थ, निपटान-पश्चात समायोजन की खोज अर्थात् यह पूछना कि क्या अंतिम प्रस्ताव को और परिष्कृत किया जा सकता है, अन्यथा विद्यमान समझौते के साथ आगे बढ़ना।

मध्यस्थता (अथवा अन्य गैर-न्यायिक एडीआर प्रक्रियाओं) के लाभों को प्रभावी ढंग से प्रदर्शित करने हेतु मुकदमेबाज़ी की सीमाओं को स्मरण रखना आवश्यक है, किंतु यह स्वीकार करना भी उतना ही महत्वपूर्ण है कि न्यायालय विवाद-निपटान का एक व्यवहार्य और अपरिहार्य साधन बने रहेंगे। वास्तविक प्रश्न यह नहीं है कि मध्यस्थता अथवा मुकदमेबाज़ी में कौन श्रेष्ठ है, अपितु यह है कि किसी विशिष्ट प्रकार के संघर्ष हेतु कौन-सी प्रक्रिया सर्वाधिक उपयुक्त है। सफल सौहार्दपूर्ण मध्यस्थता में पक्षों के संयुक्त प्रयासों से 'जीत-जीत' दृष्टिकोण साकार होता है, जिसमें समग्र मूल्य में वृद्धि होती है और सभी पक्षों की आवश्यकताएँ पूर्ण होती हैं—एक ऐसा परिणाम जो अधिक प्रतिकूल विवाद-समाधान विधियों से प्राप्त करना प्रायः दुष्कर होता है। व्यवहार में मध्यस्थता को सामान्यतः दो शैलियों में वर्गीकृत किया जाता है सुविधाप्रदायी मध्यस्थता, जिसमें मध्यस्थ केवल संवाद को सुगम बनाता है और पक्षों को स्वयं समाधान तक पहुँचने देता है; तथा मूल्यांकनात्मक मध्यस्थता, जिसमें मध्यस्थ विवाद की गुणवत्ता पर अपनी राय भी व्यक्त करता है, यद्यपि निर्णय अंततः पक्षों पर ही छोड़ देता है।⁷ भारत में विकसित हो रही मध्यस्थता-संस्कृति में अधिवक्ताओं की भूमिका भी रूपांतरित हो रही है, पारंपरिक प्रतिकूल पैरवी के स्थान पर अधिवक्ता अब अपने मुवक्किलों को मध्यस्थता-कक्ष में सूचित एवं रचनात्मक भागीदारी हेतु तैयार करने वाले सुविधाप्रदाता की भूमिका भी निभाने लगे हैं। यह रूपांतरण विधि-शिक्षा में मध्यस्थता-कौशल के औपचारिक समावेशन की माँग करता है, जिसे राष्ट्रीय विधिक सेवा प्राधिकरण तथा विधि विश्वविद्यालय संयुक्त रूप से पूरा कर सकते हैं।

५. भारत में मध्यस्थता को विधायी मान्यता

भारत में मध्यस्थता को संस्थागत रूप देने की प्रक्रिया क्रमिक रही है। औद्योगिक विवाद अधिनियम, 1947 की धारा 4 के अंतर्गत नियुक्त सुलह अधिकारियों को औद्योगिक विवादों के समाधान में मध्यस्थता करने और उसे प्रोत्साहित करने का दायित्व सौंपा गया, तथा अधिनियम ने सुलह की एक संपूर्ण प्रक्रिया भी स्थापित की।⁸ 1940 में अधिनियमित मध्यस्थता अधिनियम ने सिविल प्रक्रिया संहिता में विद्यमान संबंधित प्रावधान को निरस्त कर दिया था। तत्पश्चात भारतीय संसद ने 1987 में विधिक सेवा प्राधिकरण अधिनियम पारित कर राष्ट्रीय विधिक सेवा प्राधिकरण (नालसा) की स्थापना की, जिसके प्रमुख संरक्षक भारत के मुख्य न्यायाधीश होते हैं।⁹ इस प्राधिकरण को, अन्य कार्यों के अतिरिक्त, बातचीत, मध्यस्थता और सुलह के माध्यम से विवाद-समाधान को प्रोत्साहित करने, विधिक सेवाओं हेतु किफ़ायती योजनाएँ बनाने, तथा बार काउंसिल के सहयोग से मध्यस्थता-प्रशिक्षण कार्यक्रम आयोजित करने का दायित्व सौंपा गया है। 1988 की विधि आयोग की 129वीं रिपोर्ट तथा 1990 की न्यायमूर्ति मालीमठ की अध्यक्षता वाली शेष-मामला समिति की रिपोर्ट ने नगरीय मुकदमेबाज़ी में सुलह-न्यायालयों की स्थापना की सिफ़ारिश की। आर्थिक उदारीकरण की नीतियों और अंतरराष्ट्रीय विधिक सुधारों को अपनाए जाने के पश्चात, विद्वज्जन इस बात पर सहमत हुए कि वाणिज्यिक एवं सिविल विवादों में उन्नत मध्यस्थता-उपकरणों का प्रयोग सिविल अदालतों में लंबित मामलों की गंभीर

7 श्रीराम पंचू, मिडिएशन – प्रैक्टिस एंड लॉ: द पाथ टू सक्सेसफुल डिस्प्यूट रेज़ोल्यूशन (LexisNexis, तृतीय संस्करण, 2021)।

8 औद्योगिक विवाद अधिनियम, 1947, धारा 4 (सुलह अधिकारियों की नियुक्ति)।

9 विधिक सेवा प्राधिकरण अधिनियम, 1987 (नालसा की स्थापना)।

समस्या का एक महत्वपूर्ण समाधान है। वर्ष 1995-96 में, तत्कालीन भारत के मुख्य न्यायाधीश श्री ए.एम. अहमदी के नेतृत्व में सर्वोच्च न्यायालय ने भारतीय सिविल न्याय-प्रणाली में विलंब को दूर करने हेतु संयुक्त राज्य अमेरिका के साथ एक संयुक्त अध्ययन किया, जिसमें प्रत्येक उच्च न्यायालय को एक अध्ययन-दल गठित करने तथा विशिष्ट भारतीय संदर्भ हेतु केस-प्रबंधन सिद्धांतों के कार्यान्वयन का प्रस्ताव तैयार करने का दायित्व सौंपा गया। भारतीय संसद ने 1996 में मध्यस्थता एवं सुलह अधिनियम पारित किया, जिसने कानूनी संबंधों से उत्पन्न विवादों में चाहे वे संविदात्मक हों अथवा न हों सुलह की एक व्यापक प्रक्रिया स्थापित की।¹⁰ 1999 के प्रथम संशोधन अधिनियम ने सिविल प्रक्रिया संहिता में एडीआर-प्रावधानों को समाविष्ट किया, और 2002 के द्वितीय संशोधन ने धारा 89 को पूर्णतः क्रियान्वित करते हुए न्यायालयों के लिए उपयुक्त लंबित मामलों को अनिवार्यतः एडीआर के पास संदर्भित करना आवश्यक बना दिया।¹¹ इन संशोधनों की संवैधानिक वैधता को सर्वोच्च न्यायालय ने सेलम एडवोकेट बार एसोसिएशन बनाम भारत संघ मामले में सुनिश्चित किया, जिसमें न्यायमूर्ति एम. जगन्नाथ राव की अध्यक्षता वाली समिति की सिफारिशों को अंगीकार करते हुए धारा 89 के प्रभावी क्रियान्वयन हेतु प्रतिरूप नियम तैयार करने का निर्देश दिया गया।¹² पश्चात्तवर्ती वाद अफ्रकॉन्स इंफ्रास्ट्रक्चर लिमिटेड बनाम चेरियन वर्की कंस्ट्रक्शन कंपनी में सर्वोच्च न्यायालय ने धारा 89 में विद्यमान प्रारूपण-संबंधी विसंगतियों को स्पष्ट करते हुए यह प्रतिपादित किया कि पक्षों की सहमति अथवा विद्यमान मध्यस्थता-करार के अभाव में न्यायालय पक्षों को बलपूर्वक मध्यस्थता हेतु निर्दिष्ट नहीं कर सकता।¹³

हाल के वर्षों में मद्रास, बंबई, नई दिल्ली, इलाहाबाद और बेंगलुरु सहित कई उच्च न्यायालयों ने न्यायालय-संबद्ध मध्यस्थता केंद्र स्थापित किए हैं; इस दिशा में मद्रास उच्च न्यायालय अग्रणी रहा, जिसने 2005 में देश का प्रथम न्यायालय-संबद्ध मध्यस्थता केंद्र तमिलनाडु मध्यस्थता एवं सुलह केंद्र स्थापित किया।¹⁴ सर्वोच्च न्यायालय द्वारा गठित मध्यस्थता एवं सुलह परियोजना समिति ने दिल्ली की अधीनस्थ अदालतों में अपनी पहली परियोजना आरंभ की, जहाँ कार्यरत न्यायाधीशों ने ही मध्यस्थ के रूप में कार्य किया, और तब से यह पहल देश भर में मध्यस्थता-सेवाओं के विस्तार में सहायक रही है। संसद ने वाणिज्यिक न्यायालय अधिनियम, 2015 के अंतर्गत मुकदमा-पूर्व अनिवार्य मध्यस्थता का भी प्रावधान किया।¹⁵ इस विकास-यात्रा का सर्वाधिक महत्वपूर्ण चरण मध्यस्थता अधिनियम, 2023 का अधिनियमन है, जिसने पहली बार मध्यस्थता के लिए एक व्यापक, स्वतंत्र संहिता स्थापित की तथा भारतीय मध्यस्थता परिषद के गठन का प्रावधान किया।¹⁶ विधि एवं न्याय मंत्रालय ने अगस्त 2026 में अधिसूचना जारी कर औपचारिक रूप से भारतीय मध्यस्थता परिषद का गठन कर दिया,¹⁷ जो मध्यस्थों के पंजीकरण, मध्यस्थता-संस्थाओं की मान्यता तथा प्रशिक्षण-मानकों के निर्धारण हेतु उत्तरदायी होगी—अर्थात् वह संस्था, जिसकी आवश्यकता विद्वानों द्वारा वर्षों से प्रतिपादित की जा रही थी, अब वास्तविकता का रूप ले चुकी है।

10 मध्यस्थता एवं सुलह अधिनियम, 1996, भाग तृतीय (सुलह)।

11 सिविल प्रक्रिया संहिता (संशोधन) अधिनियम, 1999; सिविल प्रक्रिया संहिता (संशोधन) अधिनियम, 2002; धारा 89, सिविल प्रक्रिया संहिता, 1908।

12 Salem Advocate Bar Ass'n, T.N. v. Union of India, (2005) 6 SCC 344।

13 Afcons Infrastructure Ltd. v. Cherian Varkey Constr. Co. (P) Ltd., (2010) 8 SCC 24।

14 सुप्रा नोट 8।

15 वाणिज्यिक न्यायालय अधिनियम, 2015, धारा 12क (मुकदमा-पूर्व अनिवार्य मध्यस्थता)।

16 मध्यस्थता अधिनियम, 2023 (15 सितंबर 2023 को अधिसूचित)।

17 विधि एवं न्याय मंत्रालय, अधिसूचना, भारतीय मध्यस्थता परिषद का गठन (27 अगस्त 2026); मध्यस्थता अधिनियम, 2023, धारा 31।

मध्यस्थता अधिनियम, 2023 की संरचना पर दृष्टि डालना उपयोगी होगा। अधिनियम मध्यस्थता को विस्तृत रूप से परिभाषित करता है, जिसमें मुकदमा-पूर्व मध्यस्थता, ऑनलाइन मध्यस्थता, सामुदायिक मध्यस्थता तथा सुलह सभी सम्मिलित हैं। मध्यस्थता-कार्यवाही की गोपनीयता अनिवार्य है, और सामान्यतः इसे 180 दिनों की अवधि में—पक्षों की सहमति से अधिकतम 180 दिनों के विस्तार सहित पूर्ण करना आवश्यक है; कोई भी पक्ष कम-से-कम दो सत्रों की भागीदारी के पश्चात प्रक्रिया से हट सकता है। मध्यस्थता के परिणामस्वरूप हुआ समझौता सामुदायिक मध्यस्थता को छोड़कर न्यायालय की डिफ्री के समान अंतिम, बाध्यकारी और प्रवर्तनीय माना जाता है, तथा इसे केवल कपट, भ्रष्टाचार, प्रतिरूपण अथवा मध्यस्थता हेतु अनुपयुक्त विवाद-विषय जैसे सीमित आधारों पर ही चुनौती दी जा सकती है। भारतीय मध्यस्थता परिषद में एक अध्यक्ष, मध्यस्थता अथवा एडीआर के अनुभवी दो पूर्णकालिक सदस्य, विधि सचिव सहित तीन पदेन सदस्य, तथा उद्योग-निकाय का एक अंशकालिक सदस्य सम्मिलित होंगे; परिषद मध्यस्थों के पंजीकरण, मध्यस्थता-संस्थाओं की मान्यता, तथा निरंतर प्रशिक्षण एवं प्रमाणन के दायित्व का निर्वहन करेगी। सामुदायिक मध्यस्थता के लिए अधिनियम तीन मध्यस्थों के एक पैनल का प्रावधान करता है, जो किसी इलाके के निवासियों के मध्य शांति और सौहार्द को प्रभावित करने वाले विवादों के समाधान हेतु गठित किया जाएगा—यह प्रावधान भारतीय पंचायत परंपरा की सामूहिक निर्णय-प्रक्रिया से गहरा साम्य रखता है।¹⁸

६. ऑनलाइन मध्यस्थता

कुछ परिस्थितियों में आमने-सामने की बैठकें निस्संदेह अनिवार्य रहेंगी, विशेषतः मध्यस्थता के उन संदर्भों में जहाँ सहयोगात्मक संबंध सकारात्मक परिणाम देते हैं। तथापि कोविड-19 महामारी ने संपूर्ण विश्व-समुदाय के समक्ष अभूतपूर्व चुनौतियाँ प्रस्तुत कीं; फर्मों को या तो परिचालन स्थगित करना पड़ा अथवा दूरस्थ-कार्य व्यवस्था के माध्यम से डिजिटल रूपांतरण अपनाना पड़ा। इसके बावजूद विवादों का प्रसार नहीं थमा, अपितु महामारी के आर्थिक दुष्प्रभावों ने संविदात्मक दायित्वों की अपूर्ति के कारण नए विवादों को जन्म दिया। ऐसी परिस्थिति में, जब भारतीय अदालतें अपनी विशाल लंबित-मामलों की संख्या के कारण वर्चुअल न्यायालय-प्रणाली को प्रभावी ढंग से नियोजित करने में असमर्थ रहीं, तब ऑनलाइन विवाद समाधान (ओडीआर), और विशेषतः ऑनलाइन मध्यस्थता, एक प्रमुख गैर-न्यायिक तंत्र के रूप में उभरा। ऑनलाइन मध्यस्थता में विवाद के पक्षों को किसी विशिष्ट स्थान पर शारीरिक रूप से उपस्थित होने की आवश्यकता नहीं होती; इसके स्थान पर आभासी मंचों का उपयोग कर मध्यस्थता-कार्यवाही संपन्न की जाती है। दूरस्थ प्लेटफॉर्म उन व्यवसायों के लिए भी आकर्षक हैं जो अपने पर्यावरणीय प्रभाव को न्यूनतम करना चाहते हैं, तथा यह सीमित वित्तीय संसाधनों वाले वादियों के लिए एक किफ़ायती विकल्प प्रस्तुत करता है। इंटरनेट एंड मोबाइल एसोसिएशन ऑफ़ इंडिया की 'इंडिया इंटरनेट 2019' रिपोर्ट के आँकड़े दर्शाते हैं कि भारत, विशेषतः उसके बड़े नगरों में, इंटरनेट-उपयोग की दर विश्व के अनेक देशों की तुलना में अत्यधिक है, जो ऑनलाइन मध्यस्थता को एक विश्वसनीय ओडीआर-पद्धति के रूप में स्वीकार किए जाने का आधार प्रदान करती है।¹⁹ तथापि यह भी तर्क दिया गया है कि मध्यस्थता का मूल दायित्व पक्षों के मध्य विश्वास-निर्माण करना है, और चूँकि मध्यस्थता के अधिकांश लाभ आमने-सामने के संचार पर निर्भर करते हैं, अतः ऑनलाइन मध्यस्थता के अपेक्षित लाभ अब भी विवाद का विषय बने हुए हैं। विवादित पक्षों को यह तय करने से पूर्व कि किस मंच का चयन करें, अपने विधिक प्रतिनिधियों से परामर्श करना चाहिए।

18 सुप्रा नोट 17।

19 इंटरनेट एंड मोबाइल एसोसिएशन ऑफ़ इंडिया (IAMAI), इंडिया इंटरनेट 2019 रिपोर्ट (2019)।

७. सामुदायिक मध्यस्थता, मध्यस्थ-कौशल और संस्थागत चुनौतियाँ

सामुदायिक संदर्भ में मध्यस्थता, इस प्रक्रिया के दायरे और प्रभाव को व्यापक बनाने की एक अत्यंत प्रभावी रणनीति हो सकती है। यद्यपि सामुदायिक मध्यस्थता के परिणामस्वरूप बनने वाले समझौते में औपचारिक विधिक प्रवर्तनीयता का अभाव हो सकता है, तथापि इससे उसका नैतिक दायित्व कम नहीं होता। सामुदायिक मध्यस्थता ने विश्व भर में व्यापक लोकप्रियता अर्जित की है और अनेक देशों में समुदायों को तीव्रतर रूप से विवादास्पद होने से रोकने में सफलता पाई है; इसकी उदार और एकजुट प्रकृति के कारण समुदाय के हितधारकों ने इसके प्रति पर्याप्त स्वीकार्यता प्रदर्शित की है।

प्रायः तीव्र भावनाओं से संबद्ध परिस्थितियों को प्रभावी ढंग से प्रबंधित करने हेतु मध्यस्थों को विशिष्ट दृष्टिकोण और तकनीकों को अपनाना आवश्यक होता है, यथा सकारात्मक वातावरण का सृजन, तनाव-न्यूनीकरण, आक्रामक भावनाओं का नियमन, पक्षों को अपनी भावनाएँ व्यक्त करने में सुविधा प्रदान करना—विशेषतः जब वे स्वयं ऐसा करने में अनिच्छुक हों स्वीकार्य व्यवहार का प्रतिमान प्रस्तुत करना, तथा व्यावहारिक समाधान की संभावना के प्रति आशावाद व्यक्त करना। स्पष्टतः मध्यस्थों की बौद्धिक क्षमता, सामाजिक कौशल, व्यक्तित्व और भाषा-दक्षता जैसे तत्व पक्षों की आवश्यकताओं, चिंताओं और प्रेरणाओं को समझने-संबोधित करने हेतु अनिवार्य हैं। तथापि भारत में प्रशिक्षित मध्यस्थों तथा आवश्यक अवसंरचना की उपलब्धता में पर्याप्त कमी स्पष्टतः विद्यमान है। मध्यस्थता अधिनियम, 2023 में मुकदमा-पूर्व मध्यस्थता को सम्मिलित किया जाना एक महत्वपूर्ण घटक है, जो इसे विवाद-समाधान के पसंदीदा प्रथम चरण के रूप में प्रोत्साहित करता है; तथापि औपचारिक मध्यस्थता-प्रक्रियाओं को अनौपचारिक तरीकों से प्रतिस्थापित नहीं किया जाना चाहिए। सुसंगत तथा उच्च-गुणवत्तायुक्त मानकों को बनाए रखने के लिए प्रमाणन और मान्यता की एक सुदृढ़ प्रक्रिया अनिवार्य है—यह दायित्व अब नवगठित भारतीय मध्यस्थता परिषद पर है, जो मध्यस्थों के पंजीकरण, प्रशिक्षण और मध्यस्थता-सेवा प्रदाताओं की मान्यता हेतु उत्तरदायी होगी। न्यायालय-आदेशित मध्यस्थता आज भी सामान्य प्रचलन में है, किंतु परिषद के पूर्णतः कार्यशील होने से यह अपेक्षा की जाती है कि अधिकाधिक कंपनियाँ और व्यक्ति स्वेच्छा से मध्यस्थता का चयन करेंगे, जिससे वाणिज्यिक विवादों के समाधान में इसकी भूमिका का और विस्तार होगा। इस दिशा में विधि विश्वविद्यालयों, राज्य विधिक सेवा प्राधिकरणों तथा बार काउंसिल के मध्य समन्वय की महत्वपूर्ण भूमिका है। मध्यस्थता-कौशल को स्नातक विधि-पाठ्यक्रम का अनिवार्य अंग बनाया जाना, नियमित सतत-विधिक-शिक्षा कार्यशालाओं का आयोजन, तथा अनुभवी मध्यस्थों द्वारा नए मध्यस्थों के लिए संरक्षण कार्यक्रम ये तीनों उपाय मिलकर उस अवसंरचनात्मक कमी को दूर कर सकते हैं जो वर्तमान में मध्यस्थता के व्यापक प्रसार में सबसे बड़ी बाधा है। भारतीय मध्यस्थता परिषद के गठन के पश्चात यह अपेक्षित है कि वह इन प्रशिक्षण-मानकों को एकरूप एवं राष्ट्रव्यापी रूप देगी, जिससे ग्रामीण और शहरी दोनों क्षेत्रों में समान गुणवत्ता की मध्यस्थता-सेवाएँ सुलभ हो सकें।

८. निष्कर्ष

विश्व भर में मध्यस्थता आशा के एक स्वर्णिम सेतु के रूप में तीव्रता से कार्य कर रही है, जो न्यायालयों के कार्यभार को न्यून करती है, खंडित संबंधों को सुदृढ़ बनाती है और दीर्घकालिक समझौतों को प्रोत्साहित करती है। महात्मा गांधी, अब्राहम लिंकन और नानी पालखीवाला जैसी उल्लेखनीय विधिक हस्तियों ने न्यायालय के बाहर विवाद सुलझाने, विच्छेदित पक्षों में सामंजस्य स्थापित करने तथा मुकदमेबाजी को रोकने में ही अपनी सच्ची संतुष्टि पाई। गौतम बुद्ध की शिक्षा के अनुसार, शांति लाने वाला एक शब्द सहस्र खोखले वाक्यों से कहीं अधिक मूल्यवान होता है यह भावना प्रसिद्ध संस्कृत सूक्ति 'संतोषम् परमं सुखम्' में भी प्रतिबिंबित होती है।

भारत में मध्यस्थता, विवाद-समाधान की एक विधि के रूप में, अत्यंत प्राचीन इतिहास रखती है—यह हमारी ग्रामीण और आदिवासी परंपराओं में आज भी अपने मौलिक स्वरूप में संरक्षित है। तथापि वर्तमान सामाजिक परिदृश्य की माँगों की पूर्ति हेतु इस पारंपरिक दृष्टिकोण को सफलतापूर्वक आधुनिक बनाने के लिए अटूट समर्पण और सतत परिश्रम अपेक्षित है। सिविल प्रक्रिया संहिता की धारा 89 से आरंभ होकर मध्यस्थता अधिनियम, 2023 तथा भारतीय मध्यस्थता परिषद् के गठन तक की विधायी यात्रा यह प्रदर्शित करती है कि भारत इस दिशा में सुनिश्चित कदम उठा रहा है। किंतु अकेले विधायी मान्यता पर्याप्त नहीं; प्रशिक्षित मध्यस्थों, सुदृढ़ अवसंरचना, जन-जागरूकता तथा प्रमाणन-मानकों के अभाव में मध्यस्थता की वास्तविक क्षमता अधूरी रह जाएगी। भारतीय ज्ञान प्रणाली में निहित यह प्राचीन प्रज्ञा—लचीलापन, सामूहिक सहमति, आत्मनिरीक्षण और संबंधों के सौहार्दपूर्ण संरक्षण पर आधारित—आधुनिक भारत के लिए एक सशक्त मार्गदर्शक सिद्ध हो सकती है, बशर्ते इसे संस्थागत प्रतिबद्धता के साथ आगे बढ़ाया जाए।

PRESS-FREEDOM IN INDIA: UNFETTERED POWERS OR ECLIPSED LIBERTY?

Adv. Apoorva Thakur
Adv. Manish Kumar

Abstract

The press has long been described as the fourth pillar of Indian democracy, yet the constitutional guarantee that protects it Article 19(1)(a) nowhere mentions it by name. This article examines the resulting tension: an implied, judicially expanded freedom that is simultaneously subject to the reasonable-restriction regime under Article 19(2), the contempt jurisdiction of courts, the law of defamation, and sedition law. Using the phenomenon of ‘media trial’ as a case study, the article argues that Indian press freedom does not suffer from a single defect of excess or repression but oscillates between both extremes depending on the political and commercial incentives operating on any given newsroom. It concludes with a set of practical, implementable recommendations addressed to legislators, courts, media self-regulatory bodies, and newsrooms themselves for narrowing this oscillation into a more predictable, rights-respecting equilibrium.

Keywords: Press Freedom; Media Trial; Contempt of Court; Defamation; Sedition; Free Speech

I. Introduction: The Fourth Estate’s Uncertain Constitutional Footing

The press is conventionally described as the ‘fourth pillar’ of Indian democracy, alongside the legislature, executive and judiciary. Whatever the accuracy of that metaphor, the underlying function it captures is real: the press disseminates information about social, political, economic, cultural and legal developments to a public that could not otherwise access it, and in doing so shapes how that public perceives and evaluates the exercise of power.¹ The rapid expansion of vernacular and English-language print

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1 Apoorva Sinha, “Media Trial from the Lens of Indian Constitution and Judiciary”, *Legal Desire*, 14 March 2018, available at: <https://legaldesire.com/article-media-trial-lens-indian-constitution-judiciary/> (Last visited on Aug. 5, 2026).

media, together with television, digital platforms and social media, has multiplied both the reach and the velocity of this influence over the past three decades.

Yet Indian constitutional law affords the press no freestanding guarantee. 'Press freedom' is judicially read into Article 19(1)(a)'s guarantee of speech and expression; the commercial and organisational dimensions of media houses fall instead under Article 19(1)(g)'s freedom of trade and profession, itself qualified by Article 19(6).² Both freedoms are in turn subject to the 'reasonable restrictions' catalogued in Articles 19(2) and 19(6) restrictions that touch privacy, contempt of court, defamation, and the security of the State, among others.³ The result is a freedom constructed almost entirely by implication and by the accretive interpretation of courts, rather than by any dedicated textual guarantee which is itself a source of the instability this article examines.

This implied character has a discernible history. When the Constitution came into force, the Supreme Court twice construed Article 19(1)(a) expansively in favour of the press setting aside a ban on the entry and circulation of a journal in *Romesh Thappar v. State of Madras*,⁴ and a system of pre-censorship in *Brij Bhushan v. State of Delhi*⁵ prompting Parliament to widen the permissible grounds of restriction through the Constitution (First Amendment) Act, 1951.⁶ In the decades that followed, the Court built the freedom of the press almost entirely by inference from that general guarantee: it struck down newsprint controls that penalised the larger papers in *Bennett Coleman & Co. v. Union of India*,⁷ set aside a punitive levy on imported newsprint in *Indian Express Newspapers (Bombay) Pvt. Ltd. v. Union of India*,⁸ and, carrying the principle into the electronic medium, held in *Secretary, Ministry of Information and Broadcasting v. Cricket Association of*

2 Sanatan Deshpande and Priyank Jagawanshi, "A critical analysis of media trial and its effect on Indian judiciary" *International Journal of Research and Analytical Reviews* 2 (2019), available at: http://ijrar.com/upload_issue/ijrar_issue_20543141.pdf (Last visited on Aug. 12, 2026).

3 Anandita Singh, *The Freedom of Press and Trial by Media – A Critical Study from the Perspective of Indian Constitution and Criminal Justice System* (2019) (LL.M Dissertation, National Law University), available at: <http://14.139.58.147:8080/jspui/bitstream/123456789/289/1/18LLM18.pdf> (Last visited on Aug. 18, 2026).

4 *Romesh Thappar v. State of Madras*, AIR 1950 SC 124.

5 *Brij Bhushan v. State of Delhi*, AIR 1950 SC 129.

6 *The Constitution (First Amendment) Act*, 1951.

7 *Bennett Coleman & Co. v. Union of India* (1972) 2 SCC 788.

8 *Indian Express Newspapers (Bombay) Pvt. Ltd. v. Union of India* (1985) 1 SCC 641.

*Bengal*⁹ that the airwaves are public property to be regulated in the interest of a plurality of voices. Each decision enlarged the working content of press freedom without ever anchoring it to a dedicated textual clause a mode of protection that is generous in expansive times and correspondingly exposed in restrictive ones, and which sets up the very oscillation this article traces.

This article's central claim is that Indian press freedom does not suffer from one defect but from two, pulling in opposite directions at different times: an under-use of the ordinary legal tools available to check media excess (Part II), and an over-use of the State's restrictive powers once the press turns critical of government (Part IV) with the constitutional doctrine on prior restraint and contempt sitting uneasily in between (Part III). Part V hereof translates this diagnosis into practical recommendations, since doctrinal critique alone rarely moves underlying practice.

II. When Reporting Becomes Adjudication: The Problem of Media Trial

Crime reporting supplies the clearest illustration of press excess. Journalists frequently construct a pre-determined narrative of guilt around an accused well before a court has pronounced on the matter, a phenomenon that has acquired its own vocabulary: 'trial by media'.¹⁰ The expression captures a specific institutional failure the press assuming the roles of judge, jury and, rhetorically at least, executioner, often in parallel with an ongoing police investigation, and typically before either party has had a fair opportunity to test the evidence.

The Law Commission of India recognised this problem as early as 2006. Its 200th Report proposed restraining the media from publishing material prejudicial to an accused's rights between the point of arrest and the conclusion of trial, observing that "the extensive use of television and cable services" had changed "the whole pattern of publication of news", with a corresponding risk of prejudice to "suspects, accused, witnesses and even

9 *Secretary, Ministry of Information and Broadcasting v. Cricket Association of Bengal* (1995) 2 SCC 161.

10 Nikita Das, "Media trials in India: An unwritten carve-out to the right", <https://iapp.org/news/a/media-trials-in-india-an-unwritten-carve-out-to-the-right-to-privacy/> (Last visited on Aug. 24, 2026).

judges” and, more broadly, to the administration of justice.¹¹ Two decades on, the underlying diagnosis remains largely unaddressed by legislation, even as the platforms involved have multiplied.

The pattern recurs across some of India’s most closely-watched criminal trials the *Jessica Lal murder case*,¹² the *Priyadarshini Mattoo case*,¹³ and the *Nitish Katara case*¹⁴ each drew saturation coverage that arguably shaped public expectations of the outcome well before the courts had ruled, as did the more recent coverage of Sushant Singh Rajput’s death, where the accused directly raised media trial as a ground of prejudice. What unites these cases is not merely the intensity of coverage but its editorial framing verdicts announced in headlines before they were pronounced in court.

Media trial is not merely bad journalistic practice; where it prejudices a pending proceeding, it constitutes contempt of court, and it independently undermines the accused’s right to a fair trial under Article 21. The doctrinal tools to address it principally the Contempt of Courts Act, 1971, discussed in Part III already exist. What is largely missing is the institutional will, on the part of both courts and media self-regulatory bodies, to invoke them consistently.

The deeper objection to media trial is that it inverts a foundational premise of the criminal process. The presumption of innocence requires that guilt be established by admissible evidence, tested through cross-examination, before an impartial tribunal; a televised verdict reverses that sequence, fixing culpability in the public mind on the strength of leaked case diaries, selective disclosures and reconstructed ‘sting’ footage. Where the resulting prejudice reaches the tribunal itself, it engages not only the accused’s fair-trial guarantee under Article 21¹⁵ but also the cognate protections that the law of evidence builds around that presumption. The Supreme Court has more than once had to correct convictions and acquittals against the backdrop of precisely such publicity, in the very cases that had earlier been conducted in the press.¹⁶

11 Law Commission of India, “200th Report on Trial by Media: Free Speech v. Fair Trial under Criminal Procedure (amendments to the Contempt of Court Act, 1971)” (August, 2006), available at <https://lawcommissionofindia.nic.in/reports/rep200.pdf> (Last visited on Aug. 28, 2026).

12 *Sidhartha Vashisht @ Manu Sharma v. State (NCT of Delhi)* 2010 (6) SCC 1.

13 *Santosh Kumar Singh v. State through CBI* (2010) 9 SCC 747.

14 *Vikas Yadav v. State of U.P.* (2016) 9 SCC 541.

15 The Constitution of India, art. 21.

16 *Sidhartha Vashisht @ Manu Sharma v. State (NCT of Delhi)* (2010) 6 SCC 1; *Santosh Kumar Singh v. State through CBI* (2010) 9 SCC 747.

Part of the difficulty is structural rather than ethical. Competition for television rating points rewards the newsroom that reaches a verdict first, not the one that reaches it last and correctly; the commercial logic of the twenty-four-hour cycle is therefore in standing tension with the deliberative pace of a criminal trial. India's self-regulatory architecture has struggled to counteract that incentive. The Press Council of India, a statutory body constituted under the Press Council Act, 1978,¹⁷ may admonish or censure but cannot fine or suspend, and its writ does not reach broadcast media at all; the News Broadcasting and Digital Standards Authority, a voluntary body, binds only its member channels and imposes penalties too modest to alter conduct. The institutions best placed to discipline pre-trial reporting are thus precisely the two with the weakest enforcement powers.

Comparative practice underscores how far the Indian position has drifted. In the United Kingdom, the *sub judice* rule, codified in the Contempt of Court Act, 1981,¹⁸ imposes a strict-liability contempt on publications that create a substantial risk of serious prejudice to active proceedings, and it is enforced with a regularity that has no counterpart in Indian practice. The doctrinal tools are broadly similar; their consistent invocation is not. The contrast suggests that the Indian deficit is one of enforcement culture rather than of legal design, and it points to a modest but underused corrective: a newsroom required to publish a prominent, time-stamped retraction whenever its pre-trial reporting is later falsified faces a reputational cost that private settlement does not impose a discipline that operates prospectively on the incentive to rush to judgment, rather than only punitively after the damage is done.

III. Constitutional Boundaries: Prior Restraint, Contempt and Defamation

Any regulation of press conduct must reckon with the Supreme Court's early and firm rejection of prior restraint. In *Sakal Papers (P) Ltd. v. Union of India*, the Court held that executive orders cannot restrict the Article 19(1) (a) guarantee by invoking Article 19(2); any restriction must have express legislative authority, and its reasonableness must be assessed case-by-case rather than by a general standard.¹⁹

17 The Press Council Act, 1978 (Act 37 of 1978), s. 14.

18 The Contempt of Court Act, 1981 (United Kingdom), s. 2.

19 *Sakal Papers (P) Ltd. v. Union of India* AIR 1962 SC 305.

This position was reaffirmed in *R. Rajagopal v. State of T.N.*, where the Court held that pre-publication censorship of a newspaper itself infringes freedom of speech and expression; the State has no power to impose prior restraint on publication, however defamatory the material, though an action for damages may lie afterward if the publication is shown to rest on false facts.²⁰

The doctrinal position is, on its own terms, a strong one. Yet India's performance on independent press-freedom indices has not reflected it: the country was ranked 140th of 180 countries on the RSF World Press Freedom Index in 2019, falling to 142nd in 2020.²¹ Whatever methodological caveats attach to any single index, the persistence of a low ranking alongside strong doctrine suggests that the gap lies less in constitutional text than in its enforcement, and in the informal pressures operating outside the courtroom.

Where formal prior restraint is unavailable, courts have instead relied on their contempt jurisdiction as an after-the-fact check. The scope of that jurisdiction was described, in restrained terms, by the Privy Council as early as 1914: "the freedom of the journalist is an ordinary part of the freedom of the subject... his privilege is no other and no higher. The range of his assertions, his criticisms or his comments is as wide as, and no wider than, that of any other subject."²² The framing is instructive: press freedom, on this view, is not a special privilege but ordinary civil liberty exercised at scale which is precisely why its excesses attract the same remedies, contempt and defamation, available against any other citizen.

The domestic vehicle for enforcing this boundary is the Contempt of Courts Act, 1971. Courts have been careful, however, to calibrate its use against the competing public interest in open reporting of judicial proceedings: in *Narmada Bachao Andolan v. Union of India*, the Supreme Court observed that freedom of speech and expression is the "life blood of democracy", even as it remains "subject to certain qualifications."²³ The operative test courts have since applied is whether an inaccuracy in reporting is, on the facts of the particular case, likely to have a real and substantial connection with the administration of justice mere inaccuracy, without that connection, does not by itself amount to contempt.

20 *R. Rajagopal v. State of T.N.* (1994) 6 SCC 632.

21 Index Details, available at: https://rsf.org/en/ranking_table (Last visited on Sept. 4, 2026).

22 *Channing Arnold v. King Emperor* AIR 1914 PC 116.

23 *Narmada Bachao Andolan v. Union of India* (1999) 8 SCC 308.

The second ex-post remedy is defamation. Printing matter that harms another's reputation is a criminal offence under Section 501 of the Indian Penal Code (IPC), 1860 (now Section 356 of the Bharatiya Nyaya Sanhita, 2023) punishable with a fine and imprisonment of up to two years. Civil liability in damages runs alongside this criminal provision. Together with contempt, defamation supplies the two principal ex-post tools available against media excess; the doctrinal gap identified in Part II is therefore not an absence of remedies, but their inconsistent invocation.

The criminal limb of defamation has itself become a contested site. In *Subramanian Swamy v. Union of India*,²⁴ the Supreme Court rejected a broad challenge to Sections 499 and 500 of the IPC (now, known as BNS),²⁵ holding that criminal defamation is a reasonable restriction on speech saved by Article 19(2), and that reputation is an intrinsic component of the right to life under Article 21. The decision preserved a remedy of considerable antiquity, but it also left intact a tool that is increasingly deployed not to vindicate genuine reputational injury but to intimidate: the strategic lawsuit against public participation, or SLAPP, in which a well-resourced litigant files a cluster of defamation complaints across scattered jurisdictions, so that the cost and inconvenience of defending them operate as a punishment independent of any eventual verdict. For the working journalist the effect mirrors that of the sedition charge examined in Part IV the process, not the outcome, does the disciplining which is why the mere availability of a remedy says little, by itself, about whether the balance it strikes is a healthy one.

Between the blunt instrument of contempt and the constitutional bar on prior restraint, the Supreme Court has fashioned a narrower, calibrated remedy. In *Sahara India Real Estate Corporation Ltd. v. Securities and Exchange Board of India*,²⁶ a Constitution Bench held that courts of record, exercising their inherent powers under Articles 129 and 215 of the Constitution, may in appropriate cases direct the temporary postponement of the publication of court proceedings where there is a real and substantial risk of prejudice to the fairness of a trial or to the administration of justice. The Court was careful to characterise such an order not as a punitive measure or a species of censorship but as a 'neutralising device' a preventive step of short duration, available only where no reasonable alternative such as change of venue exists, and governed throughout by the twin tests of necessity and

24 *Subramanian Swamy v. Union of India* (2016) 7 SCC 221.

25 IPC, 1860; Ss. 499, 500.

26 *Sahara India Real Estate Corporation Ltd. v. Securities and Exchange Board of India* (2012) 10 SCC 603.

proportionality.²⁷ The significance of the postponement doctrine lies in its middle position: it supplies a targeted answer to the media-trial problem identified in Part II without reviving the general prior-restraint regime that *Sakal Papers* and *R. Rajagopal* had firmly rejected.

The doctrinal picture is further complicated by the migration of the audience from licensed newspapers and broadcasters to digital and social-media platforms, on which the ex-post remedies described above operate weakly if at all. The Court's most consequential intervention in this space came in *Shreya Singhal v. Union of India*,²⁸ which struck down Section 66A of the Information Technology Act, 2000 as an unconstitutionally vague and overbroad restriction on online speech, while reading down the intermediary-liability regime to require actual knowledge, in the form of a court order or a government notification, before content need be taken down. *Shreya Singhal* secured the online citizen's expressive freedom against a vague penal provision; it did not resolve the harder institutional question of who is to restrain the anonymous, algorithmically-amplified pre-trial commentary that now routinely outpaces anything a regulated newsroom can produce a gap to which the recommendations in Part V return.

IV. Sedition and the Chilling of Dissent

If Parts II and III of our Constitution describe restraints on the press that are under-enforced, sedition law illustrates the opposite failure: a restraint enforced with a severity that its constitutional justification struggles to bear. Section 124A of the Indian Penal Code descends in a direct line from the Rowlatt Act, 1919, and criminalises speech "bringing into hatred or contempt" the government established by law. Whatever legitimate interest it protects, its compatibility with Article 19(1)(a) has long been in tension, given that fair criticism of public officials and government action provided it does not incite violence is ordinarily protected speech rather than sedition.

The gap between doctrine and practice widened visibly in 2015–16, when several television channels received show-cause notices over coverage that a serving Cabinet Minister publicly dismissed with a slur ('presstitutes'), and in the years that followed, through a steadier pattern of criminal cases, informal pressure toward self-censorship, and licence-related action against independent outlets.

²⁷ *Ibid.*

²⁸ *Shreya Singhal v. Union of India* (2015) 5 SCC 1.

This pattern intensified through 2019 and 2020, most visibly in Jammu and Kashmir following the abrogation of Article 370, where reporting restrictions and communications shutdowns drew sustained criticism from press-freedom monitors.²⁹ A study by the Free Speech Collective found that of 154 Indian journalists arrested or facing State action for their work between 2010 and 2020, more than 40% of those cases arose in 2020 alone.³⁰ The resulting climate of antagonism feeds a self-reinforcing polarisation, in which an increasingly divided press oscillates between inflammatory reportage and equally overheated social-media commentary.³¹ Breaking that cycle is a precondition for either side of this article's diagnosis under-enforcement in Part II, or over-enforcement here to be corrected without simply trading one excess for another.

The judicial treatment of sedition supplies the sharpest illustration of the gap between doctrine and enforcement. The constitutional validity of Section 124A was settled as long ago as 1962, when a Constitution Bench in *Kedar Nath Singh v. State of Bihar*³² upheld the provision but read it down decisively: only speech that incites violence, or has a tendency to create public disorder, falls within its reach, and strong or even bitter criticism of governmental measures, unaccompanied by any such incitement, does not. That narrowing construction has, on paper, governed the offence for more than six decades. In practice, prosecutions have persisted against journalists, cartoonists, students and dissenters on facts that come nowhere near the *Kedar Nath* threshold, the charge functioning less as a genuine allegation of incitement than as a mechanism of pre-trial detention and deterrence.

The persistence of these prosecutions is intelligible only if one attends to their procedural life rather than their eventual outcome. Conviction rates under Section 124A were, on every available account, negligible; yet a person charged with sedition faced arrest, opposition to bail on the footing of the offence's gravity, and the slow attrition of a trial that might run for years before ending in acquittal. In such a setting the process is itself the punishment, and the low conviction rate far from vindicating the provision is evidence that the charge was serving a function other than the one it nominally describes.

29 Kavitha Iyer, "India has launched a sharp assault on press freedom — but independent media is determined to resist", Scroll.in, Feb 15, 2021, available at: <https://scroll.in/article/986981/as-more-indians-turn-to-independent-media-for-news-press-freedom-faces-sharp-attacks> (Last visited on Sept. 11, 2026).

30 *Ibid.*

31 *Ibid.*

32 *Kedar Nath Singh v. State of Bihar*, AIR 1962 SC 955.

The accumulated weight of that misuse produced a striking intervention in 2022. In *S.G. Vombatkere v. Union of India*,³³ a three-judge Bench directed that Section 124A be kept in abeyance restraining the Union and the States from registering fresh sedition cases, and staying pending trials, appeals and proceedings under the section pending the Government's reconsideration of the provision. The order was, on any view, an unusual one: an operative penal provision was suspended in its entirety without being struck down. The following year the challenge was referred to a Bench of at least five judges, on the footing that *Kedar Nath* had itself been decided by a Constitution Bench and could not be revisited by a smaller one.³⁴

The reprieve may prove more apparent than real. With the replacement of the IPC by the BNS, 2023, the offence of sedition has not so much been abolished as recast: Section 152 of the new Code penalises acts that excite 'secession', 'armed rebellion' or 'subversive activities', or that encourage 'feelings of separatist activities', and that endanger the sovereignty, unity and integrity of India.³⁵ Critics contend that the reformulation retains and in some aspects broadens the vice of the provision it replaces, substituting a fresh vocabulary of proscribed tendencies for the old language of 'disaffection' while leaving the underlying chilling effect intact.

That chilling effect is measurable in the country's external reputation. India's position on the RSF World Press Freedom Index, having fallen from 140th in 2019 to 142nd in 2020, declined further to 161st of 180 countries in 2023 before recovering marginally to 159th in 2024 and 151st in 2025 a level still classified as a 'very serious situation for press freedom'.³⁶ Whatever the methodological limitations of any single index, a trajectory of this kind, persisting alongside a strong and long-settled doctrinal position, confirms the diagnosis offered throughout this article: the deficit lies not in the constitutional text or its authoritative interpretation, but in the uneven and often politically-inflected manner of its enforcement.

V. Towards a Workable Balance: Practical Recommendations

Diagnosing an oscillation between excess and repression is of limited use unless paired with proposals capable of being implemented by identifiable actors. Four are offered here.

33 *S.G. Vombatkere v. Union of India*, 2022 SCC OnLine SC 609.

34 Order dated September 12, 2023 in *S.G. Vombatkere v. Union of India*, W.P. (C) No. 682 of 2021, referring the challenge to a Bench of at least five Judges.

35 S. 152, BNS 2023.

36 World Press Freedom Index, Reporters Without Borders, available at: <https://rsf.org/en/index> (last visited on Sept. 21, 2026).

1. **For legislators:** Codify the Law Commission's 2006 proposal a statutory bar on publishing material prejudicial to an accused between arrest and the conclusion of trial, enforceable through the existing contempt jurisdiction rather than a new licensing regime, so as to avoid recreating the prior-restraint problem the courts have already rejected.
2. **For courts:** Apply the contempt jurisdiction to media-trial coverage with the same consistency shown in *Narmada Bachao Andolan's* 'real and substantial connection' test, rather than reserving it chiefly for exceptional cases predictability of enforcement, not its severity, is what will change newsroom incentives.
3. **For self-regulatory bodies (News Broadcasting & Digital Standards Authority, Press Council of India):** Extend existing codes of conduct to require a formal, time-stamped correction mechanism for pre-trial reporting later shown to be inaccurate, with findings published rather than settled privately visibility, not merely the code's existence, is what disciplines repeat offenders.
4. **For newsrooms:** Separate crime-desk incentives that are linked to television rating points from editorial sign-off on ongoing criminal matters, so that the commercial pressure identified in Part II does not sit with the same individuals responsible for pre-trial accuracy.
5. **For the digital sphere:** Bring the online intermediaries that now carry the bulk of pre-trial commentary within a proportionate, rights-respecting code, building on the framework of the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021,³⁷ but calibrated by the standards laid down in *Shreya Singhal* so that the cure for algorithmic prejudice does not itself become an instrument of executive over-reach. Courts, correspondingly, should make fuller use of the *Sahara* postponement device against digital as well as broadcast reportage wherever a real and substantial risk of prejudice is shown, in preference to the blunt alternatives of a blanket takedown or a contempt prosecution.

None of this addresses the parallel and largely unregulated challenge of social media platforms, which increasingly displace licensed broadcasters as the primary vector for both information and disinformation without being subject to any equivalent code of conduct.³⁸ Given that a functioning

37 The Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021.

38 Auqib Javed, "Freedom of Press is in Everybody's Interests", *Article 14.com*, Nov 5, 2020, available at: <https://www.article-14.com/post/freedom-of-press-is-in-everybody-s-interest> (Last visited on Sept. 18, 2026).

press remains indispensable to any modern polity, allowing *bona fide* media to be squeezed between commercial pressure and political retaliation while unregulated platforms absorb the resulting audience would be a considerable failure of policy.³⁹

VI. Conclusion

India's press has moved, within the span of a few decades, from a period in which its excesses went largely unchecked to one in which its critical voices face disproportionate State response with neither extreme serving the public interest that press freedom is meant to protect. The doctrinal architecture required to correct both problems already exists: contempt and defamation law for excess, and the constitutional bar on prior restraint for repression. What is missing is consistent enforcement of the first, and consistent restraint in exercising the second.

Press that neither escapes accountability nor operates under the threat of retaliation is not an utopian outcome; it is the ordinary condition the Constitution's framers appear to have contemplated when they left press freedom to be read into the general guarantee of speech, rather than carved out as a special privilege.

The developments canvassed in this article sharpen rather than soften that conclusion. The postponement doctrine of *Sahara* and the vagueness review of *Shreya Singhal* show that the Court possesses, and is willing to fashion, instruments precise enough to protect both a fair trial and an open internet without resort to blanket censorship; the abeyance of sedition in *Vombatkere* shows an equal willingness to restrain a coercive power that had outgrown its constitutional justification. What remains conspicuously absent is the same precision and restraint at the level of ordinary, day-to-day practice in the prosecutor's decision to charge, the newsroom's decision to broadcast, and the regulator's decision to act. The recast sedition offence in the BNS, together with the continued migration of prejudicial commentary to still-unregulated platforms, ensures that both halves of this article's diagnosis excess and repression will recur in new forms unless that practical deficit is addressed. Doctrine has, for the most part, done its work; the unfinished task belongs to the institutions that must apply it. It may be safely concluded that press-freedoms in India have moved from times of unfettered powers to eclipsed liberties and other nasty extremes in-between with sincere hopes now, of a golden balance coming into operation in the post-pandemic times to come, in the path of progress of the world's largest democracy.

39 *Ibid.*



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