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All inquiries regarding the journal should be addressed to:

The Editor

Maharaja Agrasen Journal of Law

Department of Law

Maharaja Agrasen Institute of Management Studies

Sector 22, Rohini

Delhi-110086

Email id.: Lawjournal@maims.ac.in

ABOUT MAIMS

Maharaja Agrasen Institute of Management Studies (MAIMS) was established in 2003 by the Maharaja Agrasen Technical Education Society (MATES), a society founded by a group of renowned industrialists, businessmen, professionals, and philanthropists with the objective of promoting quality education and fostering academic excellence. Affiliated with Guru Gobind Singh Indraprastha University (GGSIPU), Delhi, MAIMS has emerged as a premier institution of higher learning committed to academic excellence, innovation, and holistic development.

The Institute is accredited with the highest NAAC Grade A++, recognized under Section 2(f) of the UGC Act, 1956, and recognized by the Bar Council of India for its law programmes. It has also been awarded ISO 21001:2018 and ISO 9001:2015 certifications, reflecting its commitment to quality management and educational excellence. Further strengthening its reputation, MAIMS has secured a position in the NIRF 2025 Rank Band 101–150 in the Colleges Category, demonstrating its dedication to quality education, research, innovation, and holistic student development.

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With a strong emphasis on academic rigor, innovation, and nation-building, Department of Law MAIMS continues to contribute significantly to higher education by producing competent professionals and responsible citizens committed to societal progress.

ABOUT MAHARAJA AGRASEN JOURNAL OF LAW

Maharaja Agrasen Journal of Law (MAJL) is a peer-reviewed academic law journal published by the Department of Law, Maharaja Agrasen Institute of Management Studies (MAIMS), Delhi, affiliated with Guru Gobind Singh Indraprastha University (GGSIPU), Delhi. The Journal provides a scholarly platform for engaging with contemporary legal developments, emerging areas of jurisprudence, and interdisciplinary dimensions of law and public policy. MAJL seeks to promote high-quality legal research, critical analysis, and academic dialogue among academicians, legal practitioners, researchers, policymakers, and students. The Journal welcomes original research articles, doctrinal and empirical studies, case comments, legislative analyses, and other scholarly contributions addressing significant issues in national and international law.

The Journal encourages contributions across diverse areas of legal scholarship, including Constitutional Law, Criminal Law, Corporate and Commercial Law, Intellectual Property Rights, Cyber Law, Technology and Law, Human Rights, Environmental Law, International Law, Gender Justice, Alternative Dispute Resolution, and emerging areas of legal research. Interdisciplinary research connecting law with technology, economics, social sciences, governance, and other related disciplines is also encouraged. MAJL follows a structured peer-review process intended to maintain academic quality, originality, and scholarly integrity. Manuscripts are evaluated with due regard to their originality, research methodology, legal analysis, relevance, and contribution to existing scholarship. The Journal also emphasizes ethical academic practices and responsible research and publication standards. The Journal aims to contribute to the development of legal scholarship by providing a forum for new perspectives, contemporary debates, and evidence-based legal research. It aspires to connect academic inquiry with evolving legal and societal challenges and to facilitate meaningful discourse within the legal community. Through its commitment to scholarly excellence, research integrity, and interdisciplinary engagement, Maharaja Agrasen Journal of Law seeks to establish itself as a valuable platform for advancing contemporary legal thought and contributing to the broader development of legal education and research.

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MARRIAGE EQUALITY IN INDIA: CONSTITUTIONAL DIMENSIONS AND LEGAL CHALLENGES IN RECOGNISING SAME-SEX MARRIAGE

Ankit Purohit*

Abstract

The LGBTQIA+ community is a diverse and inclusive group of individuals who share non-heterosexual and non-cisgender identities due to which they face distinct gender identity and sexual orientation issues. Same-sex marriages are unions between two people belonging to the same sex. Such marriages are officially illegal in India, although attempts are underway to recognise and legalise them. The country's legal system does not recognise marital equality, including the rights and advantages that come with it, such as inheritance, shared property ownership, and adoption rights. This is an important issue since it addresses LGBTQIA+ people's fundamental human rights, as well as the acceptance and protection of their partnerships. Legalising same-sex marriage would not only bring legal recognition and protection to LGBTQIA+ couples, but it would also increase societal acceptance and lessen discrimination against the community. The paper will delve into the constitutional analysis of the feasibility and limitations of legalising same-sex marriage in India.

Keywords: Same-sex, Marriage, Gender, LGBTQIA+, Constitution.

Introduction

Same-sex marriage is a contentious issue in India and around the globe. India, to a large extent, still does not completely recognise LGBTQIA+ rights, discrimination against homosexuality, or same-sex marriage. In India, religion has a significant role in society and personal rules, despite the country being secular. Marriage follows long-standing traditions and beliefs. Marriage is a significant commitment between a man and a woman. In Hindu law, marriage is considered a sacred connection. Traditional practices and traditions shape attitudes about sexuality and marriage. Heterosexuality is prevalent in Indian society, and marriage is considered a sacred bond between a man and a woman. The legal meaning of marriage in India is influenced by religious, personal, and secular regulations.

* Research Scholar, Department of Laws, Panjab University, Chandigarh & Dr. Shipra Gupta, Professor, Department of Laws, Panjab University, Chandigarh.

In India, marriage is regulated by the Hindu Marriage Act, 1955, Special Marriage Act, 1954, Indian Christian Marriage Act, 1872, and the Muslim Personal Law (Shariat) Application Act, 1937.¹ None of these laws explicitly define or permit same-sex marriage. LGBTQIA+ people face social discrimination and conservative attitudes that hinder acceptance of same-sex relationships. The Special Marriage Act, 1954 makes it possible for Indian citizens or Indian nationals abroad to marry without considering their religion, caste, or creed; however, it does not legalise marriages among the same-sex people.² Therefore, although Indian marriage legislation has evolved through time, it still does not allow same-sex people to get married, which can be understandable since the Supreme Court has recently decriminalised homosexuality.³ What the LGBTQIA+ activists need to do is campaign for the passing of laws that will permit them to marry, adopt children, and inherit their partner's property from them. Nonetheless, where in 2018 the Union government decided not to comment on the constitutionality of Section 377 of the Indian Penal Code, 1860, it has made it quite clear that they will resist any call for same-sex marriages.

But this seems to be contradictory in view of the judiciary's ruling since, if we are to uphold the idea of equality with regard to the LGBTQIA+ community, then the right to marry, inherit property, and get insurance (mediclaime and life) would form a part of it. In other words, denying the LGBTQIA+ community these basic rights purely on the basis of their sexual orientation would amount to discrimination and would thus be unconstitutional (violating Articles 14 & 19).⁴

Right to Marriage: Whether Legal Right or Not?

The freedom to marry is not explicitly mentioned in the Constitution.⁵ Nevertheless, in the famous case of *Lata Singh v. State of Uttar Pradesh*,⁶ the Supreme Court has included the right to marry under Article 21 of the Indian Constitution. In this case of inter-caste marriage, the Supreme Court ruled that when the individual becomes major, then he/she is entitled to marry any individual he/she likes. The Supreme Court further ruled that

1 Hindu Marriage Act, No. 25 of 1955, India Code; Special Marriage Act, No. 43 of 1954, India Code; Indian Christian Marriage Act, No. 15 of 1872, India Code; Muslim Personal Law (Shariat) Application Act, No. 26 of 1937, India Code.

2 Special Marriage Act, No. 43 of 1954, §§ 4-8, India Code.

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

4 INDIA CONST. arts. 14, 15, 19, 21.

5 INDIA CONST. arts. 19, 21.

6 *Lata Singh v. State of Uttar Pradesh*, (2006) 5 SCC 475.

parents can break off all relations from their children but cannot murder them. Marriage is a sacred religious tradition, but apart from that, it is a basic human right as well. This right is internationally recognised under the Human Rights Charter under the name of “right to have a family” and many other charters as well.⁷ Everyone has the right to marry whom they love, and they are legally protected if they choose to marry someone. Therefore, people belonging to the LGBTQIA+ community cannot be deprived of basic human rights just because of their sexual orientation. If two lesbians, gays, bisexuals, and transgender people want to marry, their third gender should not be a problem at all. In its judgment in *Navtej Singh Johar*,⁸ the court has protected their right to have consensual sex, and therefore, they have the same right to legalise their union through marriage as well.

After the decriminalisation of homosexuality in 2009, the court of Haryana effectively legalised the marriage of two lesbians.⁹ Nevertheless, a more important decision was rendered in 2019 as the Supreme Court struck down Section 377.¹⁰ In 2019, the Madras High Court bench, affirmed a marriage of a biological male to a trans woman under the Hindu Marriage Act of 1955 and the order was given for its registration.¹¹ The constitutional position as to the right of marriage and same-sex marriage was further considered by the Supreme Court in the case of *Supriyo @ Supriya Chakraborty v. Union of India*.¹² The Constitution Bench of the Supreme Court by a majority refused to accept any right to marry as a fundamental right within the Constitution and ruled that the Special Marriage Act, 1954 would not admit of judicial interpretation or construction for the purpose of recognising the marriage between same sex persons. However, by this decision, the Court also upheld the constitutional guarantees enjoyed by the queer individuals against discrimination, coercion, and violence and also acknowledged that they have the right to select their partners and live with them. The Court also instructed the Union Government to form a committee which would look into the rights of the queer individuals in their relationships and would consider the matter related to the access to goods and services, social welfare schemes, and other legal guarantees.

7 Universal Declaration of Human Rights art. 16(1), G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948); International Covenant on Civil and Political Rights art. 23(2), Dec. 16, 1966, 999 U.N.T.S. 171.

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

9 *Savita v. State of Haryana*, AIR 2019 P&H 1663.

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

11 *Arunkumar v. Inspector General of Registration*, AIR 2019 Mad. 265.

12 *Supriyo @ Supriya Chakraborty v. Union of India*, (2023) 14 SCC 1.

Supriyo, therefore, is an important landmark in terms of constitutional law, as while safeguarding the autonomy and dignity of the LGBTQIA+ community members, it did not confer upon them the right to enter into same-sex marriages. Thus, Supreme Court itself has recorded in its majority judgment that there was no right to marriage in the constitution, that Special Marriage Act could not be read in such a way as to make same-sex marriage possible, and yet recognizing the existing rights of gender identity, sexual orientation, choice of partners and cohabitation.

The rights of LGBTQIA+ individuals are human rights as well, such as equal rights, self-expression, the right to live, and freedom from discrimination on the basis of their sexual orientation. All these rights are provided to the citizens of India under the Constitution of India and no one can strip them of these rights. That is why some laws are needed to protect these rights of the LGBTQIA+ individuals. As the homosexual couple cannot legalise their marriage, they miss many benefits and privileges that other couples receive. They are not permitted to adopt a child and also cannot enter the name of their same-sex partner on any medical emergency document. They cannot apply for spouse visa; therefore, when it comes to marriage between different countries in India, the couple is faced with much more complications than others. They face a lot of trouble in securing their future since they cannot nominate each other due to a lack of proof of their marriage.

Furthermore, they are also not allowed to make wills in the names of their partners, and if they make one, there are high chances of having it contested. Homosexual couples cannot create a joint bank account and cannot get any joint loans. It is also impossible for them to adopt a child and women cannot act as surrogates for their partners. All married people are entitled to pensions, maintenance, and succession; the only exception here are the homosexuals. The financial benefits provided through Employment Provident Fund Schemes, Workmen's Compensation Act, Migrant Labour Act, etc., can be availed only by those who are related either by blood or marriage. In addition, homosexuals that get married in other countries where homosexuality is legal will not be able to get registered in India. The marriage certificate issued to them will not be recognised; however, heterosexuals will be allowed to do so by proving that they have got married in other countries.

There are instances where the Right to Marriage is also a Fundamental Right and also comes under the Human Rights, and each person is eligible for it, without considering his/her social orientation. However, the question arises if the rulings are extensive to include same-sex marriages. The other

important point that needs to be kept in mind is that while the world is becoming bigger in terms of boundaries, India still remains traditional and does not like its people marrying out of caste. Even today people die for inter-caste marriage, and hence the idea of same-sex marriage becomes even harder to accept.

It is not a valid point to say that it is not possible for the LGBTQIA+ community to get married on the grounds that their sexual orientation is different from the rest. This issue poses yet another extremely pertinent question: Is it so important for the majority to be correct that they have the right to take away someone's right to live their life?

Issues & Challenges faced by LGBTQIA+ due to lack of legal recognition of the Right to Marriage

India, with a history and tradition of rich legacy, has been facing the issue of LGBTQIA+ rights in terms of the country's legal structure. The LGBTQIA+ community, based on laws created in the era of the colonial period and societal norms, has faced many problems with the laws regarding the legal rights, including cases of prosecution for same-sex relations, struggle for gay marriage, and other matrimonial rights. While Section 377 IPC was finally struck down, the legal regulation of gay marriages still constitutes a major issue. The Indian marriage laws, greatly influenced by religious traditions and conventions, do not regulate marriage of persons of the same sex, meaning that gays do not have the possibility to use some of the advantages of the married couples, such as property ownership, inheritance, and adopting children. Adoption and parenting rights also remain one of the major concerns for the LGBTQIA+ community. Due to the absence of laws regulating their rights in this field, LGBTQIA+ citizens wanting to adopt a child face another challenge.

The lack of entitlement to marriage rights poses several challenges for the LGBTQIA+ community.

(i) Legal Protections against Discrimination

- LGBTQIA+ individuals often face prejudice due to the lack of legal recognition for same-sex marriage.
- Employment discrimination: LGBTQIA+ employees may experience unfair treatment, harassment, or termination due to their sexual orientation or gender identity.¹³

13 Human Rights Campaign Foundation, *Equality Rising: LGBTQ+ Workers and the Road Ahead* (2021).

- **Housing discrimination:** Same-sex couples may have difficulty renting or purchasing property due to discriminatory practices.
- **Healthcare disparities:** Without marital rights, LGBTQIA+ partners may lack access to spousal health benefits or decision-making authority in medical situations.

(ii) **Marriage Equality** - The lack of marriage equality denies same-sex couples fundamental rights and privileges:

- **Property rights:** Married couples can jointly own property, while LGBTQIA+ couples may struggle with property inheritance and ownership.
- **Legal recognition:** Marriage provides legal status and protections, such as spousal insurance coverage, inheritance rights, and tax benefits.
- **Social acceptance:** Marriage validates relationships and fosters social acceptance, which is crucial for mental and emotional well-being.

Without marriage rights, LGBTQIA+ couples face challenges in building stable, legally recognised families.

(iii) **Adoption Rights and Parenting** - Adoption regulations frequently favour heterosexual married couples, making it challenging for same-sex couples to adopt.

For LGBTQIA+ parents, the lack of marriage rights has an impact on their parenting rights, including custody disputes and decision-making.

(iv) **Marginalization and Social exclusion** - Marginalization and social exclusion prohibit them from getting basic services and contribute to their isolation from their own families. Lack of support and marginalization have driven some people to engage in criminal behaviour, and they are also more vulnerable to health conditions such as HIV/AIDS. These challenges stem from cultural opinions towards their sexual orientation.

(v) **Socio-Economic issues** - Homosexuals earn less than heterosexuals and face more workplace discrimination. This frequently results in job loss and subsequent difficulties with poverty.

(vi) **Unheard Rural voices** - Urban LGBTQIA+ individuals' voices are heard on a variety of online and offline platforms. Rural LGBTQIA+ people, on the other hand, usually suppress their emotions due to a lack of exposure, comfort, and internet connectivity in their community, and their refusal to marry leads to more physical abuse.

Despite the many difficulties, there remains hope for change. Looking ahead, it is expected that India will enact more LGBTQIA+-related laws and regulations. Marriage laws will be amended to accommodate same-sex unions, adoption by LGBTQIA+ couples will be explicitly recognised, and comprehensive anti-discrimination legislation will be enacted to protect LGBTQIA+ people from discrimination in a variety of settings.

Feasibility of Legalisation of Marriage of LGBTQIA+ in India

Talking about the feasibility of legalisation of marriage of LGBTQIA+ in India, it becomes difficult to decide that how much it would be practical for the society as simply implementing anything will not be sufficient, societal recognition is also required for the same and on the other hand it is also essential to mention that how much it would be discriminatory for LGBTQIA+, if they will not be granted the right to marriage. There are certain concerns which are required to be taken into consideration for understanding the practicality of legalisation of same-sex marriage.

• Marriage as a Social institution and not a “Private issue”

Marriage is not just about privacy of two people belonging to the same sex but it is a social institution and a public concept entailing different rights, responsibilities, and legal consequences ranging from divorce, alimony, and adoption. While Article 245 of the Indian Constitution grants the Parliament of India the exclusive power to make laws relating to all or any part of the territory of India, these laws are supposed to be consistent with the requirements of the Constitution.¹⁴ Therefore, if the decision of the Supreme Court of India is that the refusal to allow same-sex marriages goes against the Constitution, then it is the task of the legislature to make amendments in the existing marriage laws in order to compensate for the injustice committed. It is wrong to call for a society-wide discussion on the issue when firstly, a discussion on this has already taken place in the court, and secondly, the statistics clearly show that the acceptance of homosexuality (not same-sex marriages) remains low even in the wake of the landmark *Navtej Singh Johar*¹⁵ verdict owing to prejudice and bias, not the fault of the LGBTQIA+ community.

14 INDIA CONST. arts. 245-246, sched. 7, list III, entry 5.

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

Secondly, it is wrong to believe that any alteration made in the law pertaining to same-sex marriage must come only through the legislature. This is a positivist view of law and runs contrary to the tradition of law-making in India. In the context of the Indian legal system, which is an extension of the common law system, it is the task of the judges, in addition to the legislature, to bring about the modernization of the law in light of the present-day situation in society. It is the Indian Constitution, which is a transformative document,¹⁶ that entrusts this responsibility of interpretation and updating of law to the judges so that it meets the socio-economic realities and expectations of the country, especially those of its vulnerable sections of the population. Even though it is the task of Parliament to make laws concerning marriage, people can take help of the Constitution for remedying their grievances and approach the Supreme Court under Article 32 of the Constitution if their basic rights are violated. Therefore, it is wrong to assert that the judiciary has no jurisdiction over the problems of marriage, including same-sex marriage.

• On the Legislative Intent of India's Existing Marriage Laws

While the personal laws of India were being made, Section 377 of the Indian Penal Code prohibited same-sex relations that are consensual and private between individuals as “against the order of nature”, but the Indian Psychiatric Association was yet to decide on whether homosexuality was a mental disorder. Nevertheless, after taking into account cases such as *National Legal Services Authority v. Union of India*¹⁷ and *Navtej Singh Johar v. Union of India*,¹⁸ the judiciary and civil society have recently realised that there was a mistake historically made: queerness is natural and normal and is a part of one's nature. This has led to the Madras High Court to amend the definition of “bride” under Section 5 of the Hindu Marriage Act to include transgender women in *Arun Kumar v. Inspector General of Registration*¹⁹

Keeping in mind the above developments, it is essential to go back to what the Court observed in *Navtej Singh Johar* case with regard to accepting the erroneously established position in *Suresh Kumar Koushal v. Naz Foundation*,²⁰ which would “amount to a retrograde step in the direction of progressive interpretation of the Constitution and denial of progressive

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

17 *National Legal Services Authority v. Union of India*, (2014) 5 SCC 438.

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

19 *Arunkumar v. Inspector General of Registration*, AIR 2019 Mad. 265.

20 *Suresh Kumar Koushal v. Naz Foundation*, (2014) 1 SCC 1.

realization of rights”. The legislative intent must be understood in the context of the progress made in science, psychiatry, and social knowledge regarding the concepts of family and sexuality.

To suggest that the legislative intent of the prevailing marriage laws of India, especially the Special Marriage Act, 1954, is heteronormative and, therefore, needs to be preserved, is to disregard the social context which has come into being after 1954. “The fundamental rights enshrined in our Constitution are dynamic and timeless,” according to the Navtej Singh Johar case, and any “static interpretation” of the rights to “liberty” and “equality” would be unconstitutional in spirit because they are “transformative”.²¹

• Procreation and Consummation as essential to a valid marriage

According to Section 12 of the Hindu Marriage Act 1955,²² the marriage shall be considered voidable if there is an absence of consummation of the marriage due to the impotence of one of the partners. But, in this case, same-sex couples can also consummate. To say that “consummation” only means penile vaginal sex, is actually a factually incorrect notion. The criterion for consummation and procreation of the offspring in marriage is archaic and discriminative. Such criteria cannot be equated with different marriages in equal measure. Moreover, due to the advancements in medical sciences, same-sex couples can conceive and have children through artificial means such as surrogacy, IVF, etc.

Moreover, one has to understand that marriage does not consist of just sex and reproduction. Marriage is an alliance of love, respect, and commitment. Everyone, regardless of his/her sexual preference, must be allowed the freedom of choosing his/her mate and getting legally married to him/her irrespective of whether he/she wants to have a baby or not. Therefore, discriminating against same-sex couples in terms of marriage because procreation is one of the primary purposes of marriage is also an insensitive attitude towards those heterosexual couples who either suffer from infertility or sexual dysfunction or don’t want to reproduce for whatever reason.

Marriage of LGBTQIA+: Special Marriage Act and Uniform Civil Code

The Special Marriage Act (SMA) was enacted in 1954 to provide two persons with a marriage that is outside the realm of religion. Two people of the same religion or of different religions can get married and registered under this Act and are free from their personal laws. Marriages under this Act do not

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

22 Hindu Marriage Act, No. 25 of 1955, § 12(1)(a), India Code.

need any kind of religious rituals or practices in order to be considered legally recognised, unlike marriages under the Hindu Marriage Act of 1955. However, there is a provision within this Act that states that the two individuals have to be of opposite sexes (as it accepts male and female), hence the homosexual community cannot benefit from this Act.

For this purpose, amendment of Section 4(c) of the Act²³ should be demanded, which says that the minimum age for men is 21 years and for women is 18 years. It will not have any effects on any religious laws, and therefore, there is less possibility of a popular uprising against it. Amendment of the Special Marriage Act by judicial means is possible due to the fact that it can be declared as unconstitutional. In cases of *Goodridge v. Dept. of Public Health*²⁴ and *Varnum v. Brien*,²⁵ the Supreme Court of the United States of America held that “Marriage laws that do not permit same-sex marriages are unconstitutional as marriage is an individual right and he cannot be deprived of it until and unless there is some strong reason, and being of same sex is not one of those reasons.”

Also in Canada, the court has given a ruling in *Halpern v. AG of Canada*²⁶ where it is stated that “the current definition of marriage is violative of the rights of same-sex couples and thus the definition was changed to voluntary union of two persons.” In the case of *Minister of Home Affairs v. Fourie*²⁷ of South Africa, the court ruled that “the marriage laws which do not allow for same-sex marriage are discriminatory on the basis of sex.”

Alongside the Special Marriage Act, there is the Uniform Civil Code (UCC), but only the state of Uttarakhand has come to be the first state to implement this common law applicable to families. Each and every individual marries under the provisions of the existing law regardless of his or her religion. Article 44 of the Indian Constitution²⁸ gives provisions for UCC, but there is an ongoing debate on whether it should be implemented throughout the whole country. Nonetheless, UCC does not allow same-sex marriage at all.

23 Special Marriage Act, No. 43 of 1954, § 4(c), India Code.

24 *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 969 (Mass. 2003).

25 *Varnum v. Brien*, 763 N.W.2d 862, 906-07 (Iowa 2009).

26 *Halpern v. Canada (Att'y Gen.)*, 65 O.R. (3d) 161, 172-73 (C.A. 2003).

27 *Minister of Home Affairs v. Fourie*, 2006 (1) SA 524 (CC) at 556-57 (S. Afr.).

28 INDIA CONST. art. 44.

As such, there cannot be any single reason as to why same-sex marriage should be banned besides the ignorance and prejudiced attitude towards the needs of same-sex couples. There is a gross injustice done by the legislative body since it fails to make changes to the existing laws or create new ones to resolve these problems.

Impact of legalisation of marriage of LGBTQIA+ in India:

(i) Social impact

- **Increased Social Acceptance:** Legalising same-sex marriage leads to a higher acceptance of LGBTQIA+ people. It normalizes same-sex partnerships and promotes equality, hence lowering stigma and discrimination.
- **Family Stability:** Same-sex marriage gives legal and societal recognition for same-sex couples, which can help to maintain family stability. This includes legal privileges like inheritance rights and medical decision-making, which help to reinforce family units.
- **Youth Support:** It provides good role models for LGBTQIA+ youth, demonstrating that they can aspire to the same committed, recognised relationships as their straight peers.

(ii) Cultural Impact

- **Societal change:** Legalising same-sex marriage can spark a broader societal change towards acceptance and inclusion. It questions traditional ideas about marriage and family, encouraging a more diversified interpretation of these institutions.
- **Role models:** Prominent same-sex couples can act as role models, influencing public opinion and inspiring future generations to embrace diversity.

Conclusion

India has been known for its rich culture, traditions, and societal values. Social and cultural systems of India are deeply rooted in the traditional system of family setup, where marriage of a man and woman is ideal in terms of family formation. Family is considered as the basic unit of the society, which provides emotional and financial security to the members of the family. However, in recent times, there has been increasing demand for same-sex marriages. While some people see it as a positive move for equality, others believe that it would ruin the Indian social and cultural setup.

Legalisation of Marriage of LGBTQIA+ will have positive impact on society as we know laws are vital in shaping public attitudes. Changing laws can reduce prejudice and discrimination while promoting equality and acceptance for marginalized groups. Legalising same-sex marriage in the US has led to increased acceptance and decreased prejudice towards LGBTQIA+ individuals. Passing laws can demonstrate society's support for marginalized people.

As a result, laws can contribute to the development of an inclusive and accepting culture. Laws protecting the rights of those with disabilities can promote inclusion and minimize stigma and prejudice.

The legalisation of marriage for the persons of the same-sex will have significant and intricate influence on the LGBTQIA+ community. Here are a few key points where this impact is likely to be noticeable:

- **Legal Protections and Rights:** Allowing same-sex marriage gives LGBTQIA+ couples the same legal rights and protections as heterosexual couples. This encompasses issues including inheritance, tax breaks, healthcare decision-making, and parental rights. It eliminates the legal uncertainty and vulnerability that many same-sex couples had previously experienced.
- **Health & Well-being:** Numerous studies have found that legalising same-sex marriage improves the mental and physical health of LGBTQIA+ people. It alleviates the stress and stigma associated with discrimination and fosters a sense of social acceptability. This can result in fewer cases of mental health concerns including sadness and anxiety, as well as an overall better sense of wellbeing.
- **Social Acceptance and Visibility:** Legalising same-sex marriage can increase public acceptance of LGBTQIA+ people. It challenges stereotypes and encourages the normalization of various family patterns. Increased exposure of LGBTQIA+ couples in society can promote inclusivity and encourage more people to come out.
- **Cultural and Educational Shifts:** Legalising same-sex marriage has the potential to change cultural norms and educational material. It advocates for the inclusion of LGBTQIA+ perspectives in curricula and public discourse, resulting in a more accurate and diversified understanding of human relationships and sexuality.

In essence, legalising same-sex marriage benefits the LGBTQIA+ population by improving legal rights, social acceptability, mental health, and economic prospects, as well as contributing to broader societal transformation.

WHEN INSOLVENCY OVERTAKES ARBITRATION: AWARD ENFORCEMENT AGAINST DISTRESSED AND CROSS- BORDER DEBTORS IN INDIA

Venu Parnami*

Abstract

An arbitral award is meant to bring a dispute to an end. Once the award debtor enters a collective process, however, Indian law treats the award as a claim like any other. This paper examines what remains of an award when insolvency or winding up intervenes, whether against the award debtor or, less obviously, against the award holder. It reads the relevant provisions of the Arbitration and Conciliation Act, 1996, the Insolvency and Bankruptcy Code, 2016 and the Companies Act, 2013 against three episodes: the Amazon and Future Retail dispute, the winding up of Devas Multimedia, and the cross-border insolvency of Jet Airways. The paper argues that the primacy of the Code over arbitration is not the difficulty. The difficulty is the absence of rules coordinating the two regimes, at home and across borders. It then assesses whether the enabling provisions inserted by the Insolvency and Bankruptcy Code (Amendment) Act, 2026 close that gap, and proposes what the rules framed under them should contain.

Keywords: Arbitral Awards; Moratorium; clean slate; winding up; cross-border insolvency; Section 240C.

Introduction

Commercial parties choose arbitration for finality. The New York Convention, and Part II of the Arbitration and Conciliation Act, 1996 which gives effect to it in India, proceed on the footing that an award, once made, will be enforced save on narrow and exhaustively stated grounds.

¹Insolvency law begins elsewhere. It is concerned not with the creditor who has won but with the body of creditors who must share what is left. When the two systems meet, the collective prevails. The Insolvency and

* Research Scholar, Chaudhary Devi Lal University, Sirsa, Srishti Juneja, Advocate on Record, Supreme Court of India

1 The Arbitration and Conciliation Act, 1996, No. 26, Acts of Parliament, 1996 (India), §§ 44-49; Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. V, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3.

Bankruptcy Code, 2016 ("the Code") says so in terms,² and the Supreme Court has consistently described the Code as a statute for time-bound resolution rather than recovery.³

That hierarchy is not challenged here. The problem lies in what follows once it is applied. An award holder whose debtor is admitted into the corporate insolvency resolution process ("CIRP") finds that years of arbitration have bought it surprisingly little. Execution is stayed by the moratorium. The claim is verified by a resolution professional who has no power to adjudicate. Payment, if any, comes in the same proportion as for an unadjudicated invoice of the same class. If the holder misses the claims window, the approved plan may extinguish the award altogether. Where the debtor's assets, or the holder's enforcement proceedings, lie abroad, the absence of any operative cross-border framework means that each forum proceeds on its own terms.

This paper addresses two questions. First, when an award debtor enters insolvency or winding up, does the award survive as anything more than an unsecured claim? Second, does India's failure to operationalise Sections 234 and 235 of the Code, or to adopt the UNCITRAL Model Law on Cross-Border Insolvency, leave foreign award holders without an effective remedy? The method is doctrinal, supported by three case studies chosen because each exposes a different gap. Part II maps the statutory position. Parts III, IV and V take up Future Retail, Devas and Jet Airways. Part VI evaluates the 2026 amendments against comparative models, and Part VII concludes.

The Award in the Collective Process

A. The Award as a Trigger

An unpaid award may found an application under Section 7 or Section 9 of the Code, depending on whether the underlying debt is financial or operational. The award does not alter the character of the debt. For operational creditors the gateway is narrow. In *Mobilox*, the Supreme Court held that an application under Section 9 must be rejected where a plausible dispute existed before the demand notice.⁴ In *K. Kishan*, it treated

2 The Insolvency and Bankruptcy Code, 2016, No. 31, Acts of Parliament, 2016 (India), § 238.

3 *Swiss Ribbons Pvt. Ltd. v. Union of India*, (2019) 4 SCC 17 (India); *Comm. of Creditors of Essar Steel India Ltd. v. Satish Kumar Gupta*, (2020) 8 SCC 531 (India).

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

a pending challenge under Section 34 of the 1996 Act as such a dispute, observing that the Code is not a mechanism for executing awards whose validity is still under challenge.⁵

The rule is sound in principle, since insolvency proceedings should not be used to collect disputed debts. Its practical consequence is less often noticed. A solvent award debtor can keep an operational creditor out of the insolvency forum for as long as its Section 34 petition remains pending, and such petitions routinely take years. A financial creditor faces no comparable obstacle, because Section 7 turns on default and not on the absence of dispute.⁶ The value of an award at the threshold of insolvency therefore depends less on the award than on how the debt beneath it is classified.

B. The Moratorium

Section 14(1)(a) prohibits "the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority".⁷ The provision leaves no room for pending arbitrations against the corporate debtor or for the execution of awards. An arbitration commenced after the moratorium has been held to be non est,⁸ and the Court has since read "proceedings" widely enough to reach quasi-criminal proceedings under Section 138 of the Negotiable Instruments Act, 1881.⁹

Proceedings initiated by the corporate debtor are not barred. The moratorium protects the debtor. It does not disable the debtor from pursuing its own remedies. A more difficult case arises where the corporate debtor has filed, or wishes to file, a Section 34 petition against an award in favour of one of its creditors. Formally, the petition is the debtor's own proceeding and falls outside Section 14. In substance, its outcome determines the creditor's claim, a function the Code assigns to the resolution professional and, on dispute, to the Adjudicating Authority under Section 60(5). The Supreme Court has not yet settled the point. The better view, it is submitted, is that the challenge should be permitted to

5 K. Kishan v. Vijay Nirman Co. Pvt. Ltd., (2018) 17 SCC 662 (India).

6 Indus Biotech Pvt. Ltd. v. Kotak India Venture (Offshore) Fund, (2021) 6 SCC 436 (India).

7 The Insolvency and Bankruptcy Code, 2016, No. 31, Acts of Parliament, 2016 (India), § 14(1)(a).

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

9 P. Mohanraj v. Shah Bros. Ispat Pvt. Ltd., (2021) 6 SCC 258 (India).

continue. The alternative would leave the award immune from challenge and the claim incapable of proper verification. The result of the challenge should, however, bind the resolution professional only as to the amount of the claim, and not as to its priority.

C. Verification, the Clean Slate and Liquidation

The award holder files its claim like any other creditor. The resolution professional verifies it and, where the amount cannot be stated precisely because of a contingency or for any other reason, must make "the best estimate" on the information available.¹⁰ The resolution professional performs administrative, not adjudicatory, functions.¹¹ Nothing in the Code gives an adjudicated claim any priority or procedural weight over an unadjudicated claim of the same class. The arbitration serves, at most, as strong evidence of the debt.

Once after the approval of a resolution plan, it binds the corporate debtor, its creditors and every other stakeholder.¹² In *Essar Steel*, it was held by the Court that a successful resolution applicant cannot be confronted with undecided claims after the plan is accepted.¹³ *Ghanashyam Mishra* went further: every claim not constituting part of the plan stands extinguished, and no proceeding in respect of it may be initiated or continued.¹⁴ An award holder who did not file, or whose claim was rejected and not pursued, therefore loses the award entirely. The outcome is severe for a claim determined after a full hearing, but it follows logically from the finality of the plan. The Code makes no exception for adjudicated claims.

In liquidation the position is no better. Section 33(5) bars suits and judicial processes involving the company in debt, unless the Adjudicating authority grants permission, and Section 53 fixes the order of distribution. After insolvency expenses, secured creditors, workers, employees, and unsecured financial creditors comes unsecured operational creditors with award.¹⁵ Winding up under the Companies Act, 2013 carries a comparable

10 Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, regs. 13-14 (India).

11 *Swiss Ribbons*, (2019) 4 SCC 17.

12 The Insolvency and Bankruptcy Code, 2016, No. 31, Acts of Parliament, 2016 (India), § 31(1).

13 *Essar Steel*, (2020) 8 SCC 531.

14 *Ghanashyam Mishra & Sons Pvt. Ltd. v. Edelweiss Asset Reconstruction Co. Ltd.*, (2021) 9 SCC 657 (India).

15 The Insolvency and Bankruptcy Code, 2016, No. 31, Acts of Parliament, 2016 (India), §§ 33(5), 53(1).

stay.¹⁶ The recovery figures that the Insolvency and Bankruptcy Board of India publishes each quarter show how little usually reaches that class.¹⁷ Put simply, in the domestic collective process an award is an unsecured claim with better documentation.

Amazon and Future Retail: The Award Overtaken

In 2019, Amazon invested in Future Coupons Pvt. Ltd., a promoter entity of Future Retail Ltd. ("FRL"). The transaction documents restricted the transfer of FRL's retail assets to certain named persons, among them entities of the Reliance group. In August 2020, the Future group announced a scheme under which FRL's retail business would pass to Reliance. Amazon invoked arbitration under the SIAC Rules, and on 25 October 2020 an emergency arbitrator restrained the parties from proceeding with the transaction. On 6 August 2021 the Supreme Court held that an emergency arbitrator's award is an order under Section 17(1) of the 1996 Act, enforceable under Section 17(2), and that no appeal lies against an order enforcing it.¹⁸

The judgment was widely welcomed as an endorsement of institutional arbitration. Within a year, however, its practical value had largely disappeared. In early 2022, possession of a large number of FRL's retail premises passed to Reliance group entities after the underlying leases were terminated, a development whose characterisation remains disputed between the parties.¹⁹ On a petition by Bank of India under Section 7, the Mumbai Bench of the National Company Law Tribunal admitted FRL into CIRP on 20 July 2022. No resolution plan secured the approval of the committee of creditors within the statutory period, and on 29 July 2024 the Tribunal directed liquidation.²⁰

Three points emerge. The first concerns the nature of the relief. The emergency award was a negative injunction protecting a contractual position. Once the resolution professional assumed control and the moratorium took effect, the injunction had nothing left to operate upon.

16 The Companies Act, 2013, § 279, No. 18, Acts of Parliament, 2013 (India).

17 See, e.g., Insolvency & Bankr. Bd. of India, *Quarterly Newsletter* (various issues), <https://ibbi.gov.in>.

18 Amazon.com NV Inv. Holdings LLC v. Future Retail Ltd., (2022) 1 SCC 209 (India).

19 See *Amazon-Future Hearing #4: Future Did Not Transfer Its Assets, Was Forced to Surrender Lease*, Sup. Ct. Observer, <https://www.scoobserver.in> (last visited Sept. 30, 2026).

20 Bank of India v. Future Retail Ltd. (NCLT Mumbai July 20, 2022) (India) (admission); Future Retail Ltd., In re (NCLT Mumbai July 29, 2024) (India) (liquidation). [Company petition numbers to be inserted.] See also *NCLT Orders Liquidation of Future Retail*, LiveLaw (July 30, 2024), <https://www.livelaw.in/ibc-cases/nclt-mumbai-future-retail-liquidation-265218>.

There is an irony here. Section 14(1)(b) itself prohibits the corporate debtor from transferring or disposing of its assets, so the moratorium imposed the very restraint Amazon had sought. It did so, however, for the benefit of all creditors and not of the award holder.

The second concerns non-monetary entitlements. A "claim" under the Code includes a right to a remedy for breach of contract only "if such breach gives rise to a right to payment".²¹ The holder of an injunction or an award of specific performance can enter the CIRP only by converting its entitlement into a claim for damages, which is then estimated by the resolution professional and paid *pari passu* with other claims of its class. The Code offers no method for valuing such a claim, and no reported decision appears to have considered whether the conversion is fair to a party that bargained for specific relief.

The third concerns standing. Proceedings under Section 7 are, in structure, a matter between the financial creditor and the corporate debtor. A party with a live arbitral claim over the debtor's principal business has no right to be heard at admission unless it is itself a creditor. Amazon sought to be heard in the admission proceedings.²² Whatever the merits of its objections, the episode shows that no adverse finding was ever made against the award. Insolvency simply overtook it. Pro-arbitration jurisprudence, however robust, cannot protect an award whose subject matter is the debtor's business itself once that business enters a collective process.

Devas V. Antrix: Winding Up as an Answer to an Award

Devas reverses the usual direction of the problem. Here it was the award holder, not the award debtor, that was wound up. In 2005, Devas Multimedia Pvt. Ltd. contracted with Antrix Corporation Ltd., the commercial arm of the Indian Space Research Organisation, for the lease of S-band capacity on two satellites. Antrix terminated the agreement in 2011. An ICC tribunal found the termination wrongful and in 2015 awarded Devas about USD 562 million with interest.²³ Separate investment treaty proceedings were brought by Devas's Mauritian shareholders and by Deutsche Telekom. Those proceedings are distinct and are not examined here.

21 The Insolvency and Bankruptcy Code, 2016, No. 31, Acts of Parliament, 2016 (India), § 3(6)(b).

22 [The scholar should cite the NCLT and NCLAT orders on Amazon's intervention applications, with dates, after verification from the tribunal record.]

23 See *Antrix v. Devas: Court Sets Aside Arbitral Award*, S.S. Rana & Co., <https://ssrana.in/articles/antrix-devas-court-sets-aside-arbitral-award/> (last visited Sept. 30, 2026).

In 2021, Antrix petitioned for the winding up of Devas under Section 271(c) of the Companies Act, 2013, on the ground that its affairs had been conducted fraudulently and that it had been formed for an unlawful purpose. The Bengaluru Bench of the National Company Law Tribunal ordered winding up on 25 May 2021, and the Appellate Tribunal affirmed. On 17 January 2022, the Supreme Court dismissed the appeals, observing that "the seeds of the commercial relationship between Antrix and Devas were a product of fraud".²⁴ Relying on that finding, the Delhi High Court on 29 August 2022 set aside the ICC award under Section 34 as being in conflict with the public policy of India.²⁵

The first point is structural. On a winding-up order, the liquidator takes custody of the company's property and actionable claims, and conducts its litigation.²⁶ Where the award debtor is also the petitioning creditor, it obtains an indirect influence over the proceedings brought against it, including enforcement actions abroad. The liquidator is an officer of the Tribunal who owes duties to the body of creditors, not to the petitioner, and nothing in the Act is irregular about this sequence. The concern lies in the structure. A collective proceeding against the award holder can neutralise an award as effectively as one against the award debtor.

The second point concerns fraud and finality. Parliament has already accepted that fraud justifies exceptional treatment. The Explanation to Section 34(2)(b) treats an award induced or affected by fraud as being in conflict with public policy, and the 2021 amendment to Section 36(3) requires an unconditional stay where the award or the underlying contract was *prima facie* induced by fraud or corruption.²⁷ Devas went a step further. The finding of fraud was made in winding-up proceedings under the Companies Act and then applied by the court hearing the Section 34 challenge. Those who support the outcome rely on the settled principle that fraud unravels everything it touches.²⁸ Critics respond that a state-owned award debtor used a domestic collective proceeding to defeat an

24 Devas Multimedia Pvt. Ltd. v. Antrix Corp. Ltd., 2022 LiveLaw (SC) 57 (India).

25 Antrix Corp. Ltd. v. Devas Multimedia Pvt. Ltd. (Del. HC Aug. 29, 2022) (India). [Petition number and the outcome of any appeal under Section 37 to be verified.]

26 The Companies Act, 2013, §§ 283, 290, No. 18, Acts of Parliament, 2013 (India).

27 The Arbitration and Conciliation Act, 1996, No. 26, Acts of Parliament, 1996 (India), §§ 34(2)(b) expl. 1, 36(3) proviso; The Arbitration and Conciliation (Amendment) Act, 2021, No. 3, Acts of Parliament, 2021 (India).

28 S.P. Chengalvaraya Naidu v. Jagannath, (1994) 1 SCC 1 (India).

international award. If the findings of fraud are sound, the outcome is correct. The general lesson is that the route to it passed through insolvency law rather than arbitration law.

The third point is cross-border. Enforcement abroad continued after the Indian rulings. In June 2025, the Supreme Court of the United States held that the Foreign Sovereign Immunities Act does not require proof of minimum contacts before a court may exercise personal jurisdiction in proceedings to confirm an award against a foreign state instrumentality.²⁹ Foreign courts must still decide whether to enforce an award set aside at the seat, which Article V(1)(e) of the New York Convention permits but does not require them to refuse, and what weight to give an Indian liquidator. Because India offers no reciprocal recognition, an Indian office-holder abroad depends entirely on the law of the foreign forum. The absence of a cross-border framework therefore disadvantages Indian insolvency office-holders abroad as well as foreign creditors in India.

Jet Airways and the Foreign Creditor

Jet Airways was not an arbitration case, but it shows the only working cross-border mechanism India has so far had. On 20 June 2019, the Mumbai Bench of the Tribunal admitted Jet Airways into CIRP on a petition by the State Bank of India. On the same day it declined to take note of bankruptcy proceedings already opened against the airline in the Netherlands, reasoning that Sections 234 and 235 had not been brought into operation. The Appellate Tribunal took a different course. On 26 September 2019 it approved a protocol agreed between the Dutch trustee and the resolution professional, which treated India as the centre of main interests and the Dutch case as a non-main proceeding. The Dutch trustee was allowed to attend meetings of the committee of creditors as an observer without voting rights, and was required to respect the Indian moratorium.³⁰

The resolution itself failed. A plan submitted by the Jalan Kalrock consortium was approved in 2021 but never implemented. On 7 November 2024, the Supreme Court invoked Article 142 of the Constitution to direct liquidation, ordered forfeiture of the ₹200 crore already paid by the consortium, and permitted the lenders to encash its performance bank

29 *CC/Devas (Mauritius) Ltd. v. Antrix Corp.*, 605 U.S. ____ (2025) (decided June 5, 2025).

30 *Jet Airways (India) Ltd. (Offshore Reg'l Off.) v. State Bank of India, Comp. App. (AT) (Ins.)* No. 707 of 2019 (NCLAT Sept. 26, 2019) (India); see *Cross-Border Insolvency in India: The National Company Law Appellate Tribunal Paves the Way*, *IndiaCorpLaw* (Sept. 30, 2019), <https://indiacorpplaw.in/2019/09/30/cross-border-insolvency-india-national-company-law-appellate-tribunal-paves-way/>.

guarantee of ₹150 crore.³¹ A year earlier, the Go First insolvency had exposed a different gap: the moratorium collided with lessors' rights under the Cape Town Convention until the Central Government excluded aircraft transactions from Section 14.³²

The Jet protocol was pragmatic, but it depended on the consent of the parties and a willing tribunal. Applied to award holders, the gap produces three distinct situations. A foreign award holder whose Indian debtor is in CIRP may file a claim like any other creditor. The Indian moratorium, however, has no effect abroad unless a foreign court recognises the Indian proceeding. The holder may therefore attach the debtor's foreign assets while Indian creditors are held back, which is precisely the race to assets that collective insolvency law is meant to prevent. The resolution professional's only answer is to seek recognition in the foreign forum under that forum's law. That route is often available, since the United Kingdom, Singapore and the United States do not require reciprocity, but India offers nothing in return.

Conversely, an Indian award holder whose debtor is in insolvency abroad may enforce under Part II of the 1996 Act against the debtor's Indian assets, because the foreign representative has no statutory route to a stay in India. The Indian holder gains a priority over foreign creditors that the foreign process would not have allowed. Finally, where a foreign-seated award has been made against an Indian corporate debtor, execution is barred by Section 14, but it is unclear whether proceedings for recognition under Section 48 may continue, and whether the resolution professional may go behind the award when verifying the claim. It is suggested that the award should be treated as *prima facie* proof of the debt, with objections under Section 48 left to the Adjudicating Authority under Section 60(5). No authoritative ruling appears to exist on this point.

The 2026 Amendments and What the Rules Should Say

The Insolvency and Bankruptcy Code (Amendment) Act, 2026 received assent on 6 April 2026, and most of its provisions came into force on 26 May 2026.³³ Two of its provisions bear directly on this paper. Section 240C empowers the Central Government to prescribe rules for the recognition

31 State Bank of India v. Consortium of Murari Lal Jalan & Florian Fritsch, Civil Appeal Nos. 5023-5024 of 2024 (India Nov. 7, 2024).

32 See The Insolvency and Bankruptcy Code, 2016, No. 31, Acts of Parliament, 2016 (India), § 14(3)(a); Ministry of Corp. Affs., Notification S.O. 4468(E) (Oct. 3, 2023) (India). [Notification number and date to be verified.]

33 The Insolvency and Bankruptcy Code (Amendment) Act, 2026, No. 6, Acts of Parliament, 2026 (India).

of foreign proceedings, relief, judicial cooperation and coordination in relation to notified countries or territories, and to adapt provisions of the Code and the Companies Act for that purpose. Section 59A, in a new Chapter VA, enables rules for group insolvency, including a common bench, a common insolvency professional and coordination between proceedings. As of June 2026, neither provision had been brought into force, no rules had been framed, and no country had been notified.³⁴ Sections 234 and 235 remain on the statute book, although no agreement has been concluded and no letter of request issued under them.

Section 240 C is a step in the right path. It follows the recommendation of the Insolvency Law Committee that India adopt the Model Law through a dedicated framework.³⁵ Three features, however, deserve scrutiny. First, the limitation to notified countries operates as reciprocity in substance. The Model Law does not require reciprocity, and Singapore adopted it without any such condition.³⁶ If notification proves as slow as the conclusion of agreements under Section 234, the old problem will simply reappear in a new form. Second, the substance of recognition and relief has been left entirely to subordinate legislation, which is a significant delegation for rights affecting foreign creditors. Third, and most relevant here, the provision says nothing about arbitration. Article 20 of the Model Law stays individual actions on recognition of a foreign main proceeding, leaving the scope of that stay to domestic law.³⁷ Whether a recognised foreign proceeding will stay arbitrations seated in India, or the enforcement of awards against Indian assets, will depend on rules that have not yet been drafted.

The English experience offers a caution. In *Rubin*, the Apex Court of the United Kingdom declined to enforce judgments given in foreign insolvency proceedings outside the ordinary common-law rules.³⁸ Under the older rule in *Gibbs*, a debt governed by English law is discharged only by

34 Rajasekhar V.K., *Cross Border Insolvency in India: What Rules Must Say*, LiveLaw (June 10, 2026), <https://www.livelaw.in/articles/cross-border-insolvency-india-537437>; *Cross-Border and Group Insolvency under the IBC Amendment Act 2026*, iPleaders, <https://blog.iplayers.in/cross-border-and-group-insolvency-under-the-ibc-amendment-act-2026/> (last visited Sept. 30, 2026).

35 Ministry of Corp. Affs., *Report of the Insolvency Law Committee on Cross Border Insolvency* (Oct. 2018) (India).

36 Insolvency, Restructuring and Dissolution Act 2018, third sch. (Sing.).

37 UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation, art. 20, U.N. Sales No. E.14.V.2 (2014).

38 *Rubin v. Eurofinance SA* [2012] UKSC 46, [2013] 1 AC 236 (appeal taken from Eng.).

an English proceeding.³⁹ UNCITRAL adopted its Model Law on Recognition and Enforcement of Insolvency-Related Judgments in 2018 partly to address those limitations.⁴⁰ Recognition of the proceeding alone does not settle the fate of a judgment or award made within it. India should address both when framing rules under Section 240C.

Conclusion and Recommendations

The response to the initial inquiry is predominantly negative. In an Indian collective process, an award is preserved as an unsecured claim with substantial evidentiary value, and nothing more. It may be completely extinguished if it is not filed. In principle, that result is tenable, as collective insolvency is predicated on the principle of equitable treatment among creditors within a class. Nevertheless, the Code contains gaps that could have been avoided, including the status of a debtor's challenge to an award during the moratorium, the valuation of non-monetary awards, and the status of parties whose arbitral claims pertain to the debtor's business.

Foreign award holders are not without recourse with regard to the second inquiry. Their remedies are frequently inconsistent with the collective principle that the Code safeguards, as they are uncoordinated and individual. Tribunals are capable of devising innovative solutions, as evidenced by Jet Airways. Devas demonstrates the degree of uncertainty that arises when the interests of a state entity, foreign creditors, and foreign tribunals diverge. The authority to resolve these issues is provided by Section 240C; however, the regulations have not yet been established.

The gap could be diminished by implementing five measures. First and foremost, the regulations under Section 240C should allow for recognition without a reciprocity condition, or at the very least, with a presumption in favour of recognition. Secondly, the rules should explicitly specify whether and under what conditions recognition suspends arbitrations and the enforcement of awards, as well as a process for requesting leave. Third, the CIRP Regulations should allow the Adjudicating Authority to permit a pending arbitration to continue within a fixed time for the limited purpose of quantifying a claim, so that the claim is determined by the forum the parties chose rather than estimated by the resolution professional. Fourth, the Code or the Regulations should clarify that a corporate debtor's own

39 Antony Gibbs & Sons v. La Société Industrielle et Commerciale des Métaux (1890) 25 QBD 399 (CA) (Eng.).

40 UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments (2018).

challenge under Section 34 or Section 37 is not barred by Section 14. Fifth, India should consider adopting the 2018 Model Law on Insolvency-Related Judgments alongside the 1997 Model Law.

Whether insolvency should prevail over arbitration is no longer the real question. The real question is whether India will decide, in advance and by rule, how that primacy is to operate, or will continue to leave the answer to be worked out case by case, as it was in Future Retail, Devas and Jet Airways.

CHIPPING AT THE BLOCK: PERSONALITY RIGHTS, DIGNITY AND THE UNFINISHED JURISPRUDENCE OF PERSONA IN INDIA

Dr. Navya Gupta*
Om Narendra Singh**

Abstract

Indian courts are granting personality-rights injunctions at an accelerating pace, mostly against AI-generated deepfakes, yet no statute defines the right. On 28 September 2026 a judge of the Delhi High Court likened the doctrine to an undifferentiated block from which the court must chip away whatever does not belong. This article takes up that invitation. Tracing the right from its privacy and publicity origins through Indian case law, it argues that the label 'personality rights' presently conceals three distinct interests: a dignitarian interest rooted in Article 21, a proprietary interest in commercial persona, and a reputational interest that overlaps with defamation. Each carries different claimants, proofs, remedies and free-speech limits. The article contends that blanket URL-based and John Doe injunctions should be disciplined by proportionality, and proposes an evidence-tiered approach for courts pending legislation.

Keywords: Personality Rights; Right of Publicity; Deepfakes; Article 21; Proportionality

Introduction

Asked to decide what personality rights actually cover, a judge of the Delhi High Court reached for the vocabulary of sculpture. On 28 September 2026, while agreeing to hear together the suits of the actor Vivek Oberoi, the actor Janhvi Kapoor and Aaradhya Bachchan, Justice Anup Jairam Bhambhani described his task in these words:

*I want to chip off what I consider is not personality right.*¹

* Assistant Professor of Law, Lloyd Law College

** student (Batch 2023–2028), Lloyd Law College.

1 Aakriti Bansal, *Delhi HC to Clarify Personality Rights Through Janhvi Kapoor, Aaradhya Bachchan and Vivek Oberoi Suits*, MEDIA NAMA (Sept. 29, 2026), <https://www.medianama.com/2026/09/223-delhi-hc-define-personality-rights/> (reporting remarks made on Sept. 28, 2026, and citing BAR & BENCH).

The court appointed Gautam Bhatia and Rohan Alva as *amici curiae*, and the hearing was listed to begin on 30 September.² In the same breath the judge compared the doctrine to a monolithic block of clay in which he could discern no design, and said that later cases would require the court to remove more material until some definite face emerged.³

The metaphor is a fair diagnosis. India has no statute that defines personality rights. What it has is a growing body of interim orders, mostly *ex parte*, mostly against unidentified defendants, and increasingly aimed at AI-generated deepfakes and cloned voices. A running tracker kept by one technology-policy outlet lists twenty-four entries for 2026 alone, drawn from the High Courts of Delhi and Bombay and, in one instance, a district court in Chandigarh.⁴ The same judge had already remarked, while hearing Aaradhya Bachchan's case, that the concept was acquiring 'amoebic proportions'.⁵

This article takes the judge's invitation seriously. Its argument is that the phrase 'personality rights' now does the work of three different legal interests, and that much of the inconsistency visible in this year's orders comes from treating them as one. The first is a dignitaries interest, anchored in Article 21 of the Constitution, in not being falsely or degradingly depicted. The second is a proprietary interest in the commercial value of a recognisable person. The third is a reputational interest, which merges with defamation and with the regulation of misinformation. Everyone has a different natural claimant, a different, a different remedy and a different relationship with Article 19(1)(a). Once they are separated, the different questions that have worried the Delhi High Court this year become easier to answer: whether a claimant must show monetisation, whether fan pages can be swept away, and where satire ends. Two caveats are in order. First, the taxonomy is not offered as wholly new. The *amici's* submissions at the preliminary hearing already point towards it,⁶ and American scholarship has long distinguished privacy from publicity. What this article adds is an argument about consequences, especially for the shape of injunctions. Second, most of the 2026 material exists as unreported interim orders known through press accounts, and the discussion relies on those accounts with the caution they call for. The position is stated as of 30 September 2026, the day the hearing was scheduled to begin.

2 *Id.*

3 *Id.*

4 *Id.* (tracker entries 14–37).

5 *Id.*

6 *Id.*

Two American Ancestors: Privacy And Publicity

The vocabulary Indian courts use was assembled in the United States over roughly a century, and the manner of its assembly matters. In 1890 Samuel Warren and Louis Brandeis argued that the common law had steadily widened its idea of injury, from bodily harm to harm to reputation and then to something more intangible:

“[T]he right to life has come to mean the right to enjoy life, the right to be let alone”.⁷

Their target was intrusion by the press and the instantaneous camera, and the injury they described was one of feeling. Seventy years later William Prosser surveyed the case law that had followed and sorted it into four torts: “intrusion upon seclusion, public disclosure of private facts, false light, and appropriation of name or likeness.”⁸ The fourth sat awkwardly in the group. Prosser noticed that what it protected looked less like wounded feelings and more like a proprietary interest in the exclusive use of one’s identity.⁹

That observation hardened into doctrine in 1953, when Judge Jerome Frank, deciding a contest between rival chewing-gum manufacturers over the photographs of baseball players, named a ‘right of publicity’ and treated it as distinct from the right of privacy.¹⁰ The Supreme Court of the United States has addressed the right only once, in “*Zacchini v. Scripps-Howard Broadcasting Co.*,” where a television station had broadcast a performer’s entire human-cannonball act. The Court held that the First Amendment did not license the broadcast, because the right protects the performer’s economic stake in what he has built.¹¹

Two Ninth Circuit decisions bear on the present debate because they concern voice. In *Midler v. Ford Motor Co.*, an advertiser hired a sound-alike after the singer declined to appear in a commercial, and the court held that “deliberately imitating a distinctive voice to sell a product was

7 “Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*,” 4 HARV. L. REV. 193, 193 (1890).

8 William L. Prosser, *Privacy*, 48 CALIF. L. REV. 383, 389 (1960).

9 *Id.* at 406.

10 *Haelan Lab’ys, Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866, 868 (2d Cir. 1953).

11 “*Zacchini v. Scripps-Howard Broad. Co.*,” 433 U.S. 562, 575–76 (1977). ”

actionable.”¹² *Waits v. Frito-Lay, Inc.* reached a comparable result for a singer with a famously gravelly voice.¹³ Neither case involved a machine, but the reasoning travels easily to voice-cloning tools.

The limit came from the California Supreme Court. In “*Comedy III Productions, Inc. v. Gary Saderup, Inc.*,” the court asked whether a work adds significant creative elements so as to become something more than a mere likeness of a celebrity; if it does, the First Amendment protects it.¹⁴

The point of this history is structural. American law never treated ‘personality’ as one right. It separated a family of privacy wrongs, aimed at dignity and feeling, from a publicity right, aimed at the commercial value of identity, and it built a speech-based limit specifically for the second. Indian courts have drawn freely on these authorities, but they have taken the results without taking the separation. The block of clay is what remains.

Indian Foundations: Two Streams That Have Not Met

No Indian statute speaks of personality rights. The nearest legislative anchors are partial. “The Copyright Act, 1957” gives performers rights and moral rights in their performances under sections 38 to 38B,¹⁵ and “the Trade Marks Act, 1999” expressly preserves the common-law action for passing off in section 27(2).¹⁶ Neither speaks of persona as such. The doctrine has therefore come from two judicial streams, and they have not yet been made to face each other.

The first stream is constitutional. In *R. Rajagopal v. State of Tamil Nadu*, the Supreme Court read a right to privacy into Article 21 while deciding whether a prisoner’s autobiography could be published. It recognised that the right yields where matters are already in the public record and does not shield the official conduct of public servants.¹⁷ The right acquired its present weight in *Justice K.S. Puttaswamy (Retd.) v. Union of India*, where nine judges held privacy to be a fundamental right tied to dignity, autonomy and informational self-determination, and where the plurality required that any State interference satisfy legality, a legitimate aim and proportionality.¹⁸

12 *Midler v. Ford Motor Co.*, 849 F.2d 460, 463–64 (9th Cir. 1988).

13 *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093 (9th Cir. 1992).

14 *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 808 (Cal. 2001).

15 The Copyright Act, 1957, No. 14 of 1957, Sec. 38–38B (India).

16 The Trade Marks Act, 1999, No. 47 of 1999, Sec. 27(2) (India).

17 *R. Rajagopal v. State of Tamil Nadu*, (1994) 6 S.C.C. 632 (India).

18 “*Justice K.S. Puttaswamy (Retd.) v. Union of India*, (2017) 10 S.C.C. 1 (India)”.

The second stream is commercial and grew out of trade-mark logic. In “*ICC Development (International) Ltd. v. Arvee Enterprises*,” the Delhi High Court separated “the right of publicity from the right of privacy and located it in the individual’s identity rather than in the event that made the individual famous.”¹⁹ *Titan Industries Ltd. v. Ramkumar Jewellers* granted relief where a jeweller had copied the plaintiff’s hoardings featuring two well-known actors, and spoke of a celebrity’s right to control the commercial use of identity.²⁰ *D.M. Entertainment Pvt. Ltd. v. Baby Gift House* gave relief to a singer whose name and likeness had been put on dolls without his consent,²¹ and the Madras High Court in *Shivaji Rao Gaikwad v. Varsha Productions* restrained a film whose title evoked the actor Rajinikanth, treating identifiability rather than deception as the touchstone.²²

This stream has boundaries too. In “*Digital Collectibles Pte Ltd. v. Galactus Funware Technology Pvt. Ltd.*,” the Delhi High Court refused, at the interim stage, to treat cricketers’ publicly available names and performance data, as used on a fantasy-sports platform, as something a claimant could monopolise, and it tied the publicity right to the limits of Article 19(1)(a).²³

From 2022 the two streams were being used together, usually without comment. *Amitabh Bachchan v. Rajat Nagi* restrained fraudulent lottery schemes that traded on the actor’s name and voice.²⁴ *Anil Kapoor v. Simply Life India* extended protection to name, likeness and voice against AI and face-morphing tools.²⁵ The orders for Jackie Shroff in Delhi, reaching merchandise, distorted videos and an unlicensed AI chatbot, and for Arijit Singh in Bombay, reaching AI tools that imitated his voice, took the same

19 *ICC Dev. (Int’l) Ltd. v. Arvee Enters.*, (2003) 26 P.T.C. 245 (Del.) (India).

20 *Titan Indus. Ltd. v. Ramkumar Jewellers*, 2012 S.C.C. OnLine Del 2382, (2012) 50 P.T.C. 486 (India).

21 *D.M. Ent. Pvt.. Ltd. v. Baby Gift House*, CS(OS) 893/2002 (Del. H.C. Apr. 29, 2010) (India).

22 *Shivaji Rao Gaikwad v. Varsha Prods.*, 2015 S.C.C. OnLine Mad 158 (India).

23 *Digital Collectibles Pte Ltd. v. Galactus Funware Tech. Pvt. Ltd.*, CS(COMM) 108/2023, 2023: DHC:2796 (Del. H.C. Apr. 26, 2023) (India) (refusing interim injunction), *appeal disposed of as infructuous*, FAO(OS)(COMM) 95/2023 (Del. H.C. Apr. 15, 2024) (India).

24 *Amitabh Bachchan v. Rajat Nagi*, 2022 S.C.C. OnLine Del 4110, CS(COMM) 819/2022 (Del. H.C. Nov. 25, 2022) (India).

25 *Anil Kapoor v. Simply Life India*, CS(COMM) 652/2023 (Del. H.C. Sept. 20, 2023) (India).

course.²⁶ Their shared feature is procedural: relief ran against unidentified defendants, the so-called *Ashok Kumar* orders, which allow the plaintiff to act against fresh infringers without instituting a new suit.²⁷

The constitutional stream also carries a doctrinal wrinkle. Article 21 is ordinarily invoked against the State, whereas almost every personality suit is between private parties or against platforms. Courts have bridged the gap by treating the constitutional value as informing the common-law remedies of injunction and passing off, but they have seldom said so in terms. That silence matters, because it leaves open what standard of scrutiny governs an injunction sought by one private party against another's speech.

One decision suggests that courts have already sensed the difference between the streams. In *Krishna Kishore Singh v. Sarla A. Saraogi*, the Delhi High Court held that personality and privacy-based claims do not survive the death of the person concerned, and it declined to restrain a film about the late actor Sushant Singh Rajput.²⁸ A property right would ordinarily pass to heirs. A right so bound to the person that it expires with them is behaving like a dignitarian one.

2026: When The Block Gets Heavy

The pace of this year has strained the arrangement. The orders concern very different injuries, and it helps to set several of them side by side.

Consider Shashi Tharoor. In May 2026 Justice Mini Pushkarna directed X to remove a deepfake that showed the Member of Parliament praising Pakistan's diplomacy, asked Meta to keep certain Instagram reels inaccessible, and restrained the use of his name, likeness, voice and manner of speaking to generate synthetic media.²⁹ Nothing in the reported

26 *Jaikishan Kakubhai Saraf v. Peppy Store*, CS(COMM) 389/2024, 2024:DHC:4046 (Del. H.C. May 15, 2024) (India); *Arijit Singh v. Codible Ventures LLP*, Interim Application (L) No. 23560 of 2024 in Com. IPR Suit (L) No. 23443 of 2024 (Bom. H.C. July 26, 2024) (India).

27 "AI, Deepfakes, and Personality Rights in India: What Courts Are Doing Without a Statute", CANDOUR LEGAL (July 9, 2026), <https://candourlegal.com/ai-deepfakes-personality-rights-india-courts-2026/>.

28 *Krishna Kishore Singh v. Sarla A. Saraogi*, CS(COMM) 187/2021, 2023: DHC:4631 (Del. H.C. July 11, 2023) (India).

29 *Shashi Tharoor v. Ashok Kumar*, CS(OS) 414/2026 (Del. H.C. May 8, 2026) (India); SEE "Delhi High Court Orders Takedown of AI Deepfakes Misappropriating Shashi Tharoor's Personality Rights," Live Law BIZ (May 9, 2026), <https://www.livelawbiz.com/personality-rights/delhi-high-court-grants-shashi-tharoor-interim-relief-against-ai-deepfakes-misappropriating-his-personality-rights-533512>.

facts involves merchandise or endorsement. The injury was to reputation and to the integrity of political debate, and the videos circulated while he was campaigning for the Kerala Legislative Assembly elections.³⁰ This is not a claim about the commercial value of a persona at all.

Contrast the interim order for the former cricketer Yuvraj Singh, passed by Justice Jyoti Singh. It covered AI-generated posts and deepfake videos, but also unauthorised merchandise, which the court found to be passing off. The judge observed that violators needed to be dealt with ‘a heavy hand’.³¹ The one order thus carries a dignitarian limb, a reputational limb and a proprietary limb, and does not say which supports which.

The refusals are as instructive as the grants. In April 2026, in a dispute involving Top rankers Edtech and the name and images of the CLAT 2026 topper, the Delhi High Court held that a single academic achievement does not confer personality rights, while restraining the use on defamation and trade-mark grounds.³² In May it declined a blanket takedown in Raghav Chadha’s suit, holding criticism of his political decisions to be protected speech while ordering removal of certain obscene content.³³ In the suit of the actor Meenakshi Chaudhary, it restrained sexually explicit content but left the commercial-exploitation claim open until she could show that someone was monetising her persona.³⁴ In the Kapoor sisters’ suits it ordered removal of specified obscene and AI-generated content but refused Janhvi Kapoor’s request for a blanket takedown of thousands of web addresses.³⁵ In the suit of the educator Alakh Pandey it distinguished legitimate parody from commercial exploitation.³⁶

Read together, the refusals follow a pattern. Where the complaint is sexually explicit synthetic content, relief comes readily and without proof of commercial harm. Where the claim is commercial, courts ask for

30 *Delhi High Court Protects Shashi Tharoor’s Personality Rights Against AI Deepfake Videos*, DAILY PIONEER (May 10, 2026), <https://dailypioneer.com/news/slug-lite/delhi-hc-protects-shashi-tharoors-personality-rights?year=2026>.

31 Nupur Thapliyal, *Delhi High Court Protects Cricketer Yuvraj Singh’s Personality Rights Against AI Misuse, Orders Take Down of Deepfakes*, Live Law (Aug. 1, 2026), <https://www.livelaw.in/high-court/delhi-high-court/delhi-high-court-protects-cricketer-yuvraj-singhs-personality-rights-against-ai-misuse-orders-take-down-of-deepfakes-543872> (citing 2026 Live Law (Del) 715).

32 *Supra* note 1 (tracker entry 18).

33 *Id.* (tracker entry 22).

34 *Id.* (tracker entry 36).

35 *Id.* (tracker entry 30).

36 *Id.* (tracker entry 29).

evidence. Where the content is criticism, satire or fandom, courts hesitate. The judges are already chipping in the way Justice Bhambhani describes. What is missing is a stated framework, and its absence produces variation between benches and between claimants. It has also produced, in the Kapoor litigation, a schedule of impugned material that the judge himself noted had reached 6,884 web addresses.³⁷

The platform layer has tightened as well. The Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Amendment Rules, 2026, notified as G.S.R. 120(E) on 10 February 2026 and in force from 20 February, introduced a definition of ‘synthetically generated information’ in Rule 2(1)(wa), imposed labelling and provenance duties, and shortened several takedown timelines, in some categories to as little as three hours.³⁸ These rules regulate intermediaries. They do not create a personality right, and the two should not be confused.³⁹ But they change what a court order means in practice. When compliance windows are counted in hours, an injunction drawn without precision becomes a much blunter instrument than its author intended.

Generative AI is the reason this problem has become urgent. Harming someone's image used to take effort. A doctored photograph needed some skill, and a false endorsement needed an actual advertisement. Voice cloning and face-swapping take that effort away. A single person can now make thousands of convincing fakes in an afternoon, and the same source photographs can become a fake endorsement, a pornographic image or a made-up political statement. These harm three different interests: commercial value, dignity and reputation. The tool treats them alike, so the law cannot. Chatbots that speak in a celebrity's voice are a harder case. Users usually know they are speaking to a bot, so nothing is false, and the content may not be degrading either. Even so, the chatbot can draw off the commercial value of the person's name and voice. The suits by Shilpa Shetty and Allu Arjun, both reported as involving AI chatbots, fall in this space and are best read as proprietary claims.⁴⁰

37 *Supra* note 1.

38 “The Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Amendment Rules, 2026, G.S.R. 120(E), Gazette of India,” Feb. 10, 2026 (India); *SEE IT Amendment Rules India*, GLOBAL LAW EXPERTS (Aug. 6, 2026), <https://globallawexperts.com/it-amendment-rules-india/>.

39 *SEE AI, Deepfakes, and Personality Rights in India*, *Supra* note 27 (describing the amendment as a platform-governance measure rather than a personality-rights remedy).

40 *Supra* note 1 (tracker entries 17, 19).

Three Interests Under One Name

A. The Dignitarian Interest

The first interest is the right of a person not to be falsely, degradingly or sexually depicted. Its constitutional home is Article 21 as read in *Rajagopal and Puttaswamy*. Its natural claimant is anyone, celebrity or not, because dignity does not depend on fame. Its typical harm is the pornographic deepfake or the impersonating account. Because the injury is to the person, the claimant will not have to prove recognizability in a market, commercial use by the defendant, or loss of income. The proof needed is that the content is synthetic or false and that it depicts the claimant. The remedy is prompt takedown and, where the platform can supply it, discloses of the uploader's identity. This is the strand on which the courts are most straight forward: relief against sexually explicit synthetic content has been granted consistently, including in suits where every other part of the claim was contested.⁴¹ It is also the strand that *Krishna Kishore Singh* implicitly recognises when it treats the right as extinguished by death.

B. The Proprietary Interest

The second interest is in the commercial value of a persona, and it is the true descendant of *Haelan, Titan and Gaikwad*. Here the claimant's identity is an asset. Recognisability matters because it is what gives the persona value and what makes a defendant's use a taking. The claimant should be able to show that the persona has goodwill and that the defendant has exploited, or is about to exploit, it: merchandise, endorsements, chatbots trading on a name, cloned voices used to sell. The remedies are those of property and passing off, namely injunction, damages and an account of profits, and the claim is naturally licensable and, arguably, transmissible. This explains why Justice Bhambhani could say in the Chaudhary matter that the claimant must show someone was making money, and why the Top rankers ruling found no personality right in a single academic success.⁴² The proprietary interest also has internal limits. *Digital Collectibles* shows that facts already in the public domain cannot be fenced off by calling them persona.

C. The Reputational Interest

The third interest is in not being falsely attributed statements or conduct. The Tharoor deepfake is the paradigm, and so is the August 2026 order of the Bombay High Court directing takedown of AI-generated videos falsely linking the Union Minister Nitin Gadkari to the E20 ethanol-blending

⁴¹ *Supra* note 1.

⁴² *Id.* (tracker entries 18, 36).

policy.⁴³ These cases sound in defamation and misinformation. The harm is to truth and to reputation, and the useful questions are falsity, publication and injury, not celebrity or commercial value. The constitutional position is different again, because defamation is an enumerated ground in Article 19(2) and a claim that borrows the label of personality rights can quietly escape the defences of truth, fair comment and public good that a defamation claim must meet. Justice Bhambhani put his finger on the risk when he asked in the *Aaradhya Bachchan* matter whether courts could treat fake news and defamation as intellectual-property violations.⁴⁴

D. Why the Separation Matters

The three interests overlap. A sexually explicit deepfake of a film star offends dignity and also erodes her commercial persona. The point of the taxonomy is not to force each case into one box but to require that each limb of an injunction be tied to the interest that supports it. That discipline has four practical consequences. It tells the claimant what to plead and prove. It tells the court what standard of interim proof to apply. It tells the parties whether the remedy is takedown, damages or correction. And it tells everyone which free-speech limit is engaged. Amicus Gautam Bhatia's submission that the analysis 'depends on the claim', uniform where dignity, privacy or defamation is at stake and sensitive to recognisability where the claim is commercial, is this proposition in compressed form.⁴⁵

The framework also answers a question the judge put to the amici at the outset: whether celebrities, influencers and a senior advocate can be governed by the same rules.⁴⁶ On this view the answer is partly yes and partly no. The dignitarian and reputational interests are common to all of them, and a senior advocate whose face is placed in a fabricated video is as entitled to protection as a film star. The proprietary interest is not common, because it depends on a persona that has commercial value and is being commercially used. A claimant who cannot show that value has not lost anything; she has simply brought the wrong claim, and should be directed to the dignitarian or reputational route, where the threshold is lower and the remedy, in a proper case, equally swift.

Speech, Satire and the Fan

Personality claims are, by design, claims to suppress expression. That places them squarely within Article 19(1)(a), and any order restraining speech must fit within the grounds in Article 19(2). *Shreya Singhal v. Union of*

⁴³ *Supra* note 1 (tracker entry 28).

⁴⁴ *Id.*

⁴⁵ *Supra* note 1.

⁴⁶ *Id.*

India is the reminder that vague or overbroad restrictions on speech cannot be saved by good intentions.⁴⁷ Puttaswamy's three-part test of legality, legitimate aim and proportionality supplies the working method, because an injunction that limits expression to protect privacy or reputation is a State interference in exactly the sense that test contemplates.

Proportionality is about whether a smaller order would have done the job. Here it would have. A court can schedule the URLs a plaintiff has actually proved and let the plaintiff come back when new content turns up. Ordering thousands of addresses down in one go, many of them fan pages, skips that step altogether. That is why the Delhi High Court's reluctant to do so in the Kapoor suits seems less like timidity and more like a sound sense of proportionality. The judge's own question makes the point: if the fan accounts go, so do the fans.⁴⁸ Someone posting admiration for an actor is simply speaking, and nothing of value is being taken from anyone. A fan page selling unlicensed T-shirts is a different matter, and there the proprietary interest, which depends on actual exploitation, is the right tool.

Satire is harder. Comedy III asks whether the defendant has made something new out of the likeness, but we cannot simply import that test into our law. The American right of publicity is a property right, and Article 19(2) has no "transformative use" exception to hang it on. Still, the thinking behind the test is useful. Parody and commentary do not exploit a persona commercially, so the proprietary interest never comes into play. They may still engage the reputational interest if they assert false facts, or the dignitarian interest if they become degrading. The line the Delhi High Court drew between parody and commercial exploitation in the Pandey matter is a reasonable place to start.

Political speech it calls for more care. Several of this year's matter were filed by politicians, and Rajagopal itself holds that public officials cannot use privacy to avoid scrutiny of their official conduct. A deepfake that puts invented words in a politician's mouth ought to be restrained. Parodying a politician's public record, or simply criticising their decisions, ought not to be, and the Chadha ruling gets this right. Personality rights should not turn into a tool for the more powerful person to tidy up the internet.

Procedure: John Doe Orders and the Duty of Specificity

The Ashok Kumar order exists for a good reason. Deepfakes tend to be posted by many anonymous users across several platforms at once, so a plaintiff who had to name every defendant first would always be a step behind.⁴⁹

47 Shreya Singhal v. Union of India, (2015) 5 S.C.C. 1 (India).

48 *Supra* note 1.

49 *AI, Deepfakes, and Personality Rights in India*, *Supra* note 27.

But the order carries real costs. It is passed without hearing the other side, it binds people who never had a chance to speak, and the Kapoor schedule shows how quickly it can swell. Justice Bhambhani himself observed that something begun in good faith and on a small scale had got out of hand.⁵⁰

Until Parliament steps in, courts can keep these orders in check without giving them up. I would suggest five modest steps. First, the plaint and the order should state which interest supports each part of the relief. Second, the level of interim proof should follow the interest. For dignity, it is enough that the harm looks genuine and the claimant is identifiable. For the commercial interest, the plaintiffs should show goodwill and real or imminent exploitation, which is what the DHC appeared to expect when it held back the cricketer Abhishek Sharma's plea for want of evidence.⁵¹ For reputation, the plaintiff should point to the specific false statement. Third, the schedule of content should list particular URLs, and anything new should be added by affidavit with liberty to apply, not automatically. Fourth, any order that keeps operating over time should carry a review date. Fifth, uploaders whose content is taken down should be told about it and given a way to challenge it.

None of this is meant to make relief harder for genuine victims. Sexual deepfakes are the clearest case for immediate, broad, ex-parte relief, and tiering actually helps here, because it lets the court explain why the order is broad. The real risks sit elsewhere, in the proprietary and reputational limbs, where over-broad orders are most likely to suppress lawful speech. Costs deserve attention too. Suppose a claimant obtains a sweeping order and the schedule is later found to include lawful content. Some way of restoring that content, and perhaps awarding costs, would give claimants a reason to plead narrowly from the start. The appointment of *amici curiae* in the present hearing is a welcome sign that the court is prepared to hear the side of speech before it settles the doctrine, something an ex-parte regime almost never allows.

Legislative models offer partial guidance. Tennessee's ELVIS Act of 2024 extended its statutory right of publicity to voice and to the makers of tools designed to clone it.⁵² The federal NO FAKES Act of 2026, which would create a property-style right against unauthorised digital replicas backed by a notice-and-takedown process, was reported out of the Senate Judiciary Committee in June 2026 but had not been enacted at the time

50 *Supra* note 1.

51 *Supra* note 1.

52 Ensuring Likeness Voice and Image Security (ELVIS) Act of 2024, Tenn. Code Ann. Sec. 47-25-1101 *et seq.* (2024).

of writing.⁵³ Both are, in the vocabulary of this article, proprietary instruments. They say little about the dignity of an ordinary person whose face has been placed in pornography. India's Digital Personal Data Protection Act, 2023 addresses the processing of personal data and could in principle support that interest, but section 39 ousts the jurisdiction of civil courts over matters the Data Protection Board is empowered to decide, so it is an unlikely vehicle for urgent interim relief.⁵⁴ A future Indian statute would do better to define the three interests separately, attach different thresholds and remedies to each, and write the speech exceptions into the text rather than leave them to interim discretion.

Conclusion

Justice Bhambhani's image of a sculptor working on an unshaped block is a generous account of what courts are doing. It is also a warning. Sculpting in public, one interim order at a time, is slow and inconsistent, and the material being removed is other people's speech. The 2026 orders show a judiciary that already senses where the cuts should fall: dignity is protected readily, commercial claims need proof, criticism and satire are given room. What remains to be done is to say so openly.

This article has stated that the way to do it is to stop treating 'personality rights' as a single right. Dignity, commercial persona and reputational are different interests, resting on different constitutional footings and calling for different proofs, remedies and limits. Naming them does not weaken the protection available to a person whose face has been stolen; it makes that protection easier to defend. It also makes the protection harder to stretch over the fan, the satirist and the critic. The hearing that began on 30 September 2026 will not settle every question. If the court adopts even part of this structure, the figure that emerges from the clay may at least be recognisable.

53 "NO FAKES Act of 2026, S. 4591, 119th Cong. (2026) (as reported by S. Comm. on the Judiciary, June 24, 2026); SEE ALSO *The Next Music Asset: How the NO FAKES Act Could Reshape Music Licensing, Investment and Commercialization in the AI Era*, PAUL HASTINGS LLP (July 7, 2026)," <https://www.paulhastings.com/insights/client-alerts/the-next-music-asset-how-the-no-fakes-act-could-reshape-music-licensing-investment-and-commercialization-in-the-ai-era>.

54 The Digital Personal Data Protection Act, 2023, No. 22 of 2023, Sec. 39 (India).

FROM RECOGNITION TO REALIZATION: A CRITICAL ANALYSIS OF THE RIGHT TO HEALTH OF TRANSGENDER PERSONS IN INDIA

Rimjhim Jain*

Abstract

Indian constitutional and human rights law have evolved significantly with the recognition of transgender persons as rights-bearing individuals. However, the formal recognition of equality, dignity and gender identity does not necessarily ensure meaningful access to healthcare. This paper critically examines the legal framework of the right to health of transgender people in India, with an emphasis on the disconnect between legal recognition and realisation. It analyses constitutional principles, judicial developments, the Transgender Persons (Protection of Rights) Act, 2019, the Rules, 2020, and relevant governmental policies and schemes. The study identifies persistent barriers, including stigma, discrimination, inadequate sensitisation, limited access to gender-affirming healthcare, economic constraints and fragmented implementation. It argues for a coordinated, rights-based framework ensuring accessible, enforceable and equitable healthcare entitlements for transgender persons.

Keywords: Transgender Persons; Right to Health; Gender-Affirming Healthcare; Healthcare Access; Rights-Based Approach.

Introduction

The attainment of human dignity and the enjoyment of the entire spectrum of human rights depend on good health. The right to health includes the availability, accessibility, acceptability, and quality of a health care system as well as the underlying determinants of health, such as access to safe drinking water, sanitation, adequate nutrition, housing, healthy working conditions, and health-related information.¹ Recognizing health as an indispensable component of human development, the World Health Organization (WHO) has observed that an effective health system, founded upon the right to health, constitutes a core social institution essential for

* Assistant Professor, Lloyd Law College.

1 Alicia Ely Yamin, *Power, Suffering and the Struggle for Dignity: Human Rights Frameworks for Health and Why They Matter* (Univ. of Pa. Press 2016).

ensuring social justice and equality.² There is international human rights law that enters into the recognition of the right to health as a universal human right. The recognition of the highest attainable standard of physical and mental health has a solid normative basis in the Universal Declaration of Human Rights, 1948 (UDHR), Art. 25 and in the International Covenant on Economic, Social and Cultural Rights, 1966 (ICESCR), Art. 12. Through the General Comment No. 14,³ the normative content of this right has been further developed and the AAAQ framework, availability, accessibility, acceptability and quality are expressed.

Although international law guarantees the right to health, its practical realization remains unequal for socially marginalized communities. Among the most vulnerable groups are transgender persons, who continue to experience systemic discrimination in accessing healthcare services. Social exclusion, stigma, inadequate legal recognition, economic marginalization, and the lack of sensitization among healthcare professionals significantly restrict their ability to obtain timely and appropriate medical care. The barriers extend beyond general healthcare and include denial of gender-affirming healthcare, mental health support, reproductive healthcare, HIV prevention and treatment services, and access to health insurance.⁴ Consequently, barriers to healthcare faced by transgender persons raise concerns not merely of public health but also of equality, dignity, privacy and non-discrimination.⁵ The Indian Constitution does not list the right to health as a fundamental right. Despite this, the judicial interpretation has progressively broadened the definition of art. 21 to incorporate the right to health as a fundamental component of the right to life and individual freedom.⁶ In *Parmanand Katara v. Union of India*,⁷ *Consumer Education & Research Centre v. Union of India*,⁸ *Paschim Banga Khet Mazdoor Samity v. State*

2 World Health Organization, Human Rights and Health, Fact Sheet No. 323 (2023), <https://www.who.int/news-room/fact-sheets/detail/human-rights-and-health> (last visited Aug. 11, 2026).

3 Comm. on Econ., Soc. & Cultural Rights, General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12), U.N. Doc. E/C.12/2000/4 (2000).

4 World Health Organization, Transgender People and HIV (2015); United Nations Development Programme, Discussion Paper: Transgender Health and Human Rights (2013).

5 Nat'l Legal Servs. Auth. v. Union of India, (2014) 5 SCC 438 (India); Justice K.S. Puttaswamy (Retd.) v. Union of India, (2017) 10 SCC 1 (India).

6 *Bandhua Mukti Morcha v. Union of India*, (1984) 3 SCC 161 (India); *Paschim Banga Khet Mazdoor Samity v. State of West Bengal*, (1996) 4 SCC 37 (India).

7 *Parmanand Katara v. Union of India*, (1989) 4 SCC 286 (India).

8 *Consumer Education & Research Centre v. Union of India*, (1995) 3 SCC 42 (India).

of West Bengal,⁹ and subsequent decisions, the Supreme Court affirmed that the State bears a constitutional obligation to provide timely and adequate healthcare. In addition to Art. 21, the Directive Principles of State Policy (DPSP) further reinforce the constitutional commitment to public health, particularly through Arts. 38, 39(e), 41 and 47.¹⁰

The constitutional recognition of transgender rights received a significant impetus through the judgment in *National Legal Services Authority v. Union of India*, wherein the Supreme Court recognized transgender persons as a constitutionally protected third gender and affirmed that gender identity is an integral part of individual dignity, equality and autonomy.¹¹ The Court directed the Union and State Governments to take affirmative measures to ensure that transgender persons have equal access to education, employment and healthcare. Despite these legislative and judicial advances, transgender persons continue to experience significant health inequalities, including limited access to healthcare facilities, insensitive treatment by healthcare providers, and stigma surrounding HIV and mental health issues. These vulnerabilities are often associated with structural discrimination, poverty, family rejection and homelessness.¹² While the healthcare needs of transgender people are included in the statute and legislation, access to gender-affirming healthcare remains one of the largest gaps between statutory recognition and healthcare delivery, as healthcare providers often lack the skills, knowledge, and/or experience necessary to provide gender-affirming care. Although there is statutory recognition and legislation for transgender healthcare needs, access to gender-affirming healthcare remains one of the largest gaps between statutory recognition and healthcare delivery, with the lack of skills, knowledge, and/or experience within the healthcare provider to offer gender-affirming care.¹³ However, healthcare inclusion reforms have been stunted by several implementation issues, including institutional capacity, lack of sensitization of healthcare providers and

9 *Paschim Banga Khet Mazdoor Samity v. State of West Bengal*, (1996) 4 SCC 37 (India).

10 INDIA CONST. arts. 38, 39(e), 41, 47.

11 *Nat'l Legal Servs. Auth. v. Union of India*, (2014) 5 SCC 438 (India).

12 National AIDS Control Organisation, India HIV Estimates 2023: Technical Report (Ministry of Health & Family Welfare, Gov't of India 2024).

13 Dipika Jain, Right to Health and Gender-Affirmative Procedure in the Transgender Persons Act 2019 in India, 55 *Indian J. Plastic Surgery* 205 (2022); World Professional Association for Transgender Health, Standards of Care for the Health of Transgender and Gender Diverse People (Version 8 2022).

lack of uniformity in policy implementation.¹⁴ (Ministry of Social Justice & Empowerment, Gov't of India, The Transgender Persons (Protection of Rights) Rules, 2020; Ministry of Social Justice & Empowerment, Gov't of India, Support for Marginalized Individuals for Livelihood and Enterprise (SMILE) Scheme; Ministry of Social Justice & Empowerment, Gov't of India, National Portal for Transgender Persons).

Existing scholarship has largely focused either on the recognition of transgender identity or on the broader right to health in India. Limited attention has been devoted to examining transgender healthcare rights through an integrated constitutional, statutory and human rights perspective. This study seeks to address this gap by critically analyzing whether the existing legal and policy framework adequately secures the right to health of transgender persons and identifying the reforms necessary for its meaningful realization. There has been little focus on a detailed study of transgender health care rights from a whole of constitution, statute and human rights lens. The aim of this study is to address this gap, critically analysing whether the current legal and policy landscape provides a basis for ensuring the right to health for transgender people and what changes in the law and policy are needed to make this a reality. In this context, this study critically examines the legal framework governing the right to health of transgender persons in India. It examines legal provisions and protections, judicial decisions and international human rights frameworks to determine if the current law sufficiently protects the health rights of transgender people. It further identifies the legal, institutional and policy constraints that impede the effective realization of these rights and proposes reforms aimed at developing a more inclusive, rights-based and gender-sensitive healthcare framework for transgender persons in India.

Challenges in the Realization of the Right to Health of Transgender Persons in India

The NALSA judgment, the Transgender Persons (Protection of Rights) Act, 2019, and healthcare-related welfare measures have contributed to an important legal framework. But the existence of rights and schemes is not sufficient for their effective enjoyment. Even though transgender people are officially recognised, a significant gap remains between formal recognition and effective access to healthcare services. In addition,

14 Ministry of Social Justice & Empowerment, Gov't of India, The Transgender Persons (Protection of Rights) Rules, 2020; Ministry of Social Justice & Empowerment, Gov't of India, Support for Marginalized Individuals for Livelihood and Enterprise (SMILE) Scheme; Ministry of Social Justice & Empowerment, Gov't of India, National Portal for Transgender Persons.

although there have been some positive legal changes, NHRC has also recognized that transgender individuals are still discriminated against and denied access to healthcare services.

• *Discrimination and Stigma within Healthcare Institutions*

Stigma and discrimination experienced by transgender persons within healthcare institutions remain among the most significant barriers to healthcare access. This can lead to insensitive behaviour, the denial of services, inappropriate questioning, or a lack of respect for their gender identity on the part of transgender individuals, which may discourage individuals from seeking healthcare, delay treatment or result in avoidance of healthcare altogether.¹⁵ These experiences may make transgender people less likely to approach health care institutions or may cause them to delay their treatment or even avoid the health care altogether because of the lack of sensitivity or respect for their gender identity. Discrimination in healthcare is especially paramount because it impacts not just on access to gender affirming care, but on regular healthcare services as well.

It is not just a matter of deliberate discrimination. Healthcare systems have traditionally been structured around a binary understanding of gender, which may create challenges in registration, admission, allocation of wards, and provision of gender-responsive services in healthcare. The absence of inclusive institutional practices can therefore make healthcare inaccessible even where treatment is not expressly denied. National and international health guidance increasingly recognizes that stigma, discrimination and inappropriate treatment within healthcare settings can adversely affect the willingness of transgender and gender-diverse persons to seek medical care.¹⁶

• *Lack of Sensitization and Specialized Healthcare Services*

A further challenge is the inadequate availability of healthcare professionals trained to address the specific needs of transgender persons. Gender-affirming healthcare may require access to appropriately trained professionals, including endocrinologists, surgeons, mental-

15 National Human Rights Commission, Study on Human Rights of Transgender as a Third Gender (2018).

16 World Health Organization, Improving LGBTIQ+ Health and Well-Being with Consideration for Sexual Orientation, Gender Identity, Gender Expression and Sex Characteristics; National AIDS Control Organisation, Operational Guidelines for Comprehensive HIV and STI Services for Hijras and Transgender People.

health professionals and other specialists. However, such services are not uniformly available across the country, particularly outside major urban centres.¹⁷

The lack of professional sensitization also affects the quality of general healthcare. Medical practitioners may have limited understanding of gender identity or of the healthcare requirements of transgender persons. This can result in inappropriate assumptions, unnecessary medicalization or a failure to provide care in a manner consistent with the patient's identity and dignity. The need for healthcare-worker education and training has also been recognized internationally as an important component of gender-inclusive healthcare.¹⁸ An important recent development is the issuance of Standard Operating Procedures for the medical treatment of transgender persons by the Directorate General of Health Services in 2024. Such procedures are steps towards the standardization of healthcare. The presence of guidelines, however, does not guarantee uniformity in their implementation, especially in the availability of trained health care personnel and health care facilities.¹⁹

• Limited Access to Gender-Affirming Healthcare

Another major obstacle to gender affirming care is access. Depending upon an individual's needs and choices, such healthcare may include counselling, hormone therapy, surgical procedures and post-operative care. But there is access to such services remains uneven in terms of geographical availability and affordability.

It is necessary for the appropriate Government to take measures to provide healthcare facilities including facilities in relation to sexual reassignment surgery and hormonal therapy as required by the Act, 2019. But avilment of such services remains contingent on the availability of trained professionals and proper healthcare facilities in various parts of the country.²⁰ Although healthcare coverage under schemes such as Ayushman Bharat TG Plus represents an important development, insurance coverage alone does not guarantee effective access where empanelled facilities

17 World Professional Association for Transgender Health, Standards of Care for the Health of Transgender and Gender Diverse People (Version 8 2022).

18 World Health Organization, Update on the Guideline Development Group on the Health of Trans and Gender Diverse People (2024).

19 Directorate General of Health Services, Ministry of Health & Family Welfare, Gov't of India, Standard Operating Procedures for Medical Treatment of Transgender Persons (2024).

20 Transgender Persons (Protection of Rights) Act, 2019, Sec- 15 (India); Jain, *supra* note 15.

or trained healthcare providers are unavailable. Financial support and physical availability of services must therefore operate together for the right to healthcare to be meaningfully realized.²¹

• *Economic and Social Barriers to Healthcare*

Healthcare exclusion can't be discussed without taking into account the social and economic marginalisation that transgendered individuals face. Access to education, employment, housing and family support may be compromised, which can make obtaining health care be a significant barrier.²²

The right to health also encompasses all the factors needed for a healthy life. Lack of stable housing, income and social support then can have indirect, negative impacts on physical and mental health. This illustrates the shortcoming of a one-sided view of hospitals or medical care. The right to health must be realized in a way that links health care to social welfare policies in general.²³

• *Implementation Gaps and Institutional Limitations*

One of the principal challenges is the gap between legal recognition and effective implementation. The Act, 2019 spells out the prohibition on discrimination and mandates the provision of healthcare facilities to the government and the Rules and various welfare schemes provide mechanisms for implementation. These measures, however, are largely dependent upon action at the State and local level. The effectiveness of transgender healthcare rights is thus critically reliant on the capacity and commitment of State Governments and individual health care institutions, as well as central laws and policy measures. Therefore, national legislation and schemes can achieve only a modest impact if there is lack of infrastructure, lack of awareness and weak monitoring mechanisms. The implementation of transgender rights issues continued to be a concern for the Government with issuance of advisories and institutional measures related to the same.²⁴

21 National Human Rights Commission, Study on Human Rights of Transgender as a Third Gender (2018).

22 National Human Rights Commission, Study on Human Rights of Transgender as a Third Gender (2018).

23 General Comment No. 14, *supra* note 3.

24 Ministry of Home Affairs, Gov't of India, Advisory for Ensuring the Welfare of Transgender Persons (June 23, 2026); Ministry of Social Justice & Empowerment, Gov't of India, Welfare of Transgenders (Aug. 7, 2024).

There is also a need for appropriate grievance-redressal mechanisms that can be used to address cases of discrimination and/or denial of access to health services. However, a legal ban on discrimination without the ability to report violations or secure a remedy is of little use for transgender people. Enforcement and accountability mechanisms are also necessary to actualize healthcare rights: substantive rights provisions are not enough.

• Need for a More Comprehensive Healthcare Approach

The current legal and policy landscape is an illustration of a welcome shift from the perception of transgender healthcare as a “charity” or “welfare” concern to one that is a “right” concern. However, the current one is not exactly cohesive. Constitutional rights, statutory provisions, health policies and welfare schemes exist at various institutional and governmental levels. This can lead to challenges in achieving an integrated and coherent approach to transgender health care delivery.

A better structure needs to incorporate non-discrimination, appropriate and accessible health services and effective implementation. Transgender people must have the right to receive general and specialized healthcare services, without stigma or discrimination. This demands the inclusive infrastructure of healthcare and sufficient funding and skilled personnel. The difficulties outlined above highlight that a right to health does not necessarily equate substantive equality. Although India has laid a crucial constitutional and statutory groundwork for the protection of transgender people, many obstacles are still prevailing in the way of them accessing accessible, affordable and appropriate healthcare. The real task will be to turn formal legal recognition into real access to healthcare services. The next chapter critically reviews the weaknesses in the current legal and policy framework and explores the ability of the current system to guarantee the substantive enjoyment of the right to health of transgender people.

Legal Framework Governing the Right to Health of Transgender Persons in India

International Framework

The international human rights framework provides an important normative foundation for examining the healthcare rights of transgender persons. The right to the highest attainable standard of physical and mental health, guaranteed by Art. 25 of the UDHR and Art. 12 of the ICESCR, needs to be seen in the context of equality and non-discrimination. The normative content of the right to health is elaborated on in General Comment No. 14, under the principles of availability, accessibility,

acceptability and quality. These principles, however, are particularly relevant in the context of transgender health service, as they have to do with access to health services, not only in the sense of services being in place, but whether they are available without discrimination and in a way that is respectful of an individual's dignity, gender identity, and personal autonomy. Healthcare services may formally exist, yet remain inaccessible where transgender persons experience stigma, discriminatory treatment, breaches of confidentiality or a lack of appropriately trained healthcare professionals.²⁵

The right to health of transgender persons is therefore closely connected with other human rights, particularly equality, non-discrimination, privacy, dignity and bodily autonomy. The realization of this right requires States not only to ensure the availability of healthcare services but also to ensure that medical decision-making respects informed consent, confidentiality and bodily integrity.²⁶ Although the International Covenant on Civil and Political Rights, 1966 (ICCPR) does not expressly recognize an independent right to health, its guarantees relating to life, freedom from cruel, inhuman or degrading treatment and privacy provide an important normative basis for protecting bodily integrity and personal autonomy in healthcare decision-making.²⁷ The Yogyakarta Principles, 2007 offer a helpful interpretative tool for existing human rights principles as they pertain to sexual orientation and gender identity. They state that the right to health should be exercised non-discriminatorily and respecting the dignity, the autonomy and informed consent of the person. The Yogyakarta Principles plus 10 further developed these principles in relation to gender identity, gender expression and bodily autonomy.²⁸ Thus, international human rights standards provide a normative framework based on equality, non-discrimination, accessibility, privacy, dignity and bodily autonomy for examining transgender healthcare rights in India.

25 General Comment No. 14, *supra* note 3; World Health Organization, Transgender People and HIV (2015).

26 General Comment No. 14, *supra* note 3; World Health Organization, Transgender People and HIV (2015).

27 International Covenant on Civil and Political Rights arts. 6, 7, 17 (1966).

28 International Commission of Jurists, The Yogyakarta Principles (2007); International Commission of Jurists, The Yogyakarta Principles Plus 10 (2017).

Constitutional and Judicial Framework in India

The right to health is not a specific fundamental right in the Indian Constitution, but it can be said that the right to health has been recognized through judicial interpretation under Article 21. The constitutional commitment to public health and assistance in time of sickness is also reflected in Articles 41 and 47 of the Directive Principles of State Policy.²⁹

Healthcare has always been acknowledged as an integral part of the right to life by the Supreme Court. In *Parmanand Katara v. Union of India*,³⁰ *Paschim Banga Khet Mazdoor Samity v. State of West Bengal*³¹ and *Consumer Education & Research Centre v. Union of India*,³² the Court affirmed the importance of timely medical assistance and recognized health and medical care as integral to a life with dignity.

For transgender persons, the constitutional protection of health must be read alongside Arts. 14, 15 and 21, which protect equality, non-discrimination, dignity and personal liberty. The Supreme Court in *NALSA* judgment has declared transgender persons as a third gender and has acknowledged that gender identity is an integral part of dignity, autonomy and identity.³³ Significantly, *NALSA* judgment also addressed the healthcare needs of transgender persons and directed the Central and State Governments to take appropriate measures to provide medical care and healthcare facilities. The decision therefore moved beyond formal recognition of transgender identity and acknowledged the State's responsibility to address the practical conditions affecting their ability to live with dignity.³⁴

The principles of autonomy and personal identity were subsequently strengthened in *Justice K.S. Puttaswamy (Retd.) v. Union of India*,³⁵ where the Supreme Court recognized privacy as a fundamental right and emphasized decisional autonomy in matters central to individual identity. Similarly, *Navtej Singh Johar v. Union of India*³⁶ reinforced constitutional

29 INDIA CONST. arts. 21, 41, 47.

30 *Parmanand Katara*, (1989) 4 SCC 286 (India).

31 *Paschim Banga Khet Mazdoor Samity*, (1996) 4 SCC 37 (India).

32 *Consumer Education & Research Centre*, (1995) 3 SCC 42 (India).

33 INDIA CONST., *supra* note 10.

34 *Id.*

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

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

values of dignity, equality and individual autonomy while emphasizing that constitutional rights cannot be denied on the basis of social morality or majoritarian attitudes.

The constitutional and judicial developments outlined here offer a crucial building block for the rights of transgender people in healthcare. However, statutory protection, policies and institutional mechanisms are necessary to enable their effective implementation.

• *Statutory and Policy Framework for Transgender Healthcare*

The Transgender Persons (Protection of Rights) Act, 2019 constitutes the principal statutory framework governing the rights of transgender persons in India. Section 3 prohibits discrimination against transgender people in various respects, such as health services, public facilities and services.³⁷ Section 8 further requires the appropriate Government to take measures for the welfare and protection of transgender persons.

Section 15 is particularly significant from the perspective of healthcare. It requires the appropriate Government to take measures for providing healthcare facilities to transgender persons, including counselling, hormonal therapy, sex reassignment surgery and other health services. The provision also suggests the review of the medical curriculum and research to consider the health care needs of transgender females, and the Government's obligation to create comprehensive insurance schemes for medical expenses.³⁸ The Transgender Persons (Protection of Rights) Rules, 2020 further provide an institutional framework for implementing the rights and welfare measures recognized under the Act.³⁹ The National Health Policy, 2017 emphasizes equity, universal access and the reduction of healthcare inequalities. Although it does not provide a separate framework specifically for transgender persons, its commitment to universal health coverage provides a broader policy basis for addressing the healthcare needs of marginalized communities.⁴⁰ More targeted support is provided through the SMILE scheme, which includes measures for the welfare and rehabilitation of transgender persons and addresses healthcare alongside counselling, education, livelihood and other welfare measures.⁴¹ Transgender-specific healthcare benefits have also been introduced under

37 Transgender Persons (Protection of Rights) Act, 2019, Sec- 3 (India).

38 *Id.* Sec- 8, 15.

39 Transgender Persons (Protection of Rights) Rules, 2020 (India).

40 Ministry of Health & Family Welfare, Gov't of India, National Health Policy, 2017.

41 Ministry of Social Justice & Empowerment, Gov't of India, Support for Marginalised Individuals for Livelihood and Enterprise (SMILE) Scheme Guidelines.

the Ayushman Bharat framework. Pursuant to the 2022 Memorandum of Understanding between the Ministry of Social Justice and Empowerment and the National Health Authority, eligible beneficiaries may access Ayushman Bharat TG Plus benefits, including insurance coverage and specified transition-related healthcare services.⁴²

The National Portal for Transgender Persons further facilitates the issuance of transgender certificates and identity cards and assists in connecting eligible persons with welfare measures and healthcare-related benefits.⁴³ These statutory and policy measures collectively establish the principal framework for the protection and promotion of transgender healthcare rights in India. Their effectiveness, however, depends on the implementation of the appropriate institutional mechanisms.

Critical Analysis of the Existing Legal and Policy Framework

The previous chapters show that India has established a noteworthy constitutional, judicial and legal mechanism to ensure protection of the rights of transgender people, including the right to healthcare. Key developments include the recognition of transgender identity in the NALSA judgment, protection against discrimination under the 2019 Act, and the introduction of healthcare-related schemes. But the value of this framework needs to be measured more than just by the presence of legislative provisions, and rather by the ability to provide, and ultimately access to, healthcare in a substantive and meaningful way. On a critical examination of the recognition and realization of rights, a number of gaps emerge. This chapter's main premise is that despite the gradual progress of the Indian law in recognizing the dignity, equality and healthcare rights of transgender persons, the current structure does not ensure the clarity, accessibility and enforceability of healthcare rights. The principal deficiency lies in the absence of adequately coordinated mechanisms for implementing and enforcing these rights.

• From Formal Recognition to Substantive Equality

The legal framework provides substantial formal recognition to transgender persons. This is built on a foundation of rights, including, constitutional guarantees of equality, dignity, privacy and personal

42 Ministry of Social Justice & Empowerment & National Health Authority, Gov't of India, Memorandum of Understanding on Comprehensive Healthcare for Transgender Persons Under Ayushman Bharat-PM-JAY (2022); Ministry of Social Justice & Empowerment, Gov't of India, Composite Medical Health for Transgender Persons.

43 Ministry of Social Justice & Empowerment, Gov't of India, National Portal for Transgender Persons.

autonomy and the prohibition on discrimination in the 2019 Act. But formal equality doesn't necessarily lead to substantive equality in health care. A framework based solely on non-discrimination may be insufficient where transgender persons face pre-existing disadvantages arising from stigma, social exclusion and economic marginalization. This right to equal access to healthcare should not be limited to the right to be treated equally, but must also mean the right to receive equal care. It must be taken to eradicate the disadvantages faced by transgender individuals through positive measures. The NALSA judgment itself embraced this more expansive outlook, and instructed governments to take affirmative action with regard to the welfare and social inclusion of transgender people.⁴⁴ However, the application of these principles to specific and enforceable entitlements to healthcare is still limited. Although the legal framework establishes a duty on the State to take appropriate measures, it does not explicitly specify the minimum level of medical care that is required for transgender people, or when such care is required, and will become an enforceable entitlement.

Substantive equality, in the context of health care, therefore involves more than merely equal formal access to existing health care institutions, but also positive steps to enable transgender people to have access to health care that is suitable for their needs.

• *Fragmentation of the Legal and Policy Framework*

A major limitation of the current framework is its fragmented nature. Transgender persons' right to health comes from several sources such as Art. 21, equality provisions in the Constitution, judicial rulings, the Act, 2019, the Rules of 2020, and a variety of health and welfare schemes. These initiatives together offer transgender protection, but are not a single, complete system of transgender healthcare protection. This fragmentation can make it difficult to identify institutional responsibility and ensure accountability. The various ministries of the state including the Ministry of Health and Family Welfare, the Ministry of Social Justice and Empowerment, the National Health Authority and the State Governments can perform different roles in relation to transgender healthcare. Multiple ministries and authorities can lead to coordination and accountability gaps between the process of policy making, funding, implementation and provision of health care, if there are no clearly defined mechanisms for coordination and accountability. This disjointed structure is also evident in the way that statutory duties are interpreted into healthcare services. Section 15 of the Act, 2019 mandates the appropriate Government to

44 Indian Constitution., *supra* note 10.

make provision for medical insurance, sex reassignment surgery and hormonal therapy for transgender persons. The availability, accessibility or geographical distribution of such services, however, is not defined by the provision itself.⁴⁵

• **Limited Enforceability of Healthcare Entitlements**

The above mentioned fragmentation has focused mainly on institutional coordination and on the distribution of responsibility. A separate, but related, question is how transgender individuals can enforce certain healthcare rights if they do not have those services or if they are denied them.

Another major issue is the lack of a clearly defined and comprehensive statutory right to healthcare. While the right to health has been added to Art. 21 of the Indian Constitution by different courts, the enforcement of this right may vary from case to case. Likewise, the National Health Policy, 2017 is an important policy framework which does not establish independent enforceable legal entitlements.

This creates a distinction between recognition of a general right and the ability to claim specific healthcare services. A transgender individual might have constitutional rights to be free from discrimination but may experience problems accessing a specific medical service, due to its unavailability, cost or lack of trained professionals. This lack of clear standards regarding access, affordability and quality can thus hinder the practical implementation of the rights to health.⁴⁶ This is especially pertinent in relation to gender affirming medical treatment. Statutory recognition does not necessarily translate into a clearly defined and immediately enforceable entitlement to receive such services at accessible and appropriately equipped healthcare institutions.⁴⁷

• **Welfare-Based Measures and a Rights-Based Approach**

The existing framework combines rights-based recognition with welfare-oriented measures. Some schemes like SMILE and health insurance under Ayushman Bharat TG Plus offer significant support. Welfare schemes usually, however, are implemented in a way that is dependent on eligibility conditions, administrative procedures and governmental implementation. Availability may thus be dependent on registration, documentation and awareness.

45 Transgender Persons (Protection of Rights) Act, No. 40 of 2019, Sec- 15 (India).

46 General Comment No. 14, *supra* note 3.

47 Transgender Persons (Protection of Rights) Act, No. 40 of 2019, Sec- 15 (India).

A welfare-based approach might lead to the way transgender care is seen as a problem of governmental support instead of something that is part of equality, dignity, autonomy and constitutional rights. This distinction is relevant because a rights-based approach places corresponding obligations upon the State and highlights accountability for the denial of rights.

The difficulty is ensuring that the statutory and policy measures are consistent with this rights-based approach, which is reflected in the constitutional framework, especially through the principles of the NALSA judgment.⁴⁸ Healthcare should, therefore, be considered as not only a welfare benefit but an integral part of the right to live a dignified life.

• *Inadequate Institutional Accountability*

The effectiveness of any healthcare framework depends upon mechanisms capable of addressing violations and ensuring institutional accountability. While the 2019 Act bans discrimination and makes provision for welfare measures, transgender people may still encounter issues in relation to challenging discriminatory practices within healthcare institutions. While the Act, 2019 prohibits any discrimination, it also mandates compliance to the rights conferred by the Act, the effectiveness of grievance-redressal mechanisms rely on accessibility, awareness and institutional responsiveness.⁴⁹ The lack of a specific and easily-accessed grievance procedure for a healthcare context may also make it less likely that trans people will report discriminatory behaviour, especially when they may already feel stigmatised or victimised. Having reliable data on the availability of transgender-inclusive health facilities and the use of welfare schemes and cases of discrimination, alongside consistent monitoring, is also crucial to effective accountability. Without this information it is hard to determine if legal and policy commitments are leading to real outcomes.

• *Need for a Coordinated and Inclusive Framework*

The current system's biggest shortcoming is not the lack of legal protection, however, it is the disconnect between recognition, implementation and accountability. While India has come a long way from the previous legal invisibility, the present framework is reliant on piecemeal schemes and uneven institutionalization. A more cohesive strategy would need the coordination of constitutional rights, statutory responsibilities and healthcare policy and service delivery. Such a framework should acknowledge that transgender healthcare is not

48 Indian Constitution., *supra* note 10.

49 Transgender Persons (Protection of Rights) Act, 2019, Sec- 3, 10 (India); Transgender Persons (Protection of Rights) Rules, 2020 (India).

limited to gender affirming procedures, and that healthcare should be seen as a continuum, that includes preventive care, as well as curative, mental, sexual and reproductive healthcare. Having clear minimum standards for transgender-inclusive healthcare can also help ensure consistency between States and institutions. Standards should include professional sensitization, respect for gender identity, informed consent, confidentiality, availability of specialized services, as well as grievance-redressal mechanisms.⁵⁰ So that is a significant shift in the law, but not fully realised in practice. Effective access to constitutional and statutory rights to transgender persons, however, is not just about the recognition of transsexuals but about making this recognition a reality in the form of accessible, affordable and appropriate healthcare. The measures proposed in the next chapter, therefore, are centred on strengthening the current framework, and enabling the right to health of transgender persons to be a substantive and enforceable right rather than merely formal recognition.

Recommendations and Way Forward

This preceding analysis shows that India has established important constitutional, statutory and policy provisions to safeguard the right to health of transgender persons. But the biggest hurdle is yet to convert the formal legalization into effective and accessible healthcare. Current system needs to be more coordinated, more accountable and being implemented to enable transgender people to receive equal treatment in healthcare services. The following steps could contribute to the realization of transgender persons' right to health in India. The following measures may help strengthen the realization of transgender persons' right to health in India.

• *Developing a Comprehensive Transgender Healthcare Framework*

India requires a more coordinated healthcare framework specifically addressing the needs of transgender persons. At present, relevant protections are dispersed across constitutional principles, the Act, 2019, the Rules of 2020, healthcare policies and welfare schemes. A comprehensive framework should clearly identify the responsibilities of the Central and State Governments and establish minimum standards for transgender-inclusive healthcare.

⁵⁰ General Comment No. 14, supra note 3.

Such a framework should also establish a coordinated mechanism for translating constitutional and statutory protections into identifiable healthcare obligations, institutional responsibilities and accessible services.⁵¹

• ***Strengthening Access to Gender-Affirming Healthcare***

The effective realization of gender identity and personal autonomy requires that transgender persons have access to healthcare consistent with their individual needs and choices. Although Section 15 of the Act, 2019 refers to facilities relating to hormonal therapy and sex reassignment surgery, the availability of such services remains dependent upon healthcare infrastructure and trained professionals.⁵²

Public healthcare institutions should therefore progressively develop the capacity to provide appropriate gender-affirming services. Designated government hospitals at the State or regional level should progressively develop trained multidisciplinary teams capable of providing counselling, hormone-related care, surgical services where required and post-treatment support. This would reduce excessive dependence on a limited number of private or urban healthcare institutions.

• ***Sensitization and Training of Healthcare Professionals***

Legal protection cannot be effectively realized where healthcare professionals lack awareness regarding gender identity and transgender-specific healthcare needs. Regular sensitization and professional training should therefore form an essential part of medical education and healthcare administration. Medical and nursing curricula should include appropriate content concerning transgender health, gender identity, non-discrimination, informed consent and respectful communication. Continuing sensitization and professional training should also be provided to practicing healthcare professionals. Clear policies on registration, admission, confidentiality and treatment of transsexuals should be established at the hospital. This would include measures that would reduce institutional discrimination and make health care more inclusive for transgender and gender diverse people, according to standards of care for the health of transgender and gender diverse people, developed by World Professional Association for Transgender Health.⁵³

51 Transgender Persons (Protection of Rights) Act, No. 40 of 2019; Transgender Persons (Protection of Rights) Rules, 2020 (India).

52 Transgender Persons (Protection of Rights) Act, No. 40 of 2019, Sec- 15 (India).

53 World Professional Association for Transgender Health, Standards of Care for the Health of Transgender and Gender Diverse People (Version 8 2022).

• ***Improving Financial and Geographical Accessibility***

Healthcare schemes like Ayushman Bharat TG Plus are an important step in decreasing the financial burden of transgender healthcare. Financial coverage, however, needs to be balanced by proper geographical access. This is because insurance benefits are of little use when empanelled hospitals or trained specialists are not available. The Government should, therefore, gradually increase the number of places in which transgender-inclusive health services are available, especially in smaller cities and areas where transgender people are under-served. States should also regularly check the accessibility of empanelled institutions and specialists. Easy access to information about available services and eligibility to access healthcare schemes should be ensured both online and offline through the Composite Medical Health for Transgender Persons. Information about services offered and eligibility for healthcare schemes should be made easily available online and offline through the Composite Medical Health for Transgender Persons.⁵⁴

• ***Establishing Effective Grievance-Redressal and Accountability Mechanisms***

The remedy must be effective for a right to be meaningful. There is a need for transgender persons to have easy and responsive grievance-redressal processes when they have faced discrimination, denial of treatment and/or violation of their privacy. Healthcare institutions should appoint suitable staff or procedures to handle complaints of discrimination against transgender persons. Mechanisms should be available, confidential and have fast response times. There should also be greater accountability for the systematic gathering of anonymous information on access to healthcare services, availability of specialized healthcare facilities and implementation of government schemes. This would allow policy makers to determine regional deficits and assess if current policy is making a difference.

• ***Moving from Welfare to a Rights-Based Approach***

One of the biggest changes that must be effected is the necessity to always treat transgender healthcare as a human rights problem, and not the welfare problem. Welfare schemes are useful but they might require to be eligible for welfare and have to follow documentation and administrative processes. A rights-based approach, on the other hand, sees access to health care as linked to rights to equality, dignity, privacy and personal autonomy. Future policies and institutional interventions should thus be

54 Ministry of Social Justice & Empowerment, Gov't of India, Composite Medical Health for Transgender Persons.

more than just about 'giving' benefits to transgender persons; they should be about ensuring that they have an effective say in decisions that shape the processes of care over their bodies and identities.⁵⁵

Conclusion

There has been a marked shift in the legal landscape towards transgender people's right to health in India. Constitutional jurisprudence, especially that of NALSA judgment, has emphasized on the significance of gender identity, dignity and personal autonomy, while the Act, 2019 has laid down the statutory obligations on non-discrimination and healthcare. Further, several policy initiatives like SMILE and Ayushman Bharat TG Plus have worked towards increasing welfare and healthcare services.

The ultimate challenge is thus to make transgender care a system of enforceable healthcare rights rather than a randomly mixed bag of constitutional principles, statutory requirements, and welfare considerations. In practice, the right to health will lie not only with the legal but with the institutionalization of standards and remedies that can turn constitutional dignity and equality into healthcare.

55 INDIA CONST., supra note 10.

SURROGACY LAWS AND THE INTERSECTION WITH WOMEN'S RIGHTS: BALANCING PROTECTION AND AUTONOMY

Dr. Purnima Gupta*

Abstract

Surrogacy is a reproductive process where a woman carries a child on behalf of another couple or individual, often due to infertility or medical reasons. There are two main types: traditional, where the surrogate uses her egg, and gestational, where an embryo from the intended parents is implanted. In India, surrogacy has deep historical roots, dating back to mythological times, but its modern commercial form faced significant ethical concerns, including exploitation. To address these issues, the Surrogacy (Regulation) Act, 2021, permits only altruistic surrogacy, providing protections for surrogate mothers while banning commercial practices. This regulation aims to ensure ethical practices, safeguard the surrogate's rights, and prevent the commodification of reproduction.

Introduction

In India, parenthood is often regarded as a blessing, while infertility is viewed as a misfortune. The societal structure is deeply rooted in stable family units, with a particular emphasis on having a son to continue the family lineage. When a woman faces infertility, she is often stigmatized, labelled as "Banjh," a term that carries negative connotations. However, advancements in medical science and reproductive technology have brought hope to infertile couples, enabling them to have biological children. Assisted Reproductive Technologies (ART) offered by clinics in India include:

- In Vitro Fertilization (IVF)
- Pre-implantation Genetic Diagnosis (PGD)
- Intrauterine Insemination (IUI)
- Intra-Cytoplasmic Sperm Injection (ICSI)
- Genetic Donation
- Surrogacy

* Dr. Purnima Gupta, Associate Professor, MAIMS and Ms. Laveena Gupta, student, MAIMS

Understanding the Term 'Surrogacy'

Surrogacy offers a solution for couples who are unable to carry a pregnancy themselves due to physical or medical reasons. In surrogacy, the surrogate mother carries the baby throughout the pregnancy and, after birth, hands the child over to the intended parents.

So, surrogacy is a process where a woman carries and delivers a child on behalf of a couple or another woman, with the intention of transferring the child to them after birth. The child born through surrogacy is legally considered the biological child of the intended parents and is entitled to all the rights and privileges of a child born through natural conception, as per applicable laws. There are two main types of surrogacies:

- **Traditional Surrogacy:** In this method, the surrogate mother is artificially inseminated using sperm from either the intended father or an anonymous donor.
- **Gestational Surrogacy:** This approach involves creating an embryo from the intended parents' egg and sperm, which is then implanted into the surrogate mother's uterus.

India's History of Surrogacy

- Infertile couples can turn to surrogacy, a process where a woman carries a child conceived through the transfer of embryos or gametes from the intended parents. Historically, this practice was known as Niyoga Dharma and has been part of Indian tradition for centuries.
- In Hindu mythology, Balram, the seventh child of Devki and Vasudev, was transferred as an embryo into Rohini, Vasudev's first wife, to protect him from being killed by Kansa.
- In the Mahabharata, after Gandhari's two-year pregnancy, she gave birth to a mass, which Rishi Vyasa divided into 101 parts. These parts were developed in a special medium, resulting in 100 sons, the Kauravas, and one daughter, Dushala, being born outside the womb.¹

The Surrogacy (Regulation) Bill, 2019

On July 15, 2019, Dr. Harsh Vardhan, the Minister of Health and Family Welfare, presented the Surrogacy (Regulation) Bill, 2019 in the Lok Sabha. The Lok Sabha passed the Bill on August 5, 2019. On November 21, 2019, the Rajya Sabha referred the Bill to a Select Committee chaired by Shri

1 Khushbu Sanoria, A Legal Analysis of Surrogacy in Indian Context, (Last visited on September 20, 2024), <https://ijirl.com/wp-content/uploads/2022/08/A-LEGAL-ANALYSIS-OF-SURROGACY-IN-INDIAN-CONTEXT.pdf>

Bhupender Yadav, which submitted its report on February 5, 2020.² The Bill allows only altruistic surrogacy in India, banning commercial surrogacy due to the severe exploitation of surrogate mothers and children. There had been numerous reports of unethical practices, including cases where surrogate mothers died and children were abandoned, along with the illegal trade of human embryos and gametes. The Bill mandates that surrogacy is only permitted if one or both partners are proven infertile. It defines infertility as the inability to conceive after five years of unprotected intercourse. Key provisions of the Bill include:

• **Section 4, Clause (ii)**

Surrogacy is permitted under the following conditions:

1. Either the wife, husband, or both partners must be proven infertile.
2. The surrogacy must be altruistic, not commercial.
3. Children born through surrogacy cannot be used for sale, prostitution, or any form of abuse.
4. Any other disease or condition specified by the board may also qualify.

Section 4, Clause (iii)

The intending couple must meet the following conditions to undergo surrogacy:

1. **Certificate of Essentiality:** A certificate from the District Medical Board proving infertility of either or both partners.
2. **Custody Order:** A court order from a Magistrate Court (first class or above) granting custody of the surrogate child to the intending parents.
3. **Insurance Coverage:** The surrogate mother must receive insurance coverage for at least 16 months, provided by an approved insurance company or agent.

Eligibility for the Surrogate Mother

To obtain an eligibility certificate, a surrogate mother must meet the following criteria:

1. Be married and have at least one biological child.
2. Be aged between 25 and 35 years.
3. Be a close relative of the intending couple.

2 PRS Legislative Research, *Comparison of the Surrogacy (Regulation) Bill, 2019 as passed by Lok Sabha and the Bill as passed by Rajya Sabha*, <https://prsindia.org/billtrack/prs-products/prs-comparison-table>

4. Only gestational surrogacy is permitted, meaning the surrogate cannot use her own gametes.
5. The surrogate must not have participated in surrogacy before.
6. She must be medically and psychologically fit, with a certificate to verify her suitability.

Eligibility for the Intending Couple

To be eligible for surrogacy, the intending couple must meet the following criteria:

1. The wife should be aged between 23 and 50 years, and the husband between 26 and 55 years.³
2. Both must be Indian citizens.
3. The couple must have been married for at least five years.
4. They should not already have a surviving biological, adopted, or surrogate child, except if the existing child is mentally or physically challenged or suffering from an incurable disease.

Section 6

The surrogate mother must be informed of all potential side effects and complications. She must provide written consent acknowledging her understanding and is allowed to withdraw her consent any time before the embryo is implanted.

Section 7

The intending couple is prohibited from abandoning the surrogate child, regardless of any birth defects, genetic issues, medical conditions, the child's sex, or in cases of multiple births. The surrogate child will have all the legal rights of a natural-born child and will be regarded as the biological offspring of the intending couple.

Section 9

The surrogate mother cannot be forced to terminate the pregnancy, except under legally prescribed conditions.

3 Surrogacy (Regulation) Bill, 2019, cl. 4(iii)(c)(I); the same age bands are retained in the Surrogacy (Regulation) Act, 2021 (Act 47 of 2021), s. 4(iii)(c)(I), <https://www.indiacode.nic.in/bitstream/123456789/17046/1/aaA2021-47.pdf>

• Section 10

All surrogacy clinics must be registered with the appropriate authority. Clinics are required to apply for registration within 60 days of the authority's appointment.

• Section 35

Engaging in or advertising commercial surrogacy, abandoning surrogate children, exploiting surrogate mothers, or trading human embryos is illegal. Violations, including conducting sex selection during surrogacy, are punishable by up to 10 years of imprisonment and a fine of up to ₹10 lakh.

Reasons For Banning Commercial Surrogacy in India

India's surrogacy industry once flourished with little regulation, leading to numerous unsafe and unethical practices. Surrogates were often subjected to exploitation, poor living conditions, and denied family support during their pregnancies. International demand further exacerbated these issues, as some agencies treated women as mere "baby factories," forcing them to live in isolation until they gave birth.

Additionally, surrogate mothers in India were typically paid a small fraction of what the intended parents paid to surrogacy agencies, receiving around \$4,000 to \$5,000. Poverty, financial hardship, and lack of education often drove these women to repeatedly engage in surrogacy, deteriorating their health over time as they became "baby-making machines." The emotional toll was compounded by the lack of necessary support services for the surrogates and their families. To address these issues and safeguard the well-being of all parties involved, the Indian government has sought to regulate the process and make it more humane and safer.⁴

Analysis of Surrogacy (Regulation) Bill, 2020

On February 26, 2020, the Union Cabinet approved the Surrogacy (Regulation) Bill, 2020, which allows any woman willing to become a surrogate mother to do so. Although the Bill faced delays due to the COVID-19 pandemic, it was anticipated to be introduced as the Surrogacy Bill 2021 in the lower house of the Indian Parliament. The Bill represents a notable improvement over the Surrogacy (Regulation) Bill, 2019, addressing several shortcomings, though it still follows a needs-based framework rather than a rights-based one. Before becoming law, the Bill requires presidential approval.

4 Nishant Vimal, Surrogacy Laws in India, (May 22, 2019), https://blog.ipleaders.in/surrogacy-laws-india/#Surrogacy_Regulation_Bill_2016_and_its_Salient_Features

Key Features of the Proposed Legislation:

1. **Creation of Regulatory Bodies:** The Bill aims to regulate surrogacy through the establishment of a National Surrogacy Board at the central level, a State Surrogacy Board at the state level, and competent authorities or agencies for each Union Territory.
2. **Clinic Standards:** It mandates surrogacy clinics to meet minimum standards for physical infrastructure, laboratory and diagnostic equipment, as well as qualified professional staff.
3. **Ban on Commercial Surrogacy:** Based on recommendations from the Law Commission of India in its 228th report,⁵ the Bill seeks to ban commercial surrogacy, permitting only altruistic surrogacy to curb the exploitative "uterus rental" industry and safeguard surrogate mothers. It also restricts surrogacy for commercial reasons, disallowing its use for mere convenience when no medical necessity exists. This aligns India with countries like Australia, New Zealand, the UK, Canada, the Netherlands, and South Africa, where similar regulations are in place.
4. **Modification of Infertility Definition:** Unlike the 2019 Act, which required one of the intended parents to have "proven infertility" to be eligible for surrogacy, the 2020 Bill allows surrogacy based on medical reasons requiring gestational surrogacy, broadening its scope for intended parents.
5. **Eligibility for Widows and Divorced Women:** The Bill also allows Indian women who are widowed or divorced, between the ages of 35 and 45, to pursue surrogacy.

The Surrogacy (Regulation) Act, 2021

The Surrogacy (Regulation) Act, 2021, allows a legally married couple or a widowed/divorced woman between 35 and 45 years of age to opt for surrogacy if they have a valid medical condition requiring this procedure. The Act prohibits commercial surrogacy, imposing strict penalties, including imprisonment of up to 10 years and fines up to ₹10 lakh. Only altruistic surrogacy, where no monetary compensation is involved except for medical expenses, is permitted. Additionally, the surrogate mother must be a willing woman who does not use her own gametes.

5 Law Commission of India, *Report No. 228: Need for Legislation to Regulate Assisted Reproductive Technology Clinics as well as Rights and Obligations of Parties to a Surrogacy* (August 2009).

• **Key Provisions of the Act**

The Surrogacy (Regulation) Act, 2021 consists of eight chapters and 54 sections aimed at regulating surrogacy in India. It received Presidential assent on 25th December 2021.⁶

• **Definitions**

1. **Altruistic Surrogacy (Section 2b):** Refers to surrogacy where the surrogate mother is only compensated for medical expenses, insurance, and prescribed costs, without any additional monetary rewards.
2. **Commercial Surrogacy (Section 2g):** Involves monetary compensation in cash or kind, which is strictly prohibited under the Act.
3. **Couple (Section 2h):** Defined as a legally married man and woman, with the man being over 21 and the woman over 18 years of age.
4. **Intending Couple (Section 2r):** A couple wishing to become parents through surrogacy, with the woman between 23-50 years and the man between 26-55 years old.
5. **Intending Woman (Section 2s):** A widowed or divorced woman between 35-45 years who wishes to opt for surrogacy.
6. **Surrogacy (Section 2zd):** Describes the process where a woman carries and gives birth to a child for the intending couple, and hands over the child after birth.

• **Surrogacy Clinics Regulation**

1. **Registration (Section 3):** All surrogacy clinics must be registered under this Act, and commercial surrogacy is strictly prohibited.
2. **Surrogacy Procedures (Section 4):** Unregistered clinics are barred from participating in any surrogacy-related activities. Procedures must be conducted only in registered clinics.

• **Surrogate Mother's Consent (Section 6)**

The surrogate mother must be informed of all potential risks and side effects of the procedure and provide informed consent in writing, in a language she understands.

• **Prohibition of Abandonment (Section 7)**

Intending parents cannot abandon a child born through surrogacy on grounds such as birth defects, genetic conditions, or health issues, either in India or abroad.

6 Surrogacy (Regulation) Act, 2021 (Act 47 of 2021), <https://www.indiacode.nic.in/bitstream/123456789/17046/1/aaA2021-47.pdf>

• Rights of Surrogate Child (Section 8)

The child born via surrogacy will be regarded as the biological child of the intending parents and will have all the rights of a natural-born child under Indian law.

• Surrogacy Clinics Registration (Sections 11-14)

Surrogacy clinics must be registered within 60 days of the Act's commencement, with certificates of registration granted after thorough scrutiny. Registrations may be suspended or cancelled if requirements are not met, with an option for appeal within 30 days.

• National Surrogacy Registry (Sections 15-17)

The Act mandates the creation of a National Assisted Reproductive Technology and Surrogacy Registry to maintain records of all registered surrogacy clinics and ensure compliance with the law.

• Board Meetings and Disqualifications (Sections 19, 21)

The Act requires biannual meetings of the surrogacy board, with provisions for disqualifying members due to insolvency, misconduct, or incapacity.

• Powers and Functions of the Board (Sections 25, 35, 37)

The board advises the government on surrogacy matters, monitors the implementation of the Act, and ensures clinics operate according to the law. Appropriate authorities can summon violators, search premises, and seize relevant documents.

• Punishments for Violating the Act (Section 40)

If any person or entity prevents altruistic surrogacy, they face imprisonment of up to 5 years and fines of up to ₹5 lakh for a first offence, with subsequent violations attracting harsher penalties.

• Offences and Records Maintenance (Sections 43, 46)

Offences under the Act are categorized as cognizable, non-bailable, and non-compoundable. Clinics must maintain records for 25 years, and records must be made available for inspection if required.

• Benefits of the Surrogacy (Regulation) Act, 2021

1. **Fulfilling Experience:** Surrogates often find the opportunity to help others have a child deeply rewarding, viewing it as a life-changing and meaningful experience.

2. **Support Network:** Surrogates benefit from strong support groups, including other women who have undergone similar journeys, providing emotional and practical support.
3. **Pregnancy Experience:** Many surrogates enjoy the experience of pregnancy and, through surrogacy, can relive it without raising the child afterward.
4. **Compensation:** While only altruistic surrogacy is allowed, surrogates are compensated for medical expenses and receive insurance coverage during the process.
5. **Legal Protection:** Surrogates are protected by legally binding contracts that outline the responsibilities and rights of both parties involved.

• *Drawbacks of Surrogacy*

1. **Physically and Mentally Demanding:** Surrogacy involves extensive medical and psychological screening, along with the physical demands of pregnancy, which can be challenging.
2. **Lengthy Process:** The surrogacy process can take over a year, requiring surrogates to attend numerous appointments and undergo legal and medical procedures.
3. **Health Risks:** As with any pregnancy, there are health risks involved, including complications during or after the pregnancy.
4. **Medication Requirements:** Surrogates must take medications, including birth control and hormonal treatments, which some find challenging.
5. **Social Stigma:** Despite growing acceptance, surrogacy still faces social stigma, with some people unable to understand or support the surrogate's decision.

In conclusion, the Surrogacy (Regulation) Act, 2021 provides a legal framework for altruistic surrogacy while banning commercial surrogacy, aiming to protect the interests of both surrogates and intending parents, but the process comes with its own set of challenges and benefits.⁷

7 Anjali Sinha, Surrogacy Act, (April 25, 2023), https://blog.ipleaders.in/surrogacy-act/#Important_provisions_of_the_Act

Surrogacy And Women's Right to Health: The Indian Context

- Surrogacy has a long history in India, with commercial surrogacy, often referred to as "womb for rent," emerging as a burgeoning industry. The combination of an English-speaking environment and more affordable services has made India a popular destination for intended parents.
- The future of surrogacy in India presents a dual narrative: it can either empower rural women by lifting them out of poverty or lead to a dystopian scenario where developing countries become breeding grounds for babies. In many cases, it's difficult to discern whether women are exercising their rights or are coerced into becoming surrogate mothers due to familial pressures from husbands or in-laws seeking financial stability.
- Critics of surrogacy liken the practice to prostitution, arguing that it should be banned on moral grounds. They contend that surrogacy contracts dehumanize and alienate women, stripping away the legitimacy of their experiences during pregnancy. Many surrogates attempt to distance themselves emotionally from the child, viewing their pregnancy solely as a means to earn essential income. This transactional nature of surrogacy is said to exploit women's reproductive capacities for the financial gain of wealthier clients.
- Currently, outsourcing surrogacy is an exploitative practice in India, where no legal protections exist for surrogate mothers in cases of complications during birth or forced abortions. Since the legalization of commercial surrogacy in 2002, India has positioned itself as a leader in this field. Critics argue that this trend exploits impoverished women in a country already grappling with high maternal mortality rates. Estimates suggest that the surrogacy industry in India is approaching \$445 million annually.
- The ethical, moral, social, and legal implications of surrogate motherhood raise profound questions about the status of both the women involved and the children born through these arrangements. Legal experts warn that if surrogacy becomes a pathway for wealthier individuals from developed nations to select poorer women in India for childbirth, it risks turning into a form of economic exploitation akin to "biological colonization."⁸

8 Pawan Kumar, Inder Deep Sharma and Nandini, Surrogacy and Women's Right to Health in India: Issues and Perspectives, (April 2013), https://journals.lww.com/ijph/fulltext/2013/57020/surrogacy_and_women_s_right_to_health_in_india_3.aspx

Glass Ceiling and Women's Rights

Provisions For Unmarried Women

- Unmarried pregnant women in India can legally choose to have an abortion under the 2021 amendment to the Medical Termination of Pregnancy Act, 1971,⁹ affirming a woman's right to control her own body. However, the surrogacy legislation restricts unmarried women from accessing surrogacy services. While there are documented cases of human rights abuses in commercial surrogacy, there are also instances where it has enabled women to achieve financial independence and improve their families' futures.
- A woman's reproductive choice is a fundamental right, integral to her freedom as outlined in Article 21 of the Indian Constitution.¹⁰ By tying surrogacy eligibility to marital status, the law undermines reproductive autonomy and limits access to its benefits to a specific segment of society. Furthermore, setting age limits for surrogate or intended mothers infringes on their reproductive rights.

Surrogacy and the LGBTQIA+ Community:

- The 2021 Act prohibits same-sex couples from accessing altruistic surrogacy, reflecting a narrow, stereotypical view of family that assumes a lack of autonomy for women. Indian laws and cultural norms dictate that parents must be of different sexes for a child's optimal development.
- Yet, this stance is contradictory since it allows ART services for widowed and divorced women, effectively discriminating against LGBTQIA+ individuals. Despite recognizing reproductive autonomy as a fundamental right, the Act fails to provide equal rights for same-sex couples and their families.
- While the Indian judiciary has made strides in upholding the rights of the LGBTQIA+ community, such as in the landmark Navtej Singh Johar case,¹¹ gaps remain in surrogacy legislation.
- Surrogacy arrangements have allowed many same-sex couples from abroad to start families in India, but the current legal framework forces many to seek alternatives in countries like Mexico or the

9 *Medical Termination of Pregnancy (Amendment) Act, 2021* (Act 8 of 2021).

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

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

U.S. Although decriminalizing homosexuality was a positive step, comprehensive public policy change is still necessary to ensure equal rights for LGBTQIA+ individuals.¹²

Exclusion of Live-In Relationships

- The Act does not extend its regulatory framework to live-in partners, despite the legality of such relationships upheld by the courts. While the Supreme Court has recognized the validity of live-in partnerships,¹³ the question remains as to why these couples are denied the right to pursue surrogacy.
- The recent Medical Termination of Pregnancy Amendment Act 2021 replaced "husband" with partner, signalling progress. However, it is hypocritical to support live-in relationships yet deny these couples the right to parenthood, reinforcing outdated societal notions of family.

Concerns Over Altruistic Surrogacy

- There is growing concern that banning commercial surrogacy may lead to a rise in unregulated or illegal practices. The desire for profit in the infertility healthcare industry could exacerbate exploitation, as seen in cases where vulnerable individuals are coerced into selling their eggs.
- Prohibiting commercial surrogacy could violate Article 19(1)(g) by restricting the bodily autonomy of consenting adults seeking to earn a living. A balanced approach that includes regulated commercial surrogacy could better protect human rights.

Health Implications for Surrogates and Their Children

The Act fails to adequately address the long-term health risks faced by surrogate mothers and their children. Issues like drug abuse, maternal complications, and the psychological toll of surrogacy are not sufficiently covered. While ensuring psychological fitness is part of the screening process, the lack of mandatory psychiatric assessments reflects a gap in understanding the mental health implications for surrogates.

12 Alexander Muacevic and John R Adler, *The Surrogacy Regulation Act of 2021: A Right Step Towards an Egalitarian and Inclusive Society?* (20 April 2023), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC10199460/>

13 *S. Khushboo v. Kanniammal*, (2010) 5 SCC 600; *Indra Sarma v. V.K.V. Sarma*, (2013) 15 SCC 755.

Discrimination Based on Ability

The Act allows couples with a child diagnosed with an incurable illness to access surrogacy services but lacks clear guidelines on defining such disabilities. This vagueness creates barriers for those affected by ableism. Additionally, the emotional and financial dynamics between siblings in families with disabled children are overlooked.

Impact on Medical Tourism

The previous allowance of surrogacy in India fostered "procreative medical tourism," attracting many foreign couples seeking fertility treatments. The current Act, which bans foreigners from accessing surrogacy, disrupts this market while failing to address the economic opportunities surrogacy provided for many impoverished women. Rather than an outright ban, a regulated framework could ensure fair compensation and rights for surrogate mothers.

Proposed Solutions

- To support surrogates, introducing short-term disability insurance could help compensate for lost wages, although it may not cover all income loss. Clarifying eligibility for maternity benefits would also be necessary.
- Additionally, ensuring that surrogates receive independent legal representation could help secure fair compensation and address future health-related issues. Overall, a balanced approach to surrogacy that respects the rights and well-being of all parties involved is essential.

Committee formed to address issues

- The Committee has recommended removing the clause that defines "infertility" and the requirement for a five-year waiting period before issuing an infertility certificate, thus facilitating easier access to surrogacy.¹⁴
- It also suggested eliminating the provision that restricts surrogacy to close relatives, arguing that it overlooks the reality in many Indian families where women have limited decision-making power, potentially coercing them into providing reproductive labour. While the Committee has addressed some issues in the 2019 Bill, several restrictive and discriminatory provisions remain. Notably, it continues to adopt a needs-based rather than a rights-based approach to accessing surrogacy.

14 Rajya Sabha Select Committee, *Report on the Surrogacy (Regulation) Bill, 2019* (presented 5 February 2020).

- These recommendations come at a time when the Supreme Court has been expanding the interpretation of "liberty" under Article 21 to encompass reproductive choices. By banning commercial surrogacy, the Bill fails to consider the intersectional effects on women's rights to their own bodies.
- The altruistic model expects women to endure the physical and emotional challenges of surrogacy without financial compensation, relying solely on "compassion." This expectation is paternalistic and unrealistic, ultimately denying women a legitimate source of income. As a result, fewer women may be willing to serve as surrogates, indirectly limiting the options available to intending parents.
- Moreover, the proposed Bill excludes LGBTQ+ individuals, live-in couples, and single parents from accessing surrogacy. Even those who qualify must obtain a "certificate of essentiality" proving that it is biologically impossible for them to conceive otherwise. It neglects to consider medical conditions that, while not rendering women infertile, could make pregnancy more complicated and riskier.
- The Bill also fails to account for cases where women may choose not to pursue pregnancy due to career commitments. For instance, a sportswoman whose prime career years coincide with her childbearing age faces a difficult choice between taking a break from her limited active career or opting for motherhood. This situation raises a critical question: Should a woman have to make such a compromise?

We argue that the answer is no. It is essential to recognize surrogacy as a right rather than a mere need. The outdated moral arguments framing surrogacy as a last resort are out of touch. Suggesting that the "joy of bearing one's own child cannot compare to having one through surrogacy" reflects patriarchal values. In a rights-based framework, the state is obliged to enhance reproductive rights and freedoms, ultimately improving reproductive health.

Current regulations around surrogacy ignore the financial impact on surrogates, who must often pause their careers during pregnancy. Instead of romanticizing altruistic surrogacy as a "noble act," a compensated surrogacy model should be adopted. In this model, intending parents would cover all medical expenses related to the pregnancy and postpartum care,

and also provide compensation for the surrogate's lost income. Additionally, surrogates should be reimbursed for pregnancy-related expenses, such as maternity clothing and nutritional supplements.¹⁵

Without such reforms and recognition of surrogacy as a reproductive right, India's surrogacy regulations will fail to safeguard the bodily autonomy of surrogates and the parenting rights of intending parents. Although India is experiencing a significant cultural shift towards more feminist values, the proposed surrogacy legislation represents a setback in the ongoing quest for equality.

Loopholes

- **Surrogate and Child Exploitation:** The Act aims to protect both the child's right to be born and to end the exploitation of impoverished surrogate mothers. However, it fails to effectively balance these two objectives.
- **Reinforcement of Patriarchal Norms:** The Act perpetuates traditional patriarchal norms that disregard the economic value of women's work, consequently impacting their basic reproductive rights as guaranteed under Article 21 of the Constitution.
- **Denial of Legitimate Income to Surrogates¹⁶:** By banning commercial surrogacy, the Act removes a legitimate income source for surrogates, thereby reducing the number of women willing to take on this role. This, in turn, indirectly limits parenting options for couples seeking to adopt.
- **Emotional Complications:** When a friend or relative serves as a surrogate in an altruistic arrangement, it can lead to emotional challenges for both the intended parents and the surrogate child. The dynamics of their relationship may become strained during the surrogacy process and after the birth, while altruistic surrogacy also restricts the intended couple's ability to select a surrogate, as many may be hesitant to engage in such an arrangement.

15 Eshan Sonak and Sanvi Bhatia, India's New Surrogacy Regulation Bill falls Short of Protecting bodily Autonomy and guaranteeing reproductive liberty, (21 April 2021), <https://blogs.lse.ac.uk/humanrights/2021/04/21/indias-new-surrogacy-regulation-bill-falls-short-of-protecting-bodily-autonomy-and-guaranteeing-reprodu>

16 Diksha Tekriwal, Lacunae in the Surrogacy (regulation) Act, (14 May 2022), <https://theleaflet.in/lacunae-in-the-surrogacy-regulation-act-2021/>

- **Lack of Third-Party Involvement:** Altruistic surrogacy does not incorporate a third party, which is essential for ensuring that the intended couple covers medical and other related expenses. A third party can also provide necessary support throughout the complex surrogacy process, which may not be feasible in a purely altruistic model.

In summary, the Surrogacy Act of India prohibits commercial surrogacy and any monetary compensation for surrogates. This ban contradicts the ruling in *Suchita Srivastava v. Chandigarh Administration* (2009), which affirmed that Article 21 includes the right to choose one's reproductive options.¹⁷ The prohibition prevents women from utilizing their reproductive capabilities for financial gain, disregarding the mental, physical, and emotional labour, as well as the medical costs incurred during and after pregnancy.

The 102nd report of the Parliamentary Standing Committee on Health and Family Welfare in 2017 advocated for fair compensation for surrogates instead of abolishing commercial surrogacy.¹⁸ This perspective, along with Article 23 of the Universal Declaration of Human Rights and Article 7 of the International Covenant on Economic, Social, and Cultural Rights—both of which call for equitable payment for human labour—is overlooked by the Surrogacy Act.¹⁹

Additionally, since oocyte donors play a vital role in surrogacy, legal reforms should safeguard their rights. The Surrogacy (Regulation) Act, 2021, must also uphold the rights to equality and parenthood for LGBTQIA+ individuals wishing to engage in surrogacy. Donor identity disclosure should remain voluntary, and there should be mechanisms in place to ensure that payment arrangements protect vulnerable parties from exploitation.

Conclusion and Suggestions

In India, surrogacy is purely a contractual understanding between the parties so care has to be taken while drafting agreement so that it does not violate any of the laws like, e.g., points to be taken into consideration why does the intended parents opt for surrogacy, particulars of the surrogate,

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

18 Department-related Parliamentary Standing Committee on Health and Family Welfare, *102nd Report on the Surrogacy (Regulation) Bill, 2016* (Rajya Sabha Secretariat, presented 10 August 2017).

19 Universal Declaration of Human Rights, art. 23, G.A. Res. 217A (III) (1948); International Covenant on Economic, Social and Cultural Rights, art. 7, 993 U.N.T.S. 3 (1966).

type of surrogacy, mentioning about paternity in the agreement, the creation of registry for biological father of children in an adoption cases, rules set forth on how and when genetic testing can be done to determine paternity, compensation clause, unexpected mishappening to the surrogate mother, child's custody, regarding the jurisdiction for the disputes arising out of agreement. Indian government has drafted legislation in 2008 and finally framed an ART (Regulation) Act 2021. The proposed law needs proper discussion and debate in the context of legal, social and medical aspects. It is concluded that the government must seriously consider enacting a law to regulate surrogacy in India in order to protect and guide couples seeking such options. Without a foolproof legal framework implementation couples will invariably be misled and the surrogates exploited.

SILENCE, STATE POWER, & ACCOUNTABILITY DEFICIT IN CUSTODIAL TORTURE MATTERS

Abstract

Vani Sharma*

India has established a strong legal system to safeguard human rights and prosecute major crimes, yet the country continues to experience low conviction rates for multiple types of offences. NCRB data show that between 2018 and 2022, only -27 to 28% of rape cases resulted in convictions, while Delhi's total conviction rate dropped to approximately 78% in 2023 from 88% in 2022, which resulted in thousands of cases being dismissed or acquitted. The legal requirements for speedy trials and victim rights established in Article 21 continue to exist yet enforcement remains irregular while data monitoring processes show insufficient strength. The research gap exists because there is no fundamental tracking system that monitors how prosecution teams make their decisions both at the case level and throughout their entire process. The public lacks access to prosecutor workload statistics and detailed charge outcomes, which results in hidden case-level attrition from prosecutorial cases. Institutional incentives which stem from overloaded offices and insufficient oversight as factors that decrease conviction rates. The proposals for reform focus on increasing operational capacity and establishing better system transparency. Experts recommend that prosecution resources should be increased through state prosecutor hiring and forensic support and training while establishing mandatory data collection and reporting requirements. The implementation of common case-management systems and the legal requirement to report attrition rates and the establishment of laws that allow researchers to access de-identified prosecution records represents the actual progress achieved by the organization.

Key words:- Custodial torture, Data Collection, Accountability Deficit, prosecutorial accountability, Criminal Justice Data

Introduction

Custodial torture is the gap between the constitutional rights enshrined in the Indian Constitution and the actual working of the Indian law enforcement agencies. Article 21 of the Constitution of India guarantees the right to life and personal liberty, and the courts have interpreted this provision to include protections against arbitrary detention, coercion,

* Final Year BA.LLB (Hons.) Student, Maharaja Agrasen Institute of Management Studies, Guru Gobind Singh Indraprastha University

and inhuman treatment. However, violence in police custody is not only happening, but it seems to be one of the features of the criminal justice system.¹ This persistence of custodial torture, despite formal safeguards, is rooted in deep systemic issues a culture of impunity within law enforcement, inadequate accountability mechanisms, weak oversight by supervisory authorities, and social acceptance of coercive policing as a means to achieve swift results. Combined with persistent under-resourcing and outdated training, these factors foster an environment where constitutional rights are often ignored in actual practice. Courts have expressed themselves on the issue and recognised that it is a tragedy.² The Supreme Court, in one of the most prominent criminal procedure judgments of the last decade, *D.K. Basu v. State of West Bengal*,³ specifically identified custodial torture as a fundamental rights violation and laid down detailed procedural safeguards governing arrest and detention. *Nilabati Behera v. State of Orissa*⁴ also held that the state could be held liable if a person dies in its custody without following lawful procedures.

Framework Against Custodial Torture

Following *D.K. Basu* Judgement, police departments across India were formally required to comply with guidelines such as mandatory arrest memos, timely medical examinations of detainees, and immediate notification to relatives upon arrest. Although these reforms have improved documentation and increased the visibility of police conduct, implementation⁵ on the ground remains inconsistent. In some states, courts have used these precedents to demand stricter oversight and disciplinary action against erring officers. However, neither judgment has led to a dramatic reduction in incidents of custodial violence, pointing to continued challenges in translating court-mandated safeguards

1 Sangeeta Mandal, *Custodial Torture and Human Rights in India*, 1 Indian J. L. & Just. 75 (2010), <https://ir.nbu.ac.in/server/api/core/bitstreams/2a2c7900-f14a-4897-9ca0-c912676be05f/content>

2 Aashka Vyas, *Custodial Torture in India: The Urgent Need to Align Domestic Laws with Global Standards*, NLIU-CRIL Int'l L. Blog (Mar. 17, 2025), <https://cril.nliu.ac.in/2025/03/17/custodial-torture-in-india-the-urgent-need-to-align-domestic-laws-with-global-standards/>

3 *D.K. Basu v. State of West Bengal*, (1997) 1 S.C.C. 416 (India)

4 *Nilabati Behera v. State of Orissa*, (1993) 2 S.C.C. 746 (India).

5 Sunil Kumar & Dhruv, *Custodial Violence in India: Legal Gaps and the Quest for Police Accountability*, 7 *Int'l J. L., Pol'y & Soc. Rev.* 155 (2025), <https://www.lawjournals.net/assets/archives/2025/vol7issue2/7059.pdf>.

into routine police and prosecutorial practice.⁶ These cases depict the possibilities and the limitations of judicial intervention in effecting systemic change. At the same time, conviction rates in cases of state violence are still very low and happy prosecutions are very rare. Public discourse often blames evidentiary problems, hostile witnesses, or police failure as the main reasons. While these reasons are a part of the situation, they hide the real issue, which is that transparency in prosecutorial decision-making is simply missing. Data on India's criminal justice system document crimes reported, charge sheets filed, and trial results, but they do not show how cases change at the prosecution stage. There is hardly any information on why cases are weakened, postponed, or dropped. The absence of transparency leads to an institutional black box where cases of custodial violence are most often done away with before the performance of any real judicial examination.

Black Box of Accountability

One major problem when discussing torture in custody in India is that There is no nation-wide, consistent, case-level dataset to follow up a complaint through investigation, court, trial, and final liability. The issue is especially severe on comparing those old cases registered under Sections 330 and 331 of the Indian Penal Code to those governed from 1 July 2024 under the Bharatiya Nyaya Sanhita, 2023. Section 120, BNS, criminalises causing hurt or grievous hurt to someone voluntarily to extort a confession or information. However, at the national level, there is still no such standalone offence, which could comprehensively correspond to the definition given by the Convention against Torture. The State of Policing in India Report 2025,⁷ which relies on official data, highlights severe gaps in police torture and accountability records. It states that NCRB data shows 1,107 deaths in police custody between 2011 and 2022 yet there is no case of police personnel being convicted for those deaths during that period. In light of the above situation, this paper will refrain from relying on a complainant-to-conviction numeric funnel without verification. Rather, it will treat the non-existence of a nationally coherent custodial-torture case trajectory as the accountability deficit itself.

6 *Custodial Deaths in India: Causes & Safeguards Available*, PMF IAS, <https://www.pmfias.com/custodial-deaths-in-india/> (last visited Apr. 3, 2026).

7 Common Cause, & Lokniti–Centre for the Study of Developing Societies. (2025). *Status of policing in India report 2025: Police torture and (un)accountability*. https://commoncause.in/wotadmin/upload/SPIR_2025.pdf

This kind of structural attrition is maintained by a combination of institutional and evidentiary constraints that are interlocked. The biggest one is the deep-seated conflict of interest inherent in the way investigations are carried out usually, allegations of torture are investigated by the very police force that the accused belong to. Without any independent investigative bodies, departmental inquiries and magisterial probes often lack both neutrality and power to coerce. The end result is a phenomenon that might be referred to as a closed-loop accountability failure, meaning that the very system that is supposed to find out who is guilty is, on account of its institutional nature, disincentivised from not doing so.

Adding to this is the delicate nature of evidence in custodial situations, which is most of the time intentionally manufactured rather than being an accident. Often medical examinations are done after long delays or done in a very superficial way which results in the injuries being dismissed as old ones or injuries that the person inflicted on him- or herself. The police stations having CCTV cameras that have to be used by law is not an idea that is implemented regularly, and the cameras even break down frequently. As far as the recording of forensic evidence goes, it is the weakest. The victims and witnesses who are usually the ones in the lowest socio-economic groups are sometimes forced through intimidation or other types of pressure to change their statements or become hostile during the trial. So, the courts get evidence files which don't seem to them to be very good, even if the violations themselves were very serious.

The existing law compounds the problem as we still lacks specific anti-torture law through which acts of violence in custody are handled. From the conduct occurring on and after 1 July 2024, the Bharatiya Nyaya Sanhada, which was passed in 2023, has become the effective penal code. Section 120 of this code deals with causing hurt or grievous hurt with voluntary intent for extorting the confession or giving certain information. The corresponding IPC provisions for the time before this including the sections 330 and 331 are still in force, yet one cannot really use these provisions to describe the level of pain and suffering one is subjected to in a torture scene, nor these provisions even recognize the fact that the torturer as human has an inherent advantage over the sufferer as a person who is tortured.

Moreover, these laws require you to show that there was an explicit motive, for example, the sole purpose of getting the person to talk for making a confession. If one is not able to rely on witnesses or direct pieces of evidence proving this, such a legal requirement might present itself as a problem in terms of lawfulness. Hence, one finds it legally possible to

allege that the person who has been subject the police to is at best only hurt or wrongfully confined, and in practice torture is treated this way without being properly accounted for as a serious breach of fundamental constitutional and civil human rights. Looking at police and judicial custody deaths side by side gives us a better picture of how the mechanisms for escape operate differently within the system. Even though police custody deaths are less numerous, they are much more directly linked to torture allegations and usually happen very soon after the arrest.⁸ On the other hand, most of them are never convicted mainly because their cases become protected and evidence being suppressed at an institutional level. At the same time, there are more judicial custody deaths because a larger number of prisoners are kept in custody, nevertheless, they are usually considered dead out of natural causes, illness or suicide. In other words, whenever a doctor finds someone dead in custody, that criminal act, if such was committed, is no longer the centre-piece, but it is the issue of negligence from those in charge which becomes the major point of the narrative. Still, the consequence is the same in either case, i.e., a very small number of penal consequences.

While these steps to improve documentation, they hardly change the outcomes, since they do not solve the key issues of independent investigation, prosecutorial autonomy, and the standards of evidence.⁹ All these aspects together result in what is aptly called an architecture of impunity. The practice of torture in custody in India continues not because the law gave up once, but because the system of law, institutions and procedures together make it difficult to hold the guilty accountable.¹⁰ The lack of dependable data hides the extent of the problem; the way of conducting investigations makes it impossible to find the truth; the way of handling evidence make the prosecutors' cases weak; and the rules do not adequately define torture as a separate and more serious type of violence by the state. In such a system, silence is not just an accidental consequence, rather it is a result that is intentionally produced and perpetuated by the very institutions that are supposed to uphold the law and the rule of law.

8 National Crime Records Bureau (NCRB), *Crime in India 2023* (dataset), data.opencity.in, <https://data.opencity.in/dataset/crime-in-india-2023>

9 IndiaStat, *Violation of Human Rights and Custodial Deaths (Crime and Law category)* (dataset), <https://www.indiastat.com/data/crime-and-law/violation-of-human-rights-and-custodial-deaths> (last visited Apr. 3, 2026).

10 Common Cause & Lokniti-Ctr. for the Study of Dev. Soc'y's (CSDS), *Status of Policing in India Report 2025: Police Torture and (Un)Accountability* (Mar. 20, 2025), <https://ruralindiaonline.org/en/library/resource/status-of-policing-in-india-report-2025-police-torture-and-unaccountability/>

How Structural Barriers Preclude Accountability

While the previous section shows the broader system of impunity, the real problem lies in the systematic barriers to addressing custodial torture can make it difficult to gather the evidence needed to secure conviction. The procedural requirements such as the prior permission requirement for the Bharatiya Nagarik Suraksha Sanhita (BNSS), can directly lead to dropping charges or acquittal. According to section 218, the BNSS government needs approval before the judge, magistrate, or public servant can be taken to task even if accused of a crime during the performance of official duties. This approval requirement serves as a procedural barrier, potentially holding or complicating the process of getting hold of officials.

Delays, refusals, or bureaucratic inaction with granting sanctions can further hold back the cases from the stage of investigation up to the point of trial, resulting in the criminal accountability problem being effectively handed over to the executive, whereby the State has become both the accused as well as the decision-maker about whether the prosecution can proceed.¹¹

Working discursively, these procedural difficulties are tied very closely to one another, and at the same time, a large evidential shortage is undermining the ability to prosecute torture cases. Independent forensic documentation has been lacking in the cases that make the news. Often, bodies are not properly examined sometimes examinations are delayed, and dirty work is done, or the last-minute changes of face become a norm. Police stations don't always find ways to make sure their Committees for the Prevention of Torture are functioning right through to the final phase. Deteriorating chain of custody protocols are damaging the integrity of the evidence in such a way that, in many cases, material proof can potentially be challenged in court. At the same time, the main evidence, witnesses' accounts, is being undermined with the help of fear, threats and their socio-economic weaknesses. Families of victims, particularly from marginalised backgrounds, often face significant discouragement from pursuing complaints, which can result in hostility or withdrawal of testimony in court. This points to the fact that the issue is not only with the judges/legal systems but with the obtaining and preserving of evidence/proof itself.

11 Srishti Rajput, *Evidence Mishandling and Chain of Custody Failures in India*, 3 **Innovation & Integrative Res. Ctr. J.** 786 (2025), <https://iircj.org/wp-content/uploads/81-Evidence-Mishandling-and-Chain-of-Custody-Failures-in-India.pdf>

Institutional dynamics additionally embed this pattern of non-accountability. For one thing, public prosecutors, under the strain of a huge workload, may be handling thousands of cases at a time and so, in practice, have very limited capacity to independently question the police investigations. On top of this is the structural overload, the feature that requires the prosecutors to rely on the evidence provided by the police, which gives rise to a situation where the prosecutors are only in a position to accept the police bias.

Often referred to as a brotherhood, the police themselves reinforce this very dynamic as they invariably protect each other and are not willing to expose a colleague even when he has committed a serious offence.¹² This results in investigations that are hardly in-depth, charge-sheets that are meagre and prosecutorial strategies that are not only fitting but also lacking the element of conviction. The factual result of this is blatantly clear while there have been cases of custodial deaths recorded in the hundreds in the past decade, there have been hardly any convictions of police officers in recent years, which is a clear indication of the systemic collusion or, at the very least, the institutional inertia in the matter. It is interesting to examine the various barriers that have been raised here, and one can see from that list that there is a hierarchy of dysfunction. For one thing, procedural constraints, like for instance the requirement of sanction, function as gatekeepers that quickly weed out cases even before they get off the ground. This means that they have the most impact when it comes to attrition. On the other hand, evidentiary shortfalls mainly affect only those cases that have already successfully made the journey, thus leading to acquittals rather than non-prosecution. One might say that it's at the institutional level where factors such as prosecutorial overload and the bias in the investigation really come into play, where they influence both the procedural and evidentiary aspects. In other words, this way, they augment the procedural and evidential weaknesses and the two together form a kind of domino effect that is, feeble investigations give rise to weak evidence; at the same time, weak evidence is a deterrent for prosecution; and not forgetting procedural vetoes which, at the end of the day, guarantee that even cases which are potentially viable, are very rarely brought before a court of law.

The efforts to address these problems through state-level mechanisms appear to have been only partly successful. Judicial magistrate inquiries ordered under Section 196(2) of the Bharatiya Nagarik Suraksha Sanhita,

12 *Supreme Court Petition Challenges BNSS on Judicial Prosecutions*, Supreme Today (Feb. 7, 2026), <https://supremetoday.ai/supreme-court-petition-challenges-bnss-on-judicial-prosecutions-20260207005>

2023 and interventions by State Human Rights Commissions have been marked by low levels of compliance and independence. Only a few custodial death cases come to the attention of the judicial authorities, and even then, the inspectors tend to accept the police reports, which results in the re-enactment of the prejudices that these inspections are supposed to be the remedy for. The results from such bodies rarely go beyond recommending compensation and have hardly any effect on criminal prosecution. Their reports are often not even public, which is one more reason why the mystery surrounding the violence in custody keeps on being the characteristic feature. The role of the Central Bureau of Investigation (CBI) as an external investigative agency becomes an issue of great importance. Based on the study of the case-law of the Supreme Court of India, it has been inferred that the CBI has a record of ensuring sentencing of custodial death cases at a significantly higher level than that of the state police¹³ due to the CBI having relative institutional independence and specialised investigative capacity.

In some cases, the CBI investigations, often ordered by a court, have led to the conviction of police officers, which is in sharp contrast with the usual situation of state courts, where failure to convict is nearly 100% of the cases. But the CBI is more of a help than a solution. It gets called in only after a few cases reach the courts or get a lot of media coverage. Moreover, its work takes a long time. So, all in all, while the CBI is a slightly better investigative option, it is not, and cannot be, a replacement for a whole package of changes in the usual criminal justice system.

Judicial responses to acts of violence in custody, especially with regard to bail, are an example of how the courts are beginning to acknowledge these deep-rooted disparities through law. In fact, the Supreme Court has recently stressed the importance of a tougher attitude in granting bail to police officers who are charged with custodial crimes, as it is well within their power to intimidate witnesses and destroy evidence. In cases of custodial violence, the Court, by making these police officers unfit for bail and giving importance to the violation of the right to life under Article

13 Common Cause & Lokniti-Ctr. for the Study of Dev. Soc'ys (CSDS), *Status of Policing in India Report 2025: Police Torture and (Un)Accountability* (Mar. 20, 2025), <https://ruralindiaonline.org/en/library/resource/status-of-policing-in-india-report-2025-police-torture-and-unaccountability>

21,¹⁴ as a result of brutality in custody,¹⁵ has indicated that it is ready to keep a more watchful eye on such cases. Nevertheless, these measures are still limited to the facts of the particular cases and do not really deal with the first-level problems, such as procedural, evidential, and institutional, that are mainly responsible for most of the cases not getting to a situation where the issue of bail even arises.

Technological Oversight & Its Discontents

The introduction of compulsory CCTV monitoring in police stations was initially thought of as a physical measure to deal with custodial violence.¹⁶ It was specifically targeted at the evidential problems that have always been a major hurdle in the prosecution of torture cases. In the landmark judgment of *Paramvir Singh Saini v. Baljit Singh*,¹⁷ the apex court of the country invoked Article 21 of the Constitution to justify this regulation, stating that openness in the custodial environment is even more crucial to the protection of life and liberty. The Court instructed the installation of the entire audio-visual recording systems in all police stations and law enforcement agencies so that not even a single spot where abuse can take place without anyone knowing can remain unnoticed.¹⁸ At the level of legal theory, the decision in this case is probably the biggest one in recent times. The judges have, for the first time, really tried to change things by making use of technology to understand how the state exercises its power and how individual rights are protected.

14 INDIA CONST. art. 21.

15 Ibiene Pamela Mbano, Osaretin George Izevbu & Rita Abhavan Ngwoke, *Human Rights Concerns in the Pardon Process: The Marginalisation of Petty Offenders in Nigeria*, 5 Int'l J. Crim. Com. & Statutory L. 98 (2025), <https://www.criminallawjournal.org/article/106/4-2-25-150.pdf>

16 *Supreme Court Takes Suo Motu Notice Over Non-Functional CCTV Cameras in Police Stations*, News on AIR (Sept. 4, 2025), <https://www.newsonair.gov.in/supreme-court-takes-suo-motu-notice-over-non-functional-cctv-cameras-in-police-stations/>

17 *Paramvir Singh Saini v. Baljit Singh*, (2021) 1 S.C.C. 184 (India).

18 Debby Jain, “Mere Installation of CCTVs in Police Stations Not Enough, They Should Also Work Properly”: Supreme Court in Suo Motu Case, LiveLaw (Jan. 29, 2026), <https://www.livelaw.in/amp/top-stories/supreme-court-suo-motu-mere-installation-of-cctvs-in-police-stations-not-enough-they-should-also-work-properly-rajasthan-521100>

Court stipulated that recording devices should be placed at every critical point in police stations,¹⁹ such as entry and exit gates, lock-ups, corridors, reception areas, interrogation rooms, and the offices of investigating officers. Even if the areas just outside lock-ups and washrooms have to be covered, caught on camera at all times, it would be ensured that the detainees remain under surveillance at all times without affecting their privacy in the least. The technical parameters set by the Court only reinforce the fact that the coming of the Court's intervention is a matter of great and serious concern the cameras must have night vision, record triple audio and video, and have backup power facilities so that the stoppage of power does not cause any problem. To make matters worse, the Court also went so far as to say that the recordings must not be deleted for at least a year to a year and a half and that they should be made available to the courts, human rights organisations, and law enforcement agencies whenever a case of police brutality comes up.

Yet, the true measure of this directive should be its practical impact, not its idealistic goals. The key finding is that, despite robust guidelines, empirical data show the installation of CCTV has not significantly reduced incidents of custodial torture. High non-compliance persists, as many police stations have cameras that do not work, inadequate storage, or intentional avoidance of surveillance. Importantly, alleged torture continues to occur in blind spots or during system downtimes. This demonstrates that surveillance alone cannot prevent or provide evidence of custodial abuse without strong accountability mechanisms.

The major weakness of the Supreme Court's strategy is its emphasis on administrative compliance rather than on enforcement through penalties. The court has, time and again, equated non-adherence to CCTV guidelines with a breach of human rights.²⁰ However, penalties for such breaches have mostly been in the form of warnings, and, to some extent, symbolic ones. Government functionaries have been ordered to submit compliance affidavits, and high-ranking officials like Chief Secretaries have been called to explain instances of delay. Nevertheless, there is hardly any

19 *Supreme Court Demands Accountability: Centre, States Pulled Up for Not Installing CCTVs in Police Stations*, Prime Legal Blog (Nov. 27, 2025), <https://blog.primelegal.in/supreme-court-demands-accountability-centre-states-pulled-up-for-not-installing-cctvs-in-police-stations/>

20 Anukriti Mishra, *Every Room of Each Police Station Must Have CCTV Camera With Audio Facility, Any Lapse Will Be Deemed Contempt: Madhya Pradesh High Court*, LiveLaw (Oct. 24, 2024), <https://www.livelaw.in/high-court/madhya-pradesh-high-court/madhya-pradesh-high-court-contempt-action-non-compliance-police-station-cctv-installation-case-273516>

proof showing that court orders for contempt, monetary penalties, or personal responsibility of the culpable officials have been regularly and firmly executed. The divide between the concurring courts' judgment²¹ and its practical implementation largely diminishes the deterrent effect of the mandate and facilitates non-compliance without any significant consequences.

Oversight mechanisms established in line with the judgment have similarly faced challenges in bringing about accountability. Committees operating at the state and district levels, responsible for overseeing the installation and operation of CCTV,²² are often found lacking in terms of being independent, well-equipped, or having the authority to enforce decisions. Most of the time, their function is merely supervisory, with their work limited to pointing out shortcomings rather than fixing them. The result of this is a compliance culture emphasising formal installation at the cost of functional integrity. Therefore, there is the possibility that the cameras exist, but they are not maintained regularly, are not in the right position, or are not available in case the footage is required as evidence. Lack of live monitoring and independent checking only adds to this issue, allowing major loopholes to remain unnoticed till after the events have taken place.

Judicial measures against non-compliance at the High Court level are a clue to the possibility of stricter enforcement, though such judicial remedies are infrequent so far. Some High Courts have considered CCTV blind spots as a kind of contempt and have held the station-level officers responsible for intentionally avoiding the surveillance requirements. Nevertheless, these cases have not led to the setting of a national norm, and the enforcement still differs widely from one jurisdiction to another. As for the Supreme Court, it has expressed the possibility of strict action and contempt proceedings, yet they have not been implemented into a systematic scheme of penalties that could change the behaviour of the institutions.

21 *Monitoring Torture: SC's Suo Motu Action on Custodial Deaths and CCTV Camera Non-Compliance*, Sabrang India (Sept. 13, 2025), <https://sabrangindia.in/monitoring-torture-scs-suo-motu-action-on-custodial-deaths-and-cctv-camera-non-compliance/>

22 *Ctr. for Just. & Peace, CCTV in Police Stations: From Judicial Directives to Constitutional Accountability* (Sept. 12, 2025), <https://cjp.org.in/cctv-in-police-stations-from-judicial-directives-to-constitutional-accountability/>

The limitations of the CCTV mandate ultimately highlight a deeper structural point, as technology alone cannot replace institutional accountability.²³ Although continuous surveillance can be helpful in creating a stronger body of evidence and discouraging open violence, its effectiveness depends on the presence of mechanisms that guarantee adherence, maintain the sanctity of recordings, and punish wrongdoing. Without such mechanisms, CCTV systems are merely decorative symbols, there physically but in reality without any function.

Conclusion

Why custodial torture continues in India is not only due to loopholes in the law? As shown by this article, the law and courts' roles in arrest, detention, and state liability are quite strong both in terms of law and norms. Cases like *D.K. Basu v. State of West Bengal*²⁴ and *Nilabati Behera v. State of Orissa*²⁵ have not only declared custodial torture illegal but also held the state accountable for preventing and providing remedies. However, the ongoing occurrence of such human rights violations must be considered a failure over which a court of law cannot have control. As accountability cannot be present in a system that fails to recognise its mistakes through proper documentation. Until prosecutorial systems become transparent, we will not be able to confront the issue of custodial torture, and constitutional protections will remain a pipe dream. Addressing this issue cannot be done with simple reforms here and there but requires a fundamental dedication to transparency, truthful data, and accountability at the level of the entire criminal justice system.

23 *Tusharbai Rajnikantbhai Shah v. State of Gujarat*, SLP (Crl.) No. 14489 of 2023 (India Aug. 7, 2024) (order), https://api.sci.gov.in/supremecourt/2023/44034/44034_2023_3_301_54676_Order_07-Aug-2024.pdf.

24 *D.K. Basu v. State of West Bengal*, (1997) 1 S.C.C. 416 (India)

25 *Nilabati Behera v. State of Orissa*, (1993) 2 S.C.C. 746 (India).

भारत के जनजातीय रीति रिवाज़ और प्रकृति संरक्षण

डॉ. अनुराधा अस्थाना सिंह*

सार (एब्सट्रैक्ट)

जनजातीय समाज, सदियों के शोषण के कारण एक वंचित समाज रहा है, पर इनके समाज और संस्कृति में ऐसी बातें हमें दिखती हैं जो, आज की समस्याएं विश्व झेल रहा है उनका हल इनके पास है। वो शासक भी रहे हैं। लोहा पिघलने की कला भी इन्हे आती थी। तकनीक इनकी बहुत विकसित थी। पर आदिवासी को एक अलग तरीके से अभी भी देखा जाता है। जब हम दर्शन की बात करते हैं तो सभी धर्म या दर्शन इंसान को केंद्र में रख के बात करते हैं। पर आदिवासी जब बात करता है तो वो कभी पुत्र प्राप्ति या दूधो नहाओ पूतो फलो की बात नहीं करता। वो ये कहते हैं की जंगल आबाद रहे, बारिश होती रहे, प्रकृति स्वस्थ रहे। फसलों की चिंता, पशुधन की चिंता ---समस्त पशुधन, वनस्पति और प्रकृति के तत्त्व जैसे पहाड़, पत्थर इत्यादि के लिए ये शुभ कामनाएं करते हैं। ये मानव को श्रेष्ठम सृष्टि की इकाई नहीं मानते हैं बल्कि पूरी प्रकृति की कुशलता की कामना करते हैं। संवेदनशीलता हर प्राणी में है, आज हम इंटरनेट की दुनिया में रहते हैं पर नैसर्गिक जंगल में पेड़ों की जड़ें एक दुसरे के साथ फंगस के नेट से जुड़ी हैं। कोई पेड़ अगर बीमार है तो दुसरे पेड़ उससे ठीक होने के संकेत और उपचार भेजते हैं। प्रकृति कितनी विकसित है। आज पूरा विश्व सतत विकास की बात करता है, यानि की प्राकृतिक संसाधनों को नष्ट किये बिना विकास करना। हर वर्ष यूरोप के किसी देश में पर्यावरण संरक्षण के उपायों पर, ओजोन परत के क्षरण पर शासनाध्यक्ष और पर्यावरणविद बड़ी बड़ी चर्चाओं में भाग लेते हैं और प्रस्ताव पारित किये जाते हैं। अगर हम जनजातीय संस्कृति और इतिहास का अध्ययन करें तो हमें पता चलता है की हजारों वर्ष पूर्व भी ये प्रकृति से जुड़े रहे और प्रकृति की रक्षा करना इनका सबसे बड़ा कर्तव्य रहा। जनजातीय समुदाय में स्वर्ग नरक की परिकल्पना नहीं है। ये मानते हैं कि पितर हमारी रक्षा करते हैं। उन्हें घर में ही स्थान दिया गया है। साल के वृक्ष दिवार हैं, घास फर्श है और आसमान छत है। इसलिए उनके मंदिर के भवन नहीं हैं। भगवान का निवास प्रकृति में ही है। समानता इस संस्कृति के मूल में है। शंकराचार्य का अद्वैतवाद कहता है की हर मनुष्य में ईश्वर है, पर आदिवासी दर्शन कहता है की इस विश्व के हर जीवित और अजीवित तत्त्व में भगवान् का निवास है। अतः प्रकृति की पूजा ही ईश्वर की पूजा है। स्त्रियों के प्रति सहज सम्मान का भाव है। शुरुआत में समाज मातृसत्तात्मक था। आदिवासी समाज के गोत्र सप्तऋषिओं से नहीं आते बल्कि प्रकृति के ही किसी न की तत्त्व को इंगित करते हैं। जैसे कि लकड़ा गोत्र बाघ से, खाखा गोत्र कौवे से निकला है। कुजूर गोत्र के पीछे यह कहा जाता है की कुजूर पौधे ने एक व्यक्ति की रक्षा की थी। प्रस्तावित आलेख में जनजातीय समुदाय के प्रकृति से लगाव और प्रकृति पर निर्भरता दिखाते हुए यह बताने की कोशिश की जायेगी कि आज की समस्याओं का निदान आदिवासी समाज की रीतिओं को समझ कर कैसे किया जा सकता है।

Key words : असुर, मालपहाड़ी, सरना-दर्शन, सियानी, कर्मा

प्रस्तावना

भारत की जनजातीय संस्कृति हमारे देश की वह अमूल्य निधि है जो एक अविरल धरा के रूप में आदिकाल से बहती आयी है। इस अमूल्य निधि को बचाना हमारा परम कर्तव्य है। जनजातीय समाज सदियों से एक शोषित समाज रहा है। जब इसकी संस्कृति और इनके तौर तरीकों का अध्ययन किया जाता है तो यह ज्ञात होता है की आज जिन समस्याओं को हमारा विश्व झेल रहा है उसका उपाय तो जनजातीय संस्कृति में पहले से मौजूद है। ये उस इलाके में प्रागैतिहासिक काल से रहते आये जो वृक्षों और पहाड़ों से आच्छादित रहा- -- जैसे झारखण्ड, छत्तीसगढ़, मध्य प्रदेश के इलाके, उड़ीसा, तेलंगाना का कुछ क्षेत्र, महाराष्ट्र और गुजरात आदि। पर ये वाह्य जगत से कटे हुए कभी नहीं रहे। प्राचीन काल हो (गुप्ता काल और शशांक को छोड़ कर), सल्तनत शासन हो या मुगल शासन --- कोई भी केंद्रीय शक्ति इन जनजातीय इलाकों को अपने पूर्ण नियंत्रण में नहीं ला सके। यह भी सही है की उत्तर भारत में आर्य जाति के आगमन के बाद इन्हे मैदानी इलाकों से खदेड़ा गया तब इन्ही पर्वतों और जंगलों ने इन्हे आश्रय दिया और आदिवासी जातियां जैसे हो, मुंडा, उरांव, संथाल आदि यहां बस गए। प्रारंभिक जनजातियां जैसे असुर नव पाषाण कल से लेकर लौह युग तक छोटानागपुर प्रदेश में फलते फूलते रहे। लोहा गलाने से लेकर भवन निर्माण की कला में वो माहिर थे। सदियों के शोषण और वंचन के बावजूद भी इस समाज और संस्कृति में ऐसी बातें निहित हैं जो आज के विश्व की चर्चा का केंद्र हैं जैसे कि " सतत विकास ", " वसुधैव कुटुम्बकम्", संसाधनों की रक्षा इत्यादि। प्राकृतिक सांसदों को नष्ट किये बिना, किसी भी प्रजाति को नष्ट किये बिना विकास की बात की जाती है। हर वर्ष विश्व के किसी न किसी बड़े शहर में पर्यावरण संरक्षण के उपायों पर देशों के राष्ट्राध्यक्ष या शासनाध्यक्ष बड़ी बड़ी चर्चाओं में भाग लेते हैं। प्रस्ताव पारित किये जाते हैं। जनजातीय संस्कृति का अध्ययन करने पर यह पता चलता है की हज़ारों वर्षों से ये प्रकृति से जुड़े रहे हैं और इस वसुंधरा की रक्षा करना इनका सबसे बड़ा कर्तव्य है।

साहित्य अवलोकन :

जनजातीय इतिहास और संस्कृति पर हिंदी या किसी क्षेत्रीय भाषा में शुरुआती दौर में कोई ग्रन्थ या लेख प्राप्त नहीं होता है। ब्रिटिश शासन काल के प्रारंभिक काल में दो तरह के विद्वान थे जो जनजातीय संस्कृति को जानने के इच्छुक थे--- । ओरिएंटलिस्ट स्कॉलर्स और २ ईसाई मिशनरीज। एम् सी राय की पुस्तक " मैं इन इंडिया " जनजातीय इतिहास के कई पहलुओं को उजागर करती है। उनीसवीं सदी के उत्तरार्ध में एच एच ब्लॉकमैन द्वारा रचित आलेख विशुद्ध ऐतिहासिक दृष्टिकोण से लिखा गया था। बाद में झारखण्ड के विद्रोहों जैसे कोल विद्रोह, संथाल विद्रोह आदि के बारे में इतिहासकारों जैसे डॉ जे सी झा, डॉ एस पी सिन्हा, डॉ ए पी वर्मा आदि ने कार्य किया। पर जनजातीय संस्कृति के बारे में उनके रहन सहन को देखकर और उनके द्वारा अपनाये जाने वाली रीतिओं को देख कर ही अनुमान लगाया जा सकता है।

जनजातीय समाज : एक परिचय ---

विभिन्न जनजातियां भारतीय समाज का एक प्रमुख हिस्सा है। इनकी अपनी विशिष्ट भाषा, रहन सहन, रीति रिवाज और जीवन शैली है। आपस में इनके कई रीति रिवाज मिलते जुलते हैं। भारत के संविधान के आर्टिकल ३४२ ने इन्हे अनुसूचित जनजाति का दर्जा दिया है। अनुच्छेद १५(४) और १६ (४) में इनको शिक्षा और रोजगार के क्षेत्र में आरक्षण का प्रावधान है। इसी तरह अनुच्छेद ३३०, ३३२ और २४३ डी में लोक सभा, राज्य सभा, राज्य विधायिकाओं और पंचायत आदि में आरक्षण की व्यवस्था की गयी है। यद्यपि हमारा संविधान इन्हे आर्थिक, सामाजिक और शैक्षणिक रूप से पिछड़ा मानता है, पर सांस्कृतिक रूप से ये कहीं आगे हैं। भारत में ७०० से अधिक जनजातियां हैं जैसे गोंड, भील, संथाल, मुंडा, ओराओ, बैगा, नागा, कुजूर, केरकेट्टा आदि। इनकी जीवन शैली मुख्यतः प्रकृति आधारित है। जंगल, पृथ्वी, पशु, नदी, पहाड़

इत्यादि पूज्यनीय माने जाते हैं। मुख्यतः कृषि पर आधारित ये जनजातियां हैं। पर यह भी मानना होगा कि कुछ के पास कृषि भूमि थी जैसे मुंडा ओराओं आदि, पर कुछ जनजातियां वंचित समाज में आती हैं जैसे असुर, मालपहाड़ी आदि। असुरों को लोहा गलाने की प्रक्रिया आती थी।

जनजातीय दर्शन और प्रकृति से लगाव :

अद्वैतवाद की परिकल्पना हर जीव में ईश्वर पर आधारित है जिसे सोअहं कहा गया है। पर जनजातीय दर्शन जिसे "सरना दर्शन" के नाम से भी जाना जाता है, वह अद्वैत दर्शन से भी कहीं आगे है क्योंकि यह सभी जीव के साथ सभी अजीवों जैसे पहाड़, पत्थर, नदी में भी ईश्वर के अस्तित्व को मानता है। भौतिक और पराभौतिक रूप से ये प्रकृति से जुड़े हुए हैं। आध्यात्मिक भूख भी प्रकृति से ही पूरी होती है। इनका कोई विशेष पूजा स्थल नहीं होता। वृक्षों का समूह ही पूजा स्थल बन जाता है। इनका कोई ईश्वर दूत नहीं है। न ही इनकी कोई पवित्र पुस्तक है। जनजातीय समुदाय में नरक की परिकल्पना नहीं है। उनका मानना है कि पितर ही रक्षा करते हैं। उन्हें घर में ही स्थान दिया गया है। साल के वृक्ष दीवार हैं, घास फर्श है और आसमान छत है। इसलिए उनके मंदिर के भवन नहीं हैं। समानता इस संस्कृति का मूल मन्त्र है और प्रकृति की पूजा ही ईश्वर की पूजा है। आज के सन्दर्भ में इस विचार की प्रासंगिकता और बढ़ जाती है जब सतत विकास और प्राकृतिक संसाधनों के बचाव के लिए बड़ी बड़ी योजनायें बनाई जा रही हैं और उनका कार्यावयन किया जा रहा है। अनेक जनजातीय त्यौहार और अनुष्ठान प्राकृतिक चक्रों और अनुष्ठानों से जुड़े हुए हैं। ये सांस्कृतिक घटनाएं प्रकृति के प्रति सम्मान को दिखाती हैं। जब हम गोल की बात करते हैं तो हिन्दुओं के गोल सप्तरुषिओं से आते हैं। पर जनजातीय समूहों में ये गोल प्रकृति के ही किसी न किसी तत्व को इंगित करते हैं। जैसे की लकड़ा गोल बाघ से, खाखा गोल कौवे से। कुजूर गोल के पीछे की कथा है की कुजूर के पौधे ने एक व्यक्ति की रक्षा की थी इसलिए कुजूर गोल का अविर्भाव हुआ।

प्रकृति और पर्यावरण का सह अस्तित्व :

भारतीय संस्कृति में पृथ्वी, वायु, जल, आकाश और अग्नि को जीवन का आधार मन गया है। जनजातीय समाज भी इन्हीं तत्वों को पूजता है।

प्रकृति की पूजा करना, प्राकृतिक उत्पादों का उपभोग करना और प्रकृति का संरक्षण करना इनका मुख्य उद्देश्य रहा है। "बैगा" जाति को जंगल का संरक्षक मन गया है। प्रकृति से ये इतना ही लेते हैं जितना आवश्यक होता है। प्रकृति से सामंजस्य का ज्ञान, समाज और अनुशासन के साथ प्रकृति का ज्ञान है। बैगा जनजाति का करमा नृत्य आस्था, प्रकृति और नई फसल की खुशी का उत्सव है। भादों की एकादशी पर करम वृक्ष की पूजा के साथ इसकी शुरुआत होती है। सुर, लय और अंग संचालन के साथ यह नृत्य जीवंत हो उठता है। हर गीत में उनकी सांस्कृतिक विरासत झलकती है। यह परंपरा समुदाय को एक सूत्र में बांधती है। "मुरिआ" जनजाति में "घोटुल" जैसी सामुदायिक संस्था है जो युवाओं को प्रकृति और संस्कृति के संरक्षण का ज्ञान देती है। इसी तरह साल वृक्ष की पूजा सरहुल त्यौहार में की जाती है जहाँ ओराओं जनजाति चैत्र माह में इस पर्व को मानती है और प्रकृति के प्रति धन्यवाद व्यक्त करते हैं। पर्व मनाने का मुख्य उद्देश्य सुख शांति और समृद्धि की कामना करना है।

हो जनजाति के लोग, जो प्रकृति उपासक हैं, सरना धर्म में विश्वास रखते हैं। सरना शब्द सिर (तीर) से लिया गया है। हो जनजाति के लोगों का पूजा स्थल एक पवित्र उपवन होता है, जहाँ प्राचीन सरकोमा (साल) के वृक्षों का समूह स्थित होता है। रॉय (1912) ने अपनी प्रथम महत्वपूर्ण कृति "मुंडा और उनका देश" में उल्लेख किया है कि यद्यपि बहुत से वन काटे जा चुके हैं या आग लगने से बर्बाद हो गए हैं पर प्राचीन वृक्षों का

समूह मौजूद है जो गांव के मंदिर के रूप का प्रतिनिधित्व करता है। इसे सरना कहा जाता है। यहाँ गाँव के देवता निवास करते हैं, और समय-समय पर उनकी पूजा और बलि देकर उन्हें प्रसन्न किया जाता है। इसी तरह डाल्टन (1872:56-57) और डेहॉर्न (1906:124) ने उल्लेख किया है कि धर्म प्रकृति में मिश्रित है। हो जनजाति के लोग अपने सभी देवी-देवताओं और आत्माओं को बोंगो कहते हैं और उनके अनुसार ये बोंगो मानवरूपी नहीं हैं। बोंगो एक सामान्य शब्द है, जिसका प्रयोग शक्ति और आत्मा को दर्शाने के लिए किया जाता है।¹ बोंगो शक्ति प्रत्येक व्यक्ति, प्रत्येक पशु, प्रत्येक पौधे और प्रत्येक धारा, नाले, तालाब, चट्टान, वृक्ष, वन क्षेत्र और पर्वत में विद्यमान है। इसी तरह कर्मा पूजा है जिसका केंद्र है कर्मा वृक्ष, जिसे जीवन, समृद्धि और उर्वरता का प्रतीक माना जाता है। युवा पुरुष और महिलाएँ जंगल से इसकी शाखाएँ लाते हैं और इन्हें गाँव के अखाड़ा (नृत्य स्थल) या आँगन में गाड़कर पूजा करते हैं। इस पर्व को अनेक आदिवासी समुदाय मनाते हैं, जिनमें उरांव, मुंडा, हो, संथाल, खड़िया, खरवार, बैगा, गोंड, कोल, महली, बिरहोर, असुर, भूमिज और कुरुख शामिल हैं। हर जनजाति अपने विशेष गीत, कथाएँ और परंपराएँ जोड़ती है, जिससे यह त्योहार विविधता में एकता का जीवंत उदाहरण बनाता है। यह पर्व कृषि चक्र से जुड़ा है। कर्मा वृक्ष की पूजा अच्छी फसल और आपदाओं से रक्षा सुनिश्चित करती है।

आज विश्व में पर्यावरण को लेकर बहुत चिंता है। ओजोन लेयर के क्षरण को लेकर या ग्रीन हाउस गैस के प्रभाव को रोकने को लेकर, हर वर्ष विश्व के किसी आकर्षक शहर में शासनाध्यक्ष और पर्यावरणविद मिलते हैं ---प्रस्ताव पारित किये जाते हैं और कानून बनाए जाते हैं। ऊर्जा के गैर पारम्परिक स्रोतों जैसे पवन ऊर्जा, सौर ऊर्जा, बायोमास और बायोगैस आदि के प्रयोग पर बल दिया जाता है। अगर हम जनजातीय इतिहास और संस्कृति का अध्ययन करें तो पता चलता है की हज़ारों वर्ष से, सदियों से, जनजातीय समाज प्रकृति से जुड़ा रहा और प्रकृति संरक्षण इनका सबसे बड़ा कर्तव्य रहा है। कोविड - १९ जैसी माहमारी विश्व के लिए बहुत बड़ी चुनौती थी। पर हमें यह जान कर आश्चर्य होता है की जनजातीय समूहों पर इनका सबसे कम असर पड़ा। माहमारी की स्थिति में जनजातियां ग्राम छोड़कर जंगलों की तरफ चली गईं और वापस तभी लौटी जब तक माहमारी का प्रकोप कम नहीं हो गया। जनता के सहयोग और भागीदारी से ही इतनी बड़ी समस्या से हम निकल पाए।

एथनोसांफिटिक अध्ययन यह बताता है कि जनजातीय समुदाय पर्यावरण को एक भौतिक संसाधन के रूप में नहीं बल्कि सांस्कृतिक, आध्यात्मिक और सामाजिक तौर पर देखता है। संथालों कि पारम्परिक कृषि पद्धति जैसे झूम खेती, भूमि कि उर्वरता और पर्यावरण सतुलन को ध्यान में रख कर अपनायी गयी है। महुआ का वृक्ष न सिर्फ आर्थिक महत्व का है पर धार्मिक अनुष्ठानों में भी इसका प्रयोग होता है। इनका ज्ञान तंत्र पूरी तरह पर्यावरण के अनुभव पर और पीढ़ी दर पीढ़ी चलता रहा। इनकी कृषि प्रणाली मिश्रित कृषि पर आधारित है जिसमे ये धान, मक्का बाजरा, तथा अन्य सब्जियां उगते हैं। फसल चक्र, सहफसली खेती और जैविक खाद का प्रयोग मिटटी कि उर्वरता बनाये रखते हैं। वे देशज बीजों का संरक्षण करते हैं जो जलवायु के अनुकूल और लचीले होते हैं।² सरना या पवित्र वन प्रदेश उनके धार्मिक विश्वास का हिस्सा हैं जो जैव विविधता के संरक्षण के साथ साथ सामाजिक प्रतिबद्धता भी दर्शाते है।

1 मजूमदार 1950:264-267

2 दत्ता , २०२४) दत्ता, बी., गांताई, एस., हांसदा, एस., & दास, ए. के. (2024). डॉक्युमेंशन ऑफ हांडशजजनस मेशडशसनल नॉलेज ऑफ शसलेकुरिडबल कमयुशनीज ऑफिसिबिंगाल. निशाल ऑफ डाटा साइंस, इन्फोमेटरकस एंड साइटेन स्टडीज़, 3(3), 349-355.

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लिंग समानता और स्त्री की भूमिका :

जनजातीय समाज में महिलाओं को पुरुष के समकक्ष स्थान प्राप्त है। वे खेतों में काम करती हैं , और सामाजिक जीवन में सक्रिय रहती हैं। जनजातीय महिलाओं के लिए "सियानी " शब्द का प्रयोग होता है जिसका मतलब है बुद्धिमती । ये मस्तिष्क के सौंदर्य को रेखांकित करता है न कि तन के सौंदर्य को। वही दूसरी तरफ हम पूर्व वैदिक काल और उसके बाद देखें तोह स्त्री एक उपभोग कि वास्तु के रूप में दिखाया गया है जिसका काम है कृषि कार्य करने के लिए लड़कों को जन्म देन। शायद इसलिए उसके लिए " जननी " शब्द का प्रयोग किया गया। रोहतासगढ़ के किले पर आक्रमण में सिंघनी दाई और कैली दाई नामक महिलाओं का योगदान अविस्मरणीय है। जनजातीय महिलाओं सिंघनी दाई , कैली दाई और चम्पू दाई द्वारा रोहतासगढ़ के किले का किया गया बचाव इन महिलाओं कि वीरता को दिखता है। धनुष -बाण , तलवार, लाठी , भाला इत्यादि कि मदद से लड़ा गया ये युद्ध गुरिल्ला विधि से लड़ा गया।³

इसी तरह १८३१-३२ का बिरसा मुंडा का उलगुलान हो और उसमे उनकी बेटियों रुनिआ और झुनीआ का योगदान या १८५५ के संथाल हूल में फूलो झानो और अन्य महिलाओं का योगदान जनजातीय महिलाओं कि सुदृढ़ स्थिति को दर्शाता है। रसद पहुंचने के साथ साथ दुश्मन की जानकारी एकत्र करना और रात्रि के समय शत्रुओं के टेंट पर हमला करना इनका मुख्य कार्य था। बात कृषि की हो, घर का प्रबंधन करने की, धार्मिक अनुष्ठानों में भाग लेने की या फिर युद्ध क्षेत्र की---जनजातीय महिलाओं ने हर क्षेत्र में बढ़ चढ़ कर हिस्सा लिया। आज जो महिला सशक्तिकरण के आंदोलन चल रहे हैं---हमारी जनजातीय महिलाएं तो सदियों पहले से सशक्त रही है।

सामुदायिकता और लोकतान्त्रिक मूल्य :

जनजातीय समाज का अध्ययन करने से पता चलता है कि लोकतान्त्रिक मूल्यों में इनकी बहुत आस्था है। आज का समाज औद्योगिक क्रांति और सर्विस सेक्टर के दुष्परिणाम झेल रहा है--- जैसे संयुक्त परिवार प्रथा का विनाश। आधुनिकता कि लहर हमे अकेला कर रही है जिसकी परिणीति अवसाद , नशा , तलाक , और आत्महत्या होता है। पर जनजातीय संस्कृति में स्व से पहले समुदाय , साझा जीवन शैली और पारस्परिक सहयोग को रखा जाता है। लोकतंत्र का मतलब सिर्फ वोट डालना नहीं, बल्कि एक सहभागी लोकतंत्र कि परिकल्पना है जिसमे सर्वसम्मति से सामुदायिक निर्णय लेना , लैंगिंग समानता और आत्मनिर्भरता है। " मदैत " परंपरा है जहाँ सामुदायिक रूप से एक दूसरे के खेतों में रोपाई और कटाई की जाती है। इसी तरह एक परंपरा है " मेहमानी " --अगर किसी व्यक्ति के घर आवश्यकता से अधिक उत्पादन हुआ है तो मेहमान आते हैं और अधिशेष उत्पाद को उपहार के तौर पर ले जाते हैं। ऐसा कहा जाता है कि आदिवासी टोले में कोई भूखा नहीं सोता है।

जनजातीय संस्कृति का एक प्रमुख तत्व अखड़ा है। अखड़ा संस्कृति जनजातीय समुदाय के उत्थान में बहुत महत्वपूर्ण भूमिका अदा करते हैं। ये एक सांस्कृतिक स्थल है। गांव के अखाड़े में गांव के वृद्ध समस्याओं को सुलझाते हैं। नृत्य तथा संगीत भी सामुदायिक होता है। यह सांमतवादी समाज जहाँ एक स्त्री नाचती है और पुरुष उसका आनंद लेते हैं उससे बिलकुल अलग है। यहाँ पूरा समुदाय भाग लेता है। झारखण्ड के मुख्यतः पश्चिम सिंघभूम, सराईकेला और रांची में रहने वाली हो जनजाति अपने विशिष्ट स्वायत्त तंत्र के लिए जानी जाती है। " मुंडा- मानकी " नामक एक राजनैतिक, सामाजिक और सांस्कृतिक संस्था है। स्थानीय स्तर पर यह दीवानी और जमीन सम्बन्धीवादों का निस्तारण करती आयी है। हो ग्राम का प्रमुख "

मुंडा" कहलाता है और उसका एक सहायक " डकुआ" तथा ग्राम पुजारी " दिउरी " होता है। ये तीनों ग्राम वासियों के सहयोग से कार्य करते हैं। असलियत में कोई भी निर्णय लेने के लिए ये ग्राम वासियों पर आश्रित होते हैं। मुंडा को पद से हटाया भी जा सकता है। वह ग्राम वासियों के प्रति सर्वदा उत्तरदायी रहा है। अगर कोई सड़क बनानी है या कोई तालाब बनना है तो वह ग्राम वासियों के सामूहिक प्रयास से ही होगा। आपसी भाईचारे और सहयोग की यह बहुत बड़ी मिसाल है।⁴ कोई भी पारिवारिक वाद हो --- जैसे भूमि, विवाह या पशु से सम्बंधित---उसका निबटारा प्रथागत कानून (कस्टमरी लॉ) से किया जाता था। पुलिस थाना जाने के बजाये ये अपने विवाद " मुंडा- मानकी " प्रथा से ही सुलझा लेते थे। २०२१ के एक आंकड़े के अनुसार पूर्वी सिंधभूम के गरसईन, फुल्कनि, सुपुरगुट्टु, भोभडीहा और माँझगाँवों ब्लॉक में पिछले १०० वर्षों में कोई भी दीवानी केस पुलिस स्टेशन या कोर्ट में दाखिल नहीं हुआ है।⁵

ग्राम पुजारी --दिउरी अक्सर एक मीडिएटर का काम करता है। इसी तरह डकुआ जन जागरण का काम करता है। कोविड १९ के समय भी डकुआ ने गाँव में जन जागरण फैलाने का काम किया जैसे लोगों को स्वच्छता के लिए प्रेरित करना। भाषा की समस्या के कारण गाँव में लोगों को बीमारी की विभीषिका के बारे में चेतावनी देना असंभव था। यह कार्य डकुआ ने भली भाँती किया। मुंडा - मानकी प्रथा में मानकी एक अपील के न्यायलय की तरह है। ये अनेक ही गाँव की काउन्सिल का अध्यक्ष है। कभी - कभार अगर कोई वाद मुंडा और ग्राम वासियों द्वारा हल नहीं हो पता था तो वह मानकी के पास भेजा जाता था। सामूहिक निर्णय प्रक्रिया, आपसी सहयोग और समानता के आधार पर चलती है। जनजातीय संस्थाएं जैसे अखड़ा ग्रामीण लोकतंत्र और स्थानीय स्वशासन को सुदृढ़ करता है। " सबका साथ सबका विकास " जैसा नारा इन जनजातियों में पहले से ही निहित है।

पारम्परिक ज्ञान और आत्मनिर्भरता :

जनजातीय ज्ञान प्रणाली, भारतीय ज्ञानपरंपरा का एक प्राचीन, समकालीन रूप है। यह प्रणाली जनजातीय समूहों के अनुभव पर आधारित है। ये सदियों से प्रकृति के साथ सह अस्तित्व में जीते आ रहे हैं। संथाल, भील, गोंड इत्यादि जातियाँ पर्यावरणीय समझ के साथ ज्ञान का संचरण करते रहे हैं।⁶

प्रकृति और पर्यावरण के साथ सह अस्तित्व :

आज पूरा विश्व सतत विकास की बात करता है। हम देखते हैं कि जनजातीय संस्कृति और दर्शन " प्रकृति मानव" सम्बन्ध कि बात करते हैं जो शोषण पर आधारित नहीं है। दोनों एक दुसरे को सम्मान और सहभागिता कि दृष्टि से देखते हैं और यही "सतत विकास" का मूल तत्त्व है। आधुनिक सामाजिक विज्ञान के इकोलॉजिकल एंथ्रोपोलॉजी और एसोफेमिनिस्म जैसे क्षेत्रों में अत्यंत प्रासंगिक है।

सामुदायिकता और लोकतान्त्रिक मूल्य :

यू एन डी पी (१९९३ :२१) की रिपोर्ट के अनुसार सहभागिता का मतलब है आर्थिक, सामाजिक और संस्कृतिक रूप से लोगों की सक्रीय संलिप्तता।

4 <https://www.ijtsrd.com/papers/ijtsrd57407.पीडीऍफ़>

5 दैनिक भास्कर, चैबास, पश्चिम सिंधभूम, झारखण्ड, १७ सितम्बर २०२१

6 भट्टाचार्य, 2022

जनजातीय समाज का अध्ययन करने से पता चलता है कि लोकतान्त्रिक मूल्यों में इनकी बहुत आस्था है। आज का समाज औद्योगिक क्रांति और सर्विस सेक्टर के दुष्परिणाम झेल रहा है--- जैसे संयुक्त परिवार प्रथा का विनाश। आधुनिकता कि लहर हमें अकेला कर रही है जिसकी परिणीति अवसाद, नशा, तलाक़, और आत्महत्या होता है।

पर जनजातीय संस्कृति में स्व से पहले समुदाय, साझा जीवन शैली और पारस्परिक सहयोग को रखा जाता है। लोकतंत्र का मतलब सिर्फ वोट डालना नहीं, बल्कि एक सहभागी लोकतंत्र कि परिकल्पना है जिसमें सर्वसम्मति से सामुदायिक निर्णय लेना, लैंगिंग समानता और आत्मनिर्भरता है। " मदैत " परंपरा है जहाँ सामुदायिक रूप से एक दूसरे को खेतों में रोपाई और कटाई करता है। इसी तरह एक परंपरा है " मेहमानी " --अगर किसी व्यक्ति के घर आवश्यकता से अधिक उत्पादन हुआ है तो मेहमान आते हैं और अधिशेष उत्पाद को उपहार के तौर पर ले जाते हैं। ऐसा कहा जाता है कि आदिवासी टोले में कोई भूखा नहीं सोता है। जनजातीय संस्कृति का एक प्रमुख तत्व अखड़ा है। अखड़ा संस्कृति जनजातीय समुदाय के उत्थान में बहुत महत्वपूर्ण भूमिका अदा करते हैं। ये एक सांस्कृतिक स्थल है। गाँव के अखाड़े में गाँव के वृद्ध समस्याओं को सुलझाते हैं। नृत्य तथा संगीत भी सामुदायिक होता है। यह सामंतवादी समाज जहाँ एक स्त्री नाचती है और पुरुष उसका आनंद लेते हैं उससे बिलकुल अलग है। यहाँ पूरा समुदाय भाग लेता है।

झारखण्ड के मुख्यतः पश्चिम सिंधभूम, सराईकेला और रांची में रहने वाली हो जनजाति अपने विशिष्ट स्वायत्त तंत्र के लिए जानी जाती है। " मुंडा- मानकी " नामक एक राजनैतिक, सामाजिक और सांस्कृतिक संस्था है। स्थानीय स्तर पर यह दीवानी और जमीं सम्बन्धीवादों का निस्तारण करती आयी है। हो ग्राम का प्रमुख " मुंडा " कहलाता है और उसका एक सहायक " डकुआ " तथा ग्राम पुजारी " दिउरी " होता है। ये तीनों ग्राम वासियों के सहयोग से कार्य करते हैं। असलियत में कोई भी निर्णय लेने के लिए ये ग्राम वासियों पर आश्रित होते हैं। मुंडा को पद से हटाया भी जा सकता है। वह ग्राम वासियों के प्रति सर्वदा उत्तरदायी रहा है। अगर कोई सड़क बनानी है या कोई तालाब बनना है तो वह ग्राम वासियों के सामूहिक प्रयास से ही होगा। आपसी भाईचारे और सहयोग की यह बहुत बड़ी मिसाल है।⁷ कोई भी पारिवारिक वाद हो --- जैसे भूमि, विवाह या पशु से सम्बंधित---उसका निबटारा प्रथागत कानून (कस्टमरी लॉ) से किया जाता था। पुलिस थाना जाने के बजाये ये अपने विवाद " मुंडा- मानकी " प्रथा से ही सुलझा लेते थे। २०२१ के एक आंकड़े के अनुसार पूर्वी सिंधभूम के गरसईन, फुल्कनि, सुपुरगुदु, भोभडीहा और माँझगाँवों ब्लॉक में पिछले १०० वर्षों में कोई भी दीवानी केस पुलिस स्टेशन या कोर्ट में दाखिल नहीं हुआ है।⁸

ग्राम पुजारी --दिउरी अक्सर एक मीडिएटर का काम करता है। इसी तरह डाकुआ जन जागरण का काम करता है। कोविड १९ के समय भी डाकुआ ने गाँव में जन जागरण फैलाने का काम किया जैसे लोगों को स्वच्छता के लिए प्रेरित करना। भाषा की समस्या के कारण गाँव में लोगों को बीमारी की विभीषिका के बारे में चेतावनी देना असंभव था। यह कार्य डाकुआ ने भली भाँती किया।

मुंडा - मानकी प्रथा में मानकी एक अपील के न्यायलय की तरह है। ये अनेक हो गाँव की काँउन्सिल का अध्यक्ष है। कभी - कभार अगर कोई वाद मुंडा और ग्राम वासियों द्वारा हल नहीं हो पता था तो वह मानकी के पास भेजा जाता था। सामूहिक निर्णय प्रक्रिया, आपसी सहयोग और समानता के आधार पर चलती है। जनजातीय संस्थाएँ जैसे अखड़ा ग्रामीण लोकतंत्र और स्थानीय स्वशासन को सुदृढ़ करता है। " सबका साथ सबका विकास " जैसा नारा इन जनजातियों में पहले से ही निहित है।

7 <https://www.ijtsrd.com/papers/ijtsrd57407.पीडीऍफ़>

8 दैनिक भास्कर, चैबास, पश्चिम सिंधभूम, झारखण्ड, १७ सितम्बर २०२१

इस तरह हम देखते हैं कि जनजातीय संस्कृति और दर्शन " प्रकृति मानव" सम्बन्ध कि बात करते हैं जो शोषण पर आधारित नहीं है। दोनों एक दुसरे को सम्मान और सहभागिता कि दृष्टि से देखते हैं और यही "सतत विकास" का मूल तत्त्व है। आधुनिक सामाजिक विज्ञान के इकोलॉजिकल एंथ्रोपोलॉजी और एसोफेमिनिस्म जैसे क्षेत्रों में यह अत्यंत प्रासंगिक है।

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ONLINE MEDIATION IN FAMILY DISPUTES: REIMAGINING ACCESS TO JUSTICE IN INDIA

Ayushi Jaiswal*

Abstract

In the context of the evolving family justice system in India, online mediation is becoming an integral part of the dispute resolution mechanism, especially following the explicit recognition of technology based mediation in the Mediation Act, 2023. This article considers whether online mediation will be meaningful in enhancing justice access in family conflict without sacrificing voluntariness, confidentiality, informed consent, procedural justice and protection of vulnerable parties. It compares and contrasts the Mediation Act, 2023, various judicial pronouncements, the NITI Aayog ODR Policy Plan, and a select body of international scholarship. The article concludes that the use of online mediation can help eliminate geographical, financial and procedural obstacles, but can also foster digital exclusion, privacy concerns, technological disparities and coerce power dynamics. It thus offers a rights-based, technology-sensitive model, one that is based on suitability screening, secure platforms, informed digital consent, assisted-digital access, specialized training for mediators and legal assistance, and flexible participation online, at a location, or both.

Keywords: Online Mediation; Family Disputes; Access to Justice; Digital Justice; Mediation Act, 2023.

Introduction

Family conflicts cannot be easily categorized. They are also, often, an issue of ongoing relationships and care, of living place, of economic reliance, of parenting, of dignity, of personal safety—but, of course, they are also legal disputes. Judicial determination of rights does not necessarily resolve the actual arrangements for separated family members to interact. That's why mediation is an increasingly significant aspect of modern family law. In *Afcons Infrastructure Ltd. v. Cherian Varkey Construction Co. (P) Ltd.*, the Supreme Court held that consensual procedures, especially mediation, may be appropriate for matrimonial and other types of disputes based on relationships, depending on the circumstances.¹

* Research Scholar, Faculty of Law, University of Lucknow

1 *Afcons Infrastructure Ltd. v. Cherian Varkey Construction Co. (P) Ltd.*, (2010) 8 S.C.C. 24, 28 (India).

The introduction of digital dispute resolution has presented a new opportunity: a mediation process where part – or all – of the communication takes place electronically. Online mediation is conducted via video or audio conferencing, secure digital rooms, exchange of documents online and, in appropriate cases, asynchronously. Its value is more than just to recreate a physical mediation session on a screen. Digital procedure may result in the parties to the process changing, the frequency in which they are able to participate, the way in which private caucuses are carried out, and the technological environment in which consent is given. In the wider context of ODR, as Rabinovich-Einy says, the real issue is procedural design – the technology can facilitate access and efficiency, but that efficiency and access will depend on the values embedded in the system.² India has an express statutory system for online mediation. The Mediation Act, 2023 envisages online mediation, such as pre-litigation mediation, with the consent of the parties in writing and provides for electronic mail, encrypted, secured chat rooms and audio and video conferencing. It also provides for the integrity and confidentiality of the process. Enactment is however different from commencement, and sections 22 and 30 are not in effect as of the notification date of 9 October 2023. The discussion below is thus of these provisions as they are now in effect as a mechanism for implementation, not as a set of rules applicable to all mediations. While it is significant that the legislature has recognized this, it is not enough to resolve the particular questions that may arise in family conflicts.³ The main thesis of this paper is that online family mediation ought to be thought of as a justice-design problem, not a straightforward technology transfer of traditional mediation. It can actually shorten the distance, cost and delay. And the danger of digital exclusion, surveillance, privacy violations, inequality in technological ability and hidden pressure. Convenience, speed, and cheapness cannot be called improved access to justice if there is safety concern or if there is incomprehension or if it is forced. Therefore, there is a need for safeguards to ensure meaningful, informed and safe participation in online family mediation, to ensure its legitimacy.

2 Orna Rabinovich-Einy, *The Past, Present, and Future of Online Dispute Resolution*, 74 CURRENT LEGAL PROBS. 125, 148 (2021).

3 Mediation Act, No. 32 of 2023, § 30, INDIA CODE (2023); Ministry of Law & Justice, Notification S.O. 4384(E), GAZETTE OF INDIA, EXTRAORDINARY, pt. II, sec. 3(ii) (Oct. 9, 2023). Sections 22 and 30 are not among the provisions listed in that notification. Section 30's examples of permissible technology are non-exhaustive.

The research problem is a discrepancy between the general statutory recognition of online mediation and the more rigorous requirements of family justice. The Mediation Act, 2023 provides a wide-ranging legal structure, and the NITI Aayog ODR Policy Plan provides some useful principles for the design of the system.⁴ However, a general ODR model is not sufficient to address vulnerabilities associated with family disputes, such as domestic abuse, coercive control, economic dependence, child-related issues, and lack of private physical space. The paper pursues three objectives. First, it evaluates whether online mediation can improve substantive access to family justice rather than merely reducing transactional inconvenience. Second, it identifies the principal legal and ethical risks associated with remote family mediation, particularly voluntariness, confidentiality, privacy, technological inequality and power imbalance. Third, it develops a rights-based and technology-sensitive framework for implementation in India. The study uses a doctrinal and comparative methodology. It analyses the Mediation Act, 2023, relevant Indian judicial decisions, the Digital Personal Data Protection Act, 2023, the NITI Aayog ODR Policy Plan and selected international and comparative materials. It also engages with scholarship on online family mediation, intimate partner violence screening and ODR design. Comparative materials are used functionally rather than transplantatively: the purpose is to identify safeguards capable of adaptation to Indian institutional conditions. Mediation is often attractive in family disputes because it allows parties to discuss interests that a court may not be institutionally positioned to negotiate in detail. Parenting schedules, modes of communication, relocation arrangements, division of household responsibilities and phased financial arrangements may require flexible solutions. The Supreme Court's discussion in *Afcons* placed matrimonial and family disputes among categories ordinarily suited to ADR, reflecting the continuing-relational character of these conflicts.⁵ Yet the suitability of family disputes for mediation should never become a presumption that settlement is inherently superior to adjudication. Family conflict can occur as a consequence of differential access to resources, fear or dependency. A weaker party may agree just because it is tiring to continue negotiations, or because it seems un-safe not to agree. It is therefore less important that there is agreement, and more important that there is agreement under certain conditions. These concerns are heightened in situations of intimate partner violence or

4 NITI AAYOG, DESIGNING THE FUTURE OF DISPUTE RESOLUTION: THE ODR POLICY PLAN FOR INDIA 88–98 (2021), <https://www.niti.gov.in/sites/default/files/2023-02/odr-report-29-11-2021.pdf>.

5 *Afcons Infrastructure Ltd.*, (2010) 8 S.C.C. 24, 28 (India).

coercive control. Family mediation research has focused on the importance of screening, not just assessing that there is overt physical violence. Rossi and colleagues highlight the need for mediation staff to have tools that allow them to identify IPPV, and then make informed decisions about going forward with mediation or denying it.⁶ Mediation online can sometimes minimize face-to-face confrontation, yet at the same time, it can also mask the setting where a participant is speaking. There is a sense of caution in the literature which is fitting. Rossi et al. suggest that mediation through shuttle or online may have advantages, but need to be taken into account for couples reporting intimate partner violence or abuse.⁷ This is a less extreme stance than either technological optimism or outright rejection. Physical separation via video conferencing can sometimes decrease intimidation; sometimes the vindictive person is closer and might be able to access the device or leave messages outside the mediator's vision.

Confidentiality is likewise a fundamental value. In *Perry Kansagra v Smriti Madan Kansagra*, the Supreme Court acknowledged the value of the confidentiality of mediation, but allowed the consideration of "counsellor material" regarding children to be considered in a specific statutory context: custody adjudication. It is not to be interpreted as a blanket permission to release parties' settlement discussions.⁸ The take home message for online mediation is that it is important to maintain confidentiality in accordance with the relevant legal parameters, including those in relation to child protection. The Mediation Act, 2023 expressly addresses online mediation in its enacted text. Section 30(1) envisages its use at any stage of mediation, including pre-litigation mediation, with written consent. Its examples include encrypted electronic mail, secure chat rooms and video or audio conferencing, but the list is not exhaustive. Section 30(3) provides for circumstances preserving the integrity and confidentiality of proceedings, while section 30(4) reiterates confidentiality for mediation communications. These provisions must be read with the Act's commencement mechanism, rather than treated as automatically

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- 6 Fernanda S. Rossi et al., *Screening for Intimate Partner Violence in Family Mediation: An Examination of Multiple Methodological Approaches Using Item Response Theory*, 29 ASSESSMENT 1641, 1641 (2022). IPV screening informs suitability and protective adaptations; it is not an adjudication of criminal responsibility.
 - 7 Fernanda S. Rossi et al., *Shuttle and Online Mediation: A Review of Available Research and Implications for Separating Couples Reporting Intimate Partner Violence or Abuse*, 55 FAM. CT. REV. 390, 399–400 (2017).
 - 8 *Perry Kansagra v. Smriti Madan Kansagra*, (2019) 20 S.C.C. 753, 28–32 (India). The confidentiality question arose within the statutory framework for child custody and counsellor assistance; the decision does not establish an unrestricted exception for all family disputes.

operative upon enactment.⁹ The enacted general confidentiality provision is even more specific. Section 22 provides for protection of mediation communications and a prohibition on audio or video recording by the parties, participants, mediator or mediation service provider, whether the mediation is conducted physically or online.¹⁰ This is particularly important in family disputes, where recorded conversations may contain intimate personal information, allegations of abuse, financial details or information concerning children. The statutory scheme, however, leaves significant questions to institutional design. Written consent does not necessarily establish that consent is free, informed and technologically meaningful. Nor does a prohibition on recording prevent covert screen capture, a second device in the room, compromised accounts or unauthorised listeners. Section 30 therefore should be understood as an enacted enabling provision whose integrity depends upon procedural standards developed by mediation institutions, service providers and regulators.

The NITI Aayog ODR Policy Plan offers a useful systems perspective. It treats ODR as an ecosystem involving technology platforms, neutrals and institutions and proposes principles that include accessibility, fairness, security, privacy and accountability.¹¹ For family mediation, this is preferable to a platform-centric approach. A secure application cannot compensate for a mediator who fails to screen for coercion; a skilled mediator cannot compensate for a platform that exposes confidential data; and neither can compensate for an institution that offers no alternative when a participant lacks private digital access. The greatest benefit of online family mediation is that it helps to lower barriers to participation. Parties can reside in various districts, States or countries. Repeated physical attendance can be cumbersome due to employment, disability, caregiving, illness or financial considerations. Costs of travel, lost work hours and scheduling conflicts can be decreased with remote sessions. They may also allow lawyers, interpreters, counsellors or support persons to be in attendance without having to have all of them physically present.

9 Mediation Act, No. 32 of 2023, § 30(1), (3)–(4), INDIA CODE (2023); Ministry of Law & Justice, Notification S.O. 4384(E), GAZETTE OF INDIA, EXTRAORDINARY, pt. II, sec. 3(ii) (Oct. 9, 2023).

10 Mediation Act, No. 32 of 2023, § 22(1)–(3), INDIA CODE (2023). Section 22(2) expressly extends the contemplated recording prohibition to both physical and online mediation; commencement remains distinct from enactment.

11 NITI AAYOG, *supra* note 4, at 88–98. The report distinguishes design principles for platforms from principles for institutions and neutrals.

This is relevant in a nation where geographic and institutional factors drive the cost of engaging in legal processes. Technology has been identified as a way to expand access to ODR services and to cut costs and delays, in the ODR Policy Plan.¹² In Rule, ODR is set against a background of the broader trend of applying technology to the dispute resolution process in ways that will make it faster and more accessible, but at the same time pose new risks of unfairness and abuse.¹³

Online mediation can also decrease the emotional price of engaging in mediation. Someone who is uncomfortable in a shared mediation room might be more able to express himself or herself from another area. Digital breakout rooms can help conduct caucuses without having to physically move between rooms. Shorter sessions can be arranged around child care or work responsibilities. For families that live across the border or inter-State, online communication could make more than one session possible, if that would have been too much if it had been done through physical mediation. Having access to a platform does not mean having access to justice. The question is whether the process can be understood, private communication can be made, and advice can be sought, proposals can be considered and decisions made without improper pressure being exerted. It is a difference that matters. Digitalisation can have a negative impact on one barrier and a positive impact on another. A participant might choose not to make the 6 hour trip, but might have to deal with sharing the phone with other people in a home. Measure of effective access will thus be not only the number of people who can log in but the quality of their participation.

A mediated settlement depends upon the parties' consent, although a court's referral to mediation need not always depend upon prior consent. Online mediation adds a distinct question of consent to the mode of participation.¹⁴ The written-consent requirement envisaged by section 30 is valuable, but a signed form should be the beginning rather than the end of the inquiry. In relationships marked by coercive control, a person may formally agree while lacking a realistic capacity to refuse. A robust system should therefore require confidential pre-mediation screening with each party separately. Screening should consider physical violence, threats, stalking, coercive control, financial dependence, digital surveillance, significant communication barriers and risks to children. The aim is not

12 *Id.* at 13–15.

13 Colin Rule, *Online Dispute Resolution and the Future of Justice*, 16ANN. REV. L. & SOC. SCI. 277, 278, 289–90 (2020).

14 *Afcons Infrastructure Ltd. v. Cherian Varkey Construction Co. (P) Ltd.*, (2010) 8 S.C.C. 24, ¶ 36 (India); Mediation Act, No. 32 of 2023, § 30(1), INDIA CODE (2023).

to disqualify every high-conflict case. It is to decide whether mediation is appropriate, whether procedural adaptations can make it safe, or whether the matter should proceed through adjudicatory or protective mechanisms. Rossi and colleagues' study supports using structured IPV screening to inform decisions about safety accommodations and the conduct of mediation.¹⁵

Digital procedure introduces distinctive warning signs. A participant may repeatedly look away because someone else is in the room. They may receive instructions through another messaging application. A shared email account may allow the other party to read confidential communications. Location-sharing or device monitoring may expose participation. Mediators conducting family cases online therefore need competence in recognising digital manifestations of coercion, not merely traditional mediation skills.

The process should also permit procedural asymmetry where necessary for substantive fairness. One party may participate from home while another uses a private room at a mediation centre. Shuttle mediation, separate virtual rooms, staggered participation, interpreters and support persons may be appropriate. Rossi and colleagues show why online and shuttle formats require careful consideration in IPV cases rather than a one-size-fits-all rule.¹⁶ Equality of process does not require identical conditions when the parties' circumstances are materially different.

Mediator training is consequently central. Applegate and colleagues, writing about mediators handling cases reporting high intimate partner violence, emphasise structured training, manuals and continuing consultation.¹⁷ Although that research arises from a particular empirical setting, its institutional lesson is relevant: specialised risk cannot be managed by merely adding a video-conferencing link to ordinary mediation practice.

Online mediation converts confidentiality from a primarily professional obligation into a combined professional and technological problem. A physical mediation room can be controlled to a significant degree by the mediator and institution. A remote mediation session extends

15 Rossi et al., *supra* note 6, at 1641.

16 Rossi et al., *supra* note 7, at 399–400. Separate rooms, shuttle formats and different modes of participation may help differently situated parties participate meaningfully.

17 Amy G. Applegate et al., *Preparing Mediators to Mediate Cases Reporting High IPV in a Randomized Controlled Trial: The Importance of a Mediation Manual, Training, and Consultation*, 59 FAM. CT. REV. 725, 725–26 (2021).

across devices, networks, software providers and private spaces that the institution does not fully control. The first requirement is therefore platform governance. Family mediation should not depend on whichever consumer application happens to be convenient. Recognised institutions should approve platforms against minimum requirements for authentication, access control, secure transmission, waiting-room functions, host control, document permissions and data retention. Recording functions should be disabled by default, in line with the safeguard envisaged by section 22 of the Mediation Act.¹⁸ Participants should receive a plain-language confidentiality and digital-security protocol before the first session.

The second requirement is data minimisation. Online family mediation may involve identity documents, financial statements, health information, children's records, photographs, addresses and intimate communications. The Digital Personal Data Protection Act, 2023 establishes an enacted framework for processing digital personal data, including provisions on consent, security safeguards and erasure. Its implementation is phased: the November 2025 commencement notification postpones the principal processing obligations for eighteen months from publication. Accordingly, these provisions should inform institutional preparation without being represented as already fully operative.¹⁹ Mediation providers should not collect or retain sensitive material merely because digital systems make storage inexpensive.

Third, institutions need incident-response rules. A confidentiality policy is incomplete if it says nothing about a compromised meeting link, unauthorised recording, account takeover or accidental disclosure. Parties should know whom to contact, what steps will be taken and whether the mediation will be suspended. Cybersecurity is not external to procedural fairness where a breach may expose the very information that parties were encouraged to disclose candidly.

18 Mediation Act, No. 32 of 2023, § 22(2), INDIA CODE (2023); NITI AAYOG, *supra* note 4, at 88–92.

19 Digital Personal Data Protection Act, No. 22 of 2023, §§ 6, 8, INDIA CODE (2023); Ministry of Elecs. & Info. Tech., Notification G.S.R. 843(E), cl. (c), GAZETTE OF INDIA, EXTRAORDINARY, pt. II, sec. 3(i) (Nov. 13, 2025). The Act's application to a provider depends on its role, the processing concerned and the provisions in force.

Finally, confidentiality must have intelligible limits. Parties should be told at the outset that mediation confidentiality operates within the governing law and does not convert the process into an absolute zone of secrecy. Clear boundaries are particularly important where there are threats to safety or concerns affecting children.²⁰

India's rapid expansion of digital infrastructure should not be equated with uniform digital capacity. Access to devices, connectivity, digital literacy and private digital spaces remains uneven, and these inequalities may acquire particular significance in family disputes. Official data also reveal a gendered dimension to digital access. The National Family Health Survey-5 (2019–21), for instance, reported that only 54 per cent of women aged 15–49 had a mobile phone that they themselves used, with a substantial rural–urban difference.²¹ Such disparities are especially relevant to online family mediation because access to a household device does not necessarily imply independent control over that device, a secure account, or a private space in which a party can participate confidentially.

A fair model should therefore adopt a principle of digital choice rather than digital compulsion. Online mediation should be available where it improves participation, but parties should be able to request physical or hybrid mediation where technology creates disadvantage. The objective is not to maximise the number of online cases. It is to select the mode that best supports fair participation.

Assisted-digital facilities can bridge this gap. Court-annexed mediation centres, legal services institutions and recognised mediation service providers could offer private rooms, secure devices, reliable connectivity, scanning facilities and basic technical assistance. Such facilities would preserve the advantages of remote participation—for example, where the other party or mediator is elsewhere—without making ownership of suitable technology a condition of access.

Accessibility must also include disability and language. Platforms should support captioning where feasible, accessible interfaces and interpreter participation. Instructions should be available in languages understood by the parties. A mediator must be prepared to adjourn or change the mode where a technical problem has ceased to be a mere inconvenience and has become a procedural disadvantage.

20 Mediation Act, No. 32 of 2023, §§ 22–23, INDIA CODE (2023); Perry Kansagra v. Smriti Madan Kansagra, (2019) 20 S.C.C. 753, 28–32 (India).

21 MINISTRY OF HEALTH & FAM. WELFARE, NATIONAL FAMILY HEALTH SURVEY (NFHS-5), 2019–21: INDIA FACT SHEET, indicator 123 (2021).

The international ODR literature is useful primarily for principles of design. UNCITRAL's Technical Notes on Online Dispute Resolution, adopted in 2016, are descriptive and non-binding and were developed for disputes arising from cross-border low-value sales and services contracts. They emphasise fairness, transparency, due process and accountability.²² Those principles cannot simply be imported as family-law rules, but they provide a useful reminder that online procedure should be judged by procedural values rather than by technological novelty.

The scholarly evolution of ODR makes the same point. Rabinovich-Einy traces the movement from early e-commerce ODR to systems that increasingly redesign procedure around user needs and institutional problems.²³ Rule similarly argues that ODR has moved into courts and public justice systems, making questions of fairness and ethical design unavoidable.²⁴ Family mediation is a particularly demanding test of this transition because the dispute is both legally consequential and relationally sensitive.

Specialised family-mediation scholarship reinforces the need for tailored standards. Lavi argues for an improved model of e-mediation in divorce disputes that includes training, certification, regulation and supervision.²⁵ Melamed asks whether established family-mediation ethical standards require updating for online practice and identifies technology-specific concerns.²⁶ These contributions help to form a regulatory framework where online family mediation is recognised as a unique professional context, instead of just another communication channel. However, care should be taken in the use of comparative material. There are significant differences in social circumstances of digital access, family law, legal aid and mediation institutions across the jurisdictions.²⁷

22 U.N. COMM'N ON INT'L TRADE L., UNCITRAL TECHNICAL NOTES ON ONLINE DISPUTE RESOLUTION 1-7 (2017), https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/v1700382_english_technical_notes_on_odr.pdf. The Notes were adopted in 2016 and published in this booklet in 2017; they are non-binding and are used here only for general procedural-design principles.

23 Rabinovich-Einy, *supra* note 2, at 148.

24 Rule, *supra* note 13, at 283, 289-90.

25 Dafna Lavi, *No More Click? Click in Here: E-Mediation in Divorce Disputes—The Reality and the Desirable*, 16 CARDOZO J. CONFLICT RESOL. 479, 479 (2015).

26 James C. Melamed, *Establishing Ethical Standards for Online Family Mediation*, 59 FAM. CT. REV. 244, 244 (2021).

27 See Lavi, *supra* note 25, at 479; Melamed, *supra* note 26, at 244. The comparative literature identifies recurring professional concerns without establishing that foreign family-mediation rules are directly transferable to India.

Principles such as screening, informed consent, data security, competency of mediators and procedural flexibility, should be adopted in the Indian framework, but not simply because they are found in other jurisdictions.

A workable Indian framework should begin with suitability assessment. Before the first substantive session, the mediation service provider should assess the nature of the dispute, urgency, safety, technological capacity, privacy, language, disability and need for legal or psychosocial support. The outcome should be a reasoned procedural choice among online, physical and hybrid formats, not an automatic preference for any one mode.

First, digital consent should be informed, specific and continuing. Parties should receive information about the platform, confidentiality, recording restrictions, data handling, technical failure, private caucuses and the right to request a different mode. Consent should be revisited if circumstances materially change.

Second, family cases should be subject to confidential vulnerability screening. Where there is domestic abuse or coercive control, the mediator should decide whether adaptations can create a safe process. High-risk cases should not be retained in mediation merely to improve settlement rates. A mature mediation system must be able to identify disputes that should not be mediated.

Third, recognised mediation institutions should follow minimum cybersecurity and data-governance standards. These should address approved platforms, authentication, encryption where appropriate, document access, recording, retention, deletion, breach response and third-party service providers. The standards should be understandable to mediators and parties, not confined to technical documentation.

Fourth, assisted-digital participation should be embedded in the justice system. Legal services institutions and mediation centres can provide secure access points for parties who benefit from remote mediation but lack suitable private technology. This is essential if online mediation is to reduce rather than reproduce inequality.

Fifth, mediator accreditation should include digital competence and family-specific risk management. Training should cover online communication, digital caucusing, hidden participants, coercive control, cybersecurity basics, disability access and child-sensitive practice. Melamed is persuasive in treating online family mediation as requiring explicit ethical attention rather than assuming traditional standards automatically answer technology-specific questions.²⁸

28 Melamed, *supra* note 26, at 244.

Sixth, access to independent legal advice should remain available. The mediator's neutrality is not a substitute for legal advice, particularly where settlements concern maintenance, residence, custody, property or waiver of claims. Digital systems should make it easy to pause mediation so that a party can obtain advice rather than treating rapid settlement as the principal measure of success.

Seventh, settlement documentation should be designed for comprehension. Electronic circulation and signatures can improve efficiency, but parties should have a meaningful opportunity to read the final terms, ask questions, obtain advice and confirm consent. Where children are affected, the welfare dimension cannot be reduced to the preferences of the adults.

Finally, institutions should collect carefully anonymised process data to evaluate accessibility problems, mode changes, completion rates, complaints and reasons for termination. Such evaluation must respect mediation confidentiality. Evidence-based review is especially important because digital dispute-resolution practices will continue to evolve.²⁹

The Mediation Act's online-mediation framework should be supplemented by a dedicated protocol for family disputes. The protocol should require separate pre-mediation screening, distinguish consent to mediation from consent to the online mode, and provide a clear route for switching to physical or hybrid mediation. It should identify minimum safeguards for confidentiality, recording, platform security and data retention. Recognised mediation service providers should maintain assisted-digital facilities and publish simple guidance for parties. Mediator training should include domestic abuse, coercive control, child-sensitive practice, online safety and accessibility. Institutions should also establish referral pathways to legal aid, counselling, protection services and courts where mediation becomes inappropriate or unsafe. Policy should not include setting levels of retention that create an incentive to keep "unfit" cases. The quality of consent and participation is more important than the number of mediated settlements. Procedural fairness, accessibility and user safety should also form a part of the evaluation process; not only settlement rate should be considered a measure of success.

Implementation should also be done incrementally and not in a sudden and massive system-wide change. In the first stage, court-annexed mediation centres and recognised mediation service providers should

29 Anonymised evaluation should exclude information capable, directly or indirectly, of identifying parties or reconstructing confidential mediation communications. See Mediation Act, No. 32 of 2023, §§ 22–23, INDIA CODE (2023).

have a standard online family mediation protocol that includes identity verification, private participation, vulnerability screening, informed digital consent, platform security, emergency interruption, confidentiality, record retention and mode-switching. As to the substantive mediation, the protocol should be conveyed in plain words before the beginning of substantive mediation. Institutions should also have a basic checklist for mediators to document the availability of both parties having appropriate devices, reliable access to Internet, a separate room and access to legal counsel. Such documentation should be done for the purpose of procedural accountability, rather than a detailed record of confidential negotiations.

Capacity and inclusion should be the second stage. Assisted-digital rooms can be set up in State and District Legal Services Authorities, family courts and mediation centres for persons who cannot participate safely and effectively from home. This type of facility would be especially useful if a party does not have independent control of the device, has a language barrier, or has a disability, or if a party seeks confidentiality. Institutional training should also, similarly, separate the technical competency as such from the digital competency of the family. Mediators should be familiar not just with the operation of a platform, but also with the ways in which the platform might be used in a way that is secretive, in an attempt to monitor or intimidate with coercive messages, and in ways that are otherwise technologically intimidating. A third phase should be review on a regular basis. Institutions should review the anonymised details of adjournments due to technology, mode of mediation change requests, complaints regarding privacy, withdrawal requests, and accessibility issues. Assessment of success should not be limited to settlement rates. Any settlement obtained that occurs even though a person is not technically disadvantaged, or the pressure is hidden, cannot be considered a successful result just because the case has been settled. The better test would be whether the process allowed for an informed, voluntary and reasonably equal participation. This step by step strategy would enable online family mediation to grow based on evidence and lessons learned from the process, not on the idea that online mediation is always faster, cheaper, or fairer.

While the convenience of online mediation is a real possibility for making family justice more accessible, it is not the end goal. While the Mediation Act, 2023 offers a substantial body of legislation, it specifically mentions online mediation and its connection to consent, integrity and confidentiality. Implementation needs both the necessary laws and institutional protection: the necessary procedures that can meet the reality of family conflict.

The paper has called for an expanded and conditional online family mediation. It shouldn't be used as a substitute for a physical institution or as a convenient way to speed up docket clearance. It should function as a part of a flexible mediation process in which the parties can be safely and effectively engaged. Not only are informed consent, vulnerability screening, privacy, data governance, technological equality, and competent mediators and access to legal advice peripheral protections, they are conditions of legitimacy.

Online mediation can eliminate geographical distance when built into implementation, without increasing vulnerability, and procedural burden without diminishing rights. Its most important contribution, then, would not be the idea that technology is replacing the human process, but the concept of using technology to make a well-guarded human process more attainable.

WORKPLACE HARRASMENT LAW AND IT'S IMPACT ON ORGANIZATIONAL CULTURE IN INDIA

*Bhoomi, Kavya Chadha, and Vrinda Gupta**

Abstract

Sexual harassment in the workplace is one of the chronic issues all over the world that impacts employees of various industries and professional hierarchies. Moreover, it undermines individuals' dignity and equality, thereby hindering professional growth, lowering workplace morale, and damaging organizations' reputation and trustworthiness. Such malpractice not only harms victims on both personal and professional levels, but also undermines institutional trust and organisational productivity. The paper evaluates sexual harassment at the workplace both legally and in the organisational level. First, the paper examines legal framework related to the issue of harassment in the workplace, both international and Indian levels, regarding the landmark case of Vishaka v State of Rajasthan (1997) and the provisions involving the statutory safeguards conferred by the action of the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act 2013 (POSH Act) as well as the provisions under the Bharatiya Nyaya Sanhita 2023 (BNS). These legal structures together form the basis of India's rules for preventing and dealing with workplace harassment. In addition, this paper examines the broader effects of harassment on institutions, focusing on its impact on workplace culture, how organizations behave, and the well-being of employees. The paper argues that while following the law is important, truly preventing harassment requires a bigger change in organizational culture. Second, the paper explores the broader institutional consequences of harassment by examining its impact on workplace culture, organizational behaviour, and employee well-being. The paper argues that while legal compliance is essential, meaningful prevention requires bigger cultural change within organisations.

Keywords: Sexual Harassment, Workplace Harassment, POSH Act 2013, Organisational Culture, Vishaka v. State of Rajasthan.

Introduction

Sexual harassment at work is not a new problem. However, the law and society have come a long way in taking it seriously. Harassment was a personal misconduct that was overlooked in the majority of the twentieth

* Students of BBALLB(Hons.) 5th Semester, MAIMS

century. It was also hardly perceived as a structural or cultural failure. That changed slowly. The movement of MeToo that gained momentum in the world in 2017 made the issue enter the realm of the conscious mind. In media industries, technology, aviation, and politics, individuals emerged. The sheer scale of disclosures made it impossible to treat harassment as an isolated or occasional event.¹

The research by the International Labour Organization has revealed that over fifty percent of all working women have been harassed at one time in their occupation. In other sectors, the amount is even more significant. Formal complaints are, however, uncommon. My fear of retaliation, social stigma, and a lack of trust in what goes on inside all discourage the reporting. Since the 1990s, the legal framework in India has been evolving. The Vishaka judgment case² In 1997 decision by the Supreme Court was a turning point. It created binding guidelines for workplaces at a time when no legislation existed. The POSH Act of 2013 established a thorough legal structure. The BNS 2023 then incorporated revised criminal provisions. Regardless of these developments, there is still an uneven implementation. The ICC structures in many organisations are only on paper. The underlying workplace cultures have not changed as quickly as the laws have. This paper explores why that gap exists and what can be done about it.

The Legal and Regulatory Framework

Sexual harassment has a legal history in the country of India that does not originate with a law, but rather ends with the state failing to defend one of its own workers. In 1992, a government social worker in Rajasthan by the name of Bhanwari Devi was gang-raped by upper caste men in direct response to her efforts in stopping a child marriage in her village. She was in service, doing a given government task. The local police were not eager to do something. All five accused were found not guilty in the trial court. The state did nothing more. This was not a single failure, but it revealed a huge gap in the system. No law in India regards sexual harassment within the workplace as an illegal act. As a reaction to this, women's rights organizations moved to court by presenting a public interest action in the Supreme Court, claiming that such non-existence of law itself was unconstitutional. In *Vishaka v State of Rajasthan* (1997). The Supreme Court

1 Lilia M. Cortina, L. M., & Jennifer L. Berdahl, J. L. (2008). Sexual Harassment In Organizations: A Decade Of Research In Review. In J. Barling & C. L. Cooper (Eds.), *The SAGE Handbook Of Organizational Behavior* (Vol. 1, Pp. 469–497). SAGE Publications.

2 *Vishaka v. State of Rajasthan*, AIR 1997 SC 3011

believed that sexual harassment within the workplace would constitute a breach of Articles 14, 15, 19(1)(g), and 21 of the Constitution, which are the right to equality, non-discrimination, freedom of profession, and life with dignity. Failing action taken by Parliament made the Court make its own binding measures, in part inspired by the Convention on the Elimination of All Forms of Discrimination Against Women, and proclaim them binding law until acted upon by legislation. This was made the Vishaka Guidelines were the first legal standard on sexual harassment in the workplace in India.

The Vishaka Guidelines came with specific binding requirements upon all employers, both in India, whether government or not. The employers needed to explicitly forbid sexual harassment and inform every employee. They were required to be comprised of a Complaints Committee of which half were to be women, at least one of which must be external to the institution and of a legal profession to ensure they will not become institutionalized. The Committee was no longer but forced to bring time-limited investigations, a high degree of confidentiality, and sentence as per the prevailing laws of service. There was a compulsory awareness program. There were years, however, when compliance was sporadic. Most organizations were ignorant of the guidelines or opted to act differently. In *Medha Kotwal Lele v. Union of India* (2012), the Supreme Court ruled that Vishaka was not being enforced even in governments and institutions in the whole country. It gave detailed instructions that had to be followed to the letter and made it clear that the Complaints Committee was a de facto inquiry authority, the results of which had a formal legal effect of a disciplinary procedure. A professor in a university who harassed a junior colleague, in this case, could no longer claim that there was no real authority of an internal committee. That was an argument closed after *Medha Kotwal*.

Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013,³ formed a statutory basis for the Sexual Harassment and an elaborate expansion of the Sexual Harassment framework of Vishaka. Section 2(n) provides a broad definition of sexual harassment to involve physical contacts and advances, requests or demands for the favours of a sexual nature, sexually coloured remarks, showing of pornography, or any other form of unwanted physical, verbal, or non-verbal conduct of a sexual nature. To get a picture of what this entails on the ground, a situation in a corporate office whereby a top manager keeps making comments about the appearance of a female junior, regularly

3 Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, No. 14 of 2013 (India)

whisks her at the end of the day, and sends her unsolicited messages requesting that she unwind after work with him, and even displays clear images of his phone. All the elements, namely the remarks, the messages, and the depiction of pornography material, separately satisfy Section 2(n). Physical contact is not necessary. This was cemented in a Supreme Court case of *Apparel Export Promotion Council v. A.K. Chopra* (1999) when one of the senior officers, many times tried to sit near a female subordinate, followed her and attempted to molest her on a tour. According to the respondent, no physical contact was actually achieved, and therefore no harassment was done. This was not accepted in any way by the Court, and it declared that any uncooperative behavior that infringes the dignity of a woman in the workplace does not meet the physical threshold. Section 4 expects that all organizations that employ ten or more employees to form an ICC that would include a chairperson who is a senior woman employee, along with two other employees and one NGO or legal expert, considering gender-based considerations, so that at least half of the committee should be women. The procedure is established in sections 9 to 13, complaints within three months, conciliation, where the complainant requests such before an inquiry begins, Inquiry, the inquiry under 90 days, and a written report, containing findings and disciplinary recommendations, submitted to the employer. Section 15 gives the ICC the right to suggest compensation touching upon mental trauma and loss of career chance, as well as medical expenses. Under section 19, it is clear that when the act reveals a cognizable criminal offence, the employer should make a report on the issue to the police, POSH process does not quash criminal liability. Section 26 provides the punishment of up to fifteen thousand rupees on the non-compliant employers, and the following offence can lead to cancellation of business licences (Sexual Harassment of Women at Workplace [Prevention, Prohibition and Redressal] Act, 2013).

The Bharatiya Nyaya Sanhita, 2023,⁴ which replaced the Indian Penal Code from 1 July 2024, added updated criminal provisions that directly apply in workplace harassment cases. Section 74 is a subset of sexual harassment and criminalises any unwelcome sexual advances, sexual solicitation, display of pornography, and any sexually coloured comments, which is a criminal offence equivalent to the provisions of the POSH Act. Section 75 refers to assault or criminal force which was employed to disgrace the modesty of a woman, punished with a maximum sentence of two years in prison. When a supervisor physically seizes a female employee in a storeroom, he is not only confronting an ICC inquiry at POSH — he is also committing an offence under Section 75. Section 76 deals with voyeurism,

4 Bharatiya Nyaya Sanhita, No. 45 of 2023 (India). Ministry of Home Affairs

which deals with the covert recording of a woman under the conditions of privacy, such as a restroom, changing stall, or privacy in a private office. This is also becoming more topical in the modern work environment: a 2022 case in a company located in Bengaluru in the IT sector concerned a male employee who had planted a secret camera in a female toilet. The ICC process was directly coexisting with Section 76. Section 77 addresses the issue of stalking, including in the case of online and incessant unwanted interaction. This is important since nowadays harassment has been transferred to the Internet world, where a male workmate regularly sends unsolicited WhatsApp messages to a female counterpart at night, when he is fully aware that she does not want to be communicated with in any way. The BNS also addresses criminal intimidation of a complainant after she has filed a complaint: when one of the managers threatens to terminate a contract of a complainant because she will pursue her complaint, she is engaged in a criminal but not a disciplinary offence. Section 28 of the non-derogation principle has the POSH Act and the BNS working in parallel. *Aureliano Fernandes v. The State of Goa (2023)*⁵ has affirmed that the criminal referral obligation of Section 19 POSH Act is practical — an employer cannot use the ICC process as an excuse for promoting the avoidance of engaging the police when the behaviour is shown to present a criminal offence (Bharatiya Nyaya Sanhita, 2023).

Combining these instruments, Vishaka, with the POSH Act, along with the BNS, form a multi-tiered system: on the bottom, constitutional safeguards; in the middle, a civil and quasi-judicial solution provided by the ICC; and on the top, criminal punishment. Theoretically, these layers support each other, but in practice, gaps remain. The fifty-thousand-rupee penalty provided by Section 26 does not put off the big organisations. In the case of a company that has thousands of employees, it is an administrative cost, rather than a preventive measure. The most transparent example of institutional failure in the formally conforming structure was the case of Air India: the ICC convicted one of its senior pilots of harassment, suspended him, and, on appeal, he was reinstated without clear published arguments (NDTV, 2020). The same message was sent to all the Air India workers, seniority is your fort! *Dr. Sohail Malik v. The dispute in Union of India (2025)*⁶ brought to light a gap in jurisdiction which the Act had never envisioned: having the harasser and the complainant as members of separate organisations, the ICC lacks real authority and has no cooperation

5 Fitzgerald, L. F., Gelfand, M. J., & Drasgow, F. (1997). Measuring sexual harassment: Theoretical and psychometric advances. *Basic and Applied Social Psychology*, 17(4), 425–445. https://doi.org/10.1207/s15324834basop1704_2

6 *Dr. Sohail Malik v. Union of India (2025)*.

procedures. *Aureliano Fernandes v. State of Goa (2023)*⁷ discussed natural justice failures in proceedings before an ICC but did not fully clarify the question that runs on the same track as what occurs when an ICC and police draw conflicting findings. The structure is better than it was. Only when you know its boundaries is when organisations and courts are motivated to continue innovating it.

Nuances of the Indian Socio-Cultural Context

The legal framework of sexual harassment in the workplace in India is reasonably comprehensive, on paper. What it runs within the social and cultural setting works against it. This is why very little harassment is ever actually reported, and even when it does, the process is often more intimidating than the harassment itself. Power distance is the single most significant structural factor. According to Hofstede Insights⁸ India is ranked as one of the least democratic countries in the world on the index of power distance, which is used to gauge how less powerful individuals in such a society tolerate inequality in the distribution of power (Hofstede Insights, 2023). This practically implies that it is not only uncomfortable for many Indian employees to report a supervisor, but also professionally insurmountable. The harasser has dominance over promotions, project assignments, references, and day-to-day working environments. Taking a legal right to complain is taking a chance of all that. This is not imagined. The studies about Indian workplaces time and again reveal that younger employees and especially junior females tend to view that reporting will hurt their career more than remaining silent will. Formal rights exist on paper. An explanation of power distance is the reason why they are so infrequently used.

Social norms that face the patriarchal society provide an additional layer of challenge, but also function based on gendered notions and stereotypes. The behavior of a woman in the workplace is constantly scrutinized in India in the context of modesty and propriety, which does not extend to men. When there is a complaint, then the behaviour of the man being complained against is doubted, but also the dressing, demeanour, and social living of the one complaining. This leaves a foreseeable deterrent. By expecting to undergo such scrutiny, women choose not to complain because it is safer (Menon, 2021).⁹ It also influences the credibility ratings of ICC members who are the products of the same social environment. Verbal harassment,

7 *Aureliano Fernandes v. State of Goa*, Supreme Court of India (2023, May 12).

8 Hofstede Insights. (2023). Country comparison: India. <https://www.hofstede-insights.com/country/india/>

9 Menon, N. (2021). *Seeing like a feminist*. Penguin Books India

constant sexually coloured comments, and unwanted attention are often brushed aside as harmless chit-chat or misunderstanding, particularly when the respondent is older, well-liked, or a male among male employees. A long way too much behaviour that legally amounts to harassment is thus never referred to as such.

Beneath these two dynamics is a deeper cultural force — what can most aptly be termed *log kya kahenge*, or what will people say. It is through this that the decision of a woman to report harassment is perceived not as a show of courage but as a source of shame to herself, her family, and her community. Many of the victims feel more paralysed by the fear of such a judgment than by the harassment itself. It is estimated that in Indian workplaces, an estimated fifteen per cent of the cases of harassment are never reported (International Labour Organization, 2022). Women keep silent and take themselves off the platform that will expose them to the harasser, they reduce their engagement in activities that would put them in the path of the harasser, and they silently put up with his behaviours to fit within his world. The whole expense is on the victim. The harasser remains the same. When women who do speak to the ICC are subjected to hostile interrogation by the ICC members, confidentiality is broken, or marginalization of the professional dimension, the warning to all spectators is made. The silence in this setting makes perfect sense. This is also the reason the legal system is difficult to use. While the law creates a right, cultural norms can make using that right very dangerous.

Harassment in the workplace doesn't happen on its own; it's more like a poison which slowly fills an organisation's culture — and from the inside — eating away at what good, fair and inventive places to work depend on. The harm it causes isn't just to the person who suffers it, but changes how whole teams feel and think, prevents any real movement forward on making the organisation diverse, and makes it usual not to say anything, which keeps those who do bad things safe, and punishes anyone who does complain. Importantly, harassment doesn't usually stay as one kind of damage — it often gets worse, going on to criminal frightening, forcing people to do things, and threatening people who protest, all of which the Bharatiya Nyaya Sanhita, 2023 (BNS) now deals with through a better, and more brought-together, legal system.

Erosion of Trust, Psychological Safety, and the Role of Intimidation

The idea of psychological safety — which means everyone feels safe to talk, ask questions, and share ideas without being punished or made fun of — is one of the most important things that affects how well a team does. A single incident of harassment, especially when accompanied by threats

of professional retaliation or personal harm, is enough to destroy this safety net for an entire workforce. Intimidation is the way harassment causes the biggest long-term harm in an organisation: it stops victims from speaking up, makes witnesses less likely to support their claims, and creates a memory loss within the institution. Colleagues who see or hear about harassment or a complaint that isn't handled properly start to believe that the organization cares more about following the chain of command than it does about fairness. This leads to what researchers call a "chilled environment," where employees stop speaking up or getting involved, not because they don't care, but because they're trying to protect themselves smartly.

In the landmark *Vishaka v. State of Rajasthan* (AIR 1997 SC 3011),¹⁰ the Supreme Court didn't just talk about the woman who was gang-raped for reporting a child marriage — it talked about what that kind of violence and institutional silence does to every working woman in the country. The Court recognised that when women cannot walk into a workplace without fear, their fundamental rights under Articles 14, 15, 19, and 21 are not just threatened — they're being actively violated every single day. That's a profound observation, and honestly, one that still doesn't get enough attention.

What adds even greater significance to this today is the *Bharatiya Nyaya Sanhita*, 2023. Section 351 BNS¹¹ now directly criminalizes criminal intimidation, which involves threatening someone with harm to their person, reputation, or property to force them into silence or compliance. In a workplace setting, this indicates that a manager who warns a subordinate, "If you file a complaint, I'll ensure you never work in this field again," is not simply acting as an ineffective leader. He's committing a cognisable criminal offence. Section 351(2).¹² The BNS also specifies that a person can face up to seven years in prison if threats are made using anonymous or electronic methods, which, in today's world, often includes WhatsApp messages and private emails, as these are common ways such intimidation occurs.

How "Just a Joke" Becomes Something Much Worse

From a harmless joke to something truly shocking. A comment suggesting that a woman might have been hired for reasons other than her own can be difficult to explain to non-legals or those who work in the legal

¹⁰ *Vishaka v. State of Rajasthan*, AIR 1997 SC 3011.

¹¹ <https://indiankanoon.org/doc/142872252/>

¹² <https://indiankanoon.org/doc/142872252/>

system. During group discussions, everyone on the team shares a joke that is considered hilarious because no one wants to be the only one who doesn't. They all managed to make impromptu presentations without any negative publicity. Together, these actions create essentially neologisms by gradually building dreadlocks where disrespect is widespread, and women feel unworthy of their services. *Apparel Export Promotion Council v. A.K. Chopra* (AIR 1999).¹³ It is an important case that highlights the importance of legal standards in normalizing microaggressions, which was addressed by the Supreme Court. The Court ruled that any action that undermines the dignity or results in a hostile work environment is considered essentially haram, according to SC 625. This case is particularly close to criminal intimidation, as it is often ignored and only becomes a matter of minor issues when the microaggressions become so serious that the person resists action by simply refusing to keep records or communicate with HR. The playful teasing then takes on threatening consequences, spreading rumours about her career, infiltrating the media, and those of the perpetrator's colleagues challenge her professional life in subtle ways that are difficult to define but impossible to conceal.

The Delhi High Court accurately captured this dynamic in *Saurabh Kumar Mallick v. Comptroller & Auditor General of India* (2008)¹⁴ 151. The DLT 261 ruling states that a continuous pattern of degrading treatment constitutes an unfriendly work environment, and it is essential for employers to demonstrate institutional support for such behavior by refraining from speaking up. I recommend sitting with you for the final segment. Silence is not neutral.

The Promise of Diversity that is Increasingly Disregarded

Every major Indian corporation today has a diversity and inclusion policy. Most have gender sensitisation workshops, some have women's leadership programmes, and almost all have an Internal Complaints Committee that exists — on paper, at least. And yet, the numbers tell a different story. Women remain dramatically underrepresented in senior leadership, not because they lack capability or ambition, but because the organisational environments they navigate are exhausting in ways that their male colleagues simply don't experience.

Harassment is a structural barrier disguised as an interpersonal problem. And criminal intimidation is its enforcement arm. When a woman who files a complaint suddenly finds herself being monitored, her emails being watched, her movements being tracked — that's not paranoia, that's

13 <https://indiankanoon.org/doc/130365049/>

14 <https://www.casemine.com/judgement/in/56e66a55607dba6b534361a4>

Section 79 BNS¹⁵ territory, which criminalises workplace surveillance and voyeuristic conduct used as an instrument of control. When she's being called repeatedly, sent unwanted messages, or followed after she's made her discomfort clear — that's Section 78 BNS.¹⁶ The legislature put these provisions in place because it understood something that too many organisations still don't: that retaliation is part of the harassment cycle, not a separate issue.

The Supreme Court in *Medha Kotwal Lele v. Union of India* (2012) 9 SCC 1¹⁷ had to essentially drag state governments into compliance with rules that had existed for fifteen years since Vishaka. The Court found that Internal Complaints Committees were either non-functional or being weaponised against complainants, which means that the very mechanism created to protect women was being used to intimidate them further. That case is a masterclass in how institutional failure and individual harassment feed each other. And under BNS 2023, an employer who knowingly allows or tacitly encourages a complainant to be threatened or intimidated isn't just liable under the POSH Act — they're potentially looking at criminal exposure under Section 351 as well.

The Supreme Court's earlier ruling in *Rupan Deol Bajaj v. K.P.S. Gill* (1995) 6 SCC 194¹⁸ established a principle that deserves to be repeated loudly and often: no rank, no title, no institutional prestige immunises anyone from criminal liability for violating another person's dignity. A Director General of Police was held accountable. The message was clear then, and it's clearer now under BNS — power is not a defence.

At the end of all of this, the point is straightforward even if the law is complex: organisations that treat harassment as a series of isolated bad acts, rather than as a cultural and structural problem, will keep failing — legally, institutionally, and morally. The BNS, read alongside the POSH Act and decades of Supreme Court jurisprudence, gives us a framework that is finally comprehensive enough to address not just the acts of harassment themselves, but the fear, silence, and intimidation that allow those acts to continue. The question is whether organisations — and frankly, whether we as future lawyers — will take that framework seriously.

15 <https://indiankanoon.org/doc/149679501/>

16 <https://indiankanoon.org/doc/149679501/>

17 <https://indiankanoon.org/doc/48293767/>

18 <https://indiankanoon.org/doc/579822/>

Psychological and Cultural Contagion

Think of harassment in a workplace like an infection. The first case might look isolated, even containable. But if there's no institutional response — no one willing to say *this stops here* — it spreads. Quietly, systemically, until the toxin isn't coming from one person anymore. It's coming from the culture itself.

This is psychological and cultural contagion, and it is arguably the most legally underappreciated dimension of workplace harassment. We spend considerable time in law school discussing individual liability — who did what, to whom, and whether it crosses a defined threshold. What we examine far less is how harassment fundamentally rewires the collective psychology of a workplace — reshaping what people believe is normal, what they tolerate, and what they are willing to do to survive.

Fear as the Dominant Culture

You don't need to be the direct target of harassment to be psychologically harmed by it. Witnessing it — or simply knowing it happened and watching the institution's silence in response — changes you. It recalibrates your threat assessment. You become hypervigilant, strategic about what you say, careful about who you trust. You stop making career decisions based on ambition and start making them based on fear. When enough people in a workplace reach this point, silence stops being a series of individual choices and becomes a self-reinforcing collective norm. New employees absorb it within weeks. The contagion has spread to people who weren't even present for the original incident.

The Supreme Court implicitly recognised this in *Vishaka v. State of Rajasthan* (AIR 1997 SC 3011)¹⁹ by imposing preventive obligations on all workplaces — not merely those where incidents had been reported — acknowledging that cultural decay begins long before any formal complaint is filed.

Defamation as a Tool of Contagion

One of the most calculated ways perpetrators sustain a culture of fear is through reputational destruction. When a victim speaks up, the response is frequently not just intimidation — it's defamation. Rumours are circulated about her character, competence, or motives. Her credibility is systematically dismantled through false narratives spread to colleagues,

19 <https://indiankanoon.org/doc/1031794/>

supervisors, and professional networks. This serves a dual purpose: it punishes the complainant and sends a warning to every potential witness watching.

Section 356 BNS²⁰ now consolidates the law of defamation, criminalising the making or publication of any imputation intended to harm a person's reputation. Crucially, Section 356 (2) BNS addresses defamation through electronic records and digital communication — directly relevant in workplaces where false narratives spread through group chats, professional platforms, and internal emails with devastating speed. Read alongside Section 351 BNS on criminal intimidation, a perpetrator who threatens a complainant and then orchestrates a reputational attack against her is engaging in a coordinated criminal campaign, not merely bad workplace behaviour.

In *Medha Kotwal Lele v. Union of India* (2012) 9 SCC 1, the Supreme Court's deep frustration at institutional non-compliance with Vishaka was, at its core, a frustration with exactly this phenomenon — cultures so thoroughly conditioned by toxic norms that even court-mandated reforms struggled to penetrate them.

For us as law students, this is the critical takeaway: legal tools are only as effective as the cultural environment in which they're deployed. A complaint mechanism inside a psychologically contaminated workplace isn't a safety net — it's a trap. Victims know it. Bystanders know it. Perpetrators know it best of all. Understanding the law means understanding not just what it says, but why the harm it addresses is so much harder to uproot than any single act of misconduct.

Impact on Economic and Operational Costs

From the previous sections, it can be understood how sexual harassment is defined, the legal and regulatory framework applied, and how Indian society as a whole perceives sexual harassment. In addition, it is evident that harassment acts as a toxin in the workplace, impacting organizational culture within companies. While all these are visible to the public, there is a hidden impact, or a hidden tax or damage, that has a significant impact on companies. These hidden damages or the hidden taxes are the economic and operational costs that are borne by the employers of the companies. These Economic and Operational costs include the following:

- 1) **The “Brain Drain” Phenomenon:** High turnover rates and the loss of female talent following unresolved harassment claims.

20 <https://indiankanoon.org/doc/149679501/>

- 2) **Decreased Productivity and Employee Engagement:** The psychological toll that leads to “presenteeism” (being physically present but mentally disengaged).
- 3) **Reputational Risk in the Digital Age:** The impact of “social media trials” and Glassdoor reviews on an organization’s employer brand.²¹

A LinkedIn survey among women in corporate firms across India reveals that nearly 70% have experienced at least one form of workplace harassment in the past year. The most common is sexist hostility (60%), followed by unwanted sexual attention (44%). Many women also report criminalized acts like unwelcome touching and indecent exposure. Data from the Ashoka University Centre for Economic Data and Analysis and a Business Standard analysis of annual reports filed by 300 companies on the National Stock Exchange (NSE) show that 10,337 sexual harassment cases were registered under the POSH Act between FY14 and FY25.²² Reporting grew by 974 per cent, while approximately 14 per cent of all cases remain unresolved. Among the 300 NSE companies in India, in FY25, most sexual harassment complaints were filed in Wipro, reporting 195 complaints, followed by Tata Consultancy Services (125 complaints) and ICICI Bank (117 complaints). All this data shows us that even after nearly 30 years of the infamous Vishakha judgement, which laid down the foundation for the prevention of sexual harassment at the workplace by establishing the Vishakha Guidelines, which in turn became the crux of the POSH ACT 2013, sexual harassment at the workplace remains a widespread disease around the world.

In this patriarchal society, where women already struggle through the gender bias and casual sexism to advance in their careers, being a victim of sexual harassment at the workplace makes it even more difficult for them to advance in their careers, attain promotions, and work at a senior level because they are sidelined even more than before. This is due to the harasser, or in many cases, where the management is biased towards the harasser, punishing such women by demoting them, denying raises, promotions, transferring to unwanted places slowing and gradually isolating or icing them out eventually causing the women to resign from their jobs due to the fear of gaining power over the harasser or the supporter of such

21 Dam, A., Sitniski, D. D., & G2LM, LIC. (2025, October). *Seventy percent: The reality of workplace harassment in India* (By IZA – Institute of Labor Economics) [Press-release]. G2LM|LIC. Retrieved March 15, 2025, from https://g2lm-lic.iza.org/wp-content/uploads/2025/11/GLMLIC-Policy-Brief_079.pdf

22 Pankaj, J. (2026, March 6). *Sexual harassment complaints rise as women remain 20% of India Inc. Business Standard Number Wise*. Retrieved March 15, 2025, from <https://businessstandard.substack.com/p/sexual-harassment-complaints-rise>

harasser. The combined impact of these job losses through harassment, career derailment, and accepting a pay cut contributes in a substantial way to the ongoing gender pay gap in India, where such gender-based economic discrimination continues.²³ The economic cost of workplace sexual harassment is therefore a major deterrent to women's economic empowerment, with a staggering economic burden throughout their working careers. In simple terms, it is the brain of women talent from workplaces. Harassment prompts high female turnover, with many women quitting to protect their mental health, costing firms in recruitment and lost expertise.²⁴ About 47% of Indian women leave jobs due to harassment, contributing to a "harassment tax," where women forgo 19% wages for safer workplaces.²⁵ POSH complaints rose 79% in top firms (FY20-24), often leading to unreported exits.²⁶

Women, as humans, often endure significant mental suffering after being subjected to harassment. This can lead to ongoing nervousness, mental anguish, and fear, which may cause severe depression and stress. They might also experience post-traumatic stress disorder (PTSD) due to flashbacks of the traumatic incident. All of this contributes to feelings of shame, helplessness, and isolation, making it difficult to form healthy professional relationships again. Over time, these mental health issues can also impact physical health, resulting in insomnia, migraines, chronic fatigue, and cardiovascular problems—factors that ultimately hinder a woman's focus and career advancement. A descriptive study conducted in Dhansha District, Madhesh Province, Nepal, found that 5.71% of women who have experienced Sexual Harassment suffered from headaches and body aches, 5.71% from high blood pressure, 22.86% from anorexia, 20% from restlessness and insomnia, 17.14% from fatigue, 14.29% from anxiety,

23 Swathi M S. (2025, June 25). *Impact of Workplace Sexual Harassment on Women's Career*. *ljrfvoice.com*. <https://ljrfvoice.com/impact-of-workplace-sexual-harassment-on-womens-career/>

24 Azmi, A. (2024, January 9). *The economic costs of workplace sexual harassment in India: impacts and solutions*. Retrieved March 15, 2026, from <https://www.linkedin.com/pulse/economic-costs-workplace-sexual-harassment-india-impacts-6kxwc/>

25 Dam, A., Sitniski, D. D., & G2LM, LIC. (2025, October). *Seventy percent: The reality of workplace harassment in India* (By IZA – Institute of Labor Economics) [Press-release]. G2LM|LIC. Retrieved March 15, 2025, from https://g2lm-lic.iza.org/wp-content/uploads/2025/11/GLMLIC-Policy-Brief_079.pdf

26 Sahu, A. (2024, December 10). Sexual harassment complaints at India Inc rise by 79% in last 5 years. *ETHRWORLD.COM*. <https://hr.economicstimes.indiatimes.com/news/workplace-4-0/diversity-and-inclusion/sexual-harassment-complaints-at-india-inc-rise-by-79-in-last-5-years/116137786>

11.43% from depression, and 2.86% had lost weight.²⁷ This data highlights the profound toll that sexual harassment can take on a woman's mental and physical health at her workplace.

Women in India can face severe consequences of sexual harassment in the workplace, both in the short and long term, in terms of job satisfaction. Workplace environments that are threatening, hostile, or aggressive make women feel insecure, disrespected, and undervalued, leading to a lower level of job satisfaction for women who are exposed to these types of work environments. The pervasive apprehension of inappropriate behaviour and the emotional toll taken on women when they are subjected to or observe harassment damages their job satisfaction and community feeling. This level of extreme dissatisfaction and the desire to avoid the location of the harassment have resulted in a significant increase in the turnover of female workers in the workplace in India. By leaving their jobs, many women are attempting to protect their physical and mental health and find new employment opportunities in a safe and respectful work environment. Research shows that many people have left their jobs as a result of the high occurrence of sexual harassment in the workplace.

Deloitte conducted Deloitte Access Economics' analysis, which they completed for Treasury in 2019, and formed an appendix to the Respect@ Work report.²⁸ They used a bottom-up approach, first establishing the number of people who have been sexually harassed in the workplace, based on the severity of that harassment. The results that came out of this are an example of how, actually, the economic and operational costs are impacted in such reputed companies. In 2018, workplace sexual harassment cost \$2.6 billion in lost productivity and \$0.9 billion in other financial costs. Each case of harassment represents around 4 working days of lost output. Employers bore 70% of the financial costs, the government 23%, and individuals 7%. Lost well-being for victims was an additional \$250m, or nearly \$5000 per victim on average. The methodology for the report is a global first, as the cost of workplace sexual harassment has not previously been estimated anywhere in the world.

27 Jha, L., Giri, S., Sah, P., Kapar, V., & Yadav, P. (2023). Sexual Harassment and its Impact in Females at Workplace in Dhanusha District, Madhesh Province, Nepal. *MedS Alliance Journal of Medicine and Medical Sciences*. <https://doi.org/10.3126/mjmm.v3i5.60089>

28 *The economic costs of sexual harassment in the workplace | Deloitte Australia | Economics*. (2020, March 2). Deloitte. Retrieved March 15, 2025, from The economic costs of sexual harassment in the workplace

In this era of rapid advancement in the use of technology, especially social media, which has connected the whole world like a global village, a single post or a tweet can cross thousands of kilometers, reach the audience, and create an impact on their lives. Therefore, more scandals of sexual harassment can be brought into light through social media and Glassdoor reviews. The women can share their stories of mishandled sexual harassment reports, how they are being sidelined on purpose, etc. The following illustrative scenario can help to better understand how this works. In this scenario, an employee who is complaining about sexual harassment at a reputable company continues to experience harassment at her place of employment after reporting the harassment. The employee has left her job after filing the complaint, and the company filed a charge of retaliation against the employee, who was punished with a demotion in pay and a loss of status in the company. The employee posted a review on Glassdoor.com stating that this company is a “public # MeToo waiting to happen.” It has been reported that the company used an outside firm to help manage their reputation, and within a few days of her posting the review, the company paid to have her review expunged from all available reviews at Glassdoor.com, which is simply to quiet the employee’s complaint seen by the offline public. The CEO of the company sent a company-wide email to employees “debunking” the employee’s review on Glassdoor.com. The fact that the company had to send a company-wide email in order to disprove the employee’s review indicates the company utilized an extraordinary amount of company resources to support the management of the company’s lawsuit against the employee, instead of properly managing the employee’s complaint internally.

The turnover of female employees has impacted not only individual women but also has created an enormous financial burden for companies in hiring new employees, training new employees, and losing valuable experience and productivity. The inability of a workplace to provide a safe and respectful environment for women is therefore resulting in the loss of women’s talent in the workplace. Bringing attention to these costs helps employers understand the seriousness of workplace sexual harassment and encourages them to strengthen their efforts by handling reports of sexual harassment with utmost priority, care, and seriousness without any bias and ensure highest level of transparency and fairness during the procedures followed after receiving such a complaint. It motivates them to develop and implement practices that ensure a safe and respectful working environment—something every woman deserves.

Conclusion

Sexual harassment at the workplace is not simply a legal problem waiting for a legal solution. If this paper has shown anything, it is that the law and lived reality often exist in painfully different worlds. India now has one of the more structured legal frameworks for addressing workplace harassment — built carefully over decades through the Vishaka guidelines, the POSH Act, and now the Bharatiya Nyaya Sanhita. And yet, nearly thirty years after Bhanwari Devi's case forced this conversation into the open, thousands of women continue to weigh the same exhausting calculus every day: is speaking up worth what it will cost me? That question — and the fact that so many women answer it with silence — is the most honest measure of how far we still have to go. The law creates rights. But as this paper has argued, cultural norms determine whether those rights are usable. When power distance makes reporting a supervisor feel professionally suicidal, when patriarchal expectations place the burden of scrutiny on the victim rather than the perpetrator, and when the fear of *log kya kahenge* weighs heavier than the harassment itself, the most carefully drafted statute becomes a hollow promise. The Internal Complaints Committee exists on paper in thousands of organizations. What it cannot guarantee is the psychological safety that makes using it anything other than an act of enormous personal sacrifice.

The organizational costs explored in this paper make the stakes even plainer. Harassment is not just a moral failure — it is an economic one. When nearly half of Indian women leave jobs because of harassment, when the gender pay gap widens as a direct consequence of career derailment, when the “brain drain” of female talent bleeds quietly from companies that publicly celebrate diversity, the price is borne not just by individuals but by the institutions that failed to protect them. The Deloitte findings were stark: billions in lost productivity, with employers bearing the bulk of costs they could have avoided. The irony is painful. The very organizations that lose the most from tolerating harassment are often the ones least willing to confront it. What this paper ultimately urges is a shift in how we think about prevention. Compliance is the floor, not the ceiling. Filing annual reports, constituting an ICC, and distributing a policy document — these are necessary, but they are not enough. Meaningful change requires organizations to look honestly at their own cultures: who gets protected when complaints are filed, whether silence is treated as neutral, and whether the mechanisms designed to help women are, in practice, being used against them. The Supreme Court's frustration with *Medha Kotwal Lele* was not really about paperwork. It was about institutions that had learned to perform accountability without practicing it. For students of

law, this is perhaps the sharpest lesson this paper can offer. The law is a powerful instrument, but it operates inside a society — and that society pushes back. Understanding sexual harassment law means understanding not only the provisions of the POSH Act or the sections of the BNS, but why the harm they address is so much harder to eradicate than any single act of misconduct. It means asking not just “what does the law say?” but “who does the law actually reach, and who does it leave behind?” Every woman deserves to walk into a workplace without calculating the cost of her own dignity. That should not be a radical proposition. The law has said as much since 1997. Making it real in culture, in leadership, in the daily texture of organizational life is the work that remains.

AI-DRIVEN RECRUITMENT IN INDIA: LEGAL ACCOUNTABILITY AND THE FUTURE OF FAIR HIRING

Dr. Preeti Goel*
Niharika Aggarwal**

Abstract

Artificial intelligence (AI) is increasingly embedded in Indian recruitment through résumé screening, candidate ranking, chatbot interaction, digital assessments, video-interview analytics, and predictive matching. These systems promise speed and administrative efficiency, but they can also convert historical inequality into apparently neutral scores and recommendations. This paper examines how Indian law can allocate responsibility when AI-assisted recruitment compromises equality, privacy, accessibility, or procedural fairness. It argues that India's current legal position is fragmented: the Digital Personal Data Protection Act, 2023 (DPDP Act) regulates digital personal-data processing; disability legislation protects equality and reasonable accommodation; and constitutional privacy and equality norms provide interpretive foundations. Yet none creates a complete regime for automated employment decisions, algorithmic impact assessment, bias auditing, explanation, or contestation. The paper proposes an approach in which employers bear a non-delegable duty to validate, monitor, and review tools they deploy, while vendors carry enforceable duties of documentation, testing, security, and cooperation. The proposed approach combines risk assessment, independent bias audits, candidate notice, meaningful human oversight, accessible alternatives, audit trails, shared liability, and effective grievance redress. This would allow India to realise the productivity benefits of AI without permitting opaque systems to become instruments of exclusion.

Keywords: Artificial intelligence, recruitment, algorithmic bias, data protection, employment discrimination, legal accountability, fair hiring.

Introduction

Recruitment is a gateway to economic opportunity. A decision to shortlist, reject, rank, or interview an applicant affects access to livelihood, dignity, professional mobility, and social participation. Indian employers are

* Assistant Professor, Maharaja Agrasen Institute of Management Studies, GGSIPU, Delhi

** Student, BALLB, Maharaja Agrasen Institute of Management Studies, GGSIPU, Delhi

increasingly using digital tools to manage high volumes of applications, identify candidates, parse résumés, administer assessments, schedule interviews, and communicate with applicants. When these tools use machine-learning models or other AI techniques to infer suitability, rank applicants, predict performance, or automate workflow decisions, recruitment becomes an exercise in algorithmic governance rather than merely an administrative process.

The attraction is understandable. AI may reduce repetitive work, bring structure to large applicant pools, identify skills that conventional credential filters overlook, and help recruiters respond more rapidly. Yet the same system can produce unequal results at scale. A model trained on historic hiring records may learn that characteristics associated with previously selected workers are markers of merit. If past selection reflected gendered occupational segregation, language privilege, caste-linked educational access, ableist assessment practices, regional inequality, or preference for uninterrupted careers, the model may reproduce those patterns even without explicitly using protected attributes. Proxy variables such as postal code, college, employment gap, language style, device type, or social-media activity can operate as indirect channels for exclusion.¹ The principal challenge is accountability. Employers may contend that a vendor designed the system, vendors may characterise outputs as recommendations rather than decisions, and recruiters may claim that a human remained nominally “in the loop.” These explanations do not resolve whether applicants were treated fairly, whether their data were lawfully processed, or who must remedy a discriminatory result. The problem is intensified by opacity: an applicant may never know that AI was used, which data influenced the score, or how to seek meaningful reconsideration. This paper argues that AI-assisted recruitment should be treated as a high-impact employment practice. India should not permit an employer to evade responsibility merely because a third party supplied the tool or because a human formally clicked “approve” after an automated ranking. The legal framework must combine privacy, equality, accessibility, due process, and institutional accountability. The paper further explains the operation and risks of AI recruitment and analyses India’s present legal foundations. The paper identifies accountability gaps and proposes lessons and offers reforms for fair hiring.

1 Solon Barocas & Andrew D. Selbst, *Big Data’s Disparate Impact*, 104 *Calif. L. Rev.* 671, 692–700 (2016).

AI Recruitment and its Risks

A. From Automation to Algorithmic Decision-Making

Not all recruitment technology raises the same concern. A calendar tool that schedules interviews is different from a system that scores speech patterns, filters résumés, recommends candidates, or predicts “culture fit.” The legal significance increases when technology materially influences who sees an advertisement, advances to the next stage, receives an interview, or is rejected. Recruitment AI may include natural-language processing to extract résumé information, matching engines that compare profiles against job descriptions, automated tests, game-based assessments, chatbot screening, asynchronous video-interview tools, and predictive models that infer job performance or likelihood of retention. A common misconception is that automation necessarily increases objectivity. Algorithms make decisions through data, objectives, and design choices selected by people. A model’s apparent neutrality may conceal subjective assumptions about what counts as success, which variables are relevant, whose data are representative, and what level of error is tolerable. Technical accuracy alone is not legal or ethical fairness. A model may accurately replicate historical hiring patterns while still perpetuating unjust exclusion.

B. Bias, Proxy Discrimination, and Unequal Impact

Bias can emerge at every stage of the AI lifecycle. Training data may reflect historically unequal hiring; labels such as “high performer” may embody managerial prejudice; feature selection can rely on proxies for social advantage; and performance testing may fail to include candidates from different linguistic, geographic, gender, disability, or socioeconomic backgrounds. A résumé model trained on successful employees in a male-dominated technical workforce, for example, could rate indicators associated with male career patterns more highly. It might penalise maternity-related career breaks, part-time work, non-English communication styles, or educational pathways common among applicants with fewer resources.

India’s social context makes this problem especially important. Formal attributes such as institution attended, urban location, fluency in a particular language, continuity of employment, and access to high-speed internet are not distributed evenly. These features can become proxies for caste, class, rural origin, disability, or gendered care responsibilities. An AI system need not collect caste or religion explicitly to generate disparate outcomes. The legal inquiry should therefore assess effects, not merely the list of variables entered into the model.

C. Privacy, Surveillance, and Data Quality

AI recruitment frequently relies on more data than conventional recruitment. Applicants may provide résumés, identity documents, contact details, educational history, test results, video recordings, voice samples, behavioural metadata, and inferred personality traits.² Some systems may analyse facial movement, word choice, response time, or background information. This expansion creates risks of excessive collection, use for unrelated purposes, insecure sharing with vendors, retention beyond necessity, and decisions based on inaccurate or context-poor data. Privacy is not simply a matter of secrecy. In the employment context, data practices can shape opportunity. An inaccurate inference about communication style, emotional state, disability, or reliability can become a barrier to employment. Therefore, lawful recruitment requires data minimisation, purpose limitation, security, accuracy, and meaningful opportunities to challenge consequential errors.

D. Opacity and Procedural Unfairness

An applicant cannot effectively contest a decision that is invisible.³ A generic rejection email does not reveal whether a human assessor reviewed the application, whether the candidate was rejected because of a score, or whether a system incorrectly parsed the résumé. Trade-secret arguments cannot justify total secrecy where a person's employment opportunity is at stake. Fairness does not necessarily require disclosure of source code; it does require intelligible notice, explanation of the principal factors and process, access to correction, and a genuine avenue for human reconsideration.

India's Existing Legal Framework

A. Constitutional Values: Equality, Dignity, and Privacy

The best place to start is Articles 14, 16 and 21. Together they give us a way to judge whether AI hiring tools are fair, equal and respect privacy. Article 14 promises equality before the law⁴. In *E.P. Royappa v State of Tamil Nadu*, the Supreme Court said arbitrary state action goes against this and *Maneka Gandhi v. Union of India* added that when the State effects someones rights, it has to act fairly and reasonably.⁴ So if a government body uses an AI tool to shortlist candidates and the result turns out arbitrary, Article 14 can be used to challenge it. The catch is that Article 14 mostly binds the State, so

2 *Digital Personal Data Protection Act, No. 22 of 2023, Sec. 2(i), 2(k), 8, INDIA CODE (2023).*

3 *Andrew D. Selbst & Solon Barocas, The Intuitive Appeal of Explainable Machines, 87 Fordham L. Rev. 1085, 1087-1100 (2018).*

4 *Maneka Gandhi v. Union of India, (1978) 1 S.C.C. 248, 283-84 (India).*

it doesn't work the same way in a dispute with a private employer. It has the most force when a public authority or State instrumentality is doing the hiring.

Article 16 guarantees equal opportunity in public employment,⁵ and *Indra Sawhney v. Union of India* built up the law on fairness and non-discrimination there. This means that if a public sector recruiter brings in AI for screening, the same rules on equality and non-arbitrariness still apply. Article 16 doesn't directly cover private hiring though, so there's a real gap when a private company's AI system ends up discriminating. Article 21 protects life and personal liberty, and after *Maneka Gandhi* it also demands fair procedure whenever a protected right is affected. Then in *K.S. Puttaswamy (Retd.) v. Union of India*, the Court recognised privacy as a fundamental right.⁶ This matters for AI recruitment because these tools often handle applicant details, behavioural signals and digital profiles. If that data is collected or used without proper transparency and safeguards, it raises informational privacy problems.

B. Digital Personal Data Protection Act, 2023

For digitally processed applicant information, the DPDP Act is the most important general statute.⁷ It tries to balance an individual's right to protect their personal data against the need to process data for lawful purposes. In recruitment, an employer, agency or platform can be a data fiduciary,⁸ and a technology provider handling data for it can be a data processor. The Act's rules on notice, consent, legitimate use, security, accuracy, grievance redress and processor governance therefore apply directly to AI-assisted hiring. Several practical obligations follow for recruitment systems. Applicants should get a clear notice of what data is processed and why. Where data is used to make decisions about a person, it should be accurate, complete and consistent. Employers must put reasonable security safeguards in place and offer an accessible way to raise grievances. Vendor arrangements shouldn't become a way to dodge these duties: a company that picks an AI recruiter stays answerable for its data practices even when a cloud provider or HR-tech vendor does the technical work. That said, the DPDP Act 2023 is not an AI-employment statute. It doesn't expressly give anyone a right not to be subject to purely automated recruitment decisions, a right to a detailed explanation of an algorithm, or a mandate for bias testing. Data protection can control inputs and

5 *Indra Sawhney v. Union of India*, 1992 Supp. (3) S.C.C. 217, 419–20 (India).

6 *Justice K.S. Puttaswamy (Retd.) v. Union of India*, (2017) 10 S.C.R. 569, 638–39 (India).

7 *Digital Personal Data Protection Act*, No. 22 of 2023, Sec. 8, INDIA CODE (2023).

8 *Rights of Persons with Disabilities Act*, No. 49 of 2016, Sec. 20, INDIA CODE (2016).

procedures, but it can't tell us whether a model that looks lawful is still producing discriminatory hiring outcomes. That gap is why separate rules for employment AI are needed.

C. Disability, Accessibility, and Reasonable Accommodation

The Rights of Persons with Disabilities Act, 2016 is an essential lens for AI recruitment. Section 20 prohibits disability discrimination⁹ in employment matters in Government establishments and requires reasonable accommodation and a barrier-free, conducive environment. The section is limited by the kind of institution it covers, but the Act's principles of equality and accommodation should still guide how all recruitment is designed. Exclusion can happen with no discriminatory intent at all. A hiring portal that doesn't work with assistive technology, an automated video assessment that penalises atypical speech or eye contact, and a timed test with no accommodation are all examples. Accessible AI hiring should offer alternative assessment formats, keyboard navigation, screen-reader compatibility, flexible timing and accessible communication. Candidates should also be able to request accommodation without being penalised for it. Employers should test systems with disabled users before rolling them out instead of waiting for individual complaints. Accessibility has to be built in from the start, since fixing it after deployment comes too late.

D. The Fragmentation Problem

So Indian law has some useful pieces of protection but no single rulebook for employment AI.¹⁰ Privacy law covers data, wage law covers sex discrimination in recruitment, and disability law covers equality and accommodation. Constitutional doctrine supplies the underlying values, and general contract, negligence and consumer-law principles may help in particular disputes. What the framework doesn't clearly require is an algorithmic impact assessment, an external bias audit, a notice of adverse decisions, auditable documentation, or a defined split of liability between employer and vendor. That leaves candidates, firms, vendors, regulators and courts uncertain about where they stand.

9 *Rights of Persons with Disabilities Act, No. 49 of 2016, Sec. 20, INDIA CODE (2016).*

10 *Digital Personal Data Protection Act, No. 22 of 2023; Rights of Persons with Disabilities Act, No. 49 of 2016, Sec. 20, INDIA CODE (2016).*

Legal Accountability for AI Hiring

A. Employer Responsibility Must Be Non-Delegable

The employer should bear primary responsibility¹¹ for outcomes produced by a recruitment tool it chooses to deploy. The employer defines the vacancy, selects the vendor, determines whether a score is advisory or decisive, sets thresholds, controls the recruitment workflow, and receives the business benefit of automation. These facts make the employer the most appropriate first point of accountability for candidates. Outsourcing technology may allocate commercial risk between the parties, but it should not eliminate the employer's duty to provide a lawful and fair recruitment process. A non-delegable duty would require employers to conduct vendor due diligence, ensure data-protection compliance, assess discriminatory impact, provide accommodations, maintain human review, and operate a grievance channel. It would not mean that employers must understand every technical detail of a model. Rather, employers must obtain sufficient documentation and assurance to make a responsible deployment decision. An employer that cannot explain what a tool does, what data it uses, how it was validated, and how errors can be corrected should not rely on that tool for high-impact selection.

B. Vendor Duties and Shared Liability

Vendors cannot be treated merely as neutral suppliers.¹² They design or configure models, determine data architecture, make claims about accuracy, select validation approaches, and control significant technical information. Vendors should therefore owe duties of reasonable care and transparency. At minimum, they should provide documentation on intended purpose, known limitations, training and validation methodology, performance metrics, data categories, security controls, version changes, and appropriate human-use conditions. They should also facilitate independent audits and notify clients of material risks or identified defects. Shared liability is especially important when harm results from both design and deployment. For example, a vendor may supply a résumé-ranking model trained on unrepresentative historical data, while an employer may set an aggressive rejection threshold and fail to monitor gender outcomes. Neither actor alone explains the harm. Law and contract should permit responsibility to be allocated according to control and fault, while preserving the applicant's ability to seek a remedy from the employer that made the hiring decision.

11 *Digital Personal Data Protection Act, No. 22 of 2023, Sec. 8, INDIA CODE (2023).*

12 *Nat'l Inst. of Standards & Tech., Artificial Intelligence Risk Management Framework (AI RMF 1.0), NIST AI 100-1 (2023).*

C. Meaningful Human Oversight

A human being in the workflow is not enough if that person simply rubber-stamps an AI recommendation. Meaningful oversight requires authority, competence, and time.¹³ The reviewer must be able to override the output, understand material limitations, examine relevant context, recognise potential bias, and record reasons for the final decision. A recruiter should not be required to review thousands of algorithmic rejections individually; rather, the system should be designed so that high-impact adverse decisions receive proportionate scrutiny, particularly where a candidate seeks review or raises an accommodation issue.

D. Transparency, Contestability, and Evidence

Fair recruitment requires a minimum package of procedural rights.¹⁴ First, applicants should be told when AI materially influences screening, ranking, assessment, or rejection. Second, they should receive a concise and intelligible account of the role of the system, the categories of data used, and the existence of human review. Third, they should be able to correct inaccurate data, request reasonable accommodation, and seek review by a qualified human decision-maker. Fourth, organisations should keep audit logs and decision records sufficient to investigate complaints. These measures also solve an evidentiary problem. Algorithmic discrimination is often systemic rather than intentional. Requiring an applicant to prove the inner workings of a proprietary model is unrealistic. A burden-shifting approach is preferable: once an applicant presents credible facts suggesting discriminatory or procedurally unfair treatment, the employer should demonstrate that the system was appropriately assessed, validated, monitored, and used with meaningful oversight.

Lessons for Fair and Accountable AI Hiring in India

A. Treat Recruitment AI as High-Impact Decision-Making

India's approach should begin with the recognition that AI tools used to recruit, rank, filter, assess, or reject applicants are not ordinary back-office technologies. They mediate access to employment, income, occupational mobility, and social dignity. Their effects can be particularly consequential where an automated score determines whether an applicant proceeds to an interview, sees a job advertisement, or is excluded before any human recruiter examines the application. Regulatory obligations

13 Nat'l Inst. of Standards & Tech., *Artificial Intelligence Risk Management Framework* (AI RMF 1.0), NIST AI 100-1 (2023).

14 Andrew D. Selbst & Solon Barocas, *The Intuitive Appeal of Explainable Machines*, 87 *Fordham L. Rev.* 1085, 1087-1100 (2018).

should therefore follow the impact of the decision, not the vendor's description of the product as a mere "assistive" or "efficiency" tool. A risk-based classification would allow Indian regulation to distinguish low-risk administrative automation, such as interview scheduling, from systems that make or substantially influence consequential judgments. Candidate ranking, automated rejection, predictive scoring, targeted vacancy advertising, behavioural or biometric analysis, and systems that infer personality or "fit" should fall within a high-impact category. This approach is more proportionate than a blanket ban on recruitment technology while recognising that technical convenience cannot justify opaque exclusion.

B. Build a Rights-Based Indian Framework

The Indian framework should be anchored in equality, dignity, privacy, accessibility, and procedural fairness. Articles 14, 15, 16, and 21 of the Constitution establish¹⁵ the normative basis for non-arbitrary and rights-respecting recruitment, particularly in public employment. The Supreme Court's recognition of privacy as intrinsic to life and personal liberty reinforces the principle that personal information cannot be collected, profiled, and used without regard to legality, necessity, proportionality, and safeguards. These constitutional values should inform both public-sector recruitment and the regulation of private hiring systems. They are especially relevant in India, where data points that appear facially neutral such as educational institution, postal code, language proficiency, employment gaps, device use, or location may function as proxies for class, caste, gender, disability, regional background, or unequal access to opportunity. A framework concerned only with whether an algorithm explicitly records a protected attribute will be inadequate. The legal inquiry must also examine whether the system's design and outcomes create unjustified disparate effects. The Digital Personal Data Protection Act, 2023 supplies important but incomplete protection.¹⁶ The Act provides a legal basis for regulating digital personal-data processing and gives data principals rights to correction, erasure, and grievance redress. It also requires reasonable security safeguards and imposes obligations on a data fiduciary in relation to personal data under its control. In recruitment, those duties should translate into clear applicant notices, accurate and relevant data, secure vendor arrangements, limited retention, and practical procedures for correction and complaint. However, data protection alone cannot resolve algorithmic discrimination. The DPDP Act

15 INDIA CONST. arts. 14, 15, 16, 21.

16 Digital Personal Data Protection Act, No. 22 of 2023, Sec. 8, 12-14, INDIA CODE (2023).

does not expressly create a comprehensive right against solely automated hiring decisions, require employers to disclose model logic, or impose regular fairness audits. A dedicated employment-AI framework should complement the Act by creating process-specific duties for organisations that use AI to determine access to work.

C. Make Employers Primarily Accountable

The employer should remain the primary point of accountability to an applicant. It is the employer that defines the role, procures or approves the tool, decides how heavily to rely on the output, sets decision thresholds, and receives the operational benefit of automation. These facts justify a non-delegable duty to ensure that an AI-assisted recruitment process is lawful, fair, accessible, and subject to meaningful review. An employer should not be able to answer a discrimination or privacy complaint simply by saying that the system was supplied by a third-party vendor. Primary employer responsibility should include: pre-deployment due diligence; validation of the tool for the specific job and applicant population; privacy and security review; accessibility testing; monitoring of adverse outcomes; human-review arrangements; candidate communications; and operation of an effective grievance channel. Employers need not become software engineers, but they must obtain enough documentation and assurance to assess whether a system is suitable for a high-impact employment use. If an organisation cannot identify the tool's purpose, data categories, known limitations, validation results, and route for correcting errors, it should not use that tool as a basis for adverse selection. This allocation of responsibility is consistent with existing Indian employment and data-protection values. The duty should apply with equal force where discrimination is generated through an algorithmic ranking or screening process rather than an individual recruiter's overt preference.

D. Impose Corresponding Duties on Vendors

Employer accountability should not make vendors invisible. Vendors design or configure models, determine the architecture through which information is processed, set validation methods, and often possess the technical information required to identify error, bias, and security risks. They should therefore have enforceable duties to document intended use, disclose material limitations, maintain version histories, support auditability, apply appropriate security practices, and inform clients of material changes or known defects. The appropriate model is shared but differentiated liability. Employers should answer to candidates for the fairness of the recruitment process; vendors should be responsible for defects in design, negligent validation, misleading claims, inadequate

documentation, or failure to provide promised safeguards. Contracts should allocate operational responsibilities but should not prevent injured applicants from seeking a remedy from the employer that relied on the AI output. Public procurement templates and sectoral guidance can make these duties concrete through clauses on audit access, data use, deletion, incident notification, sub-processors, model updates, and cooperation in investigations.

E. Require Algorithmic Impact Assessments and Independent Audits

Before deploying high-impact recruitment AI,¹⁷ organisations should conduct an Algorithmic Impact Assessment (AIA). The assessment should state the employment objective; explain why AI is necessary; identify the data used; evaluate privacy, discrimination, accessibility, and cybersecurity risks; consider less intrusive alternatives; specify the role of human oversight; and identify mitigation and redress measures. An AIA must be a living document, revised when the model, data source, job role, scoring threshold, or deployment setting changes. Periodic bias audits should accompany the AIA. Audits should test selection rates, false positives, false negatives, calibration, error patterns, proxy variables, and accessibility outcomes across relevant groups. In the Indian context, testing should not assume that a narrow binary-gender or urban-English-speaking dataset is representative. Depending on lawful data availability and the sensitivity of the context, organisations should examine whether system outcomes disadvantage women, persons with disabilities, linguistic minorities, rural candidates, applicants from economically weaker backgrounds, or persons with non-linear career histories. The objective is not to require unlawful profiling; it is to identify and mitigate foreseeable disparate effects.

F. Ensure Transparency, Human Review, and Contestability

Candidates should receive timely and intelligible notice when AI materially influences recruitment. The notice should identify the stage at which AI is used, the principal categories of information processed, whether a human will review the output, and the available route to seek correction, accommodation, and reconsideration. Meaningful transparency does not require publication of source code or disclosure of trade secrets. It requires enough information for an applicant to understand that an automated process has affected the opportunity and to challenge an error or unfair outcome. Human oversight must be substantive rather than ceremonial. A reviewer should have authority to override an automated recommendation, access to relevant contextual information, appropriate

17 Nat'l Inst. of Standards & Tech., *Artificial Intelligence Risk Management Framework (AI RMF 1.0)*, NIST AI 100-1 (2023).

training, and sufficient time to conduct a real assessment. Accordingly, high-impact recruitment systems should provide alternative assessment formats,¹⁸ screen-reader compatibility, keyboard navigation, captioning, flexible timing where appropriate, multilingual information, accessible support, and a straightforward process for accommodation requests. Employers should test systems with persons with disabilities and diverse users before deployment. Inclusion also demands caution regarding tools that purport to infer emotion, personality, truthfulness, or employability from facial expression, voice, or behavioural signals. Unless such tools can satisfy strong standards of necessity, scientific validity, reliability, and non-discrimination, they should not be used to make adverse employment decisions.

H. Establish Coordinated Enforcement and Remedies

A fair-hiring framework will be ineffective without accessible enforcement.¹⁹ The Data Protection Board can address obligations within the DPDP Act, while labour authorities, disability-rights institutions, and sectoral regulators may have complementary roles. India should develop coordinated guidance or a specialised mechanism for high-impact employment AI. This mechanism could issue templates for AIAs, candidate notices, audit reports, procurement clauses, vendor contracts, and accessibility checklists; receive complaints; and publish anonymised compliance trends. Effective remedies should include data correction, explanation, human reconsideration, accommodation, suspension of unsafe tools, administrative sanctions for serious violations, and compensation where permitted by applicable law. Organisations should also preserve records of model versions, decision thresholds, audit findings, material vendor changes, and complaint outcomes. These measures promote accountability and give regulators a practical evidentiary basis for identifying systemic patterns rather than treating every case as an isolated error.

Conclusion

AI may help Indian employers manage recruitment efficiently, but efficiency is not a sufficient measure of legitimacy. Employment decisions shape life chances, and automated systems can amplify existing inequality at a speed and scale that traditional hiring practices cannot match. The principal legal question is not whether algorithms are inherently good or

18 *Rights of Persons with Disabilities Act, No. 49 of 2016, Sec. 20, INDIA CODE (2016).*

19 *Digital Personal Data Protection Act, No. 22 of 2023; Rights of Persons with Disabilities Act, No. 49 of 2016, Sec. 20, INDIA CODE (2016).*

bad. It is whether institutions deploying them can demonstrate that their systems are necessary, proportionate, fair, secure, accessible, and open to challenge.

India already possesses important legal building blocks. The DPDP Act establishes duties relevant to applicant data; disability law foregrounds equality and accommodation; and constitutional doctrine protects privacy, dignity, and equality. Yet these protections remain incomplete when an applicant is rejected by an opaque score or ranking model. The absence of an explicit framework for automated employment decisions leaves too much to voluntary ethics and private contractual arrangements. India need not choose between innovation and rights. It can encourage AI-enabled efficiency while insisting that recruitment technologies are tested, documented, accessible, and contestable. The central lesson is simple: a system that determines access to employment should be governed by standards commensurate with its social impact. The appropriate response is a high-impact employment-AI regime built around non-delegable employer responsibility, enforceable vendor duties, algorithmic impact assessments, independent bias audits, candidate notice, meaningful human review, accessible design, auditable documentation, and practical remedies. Such a regime would not prohibit innovation. It would direct innovation toward systems worthy of public trust. Fair hiring in India's digital future requires more than faster selection; it requires accountable selection.



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