JOURNAL OF INDIAN LEGAL THOUGHT

Volume 18 (2)
2024

SCHOOL OF INDIAN LEGAL THOUGHT
MAHATMA GANDHI UNIVERSITY
KOTTAYAM, KERALA

ISSN 2249 - 9989

Journal of Indian Legal Thought

Volume 18 (2)
2024

School of Indian Legal Thought
Mahatma Gandhi University
Kottayam
Kerala

ISSN 2249 - 9989

Vol 18 (2) Journal of Indian Legal Thought (2024)
ISSN 2249 - 9989

Mode of Citation: JILT,Vol 18(2). 2024

Printed in India at alenlayout, Manganam, INDIA.

CONTENT

LONG ARTICLES

SHORT ARTICLES

The Dilemma of Digital Legacy: Navigating 'Right to be Forgotten' and 'Right to be Remembered' in India

Dr. Deepak Kumar Srivastava* & Shriya Badgaiyan**

Introduction

Advanced technology has been the main contributing factor towards the ever-changing nature of information through the latest innovation in digital information technologies. This change of generation has however introduced a new phase in which issues to do with privacy and protection of such data have formed a new topic for discussion. At the heart of these discussions lie two pivotal principles: two well-known citizens' rights that have been in the news frequently: 'the Right to be Forgotten' (*herein after referred as 'RTBF*") and the Right to be Remembered (*herein after referred as 'RTBR'*). While these principles seem contrary, they both have very significant responsibilities when it comes to the creation of digital privacy policies, as well as the maintaining of information repositories.[1]

The RTBF is a legal right which every citizen possesses to request the erasure of one's information from the internet if precipitated. This right came into focus with the implementation of the GDPR in the EU and has

* Associate Professor & Dean, Hidayatullah National law University,Raipur, Chattisgarh.
** Rersearch Scholar, Hidayatullah National law University, Raipur, Chattisgarh

1. Prashant Mali, *Privacy Law: Right to Be Forgotten in India*, 7 NLIU L. REV. 1 (2018).

its roots in the basic objective of preventing people from infiltration of their privacy by providing them control over the data that is generated about them. It is often used when some personal data, which is no longer relevant, false or potentially harm owner, are present online and cause risks for privacy or and character. It aims at these pursuing measures to balance right to privacy and freedom of speech.

Unlike RTBF, RTBR argues for retention of data on historical, cultural and public interest reasons. This is a clear difference from RTBF, which is focused on privacy protection, while the RTBR emphasises that one should keep information that contributes to society's knowledge and memory. This right seeks to ensure that information that is deemed pertinent in the fight against corruption, in the preservation of democracy and to ensure that the truth prevails is not concealed from the public domain. Thus, it underlines the focus on storing data that will likely attract much attention and has an impact on the development of culture, thus contributing to the improved common knowledge of history and social advances.[2]

As vast amounts of personal data are continuously being produced and shared online, the debate on RTBF & RTBR remains crucial in the postmodern society. This debate is more relevant especially to India's digital environment where investment in the digital space is increasingly becoming popular also due to the on-going formulation of laws in data protection in the country. It has also been observed that with the increased usage of social media platforms, e-commerce websites, and various digital services, there has been an unparallelled increase in collection of personal data and information, which has resulted in privacy violation, along with possible misuse of the personal data collected.

Among them, the RTBF assume superior significance in India since it provides effective means to the individuals to protect one's privacy and limit oneself from the long-term impacts of setting up the obsolete or

2. Anuprash Rajat & Gaurav Bharti, *Right to Be Forgotten in India: A Critical Legal Analysis*, 4 IJLLR 1 (2022).

erroneous information that is likely to be easily retrievable online. This right is necessary for people who are planning to change their previous wrongdoings or mistakes that can negatively shade their personal and working experiences. The feature that allows users to ask information to be removed from the Internet enables people to have at least some level of control over the information that Concerns them when posted online, thus reducing the potential harm that can come from having focused unlimited access to their personal information.

On the other hand, the RTBR is also an equally important concept in the Indian legislative regime, mainly as it provides an instrument for protection of the accuracy and credibility of public records and promotion of transparency in the working of the Government. In a democratic society, it is crucial to be able to obtain raw data from any institution to ensure that they are properly questioned and the society's decisions are based on the facts available. The RTBR also preserves the civil liberties by protecting the freedom of information that relates to genuine public interest comparable to governmental information, judicial information and even old records. In this way, recognizing the significance of preserving such information, the RTBR plays a part in strengthening the role of transparency and accountability of the situation as well as computing its historical truthfulness in terms of societal context.[3]

Also, the functioning of the both presupposes the fine line as to how one can to guarantee the legal right to privacy and, at the same time, prevent certain aspects of the public interest and societal considerations. Achieving this is by creating legislation and regulation which comprehensively deal with the challenges associated with volumes of personal information but at the same time accounting for rights and democracy. However, it is crucial that, in the realm of executing these rights, there are practical means of enforcing the measures and clear definitions to guarantee that the tasks are

3. Naman Kapoor & Juhi Punj, *Data Protection Bill and the Right to Be Forgotten*, 4 IJLLR 1 (2022).

fulfilled fairly across various Web sites and services that are provided to users.

Origin and Evolution

The origin of the RTBF could be attributed to key events in data protection legislative landscape especially within the realm of the European Union's GDPR, which was enacted in 2018. The GDPR is an extensive reform to the overall landscape of data protection legislation which was pursued to enhance rights when it comes to their personal data in enhancing its legal guard in the context of the growing digital environment.[4] This comprehensive regulation was particularly conceived to meet the emerging difficulties due to the advancement of ICT and the diffusion of internet in collecting, storing and retelling personal data. The EU data protection legislation is actually a rather strong legal framework, and within it the idea of the RTBF became a significant component, establishing the right of an individual to request that certain of their personal data be erased from certain platforms under certain circumstances. This right shows the shift in focus to wanting to permit freedom of information and accountability without compromising personal identity, reputation and human dignity in the society.[5]

Some other significant and influential laws have also contributed to strengthening the principle of the RTBF in common law systems that give more practical demonstrations of how the RTBF is exercised and implemented. A typical example is the *Google Spain SL, Google Inc.* v *Agencia Española de Protección de Datos* whereby court greatly influenced nature of RTBF.[6] This case involved an individual by name Mario Costeja González alleging that they wanted Google to remove links to a newspaper

4. Vidhi Tomar, *Reflecting the Need of "Right to Be Forgotten" in India*, 5 IJLLR. 1 (2023).
5. Surya R., *The Right to Be Forgotten: A Legal Theory in India That Has Yet to Be Codified*, 4 IJLLR 1 (2022).
6. Case C-131/12.

article. It was much worse several years ago, as reflected in the article that described his financial situation back then while his difficulties have been left unresolved. This information was available in indexed search pages, and González believed the information was stale and a violation of his right to privacy. EU Court of Justice supported him in his case, making it a legal norm for citizens to ask search engines to remove links with their identifiable information if the data listed is no longer relevant or if it is more of an invasion of privacy. This landmark decision highlighted the right to privacy in digital age of social media and put into question concept of right to dictate one's digital identity and reputation, with the right to information placed in contrast to this right. This was evidenced by the case of Mario Costeja González through which people began to develop a consciousness of having to defend their own rights to keep their private information out of the Google search results.[7]

Due to the RTBF, as a new and developing part of data protection law, there is a counterpart right called the RTBR. This concept draws out the need for keeping documented records as well as preserving the archives that are in the public domain. Whereas the RTBF aims at the control of individual rights to privacy where/when a person releases information on the web and may request that this is obliterated from the web, the RTBR supports the right to access valuable information and keep recorded history, cultural and academic records intact. This duality underlines the conflict of private liberty and public order as well as the need to expose a particular truth and unveil new facts in each history category.[8]

At the same time, the concept behind RTBR's creation originated from principles much earlier than historical archiving, although the connection is compulsory. These principles concern themselves with preserving

7. *Id*.
8. *The Right to (Not) Be Forgotten, Right to Know, and Model of Four Categories of the Right to Be Forgotten*, *in* Archives and Records 111 (2023), https://doi.org/10.1007/978-3-031-18667-7_5. (last visited May 14,2024)

accounts and evidence of occurrences, people, and concepts relevant to society inspiring future generations. Historical archiving has been a key element in supporting society, especially owing to libraries, museums, and digital archives as key institutions of social memory. These are not efforts are simply to store information but store and disseminate knowledge that we consider important for our histories and understanding of the past.

In addition, the legislation and ethics integrating the conception of the RTBR are also identified. It recognizes the public's the right to be presented with information that will assist all in better understand history and cultural heritage. It is of paramount importance for scholarly work, learning processes and archive since it can contain valuable information on civilization. It also states that the RTBR should also guarantee the proper handling of germane record and personal information to support record keeping without leaking personal information to the public. Achieving these objectives involves paying attention to these key-interests while at the same time recognizing the countervailing obligations of recording history and recognizing individuals' rights to privacy.[9]

Legal Framework and Key Legislation

Global Perspectives

The GDPR of the EU, which became effective on May 25, 2018, represents a landmark in global data protection & privacy standards. As a comprehensive regulation, it aims to provide individuals with greater control over their personal data while imposing stringent obligations on organizations that handle such data. One of the most significant features of the GDPR is the enshrinement of the RTBF in Article 17.[10] This provision empowers

9. Akriti Gupta & Mahima Sharma, *Data Privacy in Digital World: Right to Be Forgotten*, 8 Nirma U. L.J. 97 (2018).
10. Basak Bak, *reviving a European Idea: Author's Right of Withdrawal and the Right to Be Forgotten under the EU's General Data Protection Regulation (GDPR)*, 19 Scripted 120 (2022).

individuals to request deletion of their personal data under specific circumstances. For instance, individuals can invoke this right when the data is no longer necessary for the purpose for which it was originally collected or processed, or when they withdraw their consent on which data processing was based. However, the GDPR carefully balances RTBF with necessity of preserving certain data for reasons of public interest. These reasons include the facilitation of scientific research, historical archiving, or compliance with legal obligations. Such exceptions ensure that the regulation does not hinder valuable societal functions while still prioritizing individual privacy. The impact of the GDPR has been profound, extending far beyond the borders of the European Union. Its stringent requirements and high penalties for non-compliance have prompted organizations worldwide to reevaluate and enhance their data protection practices.

This regulation has thus set a global benchmark, emphasizing the critical importance of privacy and delineating responsibilities of data controllers & processors.[11]

Among the modern legislation that has emerged as an important stage in the regulation of data protection, it is possible to name the California Consumer Privacy Act (CCPA), which has been active since January 1, 2020.[12] In the US, it is regarded as the single most extensive state level data protection legislation, which exerted a profound legislative impact on how personal information is managed. The CCPA enacted private rights for California consumers with regard to their personal information to increase consumer power and clarity. Secondly, CCPA guarantees that individuals have the right to know, what specific categories of personal data are being collected by the business as far as the subject is concerned. This provision requires the firms to report on what and what type of data they collect; this

11. Marco Rizzuti, *GDPR and the Right Be Forgotten*, 2020 Eur. J. Privacy L. & Tech. 105 (2020).
12. Michael J. Kelly & Satolam David, *The Right to Be Forgotten*, 2017 U. Ill. L. Rev. 1 (2017).

ensures that consumers possess adequate information on the extent to which they are espied on by data gathering firms. The CCPA grants clients the opportunity to delete their data that has been gathered by companies. This right to deletion also allows persons to ask a company to delete their personal information that it may have in its databases although this is subject to conditions and exemptions. In this aspect of the legislation the privacy of a person is protected through regulation of the retention and sharing of a person's information. Thirdly, CCPA offers consumers the right to decline the selling of their personal information. This indicates that there is a capacity for anyone to come and tell the businesses not to forward personal data to other third parties thereby regaining more control on the amount of data being collected and by whom and for what purposes. This provision is especially pertinent even today, when data monetization has become a norm in many organizations.[13]

Internationally, it is notable that many global data protections developed laws contain several aspects and principles of the RTBF. One such is the Brazil General Data Protection Law that started its operations in August 2020. Like RTBF provision, the LGPD provides a wide legal basis for protection of personal data in Brazil that embraces all elements set by the GDPR. These provisions make it possible for persons to demand that their personal data be erased where this is feasible which helps to increase control over data.[14]

Indian Framework

India enacted its Digital Personal Data Protection Act in 2023 (*herein after referred as DPDP Act, 2023*) which can be deemed as the full-fledged step forward in strengthening the legal regulation of personal data. This remains one of most significant pieces of legislation that seeks to offer a

13. *Id*.
14. Bruno de Lima Acioli & Marcos Augusto Junior de Albuquerque Ehrhardt, *An Agenda for the Right to Be Forgotten in Brazil*, 7 Braz. J. Pub. Pol'y 384 (2017).

stable legal regime for the protection of people's personal data together with facilitating free movement of the information required for the development of the economic compartment of the country. It also includes principles such as data minimization which states that data processing should only be done where necessary to achieve the goals of the activity in which it is included; This is coupled with principle of purpose limitation directing that processing of data should only be done for the purpose that the data subject has given consent to; This has also introduced the principle of accountability for data fiduciary, an aspect which makes the person initiating data processing responsible for ensuring compliance[15]

The passing of the said DPDP Act, 2023 occurred after consulting and discussing it with various stakeholders and partners, solidifying India's commitment to establishing an efficient data protection system that complies with the prevailing international norms. This legislative process can be considered as the confirmation of the nation's desire to find the balance that would allow both the people's Personal Data to be protected, and the environment for digital business development to be created. Like most other comparable legislation, the DPDP Act, 2023 is structured to be dynamic to ensure that it is revised from time to time in a bid to respond to new technologies and societal complexities. It also makes law more adaptable to change by embracing constant updates as a means to stay prepared for the ever-evolving digital landscape.[16]

Indian judiciary has progressively incorporated RTBF into its decision-making process. An important benchmark in this progression was the Supreme Court judgement in *Justice KS Puttaswamy (Retd.) v. Union of India*.[17] In this historical decision, it was upheld right to privacy as an intrinsic part of constitutional assurance granted under Article 21. This

15. David Erdos & Krzysztof Garstka, *the 'Right to Be Forgotten' Online within G20 Statutory Data Protection Frameworks*, 10 Int'l Data Priv. L. 294 (2020).
16. Shabnam Ahmed Zaman, Saptarishi Prasad Sharma & Modhu Chanda Dey, *Right to Be Forgotten: Socio-Legal Study*, 4 IJLLR. 1 (2022-2023).
17. 2019 (1) SCC 1.

specific decision was a landmark one because it set the foundation for preserving the confidentiality of an individual for all forms of his life because information can spread and remain in the cyber space as long as the wrong parties want it.

In the context of the *Puttaswamy* case, the importance of protecting people's informational privacy was pointed out. It underscored the fact that in the period of continuous advancement in technology, and cold trail left by individuals in the electronic equipment, it is fundamental to shield individuals' information from publicity. It would be noticed that the court acknowledged that personal liberty and personal dignity concerns the ownership & control over information relating to person & thereby paved way for recognizing the RTBF. Subsequent cases have only added onto the framework prevalent in the *Puttaswamy* judgment and therefore it is the clear starting point for deriving the principles of this area of law. It is important for parent organization to still set some rules to instantiate from the remains goal of RTBF in social media; one of these is through legal requests for the anonymization of court records that has been further reinforced. Such cases may comprise persons applying for their names to be erased or redacted from legal records that are open to the public to be shielded.[18] The judiciary has responded to these requests with a shift of attitude in determining balance between right to privacy in contrary to public interest. Such a discretion is not ill-advised because through applications that may seek for anonymization of certain documents in specific situations, the courts have shown a sensible appreciation to both competing interests.[19]

Furthermore, in *Jorawar Singh Mundy v. Union of India*,[20] reiterated RTBF in the following manner. Jorawar Singh Mundy, a US-based lawyer who was acquitted of drug charges in the country. Although he was acquitted, online search results, particularly those of newspapers, still contain articles

18. *Id*.
19. Srishti Jain, *Right to Be Forgotten and Article 19*, 4 IJLLR 1 (2022).
20. W.P. (C) 3918/ 2020 & CM APPL. 11767/ 2021.

on the arrest up to the present, thus, his professional life has been affected. The Delhi high court therefore ordered Indian Kanoon and any other respondent to deindex the judgement from search engines arguing that the petitioner had a right to privacy that was supreme to right of the public to obtain the judgement.

In *Subhranshu Rout @ Gugul v. State of Odisha*,[21] petitioner sought to have his name be withdrawn from a public judgment in order to avoid being discriminated against and socially sanctioned. The Orissa High Court acknowledged name privacy as fundamental right of petitioner while extending RTBF and ordered to redact the petitioner's name from the public judgment.

Comparative Analysis

The DPDP Act, 2023 to a considerable extent aligns India with global data protection regulation while at the same time defining specific parameters of data protection and RTBF to suit the local context. This legislation is based on GDPR's conception of individuals' control over their personal data, which includes the right to erasure. Still, DPDP Act, 2023 is adapted for the particular social, economic, and legal context of India and, thus, the differences in activities and measures in comparison to the GDPR are significant. For instance, unlike GDPR that has strict regulation and guidelines in Data Protection, DPDP Act, 2023 uses the flexibility and context sensitivity approach in meeting India flexible and dynamic digital environment.[22]

This evaluates the current higher-level interpretations and applications of the RTBF in various jurisdictions based on an analysis of major court decisions. In Europe, what has most sensitised the topic is the CJEU's judgement in Google Spain case. This legal ruling established a sound basis for the RTBF and required search engines for further removal of the information that has been published in the past but is no longer perceived

21. BLAPL No. 4592 of 2020.
22. *Supra* note 9.

as relevant by the data subjects. That then just goes to show that commitment to the protection of an individual's right to privacy as well as the freedom of information access in Europe is well alive. On the other hand, the US courts have been quite reserved on the RTBF and this is largely because of the constitutionally protected First Amendment right to free speech. As a result, while U. S. law provides individuals with rights to privacy and data erasure, US legal decisions limit the conception of those rights more than European counterparts and privilege the free presence of information over the right to privacy.[23]

European jurisdictions pursue a middle-ground when it comes to sovereignty of privacy to protect citizens from unreasonable disclosures of information while promoting the freedom of information to the general public. This can be compared to the situation in the United States, where people's obsession with openness and free word mesh with the RTBF in a more limited way. As to why India is trying to seek a middle ground, it is through the DPDP Act, 2023 that the complexities are hope to be addressed. Despite its current infancy, the proposed framework in the DPDP Act, 2023 is an attempt to offer digital privacy protection primarily based on the condition and prospect of India digital environment. This is a right strategy because data protection is a complex phenomenon that includes different aspects at the same time in a country with complex socio-economic conditions and a rapidly growing digital economy.[24]

Ethical Considerations

The constant quest for maintaining a fine line between the sacred cardinality of privacy and the public's need for information presents a humongous ethical problem in the present world of digital technology. The RTBF exists as an ally to the cause, protecting people against the constant

23. Federico Fabbrini & Edoardo Celeste, *The Right to Be Forgotten in the Digital Age: The Challenges of Data Protection beyond Borders*, 21 German L.J. 55 (2020).
24. *Supra* note 16.

availability of stale or irrelevant personal information on the Internet, capable of transforming a person's reputation and personal life to the extent not imaginable. However, this fundamental right, from time to time, comes face to face with the legitimate interest of public in gaining access to certain categories of information particularly when the subject matter borders on matters that are considered to be within the public domain, issues of historical features or concerns of accountability in public matters.[25]

For instance, imagine a skilled politician who committed acts that are deemed scandalous these days, but the actions occurred several decades ago; something that has been lost in the Web's archives. So, while the politician may want to hide behind RTBF as the basis of not seeking further reparation for reputational damage and asserting a right to privacy, the public holds strong to an interest in this information, necessary for its proper judgments of its leaders and the directions taken in the unfolding of governance. Similarly, in cases for corporate wrongdoings, erasing memories of past corporate wrongdoings may significantly minimalize the principles of corporate governance accountability and public transparency within corporations.[26]

An on-point example is the recent decision in an EU case in 2014, *Google Spain SL*, wherein *Mario Costeja González* sought to have the information that was outdated regarding his financial position to be derogated.[27] It elicited a debate on the basic question of whether the sanctity of an individual's right to privacy can have the scales tilted against their freedom when it comes to matters of public interest, a verdict that reverberated loudly and clearly as an affirmatively definitive paean to the truism that no two cases are similar and that the matter under consideration with all the answered facts ought to be treated as sui generis.

---

25. Aditi Sandeep Malkar, *Right to Be Forgotten: Need for Constitutional Recognition in India?* 3 Jus Corpus L.J. 615 (2022).
26. *Id*.
27. *Supra* note 6.

Impact on Freedom of Speech and Information

RTBF discourse in India signifies more of a legal and cultural dynamic between legal provisions and liberal rights in the country. The RTBF is a legal idea derived from freedoms of speech and information which is akin to the American and Canadian constitution of freedom of information, it is about satisfying the public interest while respecting the privacy rights of the individual. Art. 19 which deal with Freedom of Speech and expression based on Indian Constitution, a key basic structure of India's legal system Based on the Indian Constitution of Free Speech. At the same time, it celebrates the protection of personal and private life as an inherent feature of human personage but privacy as a fundamental right was acknowledged by Supreme Court of India only in recent years.[28]

The discussion of RTBF in India demonstrates how authority struggles, following these principles as a foundation, complicate the study of information and communication technologies. On the positive side, people should have right to ask for some of their data to be erased from the public domain in order to minimize invasion of their privacy and infringement on their dignity claims opponents to fearing that it will lead to what they call the great licensing, or erosion of free speech. They opined that RTBF measures if applied in their unrestricted form, could result in censorship, revisionist history and correct freedom of speech distribution. Furthermore, the weaknesses in how RTBF measures are to be implemented and the absence of specific rules and avails to protect media freedom in India amplify such concerns because the measures can be applied randomly or discriminatively.[29]

However, to understand the position more profoundly, it is still important to further consider consequences of RTBF in different contexts. Language as an example in the realm of journalism and media though, the implementation of RTBF can impact the storage of the historical files of

28. Riddhi Tripathi, *The Right to Be Forgotten*, 2 Indian J. Integrated Rsch. L. 1 (2022).
29. Vedant Tapadia & Mridushi Damani, *The Right to Be Forgotten: An Aspect of Data Privacy*, 1 Lexforti Legal J. 80 (2019).

particular news organisation and the coverage the given organisation can provide to the public of history. Moreover, in the world where the amount of information doubles several times a year and the main six these days is read faster than the old testament, the challenges of enforcing RTBF measures are evident. The internationality of web-based sharing also adds a layer to the issue since the content might be blocked in quite a specific country and remain available in all the others, which makes doubts about the effectiveness and enforceability of the RTBF requests.[30]

Media and journalism serve as the backbones in which they keep on informing the masses as well as check on those in authority. None can deny the fact that their job involves more than just reporting; they are the conscience of the society tracking actions and decisions that affect the society. However, any such attempts made to minimize or control the free flow of information, including through the RTBF legislation or other means, can hinder the operation of journalists. Due to the exclusion of some information, there is a possibility of providing the audience with a limited and bias view that does not encompass it in its entirety, which is a factor that hampers the formation of an informed opinion.

Further, navigating the nuances surrounding both becomes particularly challenging in the Indian context. It is crucial to ensure that confidentiality of the individual is protected while, at the same time, guaranteeing the principles of liberty of thought and express and acquisition of knowledge. Any changes to regulations or definitions of the law must do this task carefully, always taking the balance of fairness into consideration. They should see to it that although the privacy of every individual is respected, the invaders of individual privacy do not absolutely kill journalistic pursuits or hinder the right of the public to be informed. To attain this balanced position, it is imperative to address the various cultural, legal and ethical issues of operating within the digital environment.[31]

30. Simran Chandok & Laksh Manocha, *Right to Be Forgotten: A Step Forward in the Implementation of Privacy Laws in India*, 6 Supremo Amicus 445 (2018).
31. *Id*.

First of all, with reference to individual privacy, one cannot but agree that there is always a demand for protecting the data from the excessive disclosure or abuse in one way or another. This is particularly significant, especially given that individuals are leaving behind big digital trails and many of these records are irremovable. Personal privacy is recognised as one of the basic human rights based on the Constitution, therefore, any actions that entails the right to privacy has to pass through several tests. Nevertheless, this right should not extend to cover every occasion where information is to be taken out of the public domain particularly where the information to be withdrawn is on matters that ought to be in the public domain.

As for freedom of speech and access to information are concerned, they are the critical pillars of any democratic sovereign country. These principles are relevant today and help provide checks and balances by having the journalists hold the powerful individuals accountable the way it should be. Anything that hampers their freedom of obtaining information or sharing issue of public interest will erode the democracies. As such, the regulation, or a legal construction of this area of freedom, poses certain challenges but should not obliterate the possibility of certain freedoms as it seeks to protect the privacy of individuals.[32]

Furthermore, the seemingly boundless nature of digital environment exacerbates presence of these challenges. The freedom and ease at which information moves across borders impose the difficulty in achieving consistency in the formulation of regulations. Also new social networks and the Internet resources have free accessed from different points of view, but it is very vulnerable to manipulations and misinforming. Therefore, the suggested regulatory control has to be future-proof, capable to address the changes in digital media ecology.[33]

32. *Supra* note 23.
33. *Id*

Technological Implications

Although the RTBF has been acknowledged and integrated into the legislation of various countries, the actual processes that are supposed to be undertaken to ensure the implementation of this right within the data management systems are rife with complex challenges mainly due to the complex and intricate structure of the contemporary data environment. Hybrid data is vast and is distributed across a myriad of systems, platforms, and repositories linked by intricate webs. This dispersion makes it difficult to provide a robust process for fixing individual personal data to respond to RTBF requests. Adding to this is the increased rate of data generation that rises daily, thus the increased difficulty of trying to follow movements of single records.

Solving such issues requires the use of AI solutions and algorithms. The application of AI and advanced algorithms in solving these challenges is inevitable. The real-time, autonomous solutions evolve as indispensable utilities to optimize the processes of recognition and classification of personal data to improve the speed and the degree of effectiveness of RTBF compliance quests. The use of AI in organizations allows for the efficient and precise search in the large databases and avoid storing or employing any sensitive information unknowingly. Moreover, versatility and machine learning knowledge enable a learning ability of the managed machine learning applications to improve their sensitivity to legal definitions of personal data and how to handle them over time.[34]

However, the utilisation of AI and algorithms makes it a whole new different animal to deal with since there are questions as to who should be held responsible for what they have produced or done. Algorithmic decision making may complicate the transparency of the decisions made concerning data management, which may in turn limit the understandability of the data processing operations by the subject or make them opaque in some manner thus inhibiting their right to challenge the processing operation being

34. *Supra* note 11.

undertaken on their data. Therefore, a number of measures to effectively initiate and facilitate RTBF must ensure openness and accountability as main principles. These algorithmic systems need to go through extensive critical examination and regulation in order to protect people's rights. Only through such measures it becomes possible to maintain the integrity of RTBF compliance, to guarantee that managing of data is ethical for future use and consistent with legal and policy requirements.[35]

Digital Archiving

The process of archiving records in the current world of technology offers distinct ways and difficulties that are all very important in the overall process for the preservation of records for the purpose of use in the future. Contrary to the restored printed documents, preserving and securing electronic documents come with precariously risky elements such as obsolesce and hacking, making the element of handling such documents complex requiring overhauling strategies.[36]

An important strategy of digital preservation is the sophisticated identification of a specific set of file formats and storage technologies that are designed to weather the entropic storm. There are formats like PDF/A for documents solutions and WARC for web content designed with aspects of long-term preservation that address some of risks related to obsolescence and data decay. Also, in digital archival, there is always a backup of the originals which may be in the form of mirror storage and other data replication mechanisms as a protection against failing hardware and other losses.[37]

Still, sustaining the accessibility and survivorship of uploaded data is not without its difficulties as shall be unveiled later. Due to the constant changes in technological or Access standards, born-digital objects often need to be migrated and converted to a new format for compatibility with

35. *Id*.
36. *Supra* note 2.
37. *Supra* note 11.

up-to-date systems. Furthermore, exponential generation of digitized content raises the bar in managing archival collections and curating stored documents through the use of appropriate metadata sets and complicated classification structures that aid in the search and revision processes.

For the sake of the archiving data quality and consistency, measures for check and balance should be meeting high standards in the validation and authentication of the data which would help in identifying those that are tampered or altered without the authority to do so. The authentication of records using signatories, dependence on cryptographic hash algorithms, and the use of blockchain in the creation and storage of digital archives ensures that records created in the digital realm are trusted and are often regarded as being as reliable as physical archives. These mechanisms are not only effective methods of protection against illicit operations, but they also provide crucial means to ensure adherence to the legal and regulatory requirements concerning the safekeeping of digital content.[38]

In addition, by virtue of the fact that it operates within digital spaces, any efforts carried out in this regard must be made aware of the fact that such environments are ever-evolving, meaning that measures have to be constantly reviewed. Periodic reviews are required to evaluate one's weaknesses and compliance with industry benchmarks with regard to data storage and protection. The integration of archival institutions with technology specialists and relevant regulatory agencies also enhances the sustainability and capacity of fixity for digital archives, as all stakeholders work together collectively to confront new issues affecting archives and preserve the cultural memory and other documents placed in digital collections. Preserving the records digitally requires the best planning, implementation of the best infrastructure, and careful supervision; this way, the records can be safeguarded for future use as and when required, duly proving their efficiency and reliability for future use.

38. *Supra* note 16.

Social and Cultural Impact

In the current society where information technology is almost everywhere, the internet and social networking sites especially, concerns on privacy and protecting data have become at their peak. The topic under consideration focuses on the shift in the way information about individuals is disseminated, collected, and retrieved due to digital advancement for which fear of misuse and exploitation can hardly be eliminated. At the centre of this discourse are RTBF and conversely RTBR, both of which are vital tools that have influenced the societies perception on data control.[39]

It is also crucial to understand that people can be either supportive or non-supportive of these ideas, and it is a reflection of the cultures that do allow or forbid forgetting. It evokes the widely shared sentiment in modern societies, where individualism and privacy are considered important values, in regard to strict measures of personal data protection. Individuals in these cultures support the right to control the distribution and storage of their data, regarding RTBF as an essential resource to protect the citizens' rights to privacy amid the proliferation of information technology products. On the other hand, in societies where the culture of trying to remember and narrating collective memories runs high, there might be some resistance to RTBF. Here, doubts are cast with regard to obliterating vital history or community stories, and therefore, concerns are voiced about the detrimental impact it has on culture and particularly, peoples' identity.[40]

In addition, philosophical and other cultural views of memory and forgetting deserve especially attention. Given that many societies are exigently still actively affected by historical experiences in the formation of social/ cultural collectivises, records and archival documents are considered irreplaceably valuable for culture and memory. The idea of providing 'filtering peek' into history, that is, withdrawing certain facts and data from the public domain might be met with some opposition or

39. *Supra* note 16.
40. *Supra* note 27.

suspicion, as anything to do with 'editing' history is regarded as an effort to 'twist' the truth. Therefore, it is imperative to argue that, although the discussion concerning the concept of RTBF and RTBR contains significant multiple facets, it still matters a lot, especially when it comes to understanding how important is to have a proper balance between the importance of privacy and other factors from the perspective of culture and society.

Thus, contrary to the political debate, the outcomes of RTBF and RTBR have not limited themselves to the theoretical level but can be observed in the work and social experience of individuals and collectives. In the actual world, it is quite easy to present specifics that help understand the nature of these rights and their implications for privacy, freedom of speech, and social welfare.

In the personal and career concerns, RTBF and RTBR have extensive autonomy to dictate people's pathways. For example, consider a candidate who, in his/her search for employment, carries a trail of questionable conduct that the online world has had the decency to bury. This marks another chance, another opportunity for a new start, a chance granted by RTBF wherein one could file for the deletion of his or her data that are no longer appropriate or relevant to the current life the individual is living. On the other hand, those with a need to exercise their rights and have free access to the data they require for research work with genuine intent or a necessity to understand past incidences may be limited by the RTBF regulations.

Expanding the scope to the community level exposes the social ramifications of data deletion or persistence. It is also possible that communities that place emphasis on the historical context, in cases where records are important for legal claims, ancestry, or cultural background, may experience issues in case some information becomes subject to deletion under RTBF. On the other hand, the continuation of data storage practice without proper measures in place only continue to perpetuate societal prejudices and inequities and continue to expand gaps that reduce product accessibility and utilization among certain segments of the population.

For instance, let another situation describes a small town which is experiencing some social conflict in relation to past event. This was because the existence or else suppression of relevant concerning this event could create or otherwise erase strongly influence the flux of collective memory and thus of the identification of the community. The analysis suggests that if the information is classified under RTBF, it may compromise the work towards finding a remedy for past wrongs and healing. On the other hand, keeping all the data unconstrained and uncensored could keep society flawed, maintain stereotypical views on individuals of a certain ethnicity or race, and rewrite history, which goes against the need for social acceptance and integration.[41]

Furthermore, RTBF and RTBR do not just raise issues about privacy or expression in a more traditional sense, but are connected to more profound ethical, legal and technological concerns. The expansion of Web 2.0 technologies and data accumulation add increased layers of complexity to the situation, requiring society to think more critically about the efficacy of using rights against the public good. While attending to these challenges, there is a critical need for policymakers, technologists, and other stakeholders to converse about what constitutes posthuman technologies and accompanying human rights and how to design technological fixtures that will achieve a strong and just society.

Conclusion

This argument is familiar with the discourse on the RTBF & RTBR; these are two extremes of privacy rights in contrast to public's right to know in digital age. On the RTBF relieved mainly in the GDPR, people receive the right to erase personal data that is no longer relevant or that is not in the individual's best interest. This right stems from the modern heightened concerns regarding personal privacy due to the blurring of the line between the physical and digital world with the consequences of one's actions online

41. *Supra* note 16.

able to haunt them later on in life. On the other hand, the RTBR stresses the societal need to preserve records and to provide important information that may be relevant to the public. These records form crucial archetypes in details of accurate of transparency and accountability as well as documentation on cultures. The conflict of these two rights portrays the essence of privacy and right to information which is very important in promoting tack and transparency.

A way Forward

In this paper, a criticism of the existing laws of RTBF and RTBR is discussed to show that these rights are independent and ought to exist in harmony. There are many regions of the world where the governments have set legal precedents which show the ideas of these rights in action which includes the free movement throughout the European Union and some regions of the US. For instance, the European Court of Justice in the Google Spain case was instrumental in establishing the RTBF, which includes the right of privacy as the right of an individual to request the search engine to delete the link belonging to him/her which leads to the removal of info considered by the individual as no longer relevant. At the same time, RTBR is called for the preservation of historical events, journalistic activities, and public documents to protect clients' or the public's right to know. In India, DPDP Act, 2023 has also been brought with similar notion but at present under process of evolution, thus highlighting that this is a global issue.

Several ethical concerns remain thus relevant, especially considering privacy and its duty to oppose censorship and protect journalism. The civil liberties, especially freedom of speech & expression is backbone in any democratic country and media especially journalism has the responsibility of being abreast with any incidences that transpires especially those involving the powerful persons. Hence, there is need to ensure that the RTBF is practiced in a way that does not lead to prejudice outweighing other more noble factors such as erasure of illegitimate records. Technological requirements add another layer of complexity given that many of them present difficulties

with data handling, data destruction, and data preservation. Inaccuracy of the information also means that in the age where data is created in huge quantities, the same cannot be said of the ability to control and erase information. In addition, because of the permanency of data retention, once a piece of information is posted on a website, it is unluckily almost impossible to eliminate fully. Analysing the opinions of people and real-life examples, social and cultural consequences of such rights are illustrated to express how much these rights enhance the worth of people and contribute to society. It is necessary to protect people from getting a wrong or an old piece of information based on prevailing societal standards, but, at the same time, it is crucial to preserve the historical archives.

The discursive contestation of the RTBF and RTBR is not simply a legal or technical matter but one of the logical extensions of an ongoing conversation about the worth and value of information. While the growth of the digital tracks raises the question of protection of personal data, with such breaches, it remains crucial to enhance people's privacy while not depriving them of access to vital information. This indicates that there is tension between these rights and therefore requires an ongoing discussion to ensure that they are relevant and able to meet the emerging securities technology trends. For example, considerations of the rights of personal data, to what extent they can be collected and controlled appear in modern digital technologies such as artificial intelligence and machine learning. It is important to understand that these technologies are not only indicators of increased privacy threats, but also, they can provide completely new ways for data handling.

The possibility and role of the protection and orderly storage of data in this context will be determined by the formulation and implementation of policies that will allow for privacy and anonymity while at the same time ensuring that the records are safeguarded for the future. This is especially so because societies become making the world a global village which calls for the need to harmonize laws and seek global cooperation where necessary.

Since these two registries are part of the information management process, they need to be harmonized with a legally sound approach that factors in the rightful, moral, and technical aspects. In case of both, RTBF & RTBR, the policymakers need to involve these different stakeholders from the technological industry, civil society, and citizenry. It is only through such an approach, which aims to construct an overarching theory through the cumulative synthesis of multiple partial theories, that we can hope to adequately address the multifaceted challenges that data protection faces in the contemporary digital environment.

3d Bioprinting and Genetic Privacy: A Comparative Legal and Bioethical Evaluation Based on Global and National Perspective

Arathi K.B* & Dr Vani Kesari**

"Genetics is about how information is stored and transmitted between generations"

John Maynard Smith

Introduction

The technological advancement and related privacy concerns are not a newly emerged issue. Since the invention of the printing press, issues relating to privacy have been a question. The complexity of the privacy concern is not a simple one. A person's right to privacy and the need to ensure the nation's security make it more complex. Sometimes a person's right to privacy has been sacrificed to protect national security. Many recent technological advancements that occurred in the healthcare sector have incorporated genetic information of an individual. The inclusion of one's genetic information has accelerated the matter. The protection of genetic privacy in the newly emerging technological innovations in the healthcare sector is more tangled than it seems.

* Research Scholar, Prof N.R. Madhava Menon Interdisciplinary Centre for Research Ethics and protocols, CUSAT,Kochi.

** Hon. Director & Professor, Prof N.R. Madhava Menon Interdisciplinary Centre for Research Ethics and protocols, CUSAT, Kochi.

3D bioprinting technology is one of the most recent remarkable technological advancements in the healthcare field. This technology is developed by using human biological material along with other substance and techniques.[1] 3D bioprinting technology is used to create 3D printed organs and tissues that are functional and helpful in several aspects, such as organ transplantation, drug testing, disease modeling, precision medicine, etc.[2] The scarcity of organs for transplantation has resulted in the deaths of several people who deserve to live a long time. The helplessness of the medical and scientific communities has been resolved through the emergence of 3D bioprinting technology. In order to provide organ sustainability, 3D bioprinting is a considerable solution. 3D bioprinting also acts as an important technology in regenerative medicine. The repair of damaged tissues can be done with the help of 3D bioprinting.

Despite the advantages provided by this technology, it raises several ethical and legal concerns. One among them is the issue relating to the protection of genetic privacy. The convergence of 3D bioprinting technology and genetic privacy is a complicated issue. The information obtained from the genetic material of a person is referred to as genetic information or data. It provides a future map of a person's health. Being the fundamental blueprint of the life of a living organism, genetic information is always considered more important than other personal information. The genetic information contained in the cells of a human that is used to create 3D bioprinted organs or tissues pose a concern over its misuse. An information relating to a person's health is always valuable. The physical and mental health of a person determine their quality of life and emotional well-being. At present, in India there is no legal or ethical mechanism adequate enough to govern 3D bioprinting technology and protect genetic information. The

1. Paulo Bartolo et al, *3D bioprinting: Materials, processes, and applications*, 71 Cirp Annals-Manufacturing Technology. 577 (2022)
2. Giovanna Ricci et al, *Three-Dimensional Bioprinting of Human Organs and Tissues: Bioethical and Medico-Legal Implications Examined through a Scoping Review*, 10 Bioengineering (BASEL). 1052 (2023).

inability of the lawmakers to safeguard genetic information will lead to a violation of genetic privacy. Apart from this, the regulatory mechanism for 3D bioprinting and genetic information varies according to different jurisdictions. Since the application of 3D bioprinting technology spreads across the globe, the issues arise from them can have a cross-border effect. Therefore, it is important to have an extensive approach both at the national and international level to govern 3D bioprinting technology and the problems resulting from it.

The legal and ethical challenges relating to genetic privacy results from 3D bioprinting in the modern era should not affect the advancements taken place in the healthcare sector. The fundamental right to privacy should not be compromised for such development. The stability between technological advancement and the protection of fundamental rights of a person can be secured through addressing ethical and legal complications and providing adequate solutions in the form of an ethical and legal regulatory framework. A comprehensive regulation will aid in the co-existence of technology and the protection of people.

1. 3d Bioprinting Technology

Three-dimensional bioprinting is a bio-fabrication technology that incorporates 3D printing technology and tissue engineering to create living and functional human tissues and organs in a layer-by-layer deposition process by using bioinks, living cells, and other materials in a confined place. The scarcity of organs for transplantation, regenerative medicinal applications, personalized medicine, and more efficient drug testing and development methods are the primary reasons behind the development of this technology.[3] It is a computer aided transfer process for the continuous layering of living cells and biomaterials.[4]

3. Theodore G. Papaioannou et al., *3D Bioprinting Methods and Techniques: Applications on Artificial Blood Vessel Fabrication*, 35 Acta Cardiologica Sinica (2019).
4. Ibrahim Tarik Ozbolat, 3d Bioprinting: Fundamentals, Principles And Applications (1st ed. 2016).

The birth of 3D printing occurred in 1984 with the invention of stereolithography (SLA), a 3D printing technology by Charles W. Hull.[5] In 1999, a team led by Dr. Anthony Atala of the Wake Forest Institute for Regenerative Medicine created the first artificial bladder with the help of bioprinting.[6] Later in 2002, he created a miniature 3D kidney.[7] Recently, in 2019, scientists from Israel created a fully functional 3D printed heart.[8] At present, studies are focusing on developing efficient and safe printing methods for biological tissues. It is expected that within 20 years, this rapidly evolving technology will lead to the creation of fully functioning human organs that are fit for organ transplantation.

If the 3D bioprinting technology achieve such degree of advancement several critical issues of both ethical and legal might arise. The most controversial dispute will be around its legal status, and intellectual property rights regarding the organs created out of this technology. Since the process of creating them involves the inclusion of human biological material, but the methods used for its creation is artificial one rather than a natural biological process, the legal standing of 3D bioprinted organ has become more problematic. This ambiguity extends to the matter of whether to treat it as a real human organ or biotechnological product or as a new entity that combine the two. The entire legal system will get affected if a new status is given. Other challenges that may arise include issue of licensing, illegal trade of bioprinted organs, transnational organ trafficking, privacy, data protection, commercialization, commodification, etc.

---

5. Zeming Gu et al., *Development of 3D Bioprinting: From Printing Methods to Biomedical Applications*, 15 Asian Journal of Pharmaceutical Sciences 529 (2020).
6. Jerin Jose Nesamony, *3D Bioprinting: A Promising Hope in Personalized Medicine*? Lezdotechmed https://www.lezdotechmed.com/blog/3d-bioprinting-a-promising-hope/.
7. Ashley N. Leberfinger et al., *Bioprinting Functional Tissues*, 95 Acta Biomaterialia 32 (2019).
8. Delphine Matthieussent, *Israeli scientists unveil world's first 3D-printed heart with human tissue*, The Times of Israel, April 15, (2019).

3D bioprinting is based on three fundamental principles which includes, biomimicry, or biomimetics, autonomous self-assembly, and mini tissue building blocks.[9] There are three steps involved in the process of bioprinting. In the pre-bioprinting stage, which is the first stage, a digital model is formulated for the printer to generate.[10] The preparation of bioinks also takes place at this stage. The bioprinting process takes place in the second stage, wherein the bioink is placed in the printer cartridge and layering or deposition occurs according to the digital model created in the first stage.[11] The post-bioprinting stage is where mechanical and chemical stimulation occurs in the printed tissue or organ to develop it into a more stable and functional structures.[12] The use of all these intricate techniques throughout the creation of this technology marked it as exceptional. Like its uniqueness, the legal issues they have created are equally distinctive. In the context of intellectual property rights, the issue of ownership is a pressing concern. There is an immediate need to resolve the question relating to ownership and patentability of tissues and organs created through this technology. The major parties involved in the conflict of ownership will be between the person who develops the 3D bioprinted organ, the person whose biological material has been used, and the person for whom such organ has been made.

2. Uses and Application of 3d Bio printed Human organs and Tissues

The primary reason for the development of 3D bioprinting is the shortage of organs for transplantation. At present, there is a huge crisis in organs, but there is no simultaneous decrease in the demand for organs. It leads to a situation where we are not able to save the person, which is a preventable one. 3D bioprinting technology is emerging as a promising

9. Papaioannou, *supra* note 1.
10. Kumari Priya and Dr PM Chavhan, 3*D Bioprinting Methods and Techniques – A Information*, 1 Int J Med Healthcare Rep 1, (2021).
11. Delphine, *supra* note 8.
12. Radia Jamee et al., *The Promising Rise of Bioprinting in Revolutionalizing Medical Science: Advances and Possibilities*, 18 Regenerative Therapy 133 (2021).

solution to eradicate this problem. This technology used patient's specific cells to create organs needed for them. The bioinks that contain a person's own living cell make it a more favorable environment for the transplanted 3D bioprinted organ to function in his or her body, without facing the risk of rejection.[13] The replication of the exact structure and functional features of a person's organ needs more advancement in existing technology. At present, researchers are only successful in developing tissue structures but not a fully functional organ. Even though many scientists have developed miniature organs with this technology, none of them are ready for advanced organ transplantation. This is one of the important healthcare applications provided by the 3D bioprinting technology.

When the organ developed through this technology becomes adequate for transplantation, the application of the existing laws and ethical framework may not be appropriate to regulate such transplantation and related issues. At present, in India, the removal, storage, and transplantation of human organs and tissues for therapeutic purposes is governed by the Transplantation of Human Organs and Tissues Act of 1994. It also prohibits commercialization of human organs and tissues, and other incidental matters.[14] This legislation is meant to regulate human organs and not artificially created organs. It does not contain any provisions relating to bioengineered organs or similar technology. In the absence of a proper legislation, the transplantation process and other issues pertaining to the transplantation of 3D bioprinted organ will become difficult. The determination of appropriate authority, procedure, liability, punishment, etc. concerning 3D bioprinted organ is significant. In the absence of such provision, the utilization of 3D bioprinted organs and tissues in drug development raises concern over its legality and might hinder the research process.

Drug testing and drug development are another driving reason for the development of 3D bioprinting. The inclusion of a person's own cells makes

13. Gia Saini et al., *Applications of 3D Bioprinting in Tissue Engineering and Regenerative Medicine*, 10 JCM 4966 (2021).
14. The Transplantation of Human Organs and Tissues Act, 1994, No. 42, Acts of Parliament, 1994 (India).

it a good disease model to study a particular disease and to develop more personalized medicine according to the genetic characteristics of that person. The replication of actual organs aids in testing new drugs and collecting more accurate data about the effect of particular drug on that person's organ. It aids in the development of more tailored treatment methods and effective personalized medicine.[15] Since the 3D bioprinting technology mimics the actual organ, it helps in the toxicity testing of drugs with them.[16] Toxicity testing is important to ensure the safety and efficacy of the newly developed drugs. Therefore, the application of 3D bioprinting in research and development with regard to drug discovery, personalized medicine, and disease models provides numerous advantages to society. Currently, drug and toxicity testing, which are essential in drug development, are governed mainly by the Drugs and Cosmetics Act of 1940, the Drugs and Cosmetics Rules of 1945, and other regulations such as the New Clinical Trial Rules of 2019, ICMR Guidelines for Good Clinical Laboratory Practices (GCLP) of 2021, etc. There is no provision in any of this legislation stating that a 3D bioprinted tissue or organ can be used as a drug or toxicity testing model. The New Drugs and Clinical Trials (Amendment) Rules, 2023, have provided five non-clinical testing methods, but 3D bioprinted organs were not included in it.[17]

Another compelling application of 3D bioprinted organs and tissues is in the educational and training sectors. The bioprinted three-dimensional organ structure?s serve as a good model for studying human physiology without taking actual organs from a human body and also for practicing and planning surgical procedures in these structures. It helps to reduce the risks associated with doing complex surgical procedures and allows medical

15. Ethan Hau Yin Lam et al., *3D Bioprinting for Next-Generation Personalized Medicine*, 24 IJMS 6357 (2023).
16. Diána Szűcs et al., *Toward Better Drug Development: Three-Dimensional Bioprinting in Toxicological Research*, 9 IJB 663 (2023).
17. Ministry of Health and Family Welfare, The New Drugs and Clinical Trials (Amendment) Rules, 2023, G.S.R. 175(E). Reg No. D. L.-33004/99 (Mar. 9, 2023)

practitioners to gain more experience and familiar with the process. Thereby, it improves their skills through more realistic training. The incorporation of the 3D bioprinted organs and tissues of humans improves the learning process of students in a more advanced manner.

3D bioprinted human organs and tissues have a significant use in space exploration and research.[18] Taking into consideration the long-duration space missions, the emergency need for organ transplantation or tissue due to any injury or health conditions that occurred during the space travel can be effectively managed by this technology. The manufacturing of not only the organs and tissues but also medicines help them in crises or urgent situations. Major experiments and studies related to microgravity in space have been started since the mid-20th century.[19] 3D bioprinted organs and tissue serves as a good model to study the effects of microgravity on human physiology and related health conditions.[20] The technology to generate a fully functioning organ from a person's own cell and the availability of such technology, along with their space exploration, serve many purposes in their research regarding microgravity and other related research on space.

Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies (Outer Space Treaty) of 1967 is one among the main regulation governing the activities relating to outer space. According to the treaty outer space can be used by all nations for peaceful purposes, exploration and scientific investigation, without any discrimination.[21] It further states that

18. Space Station Research Integration Office, 3D Bioprinting, NASA (Dec 20, 2023) https://www.nasa.gov/missions/station/issresearch/3dbioprinting/#:~:text=Bioprinting%20in%20microgravity%20also%20could,crew%20members%20throughout%20a%20mission. (last visited Apr 18, 2024)
19. Japan Aerospace Exploration Agency, Microgravity Science, JAXA https://iss.jaxa.jp/en/kiboexp/seu/categories/microgravity/index.html. (last visited Apr 18, 2024)
20. Angelique Van Ombergen et al., *3D Bioprinting in Microgravity: Opportunities, Challenges, and Possible Applications in Space*, 12 Adv Healthcare Materials 2300443 (2023).
21. Treaty on Principles Governing the Activities of States in the Exploration and Use of

all the activities relating to the use and exploration of the outer space should be in accordance with international law.[22] It also states that, a state shall be internationally responsible for their national space activities, whether conducted by government or non-government entities.[23] Space agencies such as Indian Space Research Organization (ISRO), National Aeronautics and Space Administration (NASA), European Space Agency (ESA), etc. and their Guidelines plays an important role in regulating space related activities. Despite the utilization of 3D bioprinting technology in various space exploration and research, these agencies have failed to properly acknowledge this technology by not providing guidelines to regulate its utilization. The absence of proper regulatory framework has resulted in a legal vacuum regarding its application and, ethical and legal oversight.

3. Privacy

The concept of privacy is the most frequently addressed topic due to its complexity and undetermined scope. Privacy, as a multifaceted concept, changes according to persons, contexts, and perspectives. The ability to have control over one's own personal information and affairs without any unwanted invasion through observation or disturbance is the basic explanation that can be provided for the term privacy.[24] Despite the difficulty of deciding a proper definition for the term privacy, the concept has been

Outer Space, including the Moon and Other Celestial Bodies, art I, Jan 27, 1967, 610 U.N.T.S. 205.

22. Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, art III, Jan 27, 1967, 610 U.N.T.S. 205.
23. Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, art VI, Jan 27, 1967, 610 U.N.T.S. 205.
24. Hamilton Bean, *Privacy and Secrecy*, *in* The International Encyclopedia of Organizational Communication 1 (Craig R. Scott et al. eds., 1 ed. 2017), https://onlinelibrary.wiley.com/doi/10.1002/9781118955567.wbieoc170 (last visited Apr 18, 2024).

narrow down to four different aspects, which includes information privacy, bodily privacy, privacy of communications, and territorial privacy.[25] The paramount reason for providing significant importance to the concept of privacy is because of its integral connection or linkage to human dignity, freedom, and independence of a person.[26] The rapidly advancing technology and the changing outlook of people towards their personal information is creating more challenges to a person's privacy.

4. Genetic Information

The genetic information or data of a person is considered valuable information about that person that he or she considers very personal, private and sensitive.[27] The reason to give genetic information more weight in the current technologically advanced and digital era is because it is considered as a blueprint of life. The genetic information of a person is his or her heritable biological information coded in the nucleotide sequences of deoxyribonucleic acid (DNA) or ribonucleic acid (RNA), which is present in the nucleus of a cell.[28] DNA is a molecule that contains genetic information. It is responsible to pass it on to the next generation and provide instructions for the growth and development of living organisms. DNA molecules enable the genetic information contained in them to pass on through the next generation. Therefore, the genetic information of all living organisms is contained in the genetic material called DNA.

25. Rachel L. Finn, David Wright & Michael Friedewald, *Seven Types of Privacy*, *in* European Data Protection: Coming of Age 3 (Serge Gutwirth et al. eds., 2013), https://link.springer.com/10.1007/978-94-007-5170-5_1 (last visited Apr 18, 2024).
26. Adrienn Lukács, *What is Privacy? The History and Definition of Privacy* https://www.academia.edu/31980162/What_is_Privacy_The_History_and_Definition_of_Privacy. (last visited Apr.18,2024)
27. R.G. Thomas, *Genetics and Insurance*, *in* Encyclopedia of Applied Ethics 470 (2012), https://linkinghub.elsevier.com/retrieve/pii/B9780123739322000387 (last visited Apr.19, 2024).
28. Steve Minchin & Julia Lodge, *Understanding Biochemistry: Structure and Function of Nucleic Acids*, 63 Essays in Biochemistry 433 (2019).

DNA is composed of nucleotides, which are organic molecules that contain a nitrogenous base, pentose sugar, and one or more phosphate groups. There are four different nitrogenous bases in DNA: adenine (A), thymine (T), cytosine (C) and guanine (G) and they are known as complimentary base pairs. The unique pairing of these bases forms the sequence of DNA.[29] The sugar-phosphate backbone of DNA provides proper structure and stability to the double strand (double helix) structure of DNA and to the single strand structure of RNA enabling the storage and transmission of genetic information or data.[30] The double helix appearance of DNA is due to the specific pairing of nucleotide bases between the two strands.[31] The nitrogenous base from one strand will pair up with the complementary bases on the other strand, and the sequences of these bases along the strands of the DNA form the genetic code, that carries the genetic information.[32] This information provides instructions for the development, growth, and functioning of organisms. These instructions are stored in a unique order in the bases, and each sequence represents different traits and functions. They are subsequently expressed through several cellular processes.

The genetic information about an individual obtained through analyzing the genetic material includes not only his own personal data but also information about his family.[33] The genetic material of a person can reveal information regarding his health, such as health risks or the possibility of

29. 1 Molecular Biology Of The Cell (Bruce Alberts eds, 4th ed 2002)
30. Leslie A Pray, *Discovery of DNA Structure and Function: Watson and Crick*, Nature Education (2008),https://www.fcav.unesp.br/Home/departamentos/tecnologia/marcostuliooliveira/discovery-of-dna-double-helix_-watson-and-crick-_-learn-science-at-scitable.pdf. (last visited Apr. 18,2024)
31. *Id*.
32. *The Order of Nucleotides in a Gene Is Revealed by DNA sequencing*, Nature Education https://www.nature.com/scitable/topicpage/the-order-of-nucleotides-in-a-gene-6525806/.(last visited Apr. 18,2024)
33. Taner Kuru & Iñigo De Miguel Beriain, *Your Genetic Data Is My Genetic Data: Unveiling Another Enforcement Issue of the GDPR*, 47 Computer Law & Security Review 105752 (2022).

developing any serious disease in the future.[34] Inherited disorders and carrier status can be identified by examining the genetic materials. The studies conducted on genetic material enable us to have an understanding of a person's traits and help us know more about genetic markers. It provides insights into information regarding an individual's ancestors, their origin, genetic markers, traits, health risks, migration patterns, etc.

5. Difference Between Genetic Information and Medical Information

In the realm of healthcare, genetic information and medical information regarding a person are crucial to his health and seem to be equally important, but they are distant from each other, and more importance is given to the genetic information of an individual over his medical data. Even though they are significant in understanding the health of a person, they differ in their nature, scope, purpose, and application. In its nature, genetic information or data about a person reveals abouts his and his ancestor's data and their tendency to develop certain diseases or conditions in the future. These information's are stable and do not change over time. Medical information about an individual mainly focuses on his or her past and present health issues, and they are not stable.[35] They mainly contain details about the diagnostic and treatment information of that particular person. Medical information's and the health risk of a person undergo changes due to several reasons, including medical interventions, lifestyles, etc.[36] The scope of genetic information ranges from an individual to his ancestors. It aids in

34. Institute of Medicine (US) Committee on Assessing Interactions Among Social, Behavioral, and Genetic Factors in Health; Hernandez LM, Blazer DG, editors. Genes, Behavior, and the Social Environment: Moving Beyond the Nature/Nurture Debate. Washington (DC): National Academies Press (US); 2006. 3, Genetics and Health. https://www.ncbi.nlm.nih.gov/books/NBK19932/.
35. Samiran Nundy et al, *Medical Records* in Samiran Nundy et al, How To Practice Academic Medicine And Publish From Developing Countries? (Springer Nature Singapore 2022) https://link.springer.com/10.1007/978-981-16-5248-6_45.
36. M. J. Yogesh & J. Karthikeyan, *Health Informatics: Engaging Modern Healthcare Units: A Brief Overview*, 10 Front. Public Health 854688 (2022).

studying many factors about different generations.[37] On the other hand, medical data helps to understand the current situation of the health of that particular individual, how it is affected, and how it can be solved. Genetic information's is used in research regarding traits, tendencies to health risks, ancestor tracing, etc.,[38] whereas medical information has its application in making sound decisions on the treatment that is needed for the individual in the present situation and focuses on patient care.

A clear distinction between these two kinds of information has not been established in any case. However, the significance of a person's genetic information, the need to maintain it apart from a normal medical record, and the practice of conducting genetic tests and using such information to discriminate against someone at their workplace are considered a violation of their privacy and right against discrimination.[39] Recently, the Supreme Court of India has restricted DNA paternity tests in a divorce case and prioritized the privacy rights of children's, especially the right to protect their genetic information.[40]

6. Genetic Privacy

Information regarding a person falls under the category of personal or private information. When such informational about him is not generally known to anyone and is not easily accessible. Personal information about a person will always be sensitive one.[41] Some information may not necessarily be sensitive in one situation, but when combined with other data's, it will become sensitive depending on the context in which it is used. There is certain information that a person is expected to retain or preserve

37. *Supra* note 23.
38. *Id*.
39. Norman-Bloodsaw v. Lawrence Berkeley Laboratory, 135 F.3d 1260 (1998)
40. Aparna Ajinkya Firodia v. Ajinkya Arun Firodia, (2024) 7 SCC 773 (2024)
41. Rahime Belen-Saglam, Jason R. C. Nurse & Duncan Hodges, *An Investigation Into the Sensitivity of Personal Information and Implications for Disclosure: A UK Perspective*, 4 Front. Comput. Sci. 908245 (2022).

under a cloak from the world, and such very private information comes under the purview of his privacy. Information such as personal identifiers, location data, biometric data, health and medical records, legal records, private conversations, etc. can be considered a person's private information, and these data cannot be accessed without his consent. If any of such information that a person believes to be his is accessed or used without his consent, it amounts to a violation of his right to privacy.

The health and medical records of a person consist of his or her information regarding diseases, conditions, diagnosis, treatments, and other health information that is very private and linked to his or her privacy.[42] Genetic information is considered more important than anyone's medical information or any other personal information. The idea of "genetic exceptionalism," which stresses on the belief that genetic information is unique and different from all other personal information, draws a connection to concerns about privacy, autonomy, confidentiality, discrimination, and stigmatization.[43]

The protection from unauthorized access, collection, use, storage, assignment, and disposal provided to a person's genetic information derived from genetic sequence through scientific analysis is referred to as "Genetic Privacy".[44] The dimensions of genetic privacy are changing according to the developments in genetic research, technological advancements, and societal changes. One of the primary aspects of genetic privacy is always linked with information, which is referred to as informational genetic privacy.[45] In this dimension, different aspects such as confidentiality,

42. Amit Bali et al., *Management of Medical Records: Facts and Figures for Surgeons*, 10 J. Maxillofac. Oral Surg. 199 (2011).
43. Lainie Friedman Ross, *Genetic Exceptionalism vs. Paradigm Shift: Lessons from HIV*, 29 J. Law. Med. Ethics 141 (2001).
44. Lawrence O. Gostin and James G. Hodge Jr, *Genetic Privacy and the Law: An End to Genetics Exceptionalism* https://www.jstor.org/stable/pdf/29762629.pdf. (last visited Apr.27,2024)
45. Handbook of Research on Patient Safety and Quality Care through Health Informatics: (Vaughan Michell et al. eds. 2014), http://services.igi-global.com/resolvedoi/resolve.aspx?doi=10.4018/978-1-4666-4546-2 (last visited Apr. 27, 2024).

anonymity, fair information practices, etc. are mainly focused. It deals with the right of an individual to have control over his genetic information in terms of its collection, usage, storage, disposal, sharing, etc. The implication is to safeguard unauthorized access to genetic information. The physical genetic privacy is another dimension that centered on the security and confidentiality of genetic information.[46] The genetic information obtained by using different methods such as genetic testing, DNA sequencing, genomic analysis, DNA microarrays, etc. comes under this sphere of protection. The protection of physical genetic privacy is significant to justify a person's autonomy in an era where research is increasing. It aids in improving a person's trust in genetic research and other research practices. The process of obtaining informed consent from a person is more addressed in this area. The freedom to make decisions without any interference is the principle of decisional privacy.[47] In the context of genetic information, decisional genetic privacy deals with a person's right to decide whether to provide genetic information to participate in a process where genetic information will be disclosed to a third person. This aspect of genetic privacy is the result of concerns over potential misuse, stigmatization, and discrimination that could happen if the genetic information is exposed without consent.[48] One of the major disputed aspects of genetic privacy is proprietary genetic privacy. As the name suggests, it deals with the property, ownership, and commercial aspects of genetic information. There are several ethical and legal concerns over the property aspect of genetic material. The major concern with proprietary genetic privacy is the confidentiality and security of the genetic information.

46. *Id*.
47. Lena V. Bjørlo, *Freedom from interferference: Decisional privacy as a dimension of consumer privacy online,* 14 Ams. Rev. 12 (2024); Roger J.R Levesque ,*Decisional Privacy*, Oxford Academic (2016),https://academic.oup.com/book/4341/chapter-abstract/146271505?redirectedFrom=fulltext&login=false.(last visited Apr. 27, 2024).
48. Annet Wauters & Ine Van Hoyweghen, *Global Trends on Fears and Concerns of Genetic Discrimination: A Systematic Literature Review*, 61 J Hum Genet 275 (2016).

7. Legal and Bioethical Concerns

Technological advancement to improve the quality of life is an essential element of a better society. The technological advancement should be encouraging, but its growth should always be monitored to check its impact on other factors of society. An evaluation of ethical and legal concerns enables us to analyze where the regulatory framework is now lacking and where more effort is needed to keep up with rapidly growing technologies and the protection of our basic rights.

7.1 Informed Consent

Informed consent, being one of the rudimentary principles of ethics, is one of the primary concerns in 3D bioprinting when it comes to genetic privacy. The process of giving people who are either research participants or patients an understanding of the ongoing and future potential risks and benefits when they enter into research, medical procedure, treatment, clinical trial, or genetic testing is the main intention behind informed consent.[49] The inclusion of human cells that contain human genetic material in 3D bioprinting raises ethical and legal concerns about genetic privacy in 3D bioprinting.[50] The prominent feature that makes 3D bioprinting different from other newly emerging technologies in the healthcare sector is its application. The main reason behind the emergence of this technology is the shortage of organs for transplantation.[51] The success rate of the transplantation process mainly depends on how well the new organ accepts into the person's body.[52] The selection of cells, biomaterials, and immunosuppression of the newly created organ through bioprinting are

49. National Cancer Institute, *Informed Consent* https://www.cancer.gov/publications/dictionaries/cancer-terms/def/informed-consent.(last visited Apr.27,2024)
50. Siti Suraya Abd Razak, Khalida Fakhruddin & Saiful Izwan Abd Razak, *Incorporating Informed Consent in 3d Bioprinting Medical Treatment*, 12 IJARBSS 751 (2022).
51. Guobin Huang et al., *Applications, Advancements, and Challenges of 3D Bioprinting in Organ Transplantation*, 12 Biomater. Sci. 1425 (2024).
52. Rafael Beyar, *Challenges in Organ Transplantation*, 2 RMMJ (2011), https://www.rmmj.org.il/issues/4/Articles/106 (last visited Apr 27, 2024).

essential for ensuring its acceptability. The genetic material and the information provided by them; their characteristic features are crucial elements in this process.

The raising concern regarding informed consent in 3D bioprinting in respect of genetic privacy is the challenge to form a valid informed consent process and how a proper understanding regarding it can be brought to the concerned person. The explanation of the purpose of the technology, risks and benefits, privacy, confidentiality, data sharing, and withdrawal rights are the common elements contained in an informed consent process. There is a need to have a proper process to inform the research subject or patient concerning the inclusion of genetic material, its importance, and the transfer of genetic information and its risks and benefits. The aim of this process should be to provide the person with an overview of the importance of genetic material and the information shared through it so that he can make a sound decision. The incorporation of all these components and the practicality of achieving them is another challenge the researchers, clinicians, and other related stakeholders are going to face. Taking into consideration that complexity of understanding 3D bioprinting and the genetic privacy of a common man is crucial, and the person who is assigned to do these procedures should have imminent knowledge in these areas. The variation that occurs on the concept of informed consent over different jurisdictions also poses challenges in its implication.

In order to solve the existing limitations in the informed consent process, a new concept of consent of governance will be more beneficial.[53] The emergence of this new concept is better at safeguarding the dignity of the person who provides their biological material for study and other purposes. This new concept exhibits a drastic shift from the traditional informed consent process. Conventional informed consent centers on providing information about the purpose for which such biological material

53. Sarah N. Boers, Johannes J. M. Van Delden & Annelien L. Bredenoord, *Broad Consent Is Consent for Governance*, 15 Am.J.Bioeth. 53 (2015).

is collected, the ongoing and future uses, potential risks, and benefits. Apart from just providing information and awareness, the new concept of consent for governance provides a constant governance mechanism over their collected human biological material. The governance mechanism ranges from transparency over the usage of their biological material and data to identification of potential commercial use, clinical benefits for the donor, privacy, benefit sharing, participant engagement, and ethical oversight.[54] It also involves frequent update about its utilization, research findings and event feedback from the participants were collected. This approach goes beyond the conventional concept of a one-time consent procedure to a mechanism that ensures continuous and active participation of an individual in the decision-making process. It gives the research participants and patients from whom their biological material is collected greater control over their biological material and data. It will help them to make more sound decisions.

The implementation of such an extended informed consent policy requires a proper legal framework, ethical guidelines, and technological infrastructure. The continuous monitoring of their biological materials through the governance procedure needs to be guided by an adequate regulatory mechanism. The importance of having a proper regulatory framework is to maintain the trust of people in the research process, protect the rights of research participants, patients, maintain the integrity of the study, and uphold the ethical standards and legal compliance. When technologies are rapidly changing, the society, to ensure the autonomy of the participant in research, the informed consent process should also undergo significant changes.

7.2 Data Security and Breaches

Data security is the process, practices, and measures that are taken to maintain and protect data from unauthorized access, corruption, exploitation,

54. Michael A. Lensink et al., *Understanding (in) Consent for Governance*, 19 Am. J. Bioeth. 43 (2019).

and theft.[55] These incidents lead to data breaches. In 3D bioprinting, genetic information plays a huge role. Genetic information itself is considered sensitive and confidential, and along with that, the information that is obtained from the organ developed through 3D bioprinting during drug tests and other diagnostic processes also becomes sensitive and confidential. The persons who are conducting the research, manufacturers or companies that develop 3D bioprinted organs, research institutions, clinicians, hospitals, regulatory bodies, and other stakeholders are responsible for protecting the genetic data and other related information. The importance of data security with regard to the genetic information of a person is because that information includes data relating to him and his other family members.

There are several kinds of research, testing, and medical diagnosis that take place, and this results in the collection and storage of data. In the digital era, since they are stored in digital form, the chances of them falling into the wrong hands are high.[56] The possible misuse and exploitation of such information will affect the privacy of a person, thereby leading to many social, ethical, and legal issues. Unauthorized access to genetic information about a person is a threat not only to that particular person but to society as a whole. At a personal level, the information taken wrongfully can be used to develop organs without consent and can be commercialized.[57] The organ so developed will be according to that particular person's genetic features, so it is not necessary that it will be suitable for another person. If such practices take place, it's going to affect public health. It may also lead to the development of an organ that is not suited for the person for whom it is created. Identity theft and fraud are other criminal activities associated with unauthorized access to genetic information and creating 3D bioprinted organs.

55. *What is Data Security*, FORTINET https://www.fortinet.com/resources/cyberglossary/data-security. (last visited Apr.24,2024)
56. Sara Quach et al., *Digital Technologies: Tensions in Privacy and Data*, 50 J. OF THE ACAD. MARK. SCI. 1299 (2022).
57. Mary Simmerling et al., *The Commercialization of Human Organs for Transplantation: The Current Status of the Ethical Debate*, 11 CURRENT OPINION IN ORGAN TRANSPLANTATION 130 (2006).

The legal and ethical complexity of data security and breaches needs special attention in this digital era.[58] The lack of a proper legal framework or the inadequacy of the existing legal framework is worsening the situation. In the absence of a proper legal regulatory instrument, people will lose trust in such technology related studies. Another issue is related to accountability. Who is responsible, or who will be? What is the liability? related question arises. In order to have clarity on such issues, a proper legal regulatory framework is essential. When it comes to the ethical perspective of the security and beaches of the genetic information in 3D bioprinting, the principles of beneficence and non-maleficence are taken into consideration. The genetic material provided by a person or obtained from him through informed consent deserves respect. The people associated with 3D bioprinting technology should take measures to respect the autonomy of that person and not cause harm to anyone.[59] People who have consented to such technology are expecting to provide something good to society, so such data needs to be protected and used for good purposes.

When a data breach occurs, the question should not only be pointed to the legal regulatory framework. The availability and accessibility of proper technology to ensure such protection is also an important factor. Encryption methods, access controls, data loss prevention technology, endpoint security, and other relevant technologies that are beneficial for protecting data. When technological advancement causes problems, complementary technologies to solve such problems need to be developed. Since rapid changes occur in technology, regular updates and monitoring of such technology are also necessary to maintain its efficiency.

58. Godwin Olaoye & Daniel Adedokun, *Digital Privacy and Security in the Age of Information and Communication Technology* (2023), https://rgdoi.net/10.13140/RG.2.2.15449.70240 (last visited Apr 27, 2024).
59. Frederic Gilbert et al., *Print Me an Organ? Ethical and Regulatory Issues Emerging from 3D Bioprinting in Medicine*, 24 Sci. Eng. Ethics 73 (2018).

7.3 Ownership and Control over Genetic Data

Property rights establish legal ownership over a property or resource.[60] Ownership rights indicate a person or an entity's right to possess, use, control, and dispose of property and resources. It refers to the legal relationship between a person and property that amounts to the highest level of control and right over that property. The 3D bioprinting technology itself has legal complexity over its ownership rights. The ownership right over genetic information always belongs to the person to whom it is relate to.[61] But the real issue arises when such genetic information is given for research or diagnostic purposes and a violation of privacy occurs. In the context of 3D bioprinting, the presence of genetic material in cells that are used in bioinks raises the question of ownership. Since the genetic material that contain genetic information are used in 3D bioprinting, the question is: who owns the genetic information contained in the 3D bioprinted organs or tissues? Who owns and controls a 3D bioprinted organ or tissue created with one's genetic material? Who owns the data derived from such genetic material during the study conducted on 3D bioprinted organs or tissues? How does such ownership affect one's genetic privacy? Is there any law to govern these concerns? What measures can be taken to protect a person's genetic privacy when ownership disputes over bioprinted organs or tissues exist? What is the ethical implication of owning genetic data in a 3D bioprinted organ?

The source of genetic material is an important factor. Nobody can own another person's genetic information unless he has consented to it.[62] When someone owns another person's genetic information in a legal manner, that

60. Salvin Paul, *Property Rights*, *in* The Palgrave Encyclopedia of Global Security Studies 1 (Scott Romaniuk, Manish Thapa, & Péter Marton eds., 2020), http://link.springer.com/10.1007/978-3-319-74336-3_355-1 (last visited Apr 27, 2024).
61. Morten Ebbe Juul Nielsen, Nana Cecilie Halmsted Kongsholm & Jens Schovsbo, *Property and Human Genetic Information*, 10 J Community Genet 95 (2019).
62. Sandi Dheensa et al., *Is This Knowledge Mine and Nobody Else's? I Don't Feel That. Patient Views about Consent, Confidentiality and Information-Sharing in Genetic Medicine,* 42 J. Med. Ethics 174 (2016).

person will get legal protection, irrespective of whose information it is. When an organ is bioprinted for one's own use, the complexity of ownership and privacy won't arise. The problem is when it is developed for some other person or in a research context.[63] Since ownership determines control over the property, when an organ is bioprinted for one's own use, ownership belongs to that person alone. When such an organ is created for someone else, in the case of transplantation, ownership needs to be transferred to the person for whom it was created, but genetic privacy protection of the person should be ensured in any situation, and in the case of research, it should belong to the actual person from whom it was collected. The latter situation can be provided with an exception if there is an agreement between the parties contrary to the situation, but in that situation, the genetic privacy of the person should not be violated.

When it comes to the data derived from the genetic material during studies, intellectual property concerns will arise.[64] The complexity of this situation could be solved through a proper informed consent process or a valid agreement. Even though, through an agreement, the researcher gets ownership, he should safeguard the genetic privacy of the actual owner of that information. It will show the integrity of the research and respect for the person. There may arise a classification between an actual owner and a legal owner. A proper definition of the two terms needs to be provided through legislation while making laws in this regard. The existing legal framework doesn't have any laws or provisions relating to 3D bioprinting technology, so the issue of genetic privacy is also blurred.

From an ethical standpoint, whoever owns the genetic material, irrespective of a valid agreement, should respect the genetic privacy of that

63. Viktor Shestak and Alyona Tsyplakova, *Legal Issues Regarding Protection of Genetic Information* (2020) SSRN Electronic Journal https://www.ssrn.com/abstract=3722419. (last visited Apr.24,2024)
64. Jonathan D Kahn, *What's the Use? Law and Authority in Patenting Human Genetic Material* (2003]) SSRN Electronic Journal http://www.ssrn.com/abstract=409220. (last visited Apr.24,2024)

person and handle the information carefully without exploiting it.[65] Importance should be given to ethical principles when dealing with genetic information. A proper ethical guideline for handling genetic material in research in the context of newly emerging technology needs to be created and should address the tissue of genetic privacy.

7.4 Intellectual Property Rights and Commercialization

The question relating to intellectual property rights in connection with 3D bioprinting technology and genetic privacy always revolves around the person whose genetic material is used, the researcher, the research institution, and other stakeholders who invested in it. Intellectual property rights are the protection and privileges provided to the inventor or creator of his or her invention or creation for a specific period of time. It is protection provided to the creation of mind.[66]

Patents in this regard deserve exceptional importance.[67] Patents are exclusive rights that are granted for an invention that possesses the conditions such as novelty, non-obviousness, and capability for industrial application. There is a legal precedent that human genes sequences are patentable as long as they are isolated or produced by using a technical procedure.[68] The primary purposes of 3D bioprinting are to create organs and tissues for transplantation, drug discovery and development, personalized medicines, and disease modeling. In all these activities, the

65. Kelly-Ann Allen et al*, The Ethical Protection of Genetic Information: Procedure Analysis for Psychologists*, 26 Clinical Psychologist 1, (2022).
66. Firoj A Tamboli et al., *Intellectual Property Rights (IPR*): *An Overview*, 10 Int. J. Pharm. Chem. 156, (2023).”plainCitation”:”Firoj A Tamboli and others, ‘Intellectual Property Rights (IPR
67. B Subba Rao and G Krishna Tulasi, *A Detailed Study of Patent System for Protection of Inventions*, 70 Indian J Pharm Sci. 547, (2008).
68. Association for Molecular Pathology v. Myriad Genetics, Inc., 569 U.S. 576 (2013); Esra Demir and Evert Stamhuis, P*atenting Human Biological Materials and Data: Balancing the Reward of Innovation with the Ordre Public and Morality Exception,* 18 J Intellet Prop Law.546 (2023).

isolated genetic material can't be used because it won't serve the purpose for which it was created. Therefore, the patenting of 3D bioprinting raises legal complexities.[69] If a parent is granted such technology, a provision for protecting the genetic privacy of the concerned person should be ensured. The protection of sensitive information about a person's family members is a huge responsibility. A proper legal clarification with the help of proper enactment of legislation is needed to eliminate problems relating to the exposure of genetic privacy or misuse of genetic information in the context of patents. The involvement of multiple stakeholders and research conducted with multiple research institutions from different disciplines pose a greater challenge to this issue.

7.5 Stigmatization and Discriminations

Stigmatization is an attitude or belief that is negative in nature held by society towards an individual for de-valuing or discrediting them, among others.[70] Discrimination is the negative treatment of an individual or society by another person who belongs to a particular group as a result of stigmatization.[71] The concept of stigmatization and discrimination poses ethical and legal concerns regarding genetic privacy. In the context of 3D bioprinting, these kinds of treatments occur when the people responsible for protecting genetic information fail to perform their duty properly, resulting in a violation of the genetic privacy of an individual. It arises due to a breach in the privacy and confidentiality that should be given to the genetic information of an individual. When a person's genetic information become publicly available due to a breach in its protection and if it resulted in any kind of discrimination or stigmatization, then it should be considered

69. Nabeel M Althabhawi and Zinatul Ashiqin Zainol, *The Patent Eligibility of 3D Bioprinting: Towards a New Version of Living Inventions' Patentability,* 12 Biomolecules. 124, (2022).
70. Brian K Ahmedani*, Mental Health Stigma: Society, Individuals, and the Professio*n, 8 J Soc Work Values Ethics. 41, (2011).
71. Kasper Lippert-Rasmussen, Born Free and Equal? A Philosophical Inquiry into the Nature of Discrimination (1st ed 2013).

a violation of not only a person's right to privacy under Article 21[72] but also his right against discrimination under Article 14[73] enshrined in the Indian Constitution. Stigmatization and discrimination are social evils that need to be eradicated.

7.6 Cross-Border Legal Issues

The rapid advancement taking place in 3D bioprinting technology and the involvement of researchers from various disciplines across the globe reveal the wide range in which this technology is used for research. The interplay of national laws of different jurisdictions creates complexity in developing a unified regulatory mechanism and an ethical and legal framework for 3D bioprinting. The data contained in the human biological material used in the creation of organs will be transferred along with the completed 3D-printed organs. These organs can be transferred across the globe, and then conflict in the different jurisdictions may arise. Intellectual property protection and contractual obligations around 3D bioprinting arise from the protection of a person's data and its privacy in other nations. In order to ensure data protection and privacy, jurisdictional complexity needs to be addressed at the international level.

The regulatory agencies, such as the Food and Drug Administration (FDA) of the USA, the Therapeutic Goods Administration (TGA) of Australia, and the European Medical Agency (EMA) of Europe, including India's Central Drugs Standard Control Organization (CDSCO), are responsible for overseeing matters such as clinical trials, drug development, medical devices, and biomedical research. They failed to provide a proper definition and classification for this technology. Debates were on whether to consider this as a medical product, advanced cell therapy, tissue engineered product, or into a new category.[74] It is evident from several

72. India Const. art. 21.
73. India Const. art. 14.
74. Tajanka Mladenovska et al., *The Regulatory Challenge of 3D Bioprinting*, 18 Regen. Med. 659 (2023).

jurisdictions, such as the USA, Australia, and Europe, that they have made certain kinds of exceptions to custom-made or patient-matched devices that might include 3D bioprinted products but are still not clear.[75] If the definition and classification of the same product vary according to each jurisdiction, the regulation of such a product will result in uncertainty. It will end up affecting the implementation of several laws, including the data protection laws.

8. International Regulatory Frameworks

An analysis of the international regulatory framework is essential since genetic privacy concerns are a huge problem that affects everyone in the world. The cross-border application and usage of 3D bioprinting technology in the creation of organs and tissues need adequate attention at the international level to reach out to a unified solution to the problem.

8.1 The Universal Declaration of Human Rights

The Universal Declaration of Human Rights[76] adopted in 1948 by the UN General Assembly, is a significant document that sets out universally accepted rights and freedoms that every individual possesses irrespective of race, color, sex, language, religion, nationality, or any other status. It is a milestone document that establishes that everyone is equal and free from any kind of differentiation. The birth of this document is the result of inhuman treatment against mankind during the Second World War, which has offended or questioned the moral conscience of mankind.

In the last seventy-six years since its adoption, the world has gone through tremendous changes, but the one that still stands is the universally accepted human rights perspective that is shaped by this document. This instrument has established that a person should be free from unwanted

75. *Id.*
76. Herein after referred as the UDHR.

interference or disturbance with regard to his privacy.[77] The concept of privacy is so broad, and genetic privacy is one of its components that has acquired attention in recent years. In this technologically advanced period, genetic testing and studies related to genetic information are shooting up at an extensive level. The method of collecting and storing such information has also become easier. The sensitive nature and potential risk when it is exposed make genetic information more vulnerable. Today, genetic privacy protection is facing a lot of challenges due to the many technological advancements taking place in the health care sector. 3D bioprinting is one such technology that raises concern over genetic privacy. Even though the document of the UDHR not expressly mention the term genetic privacy, it will come under the preview of Article 12.

Human dignity is recognized as an inherent value by the UDHR.[78] The right of a person to be valued and respected is a fundamental thing to do. The protection given to genetic information and respecting the genetic privacy of a person shows the amount of consideration society gives to a person's privacy. The protection of genetic privacy can be ensured by enacting legislative and other regulatory measures. The collection, storage, usage, and sharing of genetic information without affecting genetic privacy in an ethical manner indicates the respect provided to the most valuable information of a human being.

All are equal before the law without any discrimination, which is another fundamental concept regarding equity provided by the UDHR.[79] When genetic information is exposed without the consent of a person, such an act is considered a violation of a person's genetic privacy. Most people who are rooting for the protection of their privacy want to have control over the information about them. It provides a sense of space, well-being,

77. The Universal Declaration of Human Rights, art. 12, Dec. 12,1948, U.N.T.S 217 A (III).
78. The Universal Declaration of Human Rights, Preamble, Dec. 12,1948, U.N.T.S 217 A (III).
79. The Universal Declaration of Human Rights, art. 7, Dec. 12,1948, U.N.T.S 217 A (III).

autonomy, and the ability to make sound decisions. This peace will be affected if an unwanted intrusion takes place in their privacy and is affected by its consequences. Social evil such as discrimination and stigmatization on the basis of genetic features is a dreadful act. People deserve to live peacefully without being victims of social evil.

8.2 The International Covenant on Civil and Political Rights

The International Covenant on Civil and Political Rights[80] is a multilateral treaty adopted in 1966 for the universal protection of civil and political rights. The ICCPR adopted by the UN General Assembly has established a Human Rights Committee for monitoring and supervising the implementation of the ICCPR by state parties.[81] The right to life, the right to equality, freedom from discrimination, etc., are certain fundamental human rights that are essential for a person to live a dignified life. The ICCPR acknowledges a wide range of civil and political rights, and one of them is the right to privacy.[82]

The importance of genetic privacy and the consequences of its unauthorized access are serious legal and ethical concerns that were not properly addressed. The concept of privacy is a broad area, and genetic privacy is regarding informational privacy. Genetic privacy primarily centers on the protection of genetic information. One of the key aspects of this document is the right to life, and everyone deserves to lead a dignified life. Taking into consideration the sensitive nature of genetic information and its scope, which not only contains information about that particular individual but also about his family, makes the protection of genetic privacy more crucial in terms of the right to life.

Freedom from discrimination is another aim of this instrument. The right to privacy is always associated with the reputation of a person. The genetic

80. Herein after referred as ICCPR
81. The International Covenant on Civil and Political Rights, art. 28, Mar. 23, 1976, 999 U.N.T.S. 171.
82. The International Covenant on Civil and Political Rights, art. 17, Mar. 23, 1976, 999 U.N.T.S. 171.

information obtained from the genetic sequence can reveal many things about a person, including his ancestors, health, traits, etc. This information is considered confidential by everyone. The nature of confidential information is private in nature. If someone believes that such information should not be shared with anyone and that such transmission may affect his reputation, he will protect it with a cloak of privacy. The ICCPR recognized the right to have an opinion without interference[83] but it has certain exceptions. This exception or limitation is provided to safeguard the reputation of an individual.[84] When genetic information regarding a person is shared or exposed without his or her consent and such information is misused by someone to affect his or her reputation through a comment or other form of expression, it is a violation of his or her genetic privacy.

The ICCPR has also provided provisions for eliminating discrimination in any form.[85] In order to eradicate genetic discrimination specific laws addressing the issue of genetic discrimination, need to be enacted by the member states in accordance with this document. The unfair treatment on the basis of genetic information is affecting different aspects of an individual's life, including his or her employment, healthcare, insurance, etc. Proper legal and ethical measures need to be incorporated by the member state to eliminate such practices.

8.3 Convention on Human Rights and Biomedicine

The Convention established to prohibit misuse of innovation in biomedicine, biomedical research, and practices and to safeguard human dignity is known as the Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and

83. The International Covenant on Civil and Political Rights, art. 19, Mar. 23, 1976, 999 U.N.T.S. 171.
84. The International Covenant on Civil and Political Rights, art. 19(3)(a), Mar. 23, 1976, 999 U.N.T.S. 171.
85. The International Covenant on Civil and Political Rights, art. 2 & art. 26, Mar. 23, 1976, 999 U.N.T.S. 171.

Medicine.[86] This convention was adopted in 1996, and it laid a structured framework for protecting human dignity in the field of bioethics.

The genetic information of an individual is composed of information regarding his genetic disorders, inherited traits, carrier status, etc. predominantly, they are information's relating to the health of a person, including his family members or ancestors. The scope of privacy is not limited to physical privacy but mostly with regard to information privacy. It has been recognized in these documents that everyone possesses a right to have a private life and to keep health information private to them.[87] An individual's right to keep his/her health information to themselves exhibits the confidential and sensitive nature of health information. The genetic information of a person is extremely significant when compared with other medical health data. In this regard, protection for genetic information and the need to ensure genetic privacy in this digital era is necessary.

The human genome and discrimination on the basis of such information are also prohibited under this convention.[88] This provision strengthens the protection of genetic privacy and aims to eradicate discrimination in society. The genetic information derived from genetic material to identify the carrier status of a genetic disease or any other related research should only be conducted for health purposes to improve the health of a person.[89] These provisions enable the person to have control over their information. The autonomy of a person over their genetic information ensures privacy and prohibits them from misusing it. The collection of genetic information for a purpose other than health purposes is a violation of a person's autonomy and privacy. It is also against the principle of non-maleficence.

86. Herein after referred as Oviedo Convention
87. The Convention on Human Rights and Biomedicine, art. 10, Dec. 1, 1999, 164 ETS.
88. The Convention on Human Rights and Biomedicine, art. 11, Dec. 1, 1999, 164 ETS.
89. The Convention on Human Rights and Biomedicine, art. 12, Dec. 1, 1999, 164 ETS.

General Data Protection Regulation

The General Data Protection Regulation[90] adopted by the European Union ensures the protection of personal data. It is one of the strongest privacy and security laws since its adoption in 2016. This document mainly centers around the protection of personal information regarding a natural person and the free movement of such data. The regulation provided protection regardless of nationality.[91] The rapid technological advancements happening in society and the challenges brought by them to personal data protection have been recognized by the regulation.[92] In order to protect personal information, a national level initiative to regulate in the form of policy will help to avoid such issues.

The definition of personal data provided by the regulation includes genetic data.[93] In the principle enumerated in the regulation, it states that personal data needs to be processed in a lawful manner; it should be collected for a legitimate purpose; the storage of personal data should be in consideration of the public interest; scientific and historical research purposes; and appropriate security of personal data needs to be ensured.[94] The security of personal data indicates the situations in which personal data can be unauthorizedly accessed, misused, loss or damage etc. and the measures to prevent such situations.

Informed consent is an integral part of research, diagnostic, and treatment. A specific provision for the conditions for valid consent, including child consent, in relation to information society services is also provided in the regulation.[95]

---

90. Hereinafter called GDPR
91. The General Data Protection Regulation, preamble, May 24, 2016, Regulation (EU) 2016/679.
92. The General Data Protection Regulation, preamble, May 24, 2016, Regulation (EU) 2016/679
93. The General Data Protection Regulation, art. 1, May 24, 2016, Regulation (EU) 2016/679
94. The General Data Protection Regulation, art. 5, May 24, 2016, Regulation (EU) 2016/679
95. The General Data Protection Regulation, art. 7 & 8, May 24, 2016, Regulation (EU) 2016/679

8.4 International Declaration on Human Genetic Data 2003

The International Declaration on Human Genetic Data[96] of 2003 is one of the most resent international documents relating to the protection of human genetic data adopted by UNESCO. This instrument primarily focuses on the collection, usage, storage, and processes of human genetic data and human proteomic data.[97] Apart from genetic material, human biological material was also given attention in this document.

The instrument provides definitions for human genetic data, human proteomic data, biological samples, etc. The special status of human genetic data was explained, and it strongly argued the sensitive nature of human genetic data and its protection in this document.[98] Privacy and the confidentiality of genetic information about an individual and associated data have given special attention. The responsibility for the protection of privacy and confidentiality of human genetic information is specified to states, and it should be done in accordance with international of human rights laws.[99] The data, such as human genetic and proteomic data and biological samples that can be linked to an identifiable person, cannot be disclosed or made available to a third person except in the interest of the public. Genetic data collected for studies could be linked to the concerned person to carry out research purposes but the necessary measures should be taken to protect the data and the biological material.

The importance of protecting genetic data being used to discriminate against and stigmatize any individual, family, group or community.[100] The

96. Herein after called Genetic data declaration.
97. The International Declaration on Human Genetic Data, art. 5, Oct. 16, 2003, 32 C/ Res 22.
98. The International Declaration on Human Genetic Data, art. 4, Oct. 16, 2003, 32 C/ Res 22.
99. The International Declaration on Human Genetic Data, art. 14, Oct. 16, 2003, 32 C/ Res 22.
100. The International Declaration on Human Genetic Data, art. 7(a), Oct. 16, 2003, 32 C/Res 22.

findings of studies relating to population base research needed to be handled carefully.[101] A provision for consent procedures and withdrawal of consent during the collection of genetic material were recognized.[102] The informed consent procedure for collection lacks clarity in many aspects.

9. National Regulatory Frameworks

National regulatory frameworks have a significant role in protecting the privacy concerns of individuals. The constitutional provisions provide fundamental rights to the people. In order to protect the fundamental rights, the national lawmakers will make the necessary legislation to supplement the constitutional provisions. It enables us to ensure that protection is provided to everyone. The evaluation of existing national law regarding 3D bioprinting and to what extent the genetic privacy of an individual is protected helps identify the existing gaps and find a possible solution.

9.1 The Indian Constitution

The supreme law of India, the Indian Constitution, doesn't have a provision that explicitly mentions the right to privacy. The concept of the right to privacy in India evolved through several interpretations provided through the fundamental rights enumerated in Article 21 of the Indian Constitution.[103] Article 21 of the Indian Constitution, which assures protection of life and personal liberty, has been interpreted to incorporate the right to privacy in a landmark judgment of the Supreme Court.[104] It has been affirmed by the Supreme Court that the right to privacy is required to enjoy other rights. The Delhi High Court recently ruled in 2018 that there should be no exclusion in insurance on the basis of a genetic disorder. It

101. The International Declaration on Human Genetic Data, art. 7 (b), Oct. 16, 2003, 32 C/Res 22.
102. The International Declaration on Human Genetic Data, art. 8 & 9, Oct. 16, 2003, 32 C/Res 22.
103. India Const. art. 21.
104. Justice K.S. Puttaswamy (Retd) v. Union of India (2018) AIR 2018 SC (SUPP) 1841(India).

has been stated that discrimination based on genetic information is a violation of Article 14.[105] It has been recognized that the right to health is a fundamental right; no one can deny health care by discriminating against them with regard to their genetic information. DNA profiling has been widely used in criminal law for identification, evidence, exoneration, and as an investigative tool. In the Code of Criminal Procedure (Amendment) Act of 2005, DNA profiling has been brought in as a part of the statutory regime for medical examining of the accused and victim of rape.[106] A DNA report has been accepted as valid evidence in India.[107] Even though DNA profiling and testing have been judicially accepted in India, it stands as a violation of Articles 19, 20, and 21 of the Indian Constitution.

The genetic information of a person is considered private and sensitive information due to the potential information that can be obtained from them, which not only includes his own data but also that of his family. In a resent judgment, it was observed by Justice V. Ramasubramanian and B. V. Nagarathna that "genetic information is intimate personal information" and that it is a part of a child's fundamental right.[108] A child's genetic information should not be used as material for solving the conflicts between the parents. They have the right to keep their genetic information as private as everyone else.[109] A child who is not under the age of understanding. The importance of their genetic information is protected under Indian Constitution.

The right to privacy, its scope, and its relationship with other articles of the constitution make it a significant one in terms of genetic privacy. The

105. United India Insurance Co. Ltd. v. Jai Prakash Tayal (2018) AIR 2020 (NOC) 88 (DEL.) (India).
106. The Code of Criminal Procedure 1973, § 53 & 164A, No. 5, Acts of Parliament, 1973 (India).
107. The Indian Evidence Act 1872, §s 45, No. 1, Acts of Parliament, 1872 (India).
108. Krishnadas Rajagopal, *Children have a right to protect their genetic information from DNA tests: SC judgemen*t, The Hindu (New Delhi, 22 Feb. 2023) https://www.thehindu.com/news/national/children-have-a-right-to-protect-their-genetic-information-from-dna-tests-sc-judgment/article66537446.ece.(last visited Apr.27,2024)
109. *Supra* note 40.

protection of genetic information also gives a person the freedom to keep their personal information confidential or secret from themselves. Even the freedoms provided in the constitution are not absolute; they only fall under restrictions for the public interest. There are certain situations that lead to the transfer or disclosure of genetic information. If the sharing is the result of unauthorized access, it leads to a violation of their privacy. If they consent to the sharing of such information, the person with whom such information is shared needs to take adequate care of the information. In sufficient care, the exploration of the information should not lead to any kind of discrimination or stigmatization. If any kind of discrimination occurs, it is considered a violation of the right to equality. All individuals in a society need to be considered equal and no one should be denied their rights on the basis of their genetic features.

9.2 The Digital Personal Data Protection Act, 2023

The Digital Personal Data Protection Act of 2023 was enacted as a result of proving protection to the personal information of a person that is in a digitalized form and for data management. The judgment in the Puttaswamy case[110] underpinned the importance of privacy, but what constitutes personal information and what are the measures that can be taken to protect such sensitive information? This piece of legislation aims to bring transparency, accountability, prevent misuse of data, and more than that, protect privacy. Today, all data is stored in digital form. The increasing concerns over the data that has been digitalized and the inadequacy of safeguarding this data resulted in the enactment of this legislation.

The genetic information is mainly stored in digital form. These information's may be those that have been obtained from research, medical, or treatment purposes. The dependence on digital platforms has increased these days due to the ease of keeping huge amount of data effortlessly. The stored

110. Justice K.S. Puttaswamy (Retd) v. Union of India (2018) AIR 2018 SC (SUPP) 1841(India).

digital genetic data raises concerns about privacy and security. The digitalized data is subject to the threat of unauthorized access or hacking. When data is unauthorizedly accessed, it leads to data privacy and questions the efficacy of digital platforms in safeguarding the most important data of a person.

This act doesn't have an explicit provision for genetic data or where it can be included. It can be interpreted from the definition given for personal data that genetic information could come under the preview of the definition.[111] In the definition given to data, which is referred to as a representation of information that is adequate for interpreting, processing, and communication, it could include genetic data become it is also a representation of information.[112] The lack of clarity regarding the definition of personal data makes it inept to regulate genetic data. A provision regarding privacy is also lacking in this piece of legislation.

9.3 Medical Council of India's Code of Ethics Regulation, 2002

This regulation was created by the Medical Council of India to regulate the conduct, etiquette, and ethics of medical practitioners. It set out guidelines for managing the relationship between a physician and his patient. The professional conduct of a physician is not only important to the concerned patient but to society as a whole. The physician whom we trust with our medical information needs to maintain certain professional qualities to maintain our trust in them.[113] The conflict arises when the physician becomes a researcher, and due to his misconduct, he may obtain human biological material from the patient without consent or with consent but not use it for the purpose for which he or she consented it. The genetic

111. The Digital Personal Data Protection Act 2023, § 2(t), No. 22, Acts of Parliament, 2023 (India).
112. The Digital Personal Data Protection Act 2023, § 2(h), No. 22, Acts of Parliament, 2023 (India).
113. Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002, Chapter 1, B (1.3), Chapter 2, 2(2.2), No. MCI-211(2), Medical Council of India, 2002 (India).

information that can be obtained from a person's genetic material is easily available to a physician in his daily life.

The relevancy of this regulation even though it doesn't expressly mention the protection of the genetic privacy of a person, there are other provisions that deal with the principles such as confidentiality, consent, and professional conduct that physician is supposed to act. It is important for them to get good medical records. The thing that is superior to all this this is maintaining a good doctor-patient relationship. Patient confidentiality is one of the most important factors that a physician is required to maintain throughout the doctor-patient relationship. The details of a patient's health should only be communicated to him, but there are two exceptions. Taking into account the best interests of the patient, such information can be disclosed to the patient attended, and the other scenario is that the law does not requires such disclosure. In terms of any genetic disorder or genetic trait that can be harmful to the patient if it is revealed, and if the doctor discloses such information without the consent of the patient, it amounts to a violation of his or her privacy, particularly his or her genetic privacy.

9.4 Indian Council of Medical Research Guidelines

The ICMR guidelines are really significant in India for having a standardized protocol to ensure uniformity and stability throughout the country. They provide an ethical framework to maintain ethical conduct, scientific integrity, and good research practices while conducting research. Since its establishment in 1911, they have formatted several guidelines according to the changes that have taken place in society. It has addressed several healthcare challenges in an effective manner. The ICMR guidelines promptly address research-related aspects of healthcare. The ICMR National Ethical Guidelines for Biomedical and Health Research Involving Research Participants of 2017[114] and the ICMR National Guidelines for Gene Therapy

114. Herein after referred as The ICMR Guideline, 2017

Products Development & Clinical Trials of 2019[115] are very important guidelines that focus on genetic information and maintain the principle of privacy and confidentiality when they are used for research.

Privacy is recognized as a right, and confidentiality is recognized as an obligation of the researchers, research team, and organization towards the research participants in the guidelines.[116] The research should convey the extent to which he can protect the confidential information generated through genetic testing. In genetic research, the informed consent of the research participant, and in necessary situations, other required family members consent, if they are included in the study must be obtained.[117] In order to maintain the privacy and confidentiality of genetic information, other than obtaining informed consent, another method is not to disclose the information without the consent of the participant.[118] The anonymization of the information to a certain extent protects the privacy of the individual, but since there is a tremendous development occurring in personalized medicine challenges the process of anonymization. In personalized medicine, the information regarding a person has to be in an identifiable manner so that it can be provided to the concerned individual. A new ethical guideline needs to be developed with regard to personalized medicine and the complexity of the privacy of the person.

Conclusion

The 3D bioprinting technology is growing rapidly. 3D bioprinting technology holds extensive promises for the healthcare sector. The technology has wide applications in medicine and life sciences. The research and development of this technology is bringing positive outcomes regarding the future possibilities of this technology. The application of 3D bioprinting technology in education and skill development widened the scope of this technology. Therefore, the application of 3D bioprinting technology is not

115. Herein after referred as The ICMR Guidelines, 2019.
116. The ICMR Guideline, 2017 § 2.3, 10.3.
117. The ICMR Guideline, 2017 § 5.
118. The ICMR Guideline, 2017 §10.4.

limited to medicines or life-sciences. The creation of organs from one's own tissue is an extraordinary innovation. The lives of a lot of people will change with the successful development of this technology.

At present, the scientific community has developed prototypes of several organs and many functional small tissue structures. It is estimated to develop fully functional organs in the coming years. The 3D bioprinting technology poses many legal and ethical issues, and the most significant and less debated subject is the protection of genetic privacy. The ethical and legal issues relating to genetic privacy with regard to 3D bioprinting technology extend to informed consent issues, ownership and control of genetic information, data security, discrimination and stigmatization on the basis of genetic information, cross broader research, etc. Each of these issues has different dimensions, and most of them are not recognized. The importance of genetic information for a person needs special attention and protection.

The evaluation of existing national and international legal and ethical regulatory frameworks has shown that the existing law doesn't address the complexity of the incorporation of human biological material into the new emerging technologies such as 3D bioprinting, organoids, tissue chips, etc. The genetic privacy question arising in through these technological advances along with other ethical and legal issues, required immediate attention. The existing gaps and acceptability of 3D bioprinting technology and similar technologies need to be resolved with the help of enacting an adequate legal and ethical regulatory framework.

Metamorphosis of the Indian Marriage and Family System: Traversing the Journey from Dharma to Adharma

Shinto Thomas* & ***Dr. Naveen S.*****

Introduction

The Indian marriage and family system, deeply rooted in cultural, customary, and religious traditions, has evolved over time, spanning the Vedic, Sutra, Epic, Legislative, and Commentatorial periods. This article explores how people today understand marriage and family, especially looking at how things have changed since the Vedic era.

In the first part of this article, we delve into how marriage was perceived during the Vedic period. Here, 'dharma' stood out as the foremost objective. This article delves deeper into what the Vedic period meant by prioritizing 'dharma' and aims to establish that 'dharma' isn't about righteous behaviour. Rather, it encompasses the performance of five 'mahayajnas', ultimately urging married individuals to extend beyond their marital bonds to accommodate family members and society and ultimately culminate in greater universal harmony. This portion also elaborates on how Vedic

* Research Scholar, School of Legal Studies, Cochin University of Science and Technology, Kerala.

** Associate Professor, Faculty of Law, Banaras Hindu University, Varanasi, Uttar Pradesh.

marriage achieves its primary goal of dharma through the performance of Mahayajnas and narrates how these performances are conducted. It also explains how 'praja' and 'kama' as second and third objectives of marriage were understood in Vedic teachings and how they related to fulfilling the main goal of 'dharma'.

The second part of this article provides an insight into the teachings of Vedic scholarship regarding the fundamentals and essentials of marriage. It highlights that marriage, during this era, was considered sacramental, adhering to heteronormative principles, and publicly endorsed through ceremonies.

The concluding section elucidates the trajectory of Indian familial evolution from a universally oriented construct to an individualistic framework. The family system, once expansive, has shifted to individualised arrangements, evident in phenomena like same-sex marriages and cohabitation. The State's role has shifted towards minimalist regulation, reflecting a departure from interventionism. Liberalistic movements and judicial decisions have played a crucial part in redefining marriage and family essentials. Recognizing the significance of Vedic teachings in the context of marriage and family, and acknowledging the family's pivotal role in nation-building, post-constitutional enactments were made aimed at aligning marital and familial structures with age-old doctrines, particularly concerning the objectives and essential components of marriage. However, contemporary legal developments, especially through judicial decisions, have taken a divergent trajectory, lacking affinity to uphold the sanctity of family and marriage in accordance with traditional teachings, thereby deviating from the originally intended alignment. The article explains that the new interpretation of marriage, and the form it assumes, is contrary to the principle of 'dharma' about marriage, leading to 'adharma', which now signifies solely what is contrary to 'dharma', without implying the right or wrong. In conclusion, the article raises the question of whether the ongoing changes within Indian families are mature enough to meet the diverse social needs of a populous nation like India. Hence, it is imperative to thoroughly investigate this paradigm shift in Indian marriage and family

dynamics. This research is crucial, considering the rapid pace at which these changes are occurring.

The Primacy of Dharma: A Vedic Perspective

"The Brihadaranyaka Upanishad reminds us that "Nothing is higher than ''dharma''.[1] The weak overcomes the stronger by ''dharma'', as over a king. Truly, that ''dharma'' is the truth (Satya); Therefore, when a person speaks the truth, they say, "He speaks the 'dharma', and if he speaks 'dharma', they say, 'He speaks the truth', for both are one".[2]

The word *dharma* is derived from the root word 'dir', which means 'to uphold, support, bear'.[3] In Vedic comprehension, the meaningful existence of every individual in the universe involves aspects such as 'Dharma', 'Artha', 'Kama' and 'Moksha'. The term 'dharma':

"…is commonly interpreted to incorporate concepts such as 'order and custom' that sustain life, as well as encompassing notions of virtue and religious and moral responsibilities."[4]

---

1. The Brihadaranyaka Upanishad, composed during the 7th–6th century BCE is one of the principal Upanishads and the key scripture to various schools of Hinduism. It is a treatise on Atman (Self) with passages on metaphysics, ethics, and a yearning for knowledge which influenced various Indian religions and ancient and medieval scholars and attracted secondary works such as those by Adi Shankara and Madhvacharya. See Swami Madhavananda, Brihadaranyaka Upanishad: With the Commentary of Shankaracharya (Modern Art Press 3d ed. 1950) https://archive.org/details/Brihadaranyaka.Upanishad.Shankara.Bhashya.by.Swami.Madhavananda/mode/1up?view=theater (last visited December 15, 2023). Also see Paul Deussen, The Philosophy of the Upanishads 23 (Motilal Banarsidass Publishers Pvt. Ltd. 2011)
2. Paul Horsch & Jarrod L. Whitaker, *From Creation Myth to World Law: The Early History of Dharma*, 32 J. Indian Phil. 437 (2004). Also see Charles Johnston, The Mukhya Upanishads: Books of Hidden Wisdom 481,478-505 (Kshetra Books 1st ed. 2014).
3. *The Pluralism Project*, Harvard University, https://pluralism.org/dharma-the-social-order (last visited December 26, 2023). Also, see Joel P. Brereton, *Dhárman in the Rgveda*, 32 J. Indian Phil. 449 (2004).
4. Dharma is a fundamental concept in Hinduism, referring to the order and custom which make life and a universe possible, and thus to the behaviours appropriate to

In the Hindu religious context, dharma denotes "behaviours that are considered to be in accord with *Rta* 'order and custom' that make life and the universe possible"[5]. In Buddhism, 'it refers to cosmic law and order'[6]. The term 'dharma' holds diverse connotations and interpretations throughout Indian history, specifically in contexts related to war, contracts, trade, and various fields. Additionally, in the Vedic period, the term 'dharma' was also contextually explained and defined within the interpretational circumstances of marriage and family. Hence, for the scope of this article, it is essential to understand the term 'dharma' in detail in the context of marriage and family during the Vedic period.

Dharma the first objective of marriage: Guiding Sacred Principles in Marital and Familial Dynamics

The earliest conception of Hindu marriage and family is rooted in the teachings of sages during the Vedic period. "The aim of marriage according to the Hindu sages was 'dharma', progeny (praja) and sex (kama)"[7] "Marriage is more a social obligation as its main purpose is the performance of 'dharma' and the perpetuation of the family as well as the continuation of the group through progeny"[8]. Here, the term 'dharma' is viewed as one of three objectives of marriage. Professor K.M. Kapadia gives more insight regarding the Vedic understanding of the concept of 'dharma' in his book Marriage and Family in India[9]. He says, "'dharma' in the case of a married man, which consists of performing the five *mahayajnas* in the sacred fire enkindled at the time of marriage"[10]. "These yajnas, according to

the maintenance of that order." Sakshi Sharma, *The Ancient: The Concept of Dharma*, https://lawminds.co.in/article/the-ancient-the-concept-of-dharma/ (last visited December 26, 2023).

5. John Bowker, The Concise Oxford Dictionary of World Religions (Oxford University Press 2003).
6. *Id.*
7. K.M. Kapadia, Marriage and Family in India 30 (Oxford University Press 3d ed.1968).
8. *Id.*
9. *Id.*
10. *Id.*

Manusamhita, were offered to Brahman, pitrs, gods, *bhutas* (creatures) and men. Brahman was satisfied by the recitation of the Vedas, Pitrs by 'tarpana' (offerings of water and food) or 'sradha', gods by the burnt oblations, bhutas by 'bali'offerings and men by the reception of guests"[11]. Thus, the term 'dharma', within the context of marriage, assumes a distinct significance, transcending a general understanding of an individual's life order to a broader scope of existence. This extension encompasses relationships with other humans and other beings in nature and ultimately culminates in a synthesis with the universe as a whole. A deeper comprehension of 'dharma' invites married individuals into a profound engagement with other beings in the universe, primarily through acts of offerings and sharing. The essence of the offered life of married individuals becomes clearer with a more profound understanding of the 'dharma' concept in marriage.

Sacred Union: Exploring Dharma through the Five *Mahayajnas* in Vedic Marriage

As we have seen above, according to the Vedic teachings, the concept of 'dharma' in the context of marriage is rooted in the fulfilment of the five *mahayajnas*[12]. Each *mahayajna* holds its unique interpretation. Essentially, 'dharma', which is fulfilled by the performance of five *mahayajnas,* [13] Involves five distinct offerings. The term 'offer' implies an act of giving, and in the context of marriage, the offeror is the individual entering matrimony. While the husband or wife may not directly perform the offerings, this responsibility is typically undertaken by parents or close relatives. The offerings are extended to five categories of realities in the universe: Brahman, pitrs (ancestors), gods, bhutas (creatures), and men[14]. An all-inclusive understanding of each of these yajnas is crucial for the purpose of this article.

11. *Id.* at 31.
12. *Id* at 32
13. *Id.* at 30.
14. *Id.*

The first among the five *mahayajnas* is the offering to Brahman, which is a recitation of the Vedas[15] to satisfy Brahman. Brahman has great relevance in the Hindu contest, and it is understood as the highest universal principle, the ultimate reality[16]. The Brahman can be referred to "as a metaphysical reality, a single binding unity behind diversity in all that exists in the universe"[17]. Brahman is also described as

"…..the highest reality, seen everywhere and inside each living, and there is connected spiritual oneness in all existence"[18].

The act of reciting the Vedas as a means to praise Brahman can be construed as a ritualistic invocation aimed at invoking blessings from the eternal reality. This request is established on the acknowledgement that the pursuit of a blessed life between married persons is beyond the realm of attainability through mere human endeavours. The recitation of Vedas, therefore, symbolises a sincere engagement with the divine, signifying the aspiring receipt of blessings requisite for the cultivation of a blessed existence. In light of the imperative to reiterate the significance of adhering to Vedic principles in shaping one's life, particularly within the context of marital unions, it becomes apparent that these principles cause a sense of regularity and consistency in matrimonial bonds.

Within the marriage paradigm, this ceremonial engagement of reciting Vedas during marriage takes on profound significance, representing an occasion for individuals to encounter the aforementioned eternal reality deeply. This encounter transcends mere self-interest, as individuals in the marital context assume the role of participants in universal brotherhood. Through this paradigmatic lens, marriage is conceptualised not as a selfish pursuit but as a communal endeavour, wherein individuals contribute to the fabric of universal unity and oneness.

---

15. *Id.*
16. Swami Tathagatananda, *Vedanta Society of New York*, https://www.vedantany.org/articles/blog-post-title-two-6txr3 (last visited December 26, 2023).
17. *Supra* note 3
18. Jeffrey Brodd, World Religions: A Voyage of Discovery (Saint Mary's Press 3d ed.2008).

The essence of this perspective lies in acknowledging that each participant in the universe holds equal importance. The symbiotic relationship between individuals in the grand canvas of the cosmos becomes manifest in the realization that the self is inseparable from the collective whole. Consequently, marriage, within this philosophical framework, emerges as an occasion for embracing a profound interconnectedness with the universe. Through such interconnectedness, individuals advance as proponents of universal oneness, thereby contributing to the establishment of an overarching cosmic order.

The second facet of the 'dharma' pertains to the ritual of 'pitru tarpanam'[19]. This yajna is offered to pitrs by *tarpana*(offerings of water and food) or *sraddha* .[20] The term 'pitru' denotes one's forebears, and 'tarpanam' signifies the act of satisfying; thus, the merged expression signifies the gratification of one's ancestors. Consequently, the matrimonial ceremony includes the recollection of ancestors whose benevolence has facilitated the convening of the marriage. The corporeal form presently inhabited is also acknowledged as indebted to the lineage. Consequently, marriage transcends the confines of contemporary joyousness and happiness for the wedded individuals. The physical pleasure derived from the marital union is consecrated to those to whom gratitude is owed for the attainment of such bliss. Hence, '*pitru tarpanam'* constitutes an expression of gratitude toward the ancestors, embodying an acknowledgement of their contributory role in one's existence. Despite their physical absence, a particular remembrance of the departed becomes obligatory, thereby constituting an integral aspect of 'dharma' characterized by the benevolent recollection of those who have departed.

Thirdly, 'dharma' in the marriage consists of the yajna to 'gods' by burnt oblations[21], which indicates the presence of light to eradicate ignorance, remove fear, purify the environment and provide the condition

19. *Supra* note 7, at 30.
20. *Id.*
21. K.M. Kapadia, *supra* note 7

of peace and prosperity. Symbolizing ignorance is burnt shows that are removing the obstacles that keep us from the success of knowing our destiny. This yajna is a powerful symbol of wisdom, knowledge, passion and purification. It calls us to remove and release the past, negativity, old resentments, hurt, grudges, regrets, or sufferings, leading us to focus on what is more important. "The oblations that were offered to gods were said to support both movable and immovable creations. Oblations provided in the fire reached the sun, from the sun came rain, from the rain grew food and on food man lived."[22]. The performance of yajna through burnt oblations holds significant universal importance, as it bestows prosperity upon the entire universe. In the context of marriage and family, it signifies that the marital journey is cheered by wisdom, empowering couples to overcome life's obstacles and recognize it as a lifelong journey.

The fourth *mahayajna* is the offering that is given to the 'bhutas' (creatures), and it is fulfilled through conducting 'bali'[23]. It is the offering of cooked foods to all living beings as part of the Pancha Yajnas. Bali here refers to the cooked food that is offered. During marriage, the grihastha must throw the food toward the sky and chant the mantra, which shows that the 'bhuta' refers to living beings or creatures. By this fourth *mahayajna*, marriage becomes an act of social responsibility for the married people to consider even the non-human beings in the world and, by feeding them, proclaim the message of cosmic sharing.

Finally, the fifth *mahayajna* to married people is reverence for guests[24]. "Reverence to guests was also a cherished social etiquette because, along with the father, the mother, and the teacher, the guests were equated with God in one of the Upanishads. But while it was more or less a moral duty in Upanishad, Manu brought it within the realm of the social code by looking upon it as a yajna"[25].

22. *Id.* at 31.
23. *Id.*
24. *Id.*
25. *Id.*

The importance of conducting these yajnas is made clear by Manu, and it warns about the importance of these *mahayajnas*:

"He who neglects not these five great sacrifices, while he can perform them, is not tainted by the sins (committed) in the five places of slaughter, though he constantly lives in the house" "The importance of these yajnas is confirmed by Dharamasutras and Manusamhitha by categorically considering it as a self-purificatory process."[26]

In the context of matrimonial unions, the term 'dharma' assumes a nuanced connotation, transcending individualistic pursuits and encompassing the entirety of the cosmos. Accordingly, 'dharma', in this context, is attributed to a realm beyond the confines of human egotism and self-serving interests. Marriage, as an institution, bestows upon individuals a connection to a world external to their self, instilling a sense of duty, reverence, and gratitude towards the entirety of the universe. This sense of duty extends to acts of both giving and receiving, regardless of whether they pertain to matters of existence or mortality. Thus, marriage ought not to be perceived as a private endeavour driven solely by personal preferences; it is a concept of far-reaching scope, entailing obligations and responsibilities that extend to the broader societal context. The family unit, therefore, is not merely a product of personal definition and determination but rather a socially instituted and socially oriented construct.

Marriage for 'Dharma': From Family to Society to the Entire Universe.

The obligation of individuals in wedlock to carefully take into account the welfare of the economically disadvantaged, marginalized, and vulnerable segments of society serves as a compelling testament to the fundamentally social nature of matrimony and its intrinsic linkage to the broader human community. This unequivocally highlights the universal interconnectedness of marriage and family life. This aspect was also explicit in the Vedic understandings and teachings of marriage of marriage.

26. *Id.* at 32.

"…Besides these social duties, Manu enjoyed offerings to beings to propitiate the spirits and beings. And then in a corner, the householder had to leave offerings for dogs, outcasts, *chandalas,* those afflicted with diseases that are punishments of former sins, cows and insects."[27]

The Vedic scholarship also taught about the social responsibility of the married people. "besides giving food to those persons and animals; the householder was supposed to give gifts to the Brahmins, fees to students and at times money for the marriage, alms to an ascetic, medicine to the sick and donations to the poor. He was required to feed the guests, the newly married women, infants, sick persons and pregnant women."[28]. Thus, Vedic marriage wasn't just for humans; it included taking care of everything in the world. Married people had to look after not only their family, but also animals, birds, insects, and even those who were considered less important in society or couldn't work due to disability. So, their duties went beyond just their own family to include a larger group of people and creatures.[29]

The social outlook depicted in marriage during the early Vedic period was continued or more deeply observed in the later periods. In other words, the socialist approach and universal thoughts were increased even in the later Vedic period. In the Vedic period, rituals had great relevance to an individual's personal life. However, in the later Vedic period, individualistic concerns started to decline, becoming more social in nature to address the needs of greater humanity, transcending individual priorities[30]. Therefore, an overall evaluation of the early and later Vedic periods reveals that the far-reaching development was driven by humanitarian concerns regarding rituals and sacrifices about marriage. Expanding upon this, we can delve into the societal shifts that accompanied these changes. During the early Vedic period, marriages were not just individual unions but also had broader

27. *Id*
28. *Id.*
29. *Id.*
30. *Id.*

implications for the community. As society evolved, so did the understanding of marriage, transforming it from a purely personal affair to one deeply rooted in social cohesion and welfare.

Moreover, the rituals and sacrifices associated with marriage took on new significance. They were no longer merely rites performed for individual prosperity but were seen as acts of communal bonding and solidarity. The activities related to marriage were not merely perceived as acts of generosity but rather as the dutiful and responsible conduct expected from married individuals, and in that sense, the sacrifices to the sages and the Pitrs were obviously social and familial duties from the time of the Brahmanas.[31] This shift in perspective highlights the gradual transition from an individualistic to a more collective consciousness within Vedic society. Furthermore, the emphasis on humanitarian concerns underscores a broader trend towards social equity and inclusivity. The later Vedic period saw a greater awareness of the interconnectedness of human existence, prompting a reevaluation of traditional norms and practices surrounding marriage. This resulted in a more inclusive approach that sought to address the diverse needs and aspirations of all members of society.

In essence, the evolution of marriage in the Vedic period reflects a profound shift in societal values, moving from individualism towards a more communal ethos grounded in compassion and social responsibility. This transformation not only shaped the institution of marriage but also laid the foundation for a more egalitarian and harmonious society**.**

The institution of marriage and family, within this paradigm, serves as a channel for individuals to connect with the universe itself. The understanding of 'dharma' as the essence of marital objectives posits marriage and family not merely as arenas for the pursuit of carnal pleasures but as integral contributors to a well-ordered society that encompasses all entities within the universe. It signifies a medium through which individuals

31. *Id*

relinquish self-interest, transcending to unite with the greater cosmic order by loving, respecting and helping other beings in the world. Consequently, marriage and family emerge as forums wherein individuals are impelled to act for the welfare of others, thereby shaping societal norms and fostering a collective and universal ethos. This institutional framework is conceived within a social context, surpassing the realm of personal choices and settlements to manifest as a pivotal constituent of the broader societal landscape.

Thus, in the context of marriage and family, 'dharma', which is placed as the prime objective, assumes a pivotal role within the framework of the universal order. It is imperative to highlight that 'dharma' is not structured solely for the personal satisfaction of the individual; rather, it is designed to serve the entirety of the Universe. Every facet that marriage encompasses vibrates with its completeness and wholeness. 'Dharma', in this context, is comprehensively formulated to incorporate all aspects of the individual, family, society, and, ultimately, the universe as a whole. It is within the realm of marriage and family that 'dharma' achieves its deepest comprehension, surpassing any other context. Consequently, in the Vedic tradition, marriage emerges as a highly significant component of cosmic law, instilled with the responsibility of prescribing the right behaviour and upholding social order. The right behaviour in the context of marriage implies considering marriage as an important event in one's life, requiring divine blessings and representing a permanent union and journey. It warrants the blessings of the divine and, as a proclaimed relation, also calls for considering the entire universe as significant in harmonizing this relationship. As such, it becomes an integral part of the universal law of nature, applicable to all individuals.

'Praja' as the Second Objective of Marriage: Aligned with 'Dharma'

As previously discussed, the social perspective presented by the Hindu way of life, which incorporates 'dharma' as the primary goal of marriage, is connected and sustained by the second objective of marriage, referred to as

'Praja' (progeny)[32]. As rightly observed by the Taittiriya Samhita, "Man is said to be complete after marrying a woman and acquiring a progeny."[33]. The son's role was definite in the Hindu family system, and the rights, especially concerning property, were devolved entirely upon the son. The son is the redeemer of the father's soul from hell. "It is because the son protects his father from hell, which is called 'put', so the son is being called Putra."[34].

The Hindu family and marriage system have faced considerable criticism, particularly regarding the treatment of women, especially daughters. It is not right to say that women were treated neglectfully in all realms of life. Despite not receiving equitable rights over various crucial aspects of life, such as property, daughters were consistently treated respectfully. The sages emphasized the need to afford them the same tenderness as sons, including the provision of education. "The injunction was that the daughters should be brought up and educated with care like sons till their marriage"[35]. The Mahabharata also gives a clear picture of the daughter's role in the family, saying, "The goddess of prosperity herself resided in the person of one's daughter"[36]. Therefore, the term 'Praja' includes son and daughter and provides an equally important respect and consideration, though the last right of a father was the son's duty.

In the context of marriage within cultural and philosophical beliefs, seeking children, known as Praja, as the second goal isn't contradictory. Instead, it complements and expands the first goal of dharma. This second aim brings added joy to married couples as they witness the result of their love and lineage. However, it also comes with social responsibilities, such as ensuring the

32. *Id.* at 30.
33. Indira Sharma et al., *Hinduism, Marriage and Mental Illness*, 55 Indian J. Psychiatry 243 (2013).
34. G. Buhler, *Manusmriti*, https://eweb.furman.edu/~ateipen/ReligionA45/protected/manusmriti.htm 138 (last visited December 27, 2023).
35. Paras Diwan, The Law of Joint Family System: Debts, Gifts, Maintenance, Damdupat, Benami Transaction and Preemption 35 (1st ed. 1993).
36. *Id.*

continuity of the human race and guaranteeing that future generations inherit their fair share of the planet. This dual purpose highlights humanity's sustainability and emphasizes each person's ethical duty to safeguard the welfare of those yet to come. Thus, the concept of 'praja', in the realm of marriage and family, also unfolds a broader perspective that extends beyond the present, encompassing both current and future dimensions of life. It is postulated as a profound 'dharma, suggesting a moral and cosmic duty. Unlike 'dharma', which traditionally addresses present realities, 'praja' assumes a universal significance with a forward-looking concern for the well-being of generations yet to come. This perspective's beauty lies in preserving resources for those unseen today, embodying the teachings of sharing rights with the next generation. It demands that all to enjoy what is necessary and not misuse the resources beyond what is needed, always remembering the great principle that the right of enjoyment we have today is also the right of the generations yet to come. So their absence doesn't mean that they are not here. So, it is the responsibility of the generations present today to experience the presence of those who are absent today. Presence in the absence emphasises the profound relevance of marriage by highlighting the imperative to preserve resources for subsequent generations. This, in turn, implies a commitment to horizontal and vertical sharing of one's life, fostering harmony with all beings in the universe.

This concept underscores the interconnectedness of present actions and their impact on future generations. It highlights the importance of sustainable resource management and mindful consumption. Moreover, it emphasizes the duty we owe to those who will inherit the world we leave behind, urging us to act as custodians of the environment and stewards of prosperity for generations to come.

Kama: The third objective of marriage is also to proclaim the message of the Greater Universe.

In Vedic teachings, 'Kama' identified as the third objective of marriage[37], extends beyond mere personal satisfaction with sexual

37. K.M. Kapadia, *supra* note 7.

inclinations. A nuanced analysis reveals its broader significance, aligning with the cosmic order and beauty of the universe. Beyond individual desires, it emphasizes an appreciation for the beauty of the universe and underscores the careful intervention required in the universal process of life's order. 'Kama' is viewed as a supportive and motivating force within the body, encouraging active participation in the creative act. 'Kama', as the satisfaction of the instinctive life, is recognised as one of the aims of marriage, along with 'dharma' and 'praja'. But it is the lowest in the order of precedence, and consequently, if one is to be renounced, sex is the first to go."[38] Therefore, though Hindu thinkers assign a place for sex in every person's life, it's not deemed the end of life. Prof. KM Kapadia observes it as...

"But while accepting sex instinct, emotional urges and economic drives as necessary and even desirable, it is stressed, as it should be, that they are not the ultimate ends of life."[39]

However, the Hindu view of life also gives certain important manifestations of the principle of kama. It has an emotional and aesthetic aspect. "The aesthetic in man expresses itself in both creation and appreciation of all that is fine and sublime. Man in nature is creative, and the best part of his personality is stifled if he is not allowed to give expression to the creative in him. Life finds its greatest joy in the act of creation."[40]. Kama isn't seen as life's cage but as a way for humans to participate in creation, promoting life's presence in the universe and guiding its journey forward. Sex, in this view, isn't life's endpoint but a means of participating in creation and ensuring the universe's continuity. Therefore, placing Kama as the third objective of marriage becomes relevant, as it elevates man from being solely concerned with the pursuit of pleasure to embracing social responsibility for the nurturing of nature and the universe. The ultimate outcome of Kama is the enduring presence of humans, who hold a vital role in the universe.

38. *Id.* at 25.
39. *Id.* at 26.
40. *Id.*

Therefore, Kama, as the third objective of marriage, is not contradictory to Dharma and Praja but rather aligns harmoniously with them.

Ultimately, the above analysis conveys the profound interconnectedness of marriage with Dharma, Praja, and Kama, portraying marriage not merely as a personal union but as a pivotal societal institution with far-reaching ethical implications**.** As said, "Dharma and Praja, the more important aims of marriage reminded a man how much more he had to live for others than for himself, and that the proper utilization of wealth consisted in distributing a part of it to serve the needs of his fellow beings. To clinch this idea of living for others, it was said that he who failed to perform these five sacrifices daily 'lives not though he breaths."[41]. By enlarging his bonds with non-familial persons and the human world, he realized that even when he lived in the family, he was not of it. There was nothing in the life so regulated by onerous duties of which one could be enamoured. *Artha* and *Kama*, material possessions and emotional drives were divested of their temptations by a conventional process of sublimation in diverting them to social ends."[42] The Hindu scriptures emphasize the responsibility of an individual to extend openness beyond personal inclinations and familial bonds. Furthermore, they underscore the significance of the family unit as a means for a Hindu to contribute to the creation of a better universe. These three objectives inspire Hindus to transcend the confines of personal existence, empowering them to embrace the responsibilities of the greater universe as conscientious human beings. "It was this detachment from narrow familial ties that was the householder's personal gain for the realization of his self in the days to follow. This individualistic and personal facet of his life evolved imperceptibly from its social facet implicitly implied in and explicitly stressed through the duties of this stage."[43]

41. *Id*
42. *Id.*
43. *Id.*

The Foundations of Vedic Marriage and Family Tradition

The preceding section of this article explored the objectives of marriage in Vedic teachings. This subsequent phase delves into the foundational aspects of Hindu marriage from the Vedic period onward, highlighting how these fundamentals elevated marriage, heartened the family system and enabled resilience in the face of challenges across centuries. What are the constituents of a Hindu marriage? The Vedic period had a very definite understanding of the essential components of marriage, without which the marriage was considered as not being done. For the purpose of this article, we will take a few of these and try to understand them.

First of all, relationships between only a man and woman are essential to ascertain matrimonial relations in a Vedic marriage and not any other homogenous relation. From the Vedic period onwards, there is no proof of marriage other than men and women. This can be derived from the teachings of Manusmriti**,** who considers sexual relations between man and man as an offence.[44] Kalidasa further adds it to make evident the role of the wife in the family: "She is my grihini (the lady of the house), my sachiva (counsellor in intellectual matters), my sakhi (confidante in private) and my dearest disciple in the pursuit of the art."[45] All it says is that marriage is a relationship only between a man and a woman. How important is that a woman is for a man and thereby forming a marital bond is rightly observed in the Mahabaratha:

> It is ordained that the wife whose hand has been accepted in marriage should be given to her. By cherishing a woman, one but virtually worships the goddess of prosperity (Lakshmi) herself; by afflicting her, one but afflicts the goddess of prosperity. The wife is the source of 'dharma', Artha, and Kama; she is also the source of moksha.[46]

---

44. Amit Kumar Sinha, *Homosexuality in India: Better Late Than Never*, https://www.indialawjournal.org/archives/volume3/issue_4/article_by_amit.html (last visited December 26, 2023).
45. *Supra* note 7.
46. *Id.* at 33.

The second foremost foundational characteristic of Vedic marriage was its indissolubility. Traditional India believed that man is incomplete without marriage and it is necessary to 'samskara'. Therefore, it was considered that "the union is indissoluble; for it is a union of flesh with flesh, bone with bone. During the husband's lifetime, he is to be regarded by the wife as a God and the wife is declared to be half the body of her husband, equally sharing the fruit of pure and impure acts."[47] This indissoluble character led to the concept that Vedic marriage is irrevocable. Marriage, being a sacramental union between a man and a woman, cannot be dissolved at the whimsical will of each of them.[48] The marriage is thus regarded as a permanent, indissoluble, and eternal union rather than a social contract. So, a marital relationship in life is not a temporary settlement as a disposable matter but a permanent union brought together by eternal blessings. It is because of this Manu declared that mutual fidelity between husband and wife is the highest dharma.[49] Vedic marriage was strengthened by ritual performance, which was also compulsory to validate a marriage. As we have already seen, Dharma is the prime objective of a married man, and this is achieved through the performance of five mahayajnas in the sacred fire kindled at the time of marriage.[50]

In the Vedic period, the nature of marriage was monogamy, and in exceptional cases, there was also the practice of polygamy within noble groups. The nature of Vedic marriage, as described by Monmayee Basu in his book Hindu Woman and Marriage Law, is

47. Srikanta Mishra, Ancient Hindu Marriage Law and Practice 12 (1st ed. 1994).
48. K.M. Kapadia, *supra* note 7. "The parties to the marriage cannot dissolve it at will. They are bound to each other until the death of either of them, and the wife is supposed to be bound to her husband even after his death. This concept of marriage, that it is indissoluble, is a lofty one because it means that the husband and wife, after marriage, have to adjust their tastes and temper, their ideals and interests, instead of breaking with each other when they find that these differ. It thus involves sacrifices on the part of both husband and wife as each is called upon to overcome the incompatibility other."
49. *Id*
50. *Id.* at 30.

…Vedic literature generally endorsed monogamy and was considered the best practice of the highest virtue. However, polygamy was also in practice among nobles. A number of such instances of polygamy are available not only in later Vedic literature but also in the Rig Veda.[51]

When we deeply analyze the possibility of other forms of marriage union, we find that in exceptional cases, there was the practice of polyandry. "There is no reference to polyandry in Vedic literature except in a few sporadic instances like the marriage of Surya, Savitri's daughter, with the twin Asvin brothers. In Mahabharata, Draupadi married the five Pandava brothers. However, Draupadi's marriage took place under unusual circumstances – the Pandavas were compelled to marry her in order to abide by the wish of their mother whom they held in the highest esteem… This incident, if anything, shows that polyandry was not the customary practice in the Vedic age."[52] The above narration suggests that marriage was generally monogamous, leading to a greater demand for couples to be loyal to each other. Only in exceptional cases were other forms of marriage allowed apart from monogamy.

Another crucial aspect regarding the constitution of marriage is its initiation, wherein marriage is regarded as a sacrament accompanied by specific ceremonies. This ceremonial beginning serves as a proclamation of the union before society, signifying the commencement of the family. These rites include "*homa* or offering in the sacred fire, *panigrahana,* symbolizing the taking of the bride's hand; and *saptapadi*, the bride and the bride-groom going seven steps together"[53]. The connection between married ones is not only documented in religious records but is also acknowledged by society. This relationship entails specific responsibilities for the couples, as it is regarded as a societal activity. It imposes a sense of responsibility

51. Monmayee Basu, Hindu Women and Marriage Law: From Sacrament to Contract 28 (1st ed. 2001).
52. *Id.*
53. *Supra* note 7 at 168.

on the couples before society, making the public cognizant of their permanent union. Society, in turn, assumes the responsibility of safeguarding this union rather than undermining it. Consequently, the journey embarked upon by the couples is one that is shared with society, signifying a combination of individual responsibilities and a socially significant commitment.

Families have followed the principles outlined above regarding marriage since the Vedic period and have remained strong for centuries without being destroyed. It is evident that the entire institution of marriage and its related activities were organized with clear rules and essentials.

Legislative Alignment: Indian Laws Reflecting Vedic Teachings

The true essence of the Indian family system has been safeguarded and upheld by the Parliament of India through different legalisations. For example, Section 5 of the Hindu Marriage Act of 1955 defines the fundamental aspects of Hindu marriage, summarizing the principles governing the institution of Hindu marriage and family. The foundational components that we have seen in Vedic marriage are upheld by the Parliament while defining Hindu marriage, especially the monogamous nature and marriage between a man and a woman, etc. These aspects are specifically addressed by providing the conditions of a valid marriage.[54] The legal prerequisites for a recognized marriage, as outlined in this act, align with age-old Indian teachings on marriage and family. These principles affirm that marriage is a sacred and enduring bond between a man and a woman, initiated through rituals. The performance of rituals and the acts in relation to this also serves as a declaration to the universe, signifying that married individuals are embarking on a lifelong union blessed by God, society, and the entire cosmos. It may be because of this that Indians, as a nation, more than any other, take pride in their strong family system before the entire universe. This conviction is rightly observed by the former Vice

54. Hindu Marriage Act, 1955 (India).

President of India, Mr. Venkaiah Naidu, in the following words: "If there is one cohesive, cementing force at the heart of traditional Indian Society - a single, powerful strand which for centuries has woven the tapestry of our rich, social fabric replete with diversity, into a whole, it is our family system."[55] Mr Naidu's poignant reflection underscores the profound significance of family in Indian society. Indeed, our strong family bonds have served as pillars of support and resilience throughout history, nurturing our cultural heritage and fostering unity amidst diversity. As we embrace our heritage, we recognize the invaluable role of the family system in shaping our collective identity and fortifying our national character.

Apart from the Hindu Marriage Act[56], there are also other legislations in India that aim to align with the traditional teachings of Indian marriage and family systems. The inheritance and succession rights of Hindus, including daughters' rights to ancestral property, are upheld by the Indian parliament, which aims to maintain the traditional family structure while ensuring gender equality in matters of inheritance.[57] Parliament also prohibited the giving or receiving of dowry in marriages through legislation which aims to eradicate the social evil of dowry, which goes against the traditional teachings of marriage as a sacred union based on mutual respect and understanding.[58] Indian parliament also enacted laws that provide for the protection of women from domestic violence and ensure the right to a safe and healthy environment within the family. It aligns with the traditional teachings of Indian marriage by emphasizing the importance of mutual respect and support within the family unit.[59] These legislations reflect the Indian Parliament's efforts to balance traditional teachings with contemporary social realities and legal frameworks to promote equality, justice, and the well-being of individuals within the context of marriage and family.

---

55. M. Venkaiah Naidu, former Vice President of India, Speech at the International Conference on "Role of Family in Promoting Harmony and National Integration" (Oct. 4, 2022)
56. Hindu Marriage Act, 1955 (India).
57. The Hindu Succession Act, 1956 (India).
58. The Dowry Prohibition Act, 1961 (India).
59. The Protection of Women from Domestic Violence Act, 2005 (India).

The law of our nation also respects marriage and its ceremony, making the marriage binding under a particular personal law. This will remain valid even if the person converts to another religion. This point was also clarified by the Supreme Court in the case of *Smt. Sarla Mudgal* v. *Union of India & Ors*[60]. It is also important to note that every marriage union is accountable to the state and society. A person who is married under Hindu law cannot later convert to Islam and enter into a second marriage without legally dissolving the first marriage. Therefore, it is categorically held by the apex court that "Answering the questions posed by us in the beginning of the judgment, we hold that the second marriage of a Hindu husband after conversion to Islam, without having his first marriage dissolved under law, would be invalid. The second marriage would be void in terms of the provisions of Section 494 IPC and the apostate-husband would be guilty of the offence under Section 494 IPC".[61]

The Indian Penal Code (IPC)[62] upheld the sanctity and accountability of marital unions through specific legal provisions. Sections 493, 494, 495, and 496 address various forms of marital misconduct to ensure that marriage is respected as a sacred institution. Section 493 criminalizes deceitful inducement to believe in a lawful marriage, while Section 494 prohibits marrying again during the lifetime of a spouse without legally dissolving the first marriage. Section 495 extends this prohibition to cases where the first marriage is concealed. Additionally, Section 496 targets fraudulent marriage ceremonies, criminalizing any attempt to deceive others into believing in a lawful marriage where none exists. These sections collectively reinforce the legal and moral integrity of marriage, ensuring that individuals adhere to their responsibilities and prevent misuse of the institution.

Although Parliament introduced the Bharatiya Nyaya Sanhita[63] in place of the Indian Penal Code, Sections 81, 82(1), and 83 of the new code provide

60. Smt Sarala Mudgal President, Kalyani v. Union Of India &Ors, 1995 SCC (3) 635.
61. *Id.*
62. Indian Penal Code, 1860 (India).
63. Bharatiya Nyaya Sanhita 2023 (India), Ss. 81, 82(1), 83

the same protections to marital unions as the IPC did. The new legislation maintains the sanctity and value of married women by imposing penalties for enticing, taking away, or detaining a married woman with criminal intent.[64]

As a nation, India always upholds the family as an important social reality, and through all these legislations, it repeatedly proclaims the relevance of the family as a social institution. Although the constitutional courts of India show trends in protecting individual rights, they have frequently recollected all the constraints in balancing individual rights with social responsibility. Therefore, the Supreme Court held in the case Shayara Bano vs Union of India,[65] "The State is constitutionally obliged to maintain coherent order in the society, foundation of which is laid by the family. Thus sustenance or family purity of the marriage will lay a strong foundation for the society, without which there would be neither civilisation nor progress."[66] Although the words 'family' and 'marriage' are not explicitly mentioned in the Constitution of India, there are provisions in the Constitution that reflect the essence and purpose of marriage and family. For example, when it states that 'children are given opportunities and facilities to develop in a healthy manner and in a condition of freedom and dignity,' and that 'childhood and youth are protected against exploitation and against moral and material abandonment,"[67] the framers of the Constitution intended to underscore the importance of a strong family environment in shaping children. It also means nothing but the greatness of meaningful existence from birth to every citizen of India when the Constitution provides that 'The State shall make provision for ensuring just and humane conditions of work and maternity relief."[68]

64. *Id* s. 84
65. Shayara Bano v. Union of India, (2017) 9 SCC 1.
66. *Id.*
67. India Const. art. 39(f).
68. India Const. art. 42.

Reconceptualising Marriage Essentials: A Contemporary Shift from Vedic Traditions.

The transformation in the conceptions of personal liberty and individual freedom has been influential in reshaping the prevailing understanding of marriage and family. This paradigm shift, originating predominantly in the Western world but rapidly disseminating globally, has seen the legal framework increasingly endorse personal rights under the banner of individual liberty. The focus on personal freedom has prompted a reassessment of traditional family structures, including marriage, its goals, and fundamental aspects. This has resulted in a significant transformation in how the post-independent Indian family system interacts with the country's legal framework.

This evolution can be observed through two noticeable phases in the relationship between the Indian family system and the nation's laws. In the initial phase, the emphasis was primarily on safeguarding the family unit, affording it comprehensive legal protection while refraining from undue interference in its foundational principles. The legal framework was notably supportive of the family within the context of its collective social environment, accommodating notions of sacrifice, patience, commitment, and responsibility. Furthermore, it incorporated specific punitive measures in the event of extramarital sexual relationships and related transgressions. The legislation with regard to family and its aligned matters was enacted in line with the age-old doctrines, which we have seen in the first part of this article.

The subsequent phase of the Indian legal framework in relation to marriage and family introduced a distinct characteristic, one that prioritizes the reconfiguration of the entire family system in alignment with the tenets of individual liberty, embracing a more liberalistic ethos that privileges the 'I' over the 'we.' This transformation encourages individualism over collectivism, and it sanctions personal gratification over sacrifices, fostering a disposition favouring separateness over togetherness. This shift, notable

for its inclination to emphasize personal autonomy, was not always an inherent feature of legislative intent but rather emerged through the decisions rendered by constitutional courts.

Reaching the apex of individual liberty, in India, same-sex unions also receive acceptance under the legal umbrella. In 2019, the Madras High Court ruled that transgender woman is allowed to marry under the Hindu Marriage Act.[69] In *Shakti Vahini* v. *Union Of India* [70], the Indian Supreme Court held that adults have the fundamental right to marry a person of their choice. In this case, the court ruled that "the choice of an individual is an inextricable part of dignity or dignity cannot be thought of where there is the erosion of choice. True it is, the same is bound by constitutional limitation, but in the absence of such limitation, none, we mean, no one shall be permitted to interfere in the fructification of that choice. If the right to express one's choice is obstructed, it would be tough to think of dignity in its sanctified completeness"[71]. This observation of the Hon'ble Supreme Court is critical in the changing scenario of family and marriage. The court's mind is clear that it is ready to redefine the definition of marriage, overcoming the traditional pattern of the family system and marriage, which will pave the way for a new form of family as one wishes, without any conditions**.**

In the case of *Navtej Sing Johar*[72], the Supreme Court of India ruled that section 377 of the Indian Penal Code is unconstitutional. This decision decriminalized consensual sexual relationships between two adult homosexuals or lesbians, removing them from the purview of section 377. Consequently, same-sex sexual unions were legalized in India. LGBTQ activists advocate for a combined interpretation of *Shakti Vahini*[73] and *Navtej Singh Johar*[74] to extend recognition of same-sex unions within the framework of the Special Marriage

69. Arunkumar & Sreeja v. The Inspector General of Registration & Others, 2019 2 MLJ 1022.
70. Shakti Vahini v. Union of India (2018) 7 SCC 192.
71. *Id.*
72. Navtej Singh Johar v. Union Of India (2018) 10 SCC.
73. Shakti Vahini v. Union of India, 2018 7 SCC 192.
74. *Supra* note 72.

Act 1954. This would signify a significant step towards ensuring equal rights and legal recognition for LGBTQ couples in India. It reveals that India also moves in line with the libertarian thought of Western countries. Recently, in the case *Supriyo@Supriya Chakraborty*[75], the Indian Supreme Court has declined legal recognition for same-sex marriages. However, two judges, including the Chief Justice of India, have acknowledged that queer couples possess the right to seek recognition for their unions. The Supreme Court, in its understanding, accepts legislative authority on this matter. There was a moment when the court was open to acknowledging its statutory limitations, especially in areas directly impacting state policies. In essence, the court is agreeable to government-led changes in policies related to marriage and its foundations.

The current state of Indian law regarding marriage and family seems to break away from historical teachings. We neglect the strength of the Vedic scholarship to address the issues related to the institution of the family even today. It may be because of this that Justice Arjit Pasayat begins the judgment in *Smt. Seema* v. *Ashwani Kumar*[76] as "The origin of marriage amongst Aryans in India, as noted in Mayne's Hindu Law and Usage, as amongst other ancient peoples is a matter for the Science of anthropology. From the very commencement of the Rigvedic age, marriage was a well established institution, and the Aryans ideal of marriage was very high.[77] But opposed to the limited views, it appears that the law now leans towards letting individuals make choices without being bound by historical legal perspectives on marriage and family matters. In simpler terms, today's legal framework emphasizes individual freedom, allowing people to decide for themselves based on their preferences and choices. This shift marks a change where the law focuses more on personal autonomy and choice in marriage and family matters, departing from traditional viewpoints. Following this perspective, the longstanding objectives and essentials of marriage could become historical relics, succumbing to the influence of individual choices.

75. Supriyo@Supriya Chakraborty &Anr. v. Union of India W.P. (C) No.- 001011/2022.
76. Smt. Seema v. Ashwani Kumar*, 2006 2 SCC 578.*
77. *Id.*

Thus, in reality, the law tends to abandon the grand institution of the family for individual liberty and consciously forgets how essential the institution of family is for a strong social structure. Realising this great reality, the Supreme Court of India, in the case *Ms Githa Hariharan & Anr* v. *Reserve Bank of India*,[78] observes that marriage is the very foundation of civilised society. Once the relation is formed, the law steps in and binds the parties to various obligations and liabilities thereunder. Marriage is an institution in the maintenance of which the public at large is deeply interested. It is the foundation of the family and in turn, of the society without which no civilisation can exist.[79]

The legal approach of this country is undoubtedly influenced by the legal practices of other nations worldwide, as judges in this nation interpret laws in alignment with those of other countries. This approach can be categorized under comparative law and its applications. Even in 2015, the US Supreme Court recognized the legal validity of same-sex marriage.[80] Same-sex marriage is legally valid in the UK through *R (on the application of Steinfeld and Keidan)* v *Secretary of State for International Development*[81] In this case, the Supreme Court of the United Kingdom ruled that the Civil Partnership Act 2004[82] was incompatible with the European Convention on Human Rights[83] because it only allowed same-sex couples to enter into civil partnerships but not marriages. As a result of this ruling, the law was changed to allow same-sex couples to marry in England and Wales, as well as in Scotland and Northern Ireland. Same-sex marriage has legal recognition in other nations in the world like Canada, Germany, France, Spain, Australia, New Zealand, and South Africa. However, the same is not followed in India. Perhaps the reason for this is its solidarity and consciousness with Vedic scholarship regarding marriage and family.

78. Ms. Githa Hariharan & Anr. v. Reserve Bank of India, 1999 2 SCC 228.
79. Smt. Sarla Mudgal v. Union of India, (1995) 3 SCC 635
80. Obergefell v. Hodges 576 U.S. 644 (2015).
81. [2018] UKSC 32
82. Civil Partnership Act 2004, c. 33 (U.K.).
83. European Convention on Human Rights, Nov. 4, 1950, 213 U.N.T.S. 221.

Although Indian courts and judges often lean towards these paradigms from other parts of the world, especially concerning marriage and family matters, the hurdle they face is rooted in the age-old family tenets of Indian culture. As we have observed, the doctrines and principles followed since the Vedic period, which govern marriages in India, are still not fully embraced by post-modern liberalism.

Sacred Bonds and Personal Choices: Analysing the New Paradigms of Marriage

We have addressed the Vedic understanding of the principle of dharma concerning marriage. As we have seen, Dharma doesn't imply perfection or absolute goodness. In the context of Vedic marriage, it is understood in relation to the concept of five Mahayajnas. The significance of these Mahayajnas emphasizes that marriage is a sacramentally bonded relationship between a man and a woman, socially assured and universally connected. It's crucial to note that Mahayajnas confirm a life attuned to others, including marriage connecting parents, siblings, the bride and groom's families, elders, and all living beings. Though one dies, he/she does not perish but remains ever living through their universal merging through the five Mahayajnas in marriage. This merging is not limited to the husband and wife relation but extends to familial matters, connecting with different families and societies. This social affiliation lies in unity with all sectors of society, whether poor or rich and even addresses the needs of beings outside the human regime. Marriage calls upon man and woman to become universal beings by proper and essential linking, uniting sacramentally, deepened by bringing children, essentially promoting generations to come and continuing the progression of the universe. Thus, the roles of men and women are very important as the core characters of this journey. Therefore, the family provided with the above characteristics can be called a 'dharmic' family. The other goals of Vedic marriage, like Praja (having children) and Kama (fulfilling desires), though they involve different kinds of experiences, ultimately come together with the main goal of marriage and work together towards the same aim.

The contemporary conception of the family has evolved in a manner that is both innovative and distinctive from historical interpretations and understanding of marriage, its purpose, and its essentials, especially as taught by Vedic scholarship. This transformation carries profound and far-reaching implications that extend beyond mere imagination. Present-day society has moulded the institution of the family to conform to our desires and preferences without much consideration for the wisdom of the sages, the teachings of the Vedas, or the insights of historical commentaries. In doing so, we have defined and shaped a marriage system influenced by the philosophy of 'individualism,' which prioritizes the individual and their choices above all else. This new approach provides a personalized and self-defined concept of family.

Dharma conclusively defines marriage. On the other hand, when an individual defines marriage according to his or her personal choice, and when that personal choice in no way aligns with what was prescribed in Vedic dharma regarding marriage, it loses its original implications. Instead, it allows individuals to select partners without regard to traditional gender roles, to live a marital life without necessarily having children, and to separate at any time without much difficulty. If these aspects are incorporated into today's marriages, we can consider it as adharma, meaning a departure from the Vedic conception.

The contemporary understanding of marriage differs significantly from what was practised in Vedic times. The fundamental principles and essentials have undergone significant changes. Therefore, this discussion isn't about what's inherently right or wrong, but rather about the shift in the purpose and fundamentals of marriage from Vedic times to the present. In essence, dharma signifies a departure from these Mahayajnas (great sacrifices) without necessarily implying moral judgment.

We can shape our lives according to our desires and aspirations of the present day, but it's essential to reflect on whether such choices contribute

to the greater well-being of the universe. Take, for instance, our utilization of the earth's resources: while we may exploit them for our needs, we must consider whether these actions align with the natural harmony of the world. We might extract from our rivers endlessly, but can we truly thrive without preserving the vital resource of water? As we've observed before, the concept of 'Dharma' concerning marriage and family signifies an intricate order interwoven with the fabric of the cosmos. Marriage transcends individual significance; it serves as a pivotal mechanism for establishing order that reverberates throughout the universe. When viewed through the lens of 'Dharma,' marriage isn't solely about personal gratification; it's a profound institution that shapes the very essence of existence. The profound understanding of 'Dharma' in relation to marriage extends beyond individual desires, serving as the cohesive force that binds all beings in the universe. It fosters a harmonious new order that promotes the well-being of all. However, when marriage becomes solely about individual satisfaction, it falls short of meeting the requirements of 'Dharma' and descends into 'adharma,' disrupting the natural balance of the cosmos.Indeed, while the marriage and family system was well-defined historically, for the sake of renewal, we discarded the traditions of the past and constructed anew. The newly formed structure bears little resemblance to its centuries-old predecessor. While there may have been aspects in need of correction, in the pursuit of renewal, we often sacrificed proven truths.

It's undeniable that the strength and stability of the family unit are crucial for human survival and societal cohesion. In densely populated nations like India, where the population numbers are among the highest globally, expecting the state to cater to every individual's diverse needs from birth to death may not be realistic. Instead, perhaps we should reconsider reinforcing certain societal structures, such as the family, for the greater well-being of our society. By nurturing and preserving the family unit, we can foster a sense of belonging, support, and stability that benefits individuals and society as a whole.

Conclusion

In conclusion, the Vedic understanding of marriage, deeply intertwined with the principle of Dharma and the five Mahayajnas, presents marriage as a sacramental bond that extends beyond the individual to encompass family, society, and the cosmos. This ancient perspective emphasizes the interconnectedness of all beings, where marriage serves as a vital mechanism for promoting harmony and continuity across generations. The roles of men and women within this framework are essential, as they contribute to the progression and well-being of the universe, thus forming a 'dharmic' family. When marriage aligns with these principles, it fosters a cohesive and balanced existence; however, deviations from this understanding may lead to 'adharma,' disrupting the natural order.

In contrast, the contemporary view of marriage has shifted significantly, driven by individualism and personal choice, often diverging from the traditional Vedic principles. While this modern approach provides flexibility and freedom, it may also weaken the foundational values that have historically sustained the family and society. As we adapt to changing times, it is crucial to reflect on whether these new interpretations align with the greater good and consider whether reinforcing the traditional structures of family and marriage might better serve the long-term stability and harmony of society. The risk of 'adharma' in this context is that such changes could undermine the intrinsic balance and unity that marriage, in its dharmic form, seeks to uphold.

The Right to Health Behind Bars: Legal Standards for Indian Prisoners

Rajesh Kumar K T*& Amrutha K **

Introduction

"Convicts are not by mere reason of the conviction denuded of all the fundamental rights which they otherwise possess."[1]

Prisoners are not a homogeneous cross-section of society.[2] According to the Prison Jurisprudence, Inmates should not really give up all of their rights just because they are incarcerated[3]. However, a limitation of liberties persists in facilities that house people under custody.[4] The world's prison population has reached its highest level ever: over 11.5 million people are

* Research Scholar, School of Indian Legal Thought, Mahatma Gandhi University, Kottayam.

** Assistant Professor, Sree Narayana Law College, Poothotta, Ernakulam, Kerala.

1. Sunil Batra v. Delhi Administration (1979) 1980 AIR 1579 (per V.R. Krishna Iyer,J.,concurring) .
2. Alan Berkman, *Prison health: the breaking point* 85(12) Am. J. Pub. Health 1616 (1995)
3. *Basic Principles for the Treatment of Prisoners* (14 December 1990), Office of High Commissioner of Human Rights, https://www.ohchr.org/en/ instruments-mechanisms/ instruments/basic-principles-treatment-prisoners.(last visited Oct 2,2024)
4. Bobbala Jyothirmai, *Rights of Prisoners in India with Respect to Healthcare*, 7(4) J L Stud. and Res., 215, 215-231 (2021).

in gaol, between 2000 and 2022 that number rose by 24 percent.[5] According to the World Prison Brief as of December 31, 2021, the prison population of India was 5,54,034.[6] The COVID-19 pandemic has increased the burden on the already under-resourced prison system, both financially and in terms of human resources, with funds having to be diverted to address the crisis and staff and families facing the risk of contracting the virus. During the COVID-19 outbreak prisoners were mistreated across the globe. This is in addition to the extensive restrictions on several prisoners' rights.[7] As a result of the pandemic, prisoners' rights have been harshly curtailed, like their access to medical care, access to courts, opportunity to contact their family, friends and lawyers, and access to amenities for rehabilitation and other services.

Indian prisons are at high risk of spreading of COVID-19 with their crowded spaces and insufficient health care facilities. Most prisoners in India are uneducated, poor, belong to marginalised or socially disadvantaged groups and have limited knowledge of unhealthy lifestyles in terms of health and practise.[8] They thus represent a separate and vulnerable health group that needs priority attention. The need to control disease in prisons as part of the larger public health agenda and part of primary healthcare is a concept that has yet to catch up in India, while putting aside the fact that the ignorance of prisoner health is a problem of immense human rights concern. The government has a duty to determine the type of health care that is provided in prisons. The quality of life of people in a total institution can

5. *Global Prison Trends 2022*, Penal Reform International, https://www.penalreform.org/global-prison-trends-2022/. (last visited Oct 14, 2024)
6. *World prison brief data*, World Prison Brief, , https://www.prisonstudies.org/country/india. (last visited Oct 14, 2024)
7. UNODC, WHO, UNAIDS and OHCHR, *Joint statement on COVID-19 in prisons and other closed settings*, Who, https://www.who.int/news-room/detail/13-05-2020-unodc-who-unaids-and-ohchr-joint-statement-on-covid-19-in-prisons-and-other-closed-settings.(last visited Oct 13, 2024)
8. National Crime Records Bureau, Prison Statistics 2013.

be improved by healthcare.[9] It can also lead to human rights being fulfilled. India has no specific documentation on prison healthcare. Chapters on healthcare are included in several prison policies. Several international organisations have formulated health care policies in prisons, such as the United Nations and the World Health Organization.

This paper explores the current state of prison healthcare in India and it tries to reach those parts of society that are unable to access even the primary healthcare facilities. This study is based on a critical analysis of India 's prison health standards, including government policies and guidelines and also to examine the Indian Prisoner's health during Covid-19. The article concludes with few recommendations to enhance the healthcare facilities to the inmates. The authors have employed doctrinal sort of research methodology by analysing various governmental and non-governmental documents in international and national to accomplish the goal of the current work.

Prisoner and Significance of Prisoner's Health

The word 'prisoner' means any individual who is held in gaol or prison in custody because he/ she have committed an act prohibited by the law of the land.[10] Anyone who, against their will, is deprived of freedom is also known as a prisoner.[11] It is recognised that conviction for a crime does not reduce the person to a non-person, so that he is entitled to all the rights that the non-prisoner is generally entitled to.[12] Several international organisations, like the United Nations (UN) and the World Health Organization (WHO)

9. C.J. Redden, Candace, *Health as Citizenship Narrative*, 34 Polity 355, 355-70, 2002, DOI:10.1086/POLv34n3ms3235396.(last visited Oct 5, 2024)
10. Jayaram Swathy, *Rights of Prisoners*, https://www.legalserviceindia.com/legal/article-75-Rights -of- Prisoners.html(legalserviceindia.com). (last visited Oct 12,2024)
11. Rick Lines, *The right to health of prisoners in international human rights law*, 4(1) IJOPH 3–53(2008).
12. Mahelaka Abrar, *Rights of prisoners and major judgments on it*, https://blog.ipleaders.in/rights-prisoners-major-judgments/.(last visited Oct.1,2024)

have articulated healthcare policies in prisons.[13] There are Standard Minimum Rules for the Treatment of Prisoners (SMR), initially adopted by the UN Congress in 1955 on the Prevention of Crime and the Treatment of Offenders, were approved in 1957 by the UN Economic and Social Council. On 17 December 2015, the 70th session of the UN General Assembly unanimously adopted a revised version of the Standard Minimum Rules in a resolution known as the Nelson Mandela Rules, have served as the universally acknowledged minimum standards for the treatment of prisoners. The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment was established by the United Nations in 1984. To safeguard young offenders, the United Nations created the "Beijing Rules," or Standard Minimum Rules for the Administration of Juvenile Justice. The Basic Principles for the Treatment of Prisoners and the Body of Principles for the Protection of All Persons under any Form of Detention or Imprisonment were adopted by the United Nations in 1988 and 1990, respectively.[14] There are also documents on how to address the gender-specific health care requirements of women in gaol.[15]

In prisons, there are two compelling reasons for providing good health care.

a. **The first is the significance of prison health in general to public health**. Prison populations have a high prevalence of people with conditions that are severe and often life-threatening. Sooner or later, most inmates will return to the community, bringing back new diseases and untreated conditions with them that may pose a threat to community health and add to the community's disease burden.

13. *Id* at 11.
14. Hernán Reyes, *Health and human rights in prisons*, WHO, https://www.icrc.org/en/doc/resources/documents/misc/59n8yx.htm#a4. (last visited Sept.29,2024)
15. Declaration—*Prison Health as Part of Public Health,* WHO, https://apps.who.int/iris/handle/10665/352130?show=full ((last visited Sept.12,2024), ; Stefan et al., *Prisons and Health,* WHO, https://www.euro.who.int/__data/assets/pdf_file/0005/249188/Prisons-and-Health.pdf. (last visited Sept 12,2024)

There is therefore a compelling interest on the part of society in obtaining health protection and treatment for any ill health from this vulnerable group.

b. **The second reason is the devotion of society to social justice.** There is a strong sense of fair play in healthy societies: those involved in health care provision are committed to reducing health inequalities as a major contribution to health for all. It is a fact that the majority of prisoners, with deficiencies in education and job experience, come from the poorest parts of society. The first time they have had a settled life with adequate nutrition and a chance to reduce their vulnerability to ill health and social failure may be by their admission to prison.

Essential Components of Prison Health Service

The prison service, in spite of its importance to society, is the least known and understood of all public services.[16] A lack of prison health care can threaten public health when it comes to health and add to the health burden on communities. A prison health service can help to avoid an increase in the general burden of disease by helping to build healthy communities. Good prison health services will also lead to a decrease in reoffending after release. The essential components are[17]:

- **Medical Care[18]:**

First, the provision of medical care for inmates in need requires access to fully trained doctors and nurses with access to modern medicines and adequate facilities, such as consultation rooms, treatment rooms and short-stay beds with some supervision by nurses. In order to create a dedicated and specialised health service for people in detention, the recruitment,

16. Stefan et al.,*Id*
17. *Id.*
18. *Id.*

retention and continuing professional training of health care employees should be arranged. Maintaining the professional interest of health workers is essential, which is easier to do when the prison service is not isolated from community health services and has good connexions to specialist health services[19].

A primary care service, along the lines of primary care in the community, is the heart of prison health. Providing such a service within prisons is not easy, as easy access to health clinics is typically not possible. What is possible is for a service to be designed to provide prompt access to an appropriate level of care, with the agreement of the staff and the prisoners kept fully informed. Prison health services must also have good access to specialist and diagnostic health services, including hospitals, because the standards of hospitals serving the outside population are often not met by prison hospitals. Access to prison personnel needs to be carefully planned. It is necessary to make plans to meet this need in advance and make them known to all employees[20].

- **Health protection[21]**

It is the responsibility of governments to ensure health protection, meaning that prisoners in their care are not exposed to serious health threats. A reduction of environmental hazards, a good health screening service, attention to immediate health needs, adequate nutrition, exercise in the fresh air, if possible, and two important additions to the prison service are the main steps in protecting health: a method of using peer groups in what some prisons have developed as a listening service to attract attention where possible[22].

19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.*

- **Health promotion**[23]

The promotion of health is now considered an essential part of primary health care. An important part of promoting health remains the provision of health information in a manner that prisoners can understand. But this, on its own, is not enough. The attitudes of prisoners to health should be evaluated and encouraged and assisted in changing unhealthy behaviour, such as tobacco use, drug abuse and alcohol abuse. Prison authorities should ensure that health promotion services are available and that deficiencies can be rectified in gaol, such as any necessary immunizations. Prison authorities should be aware of the pressure on staff from prisoners with special needs. Support for staff and opportunities to discuss particular issues should be part of the service provided[24].

- **Health resilience**[25]

The resilience of health can be an important part of the process of rehabilitation and resettlement. Only in this way, prison health care play a role in reducing inequalities, reducing recidivism and helping to create a better and healthier community[26].

Health Rights of Prisoners: International Perspective

According to the International Covenant on Economic, Social, and Cultural Rights ,the specific guidelines outlined in the UN Standard Minimum Rules for the Treatment of Prisoners and the Basic Principles for the Treatment of Prisoners, prisoners and detainees have a right to health.[27] The four guiding principles of availability, accessibility, acceptability, and quality should apply to this right. [28] Everyone should have equal access to

23. *Id.*
24. *Id.*
25. *Id.*
26. *Id.*
27. Rick Lines, *supra* note 11.
28. Penal Reform International, *Penal Reform International Penal Reform Briefing No*

prison medical treatment that is provided in a way that respects medical ethics and is culturally acceptable.[29] Some of the main international provisions dealing specifically with prisoners' health rights are below:

The enjoyment of the highest attainable standard of physical and mental health is a human right.[30] All prisoners should be given a medical examination as soon as they have been admitted to a prison or place of detention.[31] Any necessary medical treatment should then be provided free of charge.[32] Prisoners should generally have the right to request a second medical opinion.[33] Prisoners and all detained persons have the right to the highest attainable standard of physical and mental health.[34] Prisoners should have free access to the health services available in the country.[35]

Decisions about a prisoner's health should be taken only on medical grounds by medically qualified people.[36] The medical officer has an important responsibility to ensure that proper health standards are met. He or she can do this by regularly inspecting and advising the director of the prison on the suitability of food, water, hygiene, cleanliness, sanitation,

---

2, 2007(2) https://cdn.penalreform.org/wp-content/uploads/2013/06/brf-02-2007-health-in-prisons-en_01.pdf. (last visited Sept 12,2024)

29. *CESCR General comment no.14: The right to the highest attainable standard of health(article12)*,OHCHR, *General comment No. 14: The right to the highest attainable (ohchr.org)*.)
30. International Covenant on Economic, Social and Cultural Rights ,16 December 1966, art 12.
31. *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, General Assembly Res. 43/173 (1988), https://www.ohchr.org/sites/default/files/ Documents/ProfessionalInterest /bodyprinciples.pdf (last visited Sept 24,2024); United Nations Standard Minimum Rules for the Treatment of Prisoners (SMR), ESC Res.663 C (XXIV) 31 July 1957, Rule 24.
32. *Id*.at. Principle 24.
33. *Id*.at. Principle 25.
34. Universal declaration on Human Rights UDHR(December.10,1948), Article 25; The International Covenant on Economic, Social and Cultural Rights ICESCR (December.16,1966), art 12.
35. *Supra* note 3, at. Principle 9.
36. Standard Minimum Rules for the Treatment of Prisoners (SMR), *Supra* note 31, Rule 25.

heating, lighting, ventilation, clothing, bedding and opportunities for exercise.[37] Every prison should have proper health facilities and medical staff to provide for a range of health needs, including dental and psychiatric care. Sick prisoners who cannot be treated in the prison, such as prisoners with mental illness, should be transferred to a civilian hospital or to a specialized prison hospital.[38]

All prisoners shall have access to a qualified dental practitioner.[39] Services for psychiatric diagnosis and, if appropriate, treatment shall be available at every prison.[40]Prisoners who are insane shall not be detained in prisons, but transferred as soon as possible to mental institutions.[41] Prisoners suffering from other mental diseases shall be treated in specialized institutions under medical management.[42] During their stay in a prison, insane and mentally ill prisoners shall be supervised by a medical officer.[43] It is important that health care for prisoners be provided by at least one qualified medical officer.[44] Medical personnel have a duty to provide prisoners and detainees with health care equal to that which is afforded to those who are not imprisoned or detained.[45]

The primary responsibility of health-care personnel is to protect the health of all prisoners.[46] Health-care personnel shall not commit or give their permission for any acts which may adversely affect the health of

37. *Id*, Rule 26.
38. *Id*, Rule 22 (1) and (2).
39. *Id* ,Rule 22 (3).
40. *Id* ,Rule 22 (1).
41. *Id*, Rule 82 (1).
42. *Id*, Rule 82 (2).
43. *Id,* Rule 82 (3).
44. *Id*, Rule 22 (1).
45. *Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (December 18,1982), Principle 1.
46. *Id*. at. Principles 1 to 6.

prisoners.[47] All prisoners shall be provided with facilities to meet the needs of nature in a clean and decent manner and to maintain adequately their own cleanliness and good appearance.[48]All prisoners shall have at least one hour's daily exercise in the open air if the weather permits[49]

The above mentioned are some of the International Human Rights Law, in which the State is obliged to uphold and ensure observances of basic human rights of prisoners[50].

The Joint United Nations Programme on HIV/AIDS (UNAIDS), the World Health Organization (WHO), the United Nations Office of the High Commissioner for Human Rights (OHCHR), and the United Nations Office on Drugs and Crimes (UNODC) released a joint statement on COVID-19 in prisons and other closed settings on May 13, 2020.[51]

The failure of States to take effective action to stop COVID-19's proliferation in jails was unequivocally noted by the UN Human Rights Council. The UN further stated that this constituted a violation of Articles 6 (right to life) and 9 (right to liberty) of the 1996 International Covenant on Civil and Political Rights (ICCPR).

Prisoner's Right to Health under the Indian Constitution

The concept of prisoner rights has long been suppressed and has only recently emerged in public discourse. A number of fundamental rights are given to citizens by the Constitution of India.[52] The Indian State is a

47. *Id*.at. Principles 1 to 6.
48. Standard Minimum Rules for the Treatment of Prisoners (SMR), *supra* note 31, Rule 12 to 16.
49. *Id,* Rule 21.
50. *Human Rights and Prisons, A Pocketbook of International Human Rights Standards for Prison Officials*, OHCHR, 0442541_CORRPocketBook11Add3.qxp (ohchr.org). (last visited June 14,2024)
51. Aishwarya Pawar and Pannaga Vijaykumar, *Right to Healthcare for Prisoners during COVID-19: Overcrowded and Suffocated,* Academike (2021) https://www.lawctopus.com/academike/prisoners-right-covid/. (last visited Sept.12,2024)
52. *Id.*

signatory to different international human rights instruments, the prospects for ensuring adequate healthcare in Indian citizens have been integrated into these guidelines and recommendations which is equally applicable to all prisoners. The Supreme Court has held that detention conditions can not be extended to the deprivation of fundamental rights.[53] All rights enjoyed by free citizens are retained by prisoners, with the exception of those necessarily lost as an incident of confinement.[54] In addition, under Articles 14, 19 and 21, the rights enjoyed by prisoners, although limited, are not static and will rise to human heights when a situation arises.[55]

The right to health is a key component of human dignity and wellbeing. Prisoners in India, regardless of their conditions of confinement, have basic human rights, including the right to health, under the constitution. The Indian Constitution, coupled with judicial interpretations, has accorded major recognition to prisoners' right to health, guaranteeing that they are treated with dignity even while in imprisonment.

a) Article 21: Right to Life and Personal Liberty

The right to life and personal liberty are guaranteed by Article 21 of the Indian Constitution. The right to health has been interpreted by the Supreme Court of India[56] to encompass the right to life as well as the right to health. All citizens, including those incarcerated, have this right. Thus, the state bears the responsibility of guaranteeing that convicts have access to sufficient medical attention, wholesome food, and hygienic housing circumstances throughout their incarceration.

b) Articles 39(E) And 47: Directive Principles of State Policy

These articles have a substantial impact on the policy framework around prisoners' rights to health care, although not being legally enforceable.

53. State of Maharashtra v. Prabhakar Pandurang Sanzgir, AIR 1966 SC 424
54. India Const.,arts. 14, 19,21, 22,39(e),47.
55. Charles Sobaraj v. Suptd., Central Jail Tihar, AIR 1978 SC 1514
56. AIR 1989 SC 2039

Article 39(e) requires the state to make sure that no one's health or strength is misused, including those who are detained, and that they be shielded from cruel treatment.

The state is required by Article 47 to enhance public health, which includes keeping prisons clean and offering medical care to inmates.

Judicial Recognition of the Right to Health for Prisoners

Indian courts have been indispensable in widening the extent of prisoners' right to health, highlighting that, while being robbed of their liberty, inmates retain their fundamental constitutional rights, including the right to life and health under Article 21. The judiciary has taken aggressive steps to ensure that inmates are treated with dignity and that the state meets their healthcare needs. Key decisions have paved the way for the recognition and protection of human rights.

a) Article 21 and Judicial Expansion

The Indian courts' interpretation of Article 21 has greatly expanded the definition of the right to life to encompass the right to health. The fundamental right to life, which encompasses the right to humane treatment and access to healthcare, is not forfeited by being incarcerated, as the courts have repeatedly determined.

In *Hussainara Khatoon* v. *State of Bihar*,[57] the Supreme Court acknowledged the right to a speedy trial as a component of Article 21 and expanded this principle to encompass the right to humane circumstances and healthcare in jails, all while addressing the appalling conditions of undertrial detainees.

In *Sunil Batra* v. *Delhi Administration*[58], the Supreme Court interpreted Article 21 to mean that prisoners could not be neglected, tortured, or kept

57. AIR 1979 SC 1369
58. AIR 1978 SC1675

in cruel conditions. The Court underlined that prison administrators have a duty to guarantee inmates receive proper medical care and are not exposed to harm that is physical or mental.

b) Acknowledgment of Rights to Mental and Physical Health

The Indian judiciary has recognized that prisoners are susceptible to mental diseases because of the severe conditions of confinement, and has expanded the scope of constitutional protections to encompass mental health in addition to physical health.

In *Charles Sobhraj* v. *Central Jail, Tihar, Superintendent*[59] the Supreme Court decided that, inmates should to have access to quality medical care, including mental health therapy. It was deemed a violation of Article 21 to deny such care.

In *State of Maharashtra* v. *Sheela Barse*[60] the Court established criteria in this case pertaining to the treatment of female convicts to guarantee that these inmates, especially those with mental health illnesses, received appropriate medical attention. The need to protect vulnerable populations' health and dignity while they are incarcerated was brought to light by this verdict.

c) Maintaining Dignity and Avoiding Torture in Custodial Contexts

The subject of torture and other cruel treatment of inmates has also been taken up by the courts, which have reiterated that such practices are a clear breach of the inmates' right to health and dignity.

In case of *D.K. Basu* v. *State of West Bengal*[61] the Supreme Court released recommendations aimed at preventing torture and mistreatment of inmates. The Court determined that Article 21 was breached by any form

59. Charles Sobaraj v. Suptd., Central Jail Tihar, AIR 1978 SC 1514
60. Sheela Barse v. State of Maharashtra, AIR 1983 SC 378
61. D.K. Basu v. State of West Bengal, (1997) 6 SCC 642

of custodial brutality, including disregarding a prisoner's medical needs. The importance of protecting inmates' health and dignity at all costs was underlined by this case.

In *Ramamurthy* v. State of Karnataka[62] the court noted that overcrowding and unsanitary conditions in prisons frequently result in violations of prisoners' rights. It concluded that the state must maintain the standards of health care and hygienic environments.

In *State of the A.P. vs. Challa Ramkrishna Reddy*,[63] it was held that a prisoner is entitled to all his fundamental rights, unless his freedom was constitutionally restricted. The provisions relating to the rights of prisoners are not expressly provided in the Constitution of India, but in the case of *T.V. Vatheeswaran v. State of Tamil Nadu*,[64] it was held that prisoners have rights under Articles 14, 19 and 21. Apart from these constitutional provisions, the National Human Rights Commission (NHRC) in its report of 1993[65] has also identified some problem in jail. [66]

In *Rasikbhai Ramsing Rana* v. *State of Gujarat*[67], the Gujarat High Court ruled that the right to medical care is one of the fundamental human rights that should be guaranteed to everyone. The court further instructed the relevant jail staff to provide the inmates with suitable mental and physical health care if they were afflicted with any illness and also directed the prison

62. Ramamurthy v. State of Karnataka, AIR 1997 SC 1739
63. State of the A.P. v. Challa Ramkrishna Reddy, AIR 2000 SC 2083
64. Rasikbhai Ramsing Rana v. State of Gujarat AIR 1983 SC 361
65. *National Human Rights Commision Annual Report* (1993-94), NHRC, https://nhrc.nic.in/publications/annual-reports. (last visited Oct 10,2024)
66. *Id*. "The report stated that disturbing prison conditions and violations of basic human rights such as custodial deaths, physical violence / torture, police surplus, degrading treatment, custodial rape, poor food quality, lack of water supply, poor support of the health system, failure to produce prisoners to the court, unjustified prolonged imprisonment, forced labour and other problems identified by the apex court have led to judicial activism."
67. Rasikbhai Ramsing Rana v. State of Gujarat, 1997 LawSuit(Guj) 641 (India).

authorities to take proper care of ailing convicts.[68] In that case the petitioners convicted of serious illnesses in the Central Prison, Vadodara, were deprived of proper and immediate medical treatment because of the lack of prison escorts needed to take them to the hospital. The High Court issued instructions to the State Government in 2005 that all central and district prisons should be equipped with ICCU, pathology laboratories, specialist doctors, adequate staff, including nurses, and the latest medical treatment instruments in a *suo moto* writ.[69]

The right to health of prisoners under the Indian Constitution has grown in recent years, with the judiciary playing a key role in recognizing it as a fundamental right. The Indian Constitution guarantees numerous essential rights to convicts, including Articles 14, 19, and 21, which protect their right to life, dignity, and health. The courts have construed Article 21 to encompass the right to health, requiring the state to ensure proper medical care, food, and hygienic conditions in prison. Additionally, while Articles 39(e) and 47 are not enforceable, they have an impact on measures aimed at protecting inmates from mistreatment and enforcing public health standards. The state has a duty to prevent torture in custody and maintain the dignity of inmates. Through landmark cases, the courts have broadened the meaning of the right to life to encompass humane treatment, medical care, and mental health support for prisoners.

Lack of predominance for Prisoner's Health Rights in Indian Legal System

There are no exclusive documents relating to health care in prisons, in India, either at the national level or at the state level. In the form of chapters in prison policies and documents, health care issues have been marginally covered.[70] Many prison reform committees such as the All India Jail Manual

68. *Id.*
69. Sanchita kadam, *Does India uphold Prisoners' Right to Health?,* https://sabrangindia.in/does-india-uphold-prisoners-right-health/. (last visited Oct 10, 2024)
70. Debolina Chatterjee and Suhita Chopra Chatterjee, *Food in Captivity: Experiences*

Committee in 1957,[71] All India Committee on Jail Reforms under the chairmanship of Mr. Justice A. N. Mulla in 1983,[72] The National Police Commission (1977-80),[73] the Uniform model prison and model police manuals in 1987,[74] The National Prison Reform and Correctional Administration Policy (2007)[75] are some of the commissions and committees that has been formed over the years to restructure management and provide prisoners with all basic facilities[76]. There has, however, been no follow-up to such recommendations. Due to budget constraints, a lack of staff and a general attitude towards prisoners, state correctional departments have failed to comply with these guidelines. From various perspectives, health in prisons has been addressed[77].

---

of Women in Indian Prisons 98(1)The Prison Journal 40-59 (2018) https://doi.org/10.1177/0032885517743444 (last visited Sept.10,2024)

71. All India Jail Manual Committee Report 1957-59, "report stated that the institution should be a centre of correctional treatment, with a major emphasis on crime reduction and reform."
72. All India Jail Manual Committee Report 1957-59, submitted "a report proposing several prisoner rights, such as the Right to Human Dignity, the Right to Minimum Needs, the Right to Communication, the Right to Access to Law, the Right to Arbitrary Prison Punishments, the Right to Significant and Profitable Employment, the Right to Release on due date. The Committee has also suggested that a national policy on prisons is immediately needed".
73. National Police Commission (1977-80), "investigated issues such as arrest, detention in custody, women's interrogation and investigative delay. It also made broad proposals to amend laws and procedures to reduce delays in the investigation and trial phases".
74. National Expert Committee On Women 1987, "known as the uniform model prison and model police manuals, indicated rights, standards and facilities to be maintained specifically for women in detention. It is important to note that this committee has made important proposals on the rights of women inmates who are pregnant, as well as on child birth in prison, medical examinations, education and recreation, child nutrition and pregnant and nursing mothers."
75. National Prison Reform And Correctional Administration Policy (2007), "called for the improvement of prison infrastructure and made some prisoner-friendly recommendations focusing on rehabilitation".
76. *Supra* note 70.
77. *Supra* note 70.

- One is a life-course perspective that takes into account differences in health that exist due to the age, gender, and living conditions of prison inmates prior to imprisonment.[78]
- Another approach to health in prison is from the public health point of view, in which it is argued that since prisoners are eventually released to communities, prisons are intended to provide safe and healthy environments and ensure prevention, early intervention, and disease containment.[79]

Prison health care is also upheld in order to protect the fundamental human rights of individuals. No crime should be punished in a cruel, inhuman or degrading manner. As per community standards, prisoners are entitled to healthcare.[80] The draw backs of the Indian Constitutional or other legislative policies concerning to the prisoner's health care is as follows:

- None of the above-mentioned Prison reform committees have addressed health issues of prisoner's sufficiently, particularly for those who require specialised care, such as women and elderly people.
- No separate recommendations for addressing the dearth of doctors in a number of prisons across the country, for preventive as well as curative measures for inmates suffering from HIV or AIDS, for health problems of old age.
- Lack of guidelines for prescribing special diets for specific categories of prisoners.

---

78. J.W Marquart et. al., *Health Condition and Prisoners: A Review of Research and Emerging Areas of Inquiry,* 77(2)The Prison Journal 184-208, (1997).
79. Rallie Murray, *Invisible Bodies: The Politics of Control and Health in Maximum Security Prisons*, Trans-Scripts 3(2013).
80. Franklin E. Zimring and Gordon J. Hawkins, The Scale of Imprisonment, (Chicago University Press 1993); Melvin Delgado and Delgado Humm-Delgado, Health and Health Care in The Nation's Prisons: Issues, Challenges, And Policies, (Rowman & Littlefield Publishers, Inc., 2009).

- No provision concerning the management and control of the epidemics like the Covid 19.

The approval of a Prison Manual in 2016 is a recent advance in prison reforms in India. It is based on the recommendations of the Standard Minimum Rules of 1957 for the Treatment of Prisoners, which were revised and adopted in 2015 as the Nelson Mandela Rules, to which India is a party. It incorporates many of the best international recommendations and references. Instead of the prison department, it recommends bringing medical services within the domain of the State Medical Services/ Health Department. The specific provisions for women prisoners, their safety and reform are another important section of the manual.[81] Regrettably, little has altered. The basic issues of relevance to prison administration in India have not been affected by any worthwhile reforms.[82]

Health Status of Prisoners in National Crime Records Bureau (NCRB) Prison Statistics

The National Crime Records Bureau (NCRB) has released a number of annual statistical reports, the most recent of which being Prison Statistics

81. "The manual stipulates comprehensive health screening for women prisoners, including tests to determine the presence of sexually transmitted or blood-borne diseases, mental health issues, drug dependence, etc. It also recommends Sensitization and training of employees on gender and sexual violence issues; Educating women on preventive health care measures; Enabling adequate counselling and treatment for those suffering from psychological disorders; Focused after-care and rehabilitation measures to facilitate reintegration of women into society; Restrictions on punishment for pregnant women by close confinement; Women-focused counselling programmes, particularly those who have been victims of abuse, focus on removing any further harm that imprisonment may have to a female inmate. It also includes provisions for holistic child development, including the provision of food, medical care, clothing, education and recreational facilities; pre-natal and post-natal care for pregnant women; child nutrition requirements and the provision of clean drinking water; a well-equipped kindergarten and a kindergarten. The challenges ahead will be to gear up at the state level for the implementation of these rules."
82. Meena Khoda*, Violations of Human Rights of Prison Inmates,*https://www.researchgate.net/publication/379956757_VIOLATION_OF_HUMAN_RIGHTS_OF_PRISON_INMATES_IN_INDIA (last visited Sept.15,2024)

India 2021.[83] Chapter 8 of the report contains the Death and Illness in Prison. The below table (Table 1.1) depicts statistical analysis of the death and illness of prisoners from 2015-2021.

Table 1.1: Statistical Analysis of the Death and Illness of Prisoners From 2015-2021

Year	Total No. of Deaths in Prisons	No. of Natural Deaths	No. of Un-natural Deaths (incl. Suicide)
2015	1584	1469	115
2016	1655	1424	231
2017	1671	1494	133
2018	1839	1638	144
2019	1764	1538	160
2020	1887	1642	189
2021	2116	1879	185

The table 1 illustrate that number of deaths in prisons raised by 7.0 percent from 1,887 in 2020 to 2116 in 2021. 1,879 more people died from natural causes in 2021 compared to 2020, an increase of 14.4%. A total of 1,796 prisoners died from disease and 83 prisoners' aged-related deaths out of the 1,879 natural deaths reported by the States.[84]

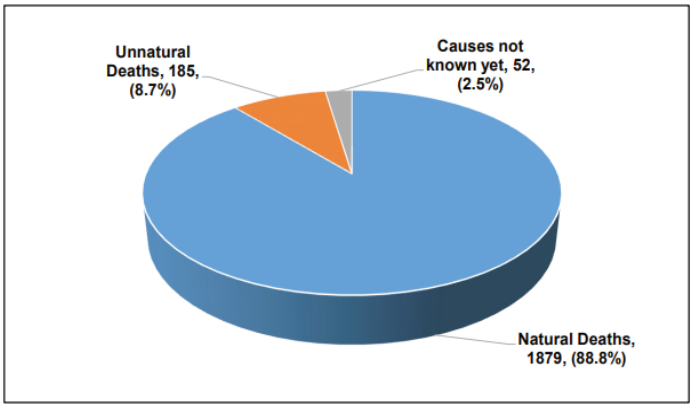
The below chart 1.1 shows that Natural deaths accounted for 88.8% (1,879 out of 2116) and Un-Natural deaths accounted for 8.7% (185 out of 2116) of the total deaths. The below chart 1.2 reveals that there were 83 deaths due to ageing, and 1,796 deaths from illness out of the 2116 natural deaths.[85]

In chart 1.3, majority of the 1879 illnesses that resulted in deaths were heart problems (493), lung-related illnesses (294), kidney issues (78),

83. National Crime Records Bureau, Prison Statistics India 2021, https://www.data.gov.in/catalog/prison-statistics-india-psi-2021 (last visited Oct 4, 2024)
84. *Id*.at. Chapter 8.
85. *Id.*

tuberculosis (TB) (83), cancer (103), liver-related illnesses (76), brain haemorrhage (57) and HIV (42) [86]

Chart 1.1

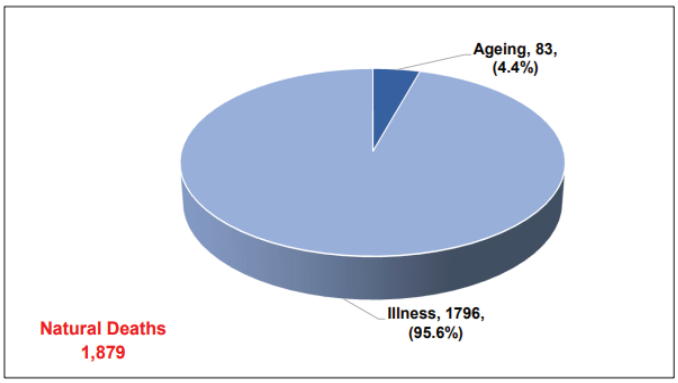


- As per data provided by States/UTs.

Deaths of Prison Inmates due to Natural & Un-natural causes during 2021

Source: *Chapter 8, NCRB Statistics 2022*

Chart 1.2



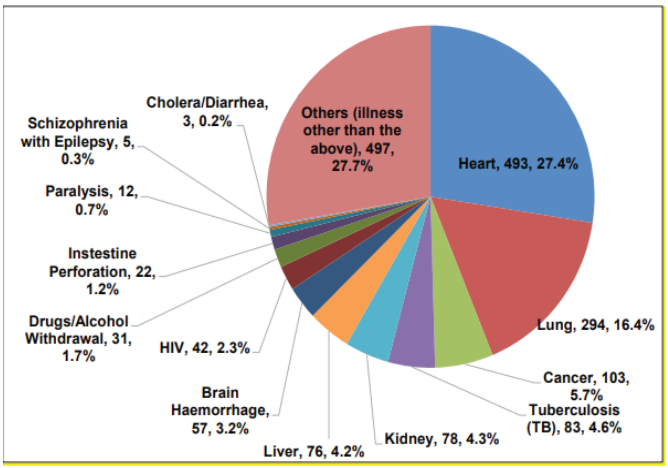
- As per data provided by States/UTs.

Deaths of Prison Inmates due to Natural Causes during 2021

Source: *Chapter 8, NCRB Statistics 2022*

86. *Id.*

Chart 1.3



Source: *Chapter 8, NCRB Statistics 2022*

Of the 1,542 deaths that were attributable to illness, 480 (31.1% of the total) were caused by heart disease, and 224 (14.5%) by lung diseases. In prisons, there were 160 unnatural fatalities in 2019 and 189 in 2020, a rise of 18.1%.

Thus, it is evident from all the above statistics that most of the Indian prisoners lacks proper health care.

Reason for Poor Health Care

Human rights organizations, courts, and studies have all addressed a number of systemic concerns that contribute to the substandard healthcare conditions that Indian prisoners face. Below are some of the primary reasons for the poor health care in prison[87]

87. Sameeksha Sharma, *Health and Safety of Prisoners in India*, 1 IJIIMR. 40, 40-46 (Feb. 2019).

a. Overcrowding:

Overcrowding is a major problem in Indian prisons. India has a large number of prisons that run much over capacity, which strains available resources and restricts access to healthcare. According to the National Crime Records Bureau (NCRB), overcrowding in Indian prisons contributes to filthy conditions and a higher chance of communicable diseases, both of which worsen health issues.

b. Unsatisfactory Living Conditions:

Overcrowding in Indian prisons leads to unsatisfactory living conditions, despite earlier reforms focusing on diet, clothing, and cleanliness. A 1997 commission report on Tihar Central Jail revealed that 10,000 inmates faced severe health hazards, overcrowding, poor sanitation, and a shortage of medical staff. In Karnataka, overcrowding exacerbates hygiene problems, with prisons often housing double their capacity and lacking sufficient water and toilet facilities. Prisoners are locked up for 23 hours a day in unsanitary conditions, with inadequate access to bathing, water, and sunlight. The Public Works Department's neglect, coupled with insufficient government funding, has led to delayed maintenance and repairs in prisons across the state. While improving prison conditions doesn't mean making life easier for inmates, it does call for humane and sensible treatment.[88]

c. Poor Spending on Healthcare and Welfare:

One of the most prevalent concerns reported by prisoners across the state was the absence of timely health care. For three-year terms, the Department of Medical Health deputes medical personnel to prisons. The allocation of doctors to prisons is again low on their priority list, and prisons are not preferred workplaces for doctors, like the vast majority of the public in general.

88. Kiran R. Naik, *The Problems of Prisoners: An Analysis*, 6(2) Int'l J. Res. & Analytical Rev. 267, 267-87 (2019).

In 2009, Indian prisons spent an average of Rs.17,725.90 per inmate, mainly on food, medical care, and welfare activities, in contrast to the much higher costs in the U.S. New prisoners often face cramped conditions, anxiety, and poor mental health care, as there are few psychiatric counselors available. Issues like inadequate nutrition, long lock-up hours, unhygienic living conditions, and illegal activities inside barracks contribute to the deteriorating physical and psychological health of inmates.

d. Shortage of Staff and Poor Training

Indian prisons face a severe staff shortage, with only 40,000 personnel against a sanctioned strength of 49,030, resulting in a 1:7 ratio between staff and inmates, compared to 2:3 in the UK. Medical staff shortages are particularly concerning, with only 42% of the sanctioned 83 medical posts filled, leaving just one medical personnel for every 144 inmates. Many district prisons lack resident doctors, relying on visiting doctors who rarely visit, as seen in places like Raichur and Mangalore. Prisoners often face long waits for treatment, and doctors are generally uninterested in prison assignments due to low priority and lack of incentives from the government.[89]

e. Lack of Legal aid and Overstays

Access to free legal aid is essential for the weaker sections of society, as emphasized by Article 39-A of the Indian Constitution. The Supreme Court has recognized the right to legal aid as implicit in Article 21, highlighting that speedy trials and legal representation are fundamental rights. However, many prisoners, particularly those from economically disadvantaged backgrounds, lack legal representation and are often unaware of their rights to legal aid. Despite the establishment of the Legal Services Authority Act in 1986 and rules implemented by the Government of Karnataka, the reality is that hundreds of prisoners remain without legal representation. Many are uninformed about their entitlement to legal aid,

89. *Id.*

with insufficient outreach or resources in prisons. Surveys indicate a lack of awareness and belief in the effectiveness of the legal aid system, leading to frustration among inmates, who often stop submitting requests or complaints due to unaddressed grievances.[90]

f. Impact of Prison Infrastructure and Conditions

Prison conditions in India lead to significant physical and mental suffering for inmates due to overcrowding, poor sanitation, lack of proper bedding, and restricted movement because of staff shortages. Women inmates often face indignities, like being paraded through men's wards due to improper segregation. Many prisoners don't receive timely medical care or the opportunity to appear in court, and parole or early release is often denied unfairly. While some NGOs offer rehabilitation, most inmates leave prison without the support needed to avoid reoffending. Good leadership in prisons can improve literacy and provide education, helping prisoners better reintegrate into society.[91]

Human rights organizations, courts, and studies have identified systemic issues contributing to the poor healthcare conditions faced by Indian prisoners, including overcrowding, unsatisfactory living conditions, inadequate healthcare spending, staff shortages, lack of legal aid, and the overall prison structure and function. Overcrowding leads to filthy conditions and a higher risk of diseases, while poor living standards result in severe health hazards. Healthcare spending is insufficient, with a low doctor-to-inmate ratio and inadequate medical staff, resulting in long waits for treatment and poor mental health care. Many prisoners lack access to legal aid and remain unaware of their rights, which exacerbate their suffering. Additionally, prisoners often endure physical and mental suffering due to inadequate facilities, limited movement, and the absence of supportive rehabilitation programs upon release.

90. *Id.*
91. *Id.*

Analysis of Prison Reforms Committee Reports with Reference to Health Conditions

The health and welfare of prisoners has been the topic of several important reports that have influenced jail reforms in India:

1) **The All-India Jail Manual Committee** (1957–59)[92]: This committee attempted to standardize jail management across India by addressing a variety of issues such as health care, cleanliness, and prisoner treatment.

- Health Standards: Stressed the importance of upholding minimal health requirements in prisons, such as requiring detainees to undergo routine medical examinations.
- Medical Infrastructure: It was suggested that jails build medical facilities and hire licensed physicians to take care of the health needs of the prisoners.

2) **The All-India Committee for Jail Reforms** (1980-83, or Mulla Committee)[93]: This committee was charged with investigating the conditions in Indian jails and presenting recommendations for reform, particularly in light of overcrowding and health concerns. Overcrowding: Identified overcrowding as a fundamental issue, leading to poor health conditions and a higher prevalence of communicable diseases.

- Access to Medical Care: Called for the establishment of health care units in prisons, with adequately trained medical personnel to ensure timely medical attention.
- Mental Health: Highlighted the importance of addressing mental health issues and recommended the inclusion of mental health professionals in prison staff.

92. All India Jail Manual Committee Report (1957-59).
93. All India Jail Manual Committee On Jail Reforms Report, (Mulla Committee 1980-83).

3) **The National Expert Committee on Women Prisoners (1987)**[94], often known as the Krishna Iyer Committee: This group focused primarily on the needs and conditions of female prisoners, highlighting the importance of gender-sensitive methods to prison health care and rehabilitation.

- Women Prisoners' Health: This group highlighted the unique health concerns of female prisoners, lobbying for improved medical care and hygiene standards.
- Sanitation and Hygiene: Emphasized the significance of upgrading sanitation facilities in women's prisons to avoid health issues.
- Pregnancy and labor: It is recommended that pregnant detainees receive specialized health treatment, as well as facilities for labor and after care.

Model Prison Manual, 2016

In accordance with international human rights norms, the Model jail Manual, 2016 seeks to standardize and modernize jail management throughout India. Ensuring that convicts receive humane treatment, encouraging rehabilitation, and assisting with their reintegration into society are important goals.

Important clauses:

- Health Care Facilities: Requires that prisons have sufficient medical facilities, such as hospitals or medical units for both routine and emergency care.
- Regular Medical Check-ups: Supports routine evaluations of prisoners' health.

  Mental Health Care: Places emphasis on the involvement of mental health specialists and the need for routine mental health evaluations.

94. National Expert Committee On Women Prisoners Report, Krishna Iyer Committee, (1987).

- Sanitation and Hygiene: Highlights the importance of having a clean and hygienic home.
- Access to Treatment: Ensures prompt access to medical treatment and essential medications

Numerous States initiated changes to their jail health care systems based on the suggestions made by the Mulla and Krishna Iyer Committees. The results had an impact on resulting in the Prisons (Amendment) Act, 1989, which attempted to enhance prisoner living quarters and medical facilities. Numerous correctional facilities have set up specialized medical departments to guarantee that prisoners can receive medical care. A lot of work has gone into educating medical professionals and prison workers on emergency protocols, mental health issues, and health care protocols. The Model Prison Manual (2016) marks a substantial attempt to improve health care in Indian jails, necessitating coordinated efforts and effective execution to protect inmates' rights and welfare.

Covid 19 and Indian Prisoner's Right to Health

The right to health is not expressly a fundamental right laid down in India's Constitution. However, according to the Supreme Court of India 's judgement in *Paschim Bangal Khet Mazdoor Samity & Others v. State of West Bengal & Others*,[95] under Article 21 of the Constitution of India, the right to health care facilities is an essential part of the right to life. It is now essential to analyse whether the fundamental right to health is as accessible to a prisoner as it is to the non-prisoners. In its decision in *Charles Sobhraj* v**.** *The Superintendent, Central Jail, Tehar, New Delhi*,[96] the Supreme Court of India held that imprisonment does not "spell farewell to fundamental rights." Thus, prisoners also have access to all fundamental rights available

95. Paschim Bangal Khet Mazdoor Samity & Others v. State of West Bengal & Others, (1996) 4 SCC 37
96. Charles Sobhraj v. The Superintendent, Central Jail, Tehar, New Delhi, AIR 1978 SC 1514

to ordinary citizens. Specifically, the Court held that failure to provide inmates with adequate health care facilities would lead to a violation of their fundamental rights, thereby attracting court remedies.

Section 4 of the Prisons Act, 1894, in addition to the Indian Constitution, provides for the supply of sanitary accommodation facilities for prisoners. At the same time, Section 7 of the same legislation provides for the provision of shelter and safe custody facilities for inmates who are found to exceed the prison capacity of a prison. Under the Prisons Act, at the time of admission to prison, a prisoner must necessarily be inspected by a medical practitioner.[97] In the case of epidemics, the Model Prison Manual, 2016 provides extensive guidelines for prisons. In cases of an epidemic breakout, the Prison Manual considers permanent sheds of segregation for every infected prisoner, avoiding overcrowding in isolation wards and cells, and treating the clothing and infected barracks of the patient.

According to information that is currently available, vaccination programmes for inmates had started in 120 countries as of September 30, 2021.[98] As per the available statistics available in India, it has been announced that 1,65,108 convicts nationwide have received their first dosage of the COVID vaccine as India steps up its immunisation campaign. 1,87,453 doses, including 22,345 second doses, have been given to convicts. According to government figures, 4,78,600 convicts are being held in various jails around India.[99]

In the Suo Motu Writ Petition (C) No.1/2020[100], the Supreme Court of India addressed the contagion of the COVID-19 virus in prisons, highlighting

97. Akash Anurag and Aniket Raj ,*COVID19-IX: Rights of Prisoners During a Pandemic* https://lawschoolpolicyreview.com/2020/04/25/covid19-ix-rights-of-prisoners-during-a-pandemic/.(last visited Sept.10,2024)
98. *Supra* note 5.
99. Suchitra Karthikeyan, *1,65,108 Prisoners Across India Given First COVID Jab, Reveals Centre; Delhi Ranks Lowest* https://www.republicworld.com/india-news/general-news/165108-prisoners-across-india-given-first-covid-jab-reveals-centre-delhi-ranks-lowest.html. (last visited Sept 16.2024)
100. In Re: Contagion of Covid 19 Virus in Prisons, Suo Motu Writ Petition(C) No.1/2020.

urgent concerns related to the health and safety of inmates. The proceedings involved various applications seeking permissions and directions regarding the management of health crises within prisons, exemptions from filing affidavits, interventions from interested parties, and requests for modifications of court orders. The court's deliberations were driven by the need to ensure adequate healthcare and protective measures for prisoners amidst the pandemic.

The Rights of Prisoners during Pandemic under International Law *vis-a-vis* Obligation of the Government of India

In the Concluding Observations on Moldova, the United Nations Human Rights Committee made clear that a state's failure to take positive steps to prevent the spread of infectious diseases in prison would constitute a violation of Article 6 (right to life)[101] and Article 9 (right to freedom)[102] of the 1996 International Convention on Civil and Political Rights (ICCPR). India is among the countries that have ratified the ICCPR. The Indian Government is therefore obliged to take steps to prevent the spread of COVID-19 in prisons and any such failure will result in the violation of the above-mentioned obligations under the ICCPR.

Indian prisons are at high risk of the spread of COVID-19 with their crowded spaces and inadequate health care facilities. Due to the closed prison environment and vicinity in common living space, prisoners detained in prison / correctional homes are at the greatest risk. In addition, people in custody often live in poor hygiene conditions, have inadequate access to health facilities, and are wholly dependent on the authorities to exercise their right to health in comparison to those outside free of charge. Prisons have always been a low priority for state governments in normal times, let alone the emergency situation that became apparent after the outbreak. In India, the Supreme Court recently acknowledged this risk when it took

101. International Covenant on Civil and Political Rights ICCPR 1966, art 6.
102. *Id* art 9.

notice of the issue in R*e: infection of the covid 19 virus in prisons*[103] the court on its own motion stated the issue of over-crowding in prisons and ordered to form a High Powered Committees to be established by both states and UTs to determine which category of prisoners can be released on parole or on interim bail.

The primary responsibility of the state governments in India is to take proactive steps to prevent the spread of COVID-19 in all places of confinement, including prisons, detention centres, childcare institutions, shelters, psychiatric homes, etc. Measures have been taken by the Supreme Court and state authorities since March to decongest prisons across the nation. In a recent report, the National Legal Services Authority said that more than 60,000 inmates have since been released. With a prison population of over four lakhs, however, and new admissions every day, it is not enough to merely decongest prisons. It is time to concentrate on the conditions inside gaols.[104]

There tends to be poor hygiene and sanitation facilities in custodial institutions. Some of the reasons for the lack of overall hygiene in our prisons are the lack of enough bathrooms, water supplies, and soap for bathing and washing. Such gaps make prisons a fertile ground for the virus, coupled with poor health care facilities. By establishing isolation wards in prisons, the Prison Manual, 2016 also provides measures to fight an epidemic.

While facilities are insufficient, the lack of institutional staff, despite the availability of posts, means that it is very difficult to implement anti-virus precautions effectively in prisons. The 2019 India Justice Report,

---

103. In re: infection of the covid 19 virus in prisons, SUO MOTU WRIT PETITION (C) NO. 1/2020].
104. Vijay Raghavan and Madhurima Dhenuka, *Covid-19: Ensure prisons do not turn into a fertile ground for the virus,* The Hindustan Times, (Jun 06, 2020,12.09 PM) https://www.hindustantimes.com/analysis/covid-19-ensure-prisons-do-not-turn-into-a-fertile-ground-for-the-virus/story-MVJdQa0f2GwwyCojTwQA3L.html (last visited Oct 14,2024)

which analysed government data on four pillars of the criminal justice system (police, prisons, legal aid and judiciary), showed institutional staff vacancies of between 30-40%. As Covid-19-positive cases increase across prisons, on a contractual basis, state governments must urgently appoint additional staff, particularly care and medical personnel.

The Supreme Court identified nine issues relating to prisons in the *Rama Murthy v. State of Karnataka*[105] (1997) case, such as overcrowding, delayed trials, prisoner torture and ill-treatment, neglect of health and hygiene, insubstantial food, and insufficient clothing.

Re Inhuman Conditions in 1382 prisons - The Supreme Court Initiative[106]

In various cases, the Supreme Court has held that inmates also have the right to live with dignity, the right to health, etc. On March 14, 2016, the Supreme Court of India delivered a landmark judgement regarding the legal and constitutional rights of prisoners in India, particularly those under trial. The Court listed the earlier efforts made in the past on the issue of prisoners' rights in this case.[107] There have also been various private and individual endeavours. It is also intended to examine the extent of overcrowding in prisons and correctional homes, to examine the functioning of the Under-Trial Review Committees, to check the availability of legal aid and advice, to grant remission, parole and furlough, to examine violence and to take measures to prevent unnatural deaths, to evaluate the availability of medical facilities in prisons, to evaluate the availability of staff; Provide methods for staff training and education, assess the feasibility of the establishment of Open Prisons, recommend steps for the psycho-social

105. Rama Murthy v. State of Karnataka, (1997) 2 SCC 642
106. AIR 2016 SC 993, 2016 (2) SCALE 185
107. The Mulla Committee On Jail Reforms , 1980; Justice V. R. Krishna Iyer Committee On Women Prisoners ,1987; 78th Report Of The Law Commission Of India On Jail Congestion Of Under-Trial Prisoners, 2007; Report Of The Bureau Of Police Research And Development (Bpr&D) And The National Prison Reform And Correctional Administration Policy 1995.

well-being of female prisoners' minor children, and provide remedial measures for all of the above-mentioned issues, together with any other recommendations that it considers fit to advance prison reforms in correctional homes.

A Comparative Analysis of Prison Healthcare Systems in India and Other Nations

A comparative analysis of jail health systems in India and prison healthcare across selected countries based on a variety of criteria, including access to medical treatments, healthcare standards, mental health provisions, staffing, rehabilitation, and policy monitoring indicates considerable disparities in methodology, funding, facilities, and results. The below table 1.2 summarises significant elements across chosen countries:

Table 1.2: Comparative Analysis of Prison Healthcare Systems in India with selected countries

Aspect	India	United States	Norway	Germany	South Africa	Canada
Health Infrastructure	Lacks basic health facilities; low spending per inmate.	Better access to healthcare services; higher spending.	Emphasizes rehabilitation; extensive healthcare services.	Legal framework ensures access to healthcare services.	Faces overcrowding and inadequate facilities.	Access through public health system; includes specialists.
Overcrowding	High rates lead to poor health outcomes; inadequate hygiene.	Issues with high rates of incarceration impact health.	Focus on creating normal living environments.	High standards maintained; less overcrowding.	Significant overcrowding impacts service delivery.	Moderate overcrowding, with emphasis on rehabilitation.

Mental Health Care	Limited access; untreated psychological issues common.	Increasing access to mental health programs.	Strong emphasis on mental health support.	Comprehensive mental health services available.	High rates of mental health issues; need for improvement.	Specialized programs for mental health available.
Funding	Low average spending per inmate on healthcare.	Over $8,000 annually per inmate on healthcare.	High investment in rehabilitation and health services.	Well-funded healthcare for prisoners.	Limited resources impacting healthcare delivery.	Adequate funding through public health initiatives.
Integration	Limited integration of prison health with public health.	Telehealth services improving access to specialists.	Health services integrated with public healthcare system.	Strong integration with public health services.	Healthcare services often underfunded and disjointed.	Integrated with public health system; continuity of care.
Rehabilitation Focus	Limited programs; need for more rehabilitation initiatives.	Emphasis on rehabilitation and reducing recidivism.	Holistic approach prioritizing rehabilitation.	Focus on preventive care and rehabilitation programs.	Need for improvement in rehabilitation and care.	Emphasis on rehabilitation; support for reintegration.

The above table indicates that countries with a strong emphasis on rehabilitation, integrated health services, and enough budget have better health results for convicts. India faces issues like as overcrowding and inadequate resources; adopting best practices from other countries could help improve its prison health system. India's jail health care system requires comprehensive modifications to meet international standards and promote inmate well-being[108].

108. Model Prison Manual 2016; National Crime Records Bureau (NCRB) Reports On Prison Overcrowding And Health Conditions-Federal Bureau Of Prisons; American Psychological Association Reports On Prison Mental Health; National Health Service (NHS) Data; Ministry Of Justice Reports On Prison Health; Norwegian Correctional Service; Scandinavian Prison Project.

Conclusion and Suggestions

It is crucial for the government to take an active role in prioritizing healthcare within prisons. By bringing prison healthcare in line with international standards and fulfilling human rights commitments, the state can guarantee that inmates receive adequate medical attention for both physical and mental health needs, while ensuring their dignity is respected. Implementing comprehensive reforms—such as improving infrastructure, conducting regular health evaluations, and introducing effective mental health programs—will be key to protecting the well-being of prisoners. These measures will not only improve inmates' quality of life but also demonstrate the government's dedication to upholding human rights in the criminal justice system. Outlined below are the key takeaways and recommendations/suggestions from the above:

- Indian prisons, in particular, face challenges in providing adequate medical care, with healthcare services often viewed as inferior and insufficient.
- The quality of medical care in Indian prisons is seen as poorer and needs to be raised to match the essential primary health care provided to non-inmate citizens.
- Inmates suffer from a wide range of health issues such as mental disorders, respiratory problems, contagious diseases, and substance abuse, which are aggravated by prison conditions.
- Overcrowded prisons, poor hygiene, and inadequate sanitation continue to exacerbate health conditions.
- Regular physical and mental health checkups are critical, as mental health disorders like stress and depression are rampant in prisons.
- The government has a duty to provide adequate healthcare in prisons, as it can significantly improve inmates' quality of life and uphold human rights.

- The International Covenant on Economic, Social, and Cultural Rights (ICESCR) and UN Standard Minimum Rules for the Treatment of Prisoners (Nelson Mandela Rules) emphasize that prisoners retain the right to the highest attainable standard of physical and mental health
- India lacks specific national documentation for prison healthcare, unlike several international organizations that have established policies.
- The health concerns of prisoners are significant, and the lack of proper legislation remains a critical factor in impeding their healthcare rights.
- Prisoners face a range of health problems, including mental health disorders, contagious diseases, substance abuse, and other serious health conditions.
- These health issues are largely a result of poor prison conditions, which need to be addressed urgently, especially in developing countries like India.
- The COVID-19 pandemic has exposed the vulnerabilities in prison healthcare, highlighting the need for systemic reform to prevent future health crises.
- Innovative technologies like AI can be utilized for improving prison conditions, ensuring better health surveillance, and maintaining sanitary measures.
- Prisoners' right to health is grounded in international standards such as the International Covenant on Economic, Social, and Cultural Rights and the UN Standard Minimum Rules for the Treatment of Prisoners. These emphasize equal access to healthcare, including mental and dental services, under the principles of availability, accessibility, acceptability, and quality.

- Various committees, including the Mulla Committee and Krishna Iyer Committee, have recommended improvements in prison healthcare, sanitation, and mental health services, yet systemic issues persist.
- Under the Indian Constitution, Article 21, which guarantees the right to life and personal liberty, has been judicially interpreted to include the right to health for prisoners. This constitutional right extends to humane treatment, proper medical care, and mental health services.
- Recent developments such as the 2016 Prison Manual, inspired by the Nelson Mandela Rules, propose integrating prison healthcare with state medical services. However, these reforms have had limited real-world impact.
- India lacks comprehensive, standalone documents on prisoners' healthcare at both national and state levels, leading to inconsistent policies and practices. While several prison reform committees have addressed prison conditions over the years, most have not adequately focused on health, particularly for vulnerable groups like women, the elderly, and those with chronic illnesses.

Suggestions

- Legislation: Introduce comprehensive healthcare legislation for prisoners, focusing on mental, physical, and infectious diseases.
- Improve prison infrastructure: Expand prison spaces to accommodate inmates better, ensuring proper sanitation and hygiene.
- Mental health programs: Implement regular mental health screenings and provide access to counselling services to address high levels of stress and depression.
- Use of technology: Incorporate artificial intelligence systems for surveillance, social distancing, staff allocation, and sanitation management.

- Curb substance abuse: Initiate more effective programs to curb drug abuse and other harmful habits prevalent among inmates.
- Ensure regular health check-ups: Routine health checkups for all inmates, including mental and physical assessments, are vital to maintaining health standards.
- Leverage International Guidelines: India should follow the health care policies suggested by international organizations like the United Nations and WHO, adapting them to the local context.
- Utilize Technology: Embrace AI and other innovative technologies for health monitoring and improving prison management, particularly in terms of social distancing and sanitation.
- Increased government involvement: The government must prioritize prison healthcare, aligning it with broader human rights commitments and international standards.
- Strengthen enforcement of existing constitutional provisions and judicial precedents to ensure consistent access to healthcare for all prisoners, particularly in the areas of mental health and specialized care.
- Develop comprehensive healthcare policies for prisoners at both national and state levels, with special focus on vulnerable populations such as women, the elderly, and those with infectious diseases.
- Implement systematic reforms in prison health services by increasing the number of medical professionals and improving facilities, particularly in prisons where staffing and resources are inadequate.
- Establish clear guidelines for managing health emergencies and epidemics, such as COVID-19, within prison settings to ensure preparedness and protection of prisoners' rights.

- Conduct regular inspections and evaluations to ensure the proper functioning of prison healthcare services, and follow up on the recommendations of prison reform committees with actionable steps for improvement.
- Actively follow the recommendations of the Mulla Committee, Krishna Iyer Committee, and others to improve healthcare facilities and introduce specialized care for vulnerable groups like female prisoners.

"It is said that no one truly knows a nation until one has been inside its jails. A nation should not be judged by how it treats its highest citizens, but its lowest ones."

— Nelson Mandela

Contempt in the Age of Social Media: A Historical and Contemporary Appraisal of Judicial Contempt Powers

Diganta Roy & Prof. (Dr.) Jyoti J. Mozika***

Introduction

Recently, the topic of contempt of court has assumed a heightened presence in various media outlets, including newspapers and social media platforms, as well as in the discourse of both political and judicial commentators and writers. Generally, contempt of court can be broadly characterised as non-compliance or lack of respect directed towards a judicial entity or as interference with its systematic proceedings, typically resulting in prompt punitive measures. It represents an authority wielded by the judiciary to compel collaboration and penalise expressions of critique or obstruction. Contempt of court has been classified into distinct categories, each addressing a specific facet of the contempt power and subject to a particular set of procedures.

The concept of contempt of court dates back to the early days of legal systems. Contempt was seen as a mechanism to ensure that the dignity and authority of the judiciary were upheld. In medieval England, for instance,

* Research Scholar(PhD)&ICSSR Doctoral Fellow, Dept of law, North Eastern Hill University, Shillong, Meghalaya

** Professor and Head, Dept of law, North Eastern Hill University,Shillong, Meghalaya

it was considered an insult to the court for a litigant or spectator to disrupt proceedings, show disrespect to the judges, or attempt to undermine the legal process. These offences were taken seriously, and individuals found in contempt could face severe penalties, including fines and imprisonment. The historical roots of contempt proceedings highlight the importance placed on maintaining order and respect within the courtroom, preserving the administration of justice from undue influence or disruption.

As legal systems evolved, so did the concept of contempt. In the United States, for example, the power to punish for contempt is a product of the common law tradition inherited from England. It was enshrined in the U.S. Constitution to safeguard the independence and impartiality of the judiciary. The Supreme Court of the United States, in the landmark case of *Ex parte Robinson*[1], reinforced the authority of the judiciary to maintain decorum and punish contemptuous conduct in court. This historical context underscores the foundational principle that the judiciary's power to punish contempt is indispensable for justice's fair and unhindered administration.

The rise of social media has ushered in an era where information is disseminated at an unprecedented speed and scale. This digital revolution has not spared the legal domain and has raised critical questions about the contemporary validity of the judicial power to punish contempt. In an age where anyone with an internet connection can comment on ongoing legal proceedings, the fine line between freedom of expression and potential interference with the justice system becomes increasingly blurred. Social media platforms provide an accessible forum for individuals to express their opinions on pending cases, judges, and even the legal system. While this democratisation of information-sharing is a fundamental aspect of modern society, it poses challenges to maintaining court etiquette and the integrity of legal proceedings. The potential for juror misconduct, witness tampering, and spreading prejudicial information becomes more pronounced in an environment where posts and comments can go viral within seconds.

1. Ex parte Robinson, 86 U.S. 505 (1873).

Moreover, the anonymity afforded by the Internet can encourage individuals to make contemptuous or inflammatory statements that they might not articulate in a physical courtroom. The impact of these statements, particularly when amplified by social media, can be substantial. The need for the judiciary to respond to such challenges and maintain the authority of the courtroom in an online world is a pressing issue.

Striking a balance between safeguarding the judiciary's authority and respecting the fundamental right to freedom of expression is complex. Courts must weigh the need to protect the integrity of legal proceedings against the principles of open justice and public scrutiny. This balancing act is at the heart of the contemporary debate surrounding the judicial power to punish contempt. India has grappled with these issues in the context of high-profile cases and the ubiquity of online commentary. Courts have issued orders, restricted access to the Internet, and sanctioned individuals for contemptuous online behaviour. However, such measures have not been without controversy, as critics argue they may infringe upon fundamental rights of citizens. This debate is not unique to India. Across the globe, legal systems face similar challenges in reconciling the age-old authority to punish contempt with the demands of the digital age. In the United Kingdom, for example, the Attorney General can bring proceedings for contempt of court in cases where social media posts pose a risk to the administration of justice.[2]

The assessment of the contemporary significance and worth of the power of contempt within our society has been noticeably limited. Despite current judicial conventions, there remains a lack of unanimous conviction among both courts and scholars as to whether the authority to administer penalties for contempt is inherent to the judiciary or if courts should indeed wield it.[3] This confusion has engendered scholarly discourse concerning

2. Ian Cram et al, Butterworths Common Law Series The Law Of Contempt 27 (LexisNexis 2010).
3. Emile J. Katz, *The "Judicial Power" and Contempt of Court: A Historical Analysis*

the judiciary's judicious application of the power of contempt, raising questions regarding its appropriateness and continued relevance. This article delves into the historical foundations of the judicial power to punish contempt. It examines its contemporary validity in the age of social media, where the boundaries between freedom of expression and the judiciary's authority are frequently tested.

History of the Judicial Contempt Power

The earliest instances of using the authority to hold individuals in contempt are documented within the works of Shakespeare's "Henry IV" and the scholarly discourse known as "The Lives of the Chief Justices of England." Therefore, the authority to address contemptuous behaviour traces its inception to the nascent stages of English jurisprudence, upholding the judiciary's effectiveness and prestige while fostering deference towards the ruling monarch. The court's authority to mete out penalties for contempt represents a legal doctrine deeply ingrained in the corpus of common law, and it predominantly emanates from the foundations of Anglo-American jurisprudence.[4] Consequently, it can be observed that the realm of contempt law can be characterised as a construct primarily associated with monarchical authority as opposed to the collective legislation of humankind. It does not represent the legislative expressions of duly elected representatives, reflecting the people's will; instead, its origin can be traced to the concept of "divine law" emanating from sovereign monarchs.

The power of judicial bodies to penalise acts of contempt traces its origin to the early periods of England and the monarchy. The foundations of English jurisprudence, from which the modern contempt doctrine emerged, are slender yet firmly rooted in the annals of history. In his erudite scholarship, Sir John C. Fox delved into the annals of English legal history,

of the Contempt Power as Understood by the Founders, 109 Calif. L. Rev. 1913, 1916 (2021).

4. Nathan M. Cohen, *The Contempt Power – The Lifeblood of the Judiciary*, 2 Loy. U. Chi. L. J. 69, 69-70 (1971).

uncovering evidence of contempt dating back to the 10th century in England.[5] Originating during the era of monarchical governance, it initially served as an inherent means to ensure the ruling monarch's effectiveness, decorum, and reverence. Considered a legal principle delineated and deeply rooted in the common law tradition, it is primarily a creation of the Anglo-American society. However, specific indications exist that communities in earlier eras may have contemplated systems for regulating contemptuous conduct. Scholarly sources indicate that the Theodosian Code[6] deliberated upon the contempt directed towards governmental authorities, ultimately determining that such contempt should not warrant punitive measures.

In this regard, Taoist logic acknowledged that the foundation of respect can find greater stability in moral rectitude than contrived power. The exercise of contempt authority had primarily occurred in England and the United States.[7] As organised societies evolved, the imperative for coercive control within a legal system's framework became indispensable for maintaining reverence and compliance. Across various epochs in history, both within the United States and England, its utilisation has elicited significant public intrigue and engagement. Depending on the time and context, its role as an expression of judicial authority has elicited both commendation and calls for its utilisation, alongside censure and scrutiny. The scholarly discourse within the common law extensively mentions the contempt power associated with courts. In Anglo-American jurisprudence, the authority to hold individuals in contempt of court is so deeply ingrained that the prevailing discourse predominantly pertains not to the necessity of this power's existence but focuses on the scope of its application and the bounds that confine its exercise. However, from the perspective of individuals outside the realm of common law practice, the power of

5. Sir John Charles Fox, *The Nature of Contempt of Court*, 37 L. Q. Rev. 191, 194 (1921).
6. Encyclopedia, https://www.encyclopedia.com/social-sciences-and-law/law/law-divisions-and-codes/theodosian-code (last visited Oct. 3, 2023).
7. Ronald Goldfarb, *The History of the Contempt Power*, 1961 Wash. U.L.Q.1, 1 (1961).

contempt appears as a legal mechanism that is not only superfluous within a functional legal framework but also contravenes fundamental philosophical principles governing the interactions between government entities and the citizenry.[8] At this juncture, it becomes pertinent to inquire whether the power of contempt is truly as indispensable and fundamental as advocated by common law. In a legal system like India, even if we acknowledge the significance of the authority vested in the contempt power, a separate inquiry arises as to whether it should be deployed in terms of procedure or concerning the current degree of frequency and magnitude of its application. In both English and American legal jurisprudence, instances addressing the authority of contempt power presuppose that the maintenance of societal order necessitates the intrinsic presence of this power within governmental institutions. Moreover, they posit that individuals, as part of their social contract, willingly relinquish a certain degree of their civil liberties to accommodate this indispensable measure.[9]

As mentioned above, the law of contempt of court is distinguishable from conventional legislation, for it finds its origins not in the enactments of representative legislative bodies that diligently mirror the will of the people but instead derives its foundations from the historical jurisprudence associated with the divine prerogatives of monarchs. While this is not the exclusive origin of this authority, it can be regarded as the foundational nucleus from which it subsequently expanded. Subsequent institutions, consistent with their interests, willingly embraced it, not as extensions of the monarch's authority, but rather to safeguard their status and distinction.

The concept of contempt power becomes comprehensible when examined within the historical context of its emergence - an era characterised by purportedly divine-right monarchies, where a monarch held absolute sovereignty and answered solely to divine authority. In all conceivable

8. Alexander H. Pekelis, *Legal Techniques and Political Ideologies: A Comparative Study*, 41 Mich. L. Rev. 665, 668 (1943).
9. Ronald, *supra* note 7, at 2.

scenarios, defiance against the monarch constituted a transgression that carried the threat of eternal condemnation.[10]

As societal complexities and expansiveness increased, the English monarchs deemed it imperative to delegate their royal governmental authority to appointed representatives. Hence, the judicial institutions of that era functioned as representatives of the monarch's authority across the entire realm. Consequently, their utilisation of contempt powers can be traced back to a perceived disrespect or defiance directed towards the sovereign himself.[11] The transgression of their legal mandates or the defiance of their appointed authorities resulted in a breach of societal tranquillity and a disregard for the sovereign authority symbolised by these officers. The transformation of the judicial power, transitioning from a derivative power vested in the courts as extensions of the monarchy to an inherent authority within the judiciary itself, was expounded upon in the ruling articulated by an Irish jurist in 1813.[12] Hence, the genesis of the judicial contempt power emanated from a prerogative practice rooted in an inferred affront to the monarch's sovereignty. During the reign of the Norman kings, the disposition of an offender's assets was subject to the monarch's discretion. Subsequently, this practice transformed into a monetary penalty system, which, in turn, was further developed into a mechanism wherein the offender's release was contingent upon the payment of the imposed fine. This historical precedent bears a resemblance to contemporary procedures associated with the handling of contemptuous actions.[13] Over time, inquiries regarding the judiciary's authority to mete out penalties for acts of defiance, obstruction, or contempt were consistently met with the assertion that such prerogatives constituted an inherent entitlement of the English judicial system. The evolution of judicial

10. John Neville Figgis, The Divine Right of Kings 6 (Cambridge 1914).
11. Joseph H. Beale, Jr., *Contempt of Court, Criminal and Civil*, 21 Harv. L. Rev. 161, 167 (1908).
12. Sir John Charles Fox, *The King v. Almon*, 24 L. Q. Rev. 184, 194 (1908).
13. Ronald, *supra* note 7, at 8.

contempt authority, progressing from the courts being perceived as an extension of the monarch's power to an inherent attribute of the judicial system, exemplified a pivotal development in the courts' growing influence. The growth of inherent judicial contempt power was a path initially illuminated by the monarch. Henceforth, fundamental principles governing the imposition of penalties to curb defiance against the directives of the monarch and the judicial institutions, alongside actions that have the propensity to impede the seamless progression of the legal system, were unequivocally solidified.

Historically, summary procedures were employed to uphold the King's writs and maintain discipline among court officials. Using summary processes in such instances was considered reasonable due to their expeditious nature and proximity to the judicial institutions. Other forms of contempt were subject to legal sanctions, albeit through the conventional, non-summary legal processes. It was not until the era of Blackstone and the influential 18th-century legal scholars that contemptuous behaviour began to be swiftly and summarily penalised, regardless of the specific location of the offence. Before this period, only those instances of contempt that occurred directly within the immediate presence of the court, known as "in facie curiae," were subject to summary punishment.[14] The implementation of contempt laws served to uphold an aura of prestige and reverence surrounding the judicial proceedings. The contemporary contempt of court laws has its origins in the articulated principles expounded by Sir William Blackstone within his seminal work, "Commentaries on the Laws of England," as well as the notable jurisprudential insights advanced by Justice Wilmot in the landmark case of *King v. Almon*. Indeed, the contemporary extent of the summary authority can be primarily attributed to the perspective developed by Justice Wilmot. By the twentieth century, the legal principles articulated by Justice Wilmot had matured to unassailable reverence.[15] The

14. Ronald, *supra* note 7, at 10.
15. Ronald, *supra* note 7, at 13.

Judiciary Act of 1789 was the first instance of federal legislation in the United States on the authority to address contemptuous behaviour towards the judiciary. The first instance of state-level legislative action in the United States on this matter occurred within the jurisdiction of Pennsylvania. Subsequently, New York enacted analogous legislation, culminating in its formal adoption in 1829.[16] The judiciary regarded the authority to mete out sanctions for contempt as a practice deeply rooted in historical precedent and indispensable for the effective functioning of the judicial system. During the renowned impeachment hearings of Justice Peck, a contention posited that the authority of judicial contempt was not an inherent prerogative but rather an outgrowth of common law principles.[17] Justice Wilmot's stance in the *Almon* case significantly impacted the trajectory of legal rulings throughout the nineteenth century. This influence emanated from his authoritative demeanour and the perceived attractiveness of the authority he asserted. This trait resonated even with conscientious judges committed to expediting judicial proceedings.[18] The power to mete out penalties for acts of contempt against the judiciary, specifically for actions deemed to scandalise the court, was formally instituted in 1765 through the renowned legal precedent of *R v. Almon*.[19] In the United States, the body of academic literature posits a compelling argument indicating that the framers of the Constitution did not envisage the contemporary extent to which the judiciary wields the authority to penalise acts of contempt, a power now commonly perceived as inherent to their role.[20]

The genesis of contempt law in India can be discerned from its English legal antecedents. Presently, the legal framework governing contempt in India comprises the Constitution of India and the Contempt of Courts Act

16. Ronald, *supra* note 7, at 14.
17. Ronald, *supra* note 7, at 15.
18. Ronald, *supra* note 7, at 17.
19. Douglas Hay, *Contempt by Scandalizing the Court: A Political History on the First Hundred Years*, 25 Osgoode Hall Law J. 431, 433 (1987).
20. Emile, *supra* note 3, at 1958.

of 1971. It is noteworthy that contempt of court, in the Indian context, has been officially designated as a "reasonable restriction" on the constitutionally protected freedom of speech and expression, as enshrined in Article 19(2) of the Constitution. The Contempt of Courts Act of 1971 seeks to underscore the underlying rationale for vesting courts with the power to hold individuals in contempt. However, owing to the intricacies and expansiveness of the terminology used in these definitions, it is susceptible to judicial interpretation and, in some instances, may inadvertently deviate from the core intentions that justify the existence of such legal powers.

Contempt in the Digital Age

The judicial system encounters contemptuous behaviour from transgressors operating within the system, including legal practitioners, judges, other court officials, and private entities who, often oblivious to the ramifications, engage in defamatory activities targeting the institution through various social media platforms. In this boundless and unregulated globalised digital realm, it is imperative to exercise prudence while exercising freedom of speech, as deviation may result in severe contemptuous implications.

In contemporary society, numerous domains of jurisprudence experience the influence of globalisation and the proliferation of the Internet, both as a medium of communication and a fount of information. Contempt of court is not immune to these transformative forces. The advent of diversification and internationalisation has introduced novel complexities to the contempt laws. Still in its beginning stage, the Internet represents a revolutionary shift in how individuals communicate. It presents inherent challenges regarding issues of defamation, copyright, privacy, and regulations on pornography but also, significantly, in the context of contemptuous expressions. Any legal framework featuring laws that constrain publications, regardless of the underlying justifications, must confront the formidable challenges posed by the contemporary era of digital

communication.[21] The proliferation of digital communication has led to an extension of the parameters within which contemptuous behaviour manifests. This, in turn, may precipitate a fundamental transformation in how contemptuous publications are addressed.

Regarding criminal contempt, the central concern revolves around the proliferation of online publications and their potential ramifications on the proper functioning of the justice system. In civil contempt, the predominant issues revolve around determining the conditions under which disseminating information through contemporary digital media platforms may violate a judicial directive. Criminal contempt pertains to behaviours that either undermine or possess a tangible potential to undermine the proper dispensation of justice within a specific legal proceeding or in a broader sense. A prevailing source of this form of contempt frequently materialises through publications that can potentially create challenges for properly administrating a trial. The proliferation of digital publications, readily accessible worldwide through the global expanse of the World Wide Web, engenders significant questions. In the context of the judiciary possessing unrestricted internet access, there exists a potential hazard whereby judges may peruse an online publication or engage with a broadcast, even if the origin of said publication is geographically remote.

Notwithstanding its foreign provenance, such media can engender significant jeopardy concerning the impartiality of legal proceedings. There exists a potential for judges to independently engage in research on matters relevant to the case at hand, such as an exploration of the pertinent legal principles or an inquiry into the defendant's prior criminal record.[22] In light of the increasing prevalence of digital publications, there is also a growing inquiry into the legal responsibility of social media platforms regarding content disseminated on their online platforms that may violate laws related to contempt. Publication, in the contemporary communication and media

21. Ian, *supra* note 2, at 27.
22. Ian, *supra* note 2, at 28.

landscape, has emerged as a novel battleground in the domain of contempt of court.

In India, under the Contempt of Courts Act of 1971, the foundation of criminal contempt lies in publishing information that either tarnishes the reputation and credibility of a court, disrupts the impartial progression of a judicial proceeding, or hampers the effective administration of justice.[23] The expansive definition of contempt in the Act is comprehensive enough to encompass contemporary modes of communication and broadcasting, contingent upon its dissemination to a segment of the public. Material posted on social media platforms may fall within the purview of criminal contempt on the condition that it is available to the public. In cases where the individual in control of the pertinent webpage limits its accessibility solely to a select group of acquaintances, it is improbable that such an action would be deemed as constituting publication sufficient to warrant criminal contempt charges.

Contempt within the digital sphere can engender challenges when implementing legal principles in practical contexts.[24] When dealing with contemptuous content disseminated from an international jurisdiction, the primary concern pertains to the feasibility of initiating legal proceedings. As long as the publication remains accessible within the confines of the nation, it may be considered as having been disseminated within the legal

23. Section 2(c) of the Contempt of Courts Act, 1971 provides: "criminal contempt" means the publication (whether by words, spoken or written, or by signs, or by visible representations, or otherwise) of any matter or the doing of any other act whatsoever which -
(*i*) scandalises or tends to scandalise, or lowers or tends to lower the authority of, any court; or
(*ii*) prejudices, or interferes or tends to interfere with, the due course of any judicial proceeding; or
(*iii*) interferes or tends to interfere with, or obstructs or tends to obstruct, the administration of justice in any other manner.
24. Joshua Rozenberg, *Does the internet mean game over for contempt of court?*, The Guardian (Nov. 28, 2012, 00:01 GMT), https://www.theguardian.com/law/2012/nov/28/internet-contempt-of-court-law-commission. (last visited Oct. 3, 2023).

authority of this jurisdiction. Engaging with any prejudicial content accessible on the Internet will be regarded as an act of publication, and those individuals accountable for providing such content could potentially face charges of contempt. A further concern emerges when online publications incorporate biased content and persist in the digital domain; will the primary author or the platform responsible for disseminating said content incur legal liability for contempt? Once it is ascertained that content has been published, the subsequent inquiry pertains to determining the entity deemed responsible for this publication, as legal accountability is contingent upon an individual or entity being designated as the publisher. The issue of ascertaining the entity accountable for publishing internet-based content presents a heightened level of complexity, necessitating a comprehensive examination encompassing common law principles alongside constitutional and statutory mandates. To establish an individual's liability under common law for a published work, it is imperative to substantiate a certain level of consciousness or an acknowledgement of responsibility.[25] Coming to statutory legislation within the context of India, it becomes evident that there is a necessity for legal frameworks tailored to address instances of contempt stemming from online publications, given the distinctive characteristics inherent in this mode of communication. A well-defined set of directives can guide authors, social media platforms, and Internet Service Providers (ISPs) regarding their obligations when confronted with contemptuous material published on the Internet. To enforce the Contempt of Courts Act effectively, measures must be instituted to regulate social media, establishing a system of checks and balances.

Balancing Contempt Power and Freedom of Speech

In its conception, the construct of contempt exhibits a profound indifference towards the principle of free speech, a principle which held no

25. Ian, *supra* note 2, at 32.

significance during the initial development of this legal doctrine.[26] Unquestionably, it is well-established that each member of the citizenry possesses the right to critique the rulings of the judiciary, and this right is enshrined within Article 19 of the Constitution, ensuring the fundamental right to freedom of expression for every inhabitant of the nation. Nevertheless, it is imperative to acknowledge that Article 19(2) of the Constitution concurrently underscores the notion that the freedom of speech is not absolute, as it is subject to existing legal provisions, including those that pertain to the regulation of contempt of court. The right to freedom of expression is constrained by the provisions relating to contempt of court, encompassing not only the Contempt of Courts Act but also the authoritative jurisdiction of the Supreme Court to penalise contempt under Articles 129 and 142(2) of the Constitution. Analogous powers are conferred upon the High Courts under Article 215 of the Constitution.[27]

The concepts of freedom of expression and contempt of court inevitably find themselves in recurrent conflict. The legal doctrine of contempt frequently juxtaposes the fundamental right of Freedom of Speech and Expression, which is the constitutional assurance that empowers citizens to articulate their thoughts and viewpoints. From one perspective, the law of contempt is an indispensable tool for the judiciary, enabling it to safeguard its prestige, thus preserving public trust and maintaining its status as an autonomous and unbiased institution. Conversely, in a democratic nation, the fundamental right to freedom of speech and expression assumes a paramount role in upholding the voice of the populace. The extensive and unrestricted utilisation of the power of contempt exacerbates the threat to individual liberty inherent in its mere presence. Justice V. R. Krishna Iyer famously characterised the domain of contempt law as a nebulous and

26. Milind Prakash Parab, *The Imbroglio of Contempt Laws in India*, 4 Int'l J.L. Mgmt. & Human. 3308, 3315 (2021).
27. K. Sita Manikyam & Ayush Khandelwal, *Recent Challenges of Contempt – A Threat to Infallible Institution*, 3 Int'l J.L. Mgmt. & Human. 207, 210 (2020).

meandering jurisdiction marked by indistinct frontiers.[28] The legal discourse encounters a lack of precise demarcations that definitively delineate statements amenable to fair criticism and comments capable of constituting contempt of court when directed towards a judicial institution. Contempt law, irrespective of its potential societal benefits, encroaches upon the fundamental rights of individuals.

In constitutional jurisprudence, an established legal principle dictates that any statutory enactment that curtails the exercise of freedom of speech and expression, based on the delineated criteria within Article 19(2), must be framed in the most restrictive and precise manner conceivable and should not employ an overly broad scope.[29] While a Constitution Bench of the Supreme Court has distinguished between defaming an individual judge and committing the offence of contempt of court, the latter remains applicable in cases where disparaging speech is directed towards a particular judge rather than the court itself.[30] This underscores the expansive wording of section 2 of the Contempt of Courts Act, 1971, which confers upon courts an unrestricted authority to suppress any form of critique directed towards the judiciary or its members. The preservation of democratic integrity relies on the fundamental right to free speech and expression, and it should not be curtailed based on mere conjecture regarding potential harm. Under the provisions stipulated in Section 2(c) of the Contempt of Courts Act, speech is constrained when it demonstrates a tendency to bring the courts into disrepute or diminish their authoritative standing. Dissenting and critical perspectives invariably tend to exhibit such a propensity, and the contested subsection operates in a manner that singles out expressions of this nature accordingly.

28. *Contempt of Court – Need, Advantages, Challenges*, IAS Express (Oct. 26, 2023, 11:33 PM), https://www.iasexpress.net/contempt-of-court/#comments. (last visited May 14,2024)
29. Shreya Singhal v. Union of India, AIR 2015 SC 1523.
30. Brahma Prakash Sharma v. State of Uttar Pradesh, 1954 SCR 1169.

Democracy's vitality does not solely rely on the watchful gaze of its legislative bodies but equally depends on the nurturance and counsel provided by public opinion. The press is the pre-eminent conduit for articulating such a view because of its unique capacity to voice public sentiment. The genuine barometer of a democracy's well-being and vitality consistently lies in the unfettered exercise of freedom of speech and expression. A free and unbiased press is an imperative linchpin in ensuring the robust operation of a democratic system. Freedom of expression, a cornerstone of human rights, is pivotal for an unshackled media. The custodian of these rights is the judiciary. The media's examination of the bench plays a vital role in upholding the integrity of the courts. The interdependent relationship between the judiciary and the media forms the cornerstone for perpetuating human rights and democracy.[31] Indeed, in a democratic society, the Freedom of the Press undeniably ranks among the paramount liberties. Within the framework of the Indian Constitution, a distinct and explicit assurance of Freedom of the Press is notably absent. Instead, this assurance is implicitly enshrined in Article 19(1)(a), which bestows all citizens the right to freedom of expression. It is imperative to underscore that the freedom of speech and expression inherently encompasses the autonomy of the press, as the existence of an unencumbered media is a prerequisite for the citizens to formulate well-informed viewpoints.

Furthermore, freedom of the press inherently encompasses the liberty to disseminate ideas and information and the right to circulate these ideas widely.[32] Freedom of speech and expression includes the entitlement to convey one's viewpoints and beliefs verbally, in written form, or through print media. This overarching right comprises various liberties, notably the freedom of the press. It is paramount to underscore that the significance of freedom of expression lies not merely in its political utility but, rather, in

31. Dr. M. C. Sheikh, *Creative Expansion of Art. 19(1)(A) vis-à-vis Contempt of Court*, 3 Indian J.L. & Just. 104, 104 (2012).
32. Brij Bhushan v. State of Delhi, AIR 1950 SC 129.

its essentiality for functioning in a democratic framework. There exists no ambiguity in the fact that judges are answerable to society, and their responsibility should be evaluated considering their moral principles and the solemn oath associated with their judicial office. Any critique directed at the legal system or its judicial officers that impedes the proper dispensation of justice or subjects the justice system to mockery must be averted. The initiation of contempt of court proceedings arises from this endeavour. In the nation's interest, all judicial criticisms must remain profoundly logical and composed, stemming from the loftiest intentions, devoid of any partisan influence or stratagem.[33]

It is imperative to understand that no individual can transgress the legal mandate to show due respect to the judicial institutions, all in the name of exercising the freedom of speech and expression guaranteed by the Constitution. This is crucial in upholding the rule of law and maintaining the judiciary's integrity within the democratic framework.[34] Journalists must maintain a commitment to precision and impartiality, deliberately providing a range of perspectives on a given situation or topic. While exercising the fundamental right of free speech and expression, no one must obstruct the legal system's proper functioning or undermine the respect and influence of the judiciary, even when critiquing its judgments. However, given that this jurisdiction limits the freedom of expression, it should be judiciously applied and restricted to exceptional circumstances.[35] The fundamental purpose of the doctrine of contempt of court is to safeguard the proper functioning of the judicial system and to maintain the honour and gravity of the courts. The jurisdiction of contempt of court is invoked not to preserve an individual judge's prestige but to safeguard the justice system's integrity from disparagement or interference.[36] Contempt, within the legal context, encompasses verbal or written expressions that serve to

33. Sheikh, *supra* note 31, at 106.
34. In Re: Arundhati Roy, AIR 2002 SC 1375.
35. Ram Dayal v. State of Bihar, AIR 1962 SC 955.
36. Supreme Court Bar Association v. Union of India, AIR 1998 SC 1895.

impede or have the potential to inhibit the dispensation of justice. The Supreme Court, in its analysis of the contours of contempt of court, established a criterion for each case, which revolves around determining whether the criticised publication is primarily a defamatory assault on the judge or if it can disrupt the regular functioning of justice or the appropriate administration of the law by the court.[37] The authority to administer penalties for contempt of court pertains to two significant fundamental rights of the citizens, namely, the right to personal liberty and the right to express oneself freely. In the ordinary course of proceedings, the defence of truth should generally be admissible unless it is determined to be a mere facade intended to evade the repercussions of a wilful or malicious effort to discredit the court or if it obstructs the due process of justice. The framers of the Indian Constitution acknowledged preserving the court's dignity as a fundamental tenet within the framework of the rule of law within a democratic system.

Conversely, the imperative components for advancing democracy entail the presence of robust and constructive critiques, which are made possible through the exercise of the freedom of speech and expression. The mutually beneficial connection between the freedom of speech and the judiciary imposes a responsibility upon individual liberty and the court itself. The exercise of freedoms such as speech, expression, press, and media, along with their associated concerns, necessitates the implementation of ethical and professional standards to maintain a nuanced equilibrium in conjunction with the judicial system.[38]

In India, the judiciary assumes a pre-eminent role as the guardian of constitutional principles, commanding a position of heightened esteem within the collective consciousness of the nation's citizenry. The judiciary is obliged to intervene, safeguarding public trust in the sanctity of the legal system. This responsibility entails upholding the honour of the judicial

37. C. K. Daphtary v. O. P. Gupta, (1971) 1 SCC 626.
38. Sheikh, *supra* note 31, at 110.

institution, averting any undue influence on the legal process, preserving the supremacy of the law, and safeguarding the general welfare through the untarnished administration of justice.[39]

In India, a critical re-evaluation of the offence of scandalising the court is urgently warranted. This is necessitated by even ordinary tweets and comments on social media being scrutinised as potential instances of contempt. Such an approach to scandalising the court has given rise to a chilling effect, which poses a significant detriment to the democratic fabric of our nation. It has led to a situation where the voices of critics are increasingly subdued because of the apprehension of becoming entangled in criminal proceedings.[40] The distinction between judicious reasoned criticism and inflammatory, defamatory statements has become increasingly indistinct, so it can be considered practically absent. This development poses a significant threat to the crucial facet of judicial accountability, a cornerstone in upholding the rule of law. A paramount aspect intrinsic to any democratic system lies in the liberty to scrutinise and inquire, and this prerogative ought not to be stifled or dissuaded due to concerns regarding an improbable and severe reprisal from the judiciary. While upholding the judiciary's sanctity is paramount, it is imperative to underscore that stifling dissenting viewpoints is not a viable nor ethical means of accomplishing this objective. Judicial institutions should recognise that the dignity of the judiciary is a direct consequence of the collective actions of the judicial body rather than being contingent upon individual perspectives.

In various legal systems, the judiciary has accorded a greater reverence to the principle of freedom of speech and expression than legal doctrines on contempt of court.[41] However, in the Indian context, a distinct approach has been adopted, seeking to harmonise and reconcile these two facets. In

39. Sukanta K Nanda, *Freedom of Expression, Contempt Proceedings and the Judicial Interpretation*, 49 Ban L.J. 111, 131 (2020).
40. N. Kumar, *Scandalizing Indian Democracy: A Critical Analysis of Section 2(c)(i) of the Contempt of Courts Act, 1971*, Revue Libre De Droit 70, 81 (2021).
41. R. v. Police Commissioner, [1968] 2 QB 118.

Narmada Bachao Andolan v. *Union of India*[42], the judiciary underscored that no entity should be granted the liberty to distort the court's proceedings and judgments deliberately, thereby presenting a wholly inaccurate and incomplete representation that possesses the potential to vilify the court, tarnish its reputation, or subject it to ridicule. Freedom of speech and expression is the lifeblood of democracy, yet it remains subject to specific constraints and limitations. Offering insights into the intricate domain of contempt law, Justice V. Krishna Iyer, in the case of *Baradakanta Mishra* v. *The Registrar of Orissa High Court*[43], remarked on the problem inherent in this legal field. He noted that this dilemma stems from the constitutional imperative to harmonise two paramount yet occasionally contradictory interests: freedom of expression and the pursuit of equitable and unwavering dispensation of justice. It is incumbent upon the judiciary to zealously safeguard civil liberties and freedom of expression against any potential encroachments from the judicial branch through tolerance and impartiality. Simultaneously, the media enhances institutional accountability by forging connections between these institutions and the citizenry.[44]

Conclusion

In the article, we have embarked on a comprehensive exploration of the judicial power to punish contempt, considering its historical foundations and contemporary relevance in the era of social media. The historical analysis revealed that the concept of contempt of court has ancient origins, designed to safeguard the dignity and authority of the judiciary. The historical evolution of contempt of court underscored its critical role in ensuring the proper administration of justice. However, the emergence of social media has presented new and intricate challenges to this traditional

42. Narmada Bachao Andolan v. Union of India, AIR 1999 SC 3345.
43. Baradakanta Mishra v. The Registrar of Orissa High Court, AIR 1974 SC 710.
44. Rupesh Aggarwal, *Scandalising the Fallible Institution: A Critical Analysis of the Varied Judicial Approach on Criminal Contempt*, 3 Indian J.L. & Pub. Pol'y 96, 99 (2016).

authority. The rapid dissemination of information and the ease of public commentary have blurred the boundaries between freedom of expression and potential interference with the justice system. Individuals can now freely comment on ongoing legal proceedings, judges, and the legal system, raising concerns about juror misconduct, witness tampering, and spreading prejudicial information.

Moreover, the anonymity provided by online platforms has encouraged individuals to make contemptuous or inflammatory statements that can quickly gain widespread attention. This phenomenon necessitates the judiciary's response to maintain the authority of the courtroom in a digital world. The article also highlighted the delicate balance that must be struck in the age of social media, as courts grapple with the need to preserve judicial authority while respecting fundamental rights, such as freedom of expression. This complex issue is not confined to a single jurisdiction, as legal systems worldwide are confronting similar challenges.

In conclusion, with its wealthy historical foundations, the judicial power to punish contempt faces intricate questions in the digital age. Striking the right balance between preserving judicial authority and respecting freedom of expression remains an ongoing and multifaceted task for legal systems across the globe. Further exploration of this subject will be instrumental to understanding the future of contempt of court in our increasingly digital world.

The Federal Friction: An Excavation into the Power Tussle of Mining

Dr. Meenakumary S.* & Fathimath Nadha C.S.**

Introduction

Etymology of the term "mining" was derived from the term *minen* which means 'to dig a tunnel under fortifications to overthrow them' and from the old French word *miner* «to dig, mine; exterminate,»[1]. Mining traces its origins to ancient times, with prehistoric communities engaging in the extraction of resources such as flint, prized for its ability to form sharp-edged tools and weapons when fractured. Additionally, the early pursuit of gold and copper mining can be traced back to this ancient era. The belief that minerals were a special finite resource, the exploitation of which should be carefully controlled and optimized, engendered the perception of scarcity[2]. This combined with high mineral price and made a "battle for control" inevitable, contributing to the Contemporary profitability of public investment in mining[3].

---

* Associate Professor, Government Law College, Thiruvananthapuram, Kerala

** 4th Semester, BA.LLB Student, Government Law College, Thiruvananthapuram, Kerala

1. *Online Etymology Dictionary*, Etymonline https://www.etymonline.com/word/mining. (last visited June 8,2024)
2. Donella H.meadows et al, Limits To Growth, (Universal Books 1st ed. 1972).
3. R. Adams, Restructuring Of The World Metals Industry: Implications For The Future 35-39 (1992)

Mining plays a pivotal role in propelling the Indian economy, with its significance only increasing over time. India is endowed with three thousand five hundred and twenty-seven mining leases across forty major minerals, spanning an area of approximately Three hundred and fifteen thousand hectares. The mining sector currently contributes 2.5 percent to the Gross Domestic Product (GDP). In the annum 2020, the aggregated valuation of mineral yield amounted to one trillion, two hundred ninety-nine billion, five hundred million, whereas the worth of mineral consignments ascended to an astronomical eighteen trillion, nine hundred sixty-three billion, four hundred eighty million.[4]

The Government of India has been making tall claims of extracting large quantities of minerals and thereby earning huge foreign exchange. It is taking the proud privilege of becoming one of the larger/largest producers of coal, mica, bauxite and other mineral resources[5]. However, the Reference Annual published by the Government of India do not divulge any information about the state of environment in and around mine area. This is nothing but a far cry from realizing the nascent fundamental right[6] to environmental information. Pertinently, reports and research bring forth miserable stories of the state of affairs in and around the mine.[7] Mining is also replete with the auxiliary variables of the power tussle between the Centre and States as it is a subject that transcends different ministries and both lists, not being exclusively confined to the Union list. The underlying intricacies of this power tussle lay dormant in the legislative framework of the country and hence an unambiguous legal framework becomes inevitable.

4. Mary Abraham, *India's Mining Sector: Towards a Sustainable and Equitable Future*, Teri Web Desk (May 5 2024, 10 AM), https://www.teriin.org/article/indias-mining-sector-towards-sustainable-and-equitable-future (last visited June 10,2024)
5. Govt Of India,India - A Reference Annual, 551-6 (Ministry of Information and Broadcasting 1955).
6. LLC. of India v. Manubhai Shah, AIR 1993 SC 171; W.B. Power Development Corpn. Ltd. v. Union of India, AIR. 1990 Cal. 125.(India)
7. Jaitli, Gupta, et al., *Sandstone Mines Eating into their lungs: Survey of Environment*, The Hindu, 1993, at 81.

Mining: The Federal Juggernaut

The halls of the parliamentary institutions and the legislatures of states are inexorable fractions of Indian federal governance. An inquiry into a philosophical allegory would elicit that central government and state government are inexorable in a way that they persist as the brain and heart of the federation. The State Government, like the heart, operates locally, ensuring the circulation of resources, services, and governance within its jurisdiction. It embodies the unique cultural and regional characteristics, nurturing the roots of society. On the other hand, the Central Government acts as the brain, coordinating and directing the overall functioning of the nation. Just as the heart and brain work in tandem to sustain life, the regional and federal governments collaborate to uphold the integrity and prosperity of the nation. Yet, often this tandem is interfered due to their appetite for power as seen in case of mining.

Entry 53 in the Union list grants the Parliament authority to legislate for the management and enhancement of oil fields and mineral assets. Specifically, Entry 54 confers upon the Union the power to enact legislation for the control and development of mines and minerals. Entry 55 imposes an obligation on the Union to regulate through legislation the aspects underscoring the safeguard of workers. Further, environment is an exclusive power of the parliament under Article 248 of the Indian Constitution[8]. Apart from these obligations, Part IV the Constitution of India also provides other obligations which in short includes, (i) An economic system's function that avoids causing widespread harm or detriment to the public. Article 39(c); (ii) the health of weaker section is not abused Article 39(e), assistance in case of sickness and disablement (Article 42), (iv) just and human condition of work (article 42); (v) living wages (Article 43), (vi) to improve public health (Article 47). The provisions underscore the pertinence of the Parliament in mining sector. In accordance with the provisions set forth under serial number 54 of List I, the Parliament has enacted the statute

8. India.Const, art 246.

known as "The Mines & Minerals (Development and Regulation) Act, 1957".

In the context of India's federal structure, while the Parliament holds the exclusive jurisdiction over mining, the mineral resources situated beneath a state's territory are under the purview of the respective State Authorities. Entry twenty-three of List 2 specifies the state legislature's authority to regulate mining and mineral development, in consonance to the stipulations of List 1 concerning governance and advancement overseen by the Union. Additionally, Entry 6 of List II, which grants states the power to regulate public health and agriculture (as detailed in List II, Entries 14, 17, and 18) and the welfare of animals and birds, implicitly bestows upon states the authority to oversee mining operations. At the administrative level, various ministries manage sectors like health, agriculture, coal, mines, environment, and forests. Section 15 of the Mines and Minerals Act empowers state governments to formulate regulations concerning minor minerals. Consequently, state governments are authorized to issue mineral leases and licenses for all minerals within their territorial boundaries are governed by the Mines and Minerals (Development and Regulation) Act of 1957 (MMDR) and the Mineral Concession Rules of 1960 (MCR) established under this Act.

The Hon'ble Apex Courts have adjudicated plethora of cases in consonance with the jurisdictional tussle of the Entry 53 of the list I. In the landmark judgment of *Reliance Natural Resources v. Reliance Industries Limited*, the Supreme Court of India unequivocally asserted that natural gas is a national asset, crucial to the development of the entire country, and its benefits should be disseminated equitably across all states. The Court emphasized that allowing any single state exclusive rights to extract and utilize natural gas would unjustly deprive other states of their fair share. This reasoning reinforces the Union's position and underscores the categorization of 'natural gas' under Entry 53 of List I. By delving into statutory history and scrutinizing definitions of 'petroleum', 'petroleum products', and 'mineral oil resources' across myriad statutes & authoritative

texts, Court concluded that the regulation of natural gas, in both its raw and liquefied states, as a component of mineral oil resources, falls squarely within the purview of Union jurisdiction to ensure its equitable distribution for national welfare.[9]. In the same vein in *Association of Natural Gas and Others v. Union of India and Supreme Court of India*, wherein the legislative competency of the Gujarat legislature was challenged on the ground that they enacted laws that comes under the purview of the entry 53 of the List I. Court held that under entry fifty-three of List one that the Parliament possesses the power to promulgate statutes governing the control and development of oilfields, petroleum products, other liquids & substances classified extremely inflammable by law[10].

The Supreme Court in *Baijnath Kedia v. State of Bihar* interpreted Entry fifty-four of the List one pertaining to the regulation of mines and minerals enhancement. It was held that while Entry 23 of the State List is subordinate to Entry fifty of the List one. Parliament possesses the power to determine that, for the Civic interest, it is necessary for control over these matters to be transferred to the Central Government. The scope of such a declaration is determined solely by Parliament and must align with public interest imperatives. Upon the issuance Of this declaration and its scope delineated, legislative matter within that specified scope becomes exclusively Parliament's domain. Any subsequent state legislation that encroaches upon the territory defined in the declaration is inherently unconstitutional, as that legislative field is removed from the State Legislature's jurisdiction[11]. The moot conundrum of this conflict surfaces due to the factor that Entry 23 is governed solely by the stipulations outlined in List I. and it doesn't have any exclusive discretionary power, rather to assist the Union when the developmental activities are undergone by the governance of the Union.

9. (2010)7 SCC 1.
10. 2004 (4) SCC 489
11. AIR 1970 SC1436

The Legislative Frameworks for Mining

The Mines Act (1952)

The Mines Act of 1952 stands as a comprehensive legislative framework designed to meticulously oversee and regulate the operational landscape within mines across India, encompassing both subterranean and open-cast environments. This legislation rigorously addresses every facet of mining activities, encompassing the deployment of machinery, adequacy of ventilation and illumination, as well as the provision of sanitation facilities.

At its core, the Act meticulously delineates the responsibilities of mine proprietors, managers, and laborers alike, while prescribing stringent protocols aimed at preemptively mitigating the risks of accidents and occupational ailments. Central to its framework is the stipulation for the appointment of inspectors, vested with the authority to enforce strict adherence to its provisions, thereby ensuring the utmost safety, health, and welfare standards for all individuals engaged in mining operations.

The nexus between Articles 21 and 24 of the Indian Constitution underscores the seamless integration of constitutional mandates with the regulatory framework established by the Mines Act of 1952. Article 21 upholds the inherent entitlement to existence and alongside ensures the entitlement to a secure & salubrious environment. Meanwhile, Article 24 explicitly proscribes the engagement of minors below the age of fourteen in perilous vocations. The Mines Act, 1952, thereby serves as the legislative embodiment of these constitutional imperatives, safeguarding workers' rights and ensuring stringent standards of safety and welfare within the mining sector. This symbiotic relationship underscores the commitment to uphold and enforce the principles of justice, safety, and dignity in the workplace, thus translating constitutional values into tangible protections for mine workers.

The Mines and Minerals (Development And Regulation) Act, 1957

Indian Constitution confers upon the Union the authority to regulate extraction and enhancement of minerals, contingent upon Parliament's determination that such regulation is necessary for the public good. In fulfillment of this mandate, Parliament promulgated the MMDR Act. This legislative framework underscores the Central Government's pivotal role in overseeing mineral resources, ensuring their development aligns with national interests and sustainable development objectives. This statute, along with its subsidiary rules, forms the cornerstone of India's legislative framework on mining. It endows State Governments with the authority to formulate regulations for granting concessions on minor minerals, while reserving analogous powers for the Central Government concerning other minerals.

The MMDR Act introduces four key types of mineral licenses. These 'two-stage concessions' streamline the process, enabling direct mining operations once the prospecting phase is successfully completed[12]. This Act was subjected to significant amendments from 2015 to 2021. It is difficult to ascertain whether it is merely a coincidence, but the significant amendments to this statute appear to exhibit a trend and embodies the traces of privatization of the sector, concealed under the guise of centralization.

Amidst the decline in industry production, the Central Government introduced several amendments to address the challenges faced by the mining sector. In 2015, a pivotal amendment to the Mines and Minerals (Development and Regulation) Act (MMDR Act) instituted bid for the assignment of resources concessions, aiming to enhance transparency and reduce corruption in the allotment process. The amendment in two thousand sixteen further facilitated the transfer of captive mining leases, originally acquired through means other than auctions, thereby simplifying 'legitimate business transactions' involving these leases. The 2020 amendment introduced provisions for the 'seamless transfer' of inclusive legitimate

12. Mines and Minerals (Development and Regulation) Act 1957, § 3 (1957) (India).

entitlements, authorizations, and permissions pertaining to extraction lease, extending this facilitation for a period of two years.[13]

Conflicts has been transpired in consonance with the tussle between the federal structure subject to the provisions of this statute. One such issue was adjudicated by the Court. Allahabad High Court in the matter that challenged authority of the State Parliament to promulgate rules under section 15 of the MMDR Act contended that,

> the primary object and the essential purpose of legislation must be distinguished from its ultimate or incidental results or consequences, for determining the character of the levy. A levy essentially in the nature of a tax and within the power of State Legislature cannot be annulled as unconstitutional merely because it may have an affect on the price of the commodity[14].

Union legislation under Entries 52 and 54 does not completely override State legislative powers. The State's authority is limited only to the extent of Parliament's declaration. Despite such declarations, States retain the freedom to act in areas not covered by these declarations. The State's power to levy taxes under List II is broad, unless restricted by the entry itself or other limitations. A State tax or fee aimed at financial augmentation, within reasonable limits, does not automatically interfere with regulation, development, or control. However, if the tax or fee is primarily regulatory, with revenue generation or service provision as secondary, it may encroach on regulatory functions.

Kerala Protection of River Banks and Regulation of Removal of Sand Act, 2001[15]

This Statute was enacted to safeguard riverbanks & riverbeds from excessive sand excavation, maintain their biophysical environmental

13. Niharika Mukherjee, *Indian Mining Law: A Critical Review* ,The Contemporary Law Forum, (Aug 19,2022) https://tclf.in/2022/08/19/indian-mining-law-a-critical-review-part-i/ (last visited June 10, 2024).
14. Chhatarpur Crasher Association v. State Of U.P 2023 AHC:166717-DB (2023).
15. Kerala Protection of River Banks and Regulation of Removal of Sand Act, 2001.

systems, and regulate sand extraction activities. It also addresses related and ancillary matters. In accordance with the current regulations of the Act[16], there was no designated officer empowered to oversee the implementation of the Act's provisions. The government after requisite observation acknowledged the imperative to confer supervisory authority upon the Land Revenue Commissioner to guarantee the effective implementation of the Act. Additionally, specific provisions were incorporated to establish a State-level Committee to evaluate and approve the advanced strategies for the fortification and safeguarding of riverbanks, proposed by the District Committee.

Since its inception, this Act has encountered relentless criticism. Its constitutional validity was initially contested on the grounds, whether the state possessed the jurisdictional competency to legislate on matters pertaining to sand mining accompanied by other auxiliary issues.

The Challenges of Opaque Legislation

How can legislation truly serve justice and public good if its provisions are shrouded in ambiguity, leaving room for misinterpretation and inconsistency? A comprehensive and inclusive legislation is requisite for the effortless functioning of all the compartments of legal system and for social welfare. Plethora of legislation within the mining sector underscores this issue; even after two decades of enforcement of certain statutes, their intended objectives have been submerged in obscurity, resulting in negligible impact.

The Kerala Protection of River Banks and Regulation of Removal of Sand Act, 2001, serves as prime example of legislation fraught with ambiguity. The central dilemma arises from the discordance between its English and Malayalam texts. Despite the Act's enactment in Malayalam, its subsequent English translation, produced in the regional dialect, is pivotal. When discrepancies exist between the terms in the English and

16. Manish Yadav et al., *Commercial Coal Mining in India Opened for Private Sector: A Boon or Inutile*? in Pollutants From Energy Sources 105, 107-108 (2018).

Malayalam versions, resorting to external aids becomes essential to decipher and elucidate the Legislature's intended purpose[17].

This Statute was described as one of the most badly drafted legislations, giving way too much of ambiguity even for Courts while interpreting the provisions therein. The areas of concern were the confiscation, seizure, interim custody and release of vehicle involved in the offence. There was incongruity between the English and Malayalam version of the Act. Even the Rules which were framed to execute the provisions of the Act lacked clarity. Because of these, even the High Court has in many cases come out with divergent dictums and findings. To put an end to this, an ordinance was promulgated by the Governor. Finally Act 15 of 2013 was passed by the Legislature with a view to plug loopholes in the Act. Many Sections were amended. Section Twenty-Three was substituted by with new section Twenty-Three, section Twenty-Three A, section Twenty-Three B, section Twenty-Three C and section Twenty-Three D[18]. It is hoped that, now the provisions of the Act could be implemented in its true letter and spirit.[19]

Even the provisions of Panchayats Extension to Scheduled Areas (PESA) Act are vague in regard with mining. This Statute envisages "*prior recommendation of the gram Sabha or panchayats at the appropriate level shall be made mandatory for grant of concession for the exploitation of minor minerals by auction*." The PESA gazette notification is conspicuously devoid of explicit stipulations concerning major minerals like coal, thereby necessitating that Coal Bearing Areas (Acquisition and Development) Act of 1957 assumes primacy in matters pertaining to land acquisition for mining activities.[20] These ambiguous legislations are creating intricate judicial hurdles, emerging as pivotal issues in cases.

17. P.K. Alavi v. The District Collector and Ors. 2007(3)KLJ734.
18. Kerala Protection of River Banks and Regulation of Removal of Sand Act, 2001, § 23A.
19. George Johnson & Dominic Johnson, Law Relating To Sand Mining In Kerala ,3 (Em Tee En Publications 2013).
20. Rahul Singh, *Tribal Laws Flounder as Coal Law Puts a Village from East India on the Mining Map*, Earth Journalism (June 08, 2024, 03:52 PM) https://earthjournalism.net/stories/tribal-laws-flounder-as-coal-law-puts-a-village-from-east-india-on-the-mining-map.

Chaos of Centralization or Privatization?

It has been contended that following the liberalization of the Indian economy in 1990s, India's mining legislation has undergone a transformation, reflecting a trend observed globally in developing nations[21] a strategic shift designed to entice increased private investment into the sector.[22]. Over the past thirty years, India has undergone a transformative realignment through privatization, accompanied by a substantial overhaul of the legislative framework, heralding a new era of Capitalist expansion and innovation. The decentralization of coal mining is epitomizing the diminishing state dominion over industrial sectors.

The hazardous mining practices and the substandard living conditions endured by laborers in the coal mining sector have raised significant concerns for the Indian government. In response to these issues, the government has resolved to undertake a transformative initiative to nationalize the private coal industry. During the formulation of the first five-year development plan post-independence, policymakers recognized the imperative to enhance coal production through the adoption of advanced technology. Consequently, the Government of India established the National Coal Development Corporation (NCDC) in 1956. Additionally, the Singareni Collieries Company Limited (SCCL), operational since 1945, was placed under the jurisdiction of the Government of Andhra Pradesh[23]. In line with the national energy strategy of the government coal mine nationalization was carried out in two stages during the 1970s. On February 20, 2018, the Union Cabinet of India opted to divulge the coal segment to private

21. Ana Elizabeth Bastida, *Mining Law in the Context of Development: An Overview* in International Competition For Resources: The Role Of Law, State And Markets 101-136 (Andrews-Speed, P. ed., 2008)
22. Pradeep Mehta, *The Indian Mining Sector: Effects on the Environment and FDI Inflows*, OECD CONFERENCE ON FOREIGN DIRECT INVESTMENT AND THE ENVIRONMENT https://elibrarywcl.wordpress.com/wp-content/uploads/2015/02/the-indian-mining-sector-effect-on-the-environment.pdf. (last visited June 8,2024)
23. Manish Yadav et al.*supr*a note 16.

companies, allowing commercial extraction. This groundbreaking move breaks the monopoly of Coal India Limited (CIL) and eradicates remaining remnants of licensing-quota regime that prevailed in the 1970s.

In August 2014, Apex Court deemed allocation of coal-blocks by the Steering Committee and via 'government dispensation' as illegal and arbitrary. This judgment led to the annulment of 214 coal blocks, with the exception of four blocks excluded from the ruling. Since 2015, these blocks have been undergoing a bidding process under stipulations of Coal Mines (Special Provisions) Act, 2015 (CMA 2015), legislated by the administration that assumed power in 2014. Subsequently, in March 2020, the Government of India enacted the Mineral Laws (Amendment) Act, effectively abolishing fifty-years old bar on commercially monetized mining . This legislative move aimed to boost auction-based coal block allocation to the private sector, eliminate end-use restrictions, and introduce commercial mining, thereby promising increased revenues for both state and central governments and a surge in coal production by the private sector.[24].

In August 2023, a momentous amendment to the (MMDR Act) was put forth by the Central, culminating in the designation of twenty-four minerals as Critical and Strategic within 1st Schedule of the MMDR Act. Introduction of Section 11(D) endows the Central Government with the authoritative prerogative to orchestrate the bid of these Critical and Strategic mineral blocks, facilitating the granting of mineral concessions as delineated in Part D of the First Schedule. Following this legislative augmentation, the Mineral (Auction) Amendment Rules, 2023 were promulgated to meticulously outline bidding protocols for these pivotal mineral blocks, ensuring a streamlined and centralized approach by the Central Government.

24. Lydia Powell et al., *Coal Production by the Private Sector in India: The Perils of Promise*, Observer Research Foundation , https://www.orfonline.org/expert-speak/coal-production-by-the-private-sector-in-india-the-perils-of-promise. (last visited June 8,2024)

Kerala's Industrial Minister, P. Rajeev, has indicated that the state administration is contemplating the possibility of legally contesting the Central Government's amendments to the Mines and Minerals Development and Regulation Act, 1957. The Kerala Government issued an official statement in July and mentioned that they are consulting legal experts to file a petition. Kerala has been vehemently opposing the amendment, contending that it facilitates the central government's usurpation of the state's authority in granting permissions for the extraction of black soil. Notably, the amendment seeks to authorize private enterprises to undertake the mining of beach sand minerals.

The suggested revision is perceived as an encroachment on the Kerala government's prerogatives, as it seeks to abrogate the sole privileges afforded to public sector undertakings (PSUs) for mineral extraction from beach sands.

This legislative alteration would facilitate the involvement of private entities in the mining of atomic minerals, given that the amendment reclassifies 8 designated atomic minerals—including Monazite, Ilmenite, Silica, and Rutile—from the genre of 'atomic minerals' to 'critical minerals.' The rationale proffered by the Union for this reclassification is regarded as implausible by the Kerala state authorities.

Commercialization of this sector possesses perks as well as edges. For the sustainable preservation of the environment and the economic advancement of the nation, privatization is indispensable. However, a balanced approach is essential to ensure the protection of both employees and the environment.

Merits and Menaces: A Swot Analysis

The SWOT analysis[25] of the coal sector facilitates a comprehensive visualization of the inherent strengths and weaknesses of the commercial coal mining industry, alongside the external opportunities and challenges that it faces. Strengths and weaknesses are intrinsic to the sector, rooted in its internal dynamics, while threats and opportunities are extrinsic, stemming from external environmental factors. This analysis provides a strategic framework to navigate the complexities and prospects of the industry.

The initiative to enhance efficiency in the coal sector marks a pivotal transition from a monopolistic regime to a competitive marketplace. This shift is crucial for augmenting the nation's energy security, given that 70% of India's electric energy is derived from thermal power plants. The strategy aims to ensure a steady coal supply through accountable allocation, thereby stabilizing coal and power prices for consumers. Central to this transformation is the commitment to transparency, simplifying business operations, and optimizing the utilization of natural resources for national development. The policy promotes the integration of advanced technologies in the coal sector to boost investments and create both direct and indirect job opportunities in coal-rich areas. Additionally, it aims to utilize revenue from private commercial mining to support coal-producing states, enhancing their fiscal resources. This will allow them to invest more in the development of disadvantaged regions and communities, including indigenous groups. This all-encompassing strategy aims to cultivate enduring growth and socio-economic advancement throughout the coal-rich states.

Nevertheless, a significant number of the 41 coal blocks earmarked for privatization in states of Madhya Pradesh, Chhattisgarh, Jharkhand, are situated within forested areas, which serve as the ancestral habitat and primary livelihood source for millions of tribal individuals. This move poses a substantial threat to the socio-economic fabric of these indigenous

25. N. Pavan Kumar & Indresh Rathore, *The Need of Mining Industry – A SWOT analysis*, 3 IRJES 32, 32-36 (2015).

communities, potentially displacing them from their traditional lands. The displacement could lead to the erosion of their cultural heritage, disruption of their livelihood practices, and exacerbate their vulnerability, given their deep-rooted dependence on these forests for sustenance and economic activities. This transformation will underscore a critical challenge.

The concept of privatization can be examined via the prism of public trust doctrine, allowing for a comprehensive analysis of its implications and inherent conflicts. This doctrinal perspective provides a framework to scrutinize how the transfer of resources from public to private control aligns with or undermines the fundamental principles of public stewardship and environmental protection.

The chronicles of this doctrine can be archived from the traces of Roman empire. The Roman Emperor Justinian refined the convoluted legislations approximately one thousand years back and codified Corpus Juris Civilis. Public Trust Doctrine, which has evolved to encompass not limited to water but a broader spectrum of resources, posits that these assets are communal property, entrusted by state for the advantages of all citizens.[26] Centuries subsequent to the decline of Roman Empire, an antiquated manuscript of Corpus Juris Civilis unearthed in Pisa, sparking an epoch of meticulous scholarly examination and rigorous study.[27] Over time, the concept of public trust permeated English and American jurisprudence. In England, the monarchy, holding nominal custodianship of public lands, safeguarded these resources held in public trust. This arrangement was designed to prevent the king from monopolizing access to these vital resources. This principle was subsequently integrated into American law, notably through the landmark ruling in *Arnold v. Mundy*[28].

---

26. Michael C. Blumm*, Public Property and the Democratization of Western Water Law: A Modern view of the Public Trust Doctrine*, 19 Envtl. L. 573 (1989).
27. Thomas Glyn Watkin, An Historical Introduction To Modern Civil Law 63 (Routledge 1st ed. 1999).
28. Arnold v. Mundy 6 N.J.L. 1 (1821) (USA).

This doctrine embodies a dual approach, initially it obliges the state to safeguard these resources and enables citizens to challenge inadequate custodianship of natural resources by the state. Consequently, the sovereign is prohibited from transferring public trust assets to denationalized entities as they would undermine the public interest. While the public trust doctrine faces notable criticisms, it is progressively being integrated with concepts such as sustainable development, the precautionary principle, and biodiversity conservation. This doctrine melds the assurance of communal availability to trust resources with a mandate for governmental liability in decisions affecting these resources. Beyond safeguarding the public against mishandling of planning regulations or environmental impact assessments, it also encompasses an inclusive perspective, emphasizing stewardship of resources for future generations.

Public trust doctrine has been inherently incarnated in Indian jurisprudence since the inception of Indian constitution. The gist of this concept is embodied by Directive Principles of State Policy and Part III of Constitution. The Sentinel on the qui vive has applied this doctrine in myriad cases. It was initially applied in the matter *M.C. Mehta* v *Kamal Nath*[29]. In *Kamal Nath*, Court scrutinized the second and third constraints, ruling that assets designated for public utility must not be appropriated for private ownership or commercial exploitation. Traditionally, this doctrine obligates the government, acting as trustee, to take specific actions or refrain from others. It has been invoked to protect diverse rights, including access to essential resources like light, air, and water, ensuring a healthy living environment, and securing natural resources for future generations. However, whether the doctrine itself fits within a rights-based framework remains an open question. The Sentinel on the qui vive has acknowledged that the doctrine in question has evolved from Article 21 of Indian Constitution, which enshrines safeguard of life and freedom. However, the judgment failed to elucidate the shift from a common law principle to a

29. M.C. Mehta v Kamal Nath (1997) 1 SCC 388.

fundamental right, and this analytical trajectory has not been further explored or expounded upon by the Court in subsequent rulings.[30]

The ongoing conflict between the Kerala state administration and the Union government exemplifies a discord that contradicts the established principles, particularly concerning the facilitation of privatization. Kerala's state authorities are contemplating a legal challenge against an amendment proposed by the Central Authority to the MMDR Act in 2023. They assert that this amendment would empower the Central government to infringe upon state powers, thereby potentially authorizing private entities to engage in mining activities.

A thorough examination of this Amendment reveals its opposition to the tenets of the doctrine. The proposed transition of beach sand mineral mining from public sector undertakings to the private sector is fraught with potential risks. Under the public trust doctrine, beach sand minerals, are designated as a public trust resource, mandating their governance by the state. However, this amendment blatantly disregards the paramount principles of the public trust doctrine. The opposition articulated by the Kerala Government underscores these dimensions.

A juxtaposition of India's contemporary trend for privatization and the doctrine of public trust would explicitly unveil a contrast in the initiatives of the Union in the camouflage of centralization. A fraction of the mining sector has increasingly shifted into the control of private entities. While privatization brings certain advantages and efficiencies, it presents a paradoxical challenge when juxtaposed with the tenets of this doctrine. As long as these resources are under the aegis of government stewardship, rigorous supervision of these sites guarantees the safeguarding of employees and the preservation of adjacent regions. Conversely, the transition to private sector management threatens these protections, given that the primary impetus for private entities is profit maximization, often at the expense of

30. Mohd. Kausar Jah v. Union of India, (2011) SCC Online All 735.

environmental integrity and social welfare. *The query of germane interest, that emerges is whether the tenets of the common law doctrine will ultimately triumph over the forces of sectoral commercialization*.

Preservation Over Exportation

A fundamental dilemma of privatization emerges when the mining sector's stewardship is vested in private corporations. These entities adopt a dual strategy, wherein they extract raw materials, potentially exporting a portion to foreign markets. These same materials are then re-imported to India as finished goods, ready for use, often at inflated prices. This cyclical process not only exacerbates costs for Indian citizens but also stifles domestic production and economic growth. Instead, a more strategic approach would involve harnessing the raw materials extracted domestically, and transforming them into finished goods for export, thereby enhancing our economic standing. Developing a profound awareness of the intrinsic value of our national resources, coupled with the implementation of stringent regulatory frameworks on private companies, is essential to overcoming this challenge. Such measures are pivotal in steering the nation towards sustainable development, ensuring that our resources are utilized efficiently for domestic prosperity and global competitiveness.

Conclusion

The intricate dynamics between state and union interests and the privatization thrust within the mining sector have exacerbated the existing ambiguities in legislative frameworks. These ambiguities undermine regulatory coherence and complicate the enforcement of sustainable and ethical mining practices. The push towards privatization has introduced a market-driven ethos that often clashes with the broader public and environmental interests, fostering a regulatory milieu that is both contentious and inconsistent. Additionally, the contentious debate over mining exports has further muddied the waters, raising questions about national resource sovereignty and long-term economic sustainability. To navigate these

complexities, it is imperative to develop a more integrated and forward-thinking policy approach that balances economic imperatives with ecological preservation and social equity. This necessitates a concerted effort to streamline legislation, enhance regulatory oversight, and forge a consensus that upholds both the economic benefits of the mining industry. It is crucial to prioritize preserving our land's assets, ensuring their sustainability for the prosperity of future generations.

Patriarchy, Law and Judicial Interventions: A Critical Analysis of Indian Judiciary in the Light of Handbook on Combating Gender Stereotypes by Supreme Court of India

Lekshmi Priya R* & Dr. Arathi P.M.**

Introduction

How judges judge has been a matter of investigation and an academic concern of legal scholars across the globe since decades. The academic inquiries about 'judging' grounded on the schools of legal formalism[1] and legal realism[2] steered the growth of epistemological understanding of law.

* Research Fellow, School of Indian Legal Thought, Mahatma Gandhi University, Kottayam, Kerala.

** Assistant Professor, School of Indian Legal Thought, Mahatma Gandhi University, Kottayam, Kerala.

1. Heeding to legal formalist theory "lawyers and judges saw law as an autonomous, comprehensive, logically ordered, and determinate and believed that judges engage in pure mechanical deduction from this body of law to produce single correct outcome". Brian Z. Tamanaha, Beyond The Formalist – Realist Divide 1 (2010).
2. "…. Legal Realists were a group of scholars who sought to pivot away from doctrinal analysis and legal formalism toward nudging legal scholars and lawyers to think about how social context affects the delivery of law on the ground. Their pragmatic realistic approach considered politics, policy, and the law in action within and among communities, as well as actively wrestling with how real-world pressures beyod doctrine impact judicial decision-making". Research Handbook On Modern Legal Realism 1(Shauhin Talesh et al eds., 2021)

It has amplified the legal scholarship through the convergence of legal anthropology and judicial behaviouralism. In every society, judicial pronouncements have great emphasis as it is the medium through which judiciary engage with the society[3]. It is obvious that public expect an exemplary judiciary which generates rational, value neutral and cognitive judgments. However, judges are human beings with various emotions, perceptions and individual experiences. Thus, completely eliminating the element of subjectivity from the judicial process and ensuring absolute objectivity is onerous. Whereas, subjectivity is not a malice unless it ruins the lofty ideals of justice. Therefore, it is quintessential to make sure that the prejudices possessed by the adjudicator never have an effect on the ultimate delivery of justice. Indeed, it is the responsibility of the judges to overcome their predilections; even so, it is ideal if judiciary itself sets parameters for judging. Ascertaining the domain which are prone to get affected by the subjective biases of a judge and developing a coherent as well as pragmatic guideline is the only panacea to uphold the public faith in judiciary. Recently, Indian legal system has witnessed such an initiative by the Supreme Court of India. It has devised a handbook to tackle the gender discriminatory stereotypes in judicial process and bring 'gender-just' actions in adjudications. Formerly, *Aparna Bhat v State of Madhya Pradesh*[4], a Supreme Court verdict which acknowledged the patriarchal reasoning of Indian courts might be a leading cause for Supreme Court's inventiveness. 'Handbook on Combating Gender Stereotypes', published in August 2023 by the Supreme Court of India has obtained global attention owing to the nature of its contents. It was the first of its kind in the history of Indian Judiciary to publish such a manifesto to regulate the gender insensitivity of judicial process and practices.

This research paper aims to evaluate the perilous situation which drove the Supreme Court to challenge gender stereotypes in judiciary. The authors

3. Rachael K. Hinkle et al*., A Positive Theory and Empirical Analysis of Strategic Word Choice in District Court Opinions*, 4 J. Of Legal Analysis 407, 408 (2012).
4. Aparna Bhat v State of Madhya Pradesh, 2021 SCC OnLine SC 230

also attempt to scrutinize the 'Handbook on Combating Gender stereotypes' to comprehend how far the document is efficacious to meet the goal. The paper has been majorly developed by espousing doctrinal method of research by mostly relying on secondary sources. The paper comprises of four parts. Initially it discusses how law understands and internalize gender discrimination. In the second part, the authors delve into the international efforts to address gender based inequality. Further, the authors revisit the judicial reasoning of Indian courts which foreground serious gender stereotypes and also the emerging transformative jurisprudence. Finally, the paper critically appraises the handbook developed by Supreme Court of India to confront gender stereotypes and bring forward certain suggestions.

Law, Discrimination and Gender

Discrimination has multiple strata.[5] A single person may experience multifarious discrimination in a society where zero adherence has been given to the concept of equality. Religion, race, caste, gender, sexual orientation, region, ethnicity, skin colour, age, and so on configure as determinants for discrimination. These elements independently or conjointly intersect with the experience of individuals and cause unequal social conditions to them. Law is of course a powerful weapon to shear the innate inequalities of every society. However, it could not completely wipe out every kind of discriminatory thoughts which are inherent among the commons. In the Indian context, multiple social inequalities coexist and the very nature of discrimination changes time to time make the scenario complex and the legal interventions and understanding difficult. Anyhow, the Constitution of India has deliberately attempted to address certain obtrusive inequities. Article 15 of the Constitution of India envisages "prohibition of discrimination on the grounds of religion, race, caste, sex

5. *See*, Paola Uccellari, *Multiple Discrimination: How Law Can Reflect Reality*, 1 The ERR 24, 24 (2008)

or place of birth".[6] How far such a single provision which comprises of tightly stuffed attributes can tenaciously battle against the discrimination, especially in a society where inequalities are historically deep rooted, is a major question?

Though every kind of discrimination has its own gravity and enormous impact upon an individual as well as societal level, discrimination in terms of gender amounts to societally uncivilized as well as personally an atrocious deed.[7] The primary concern of the legal scholarship and practice is what extent law succeeds in addressing and overcoming dogmatism in terms of gender. Deploying formal equality in a social structure like India where diverse horizon of gendered notions exist is the cardinal problem which has been debated by the academia since decades. Achieving gender equality is not at all a cake walk in a highly patriarchal[8] Indian society. The power hierarchy functions in the patriarchal landscape deprives woman's autonomy in every facet of her life.[9] Male dominance as a normalised practice in a patriarchal social order, controls the social life, sexuality, reproduction and overall decision making of women.[10] The male supremacy has been intrinsically connected with the illogical notion that women are biologically and intellectually inferior and this assumption warrants protectiveness to women from men. The upper hand of religion in Indian society which traditionally follows customary canons like *Manusmriti*[11], underpins the

6. By virtue of Article 15(1) of Constitution of India, "the State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them".
7. Olaiya E. Aina and Petronella A. Cameron, *Why Does Gender Matter? Counteracting Stereotypes with Young Children*, 39(3) Dimension Of Early Childhood 12 , 12 (2011)
8. "A patriarchal society is a social system in which the male governs a clan or family". Melissa Donahue, *Transitioning from Patriarchal Society: Women's Rights and Gender Equality*, 5 Essai 46, 46 (2007)
9. Sapna Sah, *Patriarchy and the Identity of Women in Indian Society*, 9(8) Jetir 596, 596-97 (2022)
10. *Id*
11. According to Manusmriti , "if a wife violates her duty towards her husband, she will be disgraced in the earthly world, after death she will come into the womb of a jackal,

paternalistic approach towards women. Indian legal system is not an exception to the reflection of such misogynist views. Argument for protection to women considering them as inferior in the society is apparent from the part of both legislature and judiciary. When we reread Article 15(3) of Indian Constitution in today's context one may tempt to assume that it justifies legal paternalism carried out by Indian legislature. However, that does not implicate that we ignore the tremendous contribution made by protective legislation in addressing the gender based inequalities. By virtue of this article, states can make laws in favour of women and children. Banding women and children together exemplifies how law appraises the existing gender stereotyping women as primary caregivers. A series of legislation that came after the commencement of the Constitution also illustrates legal paternalism and as a category who require protection. Every such legislation viz., Dowry Prohibition Act 1961, Protection of Women from Domestic Violence Act 2005, Medical Termination Pregnancy Act 1971, Hindu Succession Act1956 and so forth attempt to fortify women. Comprehending women as a heterogeneous category and failing to understand the intersectionality involved in it is the major limitation evident in such legislation based on protective discrimination.

Meanwhile, the conventional legal method also perceives women in accordance with the conservative stereotypes and this contemplation often gets reflected in the legal discourses too. Rather than solving an underlying problem of inequality, here, law typecast women and thereby unveils its misshapen design which is masculine in nature, which recalls Catharine MacKinnon famous remark "the law sees and treats women the way men see and treat women".[12] This innate masculine characteristic of law is the

and is anguished by diseases as a punishment for the sin she has already done". It also states that, "if a wife supersedes in anger departs from her husband's house, must either be instantly confined or cast off in the presence of the family. *Manusmriti*, Chapter: IX, Verse: 83

12. Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, 8(4) Signs 635, 644 (1983).

root cause for legal paternalism which reflects in laws based on protective discrimination. Consequently, the international endeavours to realise equality becomes fruitless in Indian context as the Indian legal system is focusing only on protective discrimination!

International Attempts to Annihilate Gender Inequality

It has been recognised globally since long back that gender mainstreaming is the preeminent strategy to defeat discrimination in preference to protective discrimination.[13] United Nations has instigated exceptional activities to mainstream marginalized gender groups. Though not expressly stated about gender inequality, Universal Declaration of Human Rights (UDHR),1948 has earnestly paid attention to construct the principle that all are equal before law without any discrimination.[14] Further, the Convention on Elimination of All Forms of Discrimination Against Women (CEDAW),1979 is one of the powerful efforts to annihilate discriminatory actions against women as its name suggests. It also strongly argues against stereotypes and prejudices. Article 5(a) of CEDAW prescribes that:

> States Parties shall take all appropriate measures to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.

In the Fourth United Nation Fourth World Conference on Women in Beijing in the year 1995 recognized gender mainstreaming as the global

13. Jacqui True, *Mainstreaming Gender in Global Public Policy*, 5(3) INT. FEM. J. POLITICS 368, 369 (2003)
14. By virtue of Article 2 of Universal Declaration of Human Rights: "Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status".
    By virtue of Article 7 of Universal Declaration of Human Rights: "All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination".

strategy to ensure equality.[15] Additionally, in Millenium Development Goals[16] and Sustainable Development Goals[17] as well, several of the goals are mainly focused on the well-being of women although it does not directly focus on their mainstreaming.The failure to achieve these goals points towards the lack of political will of the nation states and financial commitment to achieve the goals. Internationally, the idea of gender justice has reached far forward in terms of their understanding in the conception of gender orientation, gender identity and the surrounded issues. The 'Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity' is a significant progression in the realm of gender justice. However, all these attempts become fruitless unless the fellow nations take up the idea of gender justice in consonance with the conceptual progression of gender justice.

Gender and Fallacious Ratios - The Unmapped Hunches of Judges

Independent and impartial judicial system is fundamental to the democratic functioning of every nation. Adhering the classic principles of separation of powers[18], Indian Constitution has ensured that judiciary is independent[19] from executive. However, it does not explicitly mention the necessity of substantive independence which forbids judges from acting on

15. Emilie Hafner-Burton & Mark A. Pollack, *Mainstreaming Gender in Global Governance,* 8(3) Eur. J. Int. Relat. 339, 339-340 (2002)
16. Millenium Development Goal number three: "promote gender equality and empower women", Millenium Development Goal number five: "improve maternal health".
17. Sustainable Development Goal number five: "achieve gender equality and empower all women and girls".
18. Montesquieu's theory of separation of powers has been explained in his famous book "The Spirit of the Laws". He argues that there must be separation of powers between the organs of Government viz., legislature, executive and judiciary. Separations power principle restricts each branch from intruding into the functioning of other branch. *See*, Tasneem Sultana, *Montesquieu's Doctrine of Separation of Powers: A Case Study of Pakistan*, 28(2) J. Eur. Stud. 55, 55-56 (2012); *See also*, Sharon Krause, *The Spirit of Separate Powers in Montesquieu*, 62(2) Rev. Politics 231, (2000)
19. By virtue of Article 50 of Constitution of India: "The State shall take steps to separate the judiciary from the executive in the public services of the State".

the influences of preconceived notions about the matter in front of them. But every judge has an indispensable duty to be independent from external influences. Moreover, structuring independent and impartial tribunals is one of the cardinal principles of Rule Law. Society also expects utmost integrity, shrewdness and impartiality from judges. Further, judiciary stands on the pillars of public trust and it is the responsibility of judges to strengthen the public confidence and reiterate impartiality and substantive independence.[20] Concomitantly, the judicial pronouncements have significant impact on society since it controls the social, political and personal affairs of individuals. [21]. But "judges are mere human beings"[22], they also possess every trait of an ordinary person. Definitely the heuristic and cognitive biases of judges influence their decision-making.[23] According to Jerome Frank "judges' decisions are not based on a systematic analysis of fact and law, but rather on a perspicacious flash termed the "judicial hunch".[24] But what if such hunches possessed by judges affect the rights of the parties in the case? How did judicial hunches form in a structurally hierarchical society based on caste, class, gender, sexuality and so on? And what if the judicial verdicts throwback us to an antediluvian patriarchal society? It is not a hypothetical interrogation but reflects in the historic and contemporary patterns and trends in the decision-making process of the Indian judiciary.

A closer reading of verdicts of Indian courts dealing with gendered matters, divulges how male centric viewpoints impact upon the judicial

20. *See*, Balram K. Gupta, *Public Trust And Confidence: Real Strength Of Judiciary*, Live Law.In (Nov. 20., 2019, 09:31 AM), https://www.livelaw.in/columns/public-trust-and-confidence-real-strength-of-judiciary-149959?infinitescroll=1 (last visited June 14, 2024)
21. *See*, Terezie Smejkalová, *Importance of judicial decisions as a perceived level of relevance*, 16(1) Utrecht L. Rev. 39 (2020)
22. Chad M. Oldfather, *Judges as Humans: Interdisciplinary Research and the Problems of Institutional Design*, 36(1) Hofstra L. Rev. 125, 125 (2007)
23. Brian M.Barry, How Judges Judge: Empirical Insights Into Judicial Decision Making 9 (2023).
24. Timothy J. Capurso*, How Judges Judge: Theories on Judicial Decision Making*, 29(1) U. Balt. L. F. 5, 6 (1998)

reasoning. The pragmatic embodiment of the inherent androcentric characteristics of law is evident from most of the verdicts in which rights of women is the question. Such judicial verdicts germinate from the fallacious ratiocination grounded on gender stereotyping. Knowingly or unknowingly those verdicts perpetuate the paternalistic and misogynistic ideas in the mind of public. According to Simone Cusack: "stereotyping causes judges to reach a view about cases based on preconceived beliefs, rather than relevant facts and actual enquiry".[25] Even when there are ample legal rules, capable of uplifting the marginalized gender groups, justice fails due to this approach. If the judge is under the prevalence of gender stereotypes, gender rights will indeed remain in 'law in books'[26] only. In what all ways judges transmit patriarchal as well as misogynist morals through the judicial process can only be understood through the feminist jurisprudential analysis of judicial verdicts which are prima facie anti-feminist in content. Thus, the authors revisit the judicial pronouncements which are reiterated and reflected gender stereotypic ideals.

The Judicial Delusions

It is common that whenever an analysis done to understand the judicial intervention in a particular topic, judiciary has been missed critical analysis in most of the cases. Especially when the Indian judiciary's role in gender justice is discussed, everyone including legal scholars appreciate the transformative jurisprudence accomplished by the Indian courts. The convergence of legal fallacies and gender stereotypes had been hardly discusses in the mainstream academic and semi academic discourses in

25. Simone Cusack, Eliminating Judicial Stereotyping: Equal Access To Justice For Women In Gender-Based Violence Cases (2014), https://rm.coe.int/1680597b20 (last visited June 14,2024)
26. "…...with respect to enforcement issues a rather large gap does exist between what Roscoe Pound memorably called 'law in books' and 'law in action'". Robin H. Huang & Nicholas C. Howson, A Big Gap Between 'Law In Books' And 'Law In Action' And "A New Taxonomy Of Enforcement Strategies" (2017), https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1168&context=other (last visited May24,2024)

legal studies. We cannot ignore the contribution of feminist legal scholars, meticulously scanned each aspect of judicial interventions from a gendered lens[27] . These efforts from the feminist legal scholars either intentionally ignored or seldom recognized until the Supreme Court of India has thoughtfully designed a handbook to culminate gender stereotypes. That is the reason why even after the release of the handbook many people including legal luminaries got bewildered thinking about the necessity of such a step from Supreme Court. The justification for this is apparent from the judicial verdicts of which gender stereotypes are deduced as the core reasoning. Nevertheless, specific stereotype may not be identified in certain judgement, but the entire decision is inferred by applying the romantic paternalism amalgamated with the positive discrimination.

An ideal instance for the said kind of gender stereotype reasoning can be seen in most celebrated judgement of *Air India* v *Nargesh Meerza*[28] which has been popularly known as 'air hostess case'. This case has been discussed as an epitome of gender justice in past decades in legal scholarship. However, a rereading of this case from a gender lens provides a critical understanding. The case was filed against the stipulations specified by the Air India regarding the termination of air hostess on attaining the age of 35 years or on marriage if it took place within four years of the service or on their first pregnancy. In this case the Hon'ble Supreme Court of India suggested alteration of the provision by stating that:

> …the rule could be suitably amended so as to terminate the services of an AH on third pregnancy provided two children are alive which would be both salutary and reasonable for two reasons. In the first place, the provision preventing third pregnancy with two existing children would be in the larger interest of the health of the AH concerned as also for the good upbringing of the children. Secondly, as indicated above while dealing with the rule regarding prohibition

27. Ritu Menon & Kalpana Kannabiran, From Mathura To Manorama: Resisting Violence Against Women In India (Women Unlimited 2007)
28. AIR 1981 SC 1829

> of marriage within four years, same considerations would apply to a bar of third pregnancy where two children are already there because when the entire world is faced with the problem of population explosion it will not only be desirable but absolutely essential for every country to see that the family planning programme is not only whipped up but maintained at sufficient levels so as to meet the danger of over population which, if not controlled, may lead to serious social and economic problems throughout the world.[29]

Here the apex court has exhibited not only a Malthusian demographic approach but also a highly paternalistic approach allied with stereotypes about womanly roles. The court's concerns about the health of air hostesses after third pregnancy clearly manifests the danger of protective discrimination which ultimately harm equality and opportunity. By articulating the issue of population explosion and the need of family planning among air hostesses have been a spurious rationale which simply placed the burden of family planning as well as the child rearing responsibilities upon the shoulders of women alone.

The protective discrimination applied by the judiciary in fact neither uplift those gender group nor alleviate the social condition. It only helps to confine them inside the four walls of home. A classic example for the consequence of paternalism in judicial process is the verdict of *Raghubans Saudagar Singh v The State of Punjab*[30]. In this case while the petitioner approached High Court against the exclusion of women from the post of jail superintendent meant for men, the court has showcased a patronizing attitude which is unbefitting for a constitutional court. It has observed that:

The duties of the Superintendent and his subordinate officials and warders involve a direct and continuous contact with these inmates. The difficulties which even male Warders and other jail officials experience in handling this motley and even dangerous assemblage are too clear to need

29. AIR 1981 SC 1829
30. AIR 1972 P H 117

elaboration. A woman performing these duties in a men's jail would be even in a more hazardous predicament.[31]

The patriarchal value-based hypotheses on gender justice are not only discernible in the constitutional morality but also apparent in other domains of law. Ratio decidendi which contains dreadful gender stereotypes are present in every genre of cases including criminal cases and matrimonial cases. The need for gender sensitivity among judges while considering the criminal cases especially in sexual assault cases are detectable from several judgments. The incorrect ascertainment of 'consent' which is crucial to constitute rape, is commonly seen in such verdicts due to the overpowering influence of stereotypes about behaviour of a 'chaste' woman. The judgement of *Mahmood Farooqui v. State Govt of NCT of Delhi*[32], illustrates the hidden frame of mind possessed by certain judges. The court has stated that: "Absence of any real resistance of any kind re-affirms the willingness. An expression of disinclination alone, that also a feeble one, may not be sufficient to constitute rape"[33]. Further it was observed that:

> It is not unknown that during sexual acts, one of the partners may be a little less willing or, it can be said unwilling but when there is an assumed consent, it matters not if one of the partners to the act is a bit hesitant. Such feeble hesitation can never be understood as a positive negation of any advances by the other partner.[34]

Judges fixing metre for resistance exercised by a victim at the time of rape, which is anti-benevolent in nature indicates their uncivilized as well as patriarchal mindset. Because how an individual behave in a particular situation depends upon several factors and most of them are beyond their control too. Hence fixing standards for the behaviour during the occurrence of rape is purely illogical. Female body is considered as a site of male invasion and attributing the ideal situation to resist as their primary

31. AIR 1972 P H 117
32. (2017) 4 DLT (Cri) 328
33. (2017) 4 DLT (Cri) 328
34. Mahmood Farooqui v. State (Govt. of NCT of Delhi), (2017)4 DLT (Cri) 328.

responsibility comes from purely masculine ideas generated by patriarchal mindsets. Invasion of such unreasonable yardsticks in the thought process of judges are the outcome of stereotypes associated with rape. Expressing that: "after the perpetration of the act she was tired and fell asleep, is unbecoming of an Indian woman; that is not the way our women react when they are ravished"[35] is another harmful precedent from a higher judiciary. Creating a category of ideal "Indian women" and attributing feudal patriarchal disciplined way of behaviour in a moment in which she is unable act normally is clear violation of basic human rights of a victim of sexual violence. Trial courts are also not bad in judging with preconceived notions about gender attributes. A recent judgement by a trial court in Kerala has observed that: "The photographs produced along with the bail application by the accused would reveal that the de facto complainant herself is exposing to dresses which are having some sexual provocative one".[36] All these are offsprings of the patriarchal understandings about woman and her chastity. The attires, lifestyle, sexual experiences and so on have no significance in the context of decision making of a perpetrator regarding sexual assault. Still these factors play pivotal role in judicial process and the reason is nothing but the judges' affiliation with gender stereotypes which are intrinsic in every patriarchal society. The patriarchal inspirations are more visible in the family cases. In most of such situations the masculine power hierarchy combined with moral ideologies govern the judicial process. The gravity of patriarchal morals in the mind of a judge is evident from the verdict of *Vallabhi v Rajasabhi*[37], in which court has observed that:

> "Thali" around the neck of a wife is a sacred thing which symbolises the continuance of married life and it is removed only after the death of husband. Therefore, the removal of "thali" by the petitioner / wife can be said to be an act which reflected mental cruelty of highest order as it could have caused agony and hurted the sentiments of the respondent.[38]

35. Rakesh v State of Karnataka, Criminial Petition No.2427 of 2020.
36. Criminal Misc. Case 1303 of 2022 (Sessions Court, Kozhikode 12 August 2022)
37. 2017 (1) MWN (Civil) 128
38. Vallabhi v Rajasabhai 2017 (1) MWN (Civil) 128

Integrating rights, liberties and obligations of an individual with benevolent sexism[39] is the fundamental errors that can be seen in those judgements. Interpretations like a married woman who stops wearing 'sindoor'[40] amounts to cruelty against husband is another verdict exhibits the strong patriarchal influences carried by the judges.

All these judicial pronouncements not only elucidate the implicit gender biases or invisible stereotypic beliefs embedded in their psyche but also proponents a conservative and conventional ideas of gender roles. Gender insensitivity of judges is the major set-back faced by the judiciary and that is the core reason behind repetition of such irrational judgements. The existing boundary between judiciary and other limbs of Government limit the scope of correcting the persuasions or conducts of judges. The institutional independence bestows enormous superiority to the judiciary and it eliminates interference of every other body from its affairs. The characteristic of Indian judiciary is basically formidable in nature; therefore, others hardly ever step forward to rectify them. Hence, only judiciary can save it from the imputations of gender bias by proposing remarkable changes.

Strives Towards Transformative Jurisprudence

Understanding the repercussions of misogynist statements in judicial decisions, the Supreme Court of India has attempted several times to resolve the issue. A series of decisions which contains reformative philosophies about gender has been produced by Supreme Court of India. Anyhow, *Anuj Garg v Hotel Association of India & Ors*.[41], *Navtej Singh Johar v Union*

39. "Benevolent sexism encompasses subjectively positive (for the sexist) attitudes toward women in traditional roles: protective paternalism, idealization of women, and desire for intimate relations". Peter Glick and Susan T. Fiske, *Hostile and Benevolent Sexism Measuring Ambivalent Sexist Attitudes Toward Women*, 21 PSYCHOL. WOMEN Q. 119, 119 (1997)
40. Renu Das v Bhaskar Das Review.Pet. 73/2020 of Guahati High Court
41. AIR 2008 SC 663

of India[42], *Aparna Bhat v State of Madhya Pradesh*[43] are some the notable decisions among them which have gone beyond the 'protectiveness'. In Anuj Garg case the apex court has critically evaluated the gender discrimination in the name of protectiveness. It has observed that:

> The present law ends up victimizing its subject in the name of protection……The proper response to inevitable attacks on both female and male guards is not to limit the employment opportunities of law-abiding women who wish to contribute to their community, but to take swift and sure punitive action against the inmate offenders.[44]

Further, *Navtej Singh Johar v Union of India*[45] is also a revolutionary judgement in which Supreme Court has tried to rectify its own the erroneous decision in the air hostess case by stating that:

> The approach adopted the Court in Nergesh Meerza, is incorrect. A provision challenged as being ultra vires the prohibition of discrimination on the grounds only of sex under Article 15(1) is to be assessed not by the objects of the state in enacting it, but by the effect that the provision has on affected individuals and on their fundamental rights. Any ground of discrimination, direct or indirect, which is founded on a particular understanding of the role of the sex, would not be distinguishable from the discrimination which is prohibited by Article 15 on the grounds only of sex.[46]

Aparna Bhat v State of Madhya Pradesh is also such a verdict which comes under the above category of judgments which has envied a gender sensitized approach. Through that judgment the Supreme Court of India has acknowledged the magnitude of stereotypical perceptions possessed by the judiciary. Along with analysing the intensity and aftermath of judicial stereotypes, it has also put forwarded a number of suggestions to defeat the problem.

---

42. AIR 2018 SC 4321
43. AIR 2021 SC 1492
44. AIR 2008 SC 663
45. AIR 2018 SC 4321
46. AIR 2018 SC 4321

Handbook Against Gender Stereotypes: Supreme Court's Move Forward to Equality

It is comprehensible that judges often consider frivolous factors which are irrelevant in legal context as base for judicial decisions. Ascertaining the level of resistance exercised by the prosecutrix in rape cases, evaluating the attire of complainant in sexual molestation cases are not only a disgrace to the Indian judiciary but also function as a precedent for future cases. At this juncture, the handbook released by Supreme Court of India with an object to exterminate gender stereotypes in judicial process attracts attention. It has much significance as the Supreme Court has formulated it after realising that the innate feelings or implicit biases of a judge should never influence the justice dispensation in any manner. In the forward written by Chief Justice of India (Dr.) Justice D.Y. Chandrachud in the handbook, he has rightly mentioned that:

> Even when the use of stereotypes does not alter the outcome of a case, stereotypical language may reinforce ideas contrary to our constitutional ethos. Language is critical to the life of the law. Words are the vehicle through which the values of the law are communicated. Words transmit the ultimate intention of the lawmaker or the judge to the nation. However, the language a judge uses reflects not only their interpretation of the law, but their perception of society as well. Where the language of judicial discourse reflects antiquated or incorrect ideas about women, it inhibits the transformative project of the law and the Constitution of India, which seek to secure equal rights to all persons, irrespective of gender.[47]

The handbook has been focused to discuss the commonly used gender stereotypical reasoning in judgement and also provide a glossary for legal discourses to substitute the words which suggest gender stereotypes. For this, Supreme Court has thoroughly examined the stereotype promoting language which has been used in judicial process since ages and proposed appropriate as well as gender neutral words. "Woman who has engaged in

47. Supreme Court Of India, Handbook On Combating Gender Stereotypes (2023).

sexual relations outside of marriage" instead of "adulteress", "Child who has been trafficked" instead of "child prostitute", "Woman with whom a man has had romantic or sexual relations outside of marriage" instead of "Concubine / keep" and "Wife" instead of "Dutiful wife / Faithful wife / Good wife / Obedient wife" are some of the suggestions included in the handbook.

Another highlight of the handbook is that, it has intensely evaluated how gender stereotypes adversely affect the decision-making process with functional examples. It also coherently illustrated the reasoning from various judgments of its subordinate courts which contain inaccurate and highly stereotypical thoughts. It says that: "Assumptions are held about the characteristics of men and women which are believed to be "inherent" to each group. These assumptions extend to their emotional, physical, and cognitive capabilities".[48] The stereotypes assigned to women by the society actually do not have any correlation with women. Stereotypes such as women are mentally weak, they are incapable to take rational decisions, they are passive in nature and so forth are the common notions existing among the populace. However, the handbook tries to address all those gender stereotypes which are based on gender roles and false assumptions. To challenge the chauvinist stereotype theories, the handbook declares that: "A person's gender does not determine or influence their capacity for rational thought. A person's strength does not depend solely on their gender but also on factors such as their profession, genetics, nutrition, and physical activity".[49] Additionally, against the common stereotype "women are more nurturing and better suited to care for others" the handbook evokes that "people of all genders are equally suited to the task of caring for others". Further it restates that: "the clothing or attire of a woman neither indicate that she wishes to engage in sexual relations nor is it an invitation to touch her". The stereotypes operate as reasoning in judicial verdicts are not only

48. Supreme Court Of India, Handbook On Combating Gender Stereotypes (2023).
49. *Id*

something prevails in the intellection of judges but the popular narratives widespread in every male centric society. The guidelines prepared by the Supreme Court of India to combat the gender stereotypes is competent enough to enable the judges to assess their subjective understanding and gender biases and restructure their objective thinking.

The handbook specially drafted to ensure gender sensitization among judges and legal professionals is an imperative concept to an effective justice delivery system. Such a novel method will definitely confer a fresh outlook to the Indian legal system. However, the handbook ought to have included the plight of LGBTQAI+ community being experienced in the pathway of justice. Existing gender stereotypes operative as an obstruction to the access to justice to non-dominant gender groups in various manner. Further, comprehending feminine gender as a homogeneous category and non-observance of the heterogeneity encompassed in it is the biggest challenge faced by women in the Indian legal system. Failure to recognize the varied marginalization experienced by a Dalit woman, Muslim woman, an illiterate woman, a tribal woman, rural woman, single woman and so on through the lens of intersectionality is the major drawback of our legislative as well as judicial mechanism. If the Supreme Court of India could have incorporated the ideology of intersectionality while conceptualizing the handbook against stereotypes, it would be a phenomenal and outstanding manifesto in all sense.

Conclusion

Despite the shortcomings, as a step forward to the gender justice, the initiative taken by the Supreme Court of India has a lot of significance. It gives hope to all those who adhere to the notion of justice, especially gender justice. But how far the suggestions set forth in it will be followed in pragmatic sense in the lower courts is the biggest challenge in a society like ours where patriarchy rules. Because, to erase the stereotypes which are entrenched in the inner consciousness of judges, mere directions are not enough. The instructions stated by the Supreme Court in its early judgments

did not cause any explicit changes in the attitude of the judges. Therefore, intensive gender sensitization programmes among the judiciary and court system only can reshape the misconceptions about gender. Besides, this significant movement of Supreme Court will become fruitful exercise only if it undergoes continuous revision; thus, it must be timely renewed in accordance with the changing circumstances to get the expected result. A periodic revision of handbook to address changing nature of gender biases and gender based inequalities can do justice to the time we live in. An open discussion with feminist legal scholars and jurists would be beneficial in the periodic revision to make the handbook more comprehensive and reflective to the existing social realities.

However, to build a gender just egalitarian society, only an impartial judiciary is not adequate. There must be a legislative body which embrace equality in its right sense rather than mere benevolent sexism. Moreover, the executive branch of the Government must hold a proper understanding about gender more than the binary concepts. Appropriate training should also be given to them to demolish the gender stereotypes which govern their actions. Moreover, rigorous academic interventions from feminist legal research can contribute to this discourse in a valid manner.

> The goals of feminist research, and more particularly, feminist legal research, include: (i) bringing to the surface the subjugated knowledge about women's experiences which traditional scholars ignored, (ii) asking the woman question and exploring diverse understandings of social reality about women's socio- economic position, (iii) raising consciousness for initiating social transformation that promotes gender justice and change in favour of women, (iv) understanding from history how patriarchy impedes women's development and influences social relations, (v) critical analysis of law and assessment of its social impact, (vi) setting into service action that remedies women's suffering, rescues them from violence, and renders justice, (vii) knowing women's perspectives, activities, and behaviours in

> order to improve their social situation, and (viii) valuing multiple ways of knowing by hearing.[50]

According to Katharine Bartlett[51], 'In law, asking the woman question means examining how the law fails to consider the experiences and values that seem more typical of women than of men, for whatever reason, or how existing legal standards and concepts might disadvantage women.' She says, 'A question becomes a method when it is regularly asked.' According to Lydia A. Clougherty,

> "Asking the woman question" has three essential features. It seeks: (i) to identify bias against women implicit in legal rules and practices that appear as neutral and objective, (ii) to expose how the law excludes the experiences and values of women, and (iii) to insist upon application of legal rules that do not perpetuate women's subordination.[52]

Hence, annihilating gender stereotypes do not end with releasing a handbook to guide judges. To establish gender equality in the society, multi-faceted and concerted efforts from academic community, judicial fraternity and social movements is a quintessential prerequisite.

50. P. Iswara Bhat, Idea And Methods Of Legal Research 558, (Oxford University Press 2019)
51. M.D.A. Freeman (ed.), Lloyd's Introduction To Jurisprudence1285-97 (8th edn, 2008); Katharine T. Bartlett, *Feminist Legal Methods* , 103(4)Harv. L. Rev. 829 , 829 (1990)
52. Lydia A. Clougherty, '*Feminist Legal Methods and the First Amendment Defense to Sexual Harassment Liability*', 75(1) Neb. L. Rev. 1, 7 (1996)

Unravelling the One Nation, One Election Odyssey: Assessing the Demand for Electoral Synchronicity

Anjana Satheesh*

Introduction

> *"At the bottom of all tributes paid to democracy is the little man, walking into a little booth, with a little pencil, making a little cross on a little bit of paper-no amount of rhetoric or voluminous discussions can possibly diminish the overwhelming importance of the point"*
>
> -Winston Churchill[1]

The Indian democratic framework, considered to be an 'oasis of democracy'[2], follows a parliamentarian culture that adheres to the notion of 'Rule of law'[3], wherein everyone is treated equally under the eyes of law[4]. Democracy is a part of the basic feature of the Constitution of which

* Research Scholar, National University of Advanced Legal Studies(NUALS),Kochi, Kerala.

1. Shakhawat Liton, *The Power of the 'Little Man' in Democracy*, Daily Star (Oct.21,2018,1:11 PM), https://www.thedailystar.net/opinion/perspective/news/the-power-the-little-man-democracy-1649548.(last visited May 14, 2024)
2. Lakshmi Charan Sen v. AKM Hassan Uzzaman, A.I.R 1985 S.C. 1233(India).
3. Harish Narasappa, Rule Of Law In India: A Quest For Reason (Oxford University Press 2018).
4. India Const. art.14.

'Rule of law' and 'Free and Fair elections'[5] are inseparable and entwined features.

Despite striking cultural, linguistic, developmental, religious and caste differences across States, the Indian political regime, among other grand scheme of things, has always been a center of National and International attention due to its characteristics balance of this democratic governance framework[6], through the system of free, fair and periodic elections that have acted as the lifeblood of our democratic society and have thereby ensured legitimacy, accountability and responsiveness of governments elected to power.

In a democracy, that follows the practice of Universal Adult Franchise[7],the little man or the voter, as rightly pointed out by Sir Winston Churchill, has formidable importance and cannot be expropriated from the course of free and fair elections as his freedom to elect a candidate of his choice is the cornerstone of free and fair elections[8].

Throughout the years, Indian's have taken the privilege of exercising the world's largest democratic exercise through an automatic constitutional authority, namely the Election Commission of India[9], that conducts, administers and regulates election processes separately at the National and State levels. An egalitarian social order[10] spurred out in India due to these free, fair, and transparent elections which are inalienable basic features that has turned out to be the bedrock of India's democratic culture[11] and thereby

5. Union of Civil Liberties v.Union of India, 2009(2) S.C.J. 875(India).
6. Jaffrelot, C 2019, *The fate of secularism in India*. in M Vaishnav (ed.), The BJP in Power: Indian Democracy and Religious Nationalism. (Carnegie Endowment for International Peace.2019)
7. India Const. art.326.
8. Rameshwar Prasad and Ors. v. Union of India and Anr, A.I.R 2006 S.C. 980 (India).
9. India Const. art.324.
10. Dushyant Dave, *The Supreme Court's Greatest Gift Is the PIL and It Is Here to Stay, Whatever Critics May Say*, The Wire (Sept.15,2020), https://thewire.in/law/supreme-court-pil-constitution-law.(last visited May 14,2024)
11. Keshavananda Bharati v. State of Kerala, A.I.R. 1973 S.C. 1461(India).

formed a part of the basic structure of the Indian Constitution[12].

It is in this background that we need to analyse the new kid on the block, namely, the proposal for simultaneous elections that demand conducting concurrent elections, for the State Legislative Assemblies and the Lok Sabha, once in every five years, thereby aligning the terms of Central and State governments and as a result, reducing the frequency of elections held each year.This call for simultaneous elections, came as a result of the negative-effects that the ever-ongoing elections had caused on policy making and governance, thereby delaying development processes as a discrepancy is currently caused in the parliamentary procedures by the ongoing elections in the absence of a legislative schedule[13].

Thus, the 'One Nation, One Election Odyssey' has currently caused a dichotomy with supporters upholding the potential benefits in the form of cost-saving, better utilisation of resources, ensuring government stability, political continuity, reduced burden on security forces, consistency in vote behaviour and the like while critics warn that simultaneous elections might potentially harm the federal nature of India's polity, dilute regional issues, destroy the constitutional fabric of Indian democracy, increase complexity, leave less time for voter awareness, and that frequent elections are pertinent to allow course correction based on people's mandate periodically.

It is at this juncture that it has become pertinent to weigh the potential benefits against the drawbacks of conducting simultaneous election to reach a conclusion as to whether simultaneous elections will benefit the Democratic Republic of India in the long run.

12. *Id,* Indira Nehru Gandhi v. Raj Narain, 1975 A.I.R. 1590 (India);T.N Seshan v. Union of India,(1995) 4 S.C.C. 611(India) ;Kuldip Nayar v. Union of India(2006) S.C. 3127(India).
13. Bibek Debroy and Kishore Desai, *Analysis of Simultaneous Elections: The 'What', 'Why' and 'How'*, Department Of Legal Affairs (2017),https://legalaffairs.gov.in/sites/default/files/simultaneous_elections/NITI_AYOG_REPORT_2017.pdf.(last visited May 14,2024)

1. One Nation, One Election- Deciphering the 'Meaning and Scope'

The basic objective behind the concept of 'One Nation One Election' centers around synchronizing elections across all States[14], thereby halting the recurring election cycles that happen every year.Currently, general elections for the Lok Sabha and different State Assemblies are held at different times, leading to a continuous cycle of elections in various parts of the country.The proposal for simultaneous elections, if implemented, would be a shift that would ensure that elections are conducted to the Lok Sabha (lower house of the Indian Parliament), State Legislative Assemblies and local bodies simultaneously, thereby reducing the economic burden, ensuring governance continuity in policies and utilization of time judiciously on governance activities.

The concerns and challenges that lay ahead should also be examined carefully as implementation of concurrent elections might result in the encroachment of the autonomy of States, logistical hurdles, possibility of overhanging, lack of consensus among political parties and above all, might pose a vital threat to the federal fabric of the Indian democracy.

Though the Indian Constitution provides for a maximum tenure of five years for the Lok Sabha[15] and the State Legislative Assemblies[16] respectively, it does not explicitly mandate or prohibit simultaneous elections, thereby leaving room for interpretation and analysis. Moreover, this ambiguity wherein the Indian Constitution does not explicitly mandate simultaneous elections but provides a legal framework to facilitate simultaneous elections if required through premature dissolution of elected bodies before their terms end, hints that the idea of synchronizing elections across the country is not constitutionally mandated and would likely require amendments to relevant Articles to implement it in its true essence.

14. Kartikey Singh, *Explained:What is the debate around 'one nation, one election'?*, The Hindu,(Sept.4,2023,12:53 PM),https://www.thehindu.com/news/national/explained-what-is-the-debate-around-one-nation-one-election/article67267721.ece. (last visited May 14, 2024)
15. India Const. art. 83, cl.2.
16. India Const. art.172, cl.2.

It is therefore pertinent to examine the historical framework, logistical and regional issues, impact on the federal composition, relevant constitutional provisions, and legislative framework surrounding elections to assess the legal viability, feasibility and practicality of implementing a "*One Nation, One Election*" system before incorporating it into the Indian democratic setup by synchronizing elections or prescribing a specific timeline for holding them together.

2. The Electoral Odyssey of India

Elections and collective decision-making have deep-rooted origins in Indian history and philosophy as it been part of the Indian way of life since ancient times as seen in Indian scriptures from the Vedic age that showcase references to aristocratic republics and pure democracies existing in diverse regions of ancient India as documented by the Greek[17] and numerous references of the same being found in Buddhist literature[18].

India's post-independence era, laid down the constitutional foundations wherein India transitioned from colonial rule[19] with the establishment of a non-partisan Election Commission on 25th January, 1950, as a permanent constitutional body responsible for conducting periodic, free and fair elections, on the eve of India becoming a Republic. Thus, the first general elections were conducted in India during the early 1950's[20], demonstrating India's commitment to democracy.

17. R.B Pandey, *Vedic Origin of Indian Republics*,15 Proc.Indian Hist.Cong. 79–85(1952), http://www.jstor.org/stable/45436461.(last visited May 14,2024)
18. V.S. Rama Devi & S.K Mendiratta, How India Votes :Election Laws, Practice And Procedure (Lexis Nexis 4th ed. 2017).
19. Ramachandra Guha, India after Gandhi :A History (Picador India.3d.ed 2023); Bipan Chandra et.al., India since Independence 167-189 (Penguin 12th ed. 2007); Paul R. Brass, The Politics Of India Since Independence, 95-104 (Cambridge University Press2d ed.1987).
20. Suchitra Karthileyan & Diksha Munjal,*Elections that shaped India | The first general election: a free country in full bloom*,The Hindu(May. 24,2024,12:55PM), https://www.thehindu.com/elections/lok-sabha/first-general-elections-of-india-the-free-country-in-full-bloom/article67702823.ece; see also Surjit S Bhalla, Citizen Raj :Indian Elections 1952-2019(Westland 2019).

Thereafter, the electoral mechanisms in India has been superintended, directed and controlled by two constitutional authorities, namely the Central Election Commission of India for elections to the offices of the President and Vice President of India and to Parliament and State Legislatures[21], and the State Election Commission appointed in each state for elections to the Gram Panchayats[22] and Municipalities[23].

As a convention, the programme for the election is announced along with the Model Code of Conduct(hereinafter MCC), to promote ethical and lawful behaviour and to prevent unfair practices and abuse of position by the Election Commission[24], about a fortnight to one month in advance of issue of formal notification so as to ensure that elections are conducted in a smooth and transparent manner.

Surprisingly,a peep into the history of elections in India, showcases that the first consecutive general elections, during 1951-52, 1957, 1962 and 1967 were held simultaneously for both Parliament and State Assemblies, thereby synchronizing voting across the country[25]. This practice continued till 1967 before it was disrupted,postponed or held before the due date due to instances of premature dissolution of assemblies,[26] no-confidence motions,[27] emergency proclamations,[28] switching of allegiance between

21. *Supra* note 9.
22. India Const. art.243 K.
23. India Const. art.243 ZA.
24. Election Commission of India ,*Model Code of Conduct for the Guidance of Political Parties and Candidates*, https://www.eci.gov.in/mcc/. (last visited May 14,2024)
25. Sanjay Kumar, Elections In India:An Overview (Taylor & Francis Ltd 2021).
26. T Ajayan,Dismissal Of The First Communist Ministry In Kerala And The Usa100-34 (Patridge Publishing India 2016).
27. G.C Malhotra, Cabinet Responsibility To Legislature, Motions Of Confidence And No Confidence In Lok Sabha And State Legislatures, 725 (Lok Sabha Secretariat 2d.ed.2004).
28. Sumeda, *Elections that shaped India | 1957: The rise of Red Kerala*, the hindu(April 1.2024,12:01 PM), https://www.thehindu.com/news/national/india-election-history-1957-poll-kerala-communist-party-details/article67569056.ece

parties that resulted in loss of majority to form government[29] and other volatile political and non-political reasons.

Ironically, this was foreseen by the framers of the Constitution, during the debates in the Constituent Assembly while framing the Constitution, as concerns were raised regarding the proposed electoral process for India[30]. Strikingly, the electoral scenario in India has unfolded precisely as Prof. Shibban Lal Saksena, one of the framers had anticipated during the Constituent Assembly debates, with elections across different states and the Centre no longer being held simultaneously or in a synchronized manner and elections turning out to be a continuous exercise across different provinces. He had rightly observed that with around thirty provinces after the integration of states, and the Constitutional provision for dissolving legislatures upon a no-confidence motion, it was quite possible that elections to various state legislatures and the Centre would not coincide. Prof. Saxena foresaw that after the initial ten or twelve years, elections would be perpetually occurring in some province or the other at any given moment, as the terms of different legislative bodies would not be synchronised[31].

Likewise, the practice of holding simultaneous elections for the Lok Sabha and State Legislative Assemblies was first disrupted in 1959 when the Central Government invoked emergency provisions, citing failure of constitutional machinery[32], to dismiss the then existing Communist Party of India led Government of Kerala[33].Thereafter, the "*Aya Ram Gaya Ram*"

29. Varun Ramesh Balan, *'Aaya Ram, Gaya Ram': A Contemporary History of Defections to the BJP*, The Week (Mar. 12, 2020,6:57 PM),https://www.theweek.in/news/india/2020/03/12/aaya-ram-gaya-ram-a-contemporary-history-of-defections-to-the-bjp.html. (last visited May 14,2024)
30. 8 Constituent Assembly Debates 909-10(June 15, 1949) (statement of Prof. Shibban Lal Saksena), http://parliamentofindia.nic.in/ls/debates.
31. *Id.*
32. India Const. art.356.
33. Ashok K. Singh, *Namboodiripad's Dismissal :Murder of Democracy*, Peepul Tree (July.31,2021),https://www.peepultree.world/livehistoryindia/story/eras/namboodiripads-dismissal?srs.(last visited May 14,2024)

era[34], which witnessed frequent defections of elected representatives from one party to another and counter-defections, resulted in several State Legislative Assemblies being dissolved before completing their full terms[35]. This political instability eventually led to the Lok Sabha and State Assembly elections being conducted separately instead of simultaneously, a trend that has continued henceforth.

At present, the assembly elections in the states of Arunachal Pradesh, Sikkim, Andhra Pradesh, and Odisha are still held concurrently with the Lok Sabha elections, maintaining the earlier tradition of simultaneous polls in these specific states.

3. The 'One Nation, One Election' proposition -Milestones in the 'Unified Electoral Cycle' proposal

Discussions surrounding the paradigm of '*One Nation, One Election*' has been long-debated, though it has not yet been implemented. Some vital deliberations, advancements and developments regarding the notion of simultaneous elections were reflected in the Election Commission of India's Report[36], Reports of Law Commission of India[37],Report of the National

34. The phrase 'Aaya Ram Gaya Ram' became a popular expression to denote the frequent switching of political allegiances by elected representatives, a trend initiated by Haryana MLA Gaya Lal in 1967 when he changed his party affiliation three times within a span of just two weeks - moving from the Congress party to the United Front, back to the Congress, and then again to the United Front, all within a mere nine hours during his final switch. This incident was later satirized as a political joke, and it contributed to the cultivation of a culture of defection in Indian politics, leading to instability within political parties. To curb this practice of elected representatives arbitrarily changing their political affiliations, the Constitution of India was eventually amended to incorporate the 'Anti-Defection Law.'
35. Anirudh, *Defections in Parliament*, The Prs Blog (Feb.8,2010),https://prsindia.org/theprsblog/defections-in-parliament.(last visited May 14, 2024)
36. Election Commission of India, *First Annual Report 1983,* Report No. 1,(April 1984).
37. Law Commission of India, *Reform of the Electoral Laws,* Report No. 170, (May 1999);Law Commission of India, *Electoral Reforms,*Report No. 255,(Mar. 2015).

Commission to Review the Working of the Constitution[38], Report of the Parliamentary Standing Committee, 2015[39], the Working Paper of NITI Aayog[40], Draft Report of the Law Commission of India[41] and the like that had put forward proposals to implement simultaneous elections.

Recently, the Central Government had appointed a High-Level Committee, chaired by the former President of India, Sri Ram Nath Kovind[42], to examine the feasibility of holding synchronized elections across all tiers of governance and had tasked the committee with the primary mandate of exploring the prospects of conducting simultaneous polls for the Lok Sabha (the Lower House of the Parliament), State Legislative Assemblies, Municipal Bodies, and Panchayats (Village Councils) across the country and recommending specific constitutional amendments and modifications to relevant laws[43] to enable synchronization of polls. The extensive report submitted by the High-Level Committee lays the groundwork for potential constitutional and legislative changes required to implement the '*One Nation, One Election'* concept, should the government decide to pursue it[44].

38. Report of the National Commission to Review the Working of the Constitution, Department of Legal Affairs(March.2002).
39. Parliamentary Standing Committee, *Feasibility of Holding Simultaneous Elections to the House of People (Lok Sabha) and State Legislative Assemblies,* (Dec.2015).
40. *Supra* note 13.
41. Law Commission of India, *Draft Report on Simultaneous Elections*, PRS Legislative Res. (Aug.2018).
42. Sandeep Phukan, *Ram Nath Kovind Panel for Simultaneous Lok Sabha, Assembly Polls*,The Hindu (Mar. 14, 2024,2:43 PM),https://www.thehindu.com/news/national/ram-nath-kovind-led-panel-on-one-nation-one-election-submits-report-to-president/article. 9last visited may 14,2024)
43. India Const (1950); Representation of the People Act, 1950 (India); Representation of the People Act, 1951 (India).
44. Gyanvi Khanna, *'One Nation, One Election' Panel Recommends Cutting Short State Assemblies' Term To Synchronize With Lok Sabha Term*, Live Law (Mar.14,2024), https://www.livelaw.in/top-stories/one-nation-one-election-panel-recommends-cutting-short-state-assemblies-term-to-synchronize-with-lok-sabha-term-252273.(last visited May 14, 2024)

After an extensive study[45], spanning over a year since its establishment, the committee had submitted its report to the incumbent President Droupadi Murmu wherein the committee has advocated for simultaneous elections, citing the substantial burden imposed by the frequent and staggered elections on various stakeholders, including the government, businesses, workers, courts, political parties, candidates, and civil society organizations and to address the complexities involved.Aligned with its directive to investigate the feasibility of concurrent elections, and considering the current constitutional framework, the Committee has formulated its recommendations such that they adhere to the constitutional principles of India while necessitating only minimal amendments to the Constitution. For this to happen, the committee has proposed a two pronged approach namely, holding simultaneous elections for the Lok Sabha and State Legislative Assemblies, and subsequently synchronizing the elections for Municipalities and Panchayats to occur within a hundred days after the national and state assembly polls.[46]

Moreover, the Law Commission is currently formulating a mechanism to synchronize the Assembly election across the States, by extending or reducing the tenure of governments in States so as to implement the concept of synchronizing elections starting with the Lok Sabha elections proposed to be conducted in 2029[47].

---

45. Indian Franchise Comm. Rep. (1932); Gen. Election Rep. (India 1957); Gen. Election Rep. (India 1962); ELECTION Comm'n Of India First Ann. Rep. (1983); L. Comm'n Of India, Rep. No. 170 (1999); Nat'l Comm'n To Rev. The Working Of The Const., Rep. (India 2002); L. Comm'n Of India, Rep. No. 255 (2015); Parliamentary Standing Comm., 79th Rep. (India 2015); Niti Aayog, Working Paper (India 2017); L. Comm'n Of India, Draft Rep. (2018); Election Comm'n Of India, Atlas (2019).
46. Prs Legis. Rsh., High Level Comm. Rep. Summary: Simultaneous Elections In India (Mar. 31, 2024).
47. The Hindu Bureau, *Law Commission Presents Roadmap on 'One Nation, One Election' to Ram Nath Kovind-led panel*, The Hindu (Oct.26, 2023,9:35 AM), https://www.thehindu.com/news/national/law-commission-presents-roadmap-on-one-nation-one-election-to-ram-nath-kovind-led-panel/article67459227.ece.(last visited May 14, 2024)

4. Examining the Bottlenecks and Advantages of 'All-in-One' Elections

Though the concept of "One Nation, One Election" seems appealing on the surface and has gained significant traction in recent years as a proposed electoral reform aimed at streamlining the democratic process in countries with multiple levels of governance, it is crucial to critically examine its implications and potential drawbacks, as it pose constitutional, logistical,practical and legal challenges.

4.1 Advantages of One Nation, One Election: Streamlining Democracy for Efficiency and Stability

The concept of "One Nation, One Election" has emerged as a potential electoral reform aimed at enhancing the efficiency and stability of the democratic process in nations with multiple levels of governance. This is because, synchronizing elections can bring about numerous advantages, including democratic stability, economic savings, reduced political uncertainty, lessen vote bank politics and corruptions, and increased governmental focus on governance rather than perpetual electioneering and thereby deteriorating the Indian parliamentary setup[48].

One of the primary advantages of adopting the "One Nation, One Election" model is the potential for significant economic efficiency. Conducting multiple elections at different levels of government involves substantial financial resources, from organizing polling stations to deploying security personnel. Synchronizing elections could lead to substantial cost savings by consolidating these resources, allowing the government to allocate funds more effectively for other essential services such as education, healthcare, and infrastructure development.

Secondly, it reduces political uncertainty as frequent elections at different levels of government can disrupt governance and divert the attention of policymakers from crucial issues. Adopting a synchronized

48. *Id*.

election system could minimize this uncertainty by providing longer periods of stable governance[49].Longer terms would allow elected officials to focus on implementing policies and programs without the constant pressure of impending elections, fostering a more stable political environment.

Thirdly, conducting elections simultaneously at all levels of government may encourage greater voter turnout and engagement. With only one election to focus on, voters may be more inclined to participate, as the burden of frequent voting is reduced. This could lead to a more informed electorate, as voters have more time to evaluate candidates and their platforms, ultimately contributing to a healthier democratic process.

Fourthly, the "One Nation, One Election" model has the potential to improve policy coordination and governance by aligning the terms of various levels of government. This synchronization would ensure that all elected bodies are on the same electoral cycle, facilitating more effective collaboration between the central and regional governments. Coordinated terms could lead to a more coherent and integrated approach to policy formulation and implementation, fostering better governance.

Fifthly, frequent elections often contribute to heightened political polarization as parties and candidates intensify their efforts to differentiate themselves from their opponents. Synchronizing elections could mitigate this polarization by reducing the frequency of divisive campaigns. With longer intervals between elections, political discourse may become more focused on substantive issues and long-term goals rather than short-term electoral gains.

Though the concept of "One Nation, One Election" is not without its challenges and potential drawbacks, that align with the complexities of our democratic setup, the advantages it offers in terms of economic efficiency, reduced political uncertainty, increased voter engagement, better policy

49. Varghese K. George, *Reversing Democracy for Stability*, The Hindu (Sept. 3, 2023, 2:33 PM), https://www.thehindu.com/opinion/columns/political-line-reversing-democracy-for-stability/article67266927.ece.

coordination, and diminished political polarization are noteworthy as it is a potential mechanism for enhancing the overall effectiveness and stability of the democratic process of India in the long run.

4.2 Scrutinizing the Concerns Surrounding 'One Nation, One Election' Model:The Drawbacks

Though implementing simultaneous elections, may offer some potential benefits, there are several drawbacks and challenges associated with this idea as follows:

4.2.1 Different term end for different States

Currently, the Lok Sabha and various State Legislative Assemblies have different fixed tenures or terms, which do not coincide(Table 1).This non-concurrent nature of the terms is one of the challenges in implementing simultaneous elections because it would require aligning or synchronizing these different tenures.The introduction of simultaneous elections across the nation would necessitate the premature dissolution of existing State Legislative Assemblies before the completion of their scheduled tenures. However, this move to terminate State Assemblies alters the fixed five-year terms mandated for Parliament and State Legislatures, as prescribed in the Constitution, thereby violating its basic structure.Thus, the premature dissolution of State Assemblies, which would be required for ushering in simultaneous elections, is being contested as a potential violation of the Constitution's basic fabric and an egress from the foundational principle of fixed five-year terms for elected legislative bodies.

Table 1: Source-Election Commission of India[50]

SL.No	Name of State	Term End
1.	Andhra Pradesh	June 2024
2.	Arunachal Pradesh	June 2024
3	Assam	May 2026
4	Bihar	November 2025
5	Chattisgarh	January 2024
6	Goa	March 2027
9	Gujarat	December 2027
10	Haryana	November 2024
11	Himachal Pradesh	January 2028
12	Jharkhand	January 2025
13	Karnataka	May 2028
14	Kerala	May 2026
15	Madhya Pradesh	January 2024
16	Maharashtra	November 2024
17	Manipur	March 2027
18	Meghalaya	March 2028
19	Mizoram	December 2023
20	Nagaland	March 2028
21	Odisha	June 2024
22	Punjab	March 2027
23	Rajasthan	Jan 2024
24	Sikkim	June 2024
25	Tamil Nadu	May 2026
26	Telengana	Jan 2024
27	Tripura	March 2028
28	Uttarkhand	March 2027
29	Uttar Pradesh	May 2027
30	West Bengal	May 2026

50. Election Comm'n of India, *General Elections to the Lok Sabha*, https://www.eci.gov.in/general-elections.(last visited May 14,2024)

4.2.2 Premature dissolution Conundrum

The possibility of premature dissolution of the Lok Sabha or State legislative assemblies poses a major limitation to implementing simultaneous elections in India. Both the Lok Sabha and State Assemblies can be dissolved prematurely due to factors like a no-confidence motion, hung assembly, loss of majority, or constitutional breakdown in a state. Additionally, existing governments at the Centre or states can opt for midterm dissolution to seek a fresh mandate. Such premature dissolutions would disrupt the synchronized electoral cycle required for simultaneous polls.

4.2.3 Constitutional Hurdles

The primary constitutional obstacle to simultaneous elections are the rigid tenures prescribed for the Lok Sabha[51] and State Legislatures[52]. While the Lok Sabha has a fixed five-year term, Legislative Assemblies can be dissolved earlier due to a no-confidence motion or other circumstances. Additionally, the Indian Constitution empowers the Governor to dissolve a Legislative Assembly on the recommendation of the Chief Minister raising concerns about potential misuse[53].Synchronizing elections would require either curtailing or extending the tenures of some houses, necessitating constitutional amendments that may be challenged on the grounds of violating the basic structure doctrine[54]. Moreover, instituting a unified electoral roll and uniform Electoral Photo Identity Cards (hereinafter EPIC) for use across all tiers of elections - National, State, and Local government levels, would necessitate amending the Constitution[55] to empower the

51. India Const. Article 83(2) states that not more than six months shall intervene between its last sitting in one session and the date appointed for its first sitting in the next session.
52. India Const. Article 172(1) mandates that the term of state legislative assemblies shall not exceed five years unless dissolved sooner.
53. India Const. art.174(2).
54. Sudhir Krishnaswamy,Democracy and Constitutionalism in India 164-229 (Oxford University Press 2010).
55. India Const.art.325.

Election Commission of India to prepare a single, consolidated electoral roll and EPIC in consultation and coordination with State Election Commissions so as to be useful for elections at the National, State, as well as Local government levels. However, the implementation and enforcement of these constitutional amendments would be contingent upon their ratification by at least half of the Indian states before they could be enacted and brought into effect[56]. Thus, garnering the required support from a minimum of half of the country's states would be crucial for facilitating the establishment of a unified electoral roll and uniform EPICs across all levels of elections.

4.2.4 Logistical challenges

Implementing simultaneous elections across India's vast geography and immense populace would pose monumental logistical challenges as India's geographical diversity, with terrains ranging from mountains to deserts, remote locations, and connectivity deficits, and conducting of simultaneous elections in varying climatic conditions like extreme heat or rains across different regions during the same period might add another layer of challenge to be surmounted. Overcoming these multifaceted logistical obstacles across such a vast and diverse nation would demand exceptional planning, resource management, and coordinated efforts on an unparalleled scale.It would necessitate deploying a staggering number of polling personnel, security forces, and officials in a synchronized manner while ensuring adequate training and coordination. Moreover, transporting and distributing massive quantities of election materials like Electronic Voting Machines (hereinafter EVMs), Voter Verifiable Paper Audit Trials (hereinafter VVPATs) and ballot papers to remote areas within tight timelines, securing lakhs of polling booths especially in sensitive areas, resource strain involved in procuring, storing, and managing the requisite numbers of EVMs and VVPATs, unprecedented exercise of simultaneously

56. Union of India v. Rajendra N.Shah, 2021 S.C. 312(India).

counting votes and processing results from millions of polling stations nationwide is a laborious task.

4.2.5 Increased economic burden

Simultaneous elections across India for Lok Sabha, state assemblies, and local bodies would massively strain the economy. The colossal operational costs of conducting synchronized nationwide polls, mobilizing vast resources like personnel, EVMs and VVPATs within tight timelines, deploying security forces across the country and managing logistics would extract a huge financial toll. It could disrupt economic activities temporarily and inflate wage bills for the massive temporary workforce required. The concentrated advertising and spending of political parties and the governments' resource diversion from development projects would further increase the financial burden. While touted to reduce long-term costs, the initial economic strain of facilitating such a mammoth concurrent electoral exercise would be enormously burdensome.

4.2.6 Undermining the Federal structure and autonomy

India is a federal union[57], wherein the States have a certain degree of autonomy in conducting their elections. Simultaneous elections is a potential threat to the autonomy and the ability of states to choose their own election timelines and will undermine India's federal structure by centralizing power and decision-making. While India's federal structure grants autonomy to states in conducting elections, simultaneous polls threaten this autonomy by centralizing the power and imposing synchronized timelines that undermine federalism as national issues could overshadow local concerns in state campaigns, thereby diminishing the State governments' autonomy.

4.2.7 Disruption of governance

If the ruling parties at the Centre and in multiple states lose power simultaneously in elections occurring through synchronized polls, it could

57. India Const. art.1.

lead to a governance vacuum and disruption of administration until new governments are formed. This would be a dangerous transition period between the outgoing and incoming administrations, as concurrent loss of power hampers routine governance, effective policy implementation and administrative continuity.Thus there are high chances that Indian Parliamentarian democracy might give way to a Management democracy.

4.2.8 Voter fatigue

Holding multiple elections simultaneously could lead to voter fatigue and low voter turnout, particularly in a situation wherein voters would have to cast their votes for multiple levels of government (National, State, and Local) on the same day. Lengthy and complex ballots, prolonged and overlapping campaign seasons,constant barrage of political messaging and increased time commitment required to adequately prepare for and participate in multiple elections, can be tiresome for laymen.

4.2.9 Regional disparity

Regional disparity, characterized by significant differences in economic, social, cultural and political conditions across various regions within a country, can pose a significant challenge for the successful implementation of simultaneous elections. In regions grappling with poverty, lack of access to education, and limited infrastructure, voters may face substantial barriers in acquiring information about candidates and issues across multiple levels of government, potentially leading to low voter turnout or uninformed decisions. Conversely, more affluent and urbanized regions might exhibit greater political engagement, creating an imbalance in the electoral process. Regional disparities can also manifest in varying levels of trust in electoral institutions.

4.2.10 Anti-Defection Concerns

The anti-defection law, which prohibits elected representatives from switching parties, could pose challenges in the event of simultaneous elections. If a majority coalition at the National level collapses, it could

have ripple effects on State governments, leading to potential government instability and frequent mid-term elections, undermining the very purpose of 'One Nation, One Election'.

In conclusion, simultaneous elections present both advantages and drawbacks that must be carefully weighed.A one-size fits all approach wherein the existing democratic framework,federal structure and a parliamentarian form of inclusive governance that respects the diversity of the nation should be devised to strike the right balance between efficiency and inclusivity to uphold the principles of fair and equitable elections that lie at the heart of a thriving democracy.

5. Simultaneous Elections: Learning from Global Practices

Several countries have adopted simultaneous elections with varying degrees of success. Though the vast difference in scale, diversity and population exists, a critical analysis of the legal frameworks and implementation experiences of these countries can offer valuable insights for India in the long run .Some major role-models for India to follow are:

5.1 Belgium

Belgium holds simultaneous elections at different levels of government namely the Federal, Regional, and European level with elections often taking place on the same day. The annual elections at Belgium denotes how multiple levels of polls can be conducted seamlessly on a single day[58] as it allows voters to vote for multiple legislatures in one go, thereby maximizing voter turnout and reducing organizational costs. However, it would also mean that different election issues at Regional, National and European levels can influence each other during the campaign[59].Though, Belgium has proven

58. Dieter Stiers, *EU Issue Voting in Simultaneous Elections: The Case of Belgium*, in The Impact Of EU Politicisation On Voting Behaviour In Europe 169, 169–203 (Marina Costa Lobo ed., 2023).
59. Sudhir Krishnaswamy, *Supra* note 54.

to be a good model, India's greater diversity necessitates adopting a more phased approach to capture issues at each level adequately without overwhelming voters.

5.2 Brazil

Brazil's election system, where all National Legislative elections and the Presidential elections occur simultaneously, has streamlined the Brazilian electoral process, ensuring stable governments, stronger electoral legitimacy, increased voter turnout, enhanced political stability, and reduced costs of conducting elections over the years[60].This model offers valuable lesson as Brazil too has a multi-party system like India and therefore, adopting the Brazilian model of simultaneous elections can lead to a more efficient, responsive and accountable democracy that prioritises election management, increases voter participation, and fosters greater political stability. While India can learn from Brazil's experience, implementing simultaneous elections would require significant constitutional changes, careful consideration of an appropriate election date, and broad political consensus.

5.3 Germany

Germany's system is more decentralized, with elections for the Bundestag (Federal Parliament) and European Parliament happening simultaneously,while state legislatures (*Landtage*), and local councils (*Gemeinderäte*) occurring at different times. There have also been instances where some State elections have coincided with Federal elections due to differing term lengths or early dissolutions. This approach allows for a granular focus on issues at each level but can lead to increased costs and voter fatigue[61].

60. S.A. Febrianto et al., *Models of Simultaneous Elections Around the World*, in Proceedings Of International Conference On Social Science, Political Science And Humanities 176, 176–86 (2023); see also David Samuels, *Concurrent Elections, Discordant Results: Presidentialism, Federalism, and Governance in Brazil*, 33 Compar. Pol. 1, 1–20 (2000).
61. Friedel Bolle, *Simultaneous and Sequential Voting Under General Decision Rules*, Eur. Univ. Viadrina Frankfurt (Oder), Discussion Paper No. 394, (2017).

India could emulate the 'constructive no-confidence' model practiced in Germany[62],which necessitates that the removal of an incumbent government through a no-trust vote must be instantaneously succeeded by the constitution of an alternative dispensation, primed to govern for the residual legislative period, thereby preventing a legislative vaccuum.This coordinated model exhibits how two distinct levels of polls can be systematically aligned. India could explore extending this approach incrementally - first achieving synchronization of parliamentary and state assembly elections before exploring integration with local polls.

5.4 Indonesia

Similar to Brazil, Indonesia, is one of the best examples of a nation that has contributed to political stability and strengthening of its democratic process by aligning its Legislative and Presidential electoral cycles. Indonesia's commitment to democratic governance and efficient electoral management can be reflected from the fact that they had successfully implemented simultaneous elections in 2019[63], with an aim to minimize state financing for election processes, reducing high costs for election participants, curbing money politics that involved voters, preventing the abuse of power and politicization of bureaucracy, and streamlining government work schedules.Presently, the country conducts its Presidential and Parliamentary elections simultaneously every five years.

However, Indonesia is still deluged in issues like resource allocation, logistical challenges, low voter turnout, shift of focus from local issues,

62. Anat Rubabshi-Shitrit & Shlomo Hasson, *The Effect of the Constructive Vote of No-Confidence on Government Termination and Government Durability,* 45 W. EUR. POL. 576 (2021),see also Martin Paus, *The Constructive Vote of No-Confidence in Comparative Perspective—Lessons to be Learned?* 6–19 (2019). https://mongolia.hss.de/fileadmin/user_upload/Projects_HSS/Mongolia/Dokumente/2019/ArticleCVNCPaus0812.pdf. (last visited May 14,2024)
63. Constitutional Court Decision No. 14/PUU-11/2013 (Indon.); Constitutional Court Decision No. 55/PUU-XVII/2019 (Indon.); see also Kadir Johnson Rajagukguk et al., *Simultaneous General Election: Is It Fair for Democracy in Indonesia*, 6 Jurnal Ilmu Pemerintahan 2, 2–8 (2021).

regional variations and the like.Moreover, there is uncertainty about whether the same approach can be applied in India, especially considering India's larger population compared to Indonesia.

5.5 Japan

Japan holds its National Parliamentary elections separately from the Regional Prefectural Assemblies. However, it enables considerable autonomy to the Prefectures in scheduling their local elections together based on regional considerations. Under special circumstances, Japan holds simultaneous elections for the House of Representatives (Lower House) and the House of Councillors (Upper House) on a regular basis, though not always. This is referred to as a "Double election"[64] and occurs when the terms of both houses expire within a relatively short time-frame. While not mandatory, the practice of holding simultaneous elections in Japan is becoming more common, as it allows for a more streamlined and cost-effective electoral process, reduces political uncertainty, and allows voters to consider the overall political landscape in a single election cycle.

Though the Japanese Parliamentary setup(Diet) is different from India and though the concept of double elections is absent in India, Japan's successful experience with the higher voter turnout, tackling of administrative challenges, practical and political implications regarding simultaneous elections and the like highlights the need to balance synchronization while preserving autonomy for States and Union Territories, which have diverse socio-political dynamics across India . While India can benefit from this model, it must also consider its unique federal structure,diverse population and political traditions and thereafter adopt a carefully tailored approach that can lead to a more efficient, cost-effective, and responsive democratic system for India.

---

64. Hans H. Baerwald, *Japan's 'Double' Elections*, Far E. Surv. 1169-84 (1951); see also Sakura Murakami, *Double Japanese General Election Looks More Realistic as Unpopular Tax Hike Approaches*, Japan Times (May 23, 2019),https://www.japantimes.co.jp/news/2019/05/23/national/politics-diplomacy/double-japanese-general-election-looks-realistic-unpopular-tax-hike-approaches/. (last visited May 15,2024)

5.6 Philippines

The Philippines amended its Constitution to introduce synchronised and simultaneous elections for all national and local positions[65], every three years. Through this enactment, the Philippines government streamlined its democratic process and established a framework for the National and Local elections in 1992, thereby laying the groundwork for synchronised and simultaneous elections to commence in 1995 and authorizing the necessary appropriations for these initiatives.

India could explore a similar approach of anchoring 'One Nation, One Election' through constitutional validation, while learning from the Philippines' strategies in harmonizing electoral cycles through legal processes over subsequent polls.

5.7 South Africa

South Africa's electoral model is unique, with elections to the National Assembly and Provincial Legislatures held simultaneously every five years and the municipal elections occurring separately, halfway through the National and Provincial term. This staggered approach ensures that local issues receive dedicated attention but also means that the mandate at the local level may not always align with the National and Provincial governments[66].

India can adopt the South African model of managing simultaneous elections in balancing the power between the National and State Legislatures as it creates a unified political focus that streamlines electoral process and optimises resources without affecting the political stability or voter turnout.

---

65. Republic Act No.7056, pmbl.,S.1(1991)(Phil.).
66. Tom Lodge, *How the South African Electoral System Was Negotiated*, 2 J. AFR. ELECTIONS 71, 74–76 (2003); see Electoral Comm'n of S. Afr., https://www.elections.org.za/pw; see also Mohammed Haddad, *South Africa Elections Final Results: What Happens Next?,* AL JAZEERA (June 2, 2024, 4:27 AM), https://www.aljazeera.com/news/2024/6/2/south-africa-elections-results-what-happens-next.

5.8 Sweden

In Sweden, elections for the National Parliament (Riksdag), Provincial Legislatures/County Councils (Landsting), and Local Municipal Assemblies (Kommunfullmaktige) are held concurrently every four years on the second Sunday of September, which is a public holiday.[67] This synchronized electoral exercise ensures a cohesive mandate across all levels of government while reducing costs and voter fatigue. Sweden follows a proportional electoral system, where political parties are allocated seats in the elected bodies in proportion to their share of the total votes polled, ensuring representativeness of the election results across national, regional, and local legislatures based on the vote percentages secured by various parties.[68]

Though the Swedish model of elections can lead to national issues overshadowing local concerns[69],India can learn from Sweden's fixed election dates and synchronized electoral process, which promotes cohesion across different tiers of government while also ensuring cost-effectiveness and reducing voter fatigue.

Thus it can be seen that the adoption of simultaneous elections has had different levels of success in different countries, which makes it important for India to carefully consider the pros and cons of this system before adopting it[70]. While it has led to cost savings and prevented voter fatigue in some countries, it has also led to longer and more intense election campaigns, as well as challenges such as disinformation campaigns and allegations of vote-buying in some countries.

---

67. The Oxford Handbook Of Swedish Politics (Jon Pierre ed.,2016), https://doi.org/10.1093/oxfordhb/9780199665679.001.0001.(last visited May 15, 2024)
68. *Id.* at. 103-14.
69. Dipanjan Roy Chaudhury, *Sweden Inspires India for Simultaneous Elections*, econ. times (Apr. 17, 2018, 6:43 AM),https://economictimes.indiatimes.com/news/politics-and-nation/sweden-inspires-india-for-simultaneous-elections/articleshow/63792441.cms?from=mdr. (last visited May 15,2024)
70. Julio Cabral Teehankee, Electoral Politics in the Philippines, in Electoral Politics In Southeast And East Asia 149, 162-202 (Aurel Croissant et al eds., 2002).

In essence, though global practices, provide reassurance that synchronized polls are operationally feasible and can be successfully implemented in the long run,no single system can be deemed to be blindly adopted as the best road-map ahead for Indian democracy. Instead, the need of the hour demands a tailored approach that suits the diverse circumstances in India, taking into account our federal structure, logistical and population challenges, current constitutional and legal frameworks, administrative readiness, voter turnout during elections, political consensus and other pertinent factors so as to maintain a delicate balance, that blends the core tenets of India's federal structure and autonomy while upholding the democratic principles enshrined in the Constitution.

Conclusion

The researcher would like to conclude with the words of wisdom spoken by Shri Gopalakrishna Gandhi- *"*I mean to diminish no individual, institution, or phase in our history when I say that India is valued in the world over for a great many things, but for three over all others :The Taj Mahal, Mahatma Gandhi and India's electoral democracy*"*-[71]

Keeping aside the constitutional, political, administrative, logistic and practical challenges in enforcing simultaneous elections, it is doubtful as to whether concurrent elections, if at all implemented would be sustainable in the long run, given that it had failed miserably when situations were much more favourable for Indian democracy with lesser population, lesser coalition politics and lesser number of states to govern.

Nevertheless, the '*One Nation, One Election'* concept symbolises an ambitious idea that seeks to reduce costs, streamline governance, make optimal use of resources and has the potential to bring about significant benefits for India's democracy and governance through a phased approach, fostering inclusive consultation, strengthening election management and

71. Shahabuddin Yaqoob Quaraishi,An Undocumented Wonder:The Great Indian Electionn 106-08 (2d ed. 2014).

building political consensus, thereby effectively realising and reaping the benefits as it signifies a significant stride in the evolutionary journey of Indian democracy, presenting an opportunity for systemic reforms and enhanced governance that resonates with the dynamic ethos of the nation.

However, its implementation poses complex legal, operational and logistical obstacles and concerns that impacts the basic structure , federalism and parliamentary form of government that has been followed in India so far and requires meticulous amendments to be made to the Constitution and other legislations, which makes it a disputed and politically divisive idea within the Indian discourse.

A critical probe into the arguments for and against synchronizing state assembly and national election cycles has showcased that there is a substantial political complexity behind the seemingly simple *"One nation One election*" concept. Fundamentally, while efficiency arguments around reduced costs and administrative hassles make an intuitive appeal, the policy change impinges on foundational pillars of India's federal governance from regional diversity of priorities to constitutionally guaranteed autonomy of States.

Though financial and administrative efficiencies can be gained, the diversity of India necessitates a consensus-based reform preserving regional voices within the national chorus. The need of the hour demands a careful, gradualist, consultative, and incentive-driven approach rather than an aggressive top-down enforcement as political consensus should be built by addressing fears of smaller regional parties as to losing their prominence instead of going for a formulaic adaptation of the succesful western synchronous election models without considering India's unique regional complexities as it could destabilize more than streamline the democratic governance of India in the long run.

It is equally pertinent to offer a balanced perspective while synchronizing elections because if undertaken collaboratively, the concept of "*One nation one election"* may reinforce and strengthen our democratic rhythms and strengthen the dream of national integration.

Suggestion: The Way Forward

Integrating simultaneous elections into the electoral landscape of a country as diverse and vast as India will require careful planning, adequate resources, and a strong commitment to uphold the principles of free, fair and transparent elections. Some factors to be looked into before enforcing simultaneous elections are as follows:

- **Fixed Election Dates:** Bringing about fixed election dates can act as an enabling factor for exercising simultaneous elections across the National, State and Local levels so as to efficiently coordinate the massive logistical requirements by the Election Commission, prevent frequent impositions and lifting of the MCC that arise with separate poll schedules, ensure high voter participation, allow Parliament and State Assemblies to coordinate their tenures accordingly and make Constitutional amendments for synchronizing election cycles more viable. Moreover, fixed poll dates would streamline and aid in the transition towards simultaneous elections across India.
- **Synchronisation of Lok Sabha and State Assembly elections*:*** A crucial challenge lies ahead before implementing simultaneous polls across India in terms of achieving an alignment between the tenure of the Lok Sabha and the varying term ends of different State Assemblies. Nevertheless, a practical approach would involve incrementally adjourning instead of dissolving hung assemblies until the next simultaneous National and State elections, as well as undertaking delimitation of constituencies to enable synchronization of co-terminus seats so as to uphold democratic principles and thereby avoid early dissolutions or curtailment of existing elected tenures prematurely.
- **Constitutional amendments:** The High Level Committee (HLC) recommendation of inserting Article 324A in the Constitution to enable holding simultaneous elections for Panchayats, Municipalities,

the Lok Sabha, and State Legislative Assemblies should be looked into with immediate effect as implementing the 'One Nation, One Election' model would necessitate amending the Constitution and the Representation of the People Act, 1951 primarily to facilitate altering the fixed tenures of Legislative Assemblies to synchronize elections across the country. A living constitution is the main dynamics of change[72] and therefore other major amendments will have to be accommodated into the Constitution[73] so as to make it flexible enough to strike the right balance between accommodating 'One Nation, One Election' and preserving key democratic tenets like federalism, representation, and autonomy during the requisite constitutional restructuring.

- **Extensive consultation and consensus building**: It is apposite to extensively consult major National , Regional and Local parties before the elections are synchronized as the practical difficulties engulfed with the lack of political consensus and commitment will hinder the implementation of simultaneous elections. India's vast federal structure demands building consensus among diverse stakeholders as thrusting out a common ground among political parties, state governments, civil societies, and marginalized communities ensures an inclusive process that navigates legal challenges, thereby fairly allocating resources, securing political buy-in, and crucially, generating public trust.
- **Election trials**: It is pertinent to implement incremental synchronized election trials rather than directly going for comprehensive synchronization as allowing willing states to synchronize their assembly elections with upcoming polls on a test basis will help to weigh the prospects, feasibility and practicality of holding simultaneous elections.

72. David A. Strauss,The Living Constitution(Inalienable Rights) 120-24 (OUP USA.2010).
73. India Const.. arts. 83, 85, 170, 172, 174, 324, 329, 356.

- **Flexibility for States**: There should be flexibility for states to withdraw from synchronized election cycles for valid local or regional reasons. For this to happen, there should be built in provisions for individual states to hold early elections in case of hung assemblies or governance crises rather than waiting for fixed cycle as it would be give confidence to States that local issues would not take a backseat, once simultaneous elections tend to be the norm.
- **Technological updates**: Synchronizing elections on a massive scale across National, State and Local levels in India would require significant technological revamp in sync with India's digital capabilities and overhaul of existing systems before undertaking the gigantic exercise of 'One Nation, One Election'. In order to enhance transparency and auditability, measures like expanding the use of VVPAT's along with EVMs across polling booths, introducing remote live monitoring systems and analytics for smooth conduct and surveillance, improving the handling of integrated electoral data, leveraging emerging technologies like artificial intelligence, data analytics, cybersecurity solutions to strengthen the integrity of synchronized polls and the like should be introduced.
- **Fresh elections during emergency:** During unforeseen situations wherein the Lok Sabha or a State Legislative Assembly, due to a lack of clear majority becomes an hung assembly, faces a successful no-confidence motion, or any other contingency, fresh elections should be conducted to reconstitute the new House of People or State Assembly for serving out the remaining unexpired tenure of the outgoing house.
- **Tackling logistical challenges**: Tackling logistical challenges in conducting simultaneous elections across India requires robust transportation and communication networks, decentralized logistics management, adequate human resources, effective inventory

management, leveraging technology for tracking and coordination, securing storage facilities, sufficient budgetary allocation and phased implementation approach coupled with meticulous planning, resource management, technology utilization, and coordination among various agencies to streamline operations and address potential bottlenecks in distributing personnel and materials, thereby ensuring secure and efficient execution of simultaneous polls nationwide.

- **Voter awareness and education:** Lastly, a healthy democratic system involves a citizen-centric approach and strengtheneed electoral infrastructure that fosters inclusive participation, facilitates extensive voter education campaigns, equitable election awareness, clear and accessible voter information, simplified ballots, and a sense of just political system that encourages initiatives to mitigate voter fatigue, thereby eliminating the potential hindrances posed by regional disparities in conducting fair,transparent and inclusive simultaneous elections.

On the whole, it can be said that though the concept of *"One Nation, One Election"* holds a transformative potential in enhancing the administrative efficiency in the long run, its implementation in a socio-cultural and politically diverse electoral landscape like the Democratic Republic of India requires careful planning and implementation of atleast some of these pragmatic solutions. Though convenient, inclusive and credible cyclical elections is an ambitious reform that India can hope for achieving in the long run, the need of the hour demands overcoming legal, operational and logistical obstacles through collaborative efforts transcending party lines to uphold the tenets of participative democracy to preserve the integrity and accountability of the process and garner trust across the electoral spectrum. Nevertheless, there is no doubt that if effectively and judiciously implemented, simultaneous elections would be a watershed moment in India's electoral history as it would pave the path for India as a pioneer in electoral reforms among large democracies.

Bankruptcy and Insolvency in the Digital Age: Need for Cryptocurrency Associated Bankruptcy and Insolvency Regulation in India

Harshitha Ulphas*& Astitwa Kumar**

1. Introduction

Cryptocurrency is a digital currency decentralized from central authorities, using encryption for fund transfer verification. It operates on decentralized networks, lacks backing by gold, and shares digital, decentralized features across types.

The creation of cryptocurrency is controlled by the underlying code of the cryptocurrency itself, with safeguards against inflation built into many cryptocurrencies. Transactions involving cryptocurrencies are recorded on a ledger that cannot easily be falsified, as records are created through the automated consent of all users in the system.[1]

Overall, cryptocurrency represents a new form of digital currency that

* LL.M Student (Insolvency and Bankruptcy Laws), NALSAR University of Law & Indian Institute of Corporate Affairs

** LL.M Student (Insolvency and Bankruptcy Laws), NALSAR University of Law & Indian Institute of Corporate Affairs

1. *The Basics of Cryptocurrencies and Taxes,* Crypto Currency Facts, https://cryptocurrencyfacts.com/the-basics-of-cryptocurrencies-and-taxes (last visited Feb 21, 2024).

offers decentralization, security through cryptography, and a unique way of conducting financial transactions without the need for traditional intermediaries like banks or governments. However, while the regular/ real currency is issued by central banks and is a legal tender, the same cannot be said about cryptocurrency, for its main character is the decentralisation which is not a welcome change in many jurisdictions as will be explored later in this article.

Holding and owning cryptocurrency involves unique intricacies due to the digital and decentralized nature of these digital assets. Unlike traditional fiat currency, cryptocurrency is held in digital wallets, where transactions are recorded using wallet IDs rather than personal names.[2] This anonymity makes it challenging to track users' transactions and the amount of money in their wallets unless a person's identity is connected to a specific wallet. Some cryptocurrencies, like Monero, are designed to be completely anonymous and private, further complicating tracking efforts.[3]

The security of cryptocurrency ownership is crucial, as digital wallets store both a public key and a private key. The private key is essential for accessing and using cryptocurrency, similar to how an email password grants access to an email account. If the private key is compromised, stolen, or guessed, unauthorized access to the wallet and its contents can occur. Additionally, some custodial wallets are managed by exchanges, where users do not directly control their private keys.[4] Exchanges have been targeted by hackers in the past, resulting in the theft of users' cryptocurrency and subsequent bankruptcy filings by affected exchanges.

The process of obtaining cryptocurrency typically involves exchanging

2. Samer Barkat, Qais Hammouri & Khalil Yaghi, *Comparison of Hardware and Digital Crypto Wallets,* 57(6), JSJU (2022).
3. Ali Qamar, *Why Monero (XMR) should be Preferred over Bitcoin (BTC)*, Global Coin Report, (2018, April 15) https://globalcoinreport.com/why-monero-xmr-should-be-preferred-over-bitcoin-btc. (last visited Feb 21, 2024).
4. Samer Barkat et al, *Comparison of Hardware and Digital Crypto Wallets,* 57(6), JSJU (2022).

fiat currency for cryptocurrency through third-party verifiers like banks, which leaves a traceable record on financial statements. While the exact location of cryptocurrency holdings can be hidden, the exchange of fiat currency for cryptocurrency is typically recorded in financial statements, revealing the possession of cryptocurrency.

Therefore, holding and owning cryptocurrency requires users to manage their digital wallets securely, safeguard their private keys, and be cautious when using exchanges for transactions. The anonymity and security features of cryptocurrency present both opportunities and challenges for users, emphasizing the importance of understanding and implementing best practices for cryptocurrency ownership.

2. Regulatory stance of Cryptocurrency across the Globe

2.1. Uncertain to Proactive Regulatory Approaches across Jurisdictions

The regulatory approaches to cryptocurrencies in Southeast Asia, East Asia, and the United States exhibit a diverse spectrum of strategies, ranging from a complex and uncertain landscape in the United States to a more proactive and liberal approach in countries like Singapore and Japan.

In the United States, the regulatory environment for cryptocurrencies is marked by complexity and uncertainty. The classification of cryptocurrencies as securities, commodities, or payments is ambiguous, leading to challenges in determining the appropriate regulatory authority.[5] Different government agencies treat cryptocurrencies differently, contributing to a fragmented regulatory landscape. This lack of clarity has implications for market participants, as regulatory uncertainty can hinder innovation and create compliance challenges for businesses operating in the cryptocurrency space.

5. Alexander C. Drylewski et al, *Cryptocurrency Regulation and Enforcement at the US Federal and State Levels, Skadden* (Sep 2021), https://www.skadden.com/insights/publications/2021/09/quarterly-insights/cryptocurrency-regulation-and-enforcement-at-the-us-federal-and-state-levels. (last visited Feb 21, 2024).

Singapore, on the other hand, has a more relaxed approach to making rules for cryptocurrencies. Bitcoin is considered okay, and laws have been made to control digital money. Singapore wants to help cryptocurrency businesses without too many rules. This approach has made Singapore a big player in the world for cryptocurrency companies and new technology.[6] Singapore is a good place for these companies because the government doesn't interfere too much. This has led to more companies choosing Singapore as their home and helping the industry grow.

While, Japan, Hong Kong, Singapore, and Thailand adopt proactive regulations for cryptocurrencies, recognizing their benefits while ensuring safety and market integrity ensuring that their balanced approach fosters their significance in the global cryptocurrency sphere, fostering innovation and investment, India on the other hand, regulates cryptocurrencies through a framework that combines strict taxation, anti-money laundering (AML) measures, and cybersecurity protocols, where the government imposes a 30% tax on Virtual Digital Assets (VDA) transactions, enforces stringent KYC and AML requirements, and mandates prompt reporting of cybersecurity incidents involving digital assets making it hard for investors by not recognizing cryptocurrencies as legal money but still taxing them heavily.[7]

Similarly, some other countries like the Philippines, Malaysia, Indonesia, South Korea[8], and Taiwan[9] also have been cautious and have

6. Blog Library, *Is Singapore the Best Place in the World to Launch a Cryptocurrency Startup?*, The Asia Business Show (Jul 30, 2024), https://www.asiabusinessshow.com/blog-library/singapore-best-place-world-launch-cryptocurrency-startup. (last visited Aug. 16th ,2024)
7. Drupad Das, Pranay Agrawala & Nischal Anand, *India- Blockchain & Cryptocurrency Laws and Regulations 2024,* GLI, https://www.globallegalinsights.com/practice-areas/blockchain-laws-and-regulations/india/ (last visited Aug 16, 2024).
8. *South Korea Moves Toward Institutional Acceptance of Cryptocurrency,* Nasdaq.com (Jan 9, 2020), https://www.nasdaq.com/articles/south-korea-moves-toward-institutional-acceptance-of-cryptocurrency-2020-01-09. (last visited Aug 16,2024)
9 Ralph Jennings, *Taiwan edges toward liberalizing cryptocurrency as other Asian*

rules about using and investing in cryptocurrencies, and are in fact more careful and stricter compared to Japan, Hong Kong, Singapore, and Thailand. These countries want to support new ideas and keep people safe, so they have rules to manage the risks that come with cryptocurrencies being unpredictable.

Cambodia and Vietnam are developing regulations for cryptocurrencies, currently treating their use and investment as illegal. This lack of clarity may pose challenges for businesses and investors. Southeast Asia and East Asia exhibit diverse attitudes towards cryptocurrencies, with some countries being more accepting than others.

Regulatory disparities in these regions, stems from varying levels of clarity, acceptance, and enforcement. While the US faces regulatory fragmentation, India has taxed VDA at a high rate, while not recognising cryptocurrency, discouraging investments in the same and going forward with a 'wait and watch' approach, similar to that taken by Cambodia and Vietnam; wherein, Singapore and Japan have adopted proactive frameworks, fostering innovation and growth. This spectrum reflects ongoing efforts to address the dynamic cryptocurrency landscape.

2.2. Proactive and Liberal Approach towards Cryptocurrency Regulation

Countries like Japan, Hong Kong, Singapore, and Thailand have emerged as trailblazers in the realm of cryptocurrency regulation, successfully implementing proactive and liberal approaches through a series of key measures. These nations have recognized the transformative potential of cryptocurrencies and blockchain technology (a database mechanism of an advanced level that enables transparent information sharing within the business network), and their regulatory frameworks reflect a commitment

countries tighten rule, Forbes (Mar 22, 2018), https://www.forbes.com/sites/ralphjennings/2018/03/22/taiwan-edges-toward-liberalizing-cryptocurrency-as-others-in-asia-tighten-rules/. (last visited Aug 16, 2024).

to fostering innovation, ensuring investor protection, and adapting to the evolving landscape of the cryptocurrency industry.

One of the foundational aspects of their success lies in the legal recognition of cryptocurrencies. Japan, Hong Kong, Singapore, and Thailand have legalized cryptocurrencies, acknowledging them both as a form of tender and as a type of security. This legal clarity is crucial as it provides a solid foundation for businesses and investors to operate within the regulatory framework. It signals a commitment to embracing new financial technologies and positions these countries as welcoming environments for cryptocurrency-related activities.[10]

A key element in their regulatory approach is the proactive communication of regulatory changes to stakeholders. The authorities in these countries have demonstrated transparency by keeping the public and industry participants informed about regulatory developments.[11] This proactive communication not only fosters a sense of trust and security within the market but also allows businesses to adapt their operations in a timely manner. In the dynamic and rapidly evolving world of cryptocurrencies, clear and timely communication is essential for market participants to navigate regulatory changes effectively.

Japan, Hong Kong, Singapore, and Thailand implement regulations on ICOs to safeguard investors and encourage innovation. They enforce stringent measures on cryptocurrency exchanges, prioritizing transparency, security, and compliance to bolster market integrity and user confidence. These efforts include licensing requirements and adherence to regulatory frameworks, fostering a secure and trustworthy cryptocurrency ecosystem.

---

10. Smarak Swain, *Governments should regulate, not entirely ban, cryptocurrencies,* Nikkei Asia (Nov 14, 2019), https://asia.nikkei.com/Opinion/Governments-should-regulate-not-entirely-ban-cryptocurrencies. (last visited May 16, 2024).
11. *Asia "is ahead" in developing central-bank digital currencies,* South China Morning Post (Dec 29, 2019), https://www.scmp.com/business/banking-finance/article/3043805/asias-central-banks-are-ahead-race-develop-their-own. (last visited May 16, 2024).

Looking ahead, these countries are preparing to introduce Central Bank Digital Currency (CBDCs), aligning with the recommendations of international bodies such as the International Monetary Fund (IMF).[12] CBDCs are seen as a way to enhance the efficiency and security of digital transactions, offering a government-backed digital currency. The willingness of Japan, Hong Kong, Singapore, and Thailand to explore CBDCs demonstrates a forward-thinking approach to the integration of traditional finance with emerging technologies. It also positions them at the forefront of global efforts to explore the potential benefits of central bank-backed digital currencies.

Collaborative initiatives further underscore their commitment to advancing cryptocurrency regulation. For example, the partnership between Hong Kong and Thailand in working towards the implementation of central bank digital tokens showcases a joint effort to explore and integrate innovative solutions in the financial sector. Such collaborations facilitate knowledge-sharing, streamline regulatory efforts, and contribute to the development of a harmonized approach to cryptocurrency regulation.[13]

Therefore, the success of Japan, Hong Kong, Singapore, and Thailand in implementing a proactive and liberal approach to cryptocurrency regulation can be attributed to their comprehensive regulatory measures, commitment to transparency, and willingness to adapt to the evolving cryptocurrency landscape. Legal recognition, proactive communication, restrictions on ICOs, stringent regulation of exchanges, and the exploration of CBDCs collectively form a well-rounded regulatory framework that encourages innovation while safeguarding the interests of investors and

12. Policy Paper, *IMF Approach to Central Bank Digital Currency Capacity Development,* IMF (Apr 11, 2023), https://www.imf.org/en/Publications/Policy-Papers/Issues/2023/04/12/IMF-Approach-to-Central-Bank-Digital-Currency-Capacity-Development-532177. (last visited May 16, 2024).
13. Benjamin Pirus, *Bitcoin hedge argument growing stronger with time, says pomp,* Cointelegraph (Feb 5, 2020), https://cointelegraph.com/news/bitcoin-hedge-argument-growing-stronger-with-time-says-pomp. (last visited May 16, 2024).

maintaining market integrity. These countries have positioned themselves as leaders in the global cryptocurrency landscape, providing a blueprint for effective and forward-looking regulatory approaches.

3. Treatment of cryptocurrency as commodity, currency, asset in Insolvency

3.1. Cryptocurrency as a Property

Agency interpretations of cryptocurrency in the United States as property have played a significant role in shaping the legal treatment of digital assets. The Internal Revenue Service (IRS) has issued guidance stating that for federal tax purposes, virtual currency, including cryptocurrency, is treated as property.[14] This classification as property means that transactions involving cryptocurrency may be subject to capital gains tax, similar to the sale of other types of property.

Additionally, the United States Commodities and Futures Trading Commission (CFTC) has also defined Bitcoin and other virtual currencies as commodities. This classification as commodities places cryptocurrencies under the regulatory oversight of the CFTC, subjecting them to commodity trading regulations.[15]

The agency interpretations of cryptocurrency as property highlight the complexity of categorizing digital assets within existing legal frameworks. While the IRS views cryptocurrency as property for tax purposes, the CFTC considers it a commodity, leading to potential regulatory implications for cryptocurrency exchanges and traders. These differing interpretations underscore the need for clear guidelines and regulatory frameworks to

14. Fahey Douglas A, *Notice 2014-21,* (2014), https://www.irs.gov/pub/irs-drop/n-14-21.pdf. (last visited May 16, 2024).
15. *CFTC Orders Bitcoin Options Trading Platform Operator and its CEO to Cease Illegally Offering Bitcoin Options and to Cease Operating a Facility for Trading or Processing of Swaps without Registering* | CFTC. www.cftc.gov. http://www.cftc.gov/PressRoom/PressReleases/pr7231-15 (last visited on Aug 16, 2024).

address the unique characteristics of cryptocurrency in the evolving digital economy.

3.2. Cryptocurrency as a Currency

Interpretations of cryptocurrency vary among agencies, with debate over its classification as currency, property, or commodity. The IRS considers cryptocurrency as property for tax purposes, potentially subjecting transactions to capital gains tax. Conversely, the CFTC defines virtual currencies like Bitcoin as commodities, subject to the commodity trading regulations.

However, not all agencies agree with the classification of cryptocurrency as property or a commodity. The Financial Crimes Enforcement Network (FinCEN) has found that virtual currency, including cryptocurrency, is similar but not identical to "real" currency, as it lacks legal tender status in any jurisdiction.[16] This distinction highlights the challenges in categorizing cryptocurrency within existing regulatory frameworks and the differing perspectives among regulatory agencies.

The debate over agency interpretations of cryptocurrency as a currency underscores the need for clear guidelines and regulatory frameworks to address the unique characteristics of digital assets. As the legal and regulatory landscape continues to evolve, it is essential for agencies to collaborate and provide consistent guidance on how cryptocurrency should be treated in various contexts. At present, both the SEC and FinCEN have seemed to indicate that cryptocurrency can be treated as currency for the purposes of their respective jurisdictions.

16. J. Dax Hansen and Joshua L. Boehm, *Treatment of Bitcoin Under U.S. Property Law*, Perkins Coie, (2024), https://www.virtualcurrencyreport.com/wp-content/uploads/sites/13/2017/03/2016_ALL_Property-Law-Bitcoin_onesheet.pdf. (last visited May 16, 2024).

3.3. Cryptocurrency as Commodity v. Cryptocurrency as Currency

The debate over whether cryptocurrency should be seen as a commodity or currency is important. If it's treated as a commodity, it could help prevent unfair treatment of creditors and avoid delays in cases like bankruptcy. But some argue it should be seen as a currency to avoid problems with its value fluctuating a lot. This classification affects how cryptocurrency is regulated, taxed, and handled in legal situations.

If cryptocurrency is treated as a commodity, it may fall under the regulatory purview of agencies like the Commodities Futures Trading Commission (CFTC), which could subject it to the commodity trading regulations.[17] This classification could lead to increased oversight and potentially impact how cryptocurrency exchanges operate and are regulated. Additionally, treating cryptocurrency as a commodity could have implications for taxation, as capital gains taxes may apply to transactions involving cryptocurrency as a commodity.

Conversely, if cryptocurrency is classified as a currency, it may be subject to different regulatory frameworks and tax treatment. For example, the Internal Revenue Service (IRS) has treated virtual currency, including cryptocurrency, as property for tax purposes.[18] However, other agencies like the Securities and Exchange Commission (SEC) have indicated that certain cryptocurrencies may be considered replacements for sovereign currencies and not securities. This classification could impact how cryptocurrency is traded, exchanged, and taxed in the future.

In bankruptcy cases, whether cryptocurrency is seen as a commodity or currency affects how it's divided among creditors. If it's treated like a commodity, its changing value can make it hard to decide how much each creditor gets. But if it's seen as a currency, there are questions about how to handle its value changes. This decision also affects how cryptocurrency

17. *Supra* note 15
18. *Supra* note 14

is regulated, taxed, and dealt with in legal matters. Therefore, it's important to have clear rules to handle cryptocurrency properly in the modern digital world.

3.4. Cryptocurrency as an Asset in Insolvency Proceedings

Cryptocurrencies have emerged as a unique asset class that presents both opportunities and risks in insolvency proceedings. When considering cryptocurrencies as assets in insolvency, several risks need to be carefully evaluated and managed to ensure a successful resolution of the proceedings.

3.4.1. Volatility: One of the primary risks associated with cryptocurrencies in insolvency proceedings is their inherent volatility. The value of cryptocurrencies such as Bitcoin and Ethereum can fluctuate significantly within short periods, leading to challenges in accurately valuing and managing these assets during insolvency.[19] The unpredictable nature of cryptocurrency prices can impact the recovery for creditors and complicate the distribution of assets in the bankruptcy process.

3.4.2. Security Risks: Cryptocurrencies are susceptible to security breaches and hacking incidents, as seen in cases like the Mt. Gox exchange hack. The loss or theft of cryptocurrencies due to security vulnerabilities can result in substantial financial losses for the insolvent entity and its creditors. Insolvency practitioners must implement robust security measures to safeguard digital assets and mitigate the risk of cyberattacks.

3.4.3. Regulatory Uncertainty: The regulatory landscape surrounding cryptocurrencies is constantly evolving, with varying levels of oversight and legal frameworks in different

19. Mary E Maginnis, *Money For Nothing: The Treatment of Bitcoin in Section 550 Recovery Actions,* 20 U Penn. J. Of Bus. L. 493 (2018).

jurisdictions. The lack of clear regulations and guidelines for handling cryptocurrencies in insolvency proceedings can create legal uncertainties and compliance challenges for insolvency practitioners. Navigating the complex regulatory environment adds a layer of risk to the management of digital assets in insolvency.

3.4.4. Liquidity Concerns: Cryptocurrencies, unlike traditional assets, may face liquidity challenges in insolvency proceedings. Converting cryptocurrencies into fiat currency to meet creditor obligations can be hindered by limited liquidity in the cryptocurrency markets, especially during periods of market stress or volatility. Insolvency practitioners must assess the liquidity risk associated with holding and selling cryptocurrencies to maximize asset recovery.

3.4.5. Fraud and Money Laundering: Cryptocurrencies have been associated with illicit activities such as fraud and money laundering due to their pseudonymous nature and decentralized structure. Insolvency proceedings involving cryptocurrencies may encounter challenges in tracing and recovering assets linked to fraudulent activities, requiring enhanced due diligence and forensic investigations to identify potential illicit transactions.

3.4.6. Cross-Border Complexity: The borderless nature of cryptocurrencies introduces complexities in cross-border insolvency proceedings, where assets and stakeholders may be located in different jurisdictions. Conflicting laws, jurisdictional issues, and challenges in enforcing legal decisions across borders can complicate the resolution of insolvency cases involving cryptocurrencies.

4. Instances of Insolvency, Bankruptcy and Cryptocurrency Cases in the World

4.1 *The Mt Gox* Case and Valuation Issue

The *Mt. Gox* case[20] was a significant bankruptcy proceeding involving the Japanese cryptocurrency exchange *Mt. Gox*, which filed for bankruptcy in April 2014. Mt. Gox was once the largest Bitcoin exchange in the world, but it collapsed after losing hundreds of thousands of Bitcoins belonging to its customers in what was believed to be a hacking incident.[21] The bankruptcy case raised complex legal issues surrounding the treatment of cryptocurrency assets in insolvency proceedings.

One of the key issues in the *Mt. Gox* case was the valuation of the Bitcoins held by the exchange at the time of the bankruptcy filing. The creditors argued that their claims should reflect the current value of Bitcoin, which had significantly appreciated since the filing. On the other hand, the estate contended that the creditors' claims should be limited to the amount owed on the date of the petition. The court ultimately held that creditors would be limited to the value of their cryptocurrency as of the date of the bankruptcy filing.

The *Mt. Gox* case set a precedent regarding the valuation of cryptocurrency assets in bankruptcy proceedings. The court's decision to value the Bitcoins at the time of the filing of the petition, rather than at the current market value, had significant implications for the distribution of assets to creditors. This ruling highlighted the challenges of valuing volatile assets like cryptocurrency in insolvency cases and the need for clear guidelines on how to treat digital assets in bankruptcy proceedings.

---

20. *English translation of the Mt Gox judgment on the legal status of bitcoin prepared by the Digital Assets Project*, Blogs.law.ox.ac.uk (Feb 11, 2019), https://blogs.law.ox.ac.uk/business-law-blog/blog/2019/02/english-translation-mt-gox-judgment-legal-status-bitcoin-prepared. (last visited May 16,2024)
21. *Id.*

Furthermore, the *Mt. Gox* case underscored the importance of regulatory oversight and security measures in the cryptocurrency industry. The collapse of Mt. Gox due to a massive security breach raised concerns about the safety and reliability of cryptocurrency exchanges and the need for enhanced security measures to protect investors' assets.

Overall, the *Mt. Gox* case serves as a cautionary tale about the risks and challenges associated with the use and custody of cryptocurrency assets. It also highlights the need for regulatory clarity and robust security measures to safeguard the interests of investors and ensure the stability of the cryptocurrency market.

4.2 The *Dooga Case* and issues with Stolen Cryptocurrency

Insolvency professionals face several challenges in recovering stolen cryptocurrency, including the lack of standardized procedures for retrieving stolen crypto assets, the reliance on alternative recovery methods due to funding constraints and inappropriate policing discretion, and the use of cryptocurrency privacy tools such as tumblers or mixers to launder stolen funds. Additionally, the nascence of cryptocurrency and the lack of judicial education on crypto assets discredit and slow down existing legal systems, leading to a majority of crypto recovery cases involving hacks remaining unrecovered, unmitigated and un-litigated.[22] These challenges highlight the need for legislative reform and increased court education on specialized crypto rulings to improve the efficacy of recovery litigation and ensure access for everyday consumers and impacted victims of financial crimes within online spaces.

The *Dooga case* serves as a significant example of utilizing legal enforcement mechanisms to pursue laundered virtual assets. It highlights the potential effectiveness of traditional legal methods for recovering stolen

22. *How crypto forensics traced $32 million worth of stolen bitcoin,* Forkast (Jan 4, 2022). https://forkast.news/video-audio/crypto-forensics-trace-bitcoin-criminals-dooga/. (last visited May 16,2024)

cryptocurrency assets. The case study underscores the importance of judicial oversight and standardized procedures in the recovery of stolen crypto assets.[23] However, it also emphasizes the challenges faced by insolvency professionals in navigating the complexities of cryptocurrency-related litigation. The contrast between traditional legal methods and new authoritarian systems for recovery underlines the need for legislative reform and increased education within the legal system to address the evolving landscape of cryptocurrency theft and recovery.

For instance, in September 2020, when the cryptocurrency exchange KuCoin was allegedly hacked, resulting in the theft of approximately US $275 million. The hackers quickly moved the stolen funds off-site to purchase and withdraw BTC (Bitcoin) from centralized exchanges. Subsequently, the funds were sent through mixing services to decentralized exchanges for transfers. Notably, the hackers utilized decentralized exchange platforms to conduct currency swaps without providing KYC (Know Your Customer) information, enabling them to abscond with US $13 million before the majority was frozen by underlying smart contracts in a unique and novel method of asset recovery. In Kucoin Hack, KuCoin took swift action following the alleged hack, collaborating with several stakeholders in the crypto ecosystem to freeze the stolen funds.

Similarly, Bitfinex, another exchange, froze $13 million of the stablecoin Tether (USDt), while Tether Holdings Ltd. froze another $20 million of USDt at a certain address linked to the hack.[24] Additionally, KuCoin worked collaboratively with other exchanges, including Binance, Huobi, and OKEx, to track and freeze funds. Notably, the majority of other crypto projects and asset providers were able to "freeze" hackers' funds

23. Jeffrey Gogo, *Cryptocurrency exchange cubits shuts down after $33m scam,* Bitcoin News (Dec 14, 2018), https://news.bitcoin.com/u-k-cryptocurrency-exchange- cubits-shuts-down-after-33m-scam/. (last visited May 16,2024)
24. Dazeee, White Paper of Kucoin: Kucoin - A World-Class Cryptocurrency Exchange Platform, SCRIBD, https://www.scribd.com/document/401976348/Kucoin-Whitepaper-En. (last visited May 16,2024)

without any approval from courts or criminal investigative entities, setting a unique online precedent where exchanges and centralized currencies began blacklisting certain addresses linked to crimes and laundering.

The KuCoin hack exemplifies the challenges of tracking and recovering stolen cryptocurrency, particularly when moved through non-compliant exchanges or decentralized offshore platforms. It also highlights the emergence of alternative quasi-criminal recovery processes that do not rely on traditional court systems. The case demonstrates the effectiveness of online recovery methods offered by centralized currencies and the collaboration of various stakeholders in the crypto ecosystem to freeze and recover stolen funds. This illustrates the evolving landscape of cryptocurrency recovery and the need for legal professionals and insolvency litigators to be aware of these alternative forms of recovery.

5. Choice of Law and Comity of Law in Insolvency Cases Involving Cryptocurrency

5.1. Choice of Law

In international bankruptcy cases, choosing which country's laws apply is really important. This helps sort out problems when different countries have different rules. These rules decide things like which court handles the case, how judgments from other countries are recognized, and how bankruptcy actions are enforced. Having clear rules on which laws apply helps make international bankruptcy cases run smoother and work better.

Dealing with bankruptcy involving cryptocurrencies across different countries is tough and expensive because each country has its own laws. This makes it hard to manage assets, especially with cryptocurrencies that aren't tied to any specific place. Not knowing which laws apply makes it uncertain and risky for people handling the bankruptcy. Also, because laws aren't the same everywhere, it makes it even trickier to deal with bankruptcies involving cryptocurrencies across borders.

Despite the existence of international legal frameworks such as the UNCITRAL Model Law on Cross-Border Insolvency, challenges and limitations persist in cross-border insolvency proceedings.[25] One significant challenge is the conflict between state confiscation of criminal assets and insolvency proceedings, where assets may be held for extended periods, rendering insolvency proceedings ineffective, especially in cases involving stolen cryptocurrencies. Additionally, the inefficiency and high costs of cross-border insolvency proceedings are exacerbated by differences in laws and legal systems across jurisdictions, making the process cumbersome.[26]

The absence of clear rules for cryptocurrencies in international bankruptcy law makes it hard to deal with them in insolvency cases. Decentralized cryptocurrencies raise questions about where bankruptcy cases should happen and which laws should apply. Also, problems with recognizing foreign assets and claims from creditors abroad, plus the impact on transactions between countries, make cross-border bankruptcies complex. Without consistent rules, parties can exploit legal differences, complicating things further. Despite existing international frameworks like the UNCITRAL Model Law, challenges like conflicts with criminal asset confiscation and regulatory differences still hinder cross-border bankruptcy proceedings.

5.2. Comity of Law

Comity and customary international law play significant roles in influencing international insolvency law. Comity, as a doctrine of private international law, serves as a set of general principles that guide courts and judicial authorities in managing cross-border insolvency cases. It facilitates cooperation between jurisdictions by promoting mutual respect and recognition of each other's laws and decisions, thereby fostering efficient resolution of insolvency matters.

25. UNCITRAL Model Law on Cross-Border Insolvency
26. Story & Sean E, *Cross-Border Insolvency: A Comparative Analysis,* 32(2) AJICL 431–462 (2015).

On the other hand, Customary International Law (CIL) has been debated as a potential source of norms in international insolvency law.[27] While some argue that CIL may be emerging as a guiding principle in cross-border insolvency cases, its application remains subject to interpretation and enforcement mechanisms within domestic legal systems. Nonetheless, CIL could supplement existing international frameworks, such as the UNCITRAL Model Law, to address gaps and enhance the effectiveness of cross-border insolvency proceedings.

With respect to modified universalism, as an approach in managing insolvency cases across jurisdictions, plays a crucial role in promoting cooperation and harmonization in international insolvency law.[28] This concept aims to achieve a balance between pure universality (complete unity and universality) and respecting the diversity of legal systems and practices in different jurisdictions. By adopting modified universalism, insolvency proceedings can benefit from concrete and realistic rules that facilitate cross-border cooperation and coordination among courts and authorities.

Therefore, concepts like comity and customary international law influence international insolvency law by promoting cooperation, mutual respect, and potential normative guidance. Modified universalism, on the other hand, plays a crucial role in managing insolvency cases across jurisdictions by balancing universality with respect for legal diversity and facilitating effective cross-border insolvency proceedings.

6. Insolvency of Crypto Exchanges and Treatment of Stolen Cryptocurrency

The insolvency of cryptocurrency exchanges presents complex challenges due to the unique nature of digital assets and the lack of

27. Andrew Godwin et al, *The Inherent Power of Common Law Courts to Provide Assistance in Cross-Border Insolvencies: From Comity to Complexity,* 26(1), Intl Insolvency Rev 5–39 (2017).

28 Rosalind Mason & Elizabeth Streten, The Future of Cross-Border Insolvency: Overcoming Biases and Closing Gaps, 24,290(Oxford University Press 2018).

regulatory oversight in the industry. When a crypto exchange becomes insolvent, customers who entrusted their funds to the platform face uncertainties regarding the recovery of their investments.[29] The insolvency of crypto exchanges can result from alleged mismanagement, undercapitalization, or external factors such as hacks or fraud.

One of the key intricacies involved in the insolvency of crypto exchanges is the classification and treatment of digital assets in bankruptcy proceedings. Courts must grapple with categorizing cryptocurrencies as assets, securities, commodities, or currencies, each with its implications for the distribution of funds to creditors.[30] The decentralized nature of cryptocurrencies and the lack of regulatory clarity further complicate the valuation and recovery of digital assets in insolvency cases.

Additionally, the rise of decentralized finance (DeFi) platforms and non-fungible tokens (NFTs) adds another layer of complexity to the insolvency of crypto exchanges. DeFi platforms operate without intermediaries, making it challenging for courts to identify and recover assets held in these platforms. NFTs, which represent unique digital assets, pose challenges in valuation and distribution due to their indivisibility and non-substitutability.

Furthermore, the involvement of customers who invested in NFTs or DeFi platforms with the insolvent crypto exchange further complicates the insolvency proceedings. Customers may face uncertainties regarding the recovery of their assets, the classification of their claims, and the prioritization of their claims among other creditors. The lack of regulatory oversight and standardized valuation methods for digital assets exacerbates these challenges, requiring courts to navigate the novel and unregulated landscape of cryptocurrency insolvencies.

---

29. Udofia & Dr Kubi, *Treatment of Crypto-Assets in Insolvency: Lessons from Different Jurisdictions,* Ssrn (Apr 7, 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4077707. (last visited May 16.2024)
30. Amy Q Nguyen & A. Q, *The Mysteries of NFT Taxation and the Problem of Crypto Asset Tax Evasion,* Smu Science And Technology L.rev, 25(2), 323 (2022), https://doi.org/10.25172/smustlr.25.2.8. (last visited May 16,2024)

Therefore, the insolvency of crypto exchanges presents intricate challenges for courts, creditors, and customers due to the unique characteristics of digital assets, the lack of regulatory clarity, and the involvement of DeFi platforms and NFTs. Courts must navigate these complexities to determine the classification, valuation, and distribution of digital assets in insolvency proceedings, highlighting the need for clear regulatory guidance and legal frameworks in the cryptocurrency industry.

7. Conclusion and Suggestions for regulation of Crypto Related Insolvency and Bankruptcy in India

While it is true that many jurisdictions are struggling to navigate their way through the maze known as cryptocurrency, it is essential that India makes its stance on the same clear, not only to better protect the wealth that belongs to its citizens, but also to attract and house cryptocurrency related ventures in India. Cryptocurrency regulation in India, particularly concerning bankruptcy and insolvency, is crucial to mitigate risks and ensure fair resolution processes. The volatile nature of cryptocurrencies can complicate asset distribution and creditor claims in bankruptcy proceedings. Without clear regulations, determining the value of cryptocurrency holdings and addressing fluctuations in value becomes challenging, leading to uncertainties for creditors and stakeholders. Additionally, the absence of provisions for cryptocurrencies in insolvency laws creates legal ambiguities and jurisdictional challenges, further complicating cross-border insolvency proceedings. Regulation would provide clarity on how cryptocurrencies are treated in bankruptcy cases, ensuring equitable distribution of assets and enhancing the efficiency and effectiveness of insolvency processes. Furthermore, regulatory measures can help prevent fraudulent activities and mitigate the potential misuse of cryptocurrencies in bankruptcy proceedings, safeguarding the interests of creditors and maintaining the integrity of the insolvency system in India.

The issues with the wait and watch approach[31], adopted by many jurisdictions are as follows:

a. Potential Surge in Bankruptcy Filings- The speculative nature of crypto assets creates a risk of a future market collapse, which could lead to a surge in bankruptcy filings. This surge could overwhelm bankruptcy courts, resulting in inconsistent and inadequate responses.

b. Lack of Coherent Framework- Waiting for other authorities to act is unlikely to yield a coherent regulatory framework for handling crypto assets efficiently in bankruptcy cases. Legal developments surrounding crypto assets have been more akin to regulatory power grabs than meaningful framework creation.

c. Inhibition of Reliable Crypto Enterprises- A wait-and-see approach could inhibit the development of reliable crypto enterprises in the US. Without clarity on how crypto assets will be treated under US bankruptcy laws, sophisticated players may seek frameworks elsewhere, potentially limiting US courts' ability to take meaningful action in cases involving crypto assets.

To address the intersection of cryptocurrency and insolvency and bankruptcy related issues within India's legal framework, the following recommendations can be considered:

a. Establishing Clear Guidelines
Developing specific regulations and guidelines addressing the treatment of cryptocurrencies in insolvency and bankruptcy proceedings, inclusive of defining the status of cryptocurrencies as assets, establishing valuation methodologies, and outlining procedures for their distribution among creditors.

31. Megan McDermott, *The Crypto Quandry: Is Bankruptcy Ready?,* Northwestern U. L. Rev. Online, 115, 24-58 (2020-2021).

b. Including Cryptocurrency in Insolvency Laws
Amending the existing insolvency laws, such as the Insolvency and Bankruptcy Code (IBC), 2016, to explicitly include provisions for cryptocurrencies. This will ensure that cryptocurrency assets are recognized and accounted for in insolvency proceedings, providing clarity and legal certainty for stakeholders.

c. Regulating the Cryptocurrency Exchanges
Implementing regulations for cryptocurrency exchanges operating within India to enhance transparency, security, and compliance, including licensing requirements, Know Your Customer (KYC) procedures, and Anti-Money Laundering (AML) measures to prevent illicit activities and protect investors.

d. Enhancing Cross-Border Cooperation
Strengthening international cooperation and collaboration on cross-border insolvency cases involving cryptocurrencies. This involves harmonization of legal frameworks, facilitation of information sharing between jurisdictions, and streamlined procedures for asset recovery and distribution.

e. Promoting Investor Education
Educating investors and stakeholders about the risks and opportunities associated with cryptocurrency investments and their implications in insolvency scenarios. This includes raising awareness about the regulatory framework, potential pitfalls, and best practices for safeguarding assets in the event of insolvency.

f. Engaging Stakeholders
Consulting with industry experts, legal professionals, regulatory authorities, and other stakeholders to develop comprehensive and practical solutions tailored to the unique challenges posed by cryptocurrencies in insolvency proceedings.

g. Monitoring and Adapting
Continuously monitoring the developments in the cryptocurrency space and evaluating the effectiveness of regulatory measures in addressing emerging challenges. Flexibility and adaptability in regulatory frameworks are essential to effectively manage the evolving nature of cryptocurrencies and their impact on insolvency and bankruptcy proceedings.

By implementing these recommendations, India can establish a robust regulatory framework that addresses the complexities of cryptocurrencies in insolvency and bankruptcy scenarios, while promoting investor confidence, financial stability, and the integrity of the insolvency system.

STATEMENT ABOUT OWNERSHIP AND OTHER PARTICULARS ABOUT JOURNAL OF INDIAN LEGAL THOUGHT

Form (IV)

(See Rule 8)

1.	Place of Publication	School of Indian Legal Thought Mahatma Gandhi University, S.H. Mount P.O., Kottayam-686006
2.	Periodicity of of its Publication	Yearly
3.	Printer's Name	Prof (Dr). Bismi Gopalakrishnan Nationality and Address Head of the Department School of Indian Legal Thought Mahatma Gandhi University S.H. Mount P.O., Kottayam-686006
4.	Publishers Name	Prof (Dr). Bismi Gopalakrishnan Nationality and Address Head of the Department School of Indian Legal Thought Mahatma Gandhi University S.H. Mount P.O., Kottayam-686006
5.	Chief Editor's name	Prof (Dr). Sheeba Pillai Nationality and Address Assistant Professor School of Indian Legal Thought Mahatma Gandhi University S.H. Mount P.O., Kottayam-686006
6.	Name and Address of individuals who owns the Journal and partners or share holders holding more than one Percent of the total capital	Prof (Dr). Bismi Gopalakrishnan Head of the Department School of Indian Legal Thought Mahatma Gandhi University S.H. Mount P.O., Kottayam-686006

I, Prof. (Dr.) Bismi Gopalakrishnan, hereby declare that particulars given above are true to the best of my knowledge and belief.

Kottayam
01-12-2024

ISSN 2249-9989

JILT
A School of Indian Legal Thought Publication