

# NLUT



## JOURNAL OF LAW AND POLICY

Volume 1

2025

### ARTICLES

- Rule of Law and the Role of the High Court — *Justice Deepak Gupta*
- Is the Victim A Forgotten Party in our Criminal Justice System  
— *Justice S.G. Chattopadhyay*
- Environmental Laws: Ruling Politicians v Citizens — *Krishan Mahajan*
- Political Dynamics in Telangana: A First-Person Analysis of  
the Assesmbly Election of 2023 — *Afroz Alam*
- Judicial Liquidation of Social Justice Through EWS Judgement — *Ayaz Ahmad*
- Structuring Neural Rights — *Ashit Kumar Srivastava,  
Priyanshi Jain & Pragya Richa Tiwary*
- The New Law of Evidence in India: Simplification, Sensitization  
and Modernization, or Simply Reorganization? — *Akshya Verma*
- Emerging Global Trade Paradigm on E-Commerce and  
India's Policy Conundrum: What all is at Stake? — *Utkarsh K Mishra &  
Surendar Singh*
- Balancing the Scale: Justice Assisted, Not Automated  
— *Prasidh R Singh & Nitika Jain*

### CASE COMMENTS

- Enforceability of Minimum Lock in Period Clauses in Employment Contracts:  
Analysis of Recent Supreme Court Judgment in Vijaya Bank — *Satish Padhi*
- State of T.N. v Governor of T.N. — *Nehru & Harsh Singh*



**NATIONAL LAW UNIVERSITY  
TRIPURA-JOURNAL OF LAW  
AND POLICY  
(NLUT-JLP)**

Volume I | 2025

Peer Reviewed & Refereed Journal

NATIONAL LAW UNIVERSITY TRIPURA-  
Journal of Law and Policy (NLUT-JLP)

Subscription Price: Rs. 950

© National Law University, Tripura, 2025

National Law University shall be the sole copyright owner of all the published materials. Apart from fair dealing for the purposes of research, private study or criticism, no part of this Journal may be copied, adapted or used in any form whatsoever without prior written permission from the University.

The editors, publishers and printers do not claim any responsibility for the views expressed by the contributors and for the errors, if any, in the information contained in the Journal. The University shall in no way be responsible for any damage or loss in whatever manner, consequent to any action taken on the basis of the contents of the Journal, caused to any person, institution or organization.

*Published by:*

**National Law University Tripura**

Phone: +91381 2915078

Email: [nlut-jlp@nlutripura.ac.in](mailto:nlut-jlp@nlutripura.ac.in)

Website: [www.nlutripura.ac.in](http://www.nlutripura.ac.in)

*Distributed exclusively by:*

**Eastern Book Company**

34, Lalbagh, Lucknow - 226 001

U.P., India

Email: [sales@ebc-india.com](mailto:sales@ebc-india.com)

Website: [www.ebc.co.in](http://www.ebc.co.in)

The views expressed by the contributors are personal and do not in any way represent the institution

# NATIONAL LAW UNIVERSITY TRIPURA-JOURNAL OF LAW AND POLICY (NLUT-JLP)

EDITOR-IN-CHIEF

Prof. (Dr) Yogesh Pratap Singh  
Vice-Chancellor, National Law University Tripura

ADVISORY BOARD OF JOURNAL

Hon'ble Mr Justice A.K. Sikri  
*Former Judge, Supreme Court of India  
International Judge, Singapore International Commercial Court*

Prof. (Dr) Faizan Mustafa  
*Vice-Chancellor, Chanakya National Law University Patna*

Prof. Steve K. Ngo  
*An International Arbitrator, Academic and Arbitration  
Specialist, Singapore*

Prof. Krishan Mahajan  
*Senior Advocate & Mediator, Supreme Court of India*

Prof. Rajat Ganguly  
*Senior Lecturer, College of Law, Arts, and Social Sciences Murdoch University  
Editor-in-Chief, Journal of Asian Security and International Affairs*

Ms Enakshi Ganguly  
*Author, Social Activist and Co-founder HAQ: Centre for Child Rights*

EDITORIAL BOARD OF JOURNAL

*Editor-in-Chief*

Prof. (Dr) Yogesh Pratap Singh

*Vice-Chancellor, National Law University Tripura*

REVIEW EDITORS

Dr Dipikanta Chakraborty

*Assistant Professor of Political Science, NLU Tripura*

Dr Debasree Debnath

*Assistant Professor of Law, NLU Tripura*

## FROM THE DESK OF EDITOR-IN-CHIEF

*National Law University Tripura Journal of Law and Policy (NLUT–JLP) Vol. 1, Issue 1 – [July, 2025]*

It is with immense pride and scholarly anticipation that we present the inaugural issue of the National Law University Tripura Journal of Law and Policy (NLUT–JLP). Conceived as a platform to foster critical legal scholarship and informed discourse on issues of law, policy, and governance, this journal reflects the ethos of National Law University, Tripura — rooted in academic rigor, democratic engagement, and a commitment to social justice.

This first issue brings together an exceptional collection of articles and case comments, written by esteemed jurists, scholars, and emerging voices in the field of law and public policy. Each contribution explores timely and significant legal questions through diverse lenses — doctrinal, empirical, philosophical, and interdisciplinary.

We are honored to feature Justice Deepak Gupta’s authoritative article on “*Rule of Law and the Role of the High Court*,” which sets the tone for this issue by reaffirming the constitutional mandate of judicial review and institutional independence. In a compelling and poignant reflection, Justice S.G. Chattopadhyay questions whether “*the victim remains a forgotten party*” in our criminal justice system, a concern that resonates deeply in the current climate of justice reform.

Dr Krishan Mahajan addresses a crucial tension in “*Environmental Laws: Ruling Politicians v Citizens*,” revealing how environmental jurisprudence often clashes with political and economic agendas. In a deeply contextual and experiential analysis, Dr Afroz Alam offers insights into “*Political Dynamics in Telangana*” through the lens of the 2023 Assembly Election, adding a unique dimension to our understanding of electoral politics.

Dr Ayaz Ahmad’s critique of the EWS judgment in “*Judicial Liquidation of Social Justice*” calls for a deeper examination of the judiciary’s role in shaping the future of affirmative action. Meanwhile, Dr Ashit Kumar Srivastava, Ms Priyanshi Jain, and Ms Pragya Richa Tiwary delve into emerging frontiers of law in their provocative piece on “*Structuring Neural Rights*,” bridging neuroscience, human rights, and technology law.

Dr Akshya Verma’s timely article, “*The New Law of Evidence in India*,” evaluates the recent legislative overhaul, raising critical questions about simplification, modernization, and the challenges of legal transition. In the area of international trade law and policy, Utkarsh K. Mishra and Dr Surendar Singh co-author a detailed exposition on “*India’s Policy Conundrum in E-Commerce*,” mapping global shifts and domestic dilemmas.

Lastly, Prasad R. Singh and Nitika Jain present a balanced inquiry into the intersection of justice and technology in “*Balancing the Scale: Justice Assisted, Not Automated*,” cautioning against over-reliance on artificial intelligence in judicial processes.

This issue also features two insightful case comments that engage with contemporary constitutional debates. Satish Padhi has analysed recent Supreme Court’s decision in *Vijaya Bank v Prashant B.* which established the enforceability of employment bonds with liquidated damages clauses in India, particularly in public sector undertakings. Nehru and Harsh Singh has delved into “*The State of Tamil Nadu v The Governor of Tamil Nadu & Others*,” highlighting the evolving dynamics of federalism, constitutional conventions, and executive-legislative relations.

We are grateful to all contributors, reviewers, and the editorial team whose commitment and intellectual labor have brought this inaugural issue to life. It is our hope that NLUT–JLP will serve not only as a forum for critical scholarship but also as a catalyst for progressive legal thinking and policy reform.

We invite readers, scholars, practitioners, and students to engage with the ideas presented herein, to question, to critique, and to build upon them.

—Prof. (Dr.) Yogesh Pratap Singh  
Editor-in-Chief, NLUT–JLP

# CONTENTS

## ARTICLES

Rule of Law and the Role of the High Court — <i>Justice Deepak Gupta</i> . . . . .	1
Is the Victim A Forgotten Party in our Criminal Justice System — <i>Justice S G Chattopadhyay</i> . . . . .	9
Environmental Laws: Ruling Politicians v Citizens — <i>Krishan Mahajan</i> . . . . .	39
Political Dynamics in Telangana: A First-Person Analysis of the Assesmbly Election of 2023 — <i>Afroz Alam</i> . . . . .	55
Judicial Liquidation of Social Justice Through EWS Judgement — <i>Ayaz Ahmad</i> . . . . .	70
Structuring Neural Rights — <i>Ashit Kumar Srivastava, Priyanshi Jain &amp; Pragya Richa Tiwary</i> . . . . .	96
The New Law of Evidence in India: Simplification, Sensitization and Modernization, or Simply Reorganization? — <i>Akshya Verma</i> . . . . .	131
Emerging Global Trade Paradigm on E-Commerce and India's Policy Conundrum: What all is at Stake? — <i>Utkarsh K Mishra &amp; Surendar Singh</i> . . . . .	150
Balancing the Scale: Justice Assisted, Not Automated — <i>Prasidh R Singh &amp; Nitika Jain</i> . . . . .	176

CASE COMMENT

Enforceability of Minimum Lock in Period Clauses in  
Employment Contracts: Analysis of Recent Supreme Court  
Judgment in Vijaya Bank  
—*Satish Padhi* .....194

State of T.N. v Governor of T.N.  
—*Nehru & Harsh Singh* .....200

# RULE OF LAW AND THE ROLE OF THE HIGH COURT

—Justice Deepak Gupta\*

I have chosen the subject- “Rule of Law and the Role of the High Court.” I have divided my address into two parts. The first part deals with the Rule of Law and the second part will discuss on role of the High Courts.

What is Rule of Law? Aristotle, the great Greek philosopher wrote “law should govern”. What does it mean? It basically means that the citizens of a nation should be governed by law and not in accordance with the ideas and concepts of an individual or a group. Though Dicey is credited for propounding and popularizing the concept of ‘Rule of Law’ one can see the applicability of this principle in many ancient civilizations including India. Even though there may not have been democracy in ancient times, many kings governed in accordance with the principles of ‘Nyaya’ and ‘Dharma’ which also embodied the Rule of Law. However, there was no compulsion on anybody to follow any settled principles. One King may have applied the Rule of Law and may be totally just but his successor may be just the opposite. Therefore, in modern democracies especially those which have a written Constitution, the Rule of law is generally accepted to be one of the foundations of a civilized society and is incorporated in its various dimensions in the constitution.

The concept of the Rule of Law was for the first time codified in the Magna Carta which was signed on June 15, 1215.<sup>1</sup> King John ruled England at that time and there were many barons or noble men under him. King John and his predecessors had ruled using the principle, “*vis-et-voluntas*” which means force and will. This essentially meant that whosoever was so powerful could do as he liked. Many barons and other contemporary

---

\* Former Judge, Supreme Court of India delivered first Apanshu Mohan Lodh Memorial Lecture at National Law University Tripura on February 2025.

1. Magna Carta, charter of English liberties granted by King John on 15 June 1215, under threat of civil war and reissued, with alterations, in 1216, 1217, and 1225. By declaring the sovereign to be subject to the rule of law and documenting the liberties held by “free men”, the Magna Carta provided the foundation for individual rights in Anglo-American jurisprudence. See Magna Carta <<https://www.britannica.com/topic/Magna-Carta>>.

thinkers at that time believed that the Monarch should rule in accordance with custom and the law. He should not act alone but should act with the assistance of a council. This led to a lot of internecine wars between the King and the Barons. The king borrowed money from the King of France and levied huge taxes to pay back the loan. The barons who were like local chieftains were up in arms against him. The Church was also involved in the conflict. When finally facing defeat, King John brokered peace and signed the Magna Carta.

The Magna Carta is an important document but for the purpose of this lecture, I am only quoting Articles 39 and 40 of the Magna Carta which read as follows:

“No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any other way nor will we proceed with force against him or send others to do so, except by the lawful judgments of his equals or by the law of the land”.<sup>2</sup>

“To no one will we sell, to no one deny or delay rights or Justice”.<sup>3</sup>

This was the first written exposition of the Rule of Law of the undue Process of Law. Even after the Magna Carta was signed, the Monarchs were reluctant to give up their powers and there was a constant conflict between the Ruler, the Court and the Church. In 1607, King James was king of England and Edward Coke was the Chief Justice. The King believed and acted as if he had divine powers and his word was law.

Edward Coke believed that the King was also subject to law and in 1607 he said.

“the law is the golden wand and measure to try the causes of the subjects; and which protected his majesty in safety and peace”.

The King took great offence to the observation of Justice Coke and in response, Coke said “The king himself ought not to be subject to, but subject to God & the Law because the law makes him king”.

---

2. art 39.

3. art 40.

This was probably the first judicial intervention to uphold the rule of law. I may add that thereafter, Coke was removed by the King but he kept fighting his battle for the rule of Law which many of us do not do today.

The Rule of Law implies that every citizen is subject to the law. It stands in stark contrast to the idea that the ruler is above the law. Though the phrase 'Rule of Law' is commonly used, the concept is elusive and each person can have his own interpretation of what is the rule of law.

The essential characteristic of the rule of law are:

- (a) The supremacy of law, which means that all persons (individuals and government) are subject to law.
- (b) A concept of justice which emphasizes interpersonal adjudication, law based on standards and the importance of procedures.
- (c) Restrictions on the exercise of discretionary power.
- (d) The doctrine of judicial precedent.
- (e) Legislation should be prospective and not retrospective.
- (f) The exercise by Parliament of the legislative power and restrictions on exercise of legislative power by the executive.
- (g) An underlying moral basis for all law.
- (h) An above all, an independent and fearless Judiciary.

In my view, the concept of the Rule of Law implies that the laws must be framed in a manner that they do not impinge upon the human rights of individuals. All human beings should be treated equally. Once the law has been framed it must apply with equal vigour to each and every person. The essence of the rule of law is that every authority is subject to and governed by law. The opposing idea is a state of affairs in which the will of an individual or a group such as a political party is the governing force in society. Therefore, the very essence of the rule of law is that there is fairness under the rule of law. On the contrary there is arbitrariness when there is no rule of law.

Another important aspect of the Rule of Law is that there must be a provision for Judicial Review of administrative actions and also of legislative functions to ensure that they are not ultra vires the Constitution.

The ruler or the executive is also subject to all the laws including criminal laws. There must be separation between the executive and judicial functions. Judicial decisions must be made according to legal standards and not based on vague considerations of individual Judges. The right of every citizen to a fair trial is also an inherent part of the rule of law. All laws should be published so that each and every member of the public is aware of the contents of the law.

Another important concept of the rule of law is access to Courts and availability of judicial remedies to the citizens. Above all, each and every citizen is treated equally in a society which follows the rule of law.

I have a very simple approach to this concept of Rule of Law. In my view being members of society, we all have to follow certain norms which society lays down and these norms are also laws. When these norms are obeyed, we follow the rule of law and when we violate the laws the rule of law is violated.

As a principle of governance, the Rule of Law, like Democracy and Separation of Powers is an integral part our body politic. Anywhere, anytime, when ordinary people are given the chance to choose, the choice is the same: freedom, not tyranny, democracy, not dictatorship, the Rule of Law and not the whims and fancies of a few. The bedrock of our democracy is the Rule of Law. If there is no Rule of Law there is anarchy, corruption, subjugation and indignation. A truly free and democratic country is one where there is freedom of expression and belief. That can only be there if we are governed by the Rule of Law.

The second part of my discourse deals with the role of the High Courts in upholding the rule of law. The Preamble to our Constitution reads as thus:

“WE, THE PEOPLE OF INDIA, having solemnly resolved to constitute India into a SOVEREIGN SOCIALIST SECULAR DEMOCRATIC REPUBLIC and to secure to all its citizens:

JUSTICE, social, economic and political;

LIBERTY of thought, expression, belief, faith and worship;

EQUALITY of status and of opportunity;

and to promote among them all

FRATERNITY assuring the dignity of the individual and the unity and integrity of the Nation;

IN OUR CONSTITUENT ASSEMBLY this twenty-sixth day of November 1949, do HEREBY ADOPT, ENACT AND GIVE TO OURSELVES THIS CONSTITUTION.”

We have promised Justice, Liberty, Equality and Fraternity to our citizens. As far as I know, we are the only country in the world where the right to approach the highest court of the land for redressal on account of violation of fundamental rights is itself a fundamental right. The High Courts have also been vested with very wide powers under Article 226 of the Constitution of India. The founding parents of the Constitution wanted to ensure that the superior courts act as guardians of the rights of the people. The High Courts are there not only to decide the disputes between the parties but also to protect the rights of the people, especially when their rights are invaded by the state itself.

Rule of Law can only be there when we have Judges who can take decisions independent of political influence, media pressure or any other extraneous considerations. A free and fearless judiciary.

What do the people expect from the judiciary? Each of us has taken an oath of allegiance to the Constitution of India, which enshrines the spirit of democracy. The rule of law is the basis of a democratic system and our entire Constitution breathes the spirit of the rule of law. The Rule of Law runs like a golden thread binding our Constitution together. It is the duty of all democratic institutions to ensure that the rule of law is enforced. A greater burden lies on the High Court which is the highest Court of the State to uphold the Rule of Law and this is the most important duty which is cast upon the High Court.

The High Court not only decides disputes between citizens and citizens, the High Court also has to decide disputes between citizens and the State. It is the duty of the High Court to ensure that the rights of the citizens guaranteed, to them under our Constitution are actually enforced. It is the duty of the Judges to hold the scales of Justice even and administer the law without fear or favour, affection or ill will to the best of their knowledge, ability and judgment.

A democratic way of life is incomplete without a High Court. Rights will have no meaning if there are no remedies. The only remedy available

to the citizen in case of infringement of his rights is to approach the High Court. No halfway house can take the place of the High Court.

Our founding parents realizing the importance of the High Courts, conferred very wide powers on them under Articles 226 and 227 of the Constitution of India. Wide as they are, they must be exercised judiciously. The Judges while discharging their functions should act fearlessly, without any fear of criticism. At the same time, the Judges should also not seek popularity in the discharge of their duties.

It is the judiciary which sends blood and oxygen in the form of “Rule of Law” to every extremity of the body politic, constantly balancing individual rights with social interest and establishing at every point the relation between law and life. If Indian judiciary survives, Indian democracy survives. If the judiciary fails, it will be difficult for other democratic institutions to survive.

The teeming masses of this country repose great confidence in the judicial system. This is a great honour to the judiciary of this country. However, we cannot shut our eyes to some aberrations in the judicial system. There has to be zero tolerance towards corruption, and those who blacken the fair name of the judiciary must be dealt with mercilessly.

Having set out the theoretical part, let me now deal with the practical issues. When I came to Tripura as the first Chief Justice, there were nearly 7,600 cases pending. When I left after three years, the pendency was about 2,300. But for me, disposal of the cases is not the most important factor. It is the quality of the judgements and the reasoning given therein which is much more important.

No judge can deliver a good judgement unless the judge is ably assisted by the members of the bar. I received excellent assistance from the members of the Tripura High Court Bar. I delivered what I consider to be some of my best judgements in various fields while at Tripura. Because there was less work and more time, it was a pleasure to hear arguments at length and then decide cases. The tendency to just dispose of cases by single line orders without reasons is in my view, not in line with the Constitution. True it is, that disposal of cases is important but there can be no manner of doubt that this disposal cannot be at the cost of Justice. Litigants are human beings who come to court because they face problems. We should not treat them like mere numbers.

Judges must be humane. They must weigh the scales in such manner that the underprivileged sections of the society are not deprived of Justice. Barely 1% of the cases reach the High Court. An ordinary litigant from Tripura just cannot afford to go to the Supreme Court.

Keeping these above factors in mind, When I took over as Chief Justice of the High Court of Tripura, I felt that a greater responsibility lay upon me and my brother judges to hear the matters patiently and decide the matters with reasoned orders. The number of cases were not high. In fact, it was about 7600 when I joined and it is just about a 1000 now. Therefore, there is sufficient time at hand for the judges to decide the matters effectively. Single line, unreasoned orders have no place in our Jurisprudence. The tendency of sending litigants back to the government by treating their petitions as representations also needs to be avoided. In my more than 46 years in the legal profession, I am yet to see a case where a litigant who was sent back to the state ever gets a relief from it. The litigant has to come back to the court again after spending more money. In my view, if a petitioner is not entitled to relief, his petition should be dismissed. If he is entitled to relief, then full relief shall be given to the litigant as legally due to him regardless of the amounts or consequences involved. There is no point in sending the litigant back to those who have not been fair and just to them.

For more than 99% of the litigants in this beautiful state, the High Court of Tripura is the last available court. I am told that the number of cases in Tripura is only about 1000. This means that my brother judges have much more time to devote to hear and decide the cases. In my view, it is an important role of the High Court to inform the citizens of their legal rights. My experience is that though literacy in Tripura is high, people are not aware of their rights. This leads to lack of litigation. I have been strongly of the view that High Courts should not worry about pendency of cases especially in a state like Tripura where the number of cases is very low. When there are more cases, it reflects the faith, the public has in the High Court.

Lack of litigation only shows that there is lack of faith.

In states like Tripura, where litigation is less and the people are not fully aware of their rights, Public Interest Litigation has a very important role to play. I am not talking of Private interest litigation or Publicity Interest litigation but the Courts must be pro-active to ensure that the people of Tripura get what is due to them. As the Chief Justice, I had encouraged and entertained a large number of genuine PILs. To give a few examples, I had

issued directions that there will be no private tuitions even by teachers of private schools as it is prohibited under the Right to Education Act.

In another case the High Court took notice of a news item and found that a patient was not treated properly in the hospital. We finally found that this is a case of negligence and awarded an amount of INR 5,00,0000/- to the mother.

Another matter related to witnesses being treated with respect and being paid their diet money on the date of their appearance.

The court also took notice of the dismal condition of public toilets, lack of public transport, the condition of the Courts, prisons, roads etc. and pendency of cases and other issues of public interest which improved the life of people.

There was no private interest or publicity interest involved. The High Court did nothing extra ordinary. What was given to the people by way of these judgements was what was their right and what was due to them under the Constitution.

For my wife Punam and me, our 3 years in Tripura were some of the best years of our lives. We did not have to rush back to Shimla on every holiday, because we enjoyed Tripura, its people, its culture and its food to the fullest. For me, it was never a punishment post. In return, we both got complete love, affection and devotion not only from people with whom we were directly in touch but also whose lives I had touched through my Judicial interventions.

Recently, a few months back, I had gone for a walk in Nehru Park in Delhi About 4 young well-built men approached me prudently. I was also equally wary. Then one of them said “Aap Deepak Gupta hain?” I replied yes. Then they said that they were policeman from Tripura who had come to Delhi for some work and were staying in Tripura House. More than 8 years after I left Tripura, they said “Aapko Tripura ke log aaj bhi bahaut yaad karte hain”. For me, this is the greatest reward, that I could ever get as Chief Justice of this state.

# IS THE VICTIM A FORGOTTEN PARTY IN OUR CRIMINAL JUSTICE SYSTEM

— Justice S G Chattopadhyay\*

## ABSTRACT

*The criminal justice system is traditionally structured around the binary of the State and the accused, often relegating the victim to a peripheral role. This paper critically examines the extent to which victims are marginalized in the Indian criminal justice framework, despite being the primary stakeholders in the crime. It explores how procedural laws, institutional practices, and legal interpretations systematically deprioritize victims' rights, participation, and welfare. Drawing from statutory analysis, judicial decisions, and comparative frameworks, the study highlights the limited avenues available for victim representation, compensation, and restorative justice. While recent legal reforms — such as victim compensation schemes and witness protection laws — indicate a shift towards victim inclusion, they remain fragmented and inadequately implemented. The paper argues for a more victim-centric approach that balances the rights of the accused with the need for recognition, participation, and restitution for victims. It advocates institutional reforms, victim impact statements, and restorative justice mechanisms as essential components of a holistic justice process. In doing so, it raises a fundamental question: can justice be truly served if the victim remains a forgotten party in the system designed to redress their harm? The paper concludes by emphasizing the need to reframe criminal justice to center the victim as a critical participant.*

**Keywords:** Compensation, Criminal Justice, Prosecution, Victim, Witness etc.

---

\* Former Judge, High Court of Tripura.

## 1. INTRODUCTION

There is a common feeling that the victim, who lies at the core of our criminal justice system, is treated almost as an alien in the system particularly in terms of his/her participation in investigation and trial. His/her role is felt limited to reporting the offence to police and giving statement to police and court. It is felt that during the proceeding; the entire focus is on the offender and the victim remains a forgotten party except where the victim is rich or otherwise influential or the incident somehow arrests public attention. Such feelings of deprivation have sometimes led to private vengeance. Therefore, it is necessary to examine the status of victim in our criminal justice system in the present legal context.

In the historical evolution of the criminal justice system at the international and domestic level, basically two types of rights of the victim have been recognized.

*Firstly*, his/her right to participate in the criminal justice process which includes, inter alia,

- right to know the status of investigation and seek intervention of court when investigation is delayed or it is not properly directed.
- right to hearing in respect of grant or cancellation of bail.
- right to be heard when the State prosecution wants to withdraw.
- right to take part in the trial through lawyer of his or her choice.
- right to produce evidence, oral or/and documentary, with the leave of the court.
- right to ask questions to witnesses or suggest to court to put such questions to witness.
- right to advance arguments.
- right to take part in negotiation for settlement of compoundable offence.
- right to prefer appeal against acquittal without leave of court, against conviction for a lesser offence or inadequate sentence.

*Secondly*, victim's right to seek and receive compensation for the loss and injuries suffered by him/her from the crime which includes, inter alia,

- interim and immediate monetary compensation for psychiatric and medical treatment, rehabilitation etc.

- adequate compensation in terms of money, employment etc. for the loss suffered as a result of the crime.
- appropriate legal aid and assistance for realization of such compensation.

Though the thrust of this paper is an analysis of victim's right to compensation in India, we shall, at the outset, also focus on his/her right of participation in the criminal justice process because such right is an integral part of victimology.

## **2. EVOLUTION OF THE CONCEPT OF VICTIM'S PARTICIPATION IN CRIMINAL JUSTICE PROCESS**

### **2.1 Who is a victim in Indian legal context?**

**2.1.1** Under Section 2(y) of Bharatiya Nagarik Suraksha Sanhita, 2023, in short BNSS corresponding to Section 2(wa) of the Code of Criminal Procedure, 1973, in short CrPC, the victim is defined to mean "a person who has suffered any loss or injury caused by reason of the act or omission of the accused person and includes the guardian or legal heir of such victim." It is noticeable that some changes are brought to the definition of victim in BNSS. The words, 'for which the accused person has been charged' appearing in the definition under CrPC has been omitted from the definition under BNSS which has slightly expanded the scope of the definition. In my view, the definition of 'victim' needs to be further reviewed keeping in mind that under Section 396(4), BNSS corresponding to Section 357-A(4) CrPC, a person shall be treated as a victim for the purpose of compensation, even if, the offender is not traced or identified and no trial takes place. It means that if any person suffers any loss or injury from the violation of any criminal law he or she will be entitled to compensation, even if, none is named as accused while reporting the crime. Therefore, 'accused' may not have any relevance in the definition of victim. The word, 'accused' is not used anywhere in the definition of 'victim' in the UN declaration of the basic principles of justice for victims of crime and abuse of power, 1985. In the said declaration 'victim' is defined more broadly and elaborately in a purposeful manner to provide relief to all victims of crime. It may be considered whether the definition of 'victim' in our domestic law can be further reviewed in the line of the 'definition' provided under the UN declaration of 1985 aforesaid.

**2.1.2** The rights of the victims particularly the right to participate in criminal proceeding gained momentum globally following the United

Nation's Declaration of the Basic Principles of Justice for Victims of Crime and Abuse of Power in 1985. As noted, the declaration adopted by the UN General Assembly on 29.11.1985 defined the victim in much wider terms which is as follows:

“1. Victim means persons who, individually or collectively, have suffered harm, including physical or mental injury emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within member States, including those laws prescribing abuse of power.”

2. \* \* \* \*

3. \* \* \* \*”

The definition has, thus, fully captured the value of human life and human dignity. It has proclaimed in the declaration that the responsiveness of judicial and administrative processes to the needs of the victims should be facilitated by-

*Informing the victims of their role and the scope, timing and progress of the proceedings and of the disposition of their cases, especially where serious crimes are involved and where they have requested such information.*

*Allowing the views and concerns of victims to be presented and considered at appropriate stages of the proceedings where their personal interests are affected, without prejudice to the accused and consistent with the relevant national criminal justice system.*

*Providing proper assistance to victims throughout the legal process.*

*Taking measures to minimize inconvenience to victims, protect their privacy, when necessary and ensure their safety, as well as that of their families and witnesses on their behalf from intimidation and retaliation.*

*Avoiding unnecessary delay in the disposition of cases and the execution of orders or decrees granting awards to the victim.*

**2.1.3** At the domestic front, a committee called ‘The Committee on Reforms of the Criminal Justice System’ chaired by Dr. Justice V.S. Malimath was constituted by the Government of India by an order dated 24.11.2000. One of the terms of reference of the committee was;

*to suggest ways and means of developing such synergy among the judiciary, the prosecution and the police as restores the confidence of the common man in the criminal justice system by protecting the innocent and the victim and by punishing unsparingly the guilty and the criminal.*

The Committee held series of seminars across the country, met common man from different walks of life, obtained views of the State Governments, High Courts, Bar councils, the member of Bar, eminent jurists, police, prosecution, forensic scientists, law academic, media. It also consulted various law commission reports, held interaction with scholars and experts from across the globe and made a comparative study of 20 selected countries from different continents and also studied the criminal justice system of UK, USA, Australia, France and other European countries and made its report on 28.03.2003.

**2.1.4** While canvassing the status of the rights of victims with regard to participation in the criminal justice process in Europe the committee stated as follows:

*“It is interesting to find that the European system assigned a very active role to the victim or his representatives in criminal proceedings. For example, in France, all those who suffer damage on account of the commission of an offence are entitled to become parties to the proceedings from the investigation stage itself. He can assist investigation on proper lines and move the court for appropriate directions when the investigation gets delayed or distorted for whatever reasons. He may suggest questions to the court to put to the witnesses produced in court. He may conduct the proceedings if the public prosecutor does not show due diligence. He can supplement the evidence adduced by the prosecution and put forth his own arguments.....”*

**2.1.5** The committee viewed that if the criminal proceedings have to be fair to both the parties and if the courts were to be properly assisted in its search for truth, the law has to recognize the right of victim’s participation in investigation, prosecution and trial. If the victim is dead or otherwise not available, this right should vest in the next kin of the victim.

**2.1.6** In paragraph 6 of its recommendations the committee recommended as follows:

The victim’s right to participate in criminal trial shall, inter alia, include:

- *To produce evidence, oral or documentary, with leave of the court and/or seek directions for production of such evidence.*
- *To ask questions to the witnesses or to suggest to the court questions which may be put to witnesses.*
- *To know the status of investigation and to move the court to issue directions for further investigation on certain matters or direction to supervisory officer to ensure effective and proper investigation to assist in the search for truth.*
- *To be heard in respect of the grant or cancellation of bail.*
- *To be heard whenever prosecution seeks to withdraw and to offer to continue the prosecution.*
- *To advance arguments after the prosecutor has submitted arguments.*
- *To participate in negotiations leading to settlement of compoundable offences.*

We may, now, look into the statutory arrangements made in our domestic law, namely, Bharatiya Nagarik Suraksha Sanhita, 2003 and refer to the relevant judicial pronouncements with regard to participation of victims in investigation, trial and appeal in India:

## **2.2 Victim's participatory right at the stage of investigation**

### **2.2.1 Right to know the progress of investigation**

Victim's right to know the status of investigation has been recognized under Section 193, BNSS corresponding to Section 173, CrPC. In the old Code, i.e., in Section 173 CrPC, under sub section (2)(ii), the investigating officer was required only to communicate to the first informant, the action taken on the information. No time limit was prescribed and moreover the word, 'victim' was not there in Section 173(2)(ii). But under clause h(ii) of sub section (3) of Section 193, BNSS a period of 90 days has been specified within which the IO has to inform the first informant or the victim the progress of investigation. The phraseology of sub section 3(h)(ii) particularly the manner in which the words 'informant or victim' have been arranged in the provision may create some confusion. Because they have different connotations in criminal jurisprudence. Moreover, informant may not necessarily be the victim in every case. But it is crystal clear that the legislature has intended to put the word 'victim' in sub section (3)(h)

(ii) of Section 193, BNSS to protect the right of the victim to the access to information about his case by informing him about the progress of investigation. It is, therefore, mandatory for the IO to inform the victim about the progress of the case within 90 days from the date of lodging FIR apart from informing the informant in the manner prescribed under sub-section 3(h)(iii) of Section 193 BNSS.

This is, no doubt, a positive step towards protecting the participatory rights of victim during investigation. In order to add meaning to this right, the investigating officers must act vigilantly, the courts should monitor the enforcement of this right of the victims and general awareness should be created about such right. For successfully implementing the provision, the Home Department in every State should call for consolidated report from the Head of Police on quarterly basis to know in how many cases registered during the preceding quarter, the victim was actually informed about the progress of the case along with the feedback of the victim and action taken thereon.

### ***2.2.2 Victim's right to take part in bail hearing***

In so far as victim's right of participation in hearing of bail applications is concerned, the statute does not specially provide any such right to the victim. Only under Section 483 BNSS corresponding to Section 439 Cr.P.C. which deals with special powers of Sessions court and High Court with regard to bail, presence of the informant or any person authorized by him is mandatory during hearing of the bail application relating to the offence of rape of minor girl punishable under Section 65 of Bharatiya Naya Sanhita or gang rape punishable under Section 70 of Bharatiya Naya Sanhita. But that does not imply that victim has a right to participate in the hearing. As already discussed, the law makes it mandatory for the informant to be present. Moreover, the purpose of the presence of the informant is not also laid down in specific terms. This apart, neither under Section 480 BNSS which deals with the powers of Magistrate regarding bail nor under Section 482 BNSS dealing with anticipatory bail, the victim has been given any right to participate in the hearing.

In *Jagjeet Singh v Ashish Mishra*<sup>1</sup> one of the questions which fell for consideration before the Hon'ble Supreme Court was whether a 'victim' as defined under Section 2(wa) of the Criminal Procedure Code, 1973 was entitled to be heard at the stage of adjudication of bail application of an

---

1. (2022) 9 SCC 321.

accused? The three Judges' bench of the Hon'ble Supreme Court held as under:

First, the Indian jurisprudence is constantly evolving, whereby, the right of victims to be heard, especially in cases involving heinous crimes, is increasingly being acknowledged.

Second, where the victims themselves have come forward to participate in a criminal proceeding, they must be accorded with an opportunity of a fair and effective hearing. If the right to file an appeal against acquittal, is not accompanied with the right to be heard at the time of deciding a bail application, the same may result in grave miscarriage of justice. Victims certainly cannot be expected to be sitting on the fence and watching the proceedings from afar, especially when they may have legitimate grievances. It is the solemn duty of a court to deliver justice before the memory of an injustice eclipses.”

Third; The Hon'ble Apex Court cancelled the bail granted to the respondent accused by the High Court and remanded the matter(s) back to the High Court for fresh consideration on several grounds and one of the grounds was 'denial of victim's right to participate in the proceedings. Even though, the statute does not make any provision, in view of this judgment of the Apex Court. It is, therefore, settled that whenever a victim wants to exercise his right to oppose a bail application, such right cannot be denied to him/her

### ***2.2.3 Victim's right to be heard for withdrawal from prosecution***

The BNSS, 2023 has statutorily recognized the right of the victim to be heard mandatorily by court when the State prosecutor moves a petition for withdrawal from prosecution. In this regard, a proviso has been added to Section 360 BNSS corresponding to Section 321 CrPC which provides that no court shall allow such withdrawal without giving an opportunity of being heard to the victim in a case. The Public Prosecutor, in charge of a case, is allowed to withdraw any case at the investigation or trial stage before the judgment is pronounced in the manner provided under Section 360, BNSS. The victim had no statutory right of hearing in this matter before BNSS came into force. Now it is mandatory for the court to hear the victim before allowing such withdrawal. This is a welcome step in the evolving jurisprudence of victimology. The prosecution and courts must ensure the enforcement of this right of the victims which in the long run will prevent withdrawal of cases on extraneous considerations.

#### ***2.2.4 Victim's right to take part in negotiation for settlement of compoundable offences***

- (i) The persons competent to compound a compoundable offence as per the table under Section 359 BNSS corresponding to Section 320 CrPC, are all victims of those compoundable offences. They only can compound such offences in the manner provided under Section 359 BNSS. Only when such victim is a child or of unsound mind, any person competent to contract on his/her behalf may, with the permission of the court, compound such offence.
- (ii) Even in the plea bargaining of cases which may include a non compoundable offence also, participation of the victim is a must for a mutually satisfactory disposition under Section 291 BNSS corresponding to Section 265-C CrPC where the victim can bargain and negotiate with the accused for adequate compensation.

Even though the purposes and procedures of compounding and plea bargaining are different, there is no wrong if the victim in compoundable offence negotiate with the accused for compensation for the wrongs done by him to the victim to agree to the compounding of the offence particularly when bargaining between victim and accused has been recognized under the law of plea bargaining.

#### ***2.2.5 Victim's participation at the stage of trial***

- (i) Ours is a system of state administered justice and in terms of the statutory provisions victims have a very limited and restricted role to play during the trial of a case. Under Section 248 BNSS corresponding to Section 225 CrPC, every trial before a Sessions court shall be conducted by the Public Prosecutor. Through the proviso to Section 18(8) BNSS, corresponding to Section 24(8) CrPC empowers the court to permit the victim to engage an advocate of his/her choice to assist the prosecution, Section 338(2) BNSS, corresponding to Section 301(2) CrPC restricts the role of victim's counsel by providing that such counsel will act only under the directions of the State prosecutor and such counsel can submit written arguments subject to Court's permission only after the closure of prosecution evidence. However, in respect of trial before a Magistrate, Section 339 BNSS corresponding to Section 302 CrPC provides that the Magistrate trying the case, may permit any person to conduct the prosecution personally or by engaging an advocate. The only rider is

that permission cannot be given to a police officer below the rank of inspector and/or, if such police officer takes part in the investigation of the case, he cannot also be given such permission.

- (ii) Thus, it would appear from the statutory provisions aforesaid that participatory right of victim in Session's trial is very limited under the statute. The issue came up before the Supreme Court as well as before various High Courts on multiple occasions. In *Shiv Kumar v Hukam Chand*<sup>2</sup> a three Judges' bench of the Supreme Court declined to interfere with the decision of the High Court where the High Court held that advocate appointed by the victim would act under the directions of the Public Prosecutor and may file written arguments after the closure of prosecution evidence. Though, by the time the matter came up for hearing before the Apex Court, the trial was over in the Sessions court, the victim being the brother of the deceased pleaded for consideration of the issue for future guidance. The Apex Court in para 14 of the judgment held as under:

"14. It is not merely an overall supervision which the Public Prosecutor is expected to perform in such cases when a privately engaged counsel is permitted to act on his behalf. The role which a private counsel in such a situation can play is, perhaps, comparable with that of a junior advocate conducting the case of his senior in a court. The private counsel is to act on behalf of the Public Prosecutor albeit the fact that he is engaged in the case by a private party. If the role of the Public Prosecutor is allowed to shrink to a mere supervisory role the trial would become a combat between the private party and the accused which would render the legislative mandate in Section 225 of the Code a dead letter."

Further in paragraph 16, the Apex Court held as follows:

"16. As we are in complete agreement with the observation of a Division Bench of the Andhra Pradesh High Court in *Medichetty Ramakistiah v State of A.P.*<sup>3</sup> we deem it fit to extract the said observation:

"A prosecution, to use a familiar phrase, ought not to be a persecution. The principle that the Public Prosecutor should be scrupulously fair to the accused and present his case with detachment and without evincing any anxiety to secure a

---

2. (1999) 7 SCC 467.

3. 1959 SCC OnLine AP 303 : AIR 1959 AP 659.

conviction, is based upon high policy and as such courts should be astute to suffer no inroad upon its integrity. Otherwise, there will be no guarantee that the trial will be as fair to the accused as a criminal trial ought to be. The State and the Public Prosecutor acting for it are only supposed to be putting all the facts of the case before the Court to obtain its decision thereon and not to obtain a conviction by any means fair or foul. Therefore, it is right and proper that courts should be zealous to see that the prosecution of an offender is not handed over completely to a professional gentleman instructed by a private party.”

- (iii) In *Sathyavani Ponrani v Samuel Raj*<sup>4</sup> the one and only issue before the High Court of Madras was ‘whether a victim is entitled to be heard and take part in a criminal proceeding or not’.

The High Court had taken up the issue as a matter of considerable public importance, reconciled the relevant provisions of the Code of Criminal Procedure (Now BNSS, 2023) and concluded that though any plea of the victim contrary to the prosecution case would not be permissible during trial, engaging a lawyer in terms of the proviso to Section 24(8) CrPC (now the proviso to Section 18(8) BNSS, 2023) would mean permitting the victim to argue along with the Public Prosecutor and also in a given case even to examine a witness, of course with the permission of the court. The High Court summarized its conclusions as under:

“71. On a consideration of the above said principles and after analysing the provisions *vis-à-vis* the various judgments, the following conclusions are arrived at:

- i. Section 301 CrPC is not a bar for entertaining an Application to intervene in an Application filed under Section 437 or Section 438, CrPC.
- ii. Section 301 and Proviso under Section 24(8) are mutually complimentary and not conflicting with each other and therefore, there is no bar for engaging a lawyer to assist the prosecution.
- iii. The discretion of the Court in invoking Proviso under Section 24(8) is a judicial discretion.
- iv. The judicial discretion of the Court will have to be exercised keeping in mind the objects and reasons for the introduction

---

4. 2010 SCC OnLine Mad 3758.

of Proviso to Section 24(8) which is to provide an adequate opportunity to the victim to take part in the Criminal proceeding.

- v. Engaging a lawyer in accordance with Proviso under Section 24(8) would mean permitting him to argue along with the Public Prosecutor and also in a given case even to examine a witness, of-course with the permission of the Court.
- vi. The Court shall not allow any plea contrary to the case of the prosecution at the instance of the victim while assisting the prosecution.
- vii. The Court can reject a request for engaging a lawyer by the victim if it is of the opinion that it lacks *bona fides*.
- viii. While considering the Application, the Court has to keep in mind, the nature of the offence, the injuries suffered by the victim, the position of the victim as well as the Accused and the circumstances under which the offence has been committed.
- ix. The word 'victim' would also include a legitimate and genuine person representing a victim.
- x. When an application is filed by any other person other than the guardian seeking to represent the victim, the Court has to consider the *bona fides*, legitimacy and genuineness of the representative capacity while deciding such an application.
- xi. In a given case the Trial Court can also call upon a victim to engage a lawyer if in its opinion the same is required for the proper conduct of the case.
- xii. In a given case the Court can on its own appoint a lawyer if it is of the opinion the same is required for the proper conduct of case.
- xiii. When an Application is made seeking permission under the Proviso to Section 24(8), the same cannot be rejected without even numbering the same but should be considered on merits.
- xiv. An order rejecting an application seeking permission to assist the prosecution must be supported by reasons.”

- (iv) Similar question also arose for consideration before the Hon'ble Supreme Court in *Rekha Murarka v State of W.B.*<sup>5</sup> in which the Apex Court held that the role of the victim's counsel cannot extend to making oral arguments and examining witnesses, as it is not in the text of CrPC. The Apex Court was of the view that permitting a free hand to victim's counsel would go against the scheme envisaged under Cr.P.C. The Hon'ble Apex Court was of the view that victim can take part in the hearing without tampering with the balance inherent in the scheme of CrPC (now BNSS) and held as follows:

“11.3. At the same time, the realities of criminal prosecutions, as they are conducted today, cannot be ignored. There is no denying that Public Prosecutors are often overworked. In certain places, there may be a single Public Prosecutor conducting trials in over two-three courts. Thus, the possibility of them missing out on certain aspects of the case cannot be ignored or discounted. A victimcentric approach that allows for greater participation of the victim in the conduct of the trial can go a long way in plugging such gaps. To this extent, we agree with the submission made by the learned Senior Counsel for the Appellant that the introduction of the proviso to Section 24(8) acts as a safety valve, inasmuch as the victim's counsel can make up for any oversights or deficiencies in the prosecution case. Further, to ensure that the right of appeal accorded to a victim under the proviso to Section 372 of the CrPC is not rendered meaningless due to the errors of the Public Prosecutor at the trial stage itself, we find that some significant role should be given to the victim's counsel while assisting the prosecution. However, while doing so, the balance inherent in the scheme of the CrPC should not be tampered with, and the prime role accorded to the Public Prosecutor should not be diluted.

11.4. In this regard, given that the modalities of each case are different, we find that the extent of assistance and the manner of giving it would depend on the facts and circumstances of each case. Though we cannot detail and discuss all possible scenarios that may arise during a criminal prosecution, we find that a victim's counsel should ordinarily not be given the right to make oral arguments or examine and cross-examine witnesses. As stated in Section 301(2), the private party's pleader is subject to the directions of the Public Prosecutor. In our considered opinion, the same principle should apply to the victim's counsel under the

---

5. (2020) 2 SCC 474.

proviso to Section 24(8), as it adequately ensures that the interests of the victim are represented. If the victim's counsel feels that a certain aspect has gone unaddressed in the examination of the witnesses or the arguments advanced by the Public Prosecutor, he may route any questions or points *through* the Public Prosecutor himself. This would not only preserve the paramount position of the Public Prosecutor under the scheme of the CrPC, but also ensure that there is no inconsistency between the case advanced by the Public Prosecutor and the victim's counsel.

11.5. However, even if there is a situation where the Public Prosecutor fails to highlight some issue of importance despite it having been suggested by the victim's counsel, the victim's counsel may still not be given the unbridled mantle of making oral arguments or examining witnesses. This is because in such cases, he still has a recourse by channeling his questions or arguments through the Judge first. For instance, if the victim's counsel finds that the Public Prosecutor has not examined a witness properly and not incorporated his suggestions either, he may bring certain questions to the notice of the court. If the Judge finds merit in them, he may take action accordingly by invoking his powers under Section 311 CrPC or Section 165 of the Indian Evidence Act, 1872. In this regard, we agree with the observations made by the Tripura High Court in *Uma Saha v State of Tripura*,<sup>6</sup> that the victim's counsel has a limited right of assisting the prosecution, which may extend to suggesting questions to the Court or the prosecution, but not putting them by himself.”

- (v) In later decision in *Jagjeet Singh case*<sup>7</sup> a three Judges' bench of the Hon'ble Supreme Court while deciding, as one of the issues, whether a victim is entitled to hearing during adjudication of a bail application discussed the rights of the victims to participate in the criminal justice process. In this case, the Apex Court apart from relying on its earlier decisions also referred to UN Declaration of Basic Principles of Justice For victims of Crime and Abuse of Power, 1985, some of the specific legislations with regard to protection of the rights of the victims of some European countries, 154<sup>th</sup> report of the Law Commission of India on the aspect of compensatory justice and the 2003 Report of the Committee on the Reforms of Criminal Justice System and held as under:

---

6. 2014 SCC OnLine Tri 859.

7. (2022) 9 SCC 321.

“22. It cannot be gainsaid that the right of a victim under the amended CrPC are substantive, enforceable, and are another facet of human rights. The victim’s right, therefore, cannot be termed or construed restrictively like a *brutum fulmen*. We reiterate that these rights are totally independent, incomparable, and are not accessory or auxiliary to those of the State under the CrPC. The presence of “State” in the proceedings, therefore, does not tantamount to according a hearing to a “victim” of the crime.

23. A “victim” within the meaning of CrPC cannot be asked to await the commencement of trial for asserting his/her right to participate in the proceedings. He/She has a legally vested right to be heard at every step post the occurrence of an offence. Such a “victim” has unbridled participatory rights from the stage of investigation till the culmination of the proceedings in an appeal or revision. We may hasten to clarify that “victim” and “complainant/informant” are two distinct connotations in criminal jurisprudence. It is not always necessary that the complainant/informant is also a “victim”, for even a stranger to the act of crime can be an “informant”, and similarly, a “victim” need not be the complainant or informant of a felony.

24. The above stated enunciations are not to be conflated with certain statutory provisions, such as those present in Special Acts like the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989, where there is a legal obligation to hear the victim at the time of granting bail. Instead, what must be taken note of is that:

24.1. First, the Indian jurisprudence is constantly evolving, whereby, the right of victims to be heard, especially in cases involving heinous crimes, is increasingly being acknowledged.

24.2. Second, where the victims themselves have come forward to participate in a criminal proceeding, they must be accorded with an opportunity of a fair and effective hearing. If the right to file an appeal against acquittal, is not accompanied with the right to be heard at the time of deciding a bail application, the same may result in grave miscarriage of justice. Victims certainly cannot be expected to be sitting on the fence and watching the proceedings from afar, especially when they may have legitimate grievances. It is the solemn duty of a court to deliver justice before the memory of an injustice eclipses.”

What follows from the discussion is that the victim is no more an alien or a forgotten party in Indian Criminal Justice System. Recognition of victim's right to know about the progress of investigation within a given timeframe (90 days from the date of lodging FIR) under Section 193(3) (h)(ii) BNSS will provide the victims an opportunity to raise voice or seek interventions of court when the investigation is not done in proper directions, important witnesses are not examined or otherwise distorted by the investigating agency. It will also give the victim chance to assist the investigating agency in the quest for truth. Mandatory hearing of the victim for withdrawal of a criminal case is no doubt a salutary provision which has been introduced to BNSS, 2023. The courts should hear the victim and take his/her submissions into consideration before allowing a petition for withdrawal of cases on extraneous considerations. In terms of the Supreme Court's Judgment in *Jagjeet Singh case* victim has a legally vested right to be heard at every step post the occurrence of an offence". Supreme Court has categorically held in *Jagjeet Singh case* that victims certainly cannot be expected to be sitting on the fence and watching the proceedings from afar, especially when they may have legitimate grievances. (emphasis supplied) Now it is the duty of the police, prosecution, courts and the victims themselves to further advance the participatory rights of the victim.

### 2.3 Victim's Right to Appeal

**2.3.1** The proviso to Section 413, BNSS corresponding to the Proviso to Section 372 provides that the victim shall have a right to prefer an appeal against any order passed by the court acquitting the accused or convicting for a lesser offence or imposing inadequate compensation, and such appeal shall lie to the court to which an appeal ordinarily lies against the order of conviction of such court. It is now a settled position of law that there is no need for a victim to obtain leave to appeal against the order of acquittal. The Apex Court dealt with the issue also in *Naval Kishore Mishra v State of U.P.*<sup>8</sup> and held as follows:

"7. It is, however, submitted by her that the question whether the victim would also have to seek leave as would be a situation envisaged under Section 478 CrPC as in the case of the State has been considered and is no more res integra in view of the recent judgment of this Court in *Mallikarjun Kodagali v State of Karnataka*,<sup>9</sup> where this Court opined that there is no need for a

---

8. (2019) 13 SCC 182.

9. (2019) 2 SCC 752.

victim to apply leave to appeal against the order of acquittal while preferring an appeal under Section 372 proviso to CrPC.

8. In the aforesaid circumstances, it is contended that since the right to appeal would be available, it is different from the appeal filed by the State seeking leave to appeal and, thus, the appeal filed by the victim in the present case ought not to have been dismissed at the threshold only on the ground that no leave has been granted to the State to appeal against the order of acquittal.

10. The aforesaid plea is naturally supported by the learned counsel appearing for the appellant.

11. We are in agreement with the aforesaid plea since the extracted portion of the impugned order shows that the only reason recorded for dismissing the appeal of the victim (in fact styled as leave to appeal) was on the ground that leave had not been granted to the Government to file the appeal. The legal position enunciated in *Mallikarjun Kodagali* would show that the appellant had a right to file the appeal and in fact no leave has to be sought in such a situation. Thus, the appeal has to be dealt as a regular appeal.”

In my view, the victims should also be heard mandatorily before releasing convict on parole.

## **2.4 Victim’s right to compensation**

**2.4.1** In India victim’s right to compensation was recognized under Sections 357(1)(b) and 357(3) Cr.P.C. which have been replaced by Sections 395(1)(b) and 395(3) BNSS, 2023 respectively. But under Section 357(1)(b) Cr.P.C. the compensation was limited to the amount of fine only, if under the penal provision fine formed a part of sentence and that too could not be realized until the appeal was decided. Moreover, if the convict opted to suffer the default sentence due to inability to pay the fine, there was no scope of realization of fine and payment of compensation under this provision. In the cases in which fine does not form a part of sentence, compensation can be granted under Section 357(3) CrPC [now Section 395(3) BNSS] which is independent of any other provision and there is no limit to the amount of compensation payable under this provision. Bu the problem was in its enforcement. Because for non-payment of compensation under Section 357(3) Cr.P.C. [now Section 395(3) BNSS] no default sentence has been prescribed in the statute. The difficulty was removed after Supreme Court

in *Hari Singh v Sukhbir Singh*<sup>10</sup> examined the issue and held that since the imposition of compensation under Section 357(3) was on account of social concern, the court could enforce the same by imposing sentence in default. The decision was reiterated by the Apex Court in *Vijayan v Sadanandan K.*<sup>11</sup> In this context the Hon'ble Supreme Court held as under:

“27. As we have mentioned hereinbefore, when the decision of this Court in *Hari Singh case, (1988) 4 SCC (Cri) 984* was holding the field, the learned Single Judge of the High Court had wrongly relied on the decision of the Kerala High Court in *Rajendran case*.<sup>12</sup> The power to impose a default sentence in case of non-payment of compensation under Section 357(3) CrPC has been duly recognized by this Court and the arguments advanced to the contrary on behalf of the petitioner must, therefore, be rejected.”

Further, in Para 32 of the judgment, the Court held as under:

“32. The observations made by this Court in *Hari Singh case, (1988) 4 SCC (Cri) 984* are as important today as they were when they were made and if, as submitted by Dr. Pillay, recourse can only be had to Section 421 CrPC for enforcing the same, the very object of sub-section (3) of Section 357 would be frustrated and the relief contemplated therein would be rendered somewhat illusory.”

**2.4.2** In *Hari Singh case*, the Apex Court recommended that all Courts should exercise the power available under Section 357 Cr.P.C. (now Section 395 BNSS) liberally so as to meet the ends of justice. But the power under Section 357 CrPC was used sparingly by the courts. The Supreme Court in *Ankush Shivaji Gaikwad v State of Maharashtra*<sup>13</sup> examined the issue and held as under:

“33. The long line of judicial pronouncements of this Court recognised in no uncertain terms a paradigm shift in the approach towards victims of crimes who were held entitled to reparation, restitution or compensation for loss or injury suffered by them. This shift from retribution to restitution began in the mid-1960s and gained momentum in the decades that followed. Interestingly the clock appears to have come full circle by the lawmakers and courts going back in a great measure to what was in ancient times common place. Harvard Law Review (1984) in an article on *Victim*

10. (1988) 4 SCC 551 : (1988) SCC (Cri) 984.

11. (2009) 6 SCC 652.

12. *Rajendran v. Jose* 2001 (3) Kerala Law Times 431.

13. (2013) 6 SCC 770.

*Restitution in Criminal Law Process: A Procedural Analysis* sums up the historical perspective of the concept of restitution in the following words:

“Far from being a novel approach to sentencing, restitution has been employed as a punitive sanction throughout history. In ancient societies, before the conceptual separation of civil and criminal law, it was standard practice to require an offender to reimburse the victim or his family for any loss caused by the offense. The primary purpose of such restitution was not to compensate the victim, but to protect the offender from violent retaliation by the victim or the community. (emphasis supplied) It was a means by which the offender could buy back the peace he had broken. As the State gradually established a monopoly over the institution of punishment, and a division between civil and criminal law emerged, the victim’s right to compensation was incorporated into civil law.”

**2.4.3** In *Ankush Shivaji Gaikwad case*, the Apex Court held that it was mandatory for every criminal court in India to apply its mind about the application of Section 357 CrPC (now Section 395 BNSS) and to record reasons for awarding/refusing compensation, the court held as under:

“66. To sum up: while the award or refusal of compensation in a particular case may be within the court’s discretion, there exists a mandatory duty on the court to apply its mind to the question in every criminal case. Application of mind to the question is best disclosed by recording reasons for awarding/refusing compensation.....”

**2.4.4** In the said judgment, the Hon’ble Supreme Court also cited its earlier decision in *Maru Ram v Union of India*<sup>14</sup> and held as follows:

“29. More than four decades back Krishna Iyer, J. speaking for the Court in *Maru Ram case*, in his inimitable style said that while social responsibility of the criminal to restore the loss or heal the injury is a part of the punitive exercise, the length of the prison term is no reparation to the crippled or bereaved but is futility compounded with cruelty. Victimology must find fulfilment said the Court, not through barbarity but by compulsory recoupment by the wrongdoer of the damage inflicted not by giving more pain to the offender but by lessening the loss of the forlorn.”

---

14. (1981) 1 SCC 107 : 1981 SCC (Cri) 112.

**2.4.5** Apart from this provision, few other provisions of BNSS prescribe compensation for victims. Under Section 399 BNSS corresponding to Section 358 CrPC, compensation can be paid by court to persons groundlessly arrested up to a maximum amount of rupees one thousand. Under Section 273 BNSS corresponding to Section 250 CrPC, the Magistrate is empowered to ask the complainant in private complaint or the informant in a police case to pay compensation to the person against whom accusation has been brought without any reasonable ground. Amount of compensation in such cases shall not exceed the amount of fine, which the Magistrate is empowered to impose. Besides, under Section 5 of the Probation of Offenders Act, 1958, court is empowered to ask the convict to pay compensation to the victim while releasing the convict on probation.

**2.4.6** But the greatest infirmity in the compensation law was that there was no provision to compensate the victims in the cases which ended in acquittal or the cases in which identity of the accused could not be established. Victims had to wait for compensation till the accused was punished and convicted and if there was appeal until the appeal was decided. There was no law to provide immediate relief to the victims regardless of the conviction of the accused until the salutary provision of Section 357-A (now Section 396 of the BNSS) was inserted in CrPC by amendment in 2009 w.e.f. 31.12.2009. There is a historical perspective behind this legislation. In *Ankush Shivaji Gaikwad case* the Supreme Court has succinctly viewed that the paradigm shift from retribution to restitution began in the mid-1960s and gained momentum in the decades that followed.

**2.4.7** Several salutary legislations like criminal injuries compensation scheme, 1964 in England, Victim and Witness Protection Act, 1982 in USA were made which made it compulsory to award monetary compensation to victims in every case of death, injury, loss, or damage as a part of convict's sentence. The UN General Assembly also recognized victim's right to compensation by passing a resolution titled "Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power" on 29.11.1985. As already discussed, the said declaration gave a very extensive definition of victim which is as under:

*1. "Victims" means persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States, including those laws proscribing criminal abuse of power.*

*2. A person may be considered a victim, under this Declaration, regardless of whether the perpetrator is identified, apprehended, prosecuted or convicted and regardless of the familial relationship between the perpetrator and the victim. The term "victim" also includes, where appropriate, the immediate family or dependents of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.*

*3. The provisions contained herein shall be applicable to all, without distinction of any kind, such as race, colour, sex, age, language, religion, nationality, political or other opinion, cultural beliefs or practices, property, birth or family status, ethnic or social origin, and disability.*

**2.4.8** The UN declaration contained provisions for victims on 'Access to Justice and fair treatment', 'restitution', 'compensation' and 'assistance' for 'victims of crime and abuse of power'. With regard to monetary compensation for victims, the declaration contained that when compensation is not fully available from the offender or other sources, States should endeavour to provide financial compensation to victims and for this purpose to establish, strengthen and expand national funds for compensation to victims.

**2.4.9** Thereafter came the 154th report of the Law Commission of India in 1997 which recommended for reviewing the principles of compensation to crime victims in India. The commission viewed that compensation should not be limited only to fines, penalties and forfeitures realized. "The State should accept the principles of providing assistance to victims out of its own funds..." For a better perspective it would be appropriate to again refer to the judgment of the Apex Court in *Ankush Shivaji Gaikwad case*, para 47 of which reads as under:

"47. The 154th Law Commission Report on CrPC devoted an entire chapter to "Victimology" in which the growing emphasis on victims' rights in criminal trials was discussed extensively as under:

"7. Increasingly the attention of criminologists, penologists and reformers of criminal justice system has been directed to victimology, control of victimisation and protection of victims of crimes. Crimes often entail substantive harm to people and not merely symbolic harm to the social order. Consequently, the needs and rights of victims of crime should receive priority attention in

the total response to crime. One recognized method of protection of victims is compensation to victims of crime. The needs of victims and their family are extensive and varied.

9.1. The principles of victimology have foundations in Indian constitutional jurisprudence. The provision on Fundamental Rights (Part III) and Directive Principles of State Policy (Part IV) forms the bulwark for a new social order in which social and economic justice would blossom in the national life of the country (Article 38). Article 41 mandates, inter alia, that the State shall make effective provisions for 'securing the right to public assistance in cases of disablement and in other cases of undeserved want'. So also, Article 51-A makes it a fundamental duty of every Indian citizen, inter alia, 'to have compassion for living creatures' and to 'develop humanism'. If emphatically interpreted and imaginatively expanded these provisions can form the constitutional underpinnings for victimology.

9.2. However, in India, the criminal law provides compensation to the victims and their dependents, only in a limited manner. Section 357 of the Code of Criminal Procedure incorporates this concept to an extent and empowers the criminal courts to grant compensation to the victims.

11. In India the principles of compensation to crime victims need to be reviewed and expanded to cover all cases. The compensation should not be limited only to fines, penalties and forfeitures realized. The State should accept the principle of providing assistance to victims out of its own funds....”

**2.4.10** Thereafter, we have a plethora of judicial pronouncements on the issue which have led to the introduction of Section 357-A in CrPC (now Section 396 of the BNSS) w.e.f. 31.12.2009. Compensation under this provision is payable to all victims of crime irrespective of conviction or acquittal of the accused. Such compensation may be paid only if the victim is identified. Identification of the offender or trial is not necessary. Even after this salutary provision was introduced in CrPC (Now BNSS), Supreme Court in *Suresh v State of Haryana*<sup>15</sup> found that the compensation provided under the victim compensation scheme framed under Section 357-A was arbitrarily low. The Court issued direction for upward revision of the quantum of compensation and held as under:

---

15. (2015) 2 SCC 227.

“15. It has been brought to our notice that even though almost a period of five years has expired since the enactment of Section 357-A CrPC, the award of compensation has not become a rule and interim compensation, which is very important, is not being granted by the courts. It has also been pointed out that the upper limit of compensation fixed by some of the States is arbitrarily low and is not in keeping with the object of the legislation.

16. We are of the view that it is the duty of the courts, on taking cognizance of a criminal offence, to ascertain whether there is tangible material to show commission of crime, whether the victim is identifiable and whether the victim of crime needs immediate financial relief. On being satisfied on an application or on its own motion, the court ought to direct grant of interim compensation, subject to final compensation being determined later. Such duty continues at every stage of a criminal case where compensation ought to be given and has not been given, irrespective of the application by the victim. At the stage of final hearing, it is obligatory on the part of the court to advert to the provision and record a finding whether a case for grant of compensation has been made out and, if so, who is entitled to compensation and how much. Award of such compensation can be interim. Gravity of offence and need of victim are some of the guiding factors to be kept in mind, apart from such other factors as may be found relevant in the facts and circumstances of an individual case.”

**2.4.11** There is no doubt that the limitations of Section 357 Cr.P.C. (now Section 395 BNSS) have been overcome by introducing and operationalising Section 357A Cr.P.C. (now Section 396, BNSS). In terms of this provision, where the offender is not traced or identified, but the victim is identified and where no trial takes place, the victim or his dependants may make an application to the State or District Legal Services Authority for award of compensation. And where the accused is identified and a trial takes place leading to the conviction of the accused, if the trial court at the conclusion of trial, is satisfied that compensation awarded under Section 395 BNSS, corresponding to Section 357 Cr.P.C. is not adequate for rehabilitation of the victim, or where the trial ends in acquittal or discharge of the accused, the trial court may recommend to the State Legal Services Authority or District Legal Services Authority for award of compensation. The concerned Legal Services Authority after due enquiry determines the amount of compensation within two months for payment to the victim.

**2.4.12** Apart from prescribing monetary compensation under Section 357-A, Section 397, BNSS corresponding to Section 357 C provides that all hospitals, public or private, whether run by Central Government or State Government, local Government or any other person are bound to provide free medical treatment to rape victims and all other victims of sexual assault.

**2.4.13** Section 398 BNSS has been newly introduced which is also pertinent in this discussion because it provides that every State Government shall prepare and notify a witness protection scheme for the State for protection of witnesses. Obviously, the victim, if alive, is the prime witness of a case. Section 398 BNSS, thus, advances the right of victims to protection by introducing the witness protection scheme, under Section 398, BNSS.

**2.4.14** In terms of Section 357-A Cr.P.C. (now Section 396 BNSS) every State Government in co-ordination with the Central Government has framed victim compensation scheme, in short VCS. The Central Government has also framed Central Victim Compensation Fund (CVCF) Guidelines to provide one time grant to the State VCS.

**2.4.15** Every State Victim Compensation Scheme contains a commencement Clause, a definition Clause, object of the scheme, eligibility for grant of compensation, procedure for grant of compensation, who will be the implementing authority, how the quantum of compensation will be determined, limitation for submitting claim, who will be the appellate Authority etc. The scheme also contains a schedule laying down the minimum and maximum amount of compensation in respect of various offences.

**2.4.16** But the amount of compensation payable for various crimes varies from State to State depending on the resources of the concerned State. There is no uniform amount either for interim or final compensation. The victims particularly the victims of rape and other sexual offences, victims of Acid attack and the victims suffering from serious bodily injuries as a result of crime cannot wait. They need immediate compensation for treatment and rehabilitation. Pursuant to the direction of the Apex Court in *Nipun Saxena v Union of India*,<sup>16</sup> the National Legal Services Authority (NALSA) set up a committee which prepared a compensation scheme for women victims/survivors of sexual assault/other crimes-2018.

---

16. (2020) 18 SCC 499.

**2.4.17** The said scheme has a schedule of compensation for women victims of rape, gang rape, pregnancy on account of rape, victims of Acid attack and injuries resulting from other crimes etc.

**2.4.18** In Paragraph 12 of the scheme, it is provided that interim relief to the victim shall not be less than 25% of the maximum amount of final compensation payable to the victim. For Acid attack victims, the scheme provides that acid attack victims shall be paid Rs 1 lakh within 15 days of the matter being brought to the notice of SLSA/DLSA. Within next two months, if not earlier, an additional sum of Rs 2 lakhs shall be paid to the victim until final compensation is paid.

**2.4.19** Timely grant of compensation will depend on availability of fund. In different States different mechanisms have been adopted for creation of fund. For example, in Tripura, victim compensation scheme, paragraph (4) of the scheme has made provision as to how the scheme will be created. It provides that 20% of the wages of the convicts shall be deducted and credited to the VCF besides other contributions from individual/organizations and grants from State Government and Central Government. One time grant received from the Central Government under CVCF shall also be credited to State victim compensation fund. In my view, deduction of convict prisoners' wages will not be appropriate because a convict sentenced to RI earn wages by rendering labour to support his family. Only the fine realized from the convicts can be used for creation of fund to compensate the victims.

**2.4.20** NALSA's Compensation Scheme for women victims/survivors of sexual assault/other crimes-2018 in paragraph 3(2) provides that the 'Women Victims Compensation Fund' shall comprise the following:

- (a) Contribution received from CVCF Scheme, 2015.
- (b) Budgetary allocation in the shape of Grants-in-aid to SLSA for which necessary provision shall be made in the Annual Budget by the Government;
- (c) Any cost amount ordered by Civil/Criminal Tribunal to be deposited in this Fund.
- (d) Amount of compensation recovered from the wrong doer/accused under clause 14 of the Scheme;

- (e) Donations/contributions from International/National/Philanthropist/Charitable Institutions/Organizations and individuals permitted by State or Central Government.
- (f) Contributions from companies under CSR (Corporate Social Responsibility).

**2.4.21** The same mechanism can be adopted in all VCS for raising fund. Apart from other sources, individual donations may be a great source for inflating such fund, provided required awareness is created.

**2.4.22** The following table published by the National Legal Services Authority in NALSA NEWSLETTER in its special edition (Issue No. 3) of July, September, 2024 represents the statistical data about the disbursement of compensation to victims under various heads across the country from 1st January 2024 to 1st September 2024:

Sl. No.	SLsAs	Number of Applications for victim Compensation received	Number of Victims who were granted Interim Compensation	Number of Victims who were granted Final Compensation	Total Number of Victims who were granted interim or final compensation	Number of Acid Attack Victims who were granted Interim Compensation	Number of Acid Attack Victims who were granted Final Compensation	Total amount of compensation granted to acid attack victims	Number of Victims of Sexual Abuse who were granted Interim Compensation	Number of Victims of Sexual Abuse who were granted Final Compensation	Total amount of compensation granted to Victims of Sexual Abuse	Number of other victims who were granted Interim Compensation	Number of other victims who were granted Final Compensation	Total amount of compensation granted to other victims	Total Amount of Compensation Disbursed
1	Andhra Pradesh	94	11	64	75	0	0	0	7	53	17755000	0	1	500000	455000
2	Andhra Pradesh	34	0	9	0	0	0	0	0	3	225000	0	6	2850000	3075000
3	Assam	596	76	382	462	5	6	3115000	64	160	52049000	28	225	68384000	142232629
4	Bihar	745	64	367	431	9	7	4300000	55	259	129065000	5	88	23500000	86295000
5	Chhattisgarh	2664	457	1369	1741	1	2	10884001	307	742	372461800	84	386	71420000	239629700
6	Goa	0	1	0	1	0	0	0	0	0	0	0	0	0	250000
7	Gujarat	679	128	272	336	26	11	7105000	336	189	66390000	17	41	13770005	64807500
8	Haryana	336	70	267	322	5	5	4200000	64	244	86129638	10	47	6555005	77294638
9	Himachal Pradesh	112	33	42	75	0	0	0	31	39	10953344	4	3	550000	138283
10	Jharkhand	984	201	413	708	7	0	3150000	165	211	126191521	4	3	550000	13828344
11	Karnataka	346	18	328	346	0	4	1300000	17	211	82608001	1	114	41155000	56792000
12	Kerala	922	80	118	167	9	0	2200000	54	98	49405000	1	4	4100000	2275000
13	Madhya Pradesh	920	36	508	462	0	0	0	40	411	79225534	1	145	33117009	78976700
14	Maharashtra	192	38	180	217	2	2	500000	476	68	15152000	4	91	12569998	35085500
15	Manipur	79	33	47	77	0	0	0	16	0	7612500	13	23	11850000	16142500
16	Meghalaya	250	52	18	70	0	0	0	51	17	11060000	1	1	450000	11510000
17	Mizoram	127	15	54	29	0	0	0	18	40	15925000	0	10	1380000	10170000
18	Nagaland	13	0	3	3	0	0	0	0	3	250000	0	0	0	250000
19	Odisha	1380	507	386	893	11	0	1350000	374	318	192387000	61	99	56255000	235119500
20	Punjab	308	38	230	227	0	2	850000	36	140	52406250	3	101	16250000	69506250

Sl. No.	SLsAs	Number of Applications for victim Compensation received	Number of Victims who were granted Interim Compensation	Number of Victims who were granted Final Compensation	Total Number of Victims who were granted interim or final compensation	Number of Acid Attack Victims who were granted Interim Compensation	Number of Acid Attack Victims who were granted Final Compensation	Total amount of compensation granted to acid attack victims	Number of Victims of Sexual Abuse who were granted Interim Compensation	Number of Victims of Sexual Abuse who were granted Final Compensation	Total amount of compensation granted to Victims of Sexual Abuse	Number of other victims who were granted Interim Compensation	Number of other victims who were granted Final Compensation	Total amount of compensation granted to other victims	Total Amount of Compensation Disbursed
21	Rajasthan	3049	709	766	1404	15	4	3412500	463	534	214400000	248	248	233	8705000
22	Sikkim	0	0	10	10	0	0	0	0	9	2250000	0	2	1400000	3650000
23	Tamil Nadu	512	70	95	95	1	0	300000	76	44	37121487	14	30	12180500	40959587
24	Telangana	159	27	88	115	4	0	400000	23	75	26782500	0	24	4100000	3282500
25	Tripura	35	9	22	25	4	0	100000	8	21	8850000	2	1	600000	3115000
26	Uttar Pradesh	464	51	109	160	0	9	3481000	0	84	15154900	0	67	5776000	24411900
27	Uttarakhand	255	62	33	52	0	1	700000	33	28	12660000	0	5	2300000	13060000
28	West Bengal	300	119	81	200	18	8	14150000	80	63	31955000	21	10	14450000	60595000
29	A&N Islands	2	1	0	1	0	0	0	0	0	0	0	0	0	0
30	Chandigarh	32	0	30	30	0	3	900000	0	17	5752500	0	7	2950000	9602500
31	Dadra & Nagar Haveli	0	0	0	0	0	0	0	0	0	0	0	0	0	0
32	Daman & Diu	6	1	1	2	0	0	0	1	0	0	0	1	2900000	0
33	Delhi	2939	1045	1939	2984	9	4	2980000	907	258	281282500	138	1681	423279000	704561500
34	Jammu & Kashmir	63	55	8	63	0	0	0	52	6	12862000	3	2	700000	13562000
35	Ladakh	1	0	0	0	0	0	0	0	0	0	0	0	0	0
36	Lakshadweep	0	0	0	0	0	0	0	0	0	0	0	0	0	0
37	Puducherry	0	0	0	0	0	0	0	0	0	0	0	1	500000	500000
	TOTAL	18598	4010	8239	11783	126	68	63377501	3754	4345	2016362275	685	3635	898411554	2231482155

Acknowledgment: NALSA NEWSLETTER July-September 2024 (Issue No. 3)

### 3. CONCLUSION

The scar of victimisation particularly for those who fall victim to sexual offence is permanent. No amount of compensation is enough to heal the scar completely. But adequate and timely compensation in terms of money coupled with effective counselling can to some extent help them to get rid of the trauma and restore their faith in the supportive role of the State. The Acid attack victims, victims of murder and other victims of crime as well are in no less need of appropriate interim and final compensation. It is necessary to build up a strong supportive system nationwide to support the victims of crime not only in terms of money, the package of compensation must include medical as well as rehabilitative remedies fairly and quickly. Here it would be appropriate to further refer to the observation of the Hon'ble Supreme Court in *Ankush Shivaji Gaikwad* where the Apex Court observed as under:

“54. ... The power to award compensation was intended to reassure the victim that he or she is not forgotten in the criminal justice system. The victim would remain forgotten in the criminal justice system if despite the legislature having gone so far as to enact specific provisions relating to victim compensation, courts choose to ignore the provisions altogether and do not even apply their mind to the question of compensation....”

### 4. SUGGESSTIONS

NALSA's report in the Table specifically shows in how many cases of Acid attack, sexual abuse and other offences victims were given interim and final compensation in States across the country during the 3 quarters for a period from 1st January to 1st September 2024. The figures appearing in the table raises hope and compared to earlier statistics it appears that number of applications are on the increase and award of compensation is also going up. But still a lot more needs to be done. The following suggestions may be considered:

- (i) Creation of awareness about the victim's right to compensation in massive scale.
- (ii) Simplification of the victim compensation schemes.
- (iii) Publication of ad from the SLSA/DLSA/concerned department of the State Government inviting donations from philanthropists, organizations etc. and taking initiative to gather fund under CSR.

- (iv) Every hospital, nursing home etc. public or private should prominently display a notice board declaring that treatment of victims of sexual offence is not charged. (Section 397 BNSS).
- (v) Donations/Contributions to victim compensation fund should be certified for income tax benefits.
- (vi) For women victims, as per NALSA's compensation scheme for women victims/survivors of sexual assault/other crime even the SHO of the concerned police station may write to the SLSA/DLSA in Form I, along with copy of FIR, medical report if available to compensate the victim. The State Governments may issue administrative orders separately so that every SHO discharges this solemn duty to ensure that every victim gets interim compensation.

Let us go forward with a humble mindset and a pledge to help the victims more and more. Better if we remember the famous saying of Charles F. Kettering who said “we are just at the beginning of progress in every field of human endeavour.”<sup>17</sup>

---

17. Quoted from L E Watson, *Light from Many Lamps*.

# ENVIRONMENTAL LAWS: RULING POLITICIANS VS CITIZENS

—Krishan Mahajan\*

## ABSTRACT

*The three environment laws on water, air and environment empower the ruling politician and not the citizen. This must be examined in the context of the Constitution giving the ruling politician control over the country's resources and production or its political economy. The consumer whose demand triggers the production cycle which produces the waste that harms the environment, is nowhere mentioned in the environment laws. Accordingly, the consumer is the silent victim without a pollution index, an oxygen index, a traditional product index and a health index of all that he buys for consumption to trigger the supply through production. The legislative design of the environment and production laws denies the existence of the consumer despite the Supreme Court having declared that s/he has a fundamental right to know, a clean environment and health. The ruling politician has to be made legally responsible for the enforcement of these fundamental rights in the constituencies from which he has been voted to become a ruling politician controlling the national resources, the production and the pollution there from and the environment laws giving him/her vast exemption powers negating the environmental laws, while using Art.253 to enact these laws and thereby control the process and the waste in agriculture, industry and services in each constituency. As a first step the environmental and consumer laws need to be amended to establish the ruling politician's link to pollution in each constituency where production- pollution is*

---

\* Supreme Court advocate, mediator, arbitrator who has done legal field reports and argued on these reports as the Supreme Court appointed amicus curiae in environment pollution cases of distilleries, mines, tanneries, MSME industries, waters of the Ganges and Yamuna and national monuments like the Taj Mahal. Fellow of the Columbia Law School, USA, Japan Foundation, Tokyo, and the Ramakrishna Mission, Mumbai.

*located. This needs interpretative thought leadership from the Supreme Court, in terms of the already pronounced judgments on constitutionalism, to usher citizen centric governance of India's water, air, soil or the environment. The country's health and economy necessitate this.*

**Keywords:** ruling politician, constituencies, environmental accountability, production, consumption, pollution, oxygen, traditional product and health indices.

## 1. INTRODUCTION

The need of consumers creates the demand for goods and services. This demand is met by producers supplying goods and services in the three sectors of agriculture, industry and services by using land/soil, water and air. The common by product of this consumption production economic cycle is waste. If this cycle is nature friendly, then the waste is manageable. However, if the cycle takes from nature and works against it, then there is waste and pollution which becomes a health and management problem. The demand for comfort and convenience based on machines and chemicals impels per unit of time efficiency in consumption and production. There is a corresponding efficiency in the production of waste or pollution by producers and consumers, but not in the use and disposal of waste. The circular economy, an ingrained tradition of the Indian household, is not a part of any legislation which mandates the circular use of waste or incentivises such use. Environment laws have been enacted as if there is no indigenous production --- consumption thought, like the Panchabhuta (five elements of nature) or the Panchgavya (milk, curd, ghee, urine and dung).<sup>1</sup>

## 2. CENTRE'S RULING POLITICIANS TAKE OVER

As nations became aware of the consequences of such waste on the primary source called nature and on the health of their people, international conferences and agreements<sup>2</sup> emerged and have so far ended on who is to

- 
1. The Indian knowledge system about environment, lifestyle and medicine, is missing from environment law and health education. Hence the tulsi plant, the peepul and neem trees, camphor and pran or breath vidya have no place in law dealing with a vast web of waste rules under Environment Protection Act, 1986.
  2. Stockholm Declaration at the UN Conference on Environment 1972, Brundtland Commission Report of the World Commission on Environment 1987 titled as "Our Common Future."

pay how much<sup>3</sup> for the reduction and management of pollution and waste. This resulted in the ruling politicians of the Central Government (Union of India) taking over<sup>4</sup> law making on all the aspects of environment, in the name of implementing decisions of the international conferences, to enact three laws in Parliament for the prevention and control of pollution: Water Act, 1974. Air Act 1981 and the Environment Protection Act, 1986. The Water and Air Acts have common Central Govt. and State Govt Boards for the prevention and control of pollution.<sup>5</sup>

The tragedy is that the Acts empower ruling politicians of a State Government, to deal with pollution by completely excluding the citizen whose health is directly affected by the polluted water and air. There is no provision in these enacted pollution control laws for informing the citizens of the industries in or around their areas of living or working from where pollution is possible, what is it that they manufacture, the pollutants from such manufacture and the effect of these pollutants on their health. The collection, dissemination of information relating to water and air pollution, its prevention, abatement and control is a mandatory function of the State Board under S. 17 (c) of the Water & Air Acts. But organising through mass media a comprehensive programme regarding pollution is a discretionary function of the ruling politicians nominated Central Board u/S. 16(e), as is the planning and execution of a national programme for prevention, control and abatement of pollution is a discretionary function, under S. 3(2)(ii) of the Environment Protection Act.

No responsibility for pollution or for health lies on the ruling politicians, whose citizens have elected them to the Lok Sabha to represent them. The tragedy is that they are not accountable even for the enforcement of Supreme Court judgments on the fundamental right to health<sup>6</sup> and a hygienic environment of breathable air and drinkable water. Instead, the ruling politicians have designed and enacted the aforesaid laws as pollution centric instead of environment centric with no provision for publicly announcing the susceptible areas vulnerable to pollution and while the data on this is collectible by State Board surveys and inspections and analysis of samples of water and air.<sup>7</sup>

---

3. Kyoto Protocol 1997 and Paris Treaty 2016.

4. art 253.

5. Air Act 1981, s 4.

6. *State of Punjab v Mohinder Singh Chawla* (1997) 2 SCC 83 : AIR 1997 SC 1225, *Municipal Council Ratlam v. Vardichan*, (1980) 4 SCC 162.

7. Water Act 1974, ss 20 and 21, Air Act 1981, s 26.

### 3. RULING POLITICIANS CONTROL POLLUTION

Agriculture, industries, services and consumers in a State use the land, water and air of that State. For controlling pollution, the Water, Air and Environment Acts provide for the establishment by each State Government, of State Pollution Control Boards. The sixteen members, including the Chairman of the Board, are to be “nominated”, not “appointed”, for exercising the powers and performing the functions assigned to the Board by the Water and Air Acts. The Board members are eligible for renomination<sup>8</sup> at the end of their three-year term. Hence the State’s ruling politicians control the continuance of the members on the Board. Only the member Secretary in charge for rendering administrative help to such appointed members is appointed by the State Govt. for full time.<sup>9</sup> The ruling politicians in the State Government can appoint the Chairman, full or part time. The salaries, allowances and duties of the sixteen members and the funding of the Board, are entirely in the hands of the State government or its ruling politicians. The Board has only such duties and functions under the Acts as are notified for them by the State government. Any member of the Board can be removed by the State Government after issuing a show cause.

Such a Board can constitute Committees, temporarily associate persons, appoint consulting engineers It can appoint such officers and employees as it considers necessary for performing its functions efficiently according to regulations framed by it, but approved by the ruling politicians of the State.<sup>10</sup> There is no provision for assessing efficient performance of the Board in discharging its mandatory functions for prevention, abatement and control of pollution in the State. This has to be so because the State Government, in consultation with or on the recommendation of the State Board, can exempt a person:

- (i) from knowingly impeding the flow of water in a river, water course, inland water, subterranean waters or sea or tidal waves and
- (ii) knowingly permit pollution of these waters.<sup>11</sup>

Further the mandatory functions of the State Board apply only if the State Government designates areas in the State as water or air pollution control

---

8. Water Act 1974, s 5.

9. s 12.

10. ss 5, 9 and 10.

11. s 24(3).

areas.<sup>12</sup> The constitutionality of these exemption provisions is doubtful as these render meaningless the fundamental right to a clean environment, to health and a life of dignity.<sup>13</sup> Yet the State Board has the power to shut down electricity and water supply or any other service to any industry or even order the closure of the industry or its operation or process.<sup>14</sup> The control of the State's ruling politicians over the State Boards is complete as the State Government can supersede the Board in the "public interest".<sup>15</sup>

Hence ruling politicians of the State Government have complete control of the State Board. It is such a Board that is empowered to contract, hold and dispose property and sue or be sued. Setting up of the laboratories<sup>16</sup> is critical for its mandatory functions of inspection of production units, their effluent/emission treatment plants for giving its consent to the operation of the units and testing compliance with pollution standards. But the setting up of laboratories is only a discretionary function of the Board.<sup>17</sup>

#### 4. RULING POLITICIANS: CENTRE VS STATE

In keeping with the use of Art. 253 by the Central Government in enacting the three environmental laws, the State Boards are bound by the directions of the ruling politicians at the Centre. Further any inconsistency in directions by the State Boards and the Central Board the matter must be referred to the Central Govt for its decision.<sup>18</sup> The problem is that the Central Board<sup>19</sup> also consists only of a Chairman and 15 members nominated by the ruling politicians at the Centre and eligible for renomination after three years of service at the Central Pollution Control Board.<sup>20</sup> A worse problem is that none of the nine functions of the Board<sup>21</sup> are mandatory, including the three functions critical for any pollution control collect data on pollution, measures/manuals for the effective prevention and control of pollution treatment and disposal, classification of waters of each State and organising mass education programmes on pollution.<sup>22</sup> The ruling politicians can give

---

12. s 19(1).

13. *Francis Carolie Mullin v State (UT of Delhi)* (1981) 1 SCC 608.

14. s 33-A.

15. Water Act 1974, s 62.

16. s 53.

17. Water Act 1974, s 17(2).

18. Proviso to s 18(1).

19. Water Act 1974, s 3.

20. Water Act 1974, s 4.

21. Water Act 1974, s 17.

22. s 17(e) to (g).

binding directions to the Central Board<sup>23</sup> which power becomes crucial in laying standards of pollution<sup>24</sup> and in shutting down an industry or its electricity, water or any other service,<sup>25</sup> the creation of pollution control areas in a State or exempting such areas from the pollution standards.<sup>26</sup> The Central Board is bound by the directions of the ruling politicians at the Centre.<sup>27</sup> The ruling politicians at the Centre can supersede the Central Board<sup>28</sup> just as the ruling politicians of a State can supersede the State Board “in the public interest” or for “persistent default in performance of functions.” The Boards are under the judgment of ruling politicians of the Centre and States without any legal accountability for the ruling politicians for the prevention, abatement and treatment of pollution. The environmental law Acts enacted by Parliament at the Centre’s behest make a perfect setting for serious federal disputes for a resolution by the Supreme Court, especially where the ruling political parties at the Centre and in a State are different. These laws also create a major pollution regulation arbitrage power in the location and management of industries given that State Boards have a mandatory function to advise the ruling politicians of the State on the location of any industry which is likely to pollute<sup>29</sup> and the power to make, vary or revoke any order for the prevention, control or abatement of pollution.<sup>30</sup> In this context the constitutional question raised by Arts 256, 258A read with Art 365 is whether a State can be subjected to President’s rule on the ground of failure of the Constitution in a State because the State has not complied with the directions given by the ruling politicians at the Centre, through the Central Board, under the environmental laws enacted by Parliament, given that the Centre can supersede even its own Board. The question therefore is why ruling politicians are so legally supreme and hold the country’s health and pollution in their control.

## 5. RULING POLITICIANS CONTROL PRODUCTION PROCESS

The Constitution of India entrusts the country’s resources<sup>31</sup> to ruling politicians. These politicians govern the country by a collective use of legislative and executive powers in: Arts. 107, 109, 31-C, 74-75, 245-250,

---

23. s 18(1)(a).

24. ss 18(1)(g)(k).

25. s 33-A.

26. s 19.

27. s 18(1)(a).

28. s 60.

29. s 17(1)(n).

30. s 17(1)(l).

31. sch 7 Lists I-III.

253, 364, 73, 77 (1 & (3), 256, 237, 339(2), 298, 299, 19(6)(i),(ii), 265 & 274, 244 (1) & Vth 305, 301—304, 307, 365, 366(6), 279-A, 366(20), 366(12) & (12-A), 246-A, 247, 248, 292, 285-287, 288, 300, 282—284, 300-A, 31A, 31B. With this armada of constitutional powers, the country, its States and the States' panchayats/rural areas and municipalities/urban areas, are governed through the constitutional institutions of governance ----- the Central Government<sup>32</sup> and Parliament, State Government and Legislative Assemblies, municipalities and panchayats. Ruling politicians become governing or ruling politicians of the human, natural and other resources, on the basis of the majority obtained in one person one vote<sup>33</sup> elections, in defined territorial constituencies, and the continuance of this majority in Parliament, Assemblies, municipalities and panchayats.

## 6. POLLUTION CENTRIC ACTS

The governance or ruling over resources is done by using this majority to design, enact and implement the laws on the resources/subjects, assigned by the Constitution to each of these institutions of governance.<sup>34</sup> The entrustment becomes subject to the procedures in these laws to be executed by the Central and State administrative services<sup>35</sup> prescribed by the Constitution as All India and State services. The ruling politicians have used this legislative power to design pollution centric instead of environment centric laws which tell how far the free air has been polluted and not how much of it has been used. An informal political economy of management of rules on waste is implicitly formed as higher the cost of equipment, manpower and energy for abiding by the rules, higher is the saving by not complying. In the profits to pollution ratio, concerning the monetary success of a production, distribution and sale unit, what is preserved is profit instead of the environment.

## 7. ENVIRONMENTALLY FREE

Hence it is through this rule of law network that the ruling politicians govern the capturing and use of these entrusted resources for the production of goods and services demanded by consumers at various stages in the agriculture, industry and services sectors. The ruling politician through these laws governs the establishment and running of the production, distribution and sale economy through formal and informal contracts

---

32. Union of India.

33. Adult suffrage.

34. Lists I, II, III of the sch 7. Constitution of India, Parts IX, IX-A, IX-B, X & XI.

35. Constitution of India, Part XIV.

entered into between individuals, producers, sellers and consumers as proprietors/persons, association of persons, partnerships, cooperatives, companies.

The money required and generated by this political economy of ruling politicians and their administrators is provided by ruling politicians through laws enacted, amended and implemented by them as laws of contracts, transfer of property, money lending, banking, export import, foreign exchange, bullion, shares, debentures, government lending and borrowing through grants, schemes, treasury bonds, commercial paper, dividends, risks- insurance saving schemes, direct and indirect taxes. The ruling politician finances his government and himself, the institutions of governance and what he governs, through the governing power given to him by these laws.

None of these wealth process laws mandate linkage to the environment, of production, distribution, sale and financing of products. No national or State level counting is done of the social cost to the environment. Since that which is not counted does not exist, economic planning simply ignores this social cost. Accordingly, the smart producer, distributor and seller is one who can manage to escape all the expense that rules on waste require, as at the individual enterprise level money need not be spent on waste, unless something valuable can be recovered from the waste. Pollution centric laws end up polluting the socio-economic polity.

## **8. ACCOUNTABILITY: PRODUCT POLLUTION INDEX**

The Constitution gives complete legal control to the ruling politician over the entire production to pollution chain. But it does not make him responsible for the health effects of this control by ensuring relevant information to the consumer-voters in their respective territorial legally defined constituencies,<sup>36</sup> from which they have been elected to become ruling politicians. The minimal information to the consumer voters in these constituencies which the ruling politician should be required to provide is that of the air and water pollution control areas,<sup>37</sup> the production units therein, the water, air and land consumed by these units in the production of the specified products. Most of this information is available to the ruling politicians under the compliance procedures for the location,<sup>38</sup> licensing

---

36. art 81(2)(b).

37. Water Act 1974 & Air Act 1981, s 19.

38. Air Act 1981, s 17(h) and Water Act 1974, s 17(n).

for industry product<sup>39</sup> and consent<sup>40</sup> to operate under the aforementioned laws. The Central Pollution Control Board has a discretionary function<sup>41</sup> and the State Pollution Control Board has a mandatory function<sup>42</sup> to inform citizens about pollution. But the ruling politicians are not made responsible for ensuring the enforcement of these provisions in their respective constituencies. A beginning could be made by requiring the industries in an air and water pollution control area to put out for public consumption a product ingredient- pollution index. The ruling politician must ensure the declaration of air pollution and water pollution control areas, both for industries located on the advice of the State boards and illegally located industries. This links the ruling politician to the voters in his constituency from which he has been elected.

But smart business management is to nix the notifying of air/water pollution control areas.<sup>43</sup> The Water and Air Acts do not link the mandatory function of a State Pollution Control Board to advise on location of industries likely to pollute, with the discretionary power, conferred by the ruling politicians at the Centre on State ruling politicians, to notify air pollution control areas. No declaration of pollution control areas means freedom to pollute or eat up as much natural oxygen as needed. This turns into a dead letter, S.166(2) of the Companies Act 2013, requiring directors to act for protecting the environment and S.15 concerning conservation of national resources under the Industries (Development & Regulation) Act,1951. The Micro, Small and Medium Enterprises Development Act, 2024 has no linkage to the Water and Air Acts, though these enterprises are the backbone of the country's economy.<sup>44</sup>

Similarly, there are no linkages to the general needs of clothing, footwear, medicine, appliances and electronic or digital equipment.<sup>45</sup>

---

39. The Industries (Development & Regulation) Act 1951.

40. Air Act 1981, s 21 and Water Act 1974, s 25.

41. Water Act 1974, s 16(e).

42. Water Act 1974, s 17(c).

43. The Uttar Pradesh Government notified the whole State as an air pollution control area, only after the author as amicus produced before the Supreme Court the notification declaring only the area around the Taj Mahal as such an area.

44. As of 31 July 2024 there were 4.78 crore MSMEs, which includes 19.4 million micro enterprises.

45. Textiles Committee Act 1963, Drugs & Cosmetics Act 1940, Household Electrical Appliances, Quality Control, Order 198 under Essential Commodities Act, Factories Act 1948 and Bureau of Indian Standards Act 2016.

## 9. HEALTH INDEX

The ruling politician in a constituency can continue to benefit from the voters of his constituency only if they are healthy enough to perform their economic or revenue generating functions. Given the production to pollution legal control of the ruling politician, the enforcement of the pollution control laws has to be measured in terms of the health index of the citizens in each water and air pollution control area. The inherent part of this would be the ruling politician's responsibility to have a map prepared of the traditional products in his/her constituencies fulfilling the same need as the industrial product and comparing the product pollution index as also the health index of the traditional against the industrial. This creates a level playing field between the traditional and the industrial to result in the enforcement of Art.29 of the Constitution. In its absence a pollution arbitrage is created to the detriment of the citizen.

The health index needs an Oxygen consumption index for products, as without Oxygen no production, no consumption and no health are possible. Without oxygen air, water and land are dead elements. The energy required for the consumption-production-distribution-sale economy can be produced only if there is Oxygen. The consumer voter in each constituency of a ruling politician has a fundamental right to be informed of that which significantly affects health the bedrock of the economy and a fundamental right declared by the Supreme Court. Without this oxygen rating

In short, there is a need to build a rule of law architecture of responsible governance by ruling politicians on the basis of the laws enacted by these politicians and the citizens' rights already declared by the Supreme Court of a clean environment. The production and pollution control laws have empowered the ruling politicians. That has to be balanced by empowering the citizen voter.

## 10. REWARDING CYCLE OF POLLUTION

Consumption or the demand for goods and services triggers their supply through production. Neither consumption nor production are possible without use of soil, water and air. Both production and consumption pollute the soil, water and air in all the three sectors of agriculture, industry and services. Humans worry about pollution only because it threatens their health and existence. Legally undefined development through machine and chemical based processing of nature and man-made materials therefrom, annihilates time and distance. Such development makes for

pollution without borders. It results in pollution politics both national and international in which the question as to who is responsible for the pollution which undermines health comes up only when the monetary issue of who is to pay how much for the measurable and quantified untreated waste thrown out to save the producer or the consumer, costs of prevention and treatment. Pollution information, in advance and later, is a key casualty.<sup>46</sup> The net result is to create more and more demand for doctors, para medicals, medical equipment, medicines and insurance. A rewarding cycle is set up for those who pollute as producers and consumers with nothing for victims except to the extent that ruling politicians may care in their own interest of votes conservation and/or international image. The result: deep and grievous pollution inequality. The Supreme Court's declarations of fundamental rights to clean environment, health, medicines and a life of dignity remain abstract paper. The question is why is this so? The pollution economy so set up, rewards the producer and the ruling politician and creates health cum medicare cum risk insurance jobs. It rewards the large consumer waste disposer similarly and creates a whole class of a new profession: consumption influencers on all kinds of media.

### 11. RULING POLITICIAN'S CONTROL

The legal answer is that the Constitution and the laws thereunder give complete control over the production to pollution process and economy to the ruling politician with no accountability whatsoever to the citizens in the territorial constituency/ies from which they have been elected on the votes of these citizens, to the constitutional institutions of panchayats, municipalities, State assemblies and Parliament.

### 12. ART. 253 & THE RULING POLITICIAN

This applies especially to those elected to the Lok Sabha and then vaulted to cabinet Ministers, vice president and president. This is so because as such position holders in the national government and in Parliament, after participating in international conferences on environment, have used Art. 253 of the Constitution to make Central laws for the whole of India for the entire economy of industry, agriculture and services, to implement the decisions of these international conferences/agreements. This has been done regardless of whether the subjects legally sought to be controlled from the Centre in the name of pollution control have been allotted by the

---

46. *M C Mehta v Union of India* (1987) 1 SCC 395 (*Shriram Oleum Gas Leak case*) and *Union Carbide Corp'n v Union of India* (1991) 4 SCC 584 : AIR 1992 SC 248.

Constitution, exclusively to the State Government politicians. Accordingly, three key laws have been enacted by the ruling politicians of the Central Government or the Union of India: The Water (Prevention & Control of Pollution) Act, 1974, the Air (Prevention & Control of Pollution) Act, 1981 and the Environment Protection Act, 1986.

### 13. BASIC MESSAGE

The basic legal message of these Acts to producers and consumers is that both producers and consumers can pollute as much as they want, since it helps the economy and government revenue to grow. If the pollution beyond the prescribed limits becomes an issue then the ruling politicians legally control the production chain under the Constitution and the implementation of the Water, Air and Environment Protection Acts. The Constitution of India entrusts the country's resources<sup>47</sup> to ruling politicians. These politicians govern by legislative and executive powers,<sup>48</sup> the country (its States and the States' panchayats/rural areas and municipalities/urban areas, through the constitutional institutions of governance the Central Government (Union of India) and Parliament, State Government and Legislative Assemblies, municipalities and panchayats. They become governing or ruling politicians of the human, natural and other resources, on the basis of the majority obtained in one person one vote (adult suffrage) elections in defined territorial constituencies and the continuance of this majority in Parliament, Assemblies, municipalities and panchayats.

### 14. RULE OF LAW NETWORK

The governance or ruling over resources is done by using this majority to design, enact and implement the laws on the resources/subjects, assigned by the Constitution to each of these institutions of governance. The entrustment becomes subject to the procedures in these laws to be executed by the Central and State administrative services prescribed by the Constitution as All India and State services.<sup>49</sup>

Hence it is through this rule of law network that the ruling politicians govern the capturing and use of these entrusted resources for the production

---

47. sch 7 Lists I-III.

48. arts 107, 109, 31-C, 74-75, 245-250, 253, 364, 73, 77 (1) & (3), 256, 237, 339(2), 298, 299, 19(6)(i), (ii), 265 & 274, 244(1) & Vth 305, 301-304, 307, 365, 366(6), 279-A, 366(20), 366(12) & (12-A), 246-A, 247, 248, 292, 285-287, 288, 300, 282-284, 300-A, 31-A, 31-B.

49. Constitution of India, Part XIV.

of goods and services demanded by consumers at various stages in the agriculture, industry and services sectors. The ruling politician through these laws governs the establishment and running of the production, distribution and sale economy through formal and informal contracts entered into between individuals, producers, sellers and consumers as proprietors/persons, association of persons, partnerships, cooperatives, companies.

The money required and generated by this political economy of ruling politicians and their administrators is provided by ruling politicians through laws enacted, amended and implemented by them as laws of contracts, transfer of property, money lending, banking, export import, foreign exchange, bullion, shares, debentures, government lending and borrowing through grants, schemes, treasury bonds, commercial paper, dividends, risks insurance saving schemes, direct and indirect taxes. The ruling politician finances his government and himself, the institutions of governance and what he governs through the governing power given to him by these laws. The minimum prescribed equipment<sup>50</sup> and process for treating and releasing the polluted air and water of production may be there, but it may or may not function, depending on the expense of the energy consumed by these. This creates pollution arbitrage and harms the level playing field of competing goods and services. Monetary wisdom requires that this arbitrage be worked collectively by the producers and consumers. These Acts do not make any of the relevant Ministers or Secretaries liable even for continued gross violation of these laws resulting in a significant scale of victims of pollution. Generally, the victims do not even know what is it that has made them ill or caused their death.<sup>51</sup>

None of the ruling politicians, demand pollution be treated as a continuing health threat, as they constitute the top percentile of pollution inequality, protected as they are from the harshest effects of pollution at the cost of the State or the public, making it unnecessary for them to invoke the Supreme Court created fundamental rights to a life of dignity, clean environment and medi-care. In any event, the National Disaster Management Authority Act puts announcement and management of disasters under the control

---

50. The law provides for bank loans for pollution control equipment and provides income tax exemption for the business concerned on the expense for such equipment.

51. Manual Scavengers keep on dying in sewers despite the Prohibition of Employment of Manual Scavengers and Rehabilitation Act 2013. According to the National Commission of Safai Karamcharis there are 12 lac manual scavengers in India. However, the official figure is half of this at 6,76,009.

of the ruling politicians. Further the ruling politicians at the Centre take charge of court cases on behalf of the victims under the Supreme Court declared doctrine of *parens patriae*.<sup>52</sup>

### 15. KEEP THE CONSUMER IGNORANT

In the chain of consumer demand – production -pollution, the consumer is the king that triggers the entire economic cycle. Yet the consumer figures nowhere in the anti-pollution Acts which completely ignore the consumer and make the ruling politician the king of the pollution produced from production only on demand of goods and services by the consumer. These Acts are: Water (Prevention and Control of Pollution) Act, 1974, Air (Prevention and Control of Pollution Act, 1981 and the Environment (Protection) Act, 1986. Pollution in the manufacture of goods and services in the country's agriculture, industry and services sectors is not linked to the consumer under The Consumer Protection Act, 2019. It is also not linked to the major consumption areas of citizens: food under the Food Safety and Standards Act, 2006,

In any event the language in these Acts and the pollution control Acts is that of chemistry, beyond the understanding of even the average educated consumer. Hence consumer does not know whether by creating demand by spending his -her money and thereby the production of these goods and services, how much pollution s/he is creating through their own money.

Nothing in health law links pollution to health although “prevention” of pollution as per the water and air quality standards laid down for the industries/activities mentioned in the Water & Air Acts and in Schedule I of the Environment Act or its Rules.

Prevention of Pollution is based on the powers of location of industries, consent for production, based on installation and certification of the pollution control equipment by the authorities is without any public information, hearing or participation of those likely to be directly affected by an industry in or near the area where they live or of mandatory public information of the performance of the pollution control equipment. This is despite pollution being defined in the Water Act as harmful or injurious to public health/safety, to legitimate uses of water and the life/health of animals, plants or of aquatic organisms.

---

52. *Charan Lal Sahu v Union of India* (1990) 1 SCC 613 and *Union Carbide Corpn v Union of India* (1991) 4 SCC 584 : AIR 1992 SC 248.

The same is the legal situation under the Air Act in its definition of “air pollutant”. The Air Act, in para 4 of the Statement of Objects and Reasons speaks of an “integrated approach” after referring to health in para 2 and “preservation of quality of air.” But the provisions of the Act do not make the final consumer or the home/livelihood place of the innocent citizen, using the air of an industry in the air corridor connecting the industry and the citizen, an inherent vitally affected party entitled to know about the pollution s/he is likely to consume and is actually consuming. There is no provision for a product-pollution index to let each consumer know that the product being bought by him/her is the result of how much pollution.

#### **16. POLLUTION INDEX CERTIFICATE**

None of the three environment Acts mandate that products offered to consumers must have a Pollution Index Certificate from an authority specifically charged to certify the pollution place in terms of its effluents and toxic air and water/air used, as compared to the ambient air quality and water quality of the air pollution control area and the water pollution control area, where the production unit has been allowed to be located. The data on water and air would be easily available from the annual environment statement in Form V under Rule 14 of the EP Act for the production units for which consent of the Pollution Control Board is mandatory. Industry, parameters and standards of concentration<sup>53</sup> of the pollutant in the water or in the air are given in Schedule I of the EP Act for specific industries.

#### **17. NO CONSTITUENCY WISE DATA**

However, this mandatory data from specific industries is not required by the Act to be made public constituency wise. The data should be sent to the Public Relations/Media officer, the Social Welfare officer and the Health Officer of the Area with a direction to ensure that the same be put out in the public domain in simple local/vernacular language explaining the implication of the data in relation to health. In the absence of this the vital link between the elected politician in a constituency who participated in the enactment of the law for the “prevention, abatement and control” of pollution is lost, even though he participated on behalf of the voters in the constituency. The three environment Acts do not provide for such accountability of the elected representative.

---

53. EP Act 1986, s 7.

### **18. PARALLEL ECONOMY**

This rule of law political economy of producing and supplying what is demanded produces tangible and intangible waste of various kinds using the common inputs of air water, land, skilled and unskilled humans, as well as manufacture of energy from these common inputs. The nature and extent of this waste of this political economy determines the harm to the rule of law political economy, The ruling politician counters the intangible but visible waste of corruption by enacting anti defection, vigilance , anti-corruption, money laundering and tax evasion laws to curb the visible demonstration effect of the life styles of ruling politicians, administrators , producers, distributors and sellers earning from the parallel political economy established by using their respective power in the political economy, The success or failure of these laws determines the harm done to the political economy or in legal language, to the constitutional preambular justice---- social, economic and political. The Constitution and the laws do not hold the ruling politician accountable for the design and enforcement failure of laws that are designed to fail by ignoring the necessary provisions of information to the citizens in the defined territorial constituencies, of the manufacture and implementation of the political economy laws, the nature and duration of the pollution cases pending against them as also those disposed of.

### **19. CONCLUSION**

There is an urgent need for thought leadership on the contents of the rule of law in a representative democracy for environment protection instead of mere pollution protection. Representative democracy is meaningful only to the extent that the representatives are accountable for an environment that sustains life of all citizens.

# **POLITICAL DYNAMICS IN TELANGANA: A FIRST-PERSON ANALYSIS OF THE ASSESEMBLY ELECTION OF 2023**

—Afroz Alam\*

## **ABSTRACT**

*This article offers a first-person analytical account of the 2023 Telangana Legislative Assembly elections, focusing on the shifting political landscape, voter behaviour, and campaign strategies that defined the electoral process. Drawing from on-ground observations, interviews, and participation in local political events, the study captures the evolving relationship between regional identity, welfare politics, and party dynamics in the state. The 2023 election witnessed a significant contest between the incumbent Bharat Rashtra Samithi (BRS), the rising influence of the Bharatiya Janata Party (BJP), and the revival efforts of the Indian National Congress. The paper examines how key issues such as agrarian distress, unemployment, welfare schemes, and regional pride shaped public discourse. It also reflects on the role of caste, community mobilization, digital campaigning, and youth participation. The author, as an embedded observer, provides unique insights into both formal political processes and informal public sentiment, highlighting the dissonance between narrative-driven and ground-level realities. This personalized lens contributes to a deeper understanding of Telangana's democratic experience, making the article a valuable contribution to contemporary regional political studies in India.*

**Keywords:** Caste, Community, Demography, Election, Incumbency, Politics, Political Party.

---

\* Professor and Head, Department of Political Science, Maulana Azad National Urdu University, Hyderabad-500032.

## 1. INTRODUCTION

As someone deeply engaged with India's evolving political landscape, the 2023 Telangana Assembly elections provided an opportunity for both reflection and revelation. These elections were not merely another political event; they represented a referendum on nearly a decade of regional statecraft, governance innovation, and the shaping of political identity in the newly formed state. Telangana, which emerged in 2014 after a protracted and emotionally charged struggle for statehood, found itself at a pivotal crossroads in 2023 — caught between the legacy of its founding leadership and the possibility of new political alternatives. In my analysis for *The Indian Express*, I argued that this election marked a turning point — where the foundational narrative of the *Bhartiya Rashtra Samithi* (BRS), built on statehood and welfare populism, began to show signs of electoral fatigue (Alam 2023; 2024). I then pointed to the rising discontent with the BRS government's governance style, which, despite its focus on welfare schemes, failed to adequately address issues of political accountability and administrative transparency. This created an opening for new political forces, such as the *Bharatiya Janata Party* (BJP) and the Congress, to challenge the dominance of the KCR-led government. The 2023 elections thus emerged as a crucial moment to evaluate the enduring appeal of the state's founding leadership, while also testing the viability of political alternatives in the run-up to the national elections.

The election results shocked many observers and political actors alike. The Indian National Congress staged a remarkable comeback, winning 64 out of 119 seats, and dislodging the BRS, which had ruled the state for two consecutive terms. The Congress victory marked not only a shift in power but also a broader reconfiguration of political energies in the state. The BRS, despite its robust welfare delivery record and strong rural network, was reduced to 39 seats, while the BJP managed a modest presence with 8 seats — a performance below its own expectations. For many voters, the 2023 elections became a site of collective re-evaluation — a moment to assess not just the achievements of the past, but the credibility of promises for the future (Election Commission of India, 2023). What made this electoral outcome even more fascinating was the contrast between pre-election survey data — including the pre-poll survey I was involved with — and the eventual results. At the time of our survey (July 2023), the BRS led in voter preference (33.8%), enjoyed a high satisfaction rating (62.2%), and K. Chandrashekar Rao (KCR) remained the most preferred chief ministerial candidate. Yet, the data also revealed significant warning signs:

a large segment of undecided voters (over 25%), rising anti-incumbency sentiment against sitting MLAs (around 39%), and dissatisfaction among key demographic segments — particularly youth and urban voters. These nuances, I now realize, were early signals of the tectonic shift that unfolded on election day.

In this paper, I aim to critically examine the 2023 Telangana Assembly elections through a multi-layered analytical lens, drawing on pre-poll survey data, open-source insights, and established theoretical frameworks in political behaviour and electoral studies. This exercise is both retrospective and interpretive — retrospective because it reflects on why the results turned out the way they did, and interpretive because it seeks to understand what these results reveal about deeper socio-political transformations in the state. This analysis is not merely academic. It is rooted in the belief that understanding elections goes beyond numbers and margins — it involves unpacking public sentiment, political imagination, and the evolving relationship between citizens and the state. Telangana's 2023 elections offer a powerful case study for anyone interested in the democratic pulse of a young and aspirational Indian state. Through this inquiry, I hope to contribute to a deeper understanding of what democracy looks like in motion — and what it might become.

## 2. METHODOLOGICAL NOTES

Understanding the complex political landscape of Telangana requires a methodologically sound and empirically grounded approach. The pre-poll survey conducted prior to the 2023 Assembly elections was designed to capture the depth and breadth of political sentiment across the state. The survey was conducted by the Centre for Democratic Conversations (CDC), Hyderabad over the course of one month in July 2023. Its primary objective was to obtain reliable data and insights that would decode the key political dynamics shaping Telangana ahead of the elections.

The survey focused on five critical areas. First, it explored voting patterns and electoral preferences, aiming to map out the voting intentions of citizens, their party affiliations, and the key issues driving electoral choices. Second, it examined political participation by assessing the level of engagement among citizens — such as volunteering for campaigns, attending political events, or being members of political organizations. Third, it gauged public opinion on governance, approval of political leadership, and awareness of policy initiatives. Fourth, it assessed the political awareness and knowledge of voters, including their familiarity with democratic institutions, political

processes, and current political events. Finally, the survey investigated how socio-demographic variables like age, gender, caste, education, income, and occupation influence political behaviour. To ensure robust insights, the research employed both quantitative and qualitative data collection methods. A structured and pre-tested questionnaire was administered to a broad cross-section of respondents, covering voting preferences, party identification, satisfaction with the government and MLAs, and perceptions of public services. Additionally, qualitative data was collected through in-depth interviews with selected respondents to enrich the survey findings with nuanced individual perspectives on party loyalty, leadership, and voter behaviour.

A multi-stage sampling design was used to achieve demographic and regional representativeness. In the first stage, stratification was done across major regions such as North Telangana, South Telangana, and the Hyderabad metropolitan area. In the second stage, districts and Assembly Constituencies (ACs) were selected randomly. In the final stage, systematic random sampling was conducted to select individual respondents within each constituency, ensuring diversity in caste, age, gender, and occupation. Sampling was done across all 111 Assembly Constituencies (ACs) out of 119 to capture the political sentiments at a granular level. The final sample included over 6,000 individuals, with a high response rate, as shown in the table below:

<b>Interview Status</b>	<b>Respondents</b>	<b>Percentage</b>
Yes	5809	95.1%
No	302	4.9%
Total	6111	100%

Responses were digitally recorded, cleaned, and processed using data management software to ensure consistency and accuracy. Quantitative responses were analysed using statistical SPSS tool to derive frequencies, cross-tabulations, and correlations. The qualitative data from interviews was coded thematically to extract underlying trends, sentiments, and political narratives. Analysis included regional and demographic disaggregation to trace patterns across caste groups, age bands, gender divisions, and the rural-urban divide. The survey adhered to standard ethical norms of social research. Enumerators sought informed consent from all participants and clearly communicated that the data collected would remain anonymous and confidential. Participation was voluntary, and no incentives were offered to respondents. To ensure neutrality, fieldworkers clarified that the survey was

an independent academic effort and not affiliated with any political party or government agency.

Despite the robustness of the design, the survey acknowledges a few limitations. As a pre-poll survey conducted several months ahead of the elections, it may not capture last-minute shifts in political preference. Additionally, a significant number of respondents opted for “Can’t Say/No Response” on key questions — especially on voting preference and chief ministerial choice — highlighting a degree of political uncertainty. Lastly, certain remote areas or underrepresented social groups may have been harder to access, posing minor sampling challenges. In sum, the CDC’s pre-election survey in Telangana represents a comprehensive and methodologically rigorous attempt to document and analyse public opinion in one of India’s most politically dynamic states. Its mixed-methods approach, careful sampling design, and ethical research practices lend credibility to its findings and offer a reliable base for understanding voter behaviour in the 2023 Assembly elections.

### 3. THEORETICAL AND CONCEPTUAL FRAMEWORKS

To make sense of the electoral shifts observed in the 2023 Telangana Assembly elections, I found it imperative to root my analysis in a set of robust theoretical frameworks. These frameworks not only help explain voter behaviour and political strategy but also allow for a deeper understanding of the socio-political structures that shape democratic outcomes in a complex and plural society like India. While many lenses could be applied, I have chosen those that best align with the findings of the pre-poll survey and the broader dynamics observed in Telangana.

The first framework I draw upon is Anthony Downs’ Economic Theory of Democracy (Downs, 1957), which conceptualizes voters as rational actors who make decisions based on utility maximization. In this model, citizens assess political parties much like consumers evaluate products — choosing the one that offers the greatest personal or collective benefit. Telangana, with its extensive network of welfare schemes such as *Rythu Bandhu*, *Aasra Pensions*, *Shadi Mubarak*, and *Kalyana Lakshmi*, fits this model well. The survey data indicated that awareness levels for these schemes were remarkably high (above 90% in some cases), and the perception of governmental delivery on basic infrastructure was generally positive. However, despite this welfare-oriented governance, a significant section of the electorate shifted away from the incumbent BRS in 2023. This suggests that while welfare delivery may be a necessary condition for voter support,

it is not a sufficient one—other variables like corruption, leadership fatigue, and perceived inclusivity also matter in rational calculations.

Secondly, I employ Paul R. Brass' theory of elite mobilization (Brass, 1991), which argues that in ethnically diverse democracies, political mobilization is often orchestrated by elites who activate communal, regional, or caste identities to create loyal vote banks. This framework is particularly relevant in Telangana, where political actors have consistently drawn upon regional pride, caste affiliations, and socio-economic identities to build their electoral coalitions. K. Chandrashekar Rao (KCR) has long positioned himself as the architect of Telangana's statehood and the defender of its regional interests, while Revanth Reddy of the Congress projected a younger, more inclusive, and aspirational alternative — appealing especially to youth, Reddy caste voters, and minorities. These elite-led narratives have been instrumental in shifting the political discourse, particularly in urban and semi-urban constituencies.

In addition to these, the Median Voter Theorem (Black, 1948) offers a useful lens to understand the decisive role of the “undecided” or swing voter. According to this theorem, in a competitive democratic system, political parties and candidates will tailor their platforms to capture the preferences of the median voter — the one whose position lies at the centre of the ideological spectrum. In the pre-poll survey, I noted that 25.4% of respondents did not disclose their voting preference and 23.1% were undecided on their choice for Chief Minister. This sizable group of voters, located in the middle of the political spectrum, likely became the electoral tipping point. Their eventual swing towards the Congress may have been influenced by cumulative dissatisfaction with local governance, underwhelming campaign communication by BRS, and a renewed trust in the Congress' state-level leadership.

Another relevant framework is the Civic Voluntarism Model (Verba, Schlozman, & Brady, 1995), which emphasizes that political participation is shaped by three key factors: resources (time, money, skills), psychological engagement, and recruitment networks. In Telangana, youth dissatisfaction and the lower levels of direct political engagement reported in the survey (where 82% said they were not contacted by any BRS functionary) highlight a potential failure of mobilization through traditional party channels. The Congress, by contrast, seemed to have benefited from a more energized on-ground campaign, social media outreach, and alliances with local influencers.

I also draw insights from Arend Lijphart's theory of consociational democracy (Lijphart, 1977), which proposes that stability in plural societies is best maintained when diverse groups are included in governance through deliberate power-sharing arrangements. Although Telangana is not a consociational polity in the strict sense, the idea of inclusion remains central. In 2023, a section of the electorate, particularly minorities and marginalized caste groups, appeared to shift their support toward Congress due to perceptions that BRS had grown distant or unresponsive to their concerns. This shift points to a symbolic and substantive demand for inclusive governance, which goes beyond mere delivery of benefits.

Finally, I found agenda-setting theory (McCombs & Shaw, 1972) relevant in understanding the role of media and political messaging. Despite the rise of WhatsApp and YouTube as daily information sources (used by over 34% of respondents according to the survey), the survey revealed that nearly 75% of voters had not received any direct political messages. This communications vacuum may have diluted BRS's policy messaging and allowed the opposition to set the tone on issues such as corruption, joblessness, and governance fatigue. The Congress's ability to create a counter-narrative — despite having limited institutional resources — highlights the changing nature of electoral communication in the digital era.

In bringing together these conceptual frameworks — ranging from rational choice theory to elite mobilization, from voter psychology to communication strategies — I have sought to construct an interpretive scaffolding that captures the multi-dimensional nature of the 2023 Telangana Assembly elections. These theories not only help explain the outcomes we witnessed but also provide a template for analysing electoral behaviour in other Indian states undergoing similar transitions.

#### 4. ANALYSIS AND FINDINGS

Building upon the theoretical scaffolding outlined above, the following section delves into the empirical terrain of the 2023 Telangana Assembly elections. By integrating pre-poll survey data, electoral outcomes, and on-ground political narratives, I aim to trace how voter behaviour, party strategies, and issue salience converged to produce an electoral verdict. Each analytical thread is examined not in isolation but in relation to the theoretical constructs previously discussed. The following findings offer more than an explanation of “what happened” — they serve as a mirror reflecting the changing grammar of regional politics in India:

#### **4.1 Party Positions and Popularity: A Quantitative Pulse**

When we conducted the pre-poll survey in July 2023, the political landscape in Telangana appeared tilted in favour of the BRS. With a voting preference of 33.8% and a loyal support base of 36.2%, the BRS seemed poised to extend its rule into a third term. The data pointed to a generally satisfied electorate — 62.2% of respondents expressed some level of satisfaction with the state government’s performance. However, even at that point, I could sense an underlying contradiction. There was growing ambivalence, especially among undecided voters, and a significant 25.4% refused to disclose their voting preference — a silent yet powerful indicator of political volatility.

The Indian National Congress stood second with 26.3% vote share and 22.6% CM preference. Though the gap between KCR and Revanth appeared significant at the time (12.2%), the survey hinted at a rising wave of sentiment for change. The BJP, with just 8.7% support, seemed largely peripheral to the core contest despite its attempts to replicate national narratives at the state level. In retrospect, the undecided voters — those not yet emotionally or politically anchored — proved to be the critical factor. Their eventual swing toward Congress, which emerged victorious with 64 seats, confirms how much was fluid beneath the surface of our early numerical leads.

#### **4.2 Anti-Incumbency: Party v. MLA Distinction**

One of the most intriguing revelations of the pre-poll survey was the decoupling of party loyalty from MLA performance. Even as 45.1% of respondents expressed a willingness to give the BRS government another chance, a staggering 39% showed signs of anti-incumbency against their sitting MLAs. This divergence told me something important: voters were learning to differentiate between the macro and micro levels of governance. The BRS, as a brand, retained a narrative of development and welfare, but at the constituency level, personal dissatisfaction with local leadership was mounting.

The numbers validated this sentiment. While 53.1% were satisfied with their MLAs, 38.8% expressed dissatisfaction, and a significant 22.4% were “fully dissatisfied” — a number higher than those who were “fully satisfied” (19.7%). These figures indicated a shift in voter maturity — supporters were no longer blindly loyal; they were evaluative, even transactional. In hindsight, the Congress’s strategic move to field fresh faces and amplify

grassroots discontent through hyper-local campaigns effectively tapped into this anti-incumbent mood. The BRS, by retaining many of its old candidates, underestimated this sentiment — and paid the price.

### 4.3 Leadership: The Politics of Preference

In the survey, K. Chandrashekar Rao still held the edge with 34.8% of respondents preferring him as Chief Minister. His stature as the founding father of Telangana and a symbol of self-rule had not completely faded. However, Revanth Reddy's rapid rise was undeniable. With 22.6% CM preference at that stage — despite being relatively new to the leadership mantle — he was clearly breaking through the established hierarchy. Young, confrontational, and assertively regional, Revanth represented an energy that I saw resonating more with youth, middle-class, and non-committed voters. The 12.2% leadership gap, which appeared significant at the time, turned out to be more fragile than it seemed. Voters, especially the swing segment, were clearly hungry for a new style of leadership — one that was more accessible, more vocal, and less patriarchal in its politics. The final result not only catapulted Revanth to the Chief Minister's seat but also ended the decade-long monopoly of KCR, underscoring how leadership perception is not just about legacy, but also about momentum.

## 5. CASTE AND COMMUNITY VOTING: SOCIAL BASES OF SUPPORT

Our caste-wise breakdown of support patterns reflected the enduring role of identity in electoral behaviour. The BRS enjoyed significant support among Other Backward Classes (OBCs), especially rural groups who benefited directly from schemes like *Rythu Bandhu*. In contrast, the *Reddy* community showed a clear tilt toward the Congress — largely a result of Revanth Reddy's leadership and the traditional association of the Congress with dominant agrarian castes in the region. Among Scheduled Castes (SCs) and Scheduled Tribes (STs), preferences were mixed. While groups like *Madigas* and *Yadavas* were split between the two main parties, Congress made deeper inroads among these communities in constituencies where local caste leaders were fielded strategically. Minority voters — particularly Muslims and Christians — showed a strong lean toward Congress. At the time of the survey, I believed this was a signal of growing unease with BRS's perceived proximity to BJP-led national politics and the Congress's more inclusive rhetoric. This reading was validated in the election results, where minority-dominated constituencies swung heavily toward Congress, bolstering its urban and semi-urban seat share.

## 6. RURAL-URBAN DIVIDE: GEOGRAPHY OF SUPPORT

The geographical cleavage between rural and urban Telangana was another theme that emerged strongly in the survey. Rural areas, particularly those dependent on agriculture, continued to support the BRS. This was not surprising, given the party's focused rural welfare agenda, with schemes like *Rythu Bandhu* boasting 96% awareness and 65.2% beneficiary coverage. In many villages, I encountered a pragmatic electorate — people who valued material delivery even if they were unhappy with their MLA or local conditions. Urban voters, however, painted a different picture. In Hyderabad and other towns, the sentiment was more fractured, with growing openness toward Congress. Concerns about corruption, civic infrastructure, and employment dominated urban conversations. Urban voters were also more exposed to digital political narratives and national debates, which made them more responsive to calls for transparency, change, and leadership accountability. This urban swing was pivotal to the Congress victory, as they consolidated urban and minority-dominated constituencies that had been previously fragmented.

## 7. POLICY PERFORMANCE AND GOVERNANCE PERCEPTION

In terms of governance delivery, the BRS still scored reasonably well in our survey. Respondents gave high marks for improvements in roads, electricity, and water supply. These basics formed the backbone of BRS's development narrative. However, the feedback on government hospitals and schools was mixed, with concerns about quality and accessibility surfacing repeatedly. The survey also flagged two major concerns: religious harmony and corruption. Only 30% of respondents believed that inter-community relations had improved, while 54.1% believed corruption had increased in the last five years. This dichotomy — of visible delivery versus invisible rot — stood out to me. It encapsulated the broader challenge in Indian governance: can a regime retain power through efficient delivery alone, if it fails the moral and symbolic expectations of its citizens? The 2023 results answered this in the negative. Voters seemed to say: delivery matters, but so does dignity and fairness.

## 8. YOUTH, FARMERS, AND TRADERS: SECTORAL SENTIMENTS

Sector-specific sentiments provided yet another layer of insight. Farmers were the most appreciative of the government, with 43.7% believing their interests were protected — a testimony to BRS's rural orientation. Traders, meanwhile, were divided. Some appreciated the infrastructure and stability,

while others expressed frustration over bureaucratic inefficiencies and lack of economic growth. But the most striking pattern was among the youth. A staggering 28.9% of young respondents believed that the government had fully failed them. This was a red flag. In focus groups, I heard recurring themes of unemployment, lack of innovation in education, and absence of opportunities for upward mobility. While the older generations were still engaged with the legacy of statehood, the younger generation seemed far more future-focused. Their eventual pivot to Congress, which framed its campaign around employment and education, became a decisive factor in the election outcome.

### **9. COMMUNICATION AND CAMPAIGN: THE MISSED OPPORTUNITY**

In hindsight, one of BRS's most consequential missteps was in the realm of campaign communication. The survey showed that between 73% and 76.9% of respondents had not received any political messaging. Even more concerning was that over 80% had not been contacted by a BRS worker or candidate in the month before the survey. For a party in power, this revealed a dangerous complacency — an overreliance on past performance and a belief that infrastructure would speak for itself. In contrast, Congress adopted a more aggressive and personal style of campaigning. They used WhatsApp groups, youth mobilizers, local influencers, and street-level outreach to penetrate communities. Given that platforms like WhatsApp and YouTube were each used daily by over 34% of respondents, this failure to engage digitally and relationally cost BRS dearly. Elections in 2023 were not just about policies; they were about perceptions. And perceptions were being shaped less by manifestos and more by mobile phones.

### **10. ELECTORAL LESSONS AND STRATEGIC IMPLICATIONS**

Writing this paper in 2025, with the benefit of hindsight from the 2023 Assembly elections and the foresight of an upcoming contest in 2028, I find myself reflecting not just on what went wrong or right for Telangana's political players, but what lies ahead for them — and for the electorate. The pre-poll survey had offered many clues, and the actual results confirmed that political momentum in Telangana is highly fluid, emotionally charged, and yet increasingly rational in its expression.

For the BRS, the road ahead must begin with a deep introspection. The party can no longer depend on the nostalgia of statehood or the comfort of legacy infrastructure projects. The 2023 defeat was not merely a verdict

on performance — it was a statement on political fatigue and a disconnect with the aspirations of a younger, more restless electorate. The survey had already highlighted high levels of dissatisfaction with individual MLAs, and the results proved that voters were willing to separate the party's past from its present. To regain lost ground, BRS must renew itself from within — this means inducting fresh, credible faces, ensuring greater MLA accountability, and more importantly, reinventing its political narrative. Welfare alone is not enough anymore; the electorate wants dignity, transparency, and hope for upward mobility.

For the Congress, the 2023 victory was a significant turnaround, but sustaining that momentum will be a far greater challenge. If the party wants to hold on to power beyond 2028, it must do more than celebrate its comeback. The pre-poll survey had already indicated that Revanth Reddy's persona was beginning to resonate with a broad base of voters — especially the youth and urban middle class. Going forward, the Congress should institutionalize this charisma by building a stronger organizational apparatus, especially in rural areas where the BRS still retains emotional and material influence. Social outreach must continue, not just during election cycles but through governance that reflects inclusion and listens consistently to the concerns of farmers, youth, minorities, and backward castes. Congress must avoid the temptation to become complacent in power — it must continue acting like a challenger, not a beneficiary of a temporary electoral wave.

The BJP, meanwhile, faces a more foundational task. The 2023 elections exposed the limits of its national narrative in Telangana. Despite high-voltage campaigns and central leadership involvement, the party could not secure a decisive foothold. The pre-poll survey had shown its vote share stagnating at 8.7%, and while it won a few seats, it still lacks a coherent and credible regional leadership in the state. If the BJP wants to be taken seriously in Telangana, it must abandon parachute politics and invest in building a ground-up cadre, aligned with local aspirations and languages of identity. It needs to articulate a Telangana-specific development and cultural agenda — one that doesn't just replicate the national pitch but adapts it to regional nuances. The BJP's future in the state will depend not on its rhetoric, but on its ability to listen, adapt, and organize from below.

Perhaps the most important lesson that I carry forward from the 2023 cycle is the centrality of the “Can't Say/No Response” (CS/NR) group. In the survey, over a quarter of the electorate remained undecided or unwilling to express their preference. This group is not apathetic; they are reflective.

They represent voters who want to be convinced — not coerced. They are deeply aware of the promises and failures of past governments, yet remain open to persuasion. Political parties that can treat this group with respect, engage them with clear, issue-based communication, and offer them a sense of agency in the political process will find themselves with an edge in 2028.

As I look ahead to the next electoral cycle, I believe Telangana's politics will increasingly be shaped by three interlocking forces: demographic shifts, digital political communication, and the demand for ethical governance. A growing youth population, a digitally connected electorate, and a rising consciousness about corruption and fairness are changing the way politics is being imagined and practiced. No party can afford to ignore this. Ultimately, the road to 2028 is open — but not without challenges. Telangana's voters have proven that they are discerning, dynamic, and willing to change their minds. For political actors, this is both a warning and an opportunity. For analysts like me, it's a call to keep watching closely — not just the speeches and rallies, but the silences, the undecideds, and the mood on the ground. That is where the next election will be won — or lost.

## 11. CONCLUSION

Assessing the politics of Telangana in the 2023 Assembly elections felt, to me, like interpreting a complex novel with overlapping plots — where characters evolve mid-chapter, subplots unravel unpredictably, and the reader is constantly reminded that meaning is never singular. On the surface, it was the story of the BRS, a party that once commanded unquestioned dominance, seeing a dramatic erosion of its political capital. A party that had delivered on roads, pensions, and farmer schemes was eventually judged not just by what it gave, but by how it made people feel — ignored, unheard, or taken for granted. Our pre-poll survey had captured inklings of that brewing sentiment, but even we, like many observers, underestimated the speed and scale at which the ground was shifting.

At the heart of the election was a resurgent Congress, guided not by national figures but by a local leader with credibility — Revanth Reddy. He did not just fill a political vacuum; he created a new idiom of politics in Telangana — one that combined confrontation with connection, and populist symbolism with aspirational vocabulary. As I observed in my post-election commentary in *The Indian Express*, the Congress victory in Telangana was less about a pan-India resurgence and more about a successful regional strategy that understood caste arithmetic, youth anxiety, and the emotional

fatigue of a long incumbency (Alam, 2023). I believe this distinction is crucial. Telangana in 2023 was not voting for the Congress of Delhi — it was voting for a Congress it could call its own.

The pre-poll survey served as both a snapshot and a prophecy. It revealed key trends — rising anti-incumbency against MLAs, youth disillusionment, minority drift, and a muted communication strategy by BRS — that ultimately crystallized in the final outcome. More importantly, the survey highlighted the pivotal role of the “Can’t Say/No Response” demographic, which acted as the swing bloc. These voters, neither fiercely loyal nor perpetually sceptical, held the balance of power. Their eventual tilt toward the Congress was less a vote of blind faith and more a cry for attention and renewal.

In retrospect, what 2023 showed us is that governance delivery alone cannot substitute for democratic engagement. Infrastructure does not replace inspiration, and schemes do not silence scrutiny. Voters, especially the youth and urban poor, are no longer just passive recipients of welfare — they are demanding active roles as evaluators and shapers of political discourse. The civic maturity displayed by Telangana’s electorate — making clear distinctions between party, candidate, and leader — is indicative of a deepening democratic culture. Looking ahead to 2028, the political road is wide open but not without challenges. For the Congress, the task is to convert electoral success into institutional strength and policy innovation. For BRS, the future hinges on reinvention, humility, and listening to voices that were previously sidelined. The BJP, if it is serious about Telangana, must stop treating it as a national satellite and start nurturing it as a regional opportunity.

As someone who is following Telangana’s political journey closely, I can say with confidence that this state continues to defy linear narratives. It is young, restless, rooted, and aspirational all at once. And its politics, like its people, will keep evolving — sometimes unpredictably, but always with purpose. My hope, as a political observer and analyst, is that parties and policymakers read these signals not just as electoral feedback, but as democratic wisdom — spoken in the only language that truly matters: the ballot.

## References

- Alam, A ‘In Congress’s Telangana Victory, a Warning for Regional Parties’ *The Indian Express* (4 December 2023) <<https://>

indianexpress.com/article/opinion/columns/in-congresss-telangana-victory-a-warning-for-regional-parties-9052586/> (Retrieved 17 April 2025).

- Alam ‘In the Lok Sabha Polls, BRS is Fighting to Stay Relevant in Telangana’ *The Indian Express* (13 May 2024) <<https://indianexpress.com/article/opinion/columns/lok-sabha-polls-brs-telangana-9323599/>> (Retrieved 17 April 2025).
- Black, D, ‘On the Rationale of Group Decision-Making’ (1948) 56(1) *Journal of Political Economy* 23-34.
- Brass, P R, *Ethnicity and Nationalism: Theory and Comparison* (London: Sage 1991).
- Downs, A, *An Economic Theory of Democracy* (New York: Harper & Row 1957).
- Election Commission of India, *Telangana Legislative Election 2023- Statistical Report* (New Delhi 2023) <<https://eci.gov.in/>> (Retrieved 17 April 2025).
- Lijphart, A, *Democracy in Plural Societies: A Comparative Exploration* (New Haven, CT: Yale University Press 1977).
- McCombs, M E and Shaw, D L ‘The Agenda-Setting Function of Mass Media’ (1972) 36(2) *Public Opinion Quarterly* 176-187.
- Verba, S, Schlozman, K L and Brady, H E, *Voice and Equality: Civic Voluntarism in American Politics* (Cambridge, MA: Harvard University Press 1995).

# JUDICIAL LIQUIDATION OF SOCIAL JUSTICE THROUGH EWS JUDGEMENT

—Ayaz Ahmad\*

## ABSTRACT

*The Constitution (103rd Amendment) Act, 2019, also known as the Economically Weaker Section (EWS) amendment, provided 10% reservation to the upper caste (Savarna-Ashraaf) sections of society on economic grounds. This Amendment subverting extant social justice laws was validated by a majority of 3:2 judges of the Supreme Court in the EWS judgment after the basic structure review. Critical analysis of the assenting and dissenting opinions of the EWS judgment must take into account the contemporary developments in the social and political theory of post-structural variety to apprehend its conditions of possibility. How much the norms and values of Savarna-Ashraaf have shaped the form and content of the EWS amendment in the Parliament? How far upper caste hegemonic norms and values determined the judicial outcome in this case, where all five judges came from privileged social locations? Whether social justice, through constitutional means can, co-exist with the upper caste hegemony in the judicial process? These questions propel us to explore the Savarna 'self', which mediates legislative and judicial processes by an interpretative drive giving specific contour to our constitutional democracy. This article attempts to apprehend the power play in its judicial form through a critique of the EWS judgment.*

**Keywords:** Reservation, Economic Ground, Hegemony, Savarna, Supreme Court, Caste, Social Justice, Judicial Process.

---

\* Fulbright Visiting Scholar, Columbia University, New York. Professor, Karnavati University, Gujarat.

## 1. INTRODUCTION

While the outcome of the Economically Weaker Section/Savarna (EWS)<sup>1</sup> reservation judgment *Janhit Abhiyan v Union of India*<sup>2</sup> on the validity of the Constitution (103rd Amendment) Act, 2019 was widely expected to be within the upper caste subjectivity, an analysis of the assenting and dissenting judgments delivered by Savarna judges still carries many novel elements and lessons. The judgment stands as a lengthy testimony (399 pages) to the upper caste hegemony in the annals of judicial corridors. A class of people is understood to be hegemonic when their particular norms and values acquire universal character. In order to universalize particular norms and values, it is imperative that the members of the same class systematically articulate their position, opposition and juxtaposition. Relations of domination and subordination incessantly seek to conceal the particularity of those universal norms. Liberating subordinated norms from the dominance of universal ones in order to transform the power relations among different social classes could usher peaceful democratic revolution. This is easier said than done, as the hegemonic norms and values equally structure the subjectivity of the hegemonic and the hegemonized classes. This limitation goes to the very roots that germinate different social classes in the first place, crystallizing into a society as such. However, for the members of the hegemonic class, hegemonic norms appear to be the ultimate truth. This makes it all the more difficult for them to comprehend the utility of any argument against their truth which can destabilize their hegemony.<sup>3</sup> Analysis of the majority and minority opinions in the Savarna quota judgment needs to be done from this vantage point.

## 2. SAVARNA NORMS AND VALUES AS UPHELD BY JUSTICE DINESH MAHESHWARI

As a general rule, the Savarna judges avoid using the expression ‘*upper caste*’ or ‘*Savarna*’ as people avoid corona virus. They are anxious to do

- 
1. As EWS excludes SC, ST and OBCs from its ambit, Professor Mohan Gopal has rightly expanded this acronym to ‘Economically Weaker Savarna’ in his writings and speeches. In this article, the terms ‘Savarna’ and ‘Ashraaf’ have been used to refer to upper caste beneficiaries of EWS reservation with reference to their Brahminic and Islamic roots respectively. The term ‘Bahujan’ refers to SC, ST and OBCs jointly.
  2. (2023) 5 SCC 1 : 2022 SCC OnLine SC 1540.
  3. For a detailed conceptual detour of this tradition of thinking, see, Ernesto Laclau and Chantal Mouffe, *Hegemony and Socialist Strategy: Towards a Radical Democratic Politics* (Verso, London 2014); Chantal Mouffe, *The Democratic Paradox* (Verso 2000); Ernesto Laclau, *On Populist Reason* (Verso, London 2005); Ernesto Laclau, ‘Why Constructing a People is the Main Task of Radical Politics’ (2006) 32(4) *Critical Inquiry* 646-680; Ernesto Laclau, *Emancipation(s)* (Verso, London 2007).

so lest the all-upper caste social location of the judges break down the immunity of their judgment. In the opinion of Justice Dinesh Maheshwari, the word upper caste appears only once, that too when the submissions made by the counsels are summarized by him. This conspiracy of silence and avoidance runs throughout the EWS judgment. For instance, Justice Maheshwari makes the following observation in the analysis of Article 16: “*Clauses (4) and (4-A) of Article 16 carve out another exception to the rule of equality*”.<sup>4</sup> He goes silent on the ratio of *State of Kerala v N M Thomas*<sup>5</sup> and *Indra Sawhney v Union of India*<sup>6</sup> whereby it was held by larger benches that Articles 15(4) and 16(4) are *not an exception* to Articles 14, 15(1), 16(1) instead they are *a facet of equality*, it is merely *an emphatic way of stating a principle* implicit in the latter. It only implies that affirmative action would have been valid under Articles 14, 15(1) and 16(1), even in the absence of Articles 15(4) and 16(4). However, Justice Maheshwari did not miss the opportunity to reiterate Savarna judicial trope that provisions contemplated under Articles 15(4) and 16(4) are merely enabling provisions. This trope has already been used in some politically dominant Savarna states to kill reservations effectively.<sup>7</sup> That’s why it is crucial to assert that if Articles 15(4) and 16(4) are not an exception to Articles 14, 15(1) and 16(1), then Articles 15(4) and 16(4) could not be reduced to mere enabling provisions. Justice Maheshwari incorrectly relies on fallacious ‘reservation is an exception to equality’ view to exclude it from the basic feature of the Constitution overruling a constitutional position settled by much larger benches than itself.<sup>8</sup>

Justice Maheshwari moves on to quote select parts of the Objectives Resolution adopted by the Constituent Assembly, Dr. B.R. Ambedkar’s speech therein, H.M. Seervai’s book and the Preamble where the word ‘economic’ appears and latches on it to argue that our constitutional democracy aspires to achieve economic democracy as well. However, he does not bother to note that none of these references even remotely indicate reservation on economic grounds. Instead, Justice Maheshwari quotes many judgments which refer to social and economic democracy without any reference to the reservation and silently seeks to connect ‘*economic*’ ground with reservation. Similarly, his reference to some U.S. Supreme Court

---

4. para 52.2 of Justice Maheshwari’s opinion. Henceforth, all referred paras are from Justice Maheshwari’s opinion unless indicated otherwise.

5. *State of Kerala v N M Thomas* (1976) 2 SCC 310 : (1976) 1 SCR 906.

6. *Indra Sawhney v Union of India* 1992 Supp (3) SCC 217 : 1992 Supp (2) SCR 454.

7. See *Mukesh Kumar v State of Uttarakhand* (2020) 3 SCC 1.

8. para 56.

judgments concerning the Fourth and Fifth Amendments is equally stale as they do not confine economic backwardness to a select class of socially advanced citizens as impugned EWS does. Justice Maheshwari even refers to the United Nations General Assembly Resolution to equate reservation with a poverty reduction program and purge out its representative character entirely. Towards this end, he repeatedly conflates the State's responsibility to act against poverty with the need to make the state representative of all social classes in its configuration.<sup>9</sup>

In order to establish the economic criterion for reservation Justice Maheshwari selectively cites the sympathetic views of fellow upper caste judges from judgments like *M R Balaji v State of Mysore*,<sup>10</sup> *R Chitralekha v State of Mysore*,<sup>11</sup> *Janki Prasad Parimoo v State of J&K*,<sup>12</sup> *State of Kerala v N M Thomas*,<sup>13</sup> *Shantistar Builders v Narayan Khimalal Totame*,<sup>14</sup> *Indra Sawhney*<sup>15</sup> and *M Nagaraj v Union of India*<sup>16</sup> Many of those quotations often carry mutually contradictory views. Everything from these judgments which goes against the exclusive economic ground for reservation is either conveniently ignored or brazened out. Whatever Justice Maheshwari quotes fails miserably to bring out economic factor as an exclusive yardstick for reservations. Some of it actively militates against the exclusive economic criterion. Nevertheless, he persists. His reasoning after an explicitly unfavourable quotation often sounds like this: "Scientists have proved that sun rises from the east in the morning. Therefore we should turn towards the west in the morning to greet the sun"! He seeks to mitigate the absurdity of his proposition by arguing that previous judgments against exclusive economic criteria for reservation were meant "*only for class or classes covered by or seeking coverage under Articles 15(4) and/or 15(5) and/or 16(4)*".<sup>17</sup> Justice Maheshwari makes no effort to defend this conclusion with reference to the quotations that he cites. Instead, he quickly moves on to Article 46 leaving the reader wondering about the purpose of those long quotations which form the bulk of his opinion.

---

9. paras 58 to 69.

10. *M R Balaji v State of Mysore* 1962 SCC OnLine SC 147 : 1963 Supp (1) SCR 439.

11. *R Chitralekha v State of Mysore* 1964 SCC OnLine SC 88 : (1964) 6 SCR 368.

12. *Janki Prasad Parimoo v State of J&K* (1973) 1 SCC 420.

13. *State of Kerala v N M Thomas* (1976) 2 SCC 310 : (1976) 1 SCR 906.

14. *Shantistar Builders v Narayan Khimalal Totame* (1990) 1 SCC 520.

15. *Indra Sawhney v Union of India* 1992 Supp (3) SCC 217 : 1992 Supp (2) SCR 454 .

16. *M Nagaraj v Union of India* (2006) 8 SCC 212.

17. para 73.

In reading Article 46, Justice Maheshwari invokes the principle of distributive justice only to turn it on its head. His discussion of Article 46 alongside distributive justice rests on just one assumption that reservation is a poverty alleviation program. Having failed to substantiate this assumption, he turns to Preamble phrases like justice, social, economic and political, including fraternity, for support without providing any plausible legal reasoning. It is absolutely incomprehensible how these words in the Preamble support reservation on economic ground alone. Justice Maheshwari hopes to find some solace in the rules of interpretation. He refers to the living tree theory of the Constitution, which in this context advocates infinite stretching of constitutional text to accommodate any meaning that Justice Maheshwari wants to find there. When Justice Maheshwari looks at the constitutional text, he only sees empty signifiers, which can be filled with whatever meaning he deems necessary to uphold the EWS reservation. Despite labouring considerably with Article 46, he is unable to establish any relationship between economically weaker Savarna and reservation for them. He lamely refers to Articles 38 and 39 which even he knows stand firmly against any such relation.

On the exclusion of socially and educationally backward classes (SEBCs) from the benefit of EWS reservation Justice Maheshwari is even more evasive. He observes that “*poverty is a material factor taken into consideration along with caste, residence, occupation or other dominant feature while recognising any particular class/caste’s entitlement to the affirmative action by way of reservation enabled in terms of Articles 15(4), 15(5) and 16(4)*”.<sup>18</sup> He does not pause to ponder that when poverty is already taken into account for providing reservation to SEBCs, EWS reservation on the ground of poverty loses all its validity. Wherever a caste suffers from poverty, it shows up in its social and educational status, and that caste finds a place in the OBC category. There is no caste that fails to make it to the OBC category and still remains poor as a class. Justice Maheshwari seeks to transcend this reality by conjuring up a classification between “*economically weaker sections*” and “*other weaker sections*” as if the latter does not already include the former. This fallacy was reiterated later in the judgment, where he stated that the 50% ceiling rule was meant to benefit ‘*general merit candidates*’, completely ignoring that it always included the SEBCs. The rising share of SEBCs in the general merit candidate list is the reason why EWS has been brought in the first place. Even if the SEBCs were to be included in the EWS quota, it could not validate reservation

---

18. para 78.

for the Savarna given their preponderance in all public institutions, power structures and prosperity indicators.<sup>19</sup>

Justice Maheshwari treats EWS reservation as another form of “*compensatory discrimination*” so as to put it on the validating pedestal of SEBC reservation. One may ask, if EWS reservation is a compensation scheme for the discrimination that the poor Savarna-Ashraaf have faced, then who was the discriminator? After the departure of the British from India, power fell in the hands of Savarna in India and Ashraaf in Pakistan.<sup>20</sup> Is it the case that rich Savarnas, who have been in a position of economic, social and political power since independence, discriminated against the poor Savarnas? Justice Maheshwari assumes that they did. If this assumption is correct, then it is a serious charge against the rich and powerful Savarna, which sociologists, psychologists, economists and political scientists must urgently investigate. However, even if such a charge of discrimination is found to be truthful, then more than the EWS quota, what we need is a comprehensive policy for reforming the rich Savarna Ashraaf who fall prey to classist, casteist and communal impulses so easily. Instead, Justice Maheshwari invokes the creamy layer principle to support the EWS reservation, which the Supreme Court invented to arrest social democracy in the first place.<sup>21</sup>

- 
19. Prannv Dhawan, Christophe Jaffrelot and Kalaiyarasan A, ‘Supreme Court’s EWS Verdict: Why Diluting Caste-Based Reservations is a Counterproductive Move’ *The Indian Express*, 18 November 2022; Namit Saxena, ‘Disproportionate Representation at the Supreme Court: A Perspective Based on Caste and Religion of Judges’ *Bar and Bench*, 23 May 2021; Shyamlal Yadav, ‘Reservation Candidates are under-Represented in Govt’s Upper Rungs’ *The Indian Express*, 17 January 2019; Who Tells Our Stories Matters, Oxfam India Report, 2 August 2019; IDIA Diversity Survey Report, 2018-2019.
20. G Aloysius, *Nationalism without a Nation in India* (Oxford University Press, New Delhi, 1st edn 1998); D N Jha, *Ancient India: In Historical Outline* (Manohar, New Delhi, 2nd edn 1998); Braj Ranjan Mani, *Debrahmanising History: Dominance and Resistance in Indian Society* (Manohar, New Delhi, 1st edn 2005); Gail Omvedt, *Understanding Caste: From Buddha to Ambedkar and Beyond* (Orient Blackswan, Delhi 2011); Perry Anderson, *The Indian Ideology* (Three Essay Collective, Gurgaon, 2nd edn 2015); Khalid Anis Ansari, ‘Revisiting the Minority Imagination: An Inquiry Into the Anticaste Pasmanda-Muslim Discourse in India’ (2023) 11.1 Critical Philosophy of Race 120-147.
21. See Ayaz Ahmad, ‘Role of Supreme Court in Arresting Social Democracy’ in Salman Khurshid, Yogesh P Singh, Lokendra Malik, et al (eds), *The Supreme Court and the Constitution: An Indian Discourse* (Wolters Kluwer, New Delhi, 2020) 182-205; Kuffir Nalgundwar, ‘Let’s Skim the Upper Caste Creamy Layer’ Round Table India, 14 September 2012.

Having failed comprehensively in finding any constitutional basis for the EWS reservation, Justice Maheshwari triumphantly proclaims that the Amendment in question cannot be said to be in such a violation of the rule of equality which is shocking in the hope that such an act of triumphant proclamation itself will foist the Amendment with a semblance of legitimacy. It is only in his discussion of the basic structure doctrine tempered with Parliamentary sovereignty that Justice Maheshwari sounds little persuasive.<sup>22</sup> The discussion of the 50% ceiling by Justice Maheshwari too is rife with many contradictions and unfounded easy conclusions. Here he begins with the understanding that SEBCs do, after all, contain economically weak but immediately asserts that they cannot object to the breach of the 50% ceiling as there is another separate class and section, i.e., economically weaker section.<sup>23</sup> The paradox could not be more palpable. If SEBCs already include the economically weak, then how does EWS constitute a “*separate class and section*”? Similarly, if EWS is a separate class, then why does it not include all people with low incomes in it? Why shouldn’t SEBCs object when the general pool open to them shrinks by 10% without any reason or rhyme especially when their representation is far less than their share in population?

Further, if the ceiling of 50% was so malleable, then what was the justification for imposing it on SEBCs when their population exceeds it by 30-35%? How can the 50% ceiling operate harshly against SEBCs but evaporate without a trace for the Savarna Ashraaf quota? One of the main contentions of Justice Maheshwari in support of such a contradictory position is that the 50% ceiling rule originated in cases pertaining to SEBCs. How could it be otherwise? How could 50% ceiling rule cases refer to EWS when it was non-existent at that time! Be that as it may, if the ceiling of 50% is good to be applied on SEBCs whose population is far in excess, then it must apply to the Savarna quota with equal force as their population is hardly 15%.<sup>24</sup> Again, all the judgments that Justice Maheshwari cites only establish that the 50% ceiling is just a rule of caution which cannot be mechanically applied to any case of reservation. Yet he concludes that the 50% ceiling rule somehow can apply exclusively to SEBC cases of affirmative action!

---

22. para 87.1.

23. para 90.

24. Several official studies conclude that SC, ST and OBC taken together are 85% while Savarna constitute 15% of the total population.

Moreover, Justice Maheshwari quotes the passages from *M Nagaraj v Union of India*<sup>25</sup> which created the prerequisite of establishing backwardness and inadequacy of representation for implementing SEBC reservation in order to uphold the breach of the 50% ceiling by the EWS amendment. However, those prerequisites were created in *M Nagaraj* precisely to impose the rule of 50% and not to breach it.<sup>26</sup> Similarly, the quotations from *K Krishna Murthy v Union of India*<sup>27</sup> and *Jaishri Laxmanrao Patil v Chief Minister*<sup>28</sup> cited by Justice Maheshwari, clearly show that the 50% ceiling rule is a general requirement of the equality principle and not confined to SEBCs.<sup>29</sup> Therefore, either these requirements are valid for all classes of reservation or none at all. They cannot be imposed on SEBC reservations alone in a contemptuous and discriminatory fashion leaving the pure EWS quota out of their net. Such an approach will collapse the constitutional structure of equality, both formal and substantive, beyond recognition.

Judicial demand for data relating to backwardness, inadequacy and efficiency from SEBC delayed and derailed reservations for them. Not including these demands in the judicial review of the EWS quota makes the review patently partisan. Aware of this truth, Justice Maheshwari seeks to atone by suggesting that the EWS quota, too, can be reviewed with judicial demand for data sometime in future.<sup>30</sup> Why such a review in the future when the EWS quota was alive and roaring even before hearings in this case began? The answer is simple that such a review would have compounded the discriminatory character of the EWS amendment, making it even more difficult to survive the basic structure challenge. For all these reasons, there could not have been a more appropriate occasion to invoke the doctrine of basic structure. The EWS judgment lost the opportunity to demonstrate that the basic structure doctrine is not yet another device to serve the vested interests of the hegemonic caste/class.<sup>31</sup>

A more fundamental attack on the reservation is the attempt by Justice Maheshwari to stamp out Article 16 of its representative core. In Para 98, he seeks to establish that the representation related provisions of Article 16 are not confined to ‘*representation*’ alone. This he concludes by referring to the carry forward rule incorporated in Article 16(4B), which was

---

25. *M Nagaraj v Union of India* (2006) 8 SCC 212.

26. para 92.7.

27. *K Krishna Murthy v Union of India* (2010) 7 SCC 202.

28. *Jaishri Laxmanrao Patil v Chief Minister* (2021) 8 SCC 1.

29. para 92.9.

30. para 97.

31. n 21.

ironically brought in through constitutional Amendment for the purpose of representation only! When nothing appears to favour his particular conclusion on this issue, Justice Maheshwari excludes representation purpose too from the ambit of Article 16(6).<sup>32</sup> In Para 99.1, he underlines the need to construct laws, including constitutional amendments, in harmony with International Law without referring to any International Convention which advocates reservation on economic ground.

Similarly, he quotes Justice Cardozo as cited in *Kesavananda Bharati v State of Kerala*<sup>33</sup> and Cooley's passage about the need for judicial restraint in the matters of the challenge to constitutionality, blissfully ignoring that they relate to judicial review of ordinary legislation and not a constitutional amendment like EWS. In the next Para, Justice Maheshwari makes an analogous argument with reference to previous amendments to Articles 15 and 16, which were found to be valid, holding that the EWS amendment, too, is valid.<sup>34</sup> This analogy elides the fact that previous amendments were made to overcome judicial impediments to achieve substantive equality, while the EWS amendment seeks to entrench inequality substantially.

Para 101 of Justice Maheshwari's opinion starkly reveals everything that is wrong with the basic structure doctrine. If provisions concerning substantive equality contained in Articles 15 and 16 cannot be treated as an essential feature of the Constitution, does it really matter what else is included? The ease with which Justice Maheshwari brushes aside reservation as a means of affirmative action from being part of the constitutional basic structure while Justice R. F. Nariman includes the creamy layer principle in *Jarnail Singh v Lachhmi Narain Gupta*<sup>35</sup> which was judicially developed to qualify reservation should send alarm bells ringing for anyone serious about the rule of law. Not that the doctrine of the basic structure had any real justification before, but after its non-application in the EWS judgment, the doctrine has been significantly weakened. Finally, in his rush to validate the EWS amendment, Justice Maheshwari handed over the '*basic structure pass certificate*' without contesting its part related to EWS admission in private educational institutions.<sup>36</sup> For a similar certificate, SEBCs had to struggle for over a decade.<sup>37</sup>

---

32. para 98.1.

33. *Kesavananda Bharati v State of Kerala* (1973) 4 SCC 225.

34. para 100.

35. *Jarnail Singh v Lachhmi Narain Gupta* (2018) 10 SCC 396.

36. paras 103 and 104.

37. *Pramati Educational and Cultural Trust v Union of India* (2014) 8 SCC 1.

### 3. JUSTICE BELA M TRIVEDI'S CONCURRENCE WITH UPPER CASTE NORMS AND VALUES

After concurring with Justice Maheshwari and paying ritualistic homage to the doctrine of basic structure, Justice Trivedi begins to undermine both with select quotes from judgments authored by upper caste judges. The object of her judicial excursion is straightforward: to justify social classification on the economic basis as rational. She deploys the theory of reasonable classification to gouge out social justice from the constitutional principle of equality. With this move, Justice Trivedi supports reservation on economic ground for Savarna *as well as* the exclusion of economically poor SEBCs from it as a rational classification. For once, classification on economic ground alone for the purpose of poverty alleviation can indeed be reasonable. In fact, many poverty reduction programs and schemes run by the Union and State governments to provide food, housing, health, and employment to the poor irrespective of castes serve this purpose which remain valid. EWS, on the other hand, is not on the economic ground alone. It is meant for the Savarna Ashraaf only. So, the basis of EWS is both caste and poverty. The only way this classification could be reasonable is if it was meant to provide representation to the poor Savarna Ashraaf who were not adequately represented in educational institutions and public employment. To ascertain such inadequacy, one needs to find the share of poor Savarna Ashraaf vis-a-vis rich Ashraaf Savarna in public and institutions. However, the reality is that Savarna generally remains excessively represented in public services and educational institutions due to their cultural capital.<sup>38</sup> The trinity of Parliament, Executive and Judiciary dominated by the Brahmin Savarna know it very well. Without such dominance, the conception of EWS was impossible. This is why none of them even remotely made an attempt to justify EWS as a measure to provide representation to economically poor Savarna. There is no intelligible differentia between upper caste poor and the lower caste poor. In the absence of any representative character to EWS, there is no rational nexus with the object sought to be achieved by such a classification. This violates the first principle of equality, which is an essential part of the basic structure of the Constitution. Hence, the EWS amendment fails the basic structure scrutiny like no other. All that verbal jugglery in Justice Trivedi's concurrence is to avoid this immanently obvious consequence of basic structure challenge against the EWS classification.

---

38. n 19.

In Para 21 of her opinion, Justice Trivedi contends that the SEBCs for whom the special provisions has been provided in Articles 15(4), 15(5), and 16(4) form a separate category as distinguished from the “*general or unreserved category*”. The conclusion of Justice Trivedi based on the quoted sentences are factually and legally incorrect. The SEBCs were always an integral part of the *general or unreserved category* to the extent they qualified in this category. Therefore, a separate class of “*economically weaker sections of the citizens*” cannot be rationally created from the *general/unreserved class*, which does not include SEBCs. It is like an attempt to drink only hydrogen from water leaving the oxygen untouched in the glass! Such an egregious violation of the equality principle is so wide and deep that it totally mutilates the identity of the Constitution, rendering the 103<sup>rd</sup> EWS Amendment patently unconstitutional.

However, Justice Trivedi reserves her best for the comment on the time span of the reservation policy. First, she selectively refers to a few anti-social justice paras from *K C Vasanth Kumar v State of Karnataka*<sup>39</sup> and *Ashoka Kumar Thakur v Union of India*<sup>40</sup> judgments, leaving out a much richer opinion of Justice O Chinnappa Reddy in the former case. On this basis, she advocates the abolition of reservations and representations provided through Article 15 and Article 16 within a certain time limit which she considers ‘transformative constitutionalism’. Justice Trivedi thinks that this kind of ‘affirmative action’ can lead to an egalitarian, casteless and classless society. Savarna judges and their high fancy ideals!

#### **4. IRRESISTIBLE APPEAL OF SAVARNA BELIEFS AND VALUES FOR JUSTICE J.B. PARDIWALA**

After noting the majority and minority opinions of Justice Dinesh Maheshwari and Justice Ravindra Bhat, respectively, Justice Pardiwala provides reasons for his agreement with the majority opinion. He starts by referring to *State of Madras v Champakam Dorairajan*<sup>41</sup> which was decided in complete disregard to the constitutional vision of egalitarian society and hence undone by the very first Amendment to the Constitution. What purpose is served by citing a judgment which lost all its legal value soon after it was delivered 75 years ago? By repeatedly referring to this case, Savarna judges hope to normalize judicial aversion to all affirmative action

---

39. *K C Vasanth Kumar v State of Karnataka* 1985 Supp SCC 714.

40. *Ashoka Kumar Thakur v Union of India* (2008) 6 SCC 1.

41. *State of Madras v Champakam Dorairajan* 1951 SCC 351 : 1951 SCR 525.

which can destabilize caste and communal foundations of the Brahminical order.

After this, Justice Pardiwala harks back to the classification principle on which he hardly has anything more to add than what Justice Maheshwari and Justice Trivedi had already said. Later, Justice Pardiwala narcissistically refers to *Mohini Jain v State of Karnataka*,<sup>42</sup> *Unni Krishnan, J P v State of A.P.*<sup>43</sup> and *T M A Pai Foundation v State of Karnataka*<sup>44</sup> judgments eulogizing the role of the Supreme Court in developing the right to education.<sup>45</sup> However, an impact analysis of these judgments reveals that they ended up structuring private educational institutions as an exclusive preserve of the wealthy Savarna Ashraaf class.<sup>46</sup> It is unclear how these references and quotations help the cause of the EWS amendment. Such meaninglessness runs through most of his judgment. For instance, in Para 40 and 41, Justice Pardiwala aimlessly draws a distinction between the “backward classes” referred to in Article 16(4) and “SEBCs” referred to in Article 15(4) only to acknowledge in Para 42 the *undisputed position* that the State is using the categorization of SEBC for both!

Left perplexed by Justice Maheshwari’s per in-curium suggestion that Articles 15(4) and 16(4) are an exception to Articles 14, 15(1) 16(1), Justice Pardiwala refers to *State of Kerala v N M Thomas*<sup>47</sup> and *Indra Sawhney v Union of India*<sup>48</sup> in Para 43 and 44 to correct the record. However, he has nothing to say about Justice Maheshwari’s misadventure on this point with the help of these references or his concurrence with him earlier in the judgment. Next, he refers to *Pramati Educational and Cultural Trust v Union of India*<sup>49</sup> whereby the validity of those parts of Article 15(5), which concern SEBC reservation in private unaided educational institutions added by the Constitution 93<sup>rd</sup> Amendment Act, 2005, was affirmed. Justice Pardiwala uses *Pramati*’s affirmation to uphold the validity of Article 15(6) added by the EWS Amendment on the basis of analogy.<sup>50</sup> He completely ignores that the reasoning of *Pramati* related to SEBC class which could not be extended to EWS class unless it is established that both classes have identical characteristics. Instead, he casually touches on subjects like the

42. *Mohini Jain v State of Karnataka* (1992) 3 SCC 666 : AIR 1992 SC 1858.

43. *Unni Krishnan, J P v State of A.P.* (1993) 1 SCC 645 : AIR 1993 SC 2178.

44. *T M A Pai Foundation v State of Karnataka* (2002) 8 SCC 481.

45. paras 36 to 39 of Justice J.B. Pardiwala’s opinion. Henceforth, all referred paras are from Justice Pardiwala’s opinion unless indicated otherwise.

46. For a critical analysis of these judgments, see Ayaz Ahmad and Nachiketa Mittal, ‘Constitutive Functions of Minority Rights and Social Justice in India’ (2022) 64: 3 Journal of Indian Law Institute 341.

right to education, the Preamble, the Fundamental Rights, the Directive Principles of State Policy, social justice, the right to work, the creamy layer, inclusion of castes into the OBC list through quotations from different judgments without any real conclusion.<sup>51</sup> Para 61 to 63 are dedicated to find some grounds, preferably economic, for identifying backward class without reference to historical conditions which create backwardness. This attempt is hardly persuasive as the lone example of judicial recognition of the third gender cited by him is a case of backwardness due to historical reasons only.

On economic criteria for reservation, Justice Pardiwala first quotes certain parts of *N M Thomas case*<sup>52</sup> from assenting and dissenting opinions, which again gives us no conclusion. This is inevitable as these quotations are so haphazard; now, it is about the affirmative obligation of the State, and then it is about the indigent defendant. Here, you have assenting opinion supporting reasonable classification for social justice; there, you have dissenting opinion rejecting classification as unreasonable.<sup>53</sup> In desperation, he leans on the dissenting judgment of Justice Bhat for support on this issue.<sup>54</sup> Justice Pardiwala seeks to summarize his concurring judgment in Para 68. Here again, we find no conclusion regarding the economic criteria for reservation. It is in Para 69 where there is something of a conclusion about the relevance of economic criteria. He first correctly observes, “*If adequate representation in services of the under-represented class was the sole purpose of Article 16(4), any person from that class would be representative of that class*”.<sup>55</sup> However, he adds that judicially invented creamy layer exclusion qualifies this statement.<sup>56</sup> This exclusion of the creamy layer from the ‘backward class’ in Article 16(4) is presented as evidence of economic criteria being relevant for the purposes of Article 16 as a whole! In essence, one generation of Savarna judges invented the creamy layer principle to dilute the purpose of Article 16(4), and the next generation of Savarna judges used this diluted form of Article 16(4) to legitimize its further impoverishment through the EWS Amendment. Upholding the validity of the 103rd Amendment, Justice Pardiwala in Para 70 observes that economically weak Savarna *suffer from similar disadvantages as the OBCs*. If this indeed was the case, then how

---

51. paras 54 to 60.

52. *State of Kerala v N M Thomas* (1976) 2 SCC 310 : (1976) 1 SCR 906.

53. para 66.

54. para 67.

55. para 69.

56. *Indra Sawhney v Union of India* 1992 Supp (3) SCC 217 : 1992 Supp (2) SCR 454.

could successive OBC commissions fail to add poor Savarna to the OBC category? In that case, the OBC share could be increased by 10, 20 or 30% to help these poor Savarna as much as possible. However, Savarna legal strategists, jurists and judges are well aware that the economically weak Savarna *do not* suffer from similar disadvantages as the OBCs. They know for sure that the data suggesting even a *remote similarity* has already been exhausted by casually adding many Savarna castes to the state OBC lists.

Later, Justice Pardiwala holds that Article 46 cannot be interpreted on the principle of *ejusdem generis*.<sup>57</sup> Plasticity of the principles of interpretation allows all judges, including Savarna judges, to apply this or that principle selectively that agrees with the particular meaning that they seek to advance.<sup>58</sup> Justice Pardiwala makes full use of this plasticity in concluding that Article 46 is not based on the social test but on the means test, making expressions ‘*Scheduled Castes or the Scheduled Tribes*’ and ‘*social injustice*’ used in this Article completely irrelevant and out of place. So much so that he believes taking into account “*social status*” in interpreting Article 46 would be a strain and “*nullify otherwise the pure object of Article 46*”.<sup>59</sup> The pure object of Article 46, according to Justice Pardiwala, is to provide reservation to poor Savarna!<sup>60</sup>

Next Justice Pardiwala attempts to differentiate the theory of interpretation of a Constitution from the theory of interpretation of statutes. Here again, we find a patchwork of quotations from different judgments without any discernible order or conclusion.<sup>61</sup> A similar pattern ensues in the discussion of the doctrine of basic structure.<sup>62</sup> One Yaniv Roznai’s PhD thesis occupies the bulk of space in this discussion, including for the standards of review of the constitutional amendments.<sup>63</sup> Much of the debate over the basic structure doctrine is an exercise in tautology, making no new point whatsoever.<sup>64</sup> However, his concern about the difficulty in restraining the judiciary from making indiscriminate, undesirable and arbitrary use

---

57. para 79.

58. Karl N Llewellyn, ‘Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes are to Be Construed’ (1950) 3 *Vanderbilt Law Review* 395; Mark V Tushnet, ‘Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles’ (1983) 96 *Harvard Law Review* 781.

59. para 81.

60. paras 82 and 83.

61. paras 84 to 96.

62. paras 97 to 103.

63. paras 104 to 107.

64. paras 108 to 127.

of the basic structure doctrine problematizes the very existence of the doctrine itself.<sup>65</sup> The highest point of his opinion comes in Para 132 where he proclaims that, “*If the necessary changes cannot be brought through constitutional means, revolution becomes a necessity. Thus, an unlimited amending power and a simple procedure of Amendment is an effective means to bring about social revolution through law*”. It is the only point that has been argued coherently by Justice Pardiwala, as it stems from his awareness that the EWS Amendment could not be justifiably upheld without overthrowing the doctrine of basic structure. But the commitment to logical consistency hardly bothers him as he accepts the basic structure doctrine in the next few Paras without blinking an eye.<sup>66</sup>

Justice Pardiwala in Para 154 ascertains that a constitutional amendment would violate the doctrine of basic structure if it violates some overarching principle of the Constitution. Not only this, in a rare display of continuity, he acknowledges that “*egalitarian equality*” is an overarching principle. Later, he explores how the expression “*Rule of Law*” constitutes an overarching principle<sup>67</sup> without reasoning out whether the EWS Amendment violates these overarching principles. In the same fashion, the “*effect test*” and the “*degree test*” are referred to without any attempt to review the EWS amendment in their light. Instead, the “*similarly situated test*” is taken up as “*the pivotal or seminal question*” for consideration by Justice Pardiwala. The only problem here is that such a consideration never takes place in any coherent way. Moreover, Justice Pardiwala abandoned all the tests and principles he referred to thus far and returned to the identity test of *Kesavananda Bharati case*.<sup>68</sup> However, the EWS amendment is not tested even on the identity test.

The real purpose of writing this long, confused and repetitive concurring opinion becomes clear when Justice Pardiwala begs to differ with Justice Ravindra Bhat on the question of SC/ST/OBC exclusion from EWS reservation.<sup>69</sup> Justice Bhat, in his dissenting opinion, to be analyzed in the next section, quashed the EWS Amendment on the ground of this exclusion. However, to differ from Justice Bhat on this issue, Justice Pardiwala does not use any of the tests and principles he discussed above. Instead, he brings up two facets of classification recognized under Article 14. One is

---

65. para 128.

66. paras 133 to 136.

67. para 156.

68. *Kesavananda Bharati v State of Kerala* (1973) 4 SCC 225.

69. para 163.

left flabbergasted by now; what was the point of quoting and discussing so many tests and principles for reviewing a constitutional amendment if the EWS amendment was to be reviewed on the basis of the Article 14 classification principle developed to review ordinary laws? Even for this review, all that he has to say is that “*differentia used for the classification in the EWS amendment is to promote or uplift the economically weaker sections of citizens*”. What exactly is the differentia here is not explained at all. If it is economic status, then how come the majority of economically weak find themselves out from the EWS? If it is caste, then how come the majority of lower castes find themselves out from it?

In Para 168, Justice Pardiwala observes that “*there is a yardstick used for constituting the class for the purpose of the amendment*”. What is this “*yardstick*” is never revealed. Subsequently, in Para 171, he seeks to justify the exclusion of SEBCs from the EWS by suggesting that such a classification is to prevent double benefit. This suggestion fundamentally undermines the Parliamentary claim that there exists an economically weak class of people who are not adequately represented in need of representation. Minus SEBCs, what is left of EWS is a small minority of Savarna who, in fact, are over-represented in State services and educational institutions.<sup>70</sup> Is there any data to suggest that this group of Economically Weak Savarna are under-represented in any walk of life? None whatsoever. The only situation in which the poor will appear under-represented is when the category of poor includes SEBCs. To demonstrate under-representation by including SEBCs and then to enact EWS reservation by excluding SEBCs tantamount to public fraud. It is clear that the classification of an economic class under Indian conditions is a theoretical and practical impossibility. Perhaps EWS would have made some sense if it provided 10% reservation to the poor OBC as the OBC population exceeds 50%, but it gets only 27% reservation.

Justice Pardiwala goes on to ask that when provision for the advancement of SEBCs is not characterized as the one based on any prejudice, contempt or insult to any forward class then why should a provision for the advancement of any economically weaker section of the society excluding SEBCs be characterized as the one based on prejudice, contempt or insult to SEBCs? He does not pause to ponder that constitutional affirmative action for SEBCs is due to their systematic and structural exclusion historically enacted through a social system characterized by increasing order of reverence and decreasing order of contempt.<sup>71</sup> This social system

---

70. n 19.

71. Dr B R Ambedkar, *Annihilation of Caste* 1 (BAWS 1936) 23 to 96.

was presided by the Savarna Ashraaf, including their economically weak sections. EWS amendment seeks to equate such poor Savarna with SEBCs. Does this *equal treatment of unequals* not violate the equality principle? Is it not prejudiced, contemptuous and insulting to the SEBCs who find their socio-economic mobility obstructed both in the past and present due to the complicity of economically weak Savarna with whom they are now equated by the EWS amendment?

Justice Pardiwala quotes from *Ashok Kumar Thakur v Union of India*<sup>72</sup> on the inclusion of an equality code in the basic feature of the Constitution. The following lines are particularly relevant to decide the issue: “*The larger principles of equality as stated in Articles 14, 15 and 16 may be understood as an element of the “basic structure” of the Constitution and may not be subject to amendment*”. EWS amendment violates this significant principle of equality to the extent that the constitutional identity is altered in the most fundamental way. 103<sup>rd</sup> Amendment empowers socially advanced sections in such a way that the gap with socially disadvantaged sections will expand rather than shrink. In other words, EWS reservation will only increase social inequality, negating the constitutional ideal of social equality.

Para 187 makes it abundantly clear that Justice Pardiwala just wants to eradicate *caste-based reservation*. He invokes Nani A. Palkhivala to support his socially blind conclusion. He even invokes Dr. Ambedkar’s definition of fraternity to railroad against the constitutional promise of social equality. This is a direct attempt to place Dr. Ambedkar’s unflinching commitment to equality against his commitment to the fraternity in order to subvert both. Dr. Ambedkar clearly articulated that fraternity without social equality is impossible. In fact, his undelivered speech titled ‘*Annihilation of Caste*’ cited by Justice Pardiwala, there is not a single instance where Ambedkar’s reference to fraternity is not preceded by his concern for social equality.

By the end of his judgment Justice Pardiwala advocates the elimination of anti-caste reservation policy. He seeks removal of large percentage of backward class members from the backward categories. He has no idea that a periodical review of the backward category list does take place where the decision about exclusion and inclusion of a backward/forward caste is made. Whenever and wherever a caste is found to have fallen backward as a class, it is included in the backward category list along with its economically weak members. This exercise completely obviates the need for enacting a separate reservation for poor Savarna. Justice Pardiwala in Para 190

---

72. *Ashok Kumar Thakur v Union of India* (2008) 6 SCC 1.

comments on the duration of reservation by wrongly invoking Babasaheb Ambedkar. Even a cursory look at Dr. Ambedkar's life and writings would make it evident that he wanted to bring social harmony by establishing social equality after annihilating caste. He did not introduce reservation for only ten years. As a matter of fact, the present political reservation was imposed on him by snatching the right to double vote through Poona Pact by Gandhiji on a threat of grave physical violence to his people.<sup>73</sup> Justice Pardiwala nevertheless concludes his opinion by validating the impugned Amendment on the back of one falsehood after another.

##### 5. DISSENTING ASSENT OF JUSTICE S. RAVINDRA BHAT

At the very outset, Justice Bhat qualifies his dissent by expressing his assent with his Savarna brothers and sister on the issue of 'economic criteria' for affirmative action.<sup>74</sup> His conscience is pricked only by the exclusionary and discriminatory principle which is integral to the EWS Amendment. He rightly corrects the factual inaccuracy of the majority opinions regarding Articles 15(4) and 16(4) being an exception to Articles 15(1) and 16(1) by citing relevant judgments of much larger benches from *N.M. Thomas*, *Indra Sawhney* to *M. Nagaraj*. Thereafter, Justice Bhat carries out a brief survey of the doctrine of basic structure and concludes that the equality code is an integral part of it. He revisits the test for determining the basic structure and the methodology of determining whether a constitutional amendment violates the basic structure with reference to *Kesavananda Bharati*, *Indira Nehru Gandhi v Raj Narain*<sup>75</sup> and *M. Nagaraj*. He also notes that the difference in the standard that the Supreme Court adopts for judicial review vis-a-vis basic structure review does not result in a difference in the approach to consider whether the Amendment violates the basic structure. He nicely sets up the basic structure review of the EWS amendment by elaborating that, "*the appropriate test or standard of judicial review of constitutional amendments is...whether the amendment challenged destroys, abrogates, or damages the "identity", or "nature" or "character" or "personality" of the Constitution, by directly impacting one or some of the "overarching principles" which inform its express provisions*".<sup>76</sup> In other words, "*the test is whether the impact of the amendment is to change the Constitution, into*

73. Kanshi Ram, *The Chamcha Age* (Siddharth Books, Delhi 1982); B R Ambedkar, *What Congress and Gandhi Have Done to the Untouchables* 9 (BAWS 1945) 1-297.

74. For a comprehensive historical, conceptual and theoretical framework of judicial dissent see, Yogesh Pratap Singh, *Judicial Dissent and Indian Supreme Court* (Thomson Reuters, New Delhi 2018).

75. *Indira Nehru Gandhi v Raj Narain* 1975 Supp SCC 1.

76. para 29.

*something it could never be considered to be*”.<sup>77</sup> In this background, Justice Bhat answers the 3<sup>rd</sup> question first, that is, whether the exclusion of SEBCs from the EWS quota is permissible or not.

To answer the exclusion question, Justice Bhat first determines the content of the Equality Code by recalling its history and how the Equality Code is an integral part of the basic structure. He finds that the overarching idea of non-discrimination is one of the fundamental facets of equality, and so is discrimination, directly or indirectly, on proscribed grounds as spelled out under Article 15.<sup>78</sup> Through a similar process, he identifies Article 16 essentially with the idea of adequate representation of different social classes in public services intrinsic to the Equality Code.<sup>79</sup> He clearly finds that the idea and identity of equality is “*non-discrimination in any form, for any reason whatsoever on the proscribed grounds, including in matters of public employment*”.<sup>80</sup> Justice Bhat rightly concludes that *the obligation or duty* to equalize those sections of the population hitherto discriminated against and ostracized through affirmative action *is on the State*.<sup>81</sup>

Next he concludes that the destruction the principle of equality will amount to changing the basic structure of the Constitution.<sup>82</sup> Justice Bhat reaches this conclusion by referring to specific paragraphs from *Kesavananda Bharati* (para 1159), *Minerva Mills Ltd v Union of India*<sup>83</sup> (para 19), *Raghunathrao Ganpatrao v Union of India*<sup>84</sup> (para 142), *R C Poudyal v Union of India*<sup>85</sup> (para 54), *Indra Sawhney* (para 260-261), *Indra Sawhney (2) v Union of India*<sup>86</sup> (para 64-65), *M. Nagaraj* (para 31-32), *I R Coelho v State of T.N.*<sup>87</sup> (para 105), *Saurabh Chaudri v Union of India*<sup>88</sup> and *S R Bommai v Union of India*.<sup>89</sup> He further demonstrates that the overwhelming concern of the Constitution is to equalize the status of SEBCs vis-vis upper castes through reservation policies by referring

---

77. para 30.

78. paras 35 to 40.

79. para 44.

80. para 60.

81. paras 60 and 61.

82. paras 60 and 61.

83. *Minerva Mills Ltd v Union of India* (1980) 3 SCC 625.

84. *Raghunathrao Ganpatrao v Union of India* 1994 Supp (1) SCC 191.

85. *R C Poudyal v Union of India* 1994 Supp (1) SCC 324.

86. *Indra Sawhney (2) v Union of India* (2000) 1 SCC 168.

87. *I R Coelho v State of T.N.* (2007) 2 SCC 1.

88. *Saurabh Chaudri v Union of India* (2003) 11 SCC 146.

89. *S R Bommai v Union of India* (1994) 3 SCC 1.

to *Vikas Sankhala v Vikas Kumar Agarwal*,<sup>90</sup> *Samatha v State of A.P.*,<sup>91</sup> and *Indian Medical Assn v Union of India*<sup>92</sup> judgments. Accordingly, he reaches the irresistible conclusion that non-discrimination, especially the importance of the injunction not to exclude or discriminate against SC/ST communities, constitutes the essence of equality which is part of the basic structure.

On the strength of the above conclusions, Justice Bhat utilizes the classification principle to determine whether classification by the EWS amendment of ‘*economically weaker sections*’ into SEBC poor and upper caste poor to exclude the former from reservation meant for economically weak is permissible. He finds that “*this classification is plainly contrary to the essence of equal opportunity*”. He rightly argues that when the basis of classification in the impugned Amendment is *economic deprivation*, how can it exclude certain *economically deprived* sections on the basis of *social origins*? He concludes that there is no *intelligible differentia* between the SEBC poor, who may avail of 15(4) and 16(4) reservation and the Savarna poor, who cannot. Nor is there any *rational nexus* between that distinction and the object of the Amendment, which is to achieve economic justice. It is clear that although this mode of legal reasoning renders the EWS amendment invalid, it ends up treating the SEBC poor at par with the Savarna poor erasing additional social deprivations of the former. In the words of Justice Bhat, “*Poverty – or its acute ill effects are equally felt by all, irrespective of which silos they are in*”.<sup>93</sup> This inaugurates grave mischief against the cause of social justice. The natural culmination of this line of reasoning is that reservation on economic ground would be valid if it covers both the SEBC and the Savarna poor.<sup>94</sup> Validation of this formulation would effectively mean the death of social justice. There is a monumental irony in Justice Bhat’s dissent that it may eventually shut the door on social justice that he seeks to keep open. His dissent is not redeemed by his well-meaning observations later in the judgment that existing reservation policies have not yet yielded significant results.<sup>95</sup>

There is another problem in Justice Bhat’s dissent, which relates to the objectives of reservations. He euphemistically explores the objectives

---

90. *Vikas Sankhala v Vikas Kumar Agarwal* (2017) 1 SCC 350.

91. *Samatha v State of A.P.* (1997) 8 SCC 191.

92. *Indian Medical Assn v Union of India* (2011) 7 SCC 179.

93. para 94.

94. para 87.

95. paras 91 and 92.

of reservation by positing that it is meant to benefit the *individual* in the domain of education and public employment and the *community* in the case of elective public offices. Such a distinction is socially ignorant at best and mischievous at worst. No reservation policy designed to benefit a social *community* can operate without benefiting the *individual* and vice versa. The thesis that reservation is meant to benefit the individual in the domain of education and public employment goes on to legitimize the economic status of the individual for the purposes of reservation in these domains. At one level, this approach atomizes an already fragmented group of SEBCs and solidifies the already organized community of the Savarna Ashraaf. Once again, Justice Bhat's invalidation of the EWS amendment on the basis of *individual* and *community* beneficiary distinction ends up strengthening the economic ground for reservation, which is capable of much more serious mischief in the future.<sup>96</sup> Therefore, when his judgment holds that the exclusionary clauses of the EWS amendment radically damage the identity of the Constitution and violate the basic structure, it remains a counter-revolutionary verdict.<sup>97</sup> Justice Bhat is fully aware of this effect. Hence, he adds additional reasoning premised on the *inadequacy of representation* for invalidating the EWS amendment with respect to Article 16(6) in Part V of his opinion.<sup>98</sup> He reasons as "*the introduction of reservations for economically weaker sections of the society is not premised on their lack of representation.. (it) violates the equality of opportunity which the Preamble assures, and Article 16(1) guarantees*".<sup>99</sup> He rightly argues that Article 16(6) snaps the "*link - between providing equal opportunity, and representation through reservations*".<sup>100</sup> With this the "*vital dimension of need to be represented, to be heard in the decision-making process, has been entirely discarded by the impugned amendment in clause (6) of Article 16*".<sup>101</sup>

However, Justice Bhat still goes on to support reservation based on economic criteria for the purpose of Article 15. This he does by first treating Article 15(6) as an addition that removes the basis of *Indra Sawhney's* dictum against the economic criteria without answering whether it is permissible in the face of basic structure doctrine.<sup>102</sup> Next, he refers to certain Directive

---

96. paras 94 to 98.

97. paras 99 to 101.

98. Also see para 143.

99. para 131.

100. paras 125 to 133.

101. para 132.

102. para 107.

Principles of State Policy and elevates economic deprivation as part of the constitutional mandate for substantive equality sans any persuasive substantiation.<sup>103</sup> Thirdly, he bats for constitutional flexibility to achieve substantive equality in the sphere of economic deprivation, effectively bending the doctrine of basic structure which he had erected in the earlier part of his judgment. Justice Bhat refers to Sinho Commission Report (2010) and NITI Aayog Report on National Multidimensional Poverty Index 2021 but fails to ask whether these reports indicate any lack of Savarna representation in education which could justify their reservation. He validates the State action to give more space to Savarna on economic ground in education who are already over-represented.

It is interesting to note that Justice Bhat makes no attempt to explain that when the economic criteria under Article 16 violate the overarching representation principle of equality, how does it not do the same under Article 15? To be sure, if SEBCs are not proportionately represented in education through Article 15, then the objective of securing their representation in public employment through Article 16 gets so much more difficult. He did not bother to explain this dichotomy even when he “*accepted the contention that the guardrail of ‘adequate representation’ in Article 16 prohibits the introduction of reservation based on economic criteria for the purpose of public employment*”.<sup>104</sup> The only probable explanation could be that Justice Bhat was well aware that the overarching representation principle of the Equality Code is equally applicable to Article 15 as the affirmative spirit running through Articles 15 and 16 is identical. Any sincere attempt to explain its application to Article 16 and non-application to Article 15 could reveal the incongruence of his position and explicitly undermine his reasoning for both. That is why he leaves the matter by simply validating the economic criteria for the purposes of Article 15 and invalidating it for Article 16. Justice Bhat makes a feeble attempt to utilize few Supreme Court judgments on the Right to Education (RTE)<sup>105</sup> to suggest a distinction between the two articles on economic criteria in relation to admission to private unaided institutions.<sup>106</sup> However, he ignores that the definition of the weaker section and disadvantaged group under the RTE Act 2009 mainly relates to the SEBCs and, unlike the impugned

---

103. paras 108 to 110.

104. paras 143 to 145.

105. *Indian Medical Assn v Union of India* (2011) 7 SCC 179; *Society for Unaided Private Schools of Rajasthan v Union of India* (2012) 6 SCC 1; *Pramati Educational and Cultural Trust v Union of India* (2014) 8 SCC 1.

106. paras 134 to 138.

Amendment, it is not exclusively based on economic criteria. Therefore, the RTE judgments cannot be used to validate exclusive economic criteria even for Article 15.

In an attempt to justify the exclusion of SEBCs from the EWS reservation by drawing a parallel with the creamy layer exclusion from the OBC reservation, Justice Bhat takes up a typical Savarna position. On the one hand, he chides against the exclusion of SEBCs from the EWS reservation by invoking the non-discrimination principle. Still, he defends the creamy layer exclusion with the baseless argument that the caste status of those who form part of the creamy layer becomes irrelevant.<sup>107</sup> If the caste status of backward classes can be so easily made irrelevant then the corollary would be to help every backward class person with reservation and make caste irrelevant for all of them!

Similarly, Justice Bhat's disagreement with the majority judges on the deployment of the over/under classification approach and the scope of Article 46 to validate the EWS amendment remains premised on the benign non-discrimination principle.<sup>108</sup> Interestingly, in Para 166, he quotes from *Indra Sawhney's* judgment, where Justice P. B. Sawant explained why mere poverty or economic consideration cannot be a criterion for identifying backward classes of citizens for the purpose of reservation. Yet, Justice Bhat inexplicably retains economic criteria as the basis for reservation under Article 15 (6) in his dissenting assent.

Justice Bhat rightly argues that reservations under Articles 15(4) and 16(4) were not just compensatory but also reparatory, but the EWS reservation is neither compensatory nor protective. Justice Bhat redeems himself a little more by rejecting the suggestion by the majority opinion that reservation for backward classes stood exhausted by reason of Article 16(4).<sup>109</sup> Moreover, his data discussion on the percentage of poor among SEBCs lays bare the hollowness of any attempt to conceive an economic class without reference to the social location of its constituents.<sup>110</sup> His position on the persistence of untouchability and crime against marginalized and stigmatized by caste is also quite sympathetic.<sup>111</sup> His best observation against the EWS amendment came in Para 175, where Justice Bhat writes that “*what begins as a seemingly innocuous alteration, may result in the “emasculatation” and*

---

107. paras 160 and 161.

108. paras 162 to 165.

109. para 170.

110. para 171.

111. paras 172 to 175.

*ultimate annihilation of the grand principle of equality*". However, in his peculiar way, Justice Bhat preferred to keep the question of violation of the 50% rule open.<sup>112</sup>

## 6. SOCIAL PATHOLOGY OF SAVARNA NORMS AND VALUES

For the hegemonic Savarna, mere acknowledgment, even at the subconscious level, that Indian society is beset by caste primarily constructed and sustained by them can generate an existential crisis of humongous proportions. Such an acknowledgment throws many complex challenges to the Savarna mind. It must immediately grapple with their numerical inferiority and how to reconcile their privileged status despite being the upper-caste minority with their dominance over the vast lower-caste majority. It reveals how disproportionate control of Brahmin Savarna Ashraaf over public institutions sits uncomfortably with their democratic commitments. Such an acknowledgment threatens their position as the leader of a carefully constructed communal majority. Thus, Savarna acknowledgment of caste as the significant foundation of economic and social order implicates their past and present in ways that no amount of cultural and nationalist chest-thumping can wriggle out.<sup>113</sup>

The EWS judgment clearly brings out the key components of Savarna norms and values: preservation and advancement of Savarna interests without any regard to the principles of justice, morality or the rule of law. EWS reservation is on the basis of upper casteness, not on the basis of economic backwardness, which is a logical and practical impossibility for the purpose of reservation, as argued above. Both the 103<sup>rd</sup> Amendment and the EWS judgment utterly fail to establish that there exists a class of economically weak Savarna Ashraaf who have suffered historical discrimination or continue to face structural exclusion at the hands of present public institutions. This is why Brahmin Savarna judges are particularly anxious to denude reservation of its representative character. The dilemma of Savarna judges is real: if they confer representative character on EWS, they will first have to establish the inadequacy of their present representation. This can make explicit their disproportionate control over all public and private institutions worth the name. It might begin the process of unraveling their hegemonic norms and values at many levels. Therefore, both the assenting and dissenting Savarna judges seek to

---

112. paras 172 to 179.

113. n 20.

establish economic deprivation as the basis of reservation in one form or the other.

Overemphasis on economic criteria might give an impression that it is only the economic interests of their caste/class that Savarna judges and jurists seek to preserve by undermining the democratic principle of representation. However, the problem is much deeper than it appears on the surface. For the Brahmin Savarna jurists, upholding the democratic principle of representation does not just compromise their economic interests, but it militates against their whole '*being*' both as an *individual* and as a *community*. This is why there are certain caste barriers that upper caste jurists consistently fail to overcome no matter how hard they try. It is instructive to note that Justice Bhat, even after observing that "*for the first time, the constituent power has been invoked to practice exclusion of victims of social injustice...which stands in stark contradiction of the principle of egalitarianism and social justice for all*"<sup>114</sup> feels it necessary to uphold the validity of economic criteria for reservation. Hence, validating the EWS quota is no less than the '*judicial liquidation of social justice*'.

## 7. CONCLUSION

Lawyers and judges, like everyone else, perceive the world from the universe of social meaning they inhabit. Such perceptions are always partial and limited leaning towards the known and the familiar. However, the nature of judicial process is such that it must unearth mutually unknown and unfamiliar but competing meaning complexes to protect the weak from the powerful. The most plausible method to perform this task is to incorporate as much of social diversity as possible in the justice delivery system. It means that the leadership of the bar and the bench must be representative of different social classes living diverse social worlds of meaning. The profound tragedy of Indian judicial system, like most other limbs of governance, is that it has remained cocooned with the so-called Brahmin Savarna with a very nominal sprinkling of Ashraaf castes. Both the bar and the bench have been infested with high castes which represent no more than 10% of the Indian social world. Legal reasoning based on such a constricted sense of social totality is condemned to remonstrate against social justice provisions designed to accommodate the remaining 90% unrepresented castes in public institutions. As a result, judicial process gets stunted unable to develop a robust jurisprudence for social democracy. Judicial process is hopelessly reduced to policing social

---

114. para 75 of Justice Bhat's opinion.

democracy, instead of being harbinger of hope.<sup>115</sup> Under these conditions, it is imperative that SC, ST and OBCs get proportionate representation in the higher judiciary so that they can interpret the Constitution with the spirit of social democracy. Different constitutional strategies can be explored for this noble purpose.<sup>116</sup> Constitutional measures to realize representative higher judiciary alone can now unleash the revolutionary potential of Indian Constitution to establish social democracy as conceived by Dr. B. R. Ambedkar. Therefore, institution of a range of social, educational, cultural, economic, political and legal practices which can dis-articulate the existing hegemonic norms and values of Savarna Ashraaf and re-articulate a democratic order representing the Bahujan majority in the higher judiciary cannot be postponed anymore. Such a democratic order has the potential to revolutionize Indian social, economic, and political life immensely benefiting all sections of society. The road to developed status for Indian nation, it seems, passes through social justice.

---

115. *See* (n 21).

116. Ayaz Ahmad, 'Constitutional Strategies for Bahujan Representation in the Higher Judiciary' *Round Table India*, 15 August 2020, available at <<https://www.roundtableindia.co.in/constitutional-strategies-for-bahujan-representation-in-the-higher-judiciary/>>.

# STRUCTURING NEURAL RIGHTS

—Ashit Kumar Srivastava\*, Priyanshi Jain\*\* &  
Pragya Richa Tiwary\*\*\*

## ABSTRACT

*There surely has been a rise of techno-perspective of Constitutional rights. This has largely to do with the leaping growth of technology across the globe, on this front, brain mapping technologies have also seen a tremendous growth. It feels like yesterday, where the world was still consistently questioning about personal data protection, but certainly within few years, the discourse has shifted to protecting neural rights, it says a lot about the technology-savvy world we live-in, and in granularity also raises questions as to how the legal infrastructure will respond to this problem. There is no doubt that law as an enterprise attempt to address questions of social evil, but unlike, earlier times wherein a social evil will take time to generate, the technology dynamics gives rise to social evils within a second, just to name a few: digital disparity, discrimination, biasness, profiling (all types of it). Therefore, the engineering aspect of law that is meant to bring social justice has to be in sync or at least a step closer to the technological challenges. The introduction of much anticipated Neuralink is one such challenge, in fact, Neuralink is just one of the many neuro technologies meant to study the neural movement of the human brain, draw a pattern of human emotion and in some cases even to stimulate human emotions. On these lines, the authors will analyze the scope of the neuro-rights, their normative origins and what constitutional measures will be needed for them to be safeguarded.*

**Keywords:** Neurotechnology, Neurorights, Brain Computer Interface, Mental Privacy.

---

\* Assistant Professor of Law at Dharmashastra National Law University, Jabalpur.

\*\* Student at Dharmashastra National Law University, Jabalpur.

\*\*\* Student at Dharmashastra National Law University, Jabalpur.

## 1. INTRODUCTION

The novel concept of “*Neuro-Rights*”, a possible subset of the digital right, is one of the fastest growing discourses across the globe. Especially, knowing that the scope of the right has primarily increased due to the rapid technological changes in the neuro-technological development, gradually a large portion of the human brain is capable of being mapped. This mapping capacity of the technology has led to question the safety of the cerebral activity. The right moves beyond the premise of ‘*Mental Privacy*’ and attempts to locate safety for the neuron-movement. It is both centered around the concepts of ‘*Dignity*’ and ‘*Privacy*’, and to some extent overlaps between the two concepts as well. Primarily ‘*Dignity*’ because it raises serious concerns pertaining to the scope of neuro-technology and its consequential impact on autonomy of the human being. With modern-day human technology in a position to stimulate human brains to perform certain activity, to what extent this can be tolerated to not to lead to a detrimental impact on the decisional autonomy of an individual. In matters of ‘*Privacy*’, there is no doubt, the major concern is pertaining to the privacy of the individual. On the front of ‘*Privacy*’, the existing jurisprudence of ‘*Mental Privacy*’ may still be effective to curb brain-mapping to a large extent.<sup>1</sup>

However, irrespective of the ethical concerns attached with the right, it is not contested that the kind of clinical benefits that may be attached with the neuro-technology. The diseases that for decades were thought of being incurable, can be addressed such as schizophrenia, body-paralysis and can of great benefits in the discipline of pathophysiology to find cure for diseases that can be traced back to human brain, nervous system or spinal cords.<sup>2</sup> So yes, there is a genuine need of the growth of such technology, on a commercial side there is a consolidated growth of neuro-technology consumer market, selling such devices and services commercially (both implantable and wearables).<sup>3</sup>

- 
1. Ashish Goel, ‘Indian Supreme Court in Smt Selvi v State of Karnataka: Is a Confusing Judiciary Worse Than a Confusing Legislation?’ (2011) LPAALA 602.
  2. White S W, Richey J A, Gracanin D, Bell M A, LaConte S, Coffman M, Trubanova A and Kim I, ‘The Promise of Neurotechnology in Clinical Translational Science’ Clin Psychol Sci (2015).
  3. *ibid.*

With growing panache of *Brain Computer Interface*<sup>4</sup> (“BCI”) there are genuine and ethical concern pertaining to the privacy of the neural data. Privacy as an independent phenomenon is social context(ed). As the context changes the contour of the right also changes, sequentially, the context of the privacy will surely change with a change in the existing technology, the penetrative force of technology will get more sophisticated and more infiltratory, and thus viable questions will sequentially follow pertaining to the safety measures in the existing jurisprudence. As *Julian Kokkott*<sup>5</sup> highlights such kind of genuine threat to the rights will surely demand that a novel set of right be created to provide for better safety mechanism. *Kokkott* emphasizes on two criterions that leads to this creation: 1) Scope and 2) Safeguard of the right. The scope of the right is too large to be covered by a novel jurisprudence and need of a genuine safeguard to protect the right. However, the author disagrees to a certain extent from the perspective of *Kokkott*, on the premise that it is not only because of the larger scope that a right needs to be protected, rather, sometime the infiltration of the right will at such a miniscule level, that it will not be covered by the existing mechanism. This raises a viable question: is addressing concerns of neural-privacy, in a way addressing questions of ‘*Privacy*’ itself. Or again it is a question of scope of the right and kind of mechanism that will be required to safeguard that scope. Neural rights seem more proximate to the individual identity, as it is literary attached with the physiology of the human brain, the capacity of the neuro-technology to map the human brain and to a certain extent determine what part of the human brain is more active than the other in physiological activities. This sort of neural data seems more proximate to the human being, specially to human dignity. As cases of generic ‘*Privacy*’ are broadly concerned with the control of the spatial spaces, whereas, in case of powerful neuro-technology, the option for the human being to exercise that control seems denude to a large extent.

There is no iota of doubt that there is genuine concern on the ethical usage of neuro-technology and what consequence could follow from the operational usage of such technology, let alone of the concerns raised regarding safety of thoughts.<sup>6</sup> The neuro-rights activist more solidly push

---

4. World Economic Forum, *The Brain Computer Interface Market is Growing – But What are the Risks?*, accessible at <<https://www.weforum.org/stories/2024/06/the-brain-computer-interface-market-is-growing-but-what-are-the-risks/>> accessed 5 March 2025.

5. Juliane Kokott and Christoph Sobotta, ‘The Distinction Between Privacy and Data Protection in the Jurisprudence of the CJEU and the ECtHR’ (2013) 3(4) IDPL 222.

6. Jose M Munoz and Jose Angel Marinero, ‘Neurorights as Reconceptualised Human Rights’ *Frontiers in Political Science* (2023).

for safety of the cognitive liberty, mental integrity, psychological continuity and equal access to cognitive enhancement.<sup>7</sup> There are corresponding school of thoughts that question the basis of such rights and is the current state of neuro-technology in a position to harm such rights or are these concern pertaining to protection of right from a distant-future or more of a make belief.<sup>8</sup>

The other critique of the right that has gained traction is the normative space for neuro-rights, there are authors that genuinely believe that instead of creation of a novel normative space for the right, the right is merely re-conceptualization of the existing framework of rights: freedom of thought, privacy rights and right against discrimination.<sup>9</sup> The authors under the present paper will analyze the jurisprudential scope and space of neuro-rights and what sort of measure should be there, if there has to be one, to safeguard the legitimate space of neuro-rights.

## 2. CONSTITUTIONAL BASIS OF THE RIGHT

As the neuro-right activist are pushing for recognition of several neuro-rights, there are Countries that have recognized the basis of the right. The Chilean Constitutional Amendment of 2021 amended Article 19 of the Constitution that provided recognition to the mental privacy and other rights, such as: Mental Privacy, Personal Identity, Free Will, Just and Equitable Access to Technological Advancement, and Protection from discrimination against Algorithmic Practices.<sup>10</sup> This is a good head start on this particular discipline, however, the authors will take few steps ahead in this direction to test the viability of the current landscape, whether the current regimes are in a position to normatively imbibe the scope of neuro-rights, specially, with reference to Mental Privacy. As highlighted *Mental Privacy* has been an addition to the Chilean Constitution through the means of 2021 Constitutional Amendment, interestingly, the right of

---

7. *ibid.*

8. J C Bublitz, 'What an International Declaration on Neurotechnologies and Human Rights Could Look Like: Ideas, Suggestions, Desiderata' (2023) 15(2) *AJOB Neuroscience* 96-112.

9. Jose (n 6).

10. Centre for Research in International Law, *The Neurorights Legislation in Chile*, accessible at <<https://nliu-cril.weebly.com/in-the-news/the-neurorights-legislation-in-chile#:~:text=It%20prohibits%20any%20scientific%20development,the%20consent%20of%20an%20individual.>> accessed 5 March 2025.

‘*Mental Privacy*’ was recognized within the Indian jurisprudence way back in the 2010 *Selvi v State of Karnataka* judgment.<sup>11</sup>

*“There are several ways in which the involuntary administration of either of the impugned tests could be viewed as a restraint on personal liberty’. The most obvious indicator of restraint is the use of physical force to ensure that an unwilling person is confined to the premises where the tests are to be conducted. Furthermore, the drug-induced revelations or the substantive inferences drawn from the measurement of the subject’s physiological responses can be described as an intrusion into the subject’s mental privacy. It is also quite conceivable that a person could make an incriminating statement on being threatened with the prospective administration of any of these techniques. Conversely, a person who has been forcibly subjected to these techniques could be confronted with the results in a subsequent interrogation, thereby eliciting incriminating statements”.*<sup>12</sup>

*“Lastly, we must consider the possibility that the victims of offences could be forcibly subjected to any of these techniques during the course of investigation. We have already highlighted a provision in the Laboratory Procedure Manual for Polygraph tests which contemplates the same for ascertaining the testimony of victims of sexual offences. In light of the preceding discussion, it is our view that irrespective of the need to expedite investigations in such cases, no person who is a victim of an offence can be compelled to undergo any of the tests in question. Such a forcible administration would be an unjustified intrusion into mental privacy and could lead to further stigma for the victim”.*<sup>13</sup>

Both the paragraphs highlight the sanctity of the mental-privacy; however, it is still unclear what really is it protecting, is it the protection of the physiological aspect of the mental privacy consisting of the neurological movement, or is it the safety of the connection between the neurological movement and the thought as an output. This is not a far-sighted perspective to have, that in coming times there will be artificial intelligence that will be able to find patterns between the neurological movement of the electric waves and the kind of thought that are been produced as an end result. So, gradually the picture is getting clearer, it is the safety of the physiological

---

11. *Selvi v State of Karnataka* (2010) 7 SCC 263 : AIR 2010 SC 1974.

12. *ibid.*

13. *ibid.*

as well as the end result of that physiological movement. The keywords that can be extracted from the above paragraphs are ‘*Personal Liberty*’, ‘*Mental Privacy*’, ‘*Forceful Intrusion*’, these words are suggestive that there is an outer-layer in form of *Mental Privacy* (derivative of *Personal Liberty* or as the authors will suggest from a more control-centric form of *Human Dignity*). The usage of word ‘*Forceful Intrusion*’ indicates that if this outer-layer is intruded, it will be a violation of the ‘*Mental Privacy*’, on this basis it can be deduced that *Mental Privacy*, just like *privacy*, represents a control-centric approach of human dignity. Wherein, voluntary exposition/enunciation by an individual is acceptable as part of the human dignity, but not the forceful one. The Constitutional safety will be provided to the outer layer in form of ‘*Mental Privacy*’ as well as to the ‘*Content*’ that is being protected by the outer layer, and safety will also be provided to the neurological activity (the physiological aspect) that leads to creation of that content. In short, safety will be provided for the following aspects:

- 1) *Mental Privacy* (protection of the content)
- 2) *Human Dignity* (protection of the neurological process for creation of the content)

The second aspect of ‘*Human Dignity*’ emphasizes more on the control-centric approach of the human being, wherein it is a question of conscious choices of the individual to decide what piece of information he/she wants to share, what bodily choices it wants to make. This proposition, does not in any way belittles the important role that *privacy* plays in operationalization of the human dignity, as Justice Chandrachud has succinctly put in *K S Puttaswamy (Privacy-9J) v Union of India*.<sup>14</sup>

*Privacy of the individual is an essential aspect of dignity. Dignity has both an intrinsic and instrumental value. As an intrinsic value, human dignity is an entitlement or a constitutionally protected interest in itself. In its instrumental facet, dignity and freedom are inseparably intertwined, each being a facilitative tool to achieve the other. The ability of the individual to protect a zone of privacy enables the realization of the full value of life and liberty. Liberty has a broader meaning of which privacy is a subset. All liberties may not be exercised in privacy. Yet others can be fulfilled only within a private space. Privacy enables the individual to retain the autonomy of the body and mind. The autonomy of the individual is the ability to make decisions on vital matters of concern to life. Privacy*

---

14. *K S Puttaswamy (Privacy-9J) v Union of India* (2017) 10 SCC 1 [169].

*has not been couched as an independent fundamental right. But that does not detract from the constitutional protection afforded to it, once the true nature of privacy and its relationship with those fundamental rights which are expressly protected is understood. Privacy lies across the spectrum of protected freedoms. The guarantee of equality is a guarantee against arbitrary state action. It prevents the state from discriminating between individuals. The destruction by the state of a sanctified personal space whether of the body or of the mind is violative of the guarantee against arbitrary state action. Privacy of the body entitles an individual to the integrity of the physical aspects of personhood. The intersection between one's mental integrity and privacy entitles the individual to freedom of thought, the freedom to believe in what is right, and the freedom of self-determination.*<sup>15</sup>

*".....privacy facilitates freedom and is intrinsic to the exercise of liberty. The Constitution does not contain a separate Article telling us that privacy has been declared to be a fundamental right. Nor have we tagged the provisions of Part III with an alpha suffixed right of privacy: this is not an act of judicial redrafting. Dignity cannot exist without privacy. Both reside within the inalienable values of life, liberty and freedom which the Constitution has recognised. Privacy is the ultimate expression of the sanctity of the individual. It is a constitutional value which straddles across the spectrum of fundamental rights and protects for the individual a zone of choice and self-determination".*<sup>16</sup>

The paragraphs highlight the importance of privacy in relation to human dignity, its role as a normative value and its facilitative value for operationalizing different contours of personal liberty. It is interesting to mention that in the above quoted paragraph, the Court has highlighted the knitted origin of the '*Freedom of Thought*' as an end result of intersection between mental integrity and privacy. The term mental integrity, itself is suggestive of the unbreachable nature of sanctum sanctorum of human mind. This raises viable question pertaining to the need for a different set of rights. The overlapping relation between mental integrity and privacy itself knits a ground for safety of '*Freedom of Thoughts*'.<sup>17</sup>

---

15. *ibid.*

16. *ibid.*

17. Sjors Ligthart, Christoph Bublitz, Thomas Douglas, Lisa Forsberg and Gerben Meynen, 'Rethinking the Right to Freedom of Thought: A Multidisciplinary Analysis' (2022) 22(4) Human Rights Law Review.

The case for neuro-rights was specifically introduced to address this aspect of human being, with neural technology becoming more pervasive, intrusive and penetrative in nature, what impact it can have on the physiology of the human brain, or even to manipulate certain choices. Taking the question back to the original arguments of dignity, the idea of self-determination (or more specifically questions of mental self-determination) the scholars that perpetuate recognition of a novel human right to provide protection to the *mental process* and *brain data*<sup>18</sup> in form of Right to '*Freedom of Thought*' genuinely believe that the premise of neuro-right can protect the realm of mental process and brain data. As the whole premise of '*Freedom of Thought*' is custom made to address safety of mental process and the brain data. However, the authors under the present paper, still want to protest against this premise, on the pretext that the whole concept of '*Mental Integrity*' coupled with '*Privacy*' may just do the trick.<sup>19</sup> However, the premise of the authors need to be closely scrutinized on the lines of exponential growth in the neuro-science technology, the core essence is the current development of the neuro-technology so intrusive that it demands a separate right?<sup>20</sup>

Further, building on the same line of thought what forces the legal scholarship to reconceptualize the existing set of rights: such as right of *Freedom of Thought* or *Mental Integrity*. Differing scholars have highlighted three aspects of human brain that needs to be protected under the veil of neuro-rights: 1) Right not to reveal one's thought, 2) Right not to be penalized for one's thought, 3) Right not to have one's thought manipulated.<sup>21</sup> Either, they may be covered under the existing set of rights or they may be covered through the means of a novel rights. One of the proponents for the existing rights jurisprudence is Scholar N. Hertz,<sup>22</sup> who pushes for covering the aspect of neuro-rights within the broad heading of freedom of '*Right to Thought*', a right very well covered within the Article 18 of the International Covenant on Civil and Political Rights ("ICCPR"),<sup>23</sup> Article 9 of the European Charter of Human Rights ("ECHR"), and Article 30 of the Arab Charter on Human Rights. N. Hertz conveys that the scope of the right as denoted under Article 18 of the ICCPR and Article 9 of

---

18. *ibid.*

19. *ibid.*

20. *ibid.*

21. Nora Hertz, 'Neurorights — Do We Need New Human Rights? A Reconsideration of the Right to Freedom of Thought' *Neuroethics* (2023).

22. *ibid.*

23. ICCPR, art 18.

ECHR is large enough to provide for protection of *mental processes* and the end result of that mental process in form of *'thought'*. The thought of certain quality qualifies as an attitude, perspective or viewpoint. Working on the idea of N. Hertz, the objective of protection of neuro rights is to protect the mental process, which to a large extent can be covered within a broad conceptualization of *'Thought'*, when thoughts are a reflection of the political, religious or gender identity/affiliations they are already protected within the existing rights of *'Freedom of Religion'*, *'Expression of Gender Orientation'*.

This pushes the question, what actually then is left to be covered by the concept of *'Thought'*, the authors further deliberate, if the concept of *'thought'* is intermixed with *'decisional autonomy'*, it will result in mental self-determination. In a way acknowledging the human neurological autonomy of having thoughts and the process that goes into making of that thought, in lay men term, not to influence the decision making of an individual. Hertz believes, that by giving a large encompassing interpretation to the concept of *'Thought'* all three essential elements of neuro-rights can be addressed: 1) Right not to reveal one's thought, 2) Right not to be penalized for one's thought, 3) Right not to have one's thought manipulated.

Again, this is at the cost of repetition, what will be better suited for Indian jurisdiction to recognize? A freedom of *'Right to Thought'* or should there be a push for the concept of recognition of several other rights (a bouquet of rights that can be entitled as *'Neuro-Rights'*), Scholar Nita Farahany recommends for recognition of *'Right to Cognitive Liberty'* as a check against the advances in the neuro-science field. However, her concept of Cognitive Liberty works as a negative right to curb the impact of advances of neuroscience, yet it does not specifically address questions of privacy, rather, looks at the autonomy of the individual against the self-incriminating techniques of the State.<sup>24</sup> Farahany believes that this can bring clarity to the judges and the judicial system, when applying the concept of self-incriminating techniques against an individual. However, it is conducive to mention that this aspect of Farahany is very well-covered within the Indian jurisdiction, but by a different designation of *'Mental Privacy'*. It is conducive to analyze the perspective put forward by Farahany as she delves into deeper roots of neural rights, her main contention hovers around

---

24. Nita Farahany, "'Cognitive Liberty' is the Human Right We Need to Talk About" *Time* (2023) <<https://time.com/6289229/cognitive-liberty-human-right/>> accessed 5 March 2025.

commodification of human emotions, or human reactions by a deeper study of the electric waves of the human brain. This commodification can easily be utilized by commercial entities for the purpose of stimulating brain reactions.<sup>25</sup> This surely raises fear that are far beyond one's understanding, however, as the next generation non-surgical neurotechnology's (N3) are developing, it is easy to monitor human brain, its emotions, especially which part of the human brain are active, and thus a pattern can be knitted with the help of A.I. which will give sufficient insight as to the working of the human brain and what sort of stimuli should be given. This becomes interesting, knowing that there are consumer-driven neurotechnology, that are turning less and less surgical: In forms of wearables, one such technology was discussed earlier in form of Electroencephalogram (EEG) that used to measure electric activity of the brain. *Nita Farahany* has quoted examples of Chinese workforce, how sensors are being attached to the caps of the workers in Chinese factory coupled with A.I. which gives substantial insights into the working behaviour of the human brain, how are they feeling, so the administration can maneuver the workload accordingly, in fact, this has brought about positive changes in the output.<sup>26</sup> The administrator of the factories are better positioned to locate the workforce as per their possible contributory capacity at a particular time, yet it raises serious questions as to the decisional autonomy of the individual, the maneuvering of individual gives an impression of a lab rat.

As earlier noted, the authors want to test the conceptual landscape of '*Mental Integrity*', whether there is enough normative space in its framework to cover substantial, if not the whole, scope of neuro-rights.

### 3. CONSUMER LAW AND PERSONAL DATA PROTECTION ASPECT

Neuro technology, has led to an increased integration of technology in human lives. The interaction between humans and machines has increased to an extent of machines digitizing human brain data. This substantially raises the risk of selling brain data to third parties, breaching human privacy. When embedded in the body, neurotech devices are governed by health laws, however, when in form of wearables, should they be governed by consumer protection laws, or some other law is a point of contestation. Currently, for example, The Health Data Privacy Laws like the The Health Insurance Portability and Accountability Act<sup>27</sup> in Colorado is sufficient

---

25. *ibid.*

26. *ibid.*

27. HIPPA 1996.

guide usage of brain data collected by Invasive neuro-technologies as the machines are embedded in human organs. However, a regulatory gap exists to address rising concerns relating to non-invasive technologies, such as head bands etc. that digitalize, analyse, and store brain data. Looking at the increased adaptation of such technologies, it is vital to set guidelines, create new legislatures, or at least evolve current legislations, to meet the needs of contemporary era.

To regulate non-invasive neurotechnology, Colorado recently announced to extend its understanding of “sensitive data” to cover biological data , through Colorado Privacy Act. Is exclusive of “De-identified data”,<sup>28</sup> as described under Section 2(11) of the Act.<sup>29</sup> By such exclusion the law a pool of person specific information, which needs to be protected, to uphold rights of individuals. This subject neural data to regulatory frameworks to ensure human privacy, to the extent of safeguarding thoughts against unlawful, unconsented intervention.

Consent under section 2(5)<sup>30</sup> is explained as:

*“Consent” means a clear, affirmative act signifying a consumer’s freely given, specific, informed, and unambiguous agreement, such as by a written statement, including by electronic means, or other clear, affirmative action by which the consumer signifies agreement to the processing of personal data.”*

While “Consumer” is explained as an individual, not acting in commercial or employment context, under section 2(6)<sup>31</sup> of the Act. This excludes employer-employee relation is from the scope of scrutiny, implying that the employer in dominant position, may use “sensitive data” of the employee, collected via biometrics to profile<sup>32</sup> an individual. Protection against unconsented profiling is necessary, since it dilutes autonomy of an individual over their personal information and heightens the potential for discrimination on the basis of ethnicity, sex or race, which

---

28. Khaled El Emam and Bradley Malin, ‘Sharing Clinical Trial Data: Maximizing Benefits, Minimizing Risk’ *National Library for Medicine*, 20 April 2015 <<https://www.ncbi.nlm.nih.gov/books/NBK269030/>> accessed 16 February 2025.

29. Colorado Privacy Act 2021, s 2(11).

30. Colorado Privacy Act 2021, s 2(5).

31. Colorado Privacy Act 2021, s 2(6).

32. What is Automated Individual Decision-Making and Profiling? Information Commissioner’s Office <<https://ico.org.uk/for-organisations/uk-gdpr-guidance-and-resources/individual-rights/automated-decision-making-and-profiling/what-is-automated-individual-decision-making-and-profiling/>> accessed 31 January 2025.

leads to a violation of rights. The scrutiny, therefore, allowing government to access brain data. This might appear beneficial, when analysed from the perspective of designing apt and applicable policies, however, appears violative of rights, when government analyses data and designs policies to favour a race, ethnicity or gender or its targeted vote bank. State is sovereign, therefore, rights are exercised against the state, to uphold “inherent dignity” and “disregard barbarous acts that outrage conscience of mankind”.<sup>33</sup> Hence, exclusion of governmental agencies, from the scope of scrutiny, dilutes the vision of neuro rights.

Neurorights, emerged from an interplay of right to privacy and freedom, are essentially a step further than these rights. The variety of threats that they tackle is comparatively newer and complex. On further analysis, right of access, right to opt out, correction, deletion and data portability are revealed as subsets of neuro rights. However, a right that remains largely undiscussed is the right to “partially retrieve information”. A part of information submitted via “dark patterning”,<sup>34</sup> which deceives users to do things that they would not do ordinarily leading to a loss in autonomy and free choice in making decisions, should be allowed to be retrieved, while allowing consented information to stay intact with data controllers and processors.

Neurorights strive to protect brain, not as an organ, but as mind, that thinks and creates an identity for self. When not protected highly intrusive brain computer interfaces, may use sensitive data in profiling or identifying an individual. Unconsented profiling may lead third party to access, analyse, mould and predict brain activities, thoughts and preferences. The gravity of such third-party interferences is realized best when data is sold to agencies, or enterprises, that use such data to influence behaviour and choices of citizens. For example, when the U.S. Supreme Court decided to overturn *Jane Roe v Henry Wade*<sup>35</sup>, it allowed applications tracking

---

33. United Nations Human Rights Office of the High Commissioner, 70th Anniversary of the Universal Declaration of Human Rights Press Release, 6 December 2018 <<https://www.ohchr.org/en/press-releases/2018/12/70th-anniversary-universal-declaration-human-rights#:~:text=in%20the%20world.-,%22%E2%80%A6,%22 %E 2% 80%A6>> accessed 27 January 2025.

34. Amy Lee Tan, ‘Illuminating Dark Patterns: US Regulators Crack Down on Deceptive Practices Targeting Consumers’ Science and Technology Law Review, 17 February 2024 <<https://journals.library.columbia.edu/index.php/stlr/blog/view/593>> accessed 16 February 2025.

35. *Jane Roe v Henry Wade*, 1973 SCC OnLine US SC 20 : 35 L Ed 2d 147 : 410 US 113 (1973).

period to share data with the governmental agencies, leading to privacy breach and affected individual choice making. Imagine neurotechnology, that has access to patterning of thoughts, processes and sells or publishes brain data unconsented, leading to manipulated perception of self. It can also be intrusive to an extent of altering brain waves. This appears to be beneficial in curing brain disorders, however, a point of contestation is whether neurodivergent people can make a valid consent for the usage of such technologies. Valid consent requires “informed and unambiguous agreement”, according to section 2(5)<sup>36</sup> of the Colorado Privacy Act. Therefore, the act opens a possibility of penalizing companies when treating neurodivergent people. Invasive brain technology is largely excluded from such punishments, as it is scrutinized by healthcare laws, however, non-invasive wearables could be subjected to constant scrutiny even when its neurodivergent customers agreed to accessing, storing, or analysing brain data.

The act expands the scope of consumer laws, and lays foundations for future legislations that may specifically address neurorights. However, such step also paves way for transformation within the legal domain. Currently detectors in practice answer in yes or no, however “Neuronal Testimonials” could become an admissible practice as legislative framework is adopting itself to meet expectations of contemporary world. A victim brutally injured, and incapable of speaking may testify via the use of non-invasive neurotechnology, that helps to map thoughts of the victim post the crime. Not just during trials, such technology is capable of aiding investigation too. A victim in vegetative state,<sup>37</sup> with some consciousness, could provide information regarding the incident via “Neuro Identification”<sup>38</sup> of offenders or other details of the crime. However, such technologies, cannot be used on the accused as privilege against self-incrimination protects them. Nonetheless, the act is instrumental in pioneering the concept of Neurorights, while being capable to introduce newer practices in legal systems.

---

36. Colorado Privacy Act 2021, s 2(5).

37. Peter McCullagh, *Ted Freeman and the Battle for the Injured Brain: A Case History of Professional Prejudice* (ANU Press 2013).

38. Jesper Ryberg, ‘When Should Neuroimaging Be Applied in the Criminal Court? On Ideal Comparison and the Shortcomings of Retributivism’ (2014) 18(2) J Ethics <<https://www.jstor.org/stable/43895862>> accessed 14 January 2025.

#### 4. INDIAN APPROACH

When Indian legal landscape is analyzed, “The Digital Personal Data Protection Act”<sup>39</sup>, appears to be the closest step that India has come to new age technology regulation. With Apple applying for a patent for electroencephalography enabled AirPods,<sup>40</sup> the possibility of non-invasive tools that measure electrical activity of brain, flooding marketplaces is predicated. Currently no dedicated legislation exists in India to regulate neurotech specifically, however, Digital Personal Data Protection Act, largely based on consented use of information, may be interpreted expansively to temporarily direct the usage of neurotechnology. Colorado bill largely revolves around consenting to share and process data, however, the act exists as an expansion of Consumer Laws, therefore, multiple agencies that should have been regulated are ignored. Digital Personal Data Protection Act on the other hand appears to be more comprehensive, as it specifically addresses digital data collection, storage and processing.

It is predicted that most MNCs would initially dominate the market space in neurotechnology, and the act expands to regulating fiduciaries,<sup>41</sup> even when they operate on foreign lands while they deal with Indian Data. Assuring right to privacy is the aspiration of legislation and neuro rights is an evolving domain of rights could be protected by provisions of the act. Neurorights penetrate into a deeper layer of right to privacy, by striving to assure cognitive liberty and freedom. A right to think without external manipulation is promised. To process private data, that helps in identifying an individual, consent is required. Contention is raised as to whether consent to share data protects an individual against algorithmic biases of artificial intelligence. Whether “targeted advertising” breaches the right or not is another contention. However, to uphold autonomy of an individual, “right to erasure”<sup>42</sup> as called in European privacy law is essential to aid in opting out of processes, even when prior consent was given. The materialization of same can be seen in section 12<sup>43</sup> of the act, where “right to erasure” is provided.

---

39. Digital Personal Data Protection Act 2023.

40. Biosignal Sensing Device Using Dynamic Selection of Electrodes, World Intellectual Property Organization <[https://patentscope.wipo.int/search/en/detail.jsf?docId=US402825807&\\_cid=P10-LRT3OJ-01103-1](https://patentscope.wipo.int/search/en/detail.jsf?docId=US402825807&_cid=P10-LRT3OJ-01103-1)> accessed 15 February 2025.

41. Digital Personal Data Protection Act 2023.

42. Right to Erasure, Information Commissioner’s Office <<https://ico.org.uk/for-organisations/uk-gdpr-guidance-and-resources/individual-rights/individual-rights/right-to-erasure/>> accessed 31 January 2025.

43. Digital Personal Data Protection Act 2023, s 2(5).

Majorly neurorights are for protecting biological data, or digitalized brain data against unlawful sharing or selling to third parties, the Digital Personal Data Protection Act appears apt to uphold neurorights, as it specifically deals with protecting data against illegitimate processing, until a dedicated legislation is formed.

Till recently, judicial understanding of privacy in India has mostly stressed on protection of body and physical spaces from intrusive actions by the State. But now mental privacy has been recognised after a conjunctive reading of Articles 20(3) and 21 of the Constitution along with the principles of evidence law leads to a clear answer. Importance of personal autonomy must be recognised in aspects such as choice between remaining silent and speaking. An individual's decision to make a statement is the product of a private choice and there should be no scope for any other individual to interfere with such autonomy, especially in circumstances where the person faces exposure to criminal charges or penalties. Today mental information covers thoughts, feelings, emotions, dreams, nightmares, fears, anxiety etc., and the enjoyment of having control over such psychological processes is the *end* of the inborn right of mental privacy.<sup>44</sup> Control over one's own psychological information gives room to the individual to evaluate their thought, and to participate in the social, political and legal institutions of the society. Therefore, any attempt to penetrate one's mental process with an intention to decrypt the thought process can have dire consequences on the privacy. Although the nature sufficiently provides the innate veil to an individual in order to protect his or her thoughts and feelings, the prejudicial norms of a society and the powers always try to remove the natural veil through various ways since times immemorial. The traditional ways would include torture, coercion, hypnosis, etc., and the modern ways include the ubiquitous monitoring through the new media tools, with increased reliance on technologically advanced techniques.<sup>45</sup> In *Selvi v State of Karnataka*,<sup>46</sup> the Supreme Court held that compulsory administration of

---

44. Marcello Ienca and Roberto Andorno, 'Towards New Human Rights in the Age of Neuroscience and Neurotechnology' *Life Sci Soc Policy* (2017).

45. Alan F Westin classified surveillance in three parts i.e. physical surveillance, psychological surveillance, and data surveillance. The traditional means for extracting information include eavesdropping, paid surveillance agents, torture, sex, alcohol, opium, hypnotism, primitive "lie" tests, registers in which residences, movements, and transactions of individuals were recorded, etc. Modern ways include electronic eavesdropping, wiretapping, television-eye monitoring, etc. The new technology is serving the purposes of classic surveillance methods. Alan F Westin, *Privacy and Freedom* (1970) 72.

46. *Selvi v State of Karnataka* (2010) 7 SCC 263.

any of the techniques like narcoanalysis, polygraph examination and brain Electrical Activation Profile (BEAP) test, is an unjustified intrusion into the mental privacy of an individual. It was also recognized that forcible intrusion into a person's mental processes is an affront to human dignity and liberty, often with grave and long-lasting consequences.<sup>47</sup>

There are still some prime concerns that are not addressed by the Consumer Law perspective as well as Personal Data Protection perspective. Whereas, in case of Consumer law, as highlighted earlier, Government agencies have been left outside the scope of the enactment. Additionally, from the perspective of personal data protection, the brain data as sensitive data is well covered within the premise of Personal Data Protection Act, however, the deceptive and manipulative capacity of neurotechnology is not addressed by either of the objective of the laws. This is another layer of neurological integrity that needs to be addressed, in direct link with the concept of human dignity. The broad concept of neuro rights is not only about addressing safety of the brain data in form of sensitive data, rather, it is also about maintaining the decisional control of the individual over its choices and materializing of the thoughts.

## 5. NEURO-TECHNOLOGY

For centuries, the human mind has been regarded as an inviolable domain, free from external influence or intrusion. In his 1634 masque, *Comus*, John Milton expressed this sentiment through the character of a young girl held captive, who declares, "*Thou canst not touch the freedom of my mind.*" This belief, which John Bury also articulated in his assertion that a person can think whatever they choose as long as they conceal it, forms the essence of cognitive liberty—the right to autonomous thinking and free will. However, with the rise of neurotechnology, which can directly interact with and influence the human nervous system, this notion is under threat.<sup>48</sup>

Brain circuits operate in a coordinated manner to produce all of our ideas, opinions, imagination, memories, decisions, and emotions. We are

---

47. *Ramlila Maidan Incident, In re* (2012) 5 SCC 1.

48. 'Right to Cognitive Liberty in a Transhumanism Era: A Case for Integration within Indian Legal Framework' NUALS L J (29 June 2023) <<https://nualslawjournal.com/2023/06/29/right-to-cognitive-liberty-in-a-transhumanism-era-a-case-for-integration-within-indian-legal-framework/>>.

actually facing the prospect of technology being able to decipher or alter human mental processes for the first time in history.<sup>49</sup>

BCIs can function in two different ways:<sup>50</sup> they can brain data or change brain activity, enabling reciprocal communication between the brain and the outside environment. Specific regulatory gaps are exposed by both forms of neurotechnology, and these regulatory gaps lead to protections of human rights being inadequate.

Certain brain-computer interfaces (BCIs) need invasive surgery to implant electrodes directly into the brain. Brain data is sent from the electrodes to a computer for analysis and decoding. For many years, invasive brain stimulation devices (BCIs) have been a part of conventional medicine. Well-known examples of such devices are cochlear implants and deep brain stimulators, which can assist patients with Parkinson's disease regain their range of motion. Invasive Brain Component Interfacing (BCI) has several noteworthy medical uses, but it may also be applied in other contexts. In 2018, the MIT Media Lab recorded human thoughts into text messages using an intrusive brain-computer interface (BCI). Researchers have already figured out how to utilise intrusive BCIs to manipulate lab animals' behaviour, such as mice.<sup>51</sup> Scientists have developed invasive Brain-Computer Interfaces (BCIs) that can control the actions of laboratory animals, such as mice, by recording and stimulating specific brain activity. This technology has been used to induce actions, like eating, even when the animal does not want to, and to implant artificial memories or images, leading to hallucinations or false memories. Non-invasive BCIs, worn externally like helmets or glasses, can predict speech or movement and help people with communication disorders. These devices have enabled thought-sharing between individuals and allowed a quadriplegic man to drive a Formula One car. In the future, similar BCIs could be used to alter human brain activity, potentially applying the same techniques used on animals to humans.

These instances demonstrate how neurotechnology applications are full of potential human rights breaches. The growth of neurotechnology has surpassed national and international organisations' attempts to control it, as is common with new technologies. Non-invasive BCIs, which will be used

---

49. It's Time for Neuro-Rights, Center for International Relations and Sustainable Development (CIRSD) (Winter 2021) <<https://www.cirsd.org/en/horizons/horizons-winter-2021-issue-no-18/its-time-for-neuro--rights>>.

50. *ibid.*

51. *ibid.*

for the same objectives as invasive ones, frequently fall outside of medical laws, whereas invasive BCIs, which need surgery, are now controlled under the realm of medicine. Non-invasive brain-computer interfaces (BCIs) are regarded as consumer goods in the majority of nations. If they are regulated at all, they may fall within pre-existing frameworks that are insufficient to handle the particular problems this new technology presents. This also raises some genuine concerns pertaining to commercial market, that might exploit the BCI for the purpose of indiscriminate marketing, manipulating human choices or even nudging them in a particular direction.

The right to privacy, recognized as a fundamental right by the Indian Supreme Court in the landmark *Puttaswamy* judgment, is closely tied to the ethical concerns surrounding neurotechnology. Neurotechnology's ability to decode thoughts, emotions, and brain activity challenges the traditional notion of privacy, as brain data could be accessed without a person's consent or awareness. For instance, BCIs in education or workplace settings could lead to the misuse of mental data, raising concerns about surveillance, data privacy, and mental autonomy.<sup>52</sup>

Neurotechnology's potential to influence human thoughts, emotions, and behaviour brings up serious concerns about human agency. However, the development of BCIs capable of controlling or altering human behaviour poses risks to free will. In India, Article 21 of the Constitution guarantees the right to life and personal liberty, which includes bodily autonomy and mental integrity. For example, neurotechnology could be used in coercive settings, such as interrogation or surveillance, where a person's brain activity may be manipulated.

India is a diverse country with social and economic disparities, and there is a risk that neurotechnology, if misused, could exacerbate discrimination. The potential for algorithmic bias in BCIs—where brain data could be misinterpreted due to pre-existing biases in technology—raises concerns about discrimination in employment, education, and healthcare. For instance, neuro-data could be used to unfairly assess or reject candidates during hiring processes or in educational assessments, creating systemic biases that reflect social prejudices. The Indian legal system already prohibits discrimination on the basis of caste, religion, gender, and other factors, as enshrined in Articles 14, 15, and 16 of the Constitution.

---

52. *ibid.*

Mandating consent as a condition for retaining employment — especially in the context of invasive technologies like neuro-monitoring — raises significant ethical and legal concerns, particularly regarding fairness and autonomy. When an employee is forced to consent to the use of such technologies, it essentially becomes coercion disguised as voluntary agreement. The employee faces a dilemma: either consent to having their brain activity monitored or risk losing their job and livelihood.<sup>53</sup>

With a significant portion of the Indian population affected by mental health issues, the integration of neurotechnology in mental health treatment offers hope for better diagnosis and treatment.<sup>54</sup> However, this also presents ethical concerns about consent, the potential misuse of sensitive mental health data, and the accessibility of such advanced treatments.

It is crucial to guarantee neurotechnology's ethical use and accessibility since it is expected to go beyond medical and into industries including education, gaming, entertainment, transportation, law, research, and the military. The ethical issues surrounding other biological and computational technologies, such artificial intelligence and genomics, and neurotechnology do not always align. These overlapping ethical issues include those related to well-being, justice, openness, and data security.

Mental privacy refers to the presumption that the contents of a person's mind are only known to that person. In the age of neurotechnology, the presumption of mental privacy is no longer a certainty. Most brain data generated by the body's nervous system is unconsciously created and outside a person's control. Therefore, it is plausible that a person would unknowingly or unintentionally reveal brain data while under surveillance. Human agency is the combination of a person's physical autonomy and free will. Neurotechnology has the power to affect a person's behaviour, thoughts, emotions, or memories since it may be used to stimulate the brain. Although freedom of mind and the absence of force to embrace specific views are often mentioned in current international human rights treaties, it is unclear if these clauses anticipated the possibility of coercion through technology. To safeguard individual autonomy and mental privacy, it is

---

53. 'Right to Cognitive Liberty in a Transhumanism Era: A Case for Integration Within Indian Legal Framework' NUALS L J (29 June 2023) <<https://nualslawjournal.com/2023/06/29/right-to-cognitive-liberty-in-a-transhumanism-era-a-case-for-integration-within-indian-legal-framework/>>.

54. Ministry of Health & Family Welfare (2 February 2025) <

essential to both conceptualise the potential breaches of human rights that might result from the use or misuse of neurotechnology and to advocate for its safe, responsible, and efficient application. Two central aspects of privacy — informational privacy and informational self-determination — are vital in this context, particularly when discussing Brain-Machine Interfaces (BMIs), neuroimaging techniques, and other neurotechnological tools.<sup>55</sup>

Informational privacy encompasses not just physical aspects of an individual but also the mind itself. The right to informational privacy serves to promote individual autonomy, protecting personal material from unfair dissemination, while simultaneously safeguarding the freedom of thought. As recognized in the *K.S. Puttaswamy* case, the mind is an integral part of an individual's personality, and its sanctity forms the very foundation of one's private space.

Neuro-technology has the potential to revolutionize industries and enhance human experiences in ways previously unimaginable. Recent collaborations, such as between L'Oreal and Emotiv, which allow consumers to select personalized scents based on mental responses measured by EEG headsets,<sup>56</sup> or Microsoft's patented EEG device that lets users navigate apps and web browsers using their thoughts, highlight the remarkable promise of these technologies for consumer benefit. However, while such innovations offer significant advantages, they also expose individuals to risks of exploitation, particularly concerning their mental privacy, autonomy, and the collection of brain data for corporate or state purposes.<sup>57</sup>

The potential misuse of neuro-technology by states raises further ethical and legal concerns. For instance, China's widespread adoption of EEG sensor-fitted helmets by the State Grid Corporation to monitor the brainwave activity and fatigue levels of workers represents a troubling trend in workplace surveillance.<sup>58</sup> While purportedly intended to improve worker productivity and safety, such practices effectively commodify brain

---

55. It's Time for Neuro-Rights, Center for International Relations and Sustainable Development (CIRSD) (Winter 2021) <<https://www.cirsd.org/en/horizons/horizons-winter-2021-issue-no-18/its-time-for-neuro--rights>>.

56. Venya Patel, 'L'Oréal and Emotiv Harness Neurotech and Algorithms for Personalized Fragrances' (28 March 2022) <<https://www.personalcareinsights.com/news/loreal-and-emotiv-harness-neurotech-and-algorithms-for-personalized-fragrances.html>>.

57. 'The Time is Now for a "Neuro-Rights" Law in India' *Vidhi Legal Policy* (27 April 2023) <<https://vidhilegalpolicy.in/blog/the-time-is-now-for-a-neuro-rights-law-in-india/>>.

58. Erin Winick, 'With Brain-Scanning Hats, China Signals it Has No Interest in Workers' Privacy' *MIT Technology Review* (30 April 2018) <<https://www.technologyreview>

activity, stripping individuals of their cognitive privacy. The intrusion into personal mental states could lead to the erosion of human dignity, autonomy, and the right to mental privacy. More troubling still is the Chinese military's reported focus on cognitive warfare, which aims to shift warfare from the physical battlefield to the human mind. By targeting an adversary's decision-making process and cognitive abilities, this evolving form of warfare represents a significant violation of cognitive liberty. The military's interest in controlling the cognitive processes of opponents through technology is indicative of how neuro-technology, while promising positive applications, can also be weaponized to exert coercive control over individuals' thoughts and actions.<sup>59</sup>

In light of these developments, there is a growing recognition of the need for urgent legal safeguards to prevent neuro-technology from becoming a tool for corporate surveillance or state manipulation. Without clear regulations, corporations and governments could exploit neuro-technology to infringe on fundamental human rights, including the right to cognitive liberty, mental privacy, and freedom of thought.

Neurotechnology, with its ability to decode, monitor, and manipulate brain activity, presents exactly this threat. When this technology is deployed for purposes like employee monitoring or corporate surveillance without sufficient safeguards or consent, it directly infringes upon the right to privacy.<sup>60</sup>

Sections 66E and 72 of the IT Act provide protection against violations of privacy and unauthorized disclosure of personal data. Section 66E criminalizes the intentional capturing, publishing, or transmitting of images of a person's private areas without consent, while Section 72 punishes the disclosure of information in breach of lawful contracts or obligations of confidentiality. However, these provisions apply primarily to computer systems, electronic resources, and data transactions. The protection extends to electronic records and personal data but does not cover the mental domain or the autonomy of the mind. Neurotechnological advancements, such as brain-computer interfaces or EEG devices that

---

.com/2018/04/30/143155/with-brain-scanning-hats-china-signals-it-has-no-interest-in-workers-privacy/>.

59. *ibid.*

60. 'Right to Cognitive Liberty in a Transhumanism Era: A Case for Integration Within Indian Legal Framework' NUALS L J (29 June 2023) <<https://nualslawjournal.com/2023/06/29/right-to-cognitive-liberty-in-a-transhumanism-era-a-case-for-integration-within-indian-legal-framework/>>.

could potentially read or manipulate thoughts, are outside the ambit of these protections. Section 2(14) of the BNS defines “injury” means any harm whatever illegally caused to any person, in body, mind, reputation or property, it only becomes relevant when an individual’s mental state has been directly harmed through acts of physical violence or trauma. The current definition of injury does not encompass the more subtle violations that can occur through the use of neurotechnology, such as mind-reading, thought manipulation, or cognitive interference. These actions, while potentially harmful, do not necessarily result in observable injury but instead infringe upon an individual’s mental privacy and cognitive liberty.

One immediate concern is the use of neuroscience in legal proceedings. Neuroimaging technologies may blur the lines between testimonial and physical evidence. For example, a static brain image (physical evidence) might be used to extract testimonial information, which could infringe upon an individual’s right against self-incrimination under Article 20(3). The use of neuro-evidence in courtrooms could lead to significant challenges for maintaining fairness in legal proceedings, especially when individuals have not explicitly consented to sharing such information.

As neurotechnology rapidly advances, the potential for infringement on cognitive liberty and mental privacy grows. Without appropriate legal protections, the freedom to think and act autonomously — one of the most fundamental human rights — could be compromised. India must act swiftly to introduce legislation that protects neural data and regulates the use of BMIs and other neurotechnologies. By doing so, the country can ensure that technological progress does not come at the expense of individual rights, and that cognitive liberty remains protected in the face of future innovations.

## 6. COMPARATIVE ANALYSIS

The right to cognitive liberty remains a concept not yet explicitly acknowledged on an international scale, despite the growing discourse surrounding personal autonomy in the face of advancing neurotechnological innovations. In the European Union, the closest recognition can be found in Article 9 on European Convention on Human Rights (ECHR), which guarantees the right to freedom of thought, conscience, and religion. This provision, while vital in safeguarding individual beliefs, does not encompass the full spectrum of cognitive liberty, particularly in light of emerging technologies that may influence or manipulate thought processes. Additionally, Article 10 of the European Council on Foreign Relations,

which protects the right to freedom of expression, may indirectly support aspects of cognitive liberty, yet it does not explicitly articulate the nuances of thought privacy or the autonomy over one's cognitive processes.<sup>61</sup>

At a broader level, instruments like the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR) recognize the importance of freedom of thought. The UDHR, particularly in Article 18, affirms that “everyone has the right to freedom of thought, conscience, and religion,” echoing similar sentiments in the ICCPR. However, these frameworks do not delve into the complexities surrounding the privacy of thought or the implications of cognitive autonomy in the context of technological advancements. The distinction between freedom of thought and privacy of thought is significant; while freedom of thought ensures individuals can hold beliefs and opinions without coercion, the privacy of thought pertains to the safeguarding of those thoughts from external intrusion or manipulation.<sup>62</sup>

The right to cognitive liberty would inherently encompass both dimensions—freedom of thought and privacy of thought—recognizing the individual's right to maintain control over their cognitive processes without interference. This necessity becomes even more pronounced in an era marked by the proliferation of neurotechnological tools capable of monitoring and potentially altering cognitive functions. The only avenue for incorporating the right to cognitive liberty into existing international legal frameworks may lie within Article 12 of the UDHR, which offers protection against arbitrary interference with privacy, family, home, or correspondence. This article, while traditionally focused on personal privacy, was recognized by the United Nations in 2018 as encompassing issues pertinent to the digital age, thereby extending its relevance to contemporary challenges posed by neurotechnology.

By affirming the importance of protecting cognitive processes from unwarranted external influences, the international community can begin to lay the groundwork for recognizing cognitive liberty as an essential human right. This acknowledgment would not only address the ethical implications of neurotechnology but also fortify individual autonomy in a rapidly evolving digital landscape, ensuring that the sanctity of the mind

---

61. It's Time for Neuro-Rights, Center for International Relations and Sustainable Development (CIRSD) (Winter 2021) <<https://www.cirsd.org/en/horizons/horizons-winter-2021-issue-no-18/its-time-for-neuro--rights>>.

62. *ibid.*

remains inviolable against encroachments that threaten personal dignity and self-determination. The time is ripe for international legal instruments to evolve, integrating the right to cognitive liberty into the broader human rights discourse and protecting individuals from the potential abuses of emerging technologies.

Chile<sup>63</sup> has taken a pioneering step on the international stage by being the first country to formally recognize neuro-rights through a constitutional amendment. This groundbreaking move represents a significant acknowledgment of the importance of mental integrity and autonomy in the face of rapid advancements in neurotechnology. The amendment aims to safeguard mental identity as a non-manipulable right, setting a precedent for the protection of individual cognitive liberties. Specifically, the Bill delineates five key rights that are to be prominently protected: mental privacy, personal identity, freedom of thought, equitable access to neurotechnological enhancements, and the right to make autonomous decisions regarding one's cognitive processes. This proactive stance emphasizes not only the necessity of protecting individuals from potential abuses stemming from neurotechnological innovations but also the broader implications for human dignity and self-determination.

Following Chile's lead, Spain has also recognized the significance of neuro-rights by implementing a similar legal framework through the Spanish Charter<sup>64</sup> of 2021. This Charter extends the rights articulated in foundational documents such as the Universal Declaration of Human Rights and the Spanish Constitution to address the unique challenges posed by digital technologies. Article 1 of the Charter guarantees the right to free individual self-determination, asserting that individuals have the right not to be subjected to invasive tracking or profiling that could undermine their autonomy and mental integrity. This provision aligns closely with the broader concept of cognitive liberty, ensuring that individuals maintain control over their thoughts and identities in a digital landscape increasingly characterized by data exploitation and surveillance.

Furthermore, Article 2 of the Spanish Charter highlights the regulatory responsibility of the law regarding technologies that extend beyond therapeutic applications. This includes the regulation of mental augmentation

---

63. 'Right to Cognitive Liberty in a Transhumanism Era: A Case for Integration Within Indian Legal Framework' NUALS L J (29 June 2023) <<https://nualslawjournal.com/2023/06/29/right-to-cognitive-liberty-in-a-transhumanism-era-a-case-for-integration-within-indian-legal-framework/>>.

64. *ibid.*

and enhancements aimed at improving human capabilities. By explicitly acknowledging the need for regulation in this area, Spain is addressing the ethical concerns surrounding the application of neurotechnologies and the potential risks they pose to personal freedoms. The Charter thus establishes a legal framework that prioritizes individual rights while recognizing the transformative possibilities of neurotechnology, ensuring that advancements in this field are pursued responsibly and ethically.

The neuro-rights agenda seeks to fill the protection gaps in current human rights systems, ensuring that individuals retain control over their mental processes and identity amidst the evolving landscape of neurotechnology. Proposed neuro-rights encompass several fundamental concepts essential for protecting cognitive autonomy. The right to identity emphasizes individuals' ability to maintain both their physical and mental integrity, ensuring that their personal identity remains unaltered by external manipulations. The right to agency highlights the importance of freedom of thought and the capacity to make autonomous decisions, underscoring the necessity of protecting individuals from coercive influences.

The right to mental privacy ensures that individuals can keep their thoughts shielded from unauthorized disclosure, while the right to fair access to mental augmentation calls for equitable distribution of the benefits derived from neurotechnological enhancements. Lastly, the right to protection from algorithmic bias aims to prevent technologies from perpetuating existing prejudices and discrimination. Together, these rights not only build upon but also expand existing international human rights norms related to human dignity, liberty, and privacy.

However, the landscape of neuro-rights is still developing, and there is currently no international consensus on what constitutes these rights. While Chile has taken a significant step by enacting laws that explicitly protect neuro-rights, the framework remains limited and lacks widespread adoption. Spain's recent Digital Rights Charter represents another important initiative, but further international cooperation and consensus-building are essential to fully realize neuro-rights as a recognized category within the global human rights framework. Existing international instruments addressing neuroethics, such as the OECD's Recommendation on Responsible Innovation in Neurotechnology, provide some guidelines but fail to comprehensively tackle the broader implications of identity abuse, discrimination, and the responsibilities of states in relation to neurotechnology.

## 7. CERTAIN POLICY MEASURES

### 7.1 United Nation positioned recognition and standardization of right

To advance the neuro-rights agenda globally, bold leadership and new institutional structures are necessary. The United Nations (UN)<sup>65</sup> is well-positioned to facilitate this dialogue, given its overarching mandate to promote and protect human rights worldwide. A focused strategy involving both short-term and long-term measures could pave the way for a robust international framework addressing neuro-rights.

In the short term, the UN could establish an International Science and Law Expert Commission on Neuro-Rights. This Commission, composed of legal experts in human rights and scientists specializing in neuroscience, would work to define neuro-rights through collaborative research and the application of existing human rights laws. Additionally, the UN could appoint Special Advisors on Neuro-Rights to identify best practices from various countries and investigate allegations of neurotechnology misuse. Regular consultations with nations leading in neurotechnology research would also foster dialogue and promote consensus on regulatory practices.

For long-term impact, the UN General Assembly and Human Rights Council could work towards creating a new treaty or protocol that incorporates neuro-rights into international law. This would establish clear treaty bodies responsible for defining and enforcing neuro-rights. Existing treaty bodies, such as the UN Committee Against Torture and the Human Rights Committee, should also be encouraged to adopt General Comments interpreting neuro-rights within the context of their existing mandates. Furthermore, appointing a Special Rapporteur on the Impact of Neurotechnology on Human Rights would enable the UN to monitor countries' adherence to neuro-rights and report findings on violations or progress. Finally, the creation of a specialized agency to coordinate global efforts surrounding neuro-rights could further strengthen these initiatives and solidify the importance of cognitive liberty on the international stage.

---

65. It's Time for Neuro-Rights, Center for International Relations and Sustainable Development (CIRSD) (Winter 2021) <<https://www.cirsd.org/en/horizons/horizons-winter-2021-issue-no-18/its-time-for-neuro--rights>>.

## 7.2 Objective risk-perception and rights jurisprudence

As part of the research, the authors recommend certain measures that can be clubbed together under the heading of ‘*Neuro-Rights*’, these measures will be buttressing the concept of *Neuro-Rights*. It is conducive to mention that these measures are mostly churned out from a risk-perception approach, wherein the major risk that are arising against neural rights (be it short-term or long-term) due to neurotechnology will be countered by an appropriate right in the hands of the individual. The underlying idea is to empower the users (individual) of the neurotechnology, be it in form of a consumer, employee or even as a patient, what rights can be there to safeguard their interest.

### 7.2.1 Risk attached with Neuro-data

- i) Re-identification of the brain data
- ii) Hacking of the brain data
- iii) Unauthorized re-use of the data
- iv) Commercialization
- v) Digital Surveillance
- vi) Unconsented collection of brain data
- vii) Informed Consent

The points highlighted above raise genuine concern pertaining to the safety of neuro-data, interestingly, most of these points are covered within the realm of personal data protection principle. However, the intimacy of the neuro-data is more intricate (deeper) as compared to personal data or rather in a simpler tone, neuro-data seem more closer to human dignity. It will be an easier task to just to denominate neuro-data as a species of sensitive data under the data protection regime, but again from the perspective of ‘*scope*’ and ‘*safeguard required*’, the breath of neuro-data is larger. There are schools of thought that bat for recognizing neuro-data as sensitive data due to its intense proximity to the human personality.<sup>66</sup> Further, as neuro-data will not be covered in the category of special category of data as

---

66. Bojana Bellamy and Eduardo Bertoni, ‘Neurodata — the New Epicenter of Data Protection’ *Tech Policy* <<https://www.techpolicy.press/neurodata-the-new-epicenter-of-data-protection/>> accessed 5 March 2025.

mentioned under Article 9 of the GDPR, yet with much neurological device progression, it is not an off-shot believe that one day the physiological activity of the human brain may give insights into one's sexual orientation, political opinions and religious belief, all of which will qualify as a sensitive data under Article 9 of the GDPR. If Article 9 of the GDPR has to be the governing principle in this context, the primary condition for processing of the neural data will be based on explicit consent. However, will it be the right approach, it is an accepted thesis, that there is dynamism that underlies the neural data and neurotechnology, it will not be an easy task to capture the scope of the present neural data in one aspect, thus, the genus of the neural data needs to be treated differently than that of personal data (or even sensitive personal data).<sup>67</sup>

### 7.2.2 *Cognitive integrity and risk-perception*

This thought is more echoed by the fact that the sort of consequence that a breach of neural data (or brain data) can expose onto an individual is far deeper and dire as compared to the kind of consequence that an individual will be exposed to in case of personal data breach. However, there is genuine scepticism on the current growth of the neurotechnology, to be even serious enough to be considered in the legal field, let alone in the neuro science field. *Anna Wexler*,<sup>68</sup> raises concerns on the current growing frenzy on neuro-rights or even right to thought, on two counts *Wexler* raises scepticism on the future of neuro-rights. Firstly, *Wexler*, truly believes that at the current state of growth, even to imagine a lowest strand of neuro-technology affordable to consumer will be in millions of dollars, with an additional humungous infrastructure cost.<sup>69</sup> Secondly, to grow the level of accuracy to predict human thoughts, beliefs or any emotion is very skewed.<sup>70</sup> *Wexler*, insists that even for the Artificial Intelligence to draw a pattern between electrical movement within a part of the brain with a particular emotion might not be accurate enough for it to qualify as a sensitive data.<sup>71</sup> Thirdly, even to qualify as a sensitive data, the data needs to be identifiable to an individual, on this front, it is hard at the first place to establish an accurate relationship between one-set of brain electrical

---

67. *ibid.*

68. Wexler, Anna, 'At the Crossroads of Neuroethics and Policy: Navigating Neurorights and Neurotechnology Governance' (2024) 15(2) *American Journal of Bioethics Neuroscience* 77-79.

69. *ibid.*

70. *ibid.*

71. *ibid.*

movement with either of the characteristics that are regarded as sensitive; be it religious opinion, political opinion, gender identity or even identity.

*Wexler*, identifies the means of perception or cognition of a particular object might be different for different individuals, an individual 'Xs' cognition of a particular object might be different than that of individual 'Y', the same object might invoke different set of brain activities for different individuals. In this case, however, the unique brain activity for an individual for an object will be a unique impression on the neural data, particular to that individual, thus, surely coming within the realm of personal data protection.<sup>72</sup> However, *Wexler*, outrightly condemn the growth of any jurisprudence of neuro-rights as he calls all the threats highlighted earlier are merely exaggerated.<sup>73</sup> The current neurotechnology is not in a position to show any dangerous threat to be taken a consideration of, thus, in simpler terms not worth the time.<sup>74</sup>

However, authors like *Rafale Yuste*<sup>75</sup> emphasis on the need of recognition of the neuro-rights, irrespective of the current state of growth of the neurotechnology<sup>76</sup> primarily because, the current state of growth as laid the path for future threats that might arise for neural rights.<sup>77</sup> In simpler terms, it is better to be ready ahead of the threat yet to arrive. Be it exaggeration or a just caution step to prepare for the coming future, what really needs to be deciphered is the scope of revelation of the brain data. As *Wexler*, quite rightly highlighted, the current AI tools are in position to decipher a pattern between 'brain activity' and a 'thought', even if this accuracy is achieved to a certain extent, the next huddle will be knowing what are the content of the thought. If a pattern has been deciphered between 'brain activity' and 'thought', to have some impact, it is required that the technology is in a position to know the content of the thought as well as in a position to even manipulate those thoughts. If the content of the thoughts can be revealed in that case, it will be an appropriate case for personal data, as highlighted earlier. However, this does not in any way belittle the capacity of the current set of technology that can estimate mental workload,<sup>78</sup> stress

---

72. *ibid.*

73. *ibid.*

74. *ibid.*

75. Yuste, Rafael, 'Neurorights and New Charts of Digital Rights: A Dialogue Beyond the Limits of the Law' (2023) 30 *Indiana Journal of Global Legal Studies*.

76. *ibid.*

77. *ibid.*

78. *ibid.*

level<sup>79</sup> and emotions.<sup>80</sup> There are continuous research being undertaken in Caltech<sup>81</sup> on the possibility of decoding brain data, in one such research, three patients of epilepsy have been subjected to fMRI to study the blood flow in their brain while they are been read sci-fiction novel of ‘*The Moth*’. The underlying idea was to observe the flow of blood in brain when certain phrases were being read and later the patients were called to recall those sentences, and the AI tool that had observed the blood-flow earlier will make prediction of the sentence the patient is going to say. Interestingly, the vocabulary used for this exercise was very less, yet, the accuracy achieved in the exercise was 61%.<sup>82</sup> These are good indicators that the neurotechnology is well on its way to predict the kind of words that are about to be said an individual, the type of words to be used by an individual will give a lead to the category of theme he/she is talking about. Like, if the word to be used by the individual has religious undertone, a revelation to his religious affiliation can be divulged, the same can happen in case of sexual orientation, political affiliation or ethnicity. The only limitation currently the technology faces is the limited data-set on which the AI is observing the individual and is being trained on, but there surely cannot be scaling problem in coming times.<sup>83</sup> Though there are ethical concerns for using of the brain-data at such level. However, currently the prime concern is pertaining to the legislative framework to tackle such questions of liability and responsibility. As highlighted earlier, as these brain-data can reveal sensitive data about an individual, in such a case, there is no limitation to regard them as part of Article 9 of the GDPR.<sup>84</sup> The author even suggests an additional layer of security for these data, due to their deeper sensitive nature, revelation of such data to any neuro-marketing firm can have devastating impact for individual right, wherein the individual might be subjected to unwarranted stimulation that may make him loose control over his/her senses.

Neuro-marketing is already working in this area, giving stimuli to individual directing an individual to certain choices, that might not be deliberate choice, rather his brain has just been nudge towards that direction. The author truly believes, no other right than ‘*Cognitive Integrity*’ right can

---

79. *ibid.*

80. *ibid.*

81. Cynthia Eller, ‘A Window Into the Brain’ *Caltech* <<https://www.caltech.edu/about/news/window-into-the-brain#:~:text=In%202021%20and%202023%2C%20Andersen,intention%20can%20be%20carried%20out>>. accessed 5 March 2025.

82. *ibid.*

83. *ibid.*

84. General Data Protection Regulation 2016, art 9.

address the concern of sensitivity of the brain data. As the term '*Cognitive*' is suggestive of understanding by the human brain and '*Integrity*' represents the idea of impenetrable nature.

The authors truly believe that the term '*Cognitive Integrity*' will address both the concerns pertaining to the safety of the brain data and possibility of manipulative measures that the human brain may be made a subject too.

The authors suggest there are darker times to come in the area of neuro-marketing wherein, large showrooms of consumer goods will be laced-up with in-built fMRI readings, where every consumer entering their shops will be monitored, to know their inclination and ads on the screen will keep changing as per the likes of the individual, this will give a nudge to the individual (as a stimuli) to buy something, which the individual will buy without a hint why did he/she did so?

Further, such a scenario, is not a far-off possibility that shops, platforms or any other publicly accessible places will be having '*Sign Boards*' highlighting you are entering into a monitored-space (either by some or the other sophisticated non-intrusive neurotechnology), just like in cases of CCTV surveillance, and the individual entering the space has to think twice before entering the space.

In second scenario, where the thoughts can be manipulated will be a direct violation of human dignity (covered under Article 21 of the Indian Constitution), however, this second situation, only requires to establish that certain stimuli had led to tweaking the brain to produce a result that was not warranted by the victim individual. It is not required that stimulation given to the brain produces the result intended by the stimulation, but the loss of control of the individual victim is justifiably a violation of the human dignity. It turns into a question of self-determination; or the question of decisional autonomy of an individual being at risk.

## 8. CONCLUSION & RECOMMENDATION

It goes without saying that there are normative overlap of mental integrity, bodily integrity and dignity jurisprudence, the core question that the authors had raised earlier in the starting of the paper was, is it required to set a new set of jurisprudence? Specifically named as neuro-rights for the purpose of maintaining the integrity of the human brain or are there existing sets of rights, capable of addressing the genuine concern raised by

the novel technology. *Christoph Bublitz*<sup>85</sup> reaffirms that the existing set of jurisprudence on bodily integrity, mental privacy and privacy provides for a layered protection to what is being attempted to be named as neuro-rights. *Bublitz*'s bats for actualization and specification of the existing set of right to cover the requisite area.<sup>86</sup> However, authors do disagree that existing set of right may not be in a position to be directed at the right place, rather, the actualization of the existing right may still require invocation of it, and this invocation may be termed as '*cognitive integrity*', what others are terming as '*neuro-rights*'. The reason for the authors to suggest this mechanism is simply because certain rights may still not be precise enough to address the intricate questions of autonomy, though the existing right maybe a genus capable of addressing the right-issue, yet, it requires custom-tailoring to be directed at the right place with the right force. For example, the cases of freedom of speech and expressions are appropriately suited to explain authors' point, like in the early cases of freedom of press, the idea of *Right of Circulation*,<sup>87</sup> *Newspaper Right*,<sup>88</sup> *Volume of Circulation* and such other rights are not specifically written rights, yet drawing their legitimate space from the genus of Freedom of Speech & Expression.<sup>89</sup> Idea being that these rights are a means to an end, what the authors calls as invocation of the spirit of the genus right. The invocation is only possible if there is a right in form of a stepping stone to reach the genus right, in the present paper the authors have called it as '*cognitive integrity*'.

Cognitive Integrity and the measures underlying it: The measures that will surely make a way for themselves post-cognitive integrity becomes a part of the Indian Jurisprudence will depend on the context in which the threat arises for the right. The authors would like to discuss few such instances wherein certain measures will be required to be contrived to safeguard '*Cognitive Integrity*'.

Privacy of the Brain Data: At the cost of repetition, the privacy of the neural data has been discussed at length in the earlier part of the paper. The authors have suggested for a more stringent provisions for safeguarding of the neural data, due to its deeper proximity to the human personality. In fact, giving them the stature of sensitive data can be regarded as a standard safety measure. However, the authors believe, something more can be

---

85. Bublitz (n 8).

86. *ibid.*

87. *Sakal Papers (P) Ltd v Union of India* 1961 SCC OnLine SC 124 : (1962) 3 SCR 842.

88. *Bennett Coleman & Co v Union of India* (1972) 2 SCC 788 : AIR 1973 SC 106.

89. Constitution, art 19(1)(a).

done to provide protection to the neural data, something more sensitive, wherein, the possibility of vices of neuro-marketing arising in the future (be it in the form of intrusive or non-intrusive gadget) can be kept under a check. Measures such as; (a) detailed notice, with continuous update to the consumer as to how his data is being used; and (b) appointment of special officer with expertise in neurotechnology for the companies that are processing neural data (this will be in lines with the position of ‘*Data Protection Officer*’ as suggested in the case of Personal Data Protection laws) may be effective. This specialized body will be well positioned and well trained to know the dynamic nature of the neural data, and will vehemently work in favour of the individual right.

### **Surveillance Jitters**

There is no denial that State too is a relevant party in the citizens’ neural data, the prime concern can be pertaining to usage of neural data as evidence against the accused. However, the authors will not be dealing with this issue, as primarily this issue can easily be tackled by the scope of Article 20 (3) of the Indian Constitution. The judgments of *Selvi* and *State of Bombay v Kathi Kalu Oghad*<sup>90</sup> will still hold good to deal with possible abuse of doctrine ‘*rule against self-incrimination*’ in case of neural data.

Whereas, in overall cases of surveillance wherein the State might use intrusive technology, in such cases, the principle of personal data protection will be equally applicable to the State and to the Non-State actor.<sup>91</sup> Further, any unwarranted surveillance in any form is already restricted within the Indian Constitution, and can easily be culminated from the judgments of *K S Puttaswamy-I*<sup>92</sup> & *II*,<sup>93</sup> *Kharak Singh v State of U.P.*,<sup>94</sup> *PUCL v Union of India*,<sup>95</sup> and many more.

### **Special wing of Personal Data Protection Board**

In cases wherein the individual is using the neurotechnology for conducive purposes such as patient of paralysis using the technology to communicate using the technology to move their limbs or users’ using artificial limbs.

---

90. *State of Bombay v Kathi Kalu Oghad* 1961 SCC OnLine SC 74 : AIR 1961 SC 1808.

91. *ibid.*

92. *K S Puttaswamy (Privacy-9J) v Union of India* (2017) 10 SCC 1.

93. *K S Puttaswamy (Privacy-9J) v Union of India* (2017) 10 SCC 1.

94. *Kharak Singh v State of U.P.* 1962 SCC OnLine SC 10 : AIR 1963 SC 1295.

95. *PUCL v Union of India* (1997) 3 SCC 433.

As neurotechnology is a dynamic phenomenon, the technology is bound to bring dynamic changes in the context of ‘individual consent’ and ‘controlling mechanism.’ In such a scenario, there has to be a continuous study of the individual autonomy under the usage of neurotechnology. The author suggests establishment of a ‘*Committee of Neurotechnological and Legal experts*’ to monitor the growth of the neurotechnology and usage with the individuals. As in cases of patients using the neurotechnology, it will be hard to draw the bifurcating line as to when the individual choice starts or the influence of the technology kicks-in. Technology that are capable of influencing thoughts or choices will be detrimental to individual choices. The constitution of the committee is suggested by the authors in line with the provisions of the similar nature suggested under the *The Rights of Person with Disability Acts, 2016*.<sup>96</sup> This Committee can also be a special wing of the Personal Data Protection Board established under the *Digital Personal Data Protection Act, 2023*.

The core idea will be to detect as to when the influence of the technology has affected the human brain. This is only possible with a continuous monitoring of the gadget in question.

Further, in cases, wherein the individual himself is in a position to detect the influence of technology upon themselves, there are few rights that the authors are pushing forward should be there with the individual also, so it can have some leverage against the infringement by such technology.

Certain Rights that can be exercised by the individual are as follows:

**(a) Right to Opt-Out/detach**

The right to opt-out has gained much international traction, specially, in the field of international human rights law. As the name of the right suggest, the right is meant to bring back the status-quo, in cases the individual does not feel comfortable with the technology, it is a simpler idea of not being subject to technological intervention with one’s body. The individual should also be entitled, that he/she is reversed back to the physical and neurological state of being that he/she was in when the technology was applied onto the individual.

**(b) Insurance Pool**

---

96. Refer to Rights of Person with Disability Act 2016, ss 60, 65 and 66.

Further, in cases of damages faced by the individual, be it bodily damage or decisional damage (in form of impact on the decision-making capacity) the concerned individual should be compensated for the same from the company concerned. This principle will be based on tortious liability cases. However, the State as a part of the regulatory framework may establish a joint insurance pool, wherein, all the tech companies coming-up with intrusive and non-intrusive neurotechnology are required to contribute a certain amount of their revenue to the pool, thus, the insurance pool can be used for the purpose of compensating the individual damaged by the technology in question.

Additionally, certain principles of consumer protection such as '*product-call back*' have to be robustly practiced. However, this does not in any way means to step on the jurisdiction of the Medical Device Rules, 2017.

### **(c) Right to Explanation**

Right to explanation is one of the most talked about rights in the contemporary times, primarily because as technology has engulfed the human society, it is becoming more and more intriguing to know modus operandi underlying the technology. Especially in cases of Artificial Intelligence, the algorithmic setup they have and what result do they produce. In cases of neurotechnology, concerned individual and close aids has all the right to know how the technology is working, what modus-operandi it has and what consequences it can expose the individual too. This will reflect a closer control that the individual still can exercise over his physical body. Asking for explanation can have a deeper controlling measure over the technology.

# THE NEW LAW OF EVIDENCE IN INDIA: SIMPLIFICATION, SENSITIZATION AND MODERNIZATION, OR SIMPLY REORGANIZATION?

—Akshya Verma\*

## ABSTRACT

*Aligning law with the social realities will enliven the entire legal system, and therefore law should change with the change in society. Law cannot remain static and needs to evolve with time to meet the needs of an ever-changing society. With the technological advancements and societal changes, there was an urgent need to re-tune the law of evidence in order to cover crimes beyond the territorial jurisdiction of India, include the digital space, and use of modern technologies within its ambit. The author in this article has dealt with some of the fundamental modifications viz. additions, deletions, integrations, substitutions and omissions to/of the key provisions introduced by the Bharatiya Sakshya Adhiniyam, 2023 (BSA), and analysed their constitutional and jurisprudential cohesiveness. Further, the author, through critical analysis, attempts to appraise the BSA's impact on the efficiency and fairness of the justice system in India, and assess the justification for the enactment of the Adhiniyam. Furthermore, the author has dealt in detail with the legalities, technicalities and the process connected with handling, presentation and interpretation of electronic and digital evidence with specific reference to the mandatory requirement of contemporaneous certificate under s.63, BSA.*

**Keywords:** BSA, technological advancements, societal changes, constitutional and jurisprudential cohesiveness, electronic and digital evidences.

---

\* Assistant Professor of Law at National Law University Odisha.

## 1. INTRODUCTION

Justice dispensation system can be broadly classified into three parts viz. Investigation or Pre-trial, Trial and Post-trial. It is only at the stage of trial where there is a role of the Indian Evidence Act, 1872 (earlier) and now, the Bharatiya Sakshya Adhiniyam, 2023. Justice is best served only when it is based on truth. Therefore, the ultimate purpose of the Law of Evidence is to find the truth. It is the law which helps the court in finding the reality, by offering reasonable opportunity to both the sides to present their case and confirming the basis on which the action is taken against one of them.

The Bharatiya Sakshya Adhiniyam, 2023 (hereinafter referred to as BSA) has replaced the Indian Evidence Act, 1872 (hereinafter referred to as IEA) on July 1, 2024. However, IEA still applies to the pending application, trial, inquiry, investigation, proceeding or appeal commenced before 1 July, 2024. BSA is an adjective law to define the pleadings and methodology by which the substantive and procedural laws are operationalized. The *preamble* of the Adhiniyam states: “To consolidate and to provide for general rules and principles of evidence for fair trial”. Thus, it deals with the rules and principles on how evidence should be presented and interpreted inside the courts? i.e., What has to be proved? How it has to be proved? Who will prove it? The most basic reason to bring BSA is to address the technological advancement undergone in the country during the last few decades. Replacing IEA by BSA has three-fold objectives:

One, *simplify* i.e., renumbering and integration of like provisions e.g., provisions in relation to confession to police officer, and in police custody (ss. 25,<sup>1</sup> 26<sup>2</sup> and 27,<sup>3</sup> IEA) are now clubbed together as one section (s. 23, BSA<sup>4</sup>). Further, ss. 24,<sup>5</sup> 28<sup>6</sup> and 29,<sup>7</sup> IEA are now included under s. 22, BSA (Confession caused by inducement, threat, coercion or promise, when irrelevant in criminal proceeding). Similarly, provisions in relation to public and private documents (ss.74 and 75, IEA respectively) are put

- 
1. Evidence Act 1872 (Act 1 of 1872), s 25 (Confession to police officer not to be proved).
  2. *ibid* s 26 (Confession by accused while in custody of police not to be proved against him).
  3. *ibid* s 27 (How much of information received from accused may be proved).
  4. Sakshya Adhiniyam 2023 (Act 47 of 2023), s 23 (Confession to police officer).
  5. Evidence Act 1872, s 24 (Confession caused by inducement, threat or promise, when irrelevant in criminal proceeding).
  6. *ibid* s 28 (Confession made after removal of impression caused by inducement, threat or promise, relevant).
  7. *ibid* s 29 (Confession otherwise relevant not to become irrelevant because of promise of secrecy, etc).

together as one (s.74, BSA<sup>8</sup>). Also, s. 146, BSA<sup>9</sup> includes all the provisions in relation to leading questions, which were earlier contained in ss.141,<sup>10</sup> 142<sup>11</sup> and 143,<sup>12</sup> IEA. Due to the modifications in BSA i.e., introduction of one section (s. 61, BSA), removal of 5 sections (ss. 22A, 82, 88, 113 and 166, IEA) and other changes like addition, deletion, substitution of certain words or provisions, etc., a lot of sections, almost all, are renumbered and the new BSA consists of 169 sections in total whereas the old IEA consisted of 167 sections.

Two, *sensitize* i.e., use of politically correct terms e.g., use of the term ‘unsoundness of mind’ instead of ‘lunacy’ in explanation to s.124 (Who may testify).

Three, *modernize* i.e., a) removal of outdated and colonial references (like Act of the Parliament of the United Kingdom; Provincial Act; Crown Representative; London Gazette; the Government Gazette of the Dominion, colony or possession of his Majesty; British Crown; Queen’s Printer; Her Majesty) have been deleted from ss. 31,<sup>13</sup> 52,<sup>14</sup> 77<sup>15</sup> and 80,<sup>16</sup> BSA. b) inclusion of electronic and digital records under evidence and its admissibility e.g., “evidence” now, means and includes all statements including statements given electronically, and all documents including electronic or digital records (s. 2(1)(e), BSA); “document” includes electronic and digital records. Recognizing the challenges involved in repetitive physical appearance in courts, this update acknowledges the shift to electronic communication and data storage from traditional paper-based documentation. It offers a viable alternative by permitting the appearance of victims, witnesses, accused, and experts to depose their evidence through electronic means while minimizing the necessity for any kind of physical travel and reducing related expenses. This has logical connection to s. 530 of Bharatiya Nagarik Suraksha Sanhita, 2023 (BNSS)<sup>17</sup> providing for examination of complainant and witnesses in electronic mode by use of

---

8. Sakshya Adhinyam 2023, s 74 (Public and private documents).

9. *ibid* s 146 (Leading questions).

10. Evidence Act 1872, s 141 (Leading questions).

11. *ibid* s 142 (When they must not be asked).

12. Evidence Act 1872, s 143 (When they may be asked).

13. Sakshya Adhinyam 2023, s 31 (Relevancy of statement as to fact of public nature contained in certain Acts or notifications).

14. *ibid* s 52 (Facts of which Court shall take judicial notice).

15. *ibid* s 77 (Proof of other official documents).

16. *ibid* s 80 (Presumption as to Gazettes, newspapers, and other documents).

17. Nagarik Suraksha Sanhita 2023 (Act 46 of 2023), s 530 (Trial and proceedings to be held in electronic mode).

electronic communication or by audio-video electronic means. c) expansion of the scope of evidence i.e., Definition of secondary evidence has been expanded by including 3 new categories of secondary evidence (clauses vi, vii and viii, s. 58, BSA). Presently, secondary evidence also encompasses oral and written admissions as well as evidence provided by individuals skilled in examining certain technical and voluminous documents that cannot be easily examined in court. d) omission of outdated provisions e.g., s. 22A, IEA (When oral admissions as to contents of electronic records are relevant) has been completely removed from the law of evidence for, electronic certificates have come into picture now. Hence, no requirement of oral admissions as to their contents. Other fully removed provisions are s. 82, IEA (Presumption as to document admissible in England without proof seal or signature), s. 88, IEA (Presumption as to telegraphic messages), s. 113, IEA (Proof of cession of territory) and s.166, IEA (Power of jury or assessors to put questions).

Apart from these key changes, the core principles under the law of evidence remain the same i.e., there is no change to fundamental concepts like Facts in Issue, Relevancy, Admissibility, Confessions, Dying Declaration, Burden of Proof, etc.

## **2. FROM ACT TO ADHINIYAM: DE-COLONISATION OR RE-ORGANISATION?**

Pt. Jawahar Lal Nehru<sup>18</sup> was well aware about the fact that the society cannot remain static forever, and therefore, during the Constituent Assembly Debates, he emphasized the importance of art. 368 of the Constitution of India<sup>19</sup> by stating:

“While we want this Constitution to be as solid and permanent as we can make it, there is no permanence in a Constitution. ... If you make any Constitution rigid and permanent, you stop the nation’s growth, the growth of a living, vital, organic people.”

His vision was very clear in the sense that while the Constitution should be respected, it should not be treated as unchangeable for, it should evolve with time, ensuring that democracy, justice and social progress are upheld.

---

18. (1889-1964), Pt Jawaharlal Nehru was one of the most important leaders of the Indian national movement for independence, and became the first Prime Minister of independent India.

19. Constitution of India, art 368 (Power of Parliament to amend the Constitution and procedure therefor).

The same goes with any other law (Law of Evidence, for that matter), and until and unless such amendments or enactments are at par with the constitutional values and principles, and are not done recklessly, the change should be welcomed and respected.

The jurisprudential essence behind the new law of evidence lies in the fact that society evolves like a biological organism and this evolutionary process involves increasing complexities and specialisation as it progresses. With such development in social structure, the law should evolve over time.

As far as the jurisprudential perspective is concerned, one theory is not applicable in totality but some element of each is taken. The same goes for law of evidence and its evolution from the Act to Adhinyam as it has never developed in isolation and thus no one theory can explain and justify the change in full. Rather the evolution can be explained through various theories by adopting favourable elements of the same. It is a law which developed with the passage of time along with the progress of society. Therefore, its evolution can be justified by associating the following schools and theories with the law of evidence:

## 2.1 Philosophical School

The State and law are both the consequences of evolution, as opined by Hegel.<sup>20</sup> As per Hegel,<sup>21</sup> law was made in order to conform to the clashing egos in the society. The amalgamation of selfish consciousness of each ego helps to achieve universal consciousness.<sup>22</sup> The union of family and civil society makes up the State.<sup>23</sup> For meeting the requirements of time, both the society and law have been changing with time. Therefore, it is necessary that laws reconcile to the dynamic moderations in society for attaining the purpose of human excellence.<sup>24</sup>

It is an undeniable statement that the shift from IEA to BSA is the result of finding solutions to the challenges which have arisen due to the advancement in technology. It proves to be a complete law on evidence in

---

20. V D Mahajan, *Jurisprudence and Legal Theory* (5th edn, Eastern Book Company, Lucknow 2014) 515.

21. (1770-1831), Georg Wilhelm Friedrich Hegel, was a German philosopher who developed a dialectical scheme that emphasised the progress of history and of ideas from thesis to antithesis and thence to a synthesis.

22. Dr N V Paranjape, *Studies in Jurisprudence and Legal Theory* (8th edn, Central Law Agency, Allahabad 2016) 81.

23. Mahajan (n 20).

24. Paranjape (n 22) 82.

the sense it deals with not only with the oral and documentary evidences but also the electronic evidences.

## 2.2 Historical School

The Transformation of Society to the progressive stage has been elaborately discussed by Sir Henry Maine.<sup>25</sup> According to him, law evolves with the advancement of society, leading to the gradual development of an individual over time. In a static society, the rights of an individual would have been determined based on existing practices, whereas in a progressive society, legal development occurs through new mechanisms, rooted in the concept of equity, legal fiction, and legislation.<sup>26</sup> The widespread use of technology in collecting evidence and acknowledging the same by bringing new provisions under the BSA is a progressive development in law. Four explanations have been added to s. 57, BSA in order to incorporate the provisions on electronic evidences and electronic records as primary evidence. This has in turn increased the scope of primary evidence manifolds, and have given the stakeholders numerous options to present an electronic evidence in the court of law.

## 2.3 Sociological School

Social engineering, as proposed by Roscoe Pound,<sup>27</sup> focuses on balancing the interests of individuals and society to prevent conflicts. Pound's theory is known as *functional theory* due to its emphasis on the law's role in harmonizing these conflicting interests promptly to avoid disputes. Crime is a wrong against both the individual and society and therefore, the state prosecutes under the criminal justice system thereby doing balancing of interests, which is not possible until and unless there is an apposite law to deal with the crime. This reiterates the urgency to have a proper legal framework to deal with the crime in digital space, and thereby achieving the balancing of interest.

Eugen Ehrlich,<sup>28</sup> one of the prominent figures associated with sociological schools of jurisprudence believes in spontaneous evolution of

---

25. (1822-1888), Henry James Sumner Maine, was a British jurist, historian, anthropologist, pioneered the study of comparative law, notably primitive law and anthropological jurisprudence.

26. Paranjape (n 22) 63.

27. (1870-1964), Roscoe Pound, belonged to social school of thought, a prolific writer and propounded theory of social engineering, interest theory.

28. (1862-1922), Eugen Ehrlich, was an Austrian legal scholar and teacher generally credited with founding the discipline of the sociology of law.

law. He has given the concept of *living law* and argues that just as society evolves naturally through interaction and relationships of its members, law too should emerge from these social practices and norms, rather than being imposed solely through formal statutes and regulations by the state. This clearly hints to having a robust legal framework where one can deal with evolving and concerning digital aged electronic or digital evidences.

As per the *biological evolution theory*, Herbert Spencer<sup>29</sup> draws an analogy between the society and biological organism, where he emphasizes that the society, like an organism, develops continuously with time. In order to cater the needs of evolving society, law also needs to develop with time. Therefore, the enactment of the Adhiniyam is in consonance with the *biological evolution theory*, considering the societal and technological advancements.

## 2.4 Realist School

As far as the realist school of jurisprudence is concerned, Karl Llewellyn,<sup>30</sup> says that society changes faster than law and therefore, there is a constant need to examine how law meets the contemporary social problems. He further emphasised on sustained and pragmatic evaluation and examining of law in terms of changing circumstances. This theory advocates highly for the need of having a robust and contemporaneous legal framework to deal with evidence, especially electronic or digital evidence.

As per Richard Posner,<sup>31</sup> formalism should not be separated from realism for, excessive formalism leads to redundancy of law. Law should be empirical in nature, and it needs to focus on the practical outcome. Considering the *legal pragmatism* given by Richard Posner, the Adhiniyam 2023 fits well in the current real-time scenario where not everything is documented rather recorded via electronic means.

In a nutshell, in order to evolve with the society and stay topical, the law of evidence in India has transformed by incorporating the much required

---

29. (1820-1903), Herbert Spencer, was a sociologist and influencer of the structural functionalist perspective, one of the principal proponents of the evolutionary theory in the mid-nineteenth century, his synthetic philosophy, political thought primarily for the defense of natural rights was popular.

30. (1893-1962), Karl Nickerson Llewellyn, was an American jurisprudential scholar associated with the school of legal realism.

31. Richard Allen Posner, is an American legal scholar and retired United States circuit Judge who served at the US Court of Appeals for the Seventh Circuit from 1981 to 2017.

changes in the existing law prior to July 1, 2024.<sup>32</sup> It includes: addition and amendment of provisions in relation to technological advancements and societal changes; removal of outdated provisions referring to colonial era; integration of certain provisions of the same kind; removal of non-functional provisions and changes necessitated on account of changes in IPC<sup>33</sup> and CrPC<sup>34</sup> *mutatis mutandis*.

However, as far as the scheme of Law of Evidence is concerned, there is hardly any change except the change in numbering of the provisions. It can still well be classified into three parts i.e.,

- (i) Relevancy of Facts (What has to be proved?): Part I, from ss. 3 to 50, BSA (earlier, from ss. 5 to 55, IEA).
- (ii) Mode of Proof (How will you prove it?. How are the relevant facts to be proved?): Part II, from ss. 56 to 100, BSA (earlier, from ss. 51 to 103, IEA).
- (iii) Production and Effect of Evidence (Who will prove it?. By whom and in what manner must the evidence be produced?): Part II, from ss. 101 to 167, BSA (earlier, from ss. 104 to 169, IEA).

### 3. WHAT HAS TO BE PROVED?

How does the rain occur? It doesn't occur in isolation. There is a phenomenon behind it and a process which is interconnected with each other. First, there is increase in the atmospheric temperature which results in evaporation of water from lakes, oceans, rivers and other water bodies. Next, the water vapours rise into the air and form cloud. Next, the water droplets in the clouds grow and get dense through the process of condensation. Last, due to the heaviness of the droplets, they fall to the ground as rain. In the similar way, whenever something happens, there is a sequence in which it happens. It does not happen out of the blue. The same logic is used as a fundamental basis in the law of evidence for calling a fact to be relevant, and under the BSA or IEA, only those facts are required to be proved, which are either facts-in-issue or relevant facts in relation to the facts-in-issue.

---

32. The commencement date of BSA is 1 July 2024.

33. Penal Code 1860 (Act 45 of 1860).

34. Criminal Procedure Code 1973 (Act 2 of 1974).

There will be some incidents surrounding the main fact which will have some logic connection between all the circumstances, and these form circumstantial evidences. These circumstances together, if chain of surrounding circumstances is complete, are said to be logically relevant. There is no specific mention of such logical relevancy under the law of evidence. There is only one relevancy i.e., legal relevancy that relates to the relevancy under the BSA or IEA. If a fact is declared to be relevant under s. 4 till s. 50, BSA or s. 6 till s. 55, IEA, it is called as legal relevancy or legally relevant fact. This is declared under the s. 3, BSA/ s. 5, IEA as to what has to be proved.

In the law of evidence, the position is such that the every legally relevant fact is also logically relevant. Theoretically, it is not necessary that every logically fact is legally relevant also, however, practically, there is a complete overlapping i.e., logically relevant fact is legally relevant and vice versa is also true.

As per the law of evidence, one fact is said to be relevant to another when the one is connected with the other in any of the ways referred to in the provisions of the Adhinyam/Act relating to the relevancy of facts, viz:

- a) Facts logically connected with facts in issue (ss. 4-14, BSA/ ss. 6-16, IEA)
- b) Admissions and confessions (ss. 15-25, BSA/ ss. 17-31, IEA)
- c) Statements by non-witnesses (ss. 26-27, BSA/ ss. 32-33, IEA)
- d) Statements under special circumstances (ss. 28-32, BSA/ ss. 34-38, IEA)
- e) Judgement in other cases (ss. 34-38, BSA/ ss. 40-44, IEA)
- f) Opinion of third persons (ss. 39-45, BSA/ ss. 45-51, IEA)
- g) Evidence as to character (ss. 46-50, BSA/ ss. 52-55, IEA)

This part of the Adhinyam has been introduced with a very few notable changes. One is the addition of the word 'coercion' to s. 22<sup>35</sup> pertaining to confessional statement. This word has not been defined

---

35. Sakshya Adhinyam 2023, s 22 (Confession caused by inducement, threat, coercion or promise, when irrelevant in criminal proceeding).

under the Adhinyam or, under the BNS or BNSS or IT Act<sup>36</sup> from where the definitions of words used but not defined in the Adhinyam may be imported.<sup>37</sup> In common parlance, it refers to an act of persuading someone forcefully to do something that they do not want to do. The addition of the word ‘coercion’ has widened the scope of irrelevancy of confession, however, such addition was uncalled for as the term ‘threat’ was wide enough to include ‘coercion’. Next is the addition of ‘Explanation II’ to s. 24.<sup>38</sup> The explanation has been added for the commencement of joint trial even if the accused has absconded or declared a proclaimed offender, and to ensure that their trial is not stalled. The third major change is the addition of the words ‘or any other field’ to s. 39.<sup>39</sup> As a response, definition of experts has become more expansive and help of more experts in fields hitherto unknown can be taken.

#### 4. HOW IT HAS TO BE PROVED?

The second part of the Adhinyam has undergone significant changes in the sense that now, electronic or digital evidences have been made par with documentary evidences, as stated under the brand-new provision i.e., s. 61 of the Adhinyam. There is no such corresponding section under the IEA. This section clearly acknowledges the significance of electronic or digital evidences thereby recognising their legal effect, validity and enforceability as similar to paper records.

How are the relevant facts to be proved? The answer to this question lies in Part II of the Adhinyam/ Act i.e., Chapter III to VI – ss. 51 to 103, BSA/ ss. 56 to 100, IEA. Generally, a fact-in-issue or relevant fact may be proved by oral or documentary evidence (including electronic evidence).<sup>40</sup> However, after the coming of the BSA, such facts may be proved by oral or documentary or electronic evidence, where electronic or digital evidence is all together a distinct and exclusive category.

---

36. Information Technology Act 2000 (Act 21 of 2000).

37. Sakshya Adhinyam 2023, s 2(2) (Definitions) which reads:

“Words and expressions used herein and not defined but defined in the Information Technology Act 2000, the Nagarik Suraksha Sanhita 2023 and the Nyaya Sanhita 2023 shall have the same meanings as assigned to them in the said Act and Sanhitas.”

38. Sakshya Adhinyam 2023, s 24 (Consideration of proved confession affecting person making it and others jointly under trial for same offence).

39. *ibid* s 39 (Opinions of experts).

40. Introduced by the Information Technology Act 2000.

As documentary evidence may be proved via primary and secondary evidences, similarly, electronic or digital evidences may be proved by either submitting the primary electronic record itself or through its copy accompanied by the certificate mentioned under s. 63(4), BSA. Also, the best evidence rule is followed with the same effect in case of electronic or digital evidence i.e., primary evidence is preferred over secondary as given under s. 59, BSA/ s. 64, IEA.<sup>41</sup>

The issue of digital or electronic evidence in new criminal justice system revolves around two kinds of digital or electronic evidences. One, the evidence already available which is to be searched and seized during investigation. Two, the digital evidences produced through audio-video recording of procedure of search, seizure, statements, etc. Section 105, *Bharatiya Nagarik Suraksha Sanhita, 2023 (BNSS)* relates to the recording of search and seizure through audio-video electronic means.<sup>42</sup>

Under BSA, any data/record directly saved in any storage media and produced from the proper custody, shall be admissible as primary evidence unless disputed. However, its contents shall be proved in the court as evidence with a certificate as provided under s.63(4), BSA. This essentially relates to the contemporaneous certificate for, at every instance or stage, including: collecting of evidence by the investigating officer; securing it at Malkhana of the police station; scrutiny by the forensic experts (at Central Forensic Science Laboratory/State Forensic Science Laboratory) and presenting it in the court of law, a new certificate is required to be submitted with its record duly mentioned in the chain of custody form and the case diary. Thus, considering the importance of producing contemporaneous certificate at every instance, one of the inferences would be: the storage media containing data/ record directly produced by the computer device is primary evidence but when it is reproduced in human understandable form from such media as evidence, it requires certification being a secondary data.<sup>43</sup>

---

41. Proof of documents by primary evidence.

42. Delhi Police Academy, Handbook on *Bharatiya Sakshya Adhiniyam* (Annexure I: A note on search and seizure of digital evidence in amended criminal laws, January 2024) 31 <[https://training.delhipolice.gov.in/PDF/PublicData/NOTICE\\_20240614145717214.pdf](https://training.delhipolice.gov.in/PDF/PublicData/NOTICE_20240614145717214.pdf)> accessed 14 March 2025.

43. Delhi Police Academy, Handbook on *Bharatiya Sakshya Adhiniyam* (Annexure I: A note on search and seizure of digital evidence in amended criminal laws, January 2024) 31 <[https://training.delhipolice.gov.in/PDF/PublicData/NOTICE\\_20240614145717214.pdf](https://training.delhipolice.gov.in/PDF/PublicData/NOTICE_20240614145717214.pdf)> accessed 14 March 2025.

The importance of digital or electronic evidence and the acknowledgment of the same by the new Adhiniyam can be gauged by the intent of including the following four new categories of primary evidence:

Category I: Explanation IV, s. 57, BSA:<sup>44</sup> storage that occurs simultaneously or sequentially in multiple files e.g., email threads, backups and archives, website content, chat logs, data being saved in an iPhone and its iCloud linked to it, etc.

Category II: Explanation V, s. 57, BSA:<sup>45</sup> produced from the custody e.g., mail from secured server (official mails in the custody of a University's IT department), CCTV footage from secured recorder, social media posts from service provider's server, etc.

Category III: Explanation VI, s. 57, BSA:<sup>46</sup> video recording simultaneously stored and transmitted or broadcasted or transferred e.g., live streaming being broadcasted and recorded at different storage media, video conferencing calls being recorded by different participants, CCTV recordings and cloud backup, etc.

Category IV: Explanation VII, s. 57, BSA:<sup>47</sup> stored in multiple storage spaces in a computer resource e.g., recovered deleted files, web browsing history, etc.

Though, it is a primary class of evidence, however, there is still ambiguity as to whether a certificate under s. 63(4)(c) would still be required in case electronic and digital data is maintained and presented in court in the manner as mentioned under the above-mentioned explanations to s. 57?

---

44. Sakshya Adhiniyam 2023, explanation 4, s 57, which reads:

“Where an electronic or digital record is created or stored, and such storage occurs simultaneously or sequentially in multiple files, each such file is primary evidence.”

45. *ibid* explanation 5, s 57, which reads:

“Where an electronic or digital record is produced from proper custody, such electronic and digital record is primary evidence unless it is disputed.”

46. *ibid* explanation 6, s 57, which reads:

“Where a video recording is simultaneously stored in electronic form and transmitted or broadcast or transferred to another, each of the stored recordings is primary evidence.”

47. *ibid* explanation 7, s 57, which reads:

“Where an electronic or digital record is stored in multiple storage spaces in a computer resource, each such automated storage, including temporary files, is primary evidence.”

An attempt to answer this ambiguity was made by the court in *Arjun Panditrao Khotkar v Kailash Kushanrao Gorantyal*<sup>48</sup> where a 3 Judges Bench of the Supreme Court commented that the admissibility of an electronic evidence is to be governed only by ss. 65A<sup>49</sup> and 65B,<sup>50</sup> IEA 1872, and s. 65B is complete code in itself. The court emphasized on the point that if an 'original' device is produced, it shall be a primary evidence, however, if copy, in any form, is made (out of the original) and produced, it is secondary evidence. The court further emphasized that certificate under s. 65B(4) is mandatory for secondary evidence, and oral evidence cannot suffice in place of s. 65B(4) certificate i.e., in-charge of the computing device cannot give an oral evidence in place of certificate under s. 65B.

### 5. HANDLING, PRESENTING AND INTERPRETING ELECTRONIC AND DIGITAL EVIDENCE

Considering the topicality of the Adhiniyam, one needs to be well versed with the technicalities, implementation and the process in connection with the electronic or digital evidence, along with the legalities associated therein.

As far as the technicalities are concerned, evidence includes every kind of electronic or digital data/ information which can be saved in the electronic/ digital media storage. e.g., computers, mobile devices, applications, emails, audio/video files, cloud storage, etc.

It is important to ensure integrity of electronic or digital evidence as it is very volatile and fragile in nature which may be corrupted remotely. Therefore, the saved data in non-volatile medium should be first mirrored/ imaged i.e., bit by bit copy of memory with the help of write blocking. Write blocker works as valve in order to prevent any accidental or intentional modification of data on a storage device.

Once the process of write blocking is over, it is important to ensure that both the original media as well as mirrored copy of the media have absolutely the same data by matching the hash value. This process is called hashing. Hashing is a method of creating a unique fingerprint of any digital data (file, folder, or entire media of data) by applying a mathematical

---

48. *Arjun Panditrao Khotkar v Kailash Kushanrao Gorantyal* (2020) 7 SCC 1 : AIR 2020 SC 4908.

49. Evidence Act 1872, s 65A (Special provisions as to evidence relating to electronic record).

50. *ibid* s 65B (Admissibility of electronic records).

algorithm to generate an alpha-numeric string of characters of a definite length which would only change with the slightest modification of the data set, changing the hashing value entirely. In other words, hash value is the output of hash function which is nothing but a computer algorithm to convert digital file (digital record) into a unique alpha-numeric value. Hashing is facilitated by hashing algorithms e.g., MD5 (Message Digest 5), SHA-1 (Secure Hash Algorithm 1), SHA-2 (Secure Hash Algorithm 2), SHA-3 (Secure Hash Algorithm 3), etc. and tools e.g., Hash Check, Hash Tab, Hash My Files, MD5 Hash Generator, SHA-256 Online, Cyber Chef, etc.

Next in line comes the implementation. In order to present electronic or digital evidence, it is not only essential to prove the fact but also to establish the source and destination of such evidence. The source could be any computer/digital device belonging to the accused/victim/witness of the crime. Every digital file/folder contains identification details within its metadata along with the device detail being printed on the body. Metadata provides information about the author, date of creation, modification, and file size among other details. To ensure authenticity, both metadata of the electronic/digital evidence must be documented along with the device used for producing such evidence as a part of the evidence that is to be produced in the court.

Once the write blocking is done, and hash value and metadata of the evidence are known, the final step is documentation i.e., maintaining a sequence or chain of custody. ‘Sequence of Custody’ or ‘Chain of Custody’ is chronological documentation of seized articles detailing the evidence possession, control, place of keep, transfer, analysis and disposal of the seized article during investigation and trial process. This is imperative for preserving the evidentiary value of the seized article by keeping its integrity intact compared to the time it was lawfully seized. Any missing link in sequence of custody may be fatal to prosecution of the case.<sup>51</sup> Chart of documentation pertaining to chain of custody of the seized electronic device or ‘Chain of Custody Form’ shall be attached in case diary, and shall be included in the report of police officer on completion of investigation as required under s. 193, BNSS.<sup>52</sup>

---

51. Crime Investigation Department, ‘Crime Branch Circular No.13/2025: Chain of Custody of Electronic Evidence and Electronic Evidence’ (Odisha Police, February 2025) <<https://odishapolicecidcb.gov.in/sites/default/files/SOP%2013-2025.pdf>> accessed 13 March 2025.

52. Nagarik Suraksha Sanhita 2023, s 193 (Report of police officer on completion of investigation).

To present an electronic or digital record as evidence in a legal proceeding, one needs to submit a certificate along with the records. The certificate should contain/ certify the description of electronic or digital record being certified (e.g., printouts of screen shots, video clips, images or text files written on a CD/DVD or copied in a Pen Drive, etc.); computer system or communication device involved (i.e., description of the machine with manufacture's name, model, serial number, etc.); the period when the output was produced; details of the certifying person who is in lawful control over the computer system (i.e., whether they have purchased it for personal use, do the maintenance of it as assigned by their employer, uses it for official purpose allotted by their organization, etc.); the purpose of use of the computer system or communication device involved; etc. The certificate must be signed by a person in charge of the computer or communication device (or relevant activities), and an expert. It is sufficient for the matter to be stated based on their knowledge and belief.

## 6. WHO WILL PROVE IT?

The third and the last part of the Adhinyam relates to the production and effect of evidence i.e., by whom and in what manner must the evidence be produced? This portion of the Adhinyam i.e., Part III, from Chapter VII to XI – ss. 104 to 169, BSA/ ss. 101 to 167, IEA, has undergone the minimum changes and in particular, cosmetic changes. The basic principles regarding the burden of proof, and shall, may and conclusive proof are still the same. As far as the burden of proof i.e., ss. 104 to 109, BSA/ ss. 101 to 106, IEA, is concerned, party who asserts the fact will prove it, and who deny the fact, will disprove it. Regarding the *shall, may and conclusive proof*, there is no substantive change except their numbering:

- (a) *May presume*, where the court presumes a fact but may call for prove of it or allow evidence to disprove it, is now defined in s. 2(1)(h), BSA. The relevant provisions in this context are ss. 88 – 90, 92, 93, 110, 111, 117 and 119 under BSA which corresponds to ss. 86 – 88A, 90, 90A, 107, 108, 113A and 114 under IEA.
- (b) *Shall presume*, where the court presumes a fact or allow evidence to disprove it, is now defined in s. 2(1)(l), BSA. The relevant provisions in this context are ss. 78 – 87, 91, 108, 118 and 120 under BSA which corresponds to ss. 79 – 85C, 89, 105, 113B and 114A under IEA.
- (c) *Conclusive proof*, where the court on proof of one fact regards the other as proved and shall not allow evidence to disprove it, is now

defined in s. 2(1)(b), BSA. The relevant provisions in this context are ss. 35 and 116 under BSA which corresponds to ss. 41 and 112 under IEA. However, s. 113, IEA which relates to ‘proof of cession of territory’ finds no place under the Adhiniyam for, the provision has become outdated and has no relevance in the contemporary world.

It is a matter of surprise that even under the new Adhiniyam, the scientific ways of ascertaining the parentage of a child like DNA testing are not recognised as an exception to the rule of conclusive proof of legitimacy of child born during marriage.<sup>53</sup> Therefore, till date, the deciding factor in cases of conflict between a conclusive proof and scientific advancement remains the same i.e., the judgement of Supreme Court in *Nandlal Wasudeo Badwaik v Lata Nandlal Badwaik*<sup>54</sup> Here, the Supreme Court observed:

“s.112 of the IEA was enacted at a time when the modern scientific advancements with DNA as well as RNA tests were not even in contemplation of the legislature. Interest of justice is best served by ascertaining the truth and the court should be furnished with the best available science and may not be left to bank upon presumptions, unless science has no answer to the facts in issue. When there is a conflict between a conclusive proof envisaged under law and a proof based on scientific advance accepted by the world community to be correct, the latter must prevail over the former.”

However, at the same time, it is also essential that the above-mentioned factor to answer the conflict between a conclusive proof and scientific advancements, as mentioned in the *Nandlal Wasudev Badwaik* case, should only be considered, after a detailed deliberation for, DNA testing may violate fundamental rights under art. 20(3)<sup>55</sup> (Protection against

---

53. Sakshya Adhiniyam 2023, s 116 (Birth during marriage, conclusive proof of legitimacy) which reads:

“The fact that any person was born during the continuance of a valid marriage between his mother and any man, or within two hundred and eighty days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate child of that man, unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten.”

54. (2014) 2 SCC 576 : AIR 2014 SC 932.

55. Constitution of India, art 20(3) (Protection in respect of conviction for offences) which reads:

“No person accused of any offence shall be compelled to be a witness against himself.”

self-incrimination) and 21<sup>56</sup> (Protection of life and personal liberty) of the Constitution. Further, it should not be opted for religiously but cautiously.

An important change in this part of the Adhiniyam is with respect to s. 138, BSA<sup>57</sup> (earlier, s. 133, IEA<sup>58</sup>). Earlier, formulation of law was in conflict with the illustration (b) of s. 114, IEA<sup>59</sup> (now, illustration of s. 119(1), BSA<sup>60</sup>). This has now been rectified by replacing the words ‘uncorroborated testimony’ with ‘corroborated testimony’.<sup>61</sup>

## 7. CONCLUSION

*“Certainty of law is a myth”-----Jerome Frank<sup>62</sup>*

Law has to be evaluated continuously in order to check if it deals with the contemporary societal issues. Following the principle of *legal pragmatism* as given by Richard Posner,<sup>63</sup> the Indian law has undergone a lot of changes lately which includes the law on triple talak,<sup>64</sup> decriminalization of

56. *ibid* art 21 (Protection of life and personal liberty) which reads:

“No person shall be deprived of his life or personal liberty except according to procedure established by law.”

57. Sakshya Adhiniyam 2023, s 138 (Accomplice) which reads:

“An accomplice shall be a competent witness against an accused person; and a conviction is not illegal if it proceeds upon the corroborated testimony of an accomplice.”

58. Evidence Act 1872, s 133 (Accomplice) which reads:

“An accomplice shall be a competent witness against an accused person; and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice.”

59. *ibid* illustration (b), s 114 (Court may presume existence of certain facts) which reads:

“the Court may presume that an accomplice is unworthy of credit, unless he is corroborated in material particulars”.

60. Sakshya Adhiniyam 2023, illustration (b), s 119(1) (Court may presume existence of certain facts) which reads:

“the Court may presume that an accomplice is unworthy of credit, unless he is corroborated in material particulars”.

61. Constitution of India, art 368 (Power of Parliament to amend the Constitution and procedure therefor).

62. (1889-1957), Jerome New Frank, was an American legal philosopher and author who played a leading role in the legal realism movement. He was Chairman of the US Securities and Exchange Commission, and a Judge of the United States Court of Appeals for the Second Circuit.

63. Richard Allen Posner, is an American legal scholar and retired United States circuit Judge who served at the US Court of Appeals for the Seventh Circuit from 1981 to 2017.

64. Muslim Women (Protection of Rights on Marriage) Act 2019 criminalises triple talaq, making it a non-bailable offense punishable with up to three years in prison. The law

homosexuality<sup>65</sup> and adultery,<sup>66</sup> contemporary and purposive interpretation of s. 125, CrPC<sup>67</sup>/ s. 144, BNSS,<sup>68</sup> etc. This explains one of the reasons for the enactment of the new Adhiniyam 2023.

Most of the sections of the Indian Evidence Act, 1872 have been adopted in the Bhartiya Sakshya Adhiniyam as verbatim, and some with minor alterations. Major alteration is the inclusion of electronic and digital evidences.<sup>69</sup> In order to further justify the enactment of the Adhiniyam, two questions need to be answered: First, was it required? and second, are the requirements fulfilled? Regarding the first question, there is a possibility that there could have been requirement of certain modifications, but by no stretch of imagination one could consider the colonial terminologies as part of the existing lacunae in the 1872 Act. Changing Calcutta to Kolkata or Lahore to Ladakh or Attorney to Advocate alone cannot justify the enactment of this Adhiniyam. Apart from it, from the view point of the enforcement agencies, advocates, law scholars, etc., where the section number plays a crucial part, the re-numbering of the sections has caused unnecessary and excessive burden. Every such person will instantly associate s. 32 of the Indian Evidence Act with Dying Declaration, but after the commencement of this new law, they will have to make an unnecessary attempt to associate the same content to a new section number i.e., s. 26, BSA.

Now, coming to question no. 2, it can be said that the requirement of bringing new law of evidence, is partially fulfilled in the sense that the scope of entire law of evidence has been widened by introducing new categories of electronic or digital evidence as a primary evidence under explanations 4 to 7 of s. 57, BSA, and recognising their legal effect, validity

---

came into effect in September 2019.

65. In *Navej Singh Johar v Union of India* (2018) 10 SCC 1 : AIR 2018 SC 4321, the Supreme Court struck down s 377, IPC 1860, which criminalised “carnal intercourse against the order of nature”, effectively decriminalising consensual homosexual acts between adults.
66. In *Joseph Shine v Union of India* (2019) 3 SCC 39 : AIR 2018 SC 4898, the Supreme Court struck down s 497, IPC 1860, which criminalised adultery, finding it to be archaic, discriminatory against women, and a violation of fundamental rights.
67. Criminal Procedure Code 1973, s 125 (Order for maintenance of wives, children and parents).
68. Nagarik Suraksha Sanhita 2023, s 144 (Order for maintenance of wives, children and parents).
69. Delhi Police Academy, Handbook on *Bharatiya Sakshya Adhiniyam* (January 2024) <[https://training.delhipolice.gov.in/PDF/PublicData/NOTICE\\_20240614145717214.pdf](https://training.delhipolice.gov.in/PDF/PublicData/NOTICE_20240614145717214.pdf)> accessed 13 March 2025.

and enforceability as similar to any other document within the realm of the Adhiniyam.<sup>70</sup> However, adding illustrations to each explanation would have certainly helped in ascertaining what exactly constitutes primary electronic evidence.

There is still ambiguity as to whether a certificate under s. 63(4)(c), BSA would still be required in case electronic and digital data is maintained and presented in court in the manner as mentioned under the above-mentioned explanations to s.57? There is no explanation provided to this under the Adhiniyam, and one has to rely on SOPs or handbooks on BSA provided by Departments like CBI, Delhi Police, etc. Apart from it, there are a lot many concerns associated with the Adhiniyam. One, there exists a practical difficulty in submitting an electronic and digital data as a primary evidence. Therefore, almost every primary electronic and digital evidence becomes secondary as and when a certificate along with the evidence is submitted. Two, the certificate provided under the schedule to the Adhiniyam refers to hash algorithms like SHAI, SHA256 and MD5, and other legally acceptable algorithms. This in turn refers to the hastiness and lack of forethought on the part of legislation for, the mentioned algorithms may become redundant in the coming time, and would create confusion in ascertaining the standard of legally acceptable algorithms. Third, there is no specific provision on handling of electronic or digital evidence. At least, a provision ensuring a documented chain of custody could have been included.

In order to get away with the above-mentioned ambiguity, various states are coming up with their own SOPs (in consonance with the SOP on Audio-Visual Recording of Scene of Crime, by BPR&D, MHA)<sup>71</sup> on handling the electronic and digital evidence, resulting in numerous but non-uniform SOPs. The hon'ble Supreme Court in *Ram Ramaswamy v Union of India*<sup>72</sup> has clearly stated that till the time uniform guidelines in relation to the search and seizure of electronic or digital evidences/ devices are not notified, the BPR&D SOP shall be followed by all government agencies.<sup>73</sup>

---

70. Sakshya Adhiniyam 2023, s 61 (Electronic or digital record).

71. Ministry of Home Affairs, Government of India, Standard Operating Procedure for Audio-Visual Recording of Scene of Crime, Bureau of Police Research & Development <<https://bprd.nic.in/uploads/pdf/SOP%20of%20Audio%20Video%20Recording%20of%20Scene%20of%20Crime.pdf>> accessed 13 March 2025.

72. 2023 SCC OnLine SC 1703.

73. Delhi Police Academy, FAQs on the Nyaya Sanhita, the Nagarik Suraksha Sanhita and the Sakshya Adhiniyam <[https://training.delhipolice.gov.in/PDF/PublicData/NOTICE\\_20240911143445490.pdf](https://training.delhipolice.gov.in/PDF/PublicData/NOTICE_20240911143445490.pdf)> accessed 14 March 2025.

# EMERGING GLOBAL TRADE PARADIGM ON E-COMMERCE AND INDIA'S POLICY CONUNDRUM: WHAT ALL IS AT STAKE?

—Utkarsh K Mishra\* & Surendar Singh\*\*

## ABSTRACT

*The digitization of the world economy has fundamentally transformed the nature of international trade and is creating new challenges for the global trading system. There is an intense discussion at the rule-making institutions like World Trade Organisation (WTO and in Regional Trade Agreements on trade rules and their role in addressing the challenges of digital trade in world economy. The rule shaping at multilateral and regional level creates centripetal and centrifugal forces for making a base for rule making at world level. Rapid changes in rule making coupled with robust trade and commerce in digital economy is creating ambiguous, uncertain and biased benchmarks at global level, which will pose significant trade challenges for developing economies like India to cope up with them. In this context, this paper attempts to analyse the developments on E-commerce rule-making in ever-evolving multilateral/regional trading system and inherent structural challenges that participating countries like India have to face in framing new rules on E-commerce at the World Trade Organisation. In the same vein, it must be mentioned that two categories of rules-Substantive and Adjective, currently exist in the current trade regime and it is significant to analyse how both the type of rules contribute in creating a conducive environment*

---

\* Director, Centre for Studies in International Trade and Investment Laws (CITIL) and Assistant Professor of Law at Dharmashastra National Law University, Jabalpur, Madhya Pradesh, India & Expert Member, Gender Research Hub, Trade and Gender Unit, World Trade Organisation; Email: utkarsh@mpdnl.u.ac.in

\*\* Associate Professor, Jindal School of Liberal Arts and Humanities, Sonapat, Haryana, India; Former Deputy Director at Engineering Export Promotion Council of India, Ministry of Commerce and Industry, Government of India; Email: drsurendarsingh@gmail.com

*for International Electronic Commerce Trade Regime. In this light, the paper attempts to elucidate upon this contemporary rule regime while at the same time attempting to analyse the emerging challenges for E-commerce trade rules in context of bilateral, regional and multilateral trade agreements including the stance of India's policy makers.*

**Keywords:** E-Commerce, Digital Economy, Digital Trade rules, India, E-commerce Policy.

## 1. BACKGROUND: THE NEW DIGITAL PARADIGM

Electronic-commerce<sup>1</sup> (e-commerce) has emerged as one of the most important “new issues” in the global trading system. The importance of E-commerce in the global economy has increased manifold due to its role in transforming domestic and international production structures, nature of global trade, service supply and cross border transactions.<sup>2</sup> The emergence of digital economy is opening up vistas of business opportunities for enterprises to leverage “digital platforms” to connect with global markets. E-commerce enabled business models are increasingly using the electronic platforms for production, marketing, and distribution of their goods and services. E-Commerce has the immense potential to offer benefits in the form of enhanced participation in the Global Value Chains, increased

---

1. There can be various definitions of the term e-commerce. OECD defines the expression E-commerce as: ‘the sale or purchase of goods or services, conducted by methods specifically designed for the purpose of receiving or placing of orders. The goods or services are ordered by those methods, but the payment and the ultimate delivery of the goods or services do not have to be conducted online. An e-commerce transaction can be between enterprises, households, individuals, Governments, and other public or private organisations. To be included are orders made over the web, extranet or electronic data interchange. The type is defined by the method of placing the order. To be excluded are orders made by telephone calls, facsimile or manually typed e-mail’. The Work Programme on Electronic Commerce of the General Council in 1998 defines it as: ‘Exclusively for the purposes of the work programme, and without prejudice to its outcome, the term “electronic commerce” is understood to mean the production, distribution, marketing, sale or delivery of goods and services by electronic means.’ For, the purpose of this paper, we have adopted a wider definition to depict the nature of international trade i.e “digital trade” or “trade in digital goods and services”. The paper examines two types of rules pertaining to e-commerce trade-rules pertaining to e-commerce regulation and rules of digital trade facilitation which contribute towards e-commerce.

2. World Trade Organisation, *World Trade Report 2018: The Future of World Trade: How Digital Technologies are Transforming Global Commerce* (2018).

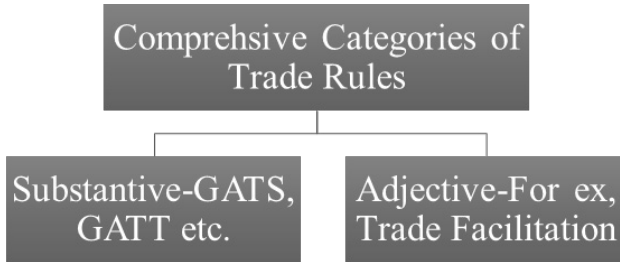
market access and reach, improved internal and external market efficiency and lowering transaction costs.<sup>3</sup>

As per the World Trade Organisation (WTO) database, the global digital trade increased from US\$ 19.3 trillion in 2012 to US\$ 27.7 trillion in 2016. The growth in digital trade has been witnessed in both Business-to-Business (B2B) and Business to Customer (B2C) while the share of latter is quite significant. Global cross-border B2C E-commerce sales are likely to reach to US\$1 trillion by 2020.<sup>4</sup> The growth of global digital trade is to be augmented by the rise of new technologies such as 3D printing, artificial intelligence, smart goods, robotics and Internet of things (IoT).<sup>5</sup> Trade rules in digital products are broadly segregated into four categories: i) cross border transactions that takes place through E-Commerce; ii) use of digital platforms such as Ebay, Amazon, Flipkart, and Alibaba; iii) products that are digital delivered such as software and eBooks; and d) 3D printing or additive manufacturing.<sup>6</sup> The first two categories are more or less similar as goods and services are delivered through digital platforms while the third category includes both delivery of physical products and services. This category has a large number of products that are delivered in physical form but recent technological advancements enabled their delivery in electronically. Products such as media and software products, printed materials and CD-ROM are largely delivered through digital networks. The final category of 3D printing or additive manufacturing is an emerging and disruptive technology but it is difficult to ascertain how digital products will be delivered through it.<sup>7</sup>

New business models dominated by digital platforms are not only disrupting the conventional structure and pattern of global trade but are

- 
3. United Nations Conference on Trade and Development, *Information Economy Report 2015*, 17.
  4. E-Marketer, *Worldwide Retail ECommerce Sales: EMarketer's Updated Estimates and Forecast Through 2019* (2015); E-Marketer Report 2015, *Worldwide Retail Ecommerce Sales: EMarketer's Updated Estimates and Forecast Through 2019* (December 2015) <<https://www.emarketer.com/Report/Worldwide-Retail-Ecommerce-Sales-eMarketers-Updated-Estimates-Forecast-Through-2019/2001716>> accessed 1 July 2024.
  5. World Trade Organisation, *World Trade Report 2018: The Future of World Trade: How Digital Technologies are Transforming Global Commerce* (2018).
  6. B Dhar, 'Electronic Commerce and the WTO: The Changing Contours of the Engagement' Briefing Paper No 21 (2017).
  7. OECD, 'Towards a G20 Initiative on Measuring Digital Trade: Mapping Challenges and Framing the Way Forward' (2016) <<http://www.oecd.org/g20/summits/hamburg/Towards-a-G20-Initiative-on-Measuring-Digital-Trade.pdf>> accessed 28 June 2024.

also creating the new ones. Trade in goods and services through digital platforms is expanding without a legally binding international trade agreement. Absence of comprehensive trade rules specially for regulating digital trade creates massive challenges to the multilateral trading system to regulate cross border transactions of digital products.<sup>8</sup> The demand to formulate new trade rules for digital trade is increasing at multilateral level. At this juncture, it is imperative to mention that, there can be two categories of overarching rules to regulate digital trade.



*Figure 1: Comprehensive Category of Trade Rules (Source: Authors)*

The first category of rules being substantive in nature to govern and regulate the digital trade transactions, like rules contained in GATT (General Agreement on Tariffs and Trade) and those in GATS (General Agreement on Trade in Services). The second category of rules being adjective rules in the nature of looking after the procedure through which substantive rules are being implemented. This category of rules may include rules of Trade Facilitation etc. It is significant to have both the category of rules in place in order to have a comprehensive regime of governance. In the context of Electronic-Commerce, dearth is of substantive rules and not much on adjective rules especially in the context of Developing countries like India. Developed countries have already negotiated rules on E-commerce through bilateral and regional trade agreements (RTAs) while developing countries are relatively reluctant to negotiate rules on digital trade due to their capacity constraints, different levels of development, infant industry and non-existence of domestic digital policies. India is also facing the conundrum in the context of regulatory governance of digital trade and especially on the international platform. The idea behind this paper is to dissect the India's regulatory and adjective position with respect to trade in digital goods and services.

Against this backdrop, this paper is divided into five parts. The first part of the paper throws light on the multilateral aspect of legal framework on

e-commerce and also analyses the challenges to the WTO legal framework to formulate new trade rules on E-commerce. The second part of the paper reviews the growth trajectories of existing rules on E-commerce in bilateral and regional trade agreements and their depth and scope. The third part of the paper puts to limelight the broad contours of existing proposals on E-commerce at the WTO vis-à-vis India's stance not to join E-commerce negotiations. The fourth part of the paper analyses the key factors which influenced India's decisions in the e-commerce talks. The last section of the paper concludes with remarks on policy implications in the context of ongoing e-commerce negotiations and joint initiative.

## **2. MULTILATERAL DEVELOPMENTS ON E-COMMERCE REGULATION AT WTO: WHAT ARE THE IMPEDIMENTS?**

In order to systematically and holistically examine the overarching framework on E-commerce at a multilateral platform of WTO, the analysis in this section has been conducted by categorizing the framework into two types of rules under the umbrella of the WTO Law as follows:

### **2.1 Category A: Rules on Substantive Governance**

The introduction of E-commerce in the WTO framework started in 1998 when members adopted the Ministerial Declaration on Global E-commerce and later turned into a "Comprehensive Work Programme on Electronic Commerce".<sup>9</sup> The Work Programme had two objectives. The first was to "*examine all trade related aspects of global e-commerce*" while the second objective was "*non-imposition of customs duties on electronic transmission*"<sup>10</sup> on imposing customs duties on e-commerce). The work programme formed three councils (goods, services and trade related intellectual property rights (TRIPS) would examine the relevant issues relating to market access of goods and services and the protection of intellectual property rights associated with digital commerce. It also placed the mandate to the Committee of Trade and Development (CTD) to examine the potential implications of E-commerce on development imperatives of developing countries and how they can be addressed through capacity building and policy interventions. Geneva's programme was not the only work programme considered by the Ministerial Conference. Ministers have considered the Work Programme on Electronic Commerce Ministers

9. WTO General Council, *Work Programme on Electronic Commerce*, WT/L274 (Adopted on 25 September, 1998) <[https://www.wto.org/english/tratop\\_e/ecom\\_e/wkprog\\_e.htm](https://www.wto.org/english/tratop_e/ecom_e/wkprog_e.htm)> accessed 1 July 2024.

10. This is also referred to as the practice of 'Moratorium'.

at their Ministerial Conferences also held in Doha 2001; Hong Kong 2005; Geneva in 2009; Geneva 2011; and Bali 2013. At those Conferences, Ministers have taken note of the reports on electronic commerce and have instructed the General Council and its relevant subsidiary bodies to continue their work on e-commerce.

Name of the Ministerial Conference/Declaration	Year	Key Agenda's taken
Buenos Aires Ministerial Conference	2017	Hold Periodic Reviews; Agreed to maintain the current practice of moratorium.
Nairobi Ministerial Conference	2015	Hold Periodic Reviews; Agreed to maintain the current practice of moratorium.
Bali Ministerial Conference	2013	Instructed the General Council to continue substantially invigorating the work on e-commerce; Taking Forward the issues concerning the application of e-commerce in enhancing development opportunities in Developing, Least Developed and Least connected countries; Maintaining the practice of Moratorium.
Geneva Ministerial Declaration	2011	The Work Programme to also examine access to electronic commerce by micro, small and medium sized enterprises, including small producers and suppliers; Instructed the General Council to look into development related issues of E-commerce for Developing and Least Developed Countries; Maintaining the current practice of Moratorium.
Geneva Ministerial Declaration	2009	Current Practice of Moratorium to be maintained.
Honk Kong Ministerial Declaration	2005	Current Practice of Moratorium to be maintained.
Doha Ministerial Declaration	2001	Current Practice of Moratorium to be maintained.
Geneva Ministerial Declaration	1998	To established a Comprehensive Work Programme on E-commerce; Practice of Moratorium to be maintained.

Table 1: Ministerial Declarations/Conference on E-Commerce (Source: WTO)

As can be observed in the above table, despite some positive developments, the work programme failed to deliver substantive output but it was able to sustain its valuable practice of *moratorium*. Recently also, the General Council in its meeting held on December 10, 2019 agreed to

maintain the current practice of not imposing customs duties on electronic transmissions until the 12th Ministerial Conference (MC12) in Nur-Sultan, Kazakhstan, scheduled for 8-11 June 2020. They also agreed to continue work under the existing 1998 work programme on e-commerce in the beginning part of 2020.<sup>11</sup>

Insignificant progress on E-commerce at the WTO is fundamentally associated with “*structural incompatibility*” of the WTO framework to deal with digital products.<sup>12</sup> One of key issues is related to this is that the legal framework of the WTO is not equipped enough to deal with digital products. The General Agreement of Trade and Tariffs (GATT) and the General Agreement on Trade and Services (GATS) are two important agreements that deal with goods and services respectively. The classification of digital products under GATT or GATS will have far-reaching economic implications to digital trade, given the fact that the former is more liberalised than latter.<sup>13</sup> This is because of GATT is a legally binding agreement while the GATS is only a framework agreement. Trade liberalisation under GATT has also made significant progress as compared to GATS. The fundamental problem is with their “*statistical classification*” under GATT or GATS. The hybrid nature of digital products falls under both agreements of the WTO. It is therefore, important to clarify under which agreement they fall. However, there is broad consensus that goods ordered electronically and delivered in physical form should fall under the scope of GATT. On the contrary, goods delivered electronically fall under the purview of GATS. Therefore, there is limited scope to debate on the application of GATT and GATS in the context of these two types of digital products. The issue of classification of digital products is evident in case of software and electronic products that are not delivered in tangible form but delivered through electronic transmission. This puts another important

- 
11. WTO General Council, *WTO Members Agree to Extend E-Commerce, Non-Violation Moratoriums* (WTO, December 2019) <[https://www.wto.org/english/news\\_e/news19\\_e/gc\\_10dec19\\_e.htm](https://www.wto.org/english/news_e/news19_e/gc_10dec19_e.htm)> accessed 2 July 2024.
  12. Meltzer, P Joshua, ‘A New Digital Trade Agenda’ (International Centre for Trade and Sustainable Development 2015) <[www.e15initiative.org/](http://www.e15initiative.org/)> accessed 1 July 2024; See also, Metschel, Manual, ‘The World Trade Organization in Times of Digital Trade Addressing Digital Protectionism?’, *Màster Oficial — Internacionalització: Aspectes Econòmics, Empresarials i Juridicopolítics* (2018) <<http://diposit.ub.edu/dspace/handle/2445/123738>> accessed 28 June 2024; Neeraj, ‘Trade Rules for the Digital Economy: Charting New Waters at the WTO’ (2019) World Trade Review 1.
  13. General Agreement on Trade in Services (15 April 1994); Marrakesh Agreement Establishing the World Trade Organization, Annexure 1B General Agreement on Tariffs and Trade 1994.

question whether electronic transmission of such digital products would also be regulated by Annex 1A of the GATT such as the Agreement on Technical Barriers to Trade.<sup>14</sup> This has become more important in view of increasing security concerns related to theft of personal data and influx of spurious products. There is a strong case for regulatory authorities to regulate the import of digital products to ensure that imported digital products do not contain any malicious backdoors and comply with mandatory technical standards. It essentially means that import of digital products has to comply with the rules of TBT Agreement but electronic delivery of such products (supply of services) eliminates the applicability of TBT Agreement.<sup>15</sup>

The hybrid nature of digital products and services makes it very difficult to understand the applicability of the GATT and GATS.<sup>16</sup> However, some of members of the WTO and experts argue that digital products and service require a completely new category or agreement. Prime facie, it seems to be very appealing proposal but the scope of such an agreement at multilateral level is limited because the WTO is facing its existential crisis. The stalemate over the appointment of judges at Appellate body has emerged a major threat to its institutional credibility.<sup>17</sup> Further, a number of issues of Doha round are yet to be concluded. A new agreement will fundamentally undermine the values of the existing agreements such as GATT and GATS.<sup>18</sup> Moreover, digital products and services to be covered under the new agreement would have to be elucidated. This again leads to the fundamental question of classification of goods. The scope of a new agreement at a multilateral level is limited as most of members are moving

---

14. Agreement on Technical Barriers to Trade, World Trade Organisation, Annex 1A.

15. Metschel, Manual, 'The World Trade Organization in Times of Digital Trade Addressing Digital Protectionism?', Màster Oficial — Internacionalització: Aspectes Econòmics, Empresarials i Juridicopolítics (2018) <<http://diposit.ub.edu/dspace/handle/2445/123738>> accessed 28 June 2024.

16. F Farrokhnia and C Richards, 'E-Commerce Products under the World Trade Organization Agreements: Goods, Services, Both or Neither' (2016) *Journal of World Trade* 793-817.

17. Robert Basedow, 'Strengthening the World Trade Organization — Critical Demands for Imperative Success: Identifying Politically Viable Options for an Incremental Reform' (Global Economic Dynamics, Bertelsmann Stiftung, 27 April 2017) 16 <[https://www.bertelsmannstiftung.de/fileadmin/files/BSf/Publikationen/GrauePublikationen/MT\\_Strengthening\\_the\\_WTO.pdf](https://www.bertelsmannstiftung.de/fileadmin/files/BSf/Publikationen/GrauePublikationen/MT_Strengthening_the_WTO.pdf)> accessed 28 June 2024.

18. S Fleuter, 'The Role of Digital Products under the WTO: A New Framework for GATT and GATS Classification' (2016) *Chicago Journal of International Law* 153-177.

towards restrictive trade regime due to their unfavourable experiences with existing agreements of the WTO.<sup>19</sup>

The rise of new technologies such as additive manufacturing poses insurmountable challenges to the existing framework of the WTO.<sup>20</sup> The gradual expansion of additive manufacturing would completely change the mode of delivery of goods across borders as the Computer Aided Design file for 3D printing is transmitted from one country to another to be printed at a manufacturing centre.<sup>21</sup> This raises a related question—how are such services to be treated. If goods delivered through 3D printing are considered services, the scope of imposing custom duties will be ruled out and it would fundamentally challenge the idea of protecting domestic industry through high import duties. The scale of 3D printing at a global level will determine the magnitude of its impact on the global trading system.

## 2.2 Category B: The Adjective Rules of E-commerce

As discussed in the introductory segment of this paper, if one is to examine holistically the legal framework of E-commerce in the multilateral paradigm, it would be imperative to look into both the substantive and adjective framework of rules relating to E-commerce. Hence, at this junction, it is significant to throw some light on the adjective rules within the paradigm of WTO Framework.

The idea of “*facilitating trade*” was not new to the countries even in the beginning of the trade negotiations. GATT, 1994 itself is equipped with certain provisions on Trade Facilitation. Even though GATT, 1994 had a mini-framework for the same, it was still not sufficient to meet the present-day needs of international trade standards and developments in the light of digital age as well. Beyond any shadow of doubt, Articles V, VIII and X of GATT, 1994 are the stepping stones on which the latest Trade Facilitation Agreement was based but those provisions alone could not have solved the

---

19. James Bacchus, ‘Might Unmakes Right the American Assault on the Rule of Law in World Trade’, Centre for International Governance Innovation (Centre for International Governance Innovation, 2018) <<https://www.cigionline.org/sites/default/files/documents/Paper%20no.173.pdf>> accessed 3 July 2024.

20. World Trade Organisation, *World Trade Report 2018, Is the WTO 3D Printing-Ready?* (2019) <[https://www.wto.org/english/res\\_e/publications\\_e/opinionpiece\\_by\\_patrik\\_tingvall\\_and\\_magnus\\_rentzhog\\_e.pdf](https://www.wto.org/english/res_e/publications_e/opinionpiece_by_patrik_tingvall_and_magnus_rentzhog_e.pdf)> accessed 28 June 2024.

21. Richard Baldwin, *The Great Convergence: Information Technology and the New Globalization* (Harvard University Press, 2016).

problems of corruption, red Tapism and innumerable formalities while at the trade across borders.<sup>22</sup>

The adjective rules informing the digitalization of international trade can be found in the Agreement on Trade Facilitation (TFA)<sup>23</sup> which was adopted in order within the framework of the WTO to elaborate upon Article V, VIII and X of the GATT, 1994, paving the way for formulation of detailed rules on expeditious clearance of goods across borders, minimisation of custom formalities and documentary procedure. Following table showcases the relevant provisions of the TFA which are significant for facilitating the Electronic Commerce:

Provision	Framework	Subject Matter/Language of the provision	Nature of the obligation	Relation with E-commerce Framework
Article 1.2.1 (a)	TFA	<i>'Each Member shall make available, and update to the extent possible and as appropriate, the following through the internet: a description of its procedures for importation, exportation, and transit, including procedures for appeal or review, that informs governments, traders, and other interested parties of the practical steps needed for importation, exportation, and transit.'</i>	Diluted Obligation as qualifier of possibility and appropriateness attached	Digital facilitation of trade procedure.
Article 1.2.1 (b)	TFA	<i>'Each Member shall make available, and update to the extent possible and as appropriate, the following through the internet: the forms and documents required for importation into, exportation from, or transit through the territory of that Member.'</i>	Diluted Obligation as qualifier of possibility and appropriateness attached	Digital trade facilitation

22. See Third, Fourth and Fifth Recital of the Preamble, Agreement on Trade Facilitation (Proposed final text), WT/L/931.

23. The Agreement on Trade Facilitation came into force on 22 February 2017. India, being a member of WTO is also bound by the rules of the Trade Facilitation Agreement.

Article 7.2	TFA	<i>'Each Member shall, to the extent practicable, adopt or maintain procedures allowing the option of electronic payment for duties, taxes, fees, and charges collected by customs incurred upon importation and exportation.'</i>	Diluted Obligation as qualifier of practicability attached	Digital Trade Facilitation
Article 10.4	TFA	<i>'Members shall endeavour to establish or maintain a single window, enabling traders to submit documentation and/or data requirements for importation, exportation, or transit of goods through a single-entry point to the participating authorities or agencies. After the examination by the participating authorities or agencies of the documentation and/or data, the results shall be notified to the applicants through the single window in a timely manner.'</i>	Best endeavour provision	Single Window system, one of the key measures of E-commerce procedure.

Table 2: Relevant Provisions in the TFA concerning Electronic Commerce  
(Source: TFA & Authors)<sup>24</sup>

The above table clearly depicts that there is a binding Multilateral Agreement especially dedicated to making the trade process smoother and easier. It also contains provisions which have contributed in digitalization of trade and hence are one of the significant components of Electronic Commerce. However, as shown above, these provisions contain obligations which even though seem binding at first glance, but are actually in the nature of diluted obligations owing to the use of legal language, like for example-“to the extent possible”; “shall endeavour”; “to the extent practicable” etc.<sup>25</sup> These qualifiers give ample regulatory autonomy to the member countries in terms of the implementation of the agreement. In this sense, the digital trade facilitation provisions in the TFA can be said to in the form of “softer obligations” or “flexibility provisions.”

When member States or State parties to any international treaty or agreement negotiate the provision of the same, one of the choices before

the parties is to include the provisions which are either in the nature of soft law<sup>26</sup> or hard law, which has also been referred as ‘choice of form’<sup>27</sup> by some international scholars. This has a great deal to do also with the drafting language of the text of the agreement. These are essentially referred to as ‘design elements’<sup>28</sup> of international agreements. The design elements of an international treaty have a huge impact on ascertaining the credibility and effectiveness of the agreement and potential of the agreement in question to effectively bind<sup>29</sup> the States. Some international scholars have classified soft law obligations as those which are binding and yet not as impactful as hard law obligations.<sup>30</sup> This may be stand true even in the case of obligations under TFA and the SPS Agreement. With soft law obligations in the TFA comes the flexibility in implementation. According to Abbott and Snidal,

- 
26. There is no agreement amongst the scholars of public international on a concise definition of soft law agreements or treaties. Some have defined it as international law which is not hard law. Some have clarified that, soft law is not be construed as a purely a political undertaking without any legal compliance or without any legal component. Some define it as law which does not fulfil the requirements of the classical definitions of international law. While some say, that soft is definitely international law and but has weaker implementation as compared to hard international law. Other scholars have classified customary international law as soft law obligations, etc. For literature of Soft law obligations under international law, see, Abbott and Snidal, ‘Hard and Soft Law in International Governance’ (2000) 54 Int Org 421, at 422; Wellens and Borchardt, ‘Soft Law in European Community Law’ (1989) 14 E L Rev 267; Chinkin, ‘The Challenge of Soft Law: Development and Change in International Law’ (1989) 38 ICLQ 850; Raustiala, ‘Form and Substance in International Agreements’ Mimeo (2002); Sykes, ‘Protectionism as a “Safeguard”: A Positive Analysis of the GATT “Escape Clause” with Normative Speculations’ (1991) 58 U Chicago L Rev 255; Weil, ‘Towards Relative Normativity in International Law’ (1983) 77 Am J Int’l L 413, at 414 n.7; Dupuy, ‘Soft Law and the International Law of the Environment’, (1990) 12 Mich J Int’l L 420; O’Connell, ‘The Role of Soft Law in a Global Order’, in D. Shelton (ed.), *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System* (2000) 100, 109-110; etc.
  27. See Guzman, ‘A Compliance-Based Theory of International Law’ (2002) 90 Calif L Rev 1823; Also See Andrew T Guzman, ‘The Design of International Agreements’ (2005) 16(4) The European Journal of International Law.
  28. See Andrew T Guzman, ‘The Design of International Agreements’ (2005) 16(4) The European Journal of International Law 583.
  29. Even though the distinction between binding and non-binding agreements is many times co-related with the distinction between hard international law and soft international law respectively, it may not always be a correct explanation in every situation. The case of WTO, the marrakesh agreement along with its annexed agreements is one of binding obligations, yet containing soft law provisions like that in the trade facilitation agreement.
  30. See for instance, Baxter, ‘International Law in “Her Infinity Variety”’ (1980) 29 ICLQ 549, at 554.

“Soft legalization allows states to adapt their commitments to their particular situations rather than trying to accommodate divergent national circumstances within a single text”.<sup>31</sup>

This flexibility is sometimes necessary for a variety of reasons. For instance, in the context of TFA, the flexibility is important to meet the objective of special and differential treatment in order to appreciate the different levels of economic development of member countries and hence allow them the space to implement certain obligations on the touchstones of ‘possibility’, ‘appropriateness’, ‘practicability’, etc. However, the same flexibility may reduce the value of the international treaty in question, i.e. the TFA in the current work.<sup>32</sup> While the same flexibility in international agreements may also be used to take pro-active measures by some member countries to advance the objectives, goals or aspirations of the Trade Facilitation.

In the final analysis, given the existing fallacies in the overall e-commerce legal framework of the WTO, it is important for policymakers to recognise that future rule making on digital trade should address the fundamental issue of classification of digital goods within the framework of GATT and GATS. Further, the recent technological advancement such as additive manufacturing, robots and IoT also needs to be well analysed to understand how digital products are to be treated in international trade. It is therefore, important to keep these developments in mind while discussing substantive rules on digital trade. This requires systematic research on emerging technologies to understand their impact on the structure, composition and pattern of international trade.

### **3. RULES ON E-COMMERCE IN REGIONAL TRADE AGREEMENTS: DECONSTRUCTING THE REGIONAL EXPERIMENT**

Trade rules on E-commerce have received significant importance in regional and bilateral trade agreements. It is widely believed that the growth of E-commerce provisions in RTA/BTAs happened due to lacklustre progress in the work programme of 1998.<sup>33</sup> Rules on E-commerce in

---

31. See Abbott and Snidal, ‘Hard and Soft Law in International Governance’ (2000) 54 Int Org 421, at 445.

32. See Andrew T Guzman, ‘The Design of International Agreements’ (2005) 16(4) The European Journal of International Law 592.

33. However, this may not be fair assessment since the work programme was not mandated to formulate rules on E-commerce.

trade agreements received significant attention post 2000. The digital transformation of trade requires a careful review of digital trade rules in regional trade agreements.<sup>34</sup> The New Zealand and Singapore<sup>35</sup> FTA was the first agreement to include provisions on E-commerce.

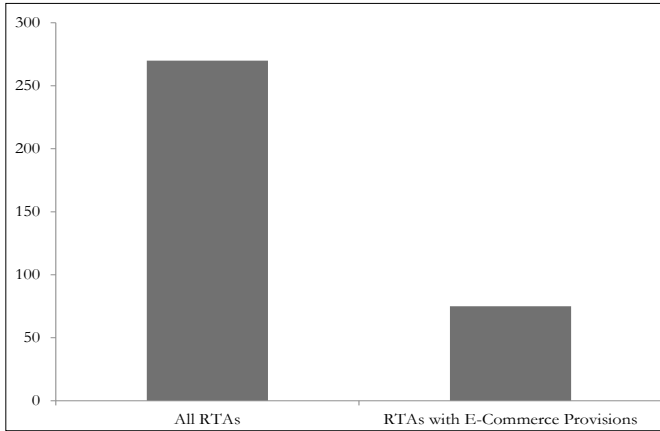


Figure 2: Number of RTAs Containing Provisions on E-Commerce (Source: WTO, RTA Database)

The Australia –Singapore Free Trade Agreement (2003) was the first agreement to include a standalone chapter on e-commerce.<sup>36</sup> The provisions on E-commerce subsequently negotiated in United States–Chile FTA, US–Australia FTA and the Thailand–Australia FTA. The total seventy-five RTAs/BTA contain a chapter or articles on E-commerce of which twenty-nine RTA/FTA are signed by developing countries. This demonstrates that developing countries have shown their keen interest in rulemaking on E-commerce through RTAs/BTAs. The number of paperless trade

- 
34. Mark Wu, Digital Trade-Related Provisions in Regional Trade Agreements: Existing Models and Lessons for the Multilateral Trade System International Centre for Trade and Sustainable Development, November 2017 <<http://e15initiative.org/wp-content/uploads/2015/09/RTA-Exchange-Digital-Trade-Mark-Wu-Final-2.pdf>> accessed 1 July 2020. See also J Antonio Monteiro and Robert Teh, Provisions on Electronic Commerce in Regional Trade Agreements, *WTO Working Paper* (2017).
35. New Zealand Foreign Affairs and Trade, Protocol to Amend the Agreement Between Singapore and New Zealand on a Closer Economic Partnership and Associated Instruments (October 2018) <<https://www.mfat.govt.nz/assets/FTAs-agreements-in-force/Singapore-FTA/Singapore-CEP-Upgrade-FINAL-NIA.pdf>> accessed 1 July 2024.
36. Singapore Australia Free Trade Agreement (SAFTA), (Chapter 14, Page 101) <<https://wits.worldbank.org/GPTAD/PDF/archive/Singapore-Australia.pdf>> accessed 2 July 2024.

measures in RTAs has also been constantly increasing as is demonstrated in the following diagram:

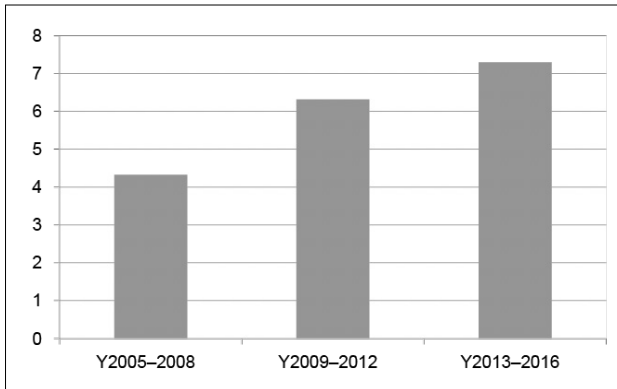


Figure 3: Number of Paperless trade measures in RTAs (From 2005-2016)<sup>37</sup>

Provisions relating to E-commerce in trade agreements are broadly categorised in three parts a) general provisions; b) trade facilitation; c) conducive environment and d) technological issues. General provisions focus on all set of regulations in E-commerce and are primarily related to promoting cooperation, transparency and non-discriminatory treatment of digital products. Trade facilitation measures emphasis on seamless and efficient movement of goods and services across borders to reduce the cost and time of doing trade. These measures focus on provisions relating to customs duties, paperless trading, electronic signature, and electronic certification. Conducive environment relates to provisions on consumer protection, personal data, unsolicited emails, free and open internet and cyber security. These provisions emphasised on improving the quality of transaction across frontier and the introduction of new issues of the digital economy. Technological issues are associated with location of computer facilities; transfer of source code and cross-free flow information.

	US – Australia	US-South Korea	Australia-Japan	Australia-China	EU-Japan	USMCA	CPTPP	RCEP
<b>A. General Provisions</b>								
Cooperation	No	No	Yes	Yes	Yes	Yes	Yes	
Transparency	No	No		Yes				

37. Yang Duval, K Mengjing, Digital Trade Facilitation: Paperless Trade in Regional Trade Agreements, ADBI Working Paper 747, 2017 <<https://www.adb.org/sites/default/files/publication/321851/adbi-wp747.pdf>> accessed 1 July 024.

Non-discriminatory treatment of digital products	Yes	Yes	Yes	No	No	Yes	Yes	
Domestic regulatory frameworks and international treaties	No	No	Yes	Yes	Partial	Yes	Yes	
<b>B. Trade facilitation and C. Conducive Environment</b>								
Customs duties	Yes	Yes	Yes	Yes	Yes	Yes		
Paperless trading	Partial	Partial	Yes	Yes		Yes	Yes	
Electronic signature	Yes	Yes	Partial	Partial	Yes	Yes	Yes	
Electronic authentication	Partial	Yes	Yes	Partial	Yes	Yes	Yes	
Online consumer protection	Partial	Partial	Partial	Partial	Yes	Yes	Yes	
Personal data protection	No	No	Yes	Partial	No	Yes	Yes	
Unsolicited (commercial) email	No	No	Partial	Partial	Yes	Yes	Yes	
Access to and use of internet	No	Partial	No	No	No	Yes	Yes	
Cybersecurity	No	No	Yes	No	No	Yes	Yes	
<b>D. Technological Issues</b>								
Data Localisation	No	No	No	No		Yes	Yes	
Non-disclosure of source code	No	No	No	No	Yes	Yes	Partial	
Cross-border flow of data	No	No	No	No		No	No	

*Table 3: Provisions relating to E-commerce in Selected Trade Agreements*  
(Source: Authors' construction based on text of trade agreements)

**Yes:** Contains a separate article and the definition of the provision is fully covered.

**Partial:** Provision exists as a separate article without a definition of the provision.

**No:** Provision does not contain the details on E-commerce in the agreement.

Most of FTAs cover provisions relating to elimination of customs duties on electronic transmissions, consumer protection, paperless trade and e-signature or authentication methods. Provisions on cross border data flows, data localisation and source code are negotiated only in soft rather than as hard disciplines. However, the Continental Progressive Trans-Pacific Partnership (CPTPP) and the United States Mexico and Canada (USMCA) are two most comprehensive trade pacts that contain legally binding rules on cross border trade flows, non-discriminatory treatment, prohibition on data localisation and transfer of source code.<sup>38</sup> Trade rules on E-commerce are under negotiations in Regional Comprehensive Economic Partnership (RCEP) are under-negotiations. The leaked “Terms of Reference”<sup>39</sup> for the Working Group on ecommerce (WGEC) shows that the scope of provisions on E-commerce have few critical areas such as cross border transfer of data, prohibition on requirement of source code and location of computing facilities.<sup>40</sup>

Further, it is important to note that provisions relating to E-commerce in RTA are highly heterogeneous in nature.<sup>41</sup> Most of common E-commerce provisions in trade agreements are related to E-commerce promotion and cooperation while reserving their existing stand of moratorium on customs duties. These provisions do not have any legal implications to the participating countries. The remaining provisions on E-commerce in RTA focus on the domestic regulatory framework and deal with specific issues such as consumer protection, electronic authentication, personal information protection and paperless trading.

#### **4. BROAD CONTOURS OF NEW RULES ON E-COMMERCE AT THE WTO: WHERE DOES INDIA STAND VIS- À-VIS DEVELOPED MEMBER COUNTRIES?**

A number of proposals have been tabled at the WTO on e-commerce, which reflects the position of members on different areas of negotiations.

---

38. Chapter on E-Commerce of Continental Progressive Trans-Pacific Partnership, <<https://www.mfat.govt.nz/assets/Trans-Pacific-Partnership/Text/14.-Electronic-Commerce-Chapter.pdf>> accessed 1 July 2024.

39. Terms of Reference, Working Group of Electronic Commerce (Regional Comprehensive Economic Partnership, 2015) <[https://www.bilaterals.org/IMG/pdf/ecommerce\\_draft\\_terms\\_of\\_reference.pdf](https://www.bilaterals.org/IMG/pdf/ecommerce_draft_terms_of_reference.pdf)> accessed 1 July 2024.

40. Asian Trade Centre, Crafting Trade Rules for a Digital Age in RCEP (ATC, 2018) <<https://static1.squarespace.com/static/5393d501e4b0643446abd228/t/5bcd233c8165f55241feadc7/1540170559464/Policy+Brief+18-07+IP+and+EC+Oct+2018.pdf>> accessed 1 July 2024.

41. J Antonio Monteiro and Robert Teh, Provisions on Electronic Commerce in Regional Trade Agreements, WTO Working Paper (2017).

The United States has circulated a non-paper to the WTO on E-commerce and proposes comprehensive rules to liberalise E-commerce to stimulate the growth of digital economy.<sup>42</sup> The key elements of the proposal are prohibition of customs duties on digital products, restrictions on sharing source code, non-discriminatory treatment, free flow of cross border data, free and open internet, and prohibition of data localisation and restriction of forced technology transfers. A proposal circulated by the European Union, Canada, Chile, Colombia, Côte d'Ivoire, Paraguay, Singapore and South Korea underpins the importance of technology to promote inclusive and sustainable growth in developing and least developed countries.<sup>43</sup> It proposes disciplines of key areas such as regulatory harmonisation, trade facilitation measures, free and open markets and enhanced transparency. It is worth noting that a large number of issues are in consonance with the United States's proposal on e-commerce. The non-paper circulated by Japan contains provisions of its E-commerce chapters of trade agreements. In 2017, a group of nine countries<sup>44</sup> Singapore, Colombia, Israel, and Hong Kong (China) submitted a proposal to the WTO and states that E-commerce has the potential to galvanise the growth and development of developing countries. China and Pakistan also circulated a paper<sup>45</sup> covering a number of measures that are required to create an enabling trade policy eco-system to facilitate the growth of digital trade. Their proposal underlines the importance exchange of information of regulatory measures, consumer protection, data privacy, publication of rules and regulations and administrative measures at multilateral level to expand the growth of digital trade. The Russia Federation has also circulated a paper<sup>46</sup>

---

42. World Trade Organisation, Work Programme on Electronic Commerce: Non-Paper from the United States (WTO, July 2016) <<https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/JOBS/GC/94.pdf>> accessed 1 July 2024.

43. World Trade Organisation, Work Programme on Electronic Commerce: Trade Policy, the WTO and the Digital Economy, Communication from Canada, Chile, Colombia, Côte d'Ivoire, the European Union, the Republic of Korea, Mexico, Paraguay and Singapore (WTO, July 2016) <[https://docs.wto.org/dol2fe/Pages/FE\\_Search/ExportFile.aspx?id=230128&filename=q:/Jobs/GC/97R1.pdf](https://docs.wto.org/dol2fe/Pages/FE_Search/ExportFile.aspx?id=230128&filename=q:/Jobs/GC/97R1.pdf)> accessed 2 July 2024.

44. World Trade Organisation, Work Programme on Electronic Commerce: Electronic Commerce and Development, Non-paper from Brunei Darussalam; Colombia; Costa Rica; Hong Kong, China; Israel; Malaysia; Mexico; Nigeria; Pakistan; Panama; Qatar; Seychelles; Singapore and Turkey (WTO, February 2017) <[https://docs.wto.org/dol2fe/Pages/FE\\_Search/DDFDocuments/234444/q/Jobs/GC/117.pdf](https://docs.wto.org/dol2fe/Pages/FE_Search/DDFDocuments/234444/q/Jobs/GC/117.pdf)> accessed 1 July 2024.

45. World Trade Organisation, Work Programme on Electronic Commerce: Aiming at the 11th Ministerial Conference, Communication from the People's Republic of China and Pakistan (WTO, November 2016) <[https://docs.wto.org/dol2fe/Pages/FE\\_Search/ExportFile.aspx?id=232753&filename=q:/Jobs/GC/110R1.pdf](https://docs.wto.org/dol2fe/Pages/FE_Search/ExportFile.aspx?id=232753&filename=q:/Jobs/GC/110R1.pdf)> accessed 1 July 2024.

46. World Trade Organisation, Work Programme on Electronic Commerce: Ways to Move Forward, Communication from the Russian Federation (WTO, July 2017)

in 2017 and stated that there are significant gaps in existing agreements of the WTO. These include network access, recognition of e-signature, e-payments, privacy, and personal data protection among others. In the Ministerial Conference of 2017 at Buenos Aires, Argentina, a number of countries submitted their proposals encompassing a diverse range of positions which include maintaining the existing work programme, new working groups, informal discussions to collate views on E-commerce and constituting a working party to prepare a roadmap for future negotiations on trade rules in e-commerce.

All in all, the proposals of the developed countries such as the United States, European Union, Canada, South Korea, Japan, Singapore and Australia demand for greater disciplines in E-commerce negotiations. Their proposals include prohibition of customs duties, free flow of cross border data, prohibition on transfer of source code, free and open internet, non-discrimination, data localisation, prohibition technology choice among others. On the other hand, the proposal of developing countries like India recognize the role of E-commerce in reducing poverty and regional inequalities in the global economy and seek a dedicated and structured discussion on different aspects of E-commerce to leverage the potential benefits of digital revolution.

India in its communication<sup>47</sup> to the WTO stated that it will continue to work on the existing WTO work programme on E-commerce and other relevant bodies. A group of African countries backed India's position and emphasised on working on the WTO work programme.<sup>48</sup> At the same time, India and African countries strongly objected to introduce new areas of discussion on E-Commerce as they go beyond the existing mandate of work programme. On 25th January 2019, seventy-six members<sup>49</sup> of the

---

<[https://docs.wto.org/dol2fe/Pages/FE\\_Search/FE\\_S\\_S009DP.aspx?language=E&CatalogueIdList=%20238906,237890,237829,237783,237711,237609,237614,237615,237604,237591&CurrentCatalogueIdIndex=6&FullTextHash=&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True%20](https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009DP.aspx?language=E&CatalogueIdList=%20238906,237890,237829,237783,237711,237609,237614,237615,237604,237591&CurrentCatalogueIdIndex=6&FullTextHash=&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True%20)> accessed 2 July 2024.

47. World Trade Organisation, Work Programme on Electronic Commerce: Communication from India (WTO, November 2017) <[https://docs.wto.org/dol2fe/Pages/FE\\_Search/DDFDocuments/240274/q/Jobs/GC/153.pdf](https://docs.wto.org/dol2fe/Pages/FE_Search/DDFDocuments/240274/q/Jobs/GC/153.pdf)> accessed 1 July 2024.
48. World Trade Organisation, Work Programme on Electronic Commerce: Statement by African Groups (WTO, December 2017) <<https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/MIN17/21.pdf>> accessed 2 July 2024.
49. World Trade Organisation, Joint Statement on Electronic Commerce by Albania; Argentina; Australia; Bahrain, Kingdom of; Brazil; Brunei Darussalam; Canada; Chile; China; Colombia; Costa Rica; El Salvador; European Union; Georgia;

WTO issued a Joint Statement on Electronic Commerce to initiate “WTO negotiations on trade-related aspects of e-commerce”. As there was no mandate on a multilateral negotiation, the members agreed to initiate an open-to-all Plurilateral negotiation on e-commerce.<sup>50</sup>

This Plurilateral negotiation got further boost at the Osaka G20 Summit in June 2019 with the launch of “*Osaka Track*” and was agreed to make substantial progress by June, 2020, when the 12th WTO Ministerial Conference was to take place in Nur-Sultan, Kazakhstan.<sup>51</sup> The same has been currently delayed because of the current COVID situation and discussions by WTO members are being done over Kazakhstan’s Offer to host 12<sup>th</sup> Ministerial Conference in June 2021.<sup>52</sup>

Amidst this, India along with other developing countries like Indonesia, South Africa etc., have Opposed the Osaka Track and have taken a firm stand of not supporting the negotiations on e-commerce.<sup>53</sup> In the same vein, India also presented a strong opposition<sup>54</sup> towards the draft proposed rules on e-commerce framework submitted by the EU.<sup>55</sup>

---

Honduras; Hong Kong, China; Iceland; Israel; Japan; Kazakhstan; Korea, Republic of; Kuwait, the State of; Lao PDR; Liechtenstein; Malaysia; Mexico; Moldova, Republic of; Mongolia; Montenegro; Myanmar; New Zealand; Nicaragua; Nigeria; Norway; Panama; Paraguay; Peru; Qatar; Russian Federation; Singapore; Switzerland; Chinese Taipei; Thailand; the former Yugoslav Republic of Macedonia; Turkey; Ukraine; United Arab Emirates; United States; and Uruguay (WT/L/1056, 25 January 2019) <<https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/L/1056.pdf&Open=True>> accessed 1 July 2024.

50. In this context, it is important to note para 34 of the 12th WTO Ministerial Declaration (Nairobi Declaration) (WT/MIN (15)/DEC), according to which any decision to launch negotiations multilaterally on issues, other than Doha Agenda, would need to be agreed by all Members.
51. World Trade Organisation, Twelfth WTO Ministerial Conference (WTO, February 2020) <[https://www.wto.org/english/thewto\\_e/minist\\_e/mc12\\_e/mc12\\_e.htm](https://www.wto.org/english/thewto_e/minist_e/mc12_e/mc12_e.htm)> accessed 1 July 2024.
52. WTO General Council, WTO Members Discuss Kazakhstan’s Offer to Host 12th Ministerial Conference in June 2021 (WTO, May 2020) <[https://www.wto.org/english/news\\_e/news20\\_e/gc\\_29may20\\_e.htm](https://www.wto.org/english/news_e/news20_e/gc_29may20_e.htm)> accessed 1 July 2024.
53. Kirtika Suneja, ‘India to Oppose Global Rules on E-Commerce at G-20 Meet’ *The Economic Times*, June 2019 <<https://economictimes.indiatimes.com/news/economy/foreign-trade/india-south-africa-asks-wto-to-revisit-moratorium-on-customs-duties-on-e-commerce/trade/articleshow/69655080.cms>> accessed 1 July 2024.
54. CATR, ‘Is India’s E-Commerce Policy on the Right Track?’ (Trade Promotion Council of India, May 2019) <<https://ibt.tpci.in/blogs/is-indias-e-commerce-policy-on-the-right-track/>> accessed 1 July 2024.
55. World Trade Organisation, Joint Statement on Electronic Commerce: EU Proposal for WTO Disciplines and Commitments Relating to Electronic Commerce,

## 5. ANALYSIS OF INDIA'S STANCE ON WTO E-COMMERCE NEGOTIATIONS

India has been a staunch supporter of the multilateral trading system and has benefited from the WTO-led trade liberalisation— both in terms of volume of trade and revenues. But, India has refused to participate in the WTO E-commerce negotiations by stating that E-commerce negotiations should focus on building blocks to develop consensus on the broader E-commerce trade framework and should follow “*sequential approach*” based on the existing WTO work programme of 1998.<sup>56</sup> This is important to address the fundamental issues of E-commerce which include- the definition and scope of E-commerce that are critical for developing country like India to develop better insights on the potential implications of liberalisation of domestic digital economy.

*Secondly*, India's decision not to participate on E-commerce negotiations at WTO is also influenced from the existing position on E-commerce in regional and bilateral trade agreements. India is an active member of 15 trade agreements but it has not negotiated rules on e-commerce so far. This also reflects from its current position in the RCEP negotiations in which it has squarely opposed the inclusion of provisions relating E-commerce (Asian Trade Centre, 2018). In contrast to this position with respect to substantive rules, India's efforts in developing paperless trade measures in Regional Trade Agreements is remarkable. India, has already notified its commitments towards TFA and has made efforts at National and Regional level to include more and more paperless trade measures (TF measures). India leads the South Asian region with the highest number of RTAs involving paperless trade measures, three of which have the same or higher number of paperless trade measures than that in the WTO TFA.<sup>57</sup>

*Third*, India's stand clearly reflects the fear that the joint initiative on e-commerce may significantly impact some of the existing trade rules, like GATT which allow a country like India to protect its domestic industries and GATS which allows to have some policy flexibilities. This concern

---

Communication from the European Union (INF/ECOM/22,26 April 2019) <<https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/INF/ECOM/22.pdf&Open=True>> accessed 1 July 2024.

56. D S Randhawa, 'Understanding India's Reluctance at the WTO E-Commerce Talks' Institute of South Asian Studies, NUS, March 2019 <<https://www.isas.nus.edu.sg/wp-content/uploads/2019/03/ISAS-Insights-No-547.pdf>> accessed 1 July 2024.

57. Yang Duval, K Mengjing, Digital Trade Facilitation: Paperless Trade in Regional Trade Agreements ADBI Working Paper 747 (2017) <<https://www.adb.org/sites/default/files/publication/321851/adbi-wp747.pdf>> accessed 1 July 2024.

can also be seen in the recent guidelines issued by India on electronic commerce in February, 2019 to provide a level playing field to domestic players.<sup>58</sup>

*Fourth*, India was specifically opposed to the draft EU proposal on two points-banning of custom duties on electronic transmissions and data localisation. India's draft e-commerce policy clearly unequivocally identifies data as a sovereign asset, which cannot be allowed to cross the borders of the country.<sup>59</sup>

*Fifth*, On the moratorium for customs duties, India is apprehensive of the potential loss of revenue, especially for developing countries. The push for initiating negotiations on substantive obligations related to e-commerce includes elements like permanently accepting the moratorium on imposing customs duties on electronic transmissions. With increasing digitization, more and more products like books, music, films, video games, etc. are being traded electronically. By agreeing to the permanent moratorium, countries which have tariff schedules, which allow putting duties on these kinds of products, will give up these rights and lose revenues.<sup>60</sup>

*Sixth*, the fundamental concern of India is that the E-commerce proposals are reflections of 21st century trade agreements of developed countries such as Trans Pacific Partnership (TPP), United States-Korea Trade Agreement, and United States Australia Free Trade Agreement among others. These agreements have strict provisions on transfer of technology, prohibition of localisation of internet servers, prohibition of customs duties, mandatory requirement for sharing telecom infrastructure, non-differential treatment, free flow of cross border supply of data and non-discrimination in sale of

---

58. CATR, 'Is India's E-Commerce Policy on the Right Track?' (Trade Promotion Council of India, May 2019) <<https://ibt.tpci.in/blogs/is-indias-e-commerce-policy-on-the-right-track/>> accessed 1 July 2024; *See also*, 'New FDI E-Commerce Rules in India: What it Means for Online Shoppers' *India Today*, February 2019 <<https://www.indiatoday.in/business/story/new-fdi-e-commerce-rules-in-india-what-it-means-for-online-shoppers-1449783-2019-02-06>> accessed 1 July 2024.

59. Department for Promotion of Industry and Internal Trade, Government of India, Draft National E-commerce Policy: India's Data for India's Development 14 (2019) <[https://dipp.gov.in/sites/default/files/DraftNational\\_e-commerce\\_Policy\\_23February2019.pdf](https://dipp.gov.in/sites/default/files/DraftNational_e-commerce_Policy_23February2019.pdf)> accessed 1 July 2024.

60. Department for Promotion of Industry and Internal Trade, Government of India, Draft National E-Commerce Policy: India's Data for India's Development 11 (2019) <[https://dipp.gov.in/sites/default/files/DraftNational\\_e-commerce\\_Policy\\_23February2019.pdf](https://dipp.gov.in/sites/default/files/DraftNational_e-commerce_Policy_23February2019.pdf)> accessed 2 July 2024.

spectrum etc.<sup>61</sup> These provisions aim to cater the interest of large digital giants and will contribute to their growth and revenue. They would help them to eliminate competition and reduce the cost of their global operations. The multilateralization of these rules will completely eliminate the scope of new firm to enter into digital space and to grow and sustain in monopolistic environment.<sup>62</sup> The direct implication of negotiating rules on digital trade at multilateral level will force country like India to hand over data/information to big digital giants, thereby reducing regulatory policy space to augment the growth of domestic firms in digital arena.<sup>63</sup>

The Indian policymakers are of view that the growth of E-commerce is remarkable without any international legally binding agreement. A recent report<sup>64</sup> of Deloitte India and Retail Association of India shows that the E-commerce market is expected to reach to US\$ 84 billion in 2021 from US\$ billion in 2017. Therefore, the participation in WTO E-commerce negotiations and its likely outcome will have negligible impact on the growth of global E-commerce but a potentially legally binding agreement at WTO will have chilling effects on the regulatory space. It will curtail the space to implement “digital industrial policy” that is critical to stimulate the growth of E-commerce and address challenges posed by advanced technologies such as additive manufacturing, robotics. The scope of use different types of policy tools including restrictions on cross border data flows and data localisation would discourage the mobilisation of international investment in the development of domestic digital infrastructure.<sup>65</sup>

The gist of India’s defensive stance on E-commerce is that it needs to develop digital capabilities and a strong domestic regulatory framework that helps in preparing to deal with complex issues related to data

---

61. South Centre & African Trade Policy Centre, The WTO’S Discussion on Electronic Commerce, Analytical Note SC/AN/TDP/2017/2 (January, 2017) <[https://www.southcentre.int/wpcontent/uploads/2017/01/AN\\_TDP\\_2017\\_2\\_The-WTO%E2%80%99s-Discussions-on-Electronic-Commerce\\_EN-1.pdf](https://www.southcentre.int/wpcontent/uploads/2017/01/AN_TDP_2017_2_The-WTO%E2%80%99s-Discussions-on-Electronic-Commerce_EN-1.pdf)> accessed 1 July 2024.

62. Neeraj, ‘Trade Rules for the Digital Economy: Charting New Waters at the WTO’ (2019) 1 World Trade Review.

63. South Centre & African Trade Policy Centre (n 63).

64. Deloitte and Retailers Association of India, ‘Unravelling the Indian Consumer’ (February 2019) <[https://www2.deloitte.com/content/dam/Deloitte/in/Documents/consumerbusiness/Unravelling%20the%20Indian%20Consumer\\_web.pdf](https://www2.deloitte.com/content/dam/Deloitte/in/Documents/consumerbusiness/Unravelling%20the%20Indian%20Consumer_web.pdf)> accessed 1 July 2024.

65. Azmeh and C Foster, ‘The TPP and the Digital Trade Agenda: Digital Industrial Policy and Silicon Valley’s Influence on New Trade Agreements’ Working Paper Series, International Development, London School of Economics (2016).

localisation, sharing of source code, restrictions on cross border supply on data, data security and intellectual property rights. India is at formative stages of developing its capabilities in advanced technologies such as robotics, artificial intelligence, additive manufacturing. The opening up E-commerce sector is likely to create the potential risk of being swamped by global technology giants. Negotiating rules at this stage will subvert the ability of the country to leverage the benefits of digital revolution.

## 6. CONCLUDING REMARKS: THE WAY FORWARD

There is an intense discussion in India on the potential costs of non-participation in E-commerce negotiations and emerging challenges in the globalised digital economy. A standard argument is that India should not miss the E-commerce train at the WTO as it gives an opportunity to shape policies in its development interests. Prime facie, it looks very interesting and appealing proposition but it is important to understand whether India has the capacity to influence negotiations in its interest. This requires a careful review of India's experience in dealing trade negotiations at the WTO. A significant volume of literature shows that the rule-making at the WTO is largely shaped by developed countries. There is hardly any scope for developing countries like India to exert influence of "core elements" of negotiations. This was quite clear in agriculture negotiations during the Doha round when developed countries walked away from negotiating table. It is therefore, difficult to say that developing countries will be shape negotiations and their outcome when a large number of developed countries are jointly pitching rules on E-commerce at the WTO. Further, the United States and EU have already challenged the existing special and differential treatment,<sup>66</sup> which provides developing countries like India to seek special rights to get favourable treatment from developed countries (WTO). Interestingly, Brazil, a developing country has announced to forgo the existing special and differential treatment on self-declared basis.<sup>67</sup>

It is widely argued that an international legally binding agreement will facilitate MSMEs (Medium and Small Enterprises) integration in the global economy by eliminating traditional challenges such as inadequate

---

66. WTO General Council, An Undifferentiated WTO: Self-Declared Development Status Risks Institutional Irrelevance: Communication from the United States (WTO, January 2019) <<https://www.tralac.org/news/article/13839-an-undifferentiated-wto-self-declared-development-status-risks-institutional-irrelevance.html>> accessed 1 July 2024.

67. Third World Network, Brazil's Tectonic Shift in Foregoing S&DT at WTO (March 2019) <<https://www.twn.my/title2/wto.info/2019/ti190311.htm>> accessed 1 July 2024.

economies of scale, procedural hurdles and lack of access to finance and technology. Digital platforms will help MSMEs to connect with global markets thereby enabling their entry in regional and global value chains.

However, the potential benefits of a global e-commerce agreement will favour of big digital giants and would cater their interest at the cost of MSMEs. This is because of the prevailing asymmetries in the market structure of digital economy in which dominant digital giants such as Amazon, Google and eBay hold a complete monopoly. In addition, there exists significant scope of predatory pricing as an instrument to eliminate competition in the market. MSMEs are unlikely to compete with digital giants due their sheer size, scale and financial strength. Moreover, global digital companies have already leveraged the benefits of digital industrial policies which extend financial and non-financial support such as subsidies; financial assistance for research and development, ownership of technologies, tax benefits and government-sponsored infrastructure etc. A study<sup>68</sup> by the International Trade Centre (ITC) also highlights the challenges encountered by MSMEs in the light of potential E-commerce agreement at the WTO. MSMEs are deeply concerned with the existing market structure in which digital platforms, e-payment solution and cross border delivery services governed by large online players. The asymmetries in market structure pose challenges for MSMEs and they also face severe constraints of financial resources, economies of scale and capacity. They are completely dependent on external suppliers for critical services for their international operations. The monopoly of digital giants on E-commerce platforms allows them to charge high membership fee for their cross-border transactions. Further, new rules on E-commerce at the WTO are likely to undermine the scope of digital industrial policies that are critical for the expansion of MSMEs in developing country like India.

Finally, proponents of E-commerce negotiations in India are of view that an agreement on E-commerce at the WTO will help India to promote the exports of information technology (IT) and information technology enabled services (ITES). It is important to understand that the rise of advanced technologies such as artificial intelligence, automation and robotics are already creating challenges for services exporting countries to remain

---

68. International Trade Centre, *New Pathways to E-Commerce: A Global MSME Competitiveness Survey* (ITC, September 2017) <[https://www.intracen.org/uploadedFiles/intracenorg/Content/Publications/New%20Pathways%20to%20E-commerce\\_Low%20res\(2\).pdf](https://www.intracen.org/uploadedFiles/intracenorg/Content/Publications/New%20Pathways%20to%20E-commerce_Low%20res(2).pdf)> accessed 1 July 2024.

competitive in global service trade. It is likely that the potential gains from IT and ITES exports would decline in future.

India's stance on WTO E-commerce negotiations underscores the importance of building blocks to develop the broader E-commerce trade framework. It demands for a "*sequential approach*" on the basis of the WTO work programme to address fundamental issues of E-commerce which include- the definition and scope of E-commerce that are more important for developing country like India to develop better insights on the potential repercussions of opening up the domestic digital economy. India's decision not participate in WTO E-commerce negotiations is influenced by a broad range of factors which include absence of robust domestic regulatory framework, digital infrastructure and lack of domestic capacity to negotiate hard trade rules on digital commerce. India strongly believes that the existing proposals on E-commerce at the WTO aimed to cater the interests of digital giants who are already ahead as compared to small digital companies of developing countries. Negotiating legally binding rules on E-commerce will curtail the regulatory space thereby undermining existing flexibilities to use newly evolved instruments such as "*digital industrial policy*" to address challenges of advanced technologies such as additive manufacturing, robotics. Finally, Indian policymakers also believe that the participation in the WTO E-commerce negotiations will not have a major impact on the growth of E-commerce sector. The global E-commerce industry continues to expand at a very fast pace without a legally binding agreement. The potential benefits from global E-commerce agreement for MSME are exaggerated given the existing asymmetries in the market structure where digital giants enjoy a complete monopoly.

# BALANCING THE SCALE: JUSTICE ASSISTED, NOT AUTOMATED

—Prasidh R Singh & Nitika Jain\*

## ABSTRACT

*The drive to introduce artificial intelligence to the judicial system will increase in the next few years. Nevertheless, as courts globally adapt to this technology, it is wise to recall the adage “justice hurried is justice buried.” As much as AI can accelerate legal proceedings, it is paramount that the quality and equity of justice are not sacrificed for the sake of efficiency. As technology progresses, there is a need to ensure that the pace of change does not undermine the public trust in the courts. AI can only act as a complement to the judicial system, not a replacement. It should be a facilitator to augment judicial work, not a replacement for human discretion. The article aims to explore the nuances that technological advancements, particularly in AI, will bring.*

**Keywords:** Artificial Intelligence, Judiciary, Algorithmic Bias, and AI-Driven Legal System.

## 1. INTRODUCTION

We asked ChatGPT to write an opening paragraph of a judicial opinion about Donkey suing Horse

The output produced by ChatGPT is as follows...

In the matter of *Donkey v Horse*, the court is presented with a novel dispute between two species – each representing long-standing symbols of labor and endurance. The plaintiff, Donkey, asserts that Horse, a fellow member of the equine family, has engaged in conduct that violates Donkey’s rights, including unfair exploitation of public perception, unequal

---

\* Faculty, National Judicial Academy, Bhopal, India.

treatment in agricultural assignments, and a monopoly over competitive racing and showmanship. This case raises unique questions about the nature of fairness, recognition, and the division of duties among animals in the realm of public work and leisure, warranting careful consideration under principles of equity and justice.

This is a perfect example of generative artificial intelligence (AI). You only need to provide the necessary details or ask a question, and the algorithm is designed to automatically generate a response. Observing the reply provided by ChatGPT, one can see that the algorithm clearly distinguishes between a horse and a donkey. This clear distinction, along with some attributes regarding the species, is well incorporated in the output. The question that arises is how does an algorithm know there is a difference between a donkey and a horse. Does it draw this distinction from the information available on the internet (publicly available data such as websites, books in public domain, instructional papers and guides, academic papers and journals etc.), whether the data is already stored in its database (licensed datasets), or is it due to the way the algorithms are designed to generate the output (like code repositories)? Only the developers who created the program know the exact answer, but surely it is either one of these sources or a combination of all or a few of them. Another important question is how much one can rely on such systems, considering the possibility of incorrect data, wrong classifications, or misleading information, who would be held liable? As of now, no one has a certain answer to it.

What if judges use AI powered tools like ChatGPT, Sora, Grok or Gemini to help with their decisions, or if lawyers asked AI to generate arguments? In just a matter of seconds, they could get well-formed arguments in a much more efficient way. Is there anything wrong with this? We are not sure. Should judges use AI to aid in writing judgments? Why not? Is there any code that prohibits it? Perhaps not till now. Maybe some within the judicial fraternity are already using it. In this article, we aim to explore the question of how much one should rely on AI in such contexts.

It is difficult for many of us to fully understand the exact purpose of AI, what it can do, how it works, what it consists of, or how we can incorporate it into our existing neuro-functionality, all while accounting for different biases or notions and without losing our individuality as humans. There is a mix of thoughts and feelings about AI. Some predict that it is changing the very nature of our basic needs, encroaching upon aspects of our lives that were never meant to become part of the public sphere. Others are still

afraid of the substantial investments being directed toward advancing and adopting this technology. At times, it feels like there is no future, as machines seem poised to overpower us. We have all seen movies like *The Matrix*, *In Time*, or *RoboCop*, where fictional depictions of the past appear to echo the future. Perhaps the time has come to prepare ourselves for an unwarranted struggle between humans and machines.

Penning down our thoughts in 2025 coupled with fear and innovation, the trajectory on which the developers are working for the advancement of AI is far beyond our imagination. There is also a debate around the world on whether machines can take-over the roles and work of humans with the kind of intelligence they are gathering artificially or whether humans are irreplaceable. Consider the judiciary, where some propose replacing judges with AI systems capable of generating self-corrected, refined judgments automatically. However, concerns arise about the accuracy of such systems, as they might cite precedents from civil law jurisdictions in common-law contexts, risking legal inconsistencies. This also raises alarms about privacy, which increasingly feels like a fading aspiration, potentially eroding further as automation advances. In Australia, law enforcement agencies are deploying advanced high-tech cameras capable of detecting whether individuals in a moving vehicle are wearing seat belts, enhancing road safety enforcement. What we are witnessing is the remarkable growth of AI, which has started to impact the judiciary across the globe. The AI has advanced manifolds, to say the least in the robotic industry, banking and financial services, healthcare, sales, marketing, tourism, agriculture and more, the list is expanding every hour. According to *PWC* report, AI could contribute up to \$15.7 trillion to the global economy by 2030, more than the current output of China and India combined.<sup>1</sup>

## 2. AI AND JUDICIARY – COURTS IN THE 21ST CENTURY

When it comes to judiciary the scope of AI still requires a deeper understanding, or, alternatively, whether presenting and arguing your case before AI would be equivalent to appearing before a judge? One often wonders about the future of AI in the Judiciary and how AI could be of any help when it comes to dispensing judicial work. Does our existing judicial infrastructure have any space for the AI technology to fit in? From an outsider's perspective, integrating AI into the judicial system appears

---

1. Pwc, Sizing the Prize What's the Real Value of AI for Your Business and How Can You Capitalise? <<https://www.pwc.com/gx/en/issues/analytics/assets/pwc-ai-analysis-sizing-the-prize-report.pdf>> (last visited 2 January 2025).

quite challenging. With each High Court following its own set of rules and procedures, leaving very limited room for AI to step in. This represents one school of thought. The other school of thought believes that AI should be made a part of the judiciary and are actively exploring ways to make it work within the legal system. In the current Indian context, there seems to be a constant race among various courts to adopt technology at different stages. While this push is necessary given today's needs, it still lacks a sense of nationwide digital uniformity in India.

### 3. RETHINKING INTELLIGENCE IN THE AGE OF MACHINES

Before we get into the nuances of AI vis-à-vis judiciary. One must get acquainted with what is AI and its scope. The term artificial intelligence was coined at Dartmouth in the year 1956 where a small group of scientists had gathered for the Dartmouth Summer Research Project on Artificial Intelligence which was the birth of this field of research.<sup>2</sup> However, prior to 1956, it was a British Mathematician Alan Turing who published an article titled “Computing Machinery and Intelligence” and asked a question: Can machines think? Proposing an experiment which came to be known as the Turing Test.<sup>3</sup> Thereafter, John McCarthy in 1965 coined the term “Artificial Intelligence” and drove the development of first AI programming Language, LISP in the 1960's.<sup>4</sup> Over the years, AI has progressively expanded its presence across multiple domains, including the realm of judiciary. A deeper exploration into the field of artificial intelligence reveals that it is generally categorized into three types: narrow AI, strong AI, and super intelligent AI. However, in Indian courts, the advancement of AI is limited to automated content review, legal research, transcription and process re-engineering. Unlike the United States who have developed a software called Correctional offender Management Profiling for Alternative solution (COMPAS) based on the algorithms used across USA to predict recidivism. To understand how different jurisdictions around the world have integrated AI into their judicial systems, the following table presents a comparative overview of various AI models adopted by different countries.

---

2. ‘Artificial Intelligence Coined at Dartmouth’ *Dartmouth College* <<https://home.dartmouth.edu/about/artificial-intelligence-ai-coined-dartmouth>> (last visited 23 January 2025).

3. Lawrence Livermore National Laboratory, ‘The Birth of Artificial Intelligence (AI) Research’ <<https://www.llnl.gov/>> (last visited 23 January 2025).

4. Dartmouth, ‘Keywords for AI Literacy’ <[https://writing.dartmouth.edu/teaching/ai-literacy/keywords-ai-literacy/#~:text=Artificial%20Intelligence%20\(AI\):%20Coined,that%20a%20machine%20can%20be](https://writing.dartmouth.edu/teaching/ai-literacy/keywords-ai-literacy/#~:text=Artificial%20Intelligence%20(AI):%20Coined,that%20a%20machine%20can%20be)> (last visited 2 February 2025).

#### 4. COMPARATIVE MODELS: AI INTEGRATION IN JUSTICE SYSTEMS WORLDWIDE

Country	Start Date	AI Tools	Description/Notes
<b>Australia</b> <sup>5</sup>	Early 1990s	Split-Up System	Predictive analytics for family law property disputes; uses rules-based reasoning and neural networks. Still in use as of 2023.
<b>Brazil</b> <sup>6</sup>	2018–2020	ATHOS, LARRY, AMON, Unnamed Chatbots	ATHOS automates appeals (Superior Court); LARRY groups cases; AMON uses facial recognition; chatbots for HR tasks. Widespread by 2022.
<b>China</b> <sup>7</sup>	2017–2018	Intelligent Trial 1.0, Internet Court Systems (Unnamed)	Intelligent Trial 1.0 digitizes filings and assigns cases.
<b>Colombia</b> <sup>8</sup>	2023	ChatGPT (Experimental)	ChatGPT used experimentally in 2023; Constitutional Court issued AI guidelines in 2024. Training tools in development.
<b>France</b> <sup>9</sup>	2018	Predictive Justice Tools (Unnamed)	Experimental use in civil/criminal courts for case analysis; restricted to auxiliary roles due to 2019 law.
<b>Germany</b> <sup>10</sup>	2020	OLGA, Frauke	OLGA categorizes cases (Stuttgart); Frauke automates air passenger rights lawsuits (Frankfurt). Reduces backlog significantly.

5. Zeleznikow, J, Stranieri, A and Gawler, M, 'Project Report: Split-Up — A Legal Expert System Which Determines Property Division Upon Divorce' (1995) 3 *Artif Intell Law* 267-275.
6. 'Project Maps Artificial Intelligence Systems Used by Brazilian Judiciary' <<https://portal.fgv.br/en/news/project-maps-artificial-intelligence-systems-used-brazilian-judiciary>> (last visited 24 January 2025).
7. J Wu, 'AI Goes to Court: The Growing Landscape of AI for Access to Justice' <<https://medium.com/legal-design-and-innovation/ai-goes-to-court-the-growing-landscape-of-ai-for-access-to-justice-3f58aca4306f>>.
8. UNESCO, 'AI in the Courtroom: Colombian Constitutional Court's Landmark Ruling Cites UNESCO's AI Tools' <<https://www.unesco.org/en/articles/ai-courtroom-colombian-constitutional-courts-landmark-ruling-cites-unescostools#:~:text=Summary&text=The%20decision%20was%20prompted%20by,exempt%20from%20paying%20the%20fees>> (last visited 24 February 2025).
9. Simone Benvenuti and Sirio Zolea, 'European Courts and Predictive Justice: A Feasible Symbiosis?' (2023) 1(1) *Opinio Juris in Comparatione*.
10. Antonia Hösch, Megan Schrader and Pierre G Zickert, 'The Evolving Role of AI in German Dispute Resolution' <<https://hengeler-news.com/en/articles/the-evolving-role-of-ai-in-german-dispute-resolution>> (last visited 14 February 2025).

Country	Start Date	AI Tools	Description/Notes
Singapore <sup>11</sup>	2024	Harvey AI (Customized System)	Tailored generative AI for legal research and claim valuation; two-year development started in 2024.
United Kingdom <sup>12</sup>	2018	Unnamed Predictive Tools, AI Judicial Guidance Tools	AI for case management and legal research; 2023 guidance limits public AI tool use (e.g., ChatGPT).
United States <sup>13</sup>	2013	COMPAS & Unnamed Defender Tools	COMPAS for sentencing risk (2013)

The global adoption of AI tools in judicial systems present a diverse landscape, with some tools venturing into the realm of adjudication while most focus on enhancing the administration of justice through assistance and technological innovation. Notably, in 2023, a Colombian court experimentally used ChatGPT to draft a ruling, prompting the Constitutional Court of Colombia to issue a landmark ruling in 2024.<sup>14</sup> This ruling established stringent criteria for the use of AI in judicial decisions, emphasizing: transparency, accountability, privacy, non-substitution of human rationality, reliability with constant checks, risk prevention, promotion of equality and fairness, ethical regulation, continuous monitoring, and suitability. This milestone underscores the principle that AI must not replace human judgment rather, be subject to rigorous scrutiny when used by judges in writing judicial opinions. Thus, ensuring the paramount importance of human oversight.

The much talked about COMPAS software which is developed by Northpointe incorporation USA is a topic for discussion not only in USA but across the globe. The use of AI in sentencing is widespread and increasingly accepted in the United States. It is pertinent to note that many

- 
11. 'Small Claims Tribunals to Roll Out AI Program to Guide Users Through Legal Processes' *The Straits Times* <<https://www.straitstimes.com/singapore/small-claims-tribunal-to-roll-out-ai-program-to-guide-users-through-legal-processes>> (last visited 14 February 2025).
  12. Courts and Tribunals Judiciary, Artificial intelligence (AI) <<https://www.judiciary.uk/wp-content/uploads/2023/12/AI-Judicial-Guidance.pdf>> (last visited 13 February 2025).
  13. Engel, C, Linhardt, L and Schubert, M, 'Code is Law: How COMPAS Affects the Way the Judiciary Handles the Risk of Recidivism' (2024) *Artif Intell Law* <<https://doi.org/10.1007/s10506-024-09389-8>>.
  14. Corte Constitucional (C.C.) (Constitutional Court), Sentencia T-323/24, 16 August 2024 (Colom.) <<http://www.corteconstitucional.gov.co.>> (last visited 26 February 2025).

of the western countries are using some or the other type of Identifying Risk Assessment Instruments in Correctional Settings such as Correctional Assessment and Intervention System (CAIS),<sup>15</sup> Dynamic Factors Intake Assessment (DFIA),<sup>16</sup> Inventory of Offender Risks, Needs, and Strengths (IORN),<sup>17</sup> Offender Group Reconviction Scale (OGRS),<sup>18</sup> Statistical Information of Recidivism Scale (SIR),<sup>19</sup> Static Risk and Offender Needs Guide (STRONG),<sup>20</sup> Wisconsin Risk and Needs (WRN)<sup>21</sup> and Wisconsin Risk and Needs-Revised (WRN-R)<sup>22</sup> and many more. The proprietor software often does not disclose the modalities through which the outcome is finally generated. It is difficult to find out how the algorithm is designed and how it works. Nonetheless a practitioner's guide<sup>23</sup> to COMPAS Core was released by Northpointe incorporation in the year 2015 which provides an overview for the user for its validity and reliability. Many have flagged issues with regard to its functioning and pointed out that it led to unfair interpretations coupled with algorithm bias but, were countered by Northpointe. The situation was escalated further when the matter reached the Wisconsin Supreme Court in *State v Loomis*.<sup>24</sup> The court upheld the

- 
15. Heeder, Eden, 'Off Risking: Offender Risk Assessment and the Correctional Assessment and Intervention System' (2012) Graduate Student Theses, Dissertations, & Professional Papers 714.
  16. Motiuk, L L, & Keown, L A, 'Correctional Intake Assessment and Case Planning: Application Development and Validation' 48(4) Criminal Justice and Behavior 556-570 <<https://doi.org/10.1177/0093854820974403>> (Original work published 2021).
  17. Holly A Miller, 'The Inventory of Offender Risk, Needs, and Strengths (IORN)' <<https://doi.org/10.1002/978119184256.ch5>> (last visited 26 February 2025).
  18. NCJRS Virtual Library, 'Predicting Reconvictions for Sexual and Violent Offences Using the Revised Offender Group Reconviction Scale' <<https://www.ojp.gov/ncjrs/virtual-library/abstracts/predicting-reconvictions-sexual-and-violent-offences-using-revised>> (last visited 21 February 2025).
  19. Olver, M, 'Statistical Information on Recidivism (SIR)' in The SAGE encyclopedia of criminal psychology vol 4 (2019) 1460-1462. SAGE Publications, Inc. <<https://doi.org/10.4135/9781483392240.n473>> (last visited 2 March 2025).
  20. Zachary Hamilton, Alex Kigerl, Baylee Allen, John Ursino and Amber Krushas, 'Never Going to Let You Down: Preventing Predictive Shrinkage via the STRONG-R Assessment Method' Justice Quarterly, DOI: 10.1080/07418825.2024.2386637.
  21. Nathan James, Risk and Needs Assessment in the Criminal Justice System, Congressional Research Service, [https://www.everycrsreport.com/files/20150724\\_R44087\\_0c47cc191ecc982888fa182c82ef0099a86eca8d.pdf](https://www.everycrsreport.com/files/20150724_R44087_0c47cc191ecc982888fa182c82ef0099a86eca8d.pdf), (last visited 21 February 2025).
  22. *ibid*.
  23. Northpointe, 'Practitioner's Guide to COMPAS Core' <<https://archive.epic.org/algorithmic-transparency/crim-justice/EPIC-16-06-23-WI-FOIA-201600805-COMPASPractitionerGuide.pdf>> (last visited 27 February 2025).
  24. 881 NW2d 749 (2016).

working of COMPAS and subsequently, the SCOTUS rejected the writ of certiorari filed by Loomis in the matter.

### 5. CHALLENGES OF ALGORITHMIC BIAS AND ACCOUNTABILITY

For a clearer insight into how the COMPAS software functions, it is helpful to examine the types of questions that are posed before the data is processed. The Northpointe incorporation prepared a questionnaire asking details on various points from the person concerned. A selection of sample questions is provided below to illustrate the range used in risk assessment analysis. The table below is indicative to offer valuable insights to the readers.

Risk Assessment – Sample questions <sup>25</sup>		
Criminal History	Exclude the current case for these questions	<ul style="list-style-type: none"> <li>• How many times has this person been arrested before as an adult or Juvenile (Criminal arrests only)</li> <li>• How many times has this person been sentenced to jail for 30 days or more?</li> <li>• How many type has this person been sentenced to probation as an adult?</li> </ul>
Non-Compliance	Include the current case for these questions	<ul style="list-style-type: none"> <li>• How many times has this person violated his or her parole?</li> <li>• How many times has this person been returned to custody while on parole?</li> <li>• How many times has this person’s probation been violated or revoked?</li> <li>• How many times has this person failed to appear for a scheduled criminal court hearing?</li> </ul>
Family Criminality	The next few questions are about the family or caretakers that mainly raised you when growing up.	<ul style="list-style-type: none"> <li>• Which of the following best describes who principally raised you?</li> <li>• If you lived with both parents and they later separated, how old were you at the time?</li> <li>• Was your father/mother (or father/mother figure who principally raised you) ever arrested, that you know of?</li> <li>• Were your brother /sister/wife/husband/partner ever arrested, that you know of?</li> <li>• Did your parent or parent figure who raised you ever have a drug or alcohol problem?</li> <li>• Was one of your parents(or parent figure who raised you) ever sent to jail or prison?</li> </ul>

25. COMPAS Risk Assessment — FUSL000112 (2019-06-27)” (2022). Parole Information Project <<https://ir.lawnet.fordham.edu/compas/29>>.

Risk Assessment – Sample questions <sup>25</sup>		
Peers	Please think of your friends and the people you hung out with in the past few (3-6) months	<ul style="list-style-type: none"> <li>• How many of your friends/acquaintances have ever been arrested?</li> <li>• How many of your friends/acquaintances served time in jail or prison?</li> <li>• Have you ever been a gang member?</li> </ul>
Substance Abuse	What are your usual habits in using alcohol and drugs	<ul style="list-style-type: none"> <li>• Do you think your current/past legal problems are partly because of alcohol or drugs?</li> <li>• Did you use heroin, cocaine, crack or methamphetamines as a juvenile?</li> </ul>
Residence/ Stability	-	<ul style="list-style-type: none"> <li>• How often do you have contact with your family (may be in person, phone, mail)</li> <li>• How often have you moved in the last twelve months?</li> <li>• How long have you been living in that community or neighborhood?</li> <li>• Do you live alone or with friends?</li> </ul>
Social Environment	Thinking of the neighborhood where you lived during the past (3-6) months	<ul style="list-style-type: none"> <li>• Is there much crime in your neighborhood?</li> <li>• Is it easy to get drugs in your neighborhood?</li> <li>• Are there gangs in your neighborhood?</li> </ul>
Education	Think of your school experiences when you were growing up	<ul style="list-style-type: none"> <li>• Did you complete your high school diploma or GED?</li> <li>• What were your usual grades in high school?</li> <li>• Were you ever suspended or expelled from school?</li> <li>• How often did you have conflict with teachers at school?</li> </ul>
Vocation (Work)	Please think of your past work experiences, job experiences, and financial situation.	<ul style="list-style-type: none"> <li>• Do you have a job?</li> <li>• Have you ever fired from a job?</li> <li>• About how many times have you been fired from a job?</li> <li>• How often do you have conflicts with friends/family over money?</li> <li>• How often do you worry about financial survival?</li> </ul>
Leisure/ Recreation	Thinking of your leisure time in the past few (3-6) months, how often did you have the following	<ul style="list-style-type: none"> <li>• How often did you feel you have nothing to do in your spare time?</li> <li>• Do you often become bored with your usual activities?</li> <li>• Is it difficult for you to keep your mind on one thing for a long time?</li> </ul>

Risk Assessment – Sample questions <sup>25</sup>		
Anger	-	<ul style="list-style-type: none"> <li>• I get into trouble because I do things without thinking?</li> <li>• If people make me angry or lose my temper, I can be dangerous?</li> </ul>

The COMPAS software and the algorithm it uses sparked significant controversy across the United States, drawing attention to issues of racial bias in the criminal justice system. In 2014, then U.S. Attorney General Eric Holder expressed concerns that risk assessment scores might be introducing bias into court decisions. He urged the U.S. Sentencing Commission to investigate their use, stating:

*Although these measures were crafted with the best of intentions, I am concerned that they may inadvertently undermine our efforts to ensure individualized and equal justice. By basing sentencing decisions on static factors and immutable characteristics – like the defendant's education level, socioeconomic background, or neighborhood – they may exacerbate unwarranted and unjust disparities that are already far too common in our criminal justice system and in our society.<sup>26</sup>*

While these concerns highlight how the COMPAS software functions, the specific algorithm behind its risk assessment remains undisclosed, presumably a trade secret of Northpointe Incorporated. The question of whether such proprietary tools could be fairly used in criminal sentencing remains open for debate and may ultimately require a ruling by the U.S. Supreme Court again. Fortunately, Indian courts have thus far refrained from adopting such AI-based decision-making tools. Rightly so, they continue to place their trust in human reasoning rather than automated algorithms.

## **6. CAUTIOUS BUT COMMITTED: INDIA'S APPROACH TO AI IN JUDICIAL SYSTEM**

In our opinion AI is best suited for the administration of justice rather than the dispensation of justice. This distinction is essential to ensure that technological advancements enhance administrative efficiency such as case and court management without encroaching on the adjudicatory process. By doing so, we can bolster public confidence and trust in the

26. Eric Holder, U.S. Attorney Gen., Speech at the National Association of Criminal Defense Lawyers 57th Annual Meeting and 13th State Criminal Justice Network Conference (1 August 2014).

justice system. To date, the Indian Supreme Court and High Courts have effectively integrated technology in a way that prioritizes the needs of litigants and lawyers through streamlining administrative tasks. For instance, the Supreme Court of India (SCI) has utilized an AI powered tool i.e. Supreme Court Vidhik Anuvaad Software (SUVAS) extensively to translate 36,271 judgments into Hindi and 17,142 into sixteen other regional languages by August 2024.<sup>27</sup> Additionally, the court is working on streamlining registry processes, using AI to assist with the formatting and sorting of judicial records, and to identify defects in petitions. Furthermore, the Supreme Court has introduced an e-filing service that provides a unified platform for electronically submitting cases, including complaints, written statements, replies, and applications, applicable to both civil and criminal cases across all High Courts and District Courts. This bilingual service (in English and local languages) ensures accessibility for a wider audience, including advocates and litigants. It is also relevant to note that the SCI is also planning to introduce an AI tool known as AI Saransh developed by National Informatics Centre to generate summary of pleadings. It is a technique that shortens a long piece of content with main points outlined that gives an idea of the whole content. The court also used live transcription tool by TERES, which is an AI driven engine to translate court arguments into text during live proceedings. Some other AI powered tools which are either used or are in process of being integrated in the Indian courts include SUPACE, AI Shruti, AI for user assistance and chatbots, AI assisted filing and court procedures and automated case management tools.

The former Chief Justice of India, Dr Justice DY Chandrachud emphasized that Artificial Intelligence (AI) can significantly enhance the efficiency of the legal profession. Speaking at the inaugural address of a two-day National Conference on “The Landscape of Technology in Courts in India and the Way Forward” at the Chandigarh Judicial Academy, the CJI highlighted the transformative impact of technology on the legal field.<sup>28</sup>

*“Sophisticated legal argumentation continues to remain in the exclusive realm of human lawyers. However, several routine tasks such as case law research, filing of pleadings, reviewing contracts, and conducting due diligence can deeply benefit from*

---

27. Ministry of Law and Justice, Artificial Intelligence in Judiciary, <<https://www.pib.gov.in/PressReleasePage.aspx?PRID=2043476>> (last visited 27 April 2025).

28. Dr Justice DY Chandrachud, Former Chief Justice of India, Speech at Chandigarh Judicial Academy (10 August 2024).

*artificial intelligence and automation. In fact, relegating such tasks to artificial intelligence leaves lawyers with more time and bandwidth. They can focus their time on high-value activities such as legal strategy, innovative argumentation and personalized client services,” said CJI.*

This highlights how Indian Courts are thoughtfully using AI to ease the burden of administrative tasks like transcription, summarisation of pleadings, language translation, court and case management, while making it clear that the final decisions in a courtroom must remain with human judges.

## 7. GLOBAL ADOPTION OF AI IN COURTS

Countries like Latvia, Netherlands and Germany are also exploring the possibilities of machine learning (AI) for the administration of justice. The main purpose is to process court statistics to draw up provisional estimates of human and financial resources for allocation. In Germany, the courts initially struggled to manage the high volume of cases due to a lack of technology, relying heavily on manual and repetitive work. To address this, the Ministry of Justice in Baden-Württemberg recommended the adoption of AI tool with Natural Language Understanding (NLU) to assist in categorizing cases into various groups.<sup>29</sup> With the introduction of an AI assistant named OLGA, which offers case categorization, extracts metadata, and facilitates quicker resolutions, judges are now relieved from repetitive tasks.<sup>30</sup> This allows them to focus on more complex issues. Courts have also reported that the case processing time has potentially reduced. These examples illustrate how courts are adopting AI in administrative capacities, carefully avoiding interference in the adjudicatory process.

In England, there is a dedicated online Traffic Penalty Tribunal (TPT)<sup>31</sup> which decides motorists’ appeals against Penalty Charge Notices (PCNs), issued by local and charging authorities in England (outside London) and Wales, for parking and traffic contraventions. All you need is Notice of Rejection (NoR) of Representations letter, PCN number, vehicle registration

---

29. IBM, ‘Judicial Systems are Turning to AI to Help Manage Vast Quantities of Data and Expedite Case Resolution’ <<https://www.ibm.com/case-studies/blog/judicial-systems-are-turning-to-ai-to-help-manage-its-vast-quantities-of-data-and-expedite-case-resolution>> (last visited 30 April 2025).

30. *ibid.*

31. The Traffic Penalty Tribunal (TPT) England & Wales, <<https://www.trafficpenaltytribunal.gov.uk/funding-and-legislation/>> (last visited 30 April 2025).

mark and pin code to complete the registration process. After that a new portal will open where one can upload his/her documents including photos, scanned paper and social media message form the smart phone. All this can be done without visiting court or without getting any assistance from lawyers. This is a streamlined way of handling court dockets wherein the litigant reachability could be achieved through online modes with a hassle-free dispute resolution mechanism. In this entire process the adjudication is not handed over to a machine or any kind of algorithm based software. It remains with human minds and the role of machine is over once the application is filled and duly submitted.

On the contrary European Commission for the Efficiency of Justice (CEPEJ) has formally adopted the five fundamental principles entitled European Ethical Charter on the use of AI in the judicial systems and their judicial environment. In the process of integrating AI into judicial decision-making, European Council member states may refer to these EU principles to uphold ethical standards in the use of AI. These principles include respect for fundamental rights, non-discrimination, quality and security, transparency, impartiality and fairness, and the principle of “under user control.” They are primarily aimed at ensuring transparency and upholding the rules necessary to guarantee a fair trial.<sup>32</sup> The implementation of these principles will undoubtedly encourage developers to identify and address ethical concerns relating to bias and respect for fundamental rights. Moreover, it is essential that the process by which machines reach to a final outcome, remains transparent, impartial, and firmly rooted on the principle of equality, an aspect which must not be compromised in algorithm design.

One country that often goes unnoticed but is making significant progress in private court proceedings is the Netherlands.<sup>33</sup> The debt collection proceedings in Netherlands, is conducting and delivering judgments without involvement of a human judge. In China the integration of AI into the courts is extensive. Last year a court in Kunshan, Jiangsu Province generated a rough draft of the decision with the aid of AI and subsequently

---

32. European Commission for the Efficiency of Justice (CEPEJ), ‘CEPEJ European Ethical Charter on the Use of Artificial Intelligence in Judicial Systems and Their Environment’, adopted at the 31st plenary meeting of the CEPEJ (Strasbourg, 3-4 December 2018) <<https://www.coe.int/en/web/cepej/cepej-european-ethical-charter-on-the-use-of-artificial-intelligence-ai-in-judicial-systems-and-their-environment>> (last visited 27 April 2025).

33. Willemien Netjes & Arno R. Lodder, ‘e-Court – Dutch Alternative Online Resolution of Debt Collection Claims - A Violation of the Law or Blessing in Disguise?’ (2019) 6(1) *International Journal of Online Dispute Resolution*.

the judge made a few changes in the draft and pronounced the judgment. It was also reported that the Supreme People's Court, the highest court in China, is now planning to equip all the courts with AI by next year. In Japan the Supreme Court Chief Justice Saburo Tokura while addressing the press conference at constitution Day said that "it is still totally unacceptable to use generative AI to make court decisions" and opposed the use of AI in trials.<sup>34</sup> Nonetheless the use of AI comes with a wide range of challenges including transparency, accountability and biased decision taken by AI based on Algorithms which needs to be addressed on priority.

### **8. REIMAGINING JUDICIAL ROLES IN AN AI-DRIVEN LEGAL SYSTEM**

Whenever the role of AI in the legal system is discussed, a fundamental question that often arises is whether AI will eventually substitute judges. To counter this paradoxical question, one can look into the distinction between replace and assist. The term 'replace' would mean to substitute something with another while 'assist' would mean to supplement, and not supplant, i.e. in aid of. Understanding these two terms would lead to an answer on the scope of AI in the judiciary. Undoubtedly, in our opinion we can make use AI for assistance but should not think of replacing it with judges.

In 2015, the United Kingdom witnessed an incident that became a point of discussion wherein thousands of couples who had settled their divorce proceedings had to reopen negotiations. This was due to a significant flaw discovered in the software used to calculate financial terms. Subsequently, His Majesty's Courts and Tribunals Service (HMCTS) had to investigate into the reason for such technical error to sustain so long without being noticed. This is to highlight that, it is imperative to undertake a detailed study of the AI powered tool before integration to identify the pros and cons attached with it. As long as technology serves to assist and supplement the court while a judge remains at the forefront of proceedings, the risk of technological failure remains low, and the integrity of the judicial institution is preserved even as it adopts modern tools to enhance the administration of justice.

For instance, The Wright brothers, Orville and Wilbur Wright, renowned for inventing airplane, never envisioned autopilot during their pioneering journey in aeronautics. From grappling with lift-generating wings to

---

34. 'Japan's Top Court Opposes Using AI in Trials' *The Japan News* <<https://japannews.yomiuri.co.jp/science-nature/technology/20240806-202833/>> (last visited 27 April 2025).

tackling complex aerodynamics and control challenges, they likely never imagined the concept of autopilot, now so prevalent. However, even today since 1912 when auto-pilot was first designed, pilots remain indispensable for critical tasks like take-off, navigating turbulence, altitude adjustments, coordinating with air traffic control, and landing. The notion of replacing pilots with highly advanced AI seems far-fetched. Similarly, in the realm of judiciary, the process of crafting judgments, listening to arguments, and delivering verdicts mirrors the precision and skill required in landing an aircraft safely. Thus, such critical task of whether landing an airplane or dispensing justice where human intelligence is required as per the need of the situation can never be replaced by machines over man but, can only be complemented. The delegation of such a critical task from human to machine should be approached with extreme caution, if at all.

Imagine a situation where AI wants to write a dissenting opinion, will it be achievable? Is it possible to create an algorithm capable of comprehending fundamental rights such as privacy, equal treatment, and fair trial just how the judges have interpreted? While discussing this aspect with some judges one of them raised a question that whether AI can give a dissent or a differing opinion when presented with similar facts, evidence etc., to which it was answered that AI can only respond based on the facts given to it giving multiple responses on similar lines but might not be in a position to give a differing opinion. This was even practically tried wherein similar facts were given to different AI tools and the response generated by each one of them were similar and not differing. This is where one must ponder over the role of humans while dealing with the AI powered tools & machines. The response of AI is based on the way information is provided, whether the facts presented to the AI are unbiased or otherwise is something to be looked upon. The extent of AI's application is yet to be fully uncovered but it comes with a word of caution that while relying on technology one must not compromise human intellect, particularly the ability to reason and to question every fact. It is equally important to emphasize that there is something called behavioural profiling that is currently being tested in many countries which involves predicting the behaviour of individual judges. However, this behaviour profiling is prohibited in France, but the US is extensively working on this. Such advanced use of AI is yet to reach the Indian courts.

In the year 2023, the High Court of Punjab and Haryana in *Jaswinder Singh v State of Punjab*,<sup>35</sup> has made an unprecedented reference to ChatGPT

---

35. 2023 SCC OnLine P&H 2587.

wherein a question was put forth to understand the jurisprudence on bail when the assailant is assaulted with cruelty. The response generated by ChatGPT which is an Open AI software was made part of the judgment with a note of caution that any reference to ChatGPT and any observation made therein above is neither an expression of opinion on the merit of the case nor shall the trial court advert to these comments. This reference is only intended to present a broader picture on bail jurisprudence, where cruelty is a factor.

*Subsequently, the Manipur High Court in Md Zakir Hussain v State of Manipur*<sup>36</sup> while dealing with a matter concerning the service conditions of Village Defence Force (VDF) did some extra research through Google and ChatGTP 3.5 to collect important information regarding VDF. The response provided by the ChatGTP is incorporated in the judgment. These instances reflect how Indian courts have underscored the assistive role of AI in the judicial process, while consciously avoiding its use as a substitute in decision making.

Recently in *Vijendra Singh Sikarwar v State of M.P.*<sup>37</sup> the Bench raised some thoughts for consideration which are summarised below:

- Under the Bhartiya Nagrik Suraksha Sanhita (BNSS), videography of the crime scene for the offences which are punishable for more than seven years is mandatory. Therefore, whether any protocol for various steps for recording the scene of crime can be conceptualized to gather important information with the help of Law Enforcement or Investigating Agency. Whether AI powered application can be created to analyse the videography data so recorded, to give necessary clues/ indications to the Investigating Officer to investigate the case in a particular direction or in respect of particular person whose evidence is left at the scene of crime.
- Whether another AI enabled application can be conceptualized which can interpret sign language of Persons with Disability (PWD) so that whenever any such victim or complainant comes to the Police Station for registering a complaint, the application would facilitate interpretation for the concerned Police Officer to understand the plight of the complaint/ victim.

---

36. 2024 SCC OnLine Mani 172.

37. 2023 SCC OnLine MP 3129.

The above observations made by the court are areas wherein there is a need for assistance of AI and also provides a cue for a developer to design an AI-powered application to assist the investigating agency, ensuring compliance with legal standards, ethical considerations, and the protection of individual rights.

## 9. CONCLUSION

This brings us to our conclusion on whether AI can replace judges in certain selective cases, while still retaining their essential role in the judicial process, or, can we completely rule-out and ignore the use of AI in this era of Technology. In many countries the shift from man to machine is becoming a reality starting from small claims like disputes between tenant and landlord or fine for traffic violations or motor accident compensation. The partial visibility of AI in decision making is becoming a reality in cases which do not require any interpretation of law or do not involve any legal complexities. For example, in the year 2019 the Estonian Ministry of Justice, in conjunction with Estonia's Chief Data Officer, have developed and piloted an AI software to hear and decide on small claims disputes of amounts less than 7000 euros. This triggered many other countries to at least run a prototype in the pursuit of speedy justice. Since traffic violation cases do not require any application of mind, mere fixation of the amount could be automated and generated with the help of AI powered tools. In India also many High Courts have developed individually or with the help of National Informatics Centre (NIC) a software to provide a rough estimate of the compensation amount in Motor Accidents Claim (MACT) cases. But, the amount generated by the software is not final and may be considered by the judge while computing the compensation amount. However, in China, they have advanced further, developing a software to use AI into criminal cases as well. It is reasonable to argue that the advancements in China should remain within its borders to prevent the misapplication of AI and thereby promote global justice administration.

It can be said that as AI is beginning to make its way into the courtrooms, its integration brings both remarkable opportunities by offering new ways to improve efficiency and support the work of judges alongside numerous ethical challenges. While these tools can be incredibly helpful to enhance efficiency, support legal research, and even assist in preliminary assessments, they are not and should not be a replacement for the human judge who interprets and applies the law. Courts are not mere processors of data; they are institutions of justice, fairness, and human values. The irreplaceability of judges lies in their ability to interpret the

law in context, weigh moral complexities, and deliver reasoned, empathetic decisions grounded in human experience. These qualities are essential in making decisions that affect real lives. AI, for all its capabilities, cannot feel compassion, lacks consciousness, accountability or grasp the full weight of human circumstances. That is why the goal should not be to replace judges with machines but to give judges better tools. The future of AI in the judiciary should not be about substitution but augmentation. A partnership where AI serves as a powerful tool in the hands of human judges, enhancing but never overshadowing their role. To make this work, we need clear ethical standards and ongoing oversight to ensure that AI remains a tool and not a decision-maker. In the end, justice must remain a human responsibility, guided by technology but grounded in the values that only people can uphold.

# ENFORCEABILITY OF MINIMUM LOCK IN PERIOD CLAUSES IN EMPLOYMENT CONTRACTS: ANALYSIS OF RECENT SUPREME COURT JUDGMENT IN VIJAYA BANK

—*Satish Padhi\**

## 1. INTRODUCTION

The debate surrounding the contours and scope of restraint of trade under Section 27 of the Indian Contract Act, 1872 (“**Contract Act**”) is an old and evolving one. One of the issues that keep arising time and again is whether a restrictive covenant during the subsistence of an employment agreement in the form of requirement of a minimum tenure is enforceable or not. The Supreme Court in *Vijaya Bank v Prashant B Narnaware*,<sup>1</sup> was dealing with the aspect of whether a minimum lock in period bond clause of a public sector bank would amount to restraint of trade under Section 27 of the Contract Act or can be said to be opposed to the public policy and thereby be contrary to Section 23 of the Contract Act. This article focuses on analyzing the judgment and its implications for employment agreements.

## 2. BACKGROUND

The Supreme Court in the classic decision of *Niranjan Shankar Golikari v Century Spg and Mfg Co Ltd*<sup>2</sup> had observed the following in the context of restraint of trade and the scope and ambit of the restriction under Section 27 of the Contract Act:

“The result of the above discussion is that considerations against restrictive covenants are different in cases where the restriction is to apply during the period after the termination of the contract than those in cases where it is to operate during the period of the contract. Negative covenants operative during the period of the

---

\* Commercial disputes and arbitration lawyer practicing in Delhi. He can be reached at [satishpadhi007@gmail.com](mailto:satishpadhi007@gmail.com). His LinkedIn profile can be viewed here: <https://in.linkedin.com/in/satish-padhi-017ab279>.

1. 2025 SCC OnLine SC 1107 : 2025 INSC 691.  
2. 1967 SCC OnLine SC 72 : AIR 1967 SC 1098.

contract of employment when the employee is bound to serve his employer exclusively are generally not regarded as restraint of trade and therefore do not fall under section 27 of the Contract Act. A negative covenant that the employee would not engage himself in a trade or business or would not get himself employed by any other master for whom he would perform similar or substantially similar duties is not therefore a restraint of trade unless the contract as aforesaid is unconscionable or excessively harsh or unreasonable or one sided (...).”

Subsequently, the Supreme Court in *Superintendence Co of India (P) Ltd v Krishan Murgai*<sup>3</sup> speaking through Sen J held as follows:

“Agreements of service, containing a negative covenant preventing the employee from working elsewhere during the term covered by the agreement, are not void under Section 27 of the Contract Act, on the ground that they are in restraint of trade. Such agreements are enforceable. The reason is obvious. The doctrine of restraint of trade never applies during the continuance of a contract of employment; it applies only when the contract comes to an end.”

### 3. IMPUGNED CLAUSES

#### 3.1 Recruitment Notification Clause- Clause 9 (w)

“Selected candidates are required to execute an indemnity bond of Rs.2.00 Lakh (Rupees Two Lakh only) indemnifying that they will pay an amount of Rs.2.00 lakh to the Bank if they leave the service before completion of 3 years”.

#### 3.2 Appointment Letter Clause - Clause 11 (k)

“You are required to serve the Bank for a minimum period of 3 years from the date of joining the bank and should execute an indemnity bond for Rs. 2.00 lakhs. The said amount has to be paid by you in case you resign from the services of the bank before completion of stipulated minimum period of 3 years. For this purpose, you have to bring a blank non-judicial stamp paper of Rs. 100/- procured in the State of your posting.”

---

3. (1981) 2 SCC 246.

#### 4. RELEVANT PROVISIONS UNDER THE CONTRACT ACT

##### Section 27: Agreement in restraint of trade, void

“Every agreement by which any one is restrained from exercising a lawful profession, trade or business of any kind, is to that extent void.”

##### Section 23. What considerations and objects are lawful, and what not

“The consideration or object of an agreement is lawful, unless—  
it is forbidden by law; or  
is of such a nature that, if permitted, it would defeat the provisions of any law; or  
is fraudulent; or  
involves or implies, injury to the person or property of another; or  
the Court regards it as immoral, or opposed to public policy.  
In each of these cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void.”

#### 5. ISSUE FRAMED BY COURT

Whether clause 11(k) of the appointment letter amounts to restraint of trade under Section 27 of the Contract Act and/or opposed to public policy and thereby being contrary to Section 23 of the Contract Act and violative of Articles 14 and 19 of the Constitution of India, 1950?

#### 6. JUDICIAL REASONING OF THE SUPREME COURT IN *VIJAYA BANK CASE*

6.1 The Contract Act is not a code but for matters provided therein, it is to be considered as exhaustive and accordingly, for restraint of trade, the provision contained in Section 27 of the Contract Act is to be viewed as the parameter in which a restriction being valid or not is to be permitted.

6.2 Given that Section 27 provides that only every agreement by which anyone is restrained from exercising a lawful profession, trade or business is void, it can be concluded that a restrictive covenant operating during the subsistence of an employment contract would be valid as it does not impose does not restraint in the sense it is used in Section 27 to trade or employment.

6.3 The Supreme Court speaking through Bagchi J observed that the relevant clause in the appointment letter only seeks to impose a restriction on the respondent's option to resign by specifying a specified term. Since, the clause was not meant to restrain future employment, it cannot be considered to be violative of Section 27 of the Contract Act.

6.4 Incorporation of a minimum service tenure for experienced employees to reduce attrition and improve efficiency cannot be said to be in contravention of public policy<sup>4</sup> or unconscionable.<sup>5</sup>

6.5 A senior managerial grade pay employee to be asked 2 Lakhs as liquidated damages cannot be deemed to be very high to make the concept of resignation itself difficult. The Supreme Court also observed the resignation by the employee by paying the said amount itself demonstrates this though it was paid under protest.

6.6 Accordingly, the Supreme Court held that the restrictive covenant as specified in the restrictive covenant of the appointment letter of the

---

4. See *Central Inland Water Transport Corpn Ltd v Brojo Nath Ganguly* (1986) 3 SCC 156, 216-217. Observations of the Supreme Court quoted as follows:

91. ... Contracts in prescribed or standard forms or which embody a set of rules as part of the contract are entered into by the party with superior bargaining power with a large number of persons who have far less bargaining power or no bargaining power at all. Such contracts which affect a large number of persons or a group or groups of persons, if they are unconscionable, unfair and unreasonable, are injurious to the public interest. To say that such a contract is only voidable would be to compel each person with whom the party with superior bargaining power had contracted to go to court to have the contract adjudged voidable. This would only result in multiplicity of litigation which no court should encourage and would also not be in the public interest. Such a contract or such a clause in a contract ought, therefore, to be adjudged void. While the law of contracts in England is mostly judge-made, the law of contracts in India is enacted in a statute, namely, the Indian Contract Act, 1872. In order that such a contract should be void, it must fall under one of the relevant sections of the Indian Contract Act. The only relevant provision in the Indian Contract Act which can apply is s 23 when it states that "The consideration or object of an agreement is lawful, unless ... the court regards it as ... opposed to public policy"...

5. See *Superintendence Co of India (P) Ltd v Krishan Murgai* (1981) 2 SCC 246, 265. Observations quoted as follows:

59. It is well-settled that employee covenants should be carefully scrutinised because there is inequality of bargaining power between the parties; indeed no bargaining power may occur because the employee is presented with a standard form of contract to accept or reject. At the time of the agreement, the employee may have given little thought to the restriction because of his eagerness for a job; such contracts "tempt improvident persons, for the sake of present gain, to deprive themselves of the power to make future acquisitions, and expose them to imposition and oppression".

employee neither amounted to a restraint of trade nor can it be construed to be opposed to public policy.

## 7. ANALYSIS OF THE JUDGMENT AND ITS IMPLICATIONS

Keeping in mind the scope and ambit of Section 27 of the Contract Act and its interpretation as laid down by the Supreme Court including the classic decision in *Niranjan Shankar Golikari*<sup>6</sup> the interpretation that reasonable restrictions during the subsistence of the employment cannot be set aside unless they are onerous is in line with the statutory framework.

This judgment though may not necessarily be a precedent automatically for similar clauses in private sector as it is fact specific and the Supreme Court has specifically upheld it by observing the peculiar circumstances of a public sector bank as Vijaya Bank as follows:

“Public sector undertakings like the appellant-bank needed to compete with efficient private players operating in the same field. To survive in an atmosphere of deregulated free-market, public sector undertakings were required to review and reset policies which increased efficiency and rationalized administrative overheads”<sup>7</sup>

Furthermore, even for the public sector and also for the private sector, the validity of an employment bond clause will be seen on a case-to-case basis and may not be automatically applicable for junior level employees where attrition is anticipated.

The other issue that arises is that given that the employee had served approximately around 18 months out of the designated 36 months prescribed as the minimum tenure, should the entire liquidated damages prescribed of Rs 2 Lakhs would have been deemed payable. On this, the Supreme Court has gone by the perspective of the quantum of liquidated damages high as the employee was on a lucrative pay package.

---

6. (n 3).

7. See *Vijaya Bank case* 2025 SCC OnLine SC 1107 : 2025 INSC 691, paras 26 and 27. Relevant observations quoted below:

26. ... Ensuring retention of an efficient and experienced staff contributing to managerial skills was one of the tools inalienable to the interest of such undertakings including the appellant-bank.

27. This prompted the appellant-bank to incorporate a minimum service tenure for employees, to reduce attrition and improve efficiency. Viewed from this perspective, the restrictive covenant prescribing a minimum term cannot be said to be unconscionable, unfair or unreasonable and thereby in contravention of public policy.

The Supreme Court in *Kailash Nath Associates v DDA*<sup>8</sup> speaking through Nariman J has held that,

“Where a sum is named in a contract as a liquidated amount payable by way of damages, the party complaining of a breach can receive as reasonable compensation such liquidated amount only if it is a genuine pre-estimate of damages fixed by both parties and found to be such by the Court. In other cases, where a sum is named in a contract as a liquidated amount payable by way of damages, only reasonable compensation can be awarded not exceeding the amount so stated.” Likewise, in *Kailash Nath*, it was clarified that, “Reasonable compensation will be fixed on well-known principles that are applicable to the law of contract, which are to be found inter alia in Section 73 of the Contract Act”<sup>9</sup>.

Accordingly, for categories of employees where the pay package is not considered to be lucrative, the entire liquidated damages may not be payable but a proportionate reduction may be undertaken basis the tenure already served and the tenure left.

---

8. (2015) 4 SCC 136.

9. *ibid.*

# CASE COMMENT

*Nehru\* & Harsh Singh\*\**

## ***STATE OF T.N. V GOVERNOR OF T.N.***<sup>1</sup>

### 1. INTRODUCTION

The extent of discretionary powers exercised by Governors in India has long been a contentious issue in constitutional discourse. In a landmark judgment delivered on April 8, 2025, a division bench of the Supreme Court comprising Justices R. Mahadevan and J.B. Pardiwala undertook a detailed examination of this matter. The *a comprehensive 415-page judgment*, authored by Justice Pardiwala, provides authoritative clarity on the constitutionally permissible scope of discretion vested in the Governor under Article 200 and in the President under Article 201, specifically with regard to granting assent to state legislation. This decision constitutes a significant advancement in the constitutional interpretation of executive powers within the framework of Indian federalism.

### 2. CHRONOLOGICAL SUMMARY<sup>2</sup>

- (i) Assumption of Office by the Governor: 18<sup>th</sup> September 2021: Shri R.N. Ravi assumed office as the Governor of Tamil Nadu.
- (ii) Constitutional Dispute Concerning Assent to Bills:
  - (a) 13th January 2020 - 28th April 2023: The Tamil Nadu Legislative Assembly passed 12 Bills and forwarded them to the Governor for his assent.
  - (b) September 2021 - October 2023: The Governor did not take any action on these 12 Bills during this period, neither granting assent nor returning them for reconsideration.

---

\* PhD Scholar, National Law University, Tripura. Email- 24phd008@gmail.com.

\*\* 2nd year, BA LLB Student, National Law University, Tripura. Email- 23ballb15@nlutripura.ac.in.

1. 2025 SCC OnLine SC 770.

2. This chronological summary has been extracted by the researchers from the case facts for ease of understanding.

- (c) 31st October 2023: The Government of Tamil Nadu filed a writ petition before the Hon'ble Supreme Court, challenging the Governor's prolonged inaction as unconstitutional.
- (d) 10th November 2023: The Supreme Court issued notice to the respondents, including the Governor's office.
- (e) 13th November 2023: The Governor withheld assent to 10 of the 12 Bills and reserved the remaining 2 Bills for the President's consideration. Crucially, the 10 Bills were not returned to the Legislature for reconsideration, in apparent contravention of Article 200 of the Constitution.
- (f) 18th November 2023: In response, the Tamil Nadu Legislative Assembly convened a special session and repassed all 10 Bills without amendments. These were immediately resubmitted to the Governor for assent.
- (g) 20 November 2023: The Supreme Court took note of the repassing and adjourned the matter to 1st December 2023, directing that the Governor's response be placed on record.
- (h) 28 November 2023: The Governor, without acting on the advice of the Council of Ministers, reserved all 10 repassed Bills for the President, citing a potential conflict with Entry 66 of the Union List (pertaining to higher education), despite having earlier acknowledged the State's legislative competence.
- (i) 12 December 2023: On the suggestion of the Supreme Court, the Governor extended an invitation to the Chief Minister for a meeting to address the constitutional impasse.
- (j) 30 December 2023: The Governor and Chief Minister met. During the meeting, the State made the following submissions:
- In light of the decision in *State of Punjab v Governor of Punjab* (2024), the Governor was not empowered to reserve Bills that had been repassed by the Legislature.
  - Article 200 mandates that once a Bill is repassed by the State Legislature, the Governor is constitutionally obligated to grant assent.

- The Governor's actions were in violation of Article 163, which requires the Governor to act on the aid and advice of the Council of Ministers.
- (iii) Subsequent Developments: The President withheld assent to 7 of the 10 Bills, granted assent to 1 Bill, and 2 Bills remained pending at the time of reporting.
- (iv) Developments concerning sanction for corruption investigations against public servants: 10th April 2022 - 15 May 2023: The State Government submitted four proposals to the Governor, seeking sanction for prosecuting public servants under the Prevention of Corruption Act, 1988. These files remained pending at the time the writ petition was filed.
- (v) Developments Concerning Proposals for the Premature Release of Prisoners: June 2022 - August 2023: The Government forwarded 53 proposals recommending the premature release of prisoners. As of 1st December 2023, the Governor's office stated that it had received 580 such proposals since September 2021, of which: 362 were approved, 165 were rejected, and 53 (forwarded between June and August 2023) were still under consideration. No further updates on these files were provided to the Court.
- (vi) Impediments to Tamil Nadu Public Service Commission (TNPSC) Appointments:
- (a) 27th September 2023: The Governor returned the State Government's proposal for appointments to the TNPSC, citing concerns about the selection process, tenure, and the credentials of the proposed candidates.
  - (b) 7th October 2023: The State submitted a detailed clarification addressing the concerns raised.
  - (c) 10th October 2023: The proposal was resubmitted for approval. The State emphasised Regulation 3 of the TNPSC Regulations, 1954, which requires the Commission to comprise 1 Chairman and 14 Members. At the time, the Commission was functioning with only four members, affecting its operational capacity.
  - (d) 27th October 2023: The Governor once again returned the files, this time without offering any reasons.

- (vii) Supreme Court's Final Judgment: On 8th April 2025, the Supreme Court invoked Article 142 and declared that all 10 Bills shall be deemed effective from the date they were originally sent to the Governor. The Court reaffirmed the binding nature of ministerial advice and limited discretion of the Governor under Article 200.

### 3. FACTUL MATRIX

This case concerns an ongoing constitutional crisis in Tamil Nadu arising from the Governor's alleged failure to discharge constitutional duties, resulting in legislative and administrative paralysis. Central issues include (1) prolonged inaction on bills passed by the State Legislature; (2) obstruction of routine executive functions such as granting prisoner remissions and prosecution sanctions; and (3) interference in ministerial appointments and public service commission approvals.<sup>3</sup> Twelve bills passed by the Tamil Nadu Legislative Assembly between January 2020 and April 2023 remained pending until the State approached the Supreme Court in October 2023. Following judicial scrutiny, Governor R.N. Ravi withheld assent to ten bills on November 13, 2023, without returning them to the legislature, in contravention of Article 200 of the Constitution. Subsequently, the Governor reserved these bills for presidential consideration, despite the Assembly repassing them in a special session, an act the State argues violates constitutional norms and judicial precedent.

Beyond the legislative impasse, the Governor's office has allegedly stalled 53 out of 580 prisoner remission applications, impeded appointments to the Tamil Nadu Public Service Commission, and exceeded constitutional authority by attempting to dismiss and delay reinstatement of duly appointed ministers, including Ministers Senthil Balaji and K. Ponmudy. The State of Tamil Nadu seeks judicial intervention to declare the Governor's reservation of repassed bills and the withholding of assent as unconstitutional. It further prays for directions to the Governor to promptly grant prosecution sanctions, dispose of remission applications, and approve TNPSC appointments in accordance with constitutional provisions.

For the purpose of clarity and ease of understanding, the researcher has identified the specific issues framed by the courts, outlined the reasoning adopted in addressing those issues, and presented the final decisions rendered by the courts in response to each.

---

3. Emphasis through bold, italics, and underlining has been added by the researcher to highlight key aspects and aid the reader's understanding of the case comment.

#### 4. ISSUES FRAMED

The issues framed by the issues which involved in the present case were<sup>4</sup>:

- I. What courses of action are available to the Governor in exercise of his powers under Article 200 of the Constitution?
  - (i) Whether the first proviso could be said to provide an independent course of action available to the Governor in addition to the three options provided under the substantive part of Article 200?
  - (ii) In what manner the expression ‘the Bill falls through unless the procedure under the first proviso is followed’, as used in *Union of India v Valluri Basavaiah Chowdhary*,<sup>5</sup> should be construed?
  - (iii) Whether the decision of this Court in *State of Punjab v Governor of Punjab*<sup>6</sup> could be said to be per incuriam for not having taken into consideration the observations made in previous decisions rendered by larger benches of this Court?
  - (iv) Whether the scheme of Article 200 of the Constitution envisages the exercise of ‘absolute veto’ or ‘pocket veto’ of a bill by the Governor?

While answering the above question and sub-questions raised, the Supreme Court, while examining the issue of the Governor’s assent to Bills, the Supreme Court referred to Section 75 of the Government of India Act, 1935 - the precursor to Article 200 of the Constitution. The Court highlighted key distinctions, including: (a) the omission of the phrase ‘in his discretion,’ (b) the shift from assent in the name of the Crown to the Governor, (c) a clause mandating assent to reconsidered Bills, and (d) the addition of a second proviso not found in Section 75. Citing D.D. Basu, the Court affirmed that the Governor is bound by ministerial advice and cannot withhold assent once a Bill is reconsidered and passed by the legislature. The Court also relied on *State of Bihar v Kameshwar Singh* (1952) to interpret Article 200. It observed that the term ‘shall’ mandates the Governor to choose only one of the three available options- grant assent, withhold assent, or reserve the Bill for the President. The use of

---

4. The six issues and sub-issues are adopted as framed in the judgment, with focus on the Court’s reasoning and conclusions.

5. (1979) 3 SCC 324 : AIR 1979 SC 1415.

6. (2024) 1 SCC 384.

“or” between these options makes them mutually exclusive; the Governor cannot simultaneously assent to and reserve a Bill, nor withhold assent and reserve it at the same time.

Article 200 mandates that a Bill passed by the State Legislature must be presented to the Governor, who can then choose one of only three options: (a) grant assent, (b) withhold assent, or (c) reserve it for the President’s consideration - only one of which can be exercised at a time. The first proviso allows the Governor, except in the case of Money Bills, to return a Bill for reconsideration with suggested amendments. If the Bill is passed again, with or without those amendments, the Governor must grant assent. The second proviso mandates that the Governor must reserve a Bill for the President if it seeks to erode the High Court’s authority.

The Court emphasised the importance of understanding the historical and constitutional context of Article 200, tracing its evolution from British and Canadian models, Indian pre-independence political documents, and the Constituent Assembly Debates. Post-independence, several commissions examined Articles 200 and 201. The First Administrative Reforms Commission (1966), the Rajamannar Committee (1971), and the Sarkaria Commission explored the scope of the Governor’s discretion, delays in granting assent, and the President’s powers. The Sarkaria Commission stressed the importance of clear and complete communication when referring Bills to the President. The Punchhi Commission proposed a six-month deadline for presidential decisions on reserved Bills and recommended that the President seek the Supreme Court’s opinion under Article 143 to avoid political bias.

The National Commission to Review the Working of the Constitution (NCRWC) recommended several reforms to Article 200: *(a) a four-month time limit for the Governor to decide on assent or reservation, (b) removal of the Governor’s power to withhold assent, (c) a three-month deadline for the President to decide on reserved Bills, (d) mandatory assent by the President if the State Legislature re-passes the Bill, (e) a bar on reserving Money Bills, and (f) limiting the Governor’s power to reserve Bills only to cases mandated by the Constitution.* The Punchhi Commission supported these recommendations and *called for their implementation through a constitutional amendment* to uphold federalism and prevent misuse of the power of assent.

The Supreme Court, in interpreting Article 200, also drew upon international jurisprudence to contextualise the role of assent in various

democratic systems. In the United Kingdom, royal assent is considered a constitutional formality and has not been refused since Queen Anne in 1707. In Canada, courts have held that royal assent by the Governor-General is a legislative act and thus non-justiciable, with the Lieutenant-Governor being part of the legislature. In the United States, once a Bill is passed by both Houses, the President may sign it into law or return it with objections. If re-passed by two-thirds of both Houses, the Bill becomes law. If the President takes no action within ten days while Congress is in session, the Bill becomes law automatically. However, if Congress adjourns during this period, the Bill does not become law- a process known as the pocket veto. In New Zealand, under the Constitution Act, 1986, the Governor-General acts solely on the advice of the Executive Council, and assent is a formal act without discretion. In Australia, State Governors usually act independently, though South Australia follows executive advice. In Ireland, the President may refer a Bill to the Supreme Court for a constitutional review within seven days of presentation, and if the court finds it unconstitutional, the President cannot grant assent. Singapore prescribes specific time limits (ranging from 30 days to six weeks) for the President to grant or withhold assent. If no action is taken, or if a tribunal upholds the Bill's validity, assent is deemed granted.

In Sri Lanka, upon initial presentation, the Governor may assent or return the Bill for reconsideration. On its second passage, the Governor may only reserve it for the President to seek judicial review; independent withholding of assent is not permitted. Similarly, in Kiribati, the head of state may withhold assent only on constitutional grounds, requiring judicial review if disagreement persists. Fiji mandates that the President must act within seven days, after which assent is deemed granted. In Antigua and Barbuda and the Solomon Islands, the Governor-General must signify assent once a Bill is duly passed by the legislature. In Pakistan, the President must act within ten days- either granting assent or returning the Bill for reconsideration. If re-passed, assent becomes mandatory. Additionally, Article 105 requires Governors to act on ministerial advice, though they may request reconsideration. Germany's Basic Law stipulates that a Bill passed by the Bundestag becomes law upon Bundesrat consent and presidential certification. In Berlin, the House President must sign the Bill without delay, and the Mayor must promulgate it within two weeks. In Italy, the President may return a Bill once with reasons, but if it is re-passed, it must be promulgated. France provides the President with 15 days to promulgate a law but permits a one-time request for reconsideration by Parliament. Lastly, Japan vests law-making authority in the Diet; if

the House of Councillors rejects a Bill, the House of Representatives may override the decision by a two-thirds majority. All laws must be signed by the competent Minister and countersigned by the Prime Minister.

In addressing the first issue, the Court relying on *State of Punjab v Governor of Punjab*,<sup>7</sup> *Union of India v Valluri Basavaiah Chowdhary*<sup>8</sup> and *Hoechst Pharmaceuticals Ltd v State of Bihar*<sup>9</sup> clarified that a Bill 'falls through' if the procedure under the first proviso to Article 200 is not followed after the Governor withholds assent. The proviso permits the Governor, 'as soon as possible,' to return a non-Money Bill to the legislature with a message suggesting reconsideration or amendments. However, the State Legislature is not bound to accept or act upon these suggestions. It retains the discretion to re-pass the Bill with or without amendments or not at all. The expression 'may' in the proviso does not grant the Governor unfettered discretion to trigger or ignore the procedure. Rather, as affirmed in case of *State of Punjab*, it reflects *the Governor's choice among the three mutually exclusive options in Article 200 - assent, return, or reservation for the President. Once the Governor opts to withhold assent, initiating the return-and-reconsideration procedure becomes constitutionally obligatory*. The Court further clarified that the word 'shall' in 'shall reconsider the Bill accordingly' must be read in context. The legislature's obligation is procedural; it must consider the Governor's suggestions if it chooses to reconsider the Bill. But it is not substantively bound to amend the Bill. The Bill lapses only if the legislature elects not to re-pass it, not due to any discretion vested in the Governor.

Importantly, the Court reaffirmed that the first proviso is not severable from the substantive provision; it is activated only upon the Governor's decision to withhold assent. The mutual exclusivity of the three options under Article 200 precludes combining or delaying them. The Court also clarified that while the substantive part of Article 200 does not exclude Money Bills from being withheld, the first proviso - being inapplicable to such Bills, precludes their return for reconsideration. Thus, the observations in *Basavaiah Chowdhary* and *Hoechst* reinforce the interpretation in *State of Punjab*, rather than rendering it per incuriam. Accordingly, the phrase 'Bill falls through unless the procedure in the first proviso is followed' must be read to mean that failure by the legislature to re-pass a returned Bill causes it to lapse - not that the Governor may unilaterally disregard the

---

7. (2024) 1 SCC 384.

8. (1979) 3 SCC 324.

9. (1983) 4 SCC 45.

procedure. The Court rejected the Attorney General's reading that treated the procedure as discretionary and independent of the decision to withhold assent.

In paragraphs 196 to 198, the Court unequivocally held that, Article 200 confers upon the Governor only three mutually exclusive options when a Bill is presented for assent: (i) grant assent, (ii) withhold assent (subject to the procedure in the first proviso), or (iii) reserve the Bill for the President's consideration. The first proviso is not an independent fourth option but is procedurally linked to the exercise of withholding assent, detailing the steps to be followed when that option is invoked. The use of the terms 'shall' in the substantive portion of Article 200 and 'as soon as possible' in the first proviso underscores the constitutional imperative of timely action by the Governor, ruling out the possibility of a 'pocket veto.' Inaction in this context violates the principle of constitutional expediency embedded in Article 200. Moreover, the Governor is not vested with an absolute or unilateral veto. Once a Bill, returned with a message, is reconsidered and repassed by the legislature, whether with or without amendments, the Governor is constitutionally bound to grant assent. The Governor may, where appropriate, reserve a Bill for the President under Article 200, triggering the procedure under Article 201. However, under no circumstance is the Governor empowered to indefinitely withhold assent or unilaterally terminate the legislative process. At no point can the Governor block a Bill permanently or end the legislative process unilaterally. The Governor's role is procedural and limited, not final or discretionary.

II. Whether the Governor can reserve a Bill for the consideration of the President when it is presented to him for assent after being reconsidered in accordance with the first proviso to Article 200, more particularly, when he had not reserved it for the consideration of the President in the first instance?

(i) Whether the reservation by the Governor, for the consideration of the President of the ten Bills which were repassed by the Tamil Nadu State Assembly and presented to the Governor on 18.11.2023, is erroneous in law and hence liable to be set aside?

While addressing Question No. 2 and interpreting Article 200, the Supreme Court clarified that a Governor has three mutually exclusive options upon receiving a bill: (a) to grant assent, (b) to withhold assent, or (c) to reserve it for the President. The use of the conjunction 'or'

underscores that once one option is exercised, the others stand foreclosed. Citing Kameshwar Singh, the Court emphasised that a bill cannot be subsequently reserved for the President's consideration once assent has been accorded, and vice versa. Significantly, the Court elucidated that the act of withholding assent under the substantive part of Article 200 cannot be equated with an absolute or discretionary veto. Drawing on dictionary definitions and constitutional context, it held that 'withholding' signifies a deferment or postponement of assent, not a denial. This interpretation is rooted in the principle of representative democracy, which does not envision a Governor acting as an unelected veto authority.

The Court emphasised that once the Governor withholds assent and returns the bill with a message as envisaged under the first proviso to Article 200. The procedural mechanism outlined therein becomes operative to the exclusion of the other options under Article 200. The first proviso is a self-contained procedural code that binds the Governor to grant assent if the bill is re-passed by the Legislature 'accordingly,' i.e., in conformity with the Governor's recommendations. The phrase 'shall not withhold assent' imposes a mandatory obligation, leaving no scope for further discretion. Nonetheless, the Court acknowledged a limited exception. If the Legislature, upon reconsideration, introduces substantive changes beyond those suggested by the Governor, and such changes potentially invoke constitutional scrutiny (e.g., under the second proviso to Article 200), the Governor may retain the option to reserve the bill for the President. However, such a reservation must be based on a legitimate assessment that the bill was not reconsidered 'accordingly' and is thus not protected by the mandate of the first proviso.

In applying these principles to the facts at hand, *the Court observed that while two of the twelve contested bills were appropriately reserved for the President at the outset, the remaining ten were subjected to a procedurally improper exercise of the Governor's discretionary powers.* Specifically, the Governor withheld assent to these ten bills without issuing the mandatory message to the State Legislature, as required under the first proviso to Article 200 of the Constitution. This omission effectively bypassed the procedural framework envisaged by the Constitution. Despite this procedural lapse, the State Legislature reconvened in a special session and re-passed the same ten bills without substantial amendment, treating them as if they had been returned for reconsideration in accordance with constitutional norms. Thereafter, the Governor reserved these re-enacted bills for the President's consideration, citing repugnancy to Entry 66 of

List I of the Seventh Schedule. The Court held this act of reservation to be unconstitutional. It reasoned that, since the bills had been re-passed without deviation from their original form and in the absence of any prior message from the Governor initiating reconsideration, the subsequent reservation contravened the first proviso to Article 200.

The Court emphasised that endorsing such a course of action would effectively amount to permitting a ‘pocket veto,’ a concept foreign to the Indian constitutional scheme. *Consequently, the Court declared that both the Governor’s reservation of the bills and any decision made by the President pursuant to such reservation were ultra vires and void ab initio.*

III. Whether there is an express constitutionally prescribed time-limit within which the Governor is required to act in the exercise of his powers under Article 200 of the Constitution?

- (i) How is the absence of an express time-limit in Article 200 to be construed for ascertaining the manner in which the Governor is expected to exercise his powers under the said provision?
- (ii) What is the import of the expression ‘as soon as possible’ appearing in the first proviso to Article 200?
- (iii) Whether a time-limit can be prescribed by this Court for ensuring that the exercise of power by the Governor under Article 200 is in conformity with the object of expediency underlying the scheme of the said provision?

While addressing Question 3 and its sub-questions, the Supreme Court referred to the Constituent Assembly debates concerning the language of Article 91 (later reflected in Article 111 and Article 200). Dr B.R. Ambedkar proposed replacing the phrase ‘not later than six weeks’ with ‘as soon as possible’, arguing for flexibility in the President’s review of legislation. Shri Naziruddin Ahmad, however, suggested changing it further to ‘as soon as may be’, asserting that ‘as soon as possible’ implied immediate action, limiting the President’s ability to deliberate thoroughly. He felt ‘as soon as may be’ would better reflect ‘reasonably practicable’ action. Others disagreed with both suggestions. Shri P.S. Deshmukh supported retaining ‘not later than six weeks’ to ensure a clear deadline, while Shri H.V. Kamath warned against vague timelines, arguing that human nature tends to procrastinate without defined limits. Despite these concerns, on 20 May 1949, the Assembly adopted Dr Ambedkar’s amendment, showing a

degree of trust in the President's timely conduct. The same language was later adopted in Article 200 for Governors. However, experience has shown that the concerns raised during the debates were justified. Commissions such as Sarkaria and Punchhi have noted that Governors have withheld bills for prolonged periods, effectively exercising a 'pocket veto'. This inaction undermines the legislative process, as Article 200 represents the final step in enacting a law. As argued by Dr Singhvi, the Governor has no constitutional space to 'decide not to decide'.

Further, the expression 'as soon as possible' in Article 200 of the Constitution has been interpreted by the Court in a manner consistent with similar phrases found elsewhere in the Constitution, such as 'as soon as may be' under Article 22(5), which has been understood to require prompt action without avoidable delay. Relying on precedents like *Durga Pada Ghosh v State of W.B.* and *Keisham Meghachandra Singh v Speaker*, the Court reaffirmed that constitutional authorities, even when vested with discretion, must act within a reasonable period. Courts may intervene through judicial review if such authorities fail to act, particularly when the delay is unreasonable or without justification.

In the context of Article 200, which deals with the Governor's assent to bills, the Court emphasised that inaction or excessive delay by the Governor can obstruct the legislative process and undermine the principles of parliamentary democracy. Although the Constitution does not prescribe specific timelines for action under Article 200, the Court, taking guidance from the Sarkaria and Punchhi Commissions, laid down reasonable outer time-limits to guide the exercise of the Governor's discretion. These timelines are: (i) in cases where the Governor withholds assent or reserves a bill based on the advice of the Council of Ministers, action must be taken within one month; (ii) if the Governor withholds assent contrary to such advice, the bill must be returned with a message within three months; (iii) if the Governor reserves the bill for the President's consideration contrary to the advice, such reservation must also be made within three months; and (iv) if a bill is re-presented after reconsideration under the first proviso to Article 200, the Governor must grant assent within one month.

The Court made it clear that failure to act within these judicially prescribed timeframes, unless justified by exceptional circumstances would make the Governor's inaction subject to judicial scrutiny. This approach seeks to prevent the misuse of the Governor's powers, such as through an informal 'pocket veto,' and ensures accountability and the smooth functioning of the law-making process in a federal democracy.

- IV. Whether the Governor in the exercise of his powers under Article 200 of the Constitution can only act in accordance with the aid and advice tendered to him by the State Council of Ministers? If not, whether the constitutional scheme has vested the Governor with some discretion in discharge of his functions under Article 200?
- (i) How has the role of the Governor been envisaged under the constitutional scheme?
  - (ii) Whether the Governor enjoys a certain degree of discretion in discharge of his functions in contrast to the President? What is the source of such discretion, if any?
  - (iii) Whether the deletion of the expression ‘in his discretion’ from Article 175 of the Draft Constitution imply that the Governor has no discretion available in the exercise of his powers under Article 200?
  - (iv) Whether the observations of this Court in *B K Pavitra v Union of India*<sup>10</sup> that ‘a discretion is conferred upon the Governor to follow one of the courses of action enunciated in the substantive part of Article 200’ could be said to be per incuriam for having failed to notice the position of law as laid down by the larger Benches of this Court?

The Supreme Court, while addressing the role of the Governor, traced its evolution from the colonial framework under the Government of India Acts of 1858 and 1935 to the post-Independence constitutional order. The 1935 Act had introduced provincial autonomy but retained discretionary powers with the Governor, a practice altered by the Adaptation Order of 1947, which omitted terms like ‘in his discretion,’ signalling a shift toward responsible government. During the Constituent Assembly Debates, Pandit Nehru argued against an elected Governor, warning that it could foster separatism and strain Centre-State relations, instead advocating for a nominated Governor aligned with the parliamentary system. Dr. B. R. Ambedkar, defending the limited discretionary powers of the Governor, emphasised that such powers did not negate responsible governance but were essential for maintaining constitutional balance. This dual role of the Governor, as a constitutional head of the State and a link to the Centre was acknowledged in reports like the Punchhi and Sarkaria Commissions. The Court emphasised that interpreting gubernatorial powers requires drawing

---

10. (2019) 16 SCC 129.

from the Constitution's founding vision, not rigid federal classifications, and must be mindful of the dangers of excessive centralisation undermining State autonomy.

The Court, in the present judgment, held that its earlier decision in *B K Pavitra* was rendered *per incuriam*, as it incorrectly attributed a discretionary power to the Governor under Article 200 of the Constitution to reserve bills for the President's consideration, even contrary to the advice of the Council of Ministers. This view was found inconsistent with both the text and the intent of the Constitution, particularly in light of the deliberate omission of the phrase 'in his discretion' from Section 75 of the Government of India Act, 1935 when it was adapted as Article 200. The Court emphasised that this omission, supported by Constituent Assembly Debates and scholarly commentary (e.g., D.D. Basu), reflects a clear constitutional mandate that the Governor ordinarily acts on ministerial advice, barring narrowly defined exceptions. These exceptions include: (a) where the Constitution expressly confers discretion, such as in the second proviso to Article 200; (b) where Presidential assent is constitutionally mandated, as under Articles 31A, 31C, 254(2), 288(2), and 360(4)(a)(ii); and (c) in rare and exceptional circumstances - such as those recognised in *M.P. Special Police* - where legislation threatens the constitutional order or democratic principles. The Court criticised *B K Pavitra* for overlooking binding precedents such as *Samsher Singh* and for misreading *Nabam Rebia*. It clarified that the Governor's role is that of a constitutional advisor, not a parallel executive authority, and that his engagement with legislative proposals should occur before the introduction of a bill, not after its passage. Ultimately, once a bill is passed by the legislature, the Governor must act in accordance with the Council of Ministers advice unless one of the limited exceptions applies. To construe otherwise, the Court warned, would risk transforming the Governor into a 'super-constitutional authority,' undermining the principles of parliamentary democracy and federalism.

- V. Whether the exercise of discretion by the Governor in discharge of his functions under Article 200 could be said to be subject to judicial review? If yes, what are the parameters for such judicial review?
  - (i) Whether the discharge of functions by the Governor under Article 200 of the Constitution in his discretion could be said to be immune from judicial review?

- (ii) Whether the withholding of assent by the President under Article 201 of the Constitution could also be said to be beyond the scope of judicial scrutiny?
- (iii) If the aforesaid discharge of functions is subject to judicial review, whether such discharge of functions could be said to be nonjusticiable in light of the decisions of this Court in *Hoechst Pharmaceuticals v State of Bihar*,<sup>11</sup> *Kaiser-I-Hind (P) Ltd v National Textile Corpn (Maharashtra North) Ltd*,<sup>12</sup> and *B K Pavitra*?

The court held that the judicial review of the exercise of power by the Governor under Article 200 and by the President under Article 201 of the Constitution can be invoked by the State Government under specific circumstances:-

- (a) When the Governor reserves a bill for the President's consideration contrary to the aid and advice of the State Council of Ministers, such action is open to challenge on grounds mentioned herein:
  - (i) If the reservation is under the Second Proviso to Article 200, it may be assailed on the ground that the bill does not derogate from the High Court's powers to an extent that endangers its constitutional role. This is a purely legal issue and is fully justiciable, potentially resulting in a writ of mandamus if upheld. (ii) If reservation is made due to the need for Presidential assent under Articles like 31A, 254(2), or 364A2, the Governor must provide clear reasons. Failure to do so, or reliance on arbitrary or mala fide grounds, renders the reservation invalid and subject to judicial review. (iii) If the reservation is based on perceived threats to democracy or constitutional principles, the Governor must clearly justify his subjective satisfaction and reasons. Courts can review such grounds for irrelevance or bad faith. (iv) Reservations based on personal dissatisfaction, political motives, or extraneous grounds are unconstitutional and liable to be struck down, including cases where the Governor has already withheld assent under Article 200, except in rare exceptions. (v) Where the Governor remains inactive beyond the time limit

---

11. (1983) 4 SCC 45.

12. (2002) 8 SCC 182.

prescribed in paragraph 250, the State Government may seek a writ of mandamus unless justified by sufficient explanation.

- (b) Similarly, if the President withholds assent after the Governor reserves the bill, such action may also be challenged on the grounds as:- (i) If the bill required Presidential assent for enforceability or immunity, the President's decision is justiciable to the limited extent of arbitrariness or mala fides, though courts exercise restraint due to the political nature of such assent. (ii) If the bill appears patently unconstitutional and threatens democratic principles, the President's action is fully justiciable, and it is advisable for the President to seek the Supreme Court's advisory opinion under Article 143. (iii) If the President shows inaction beyond the limit set in paragraph 391, the State may approach the Court for a writ of mandamus.

The judicial review of the President's power under Article 201 to withhold assent to a bill is permissible on limited grounds:- (a) Where the bill concerns a constitutional provision in which the Union Government holds primacy — particularly to maintain uniform national policy — judicial review is confined to assessing arbitrariness, mala fides, or other improper considerations. (b) Where the bill pertains to a domain in which the State Legislature holds primacy, and the Governor has reserved the bill contrary to the aid and advice of the State Council of Ministers, courts may examine not only issues of mala fides and arbitrariness but also the legal tenability of the reasons for withholding assent. These categories are illustrative and not exhaustive; courts may, based on the specific facts of each case, develop new standards of judicial scrutiny to ensure full adherence to the constitutional procedure in both letter and spirit.

VI. What is the manner in which the President under Article 201 of the Constitution is required to act once a bill has been reserved for his consideration by the Governor under Article 200 of the Constitution?

- (i) Whether the decision of the President to withhold assent under Article 201 of the Constitution could be said to be justiciable? If yes, what is the extent of justiciability that the courts can embark upon while undertaking judicial review of the exercise of powers by the President under Article 201 of the Constitution?

While decided the question no. 6, the court held that the Article 201 of the Indian Constitution governs the procedure following a Governor's reservation of a bill for the President's consideration, granting the President three options: to assent, withhold assent, or, in the case of non-money bills, return the bill to the State Legislature with suggested amendments. Unlike Articles 111 and 200, Article 201 provides broader Presidential discretion, evident from the language 'for his consideration' and the absence of any mandate requiring assent after reconsideration. Moreover, while Article 200 binds the State Legislature to act within six months upon a bill's return, Article 201 imposes no corresponding timeline on the President, enabling prolonged delays that strain Centre-State relations and disrupt the legislative process.

Recognising the procedural gap, the Sarkaria and Punchhi Commissions, along with the judiciary, have called for clear timelines and structured communication to uphold federal principles. Central guidelines emphasize accountability in inter-governmental coordination. The Supreme Court has clarified that neither the Governor nor the President holds an absolute veto; withholding assent must be constitutionally justified and formally communicated, especially under Article 201. Informal consultations, such as Office Memorandums, cannot replace the constitutional requirement of a formal message outlining objections and proposed amendments - essential for enabling proper legislative reconsideration and preserving cooperative federalism.

In *A.G. Perarivalan*, the Supreme Court exercised its powers under Article 142 due to the Governor's inordinate delay in deciding a remission petition, despite the State Cabinet's recommendation. The Governor's referral of the matter to the President was held to be without constitutional basis, prompting the Court to deem the sentence served and order the petitioner's release. This precedent affirms that constitutional authorities must act within their defined limits and cannot obstruct governance through inaction. In the present case, the conduct of the Governor was held to be both unconstitutional and obstructive to the democratic process. After initially withholding assent to ten bills and failing to communicate any message to the Legislative Assembly, as required under the first proviso to Article 200 of the Constitution of India, the Assembly duly reconsidered and re-enacted the said bills in their original form. Upon such reconsideration, the Governor was constitutionally obligated to accord assent to the legislation. Contravening this mandate, the Governor chose instead to reserve the bills for the consideration of the President - a course

of action constitutionally permissible only in exceptional circumstances. The Supreme Court found that this step, in conjunction with substantial and unexplained delays (with certain bills pending since 2020), amounted to a violation of constitutional procedure and a serious impairment of democratic governance.

The Court found the Governor's actions to be lacking in bona fides and in clear violation of constitutional duties and judicial directions. Noting the serious threat such conduct posed to representative democracy and the fixed tenure of elected legislatures, the Court exercised its powers under Article 142 to deem assent as granted. It underscored that constitutional authorities must act within their prescribed limits, and where those limits are breached in ways that endanger democratic governance, the judiciary is both empowered and duty-bound to uphold constitutional order and ensure complete justice.



**FORM IV**  
**STATEMENT ABOUT OWNERSHIP**  
**AND OTHER PARTICULARS**

**(See Rule 8)**

1. Place of Publication : New Delhi
2. Periodicity of Publication : Yearly
3. Printer's Name : EBC Publishing (P) Ltd.  
Nationality : Indian  
Address : 34-A, Lalbagh, Lucknow – 226 001
4. Publisher's Name : Prof. Yogesh Pratap Singh  
Nationality : Indian  
Address : National Law University Tripura  
Narsingarh, Agartala-799015
5. Editor's Name : Prof. (Dr) Yogesh Pratap Singh  
Nationality : Indian  
Address : Narsingarh, Agartala-799015
6. Ownership : National Law University Tripura

I, Prof. Yogesh Pratap Singh, the Editor-in-Chief of National Law University Tripura-Journal of Law and Policy (NLUT-JLP), hereby declare that the particulars given above are true to the best of our knowledge and belief.

Sd/-

Yogesh Pratap Singh

## SUBMISSION GUIDELINES

- The *NLU Tripura Journal of Law and Policy* is a peer-reviewed, academic journal devoted to publishing original and high-quality research on law, governance, and policy. Authors are invited to contribute scholarly work in the form of articles, essays, case notes, legislative comments, and book reviews.
- All submissions must be accompanied by an abstract not exceeding 300 words. Case Comments and Book Reviews do not need abstracts. The abstract must expressly include the novelty and usefulness of the idea that the author wishes to put forth and must categorically mention the specific contribution of the article beyond the existing available literature.
- Furthermore, the submission must also be accompanied with a covering letter indicating the name of the author(s), contact details (Phone number, Email ID & Address), title of the submission, institutional affiliations (if any) and academic qualifications of the author. The submissions will be reviewed and edited by the Editorial Board under the supervision of the Editor-in-Chief.
- Submission must be sent in the MS Word (.docx) format to [nlut-jlp@nlutripura.ac.in](mailto:nlut-jlp@nlutripura.ac.in) with the subject
- “Submission — <Title of the manuscript>”
- For more details, visit our website — <https://nlutripura.ac.in/nlu-tripura-journal-of-law-and-policy-nlut-jlp/>

## ORDERING COPIES

Price (inclusive of shipping) of the NLUT-JLP is as follows:

<b>Hard Copy for 2025</b>	Rs. 950
---------------------------	---------

**Order online:** [www.ebcwebstore.com](http://www.ebcwebstore.com)

**Order by post:** send a cheque/draft of the requisite amount in favour of 'Eastern Book Company' payable at Lucknow, to:

**Eastern Book Company**

34, Lalbagh, Lucknow-226001, India

Tel.: +91 9935096000, +91 522 4033600 (30 lines)

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted, in any form or by any means, electronic, mechanical, photocopying, recording or otherwise, without prior written permission.

The published works in this issue may be reproduced and distributed, in whole or in part, by nonprofit institutions for educational and research purposes provided that such use is duly acknowledged.

© The National Law University, Tripura



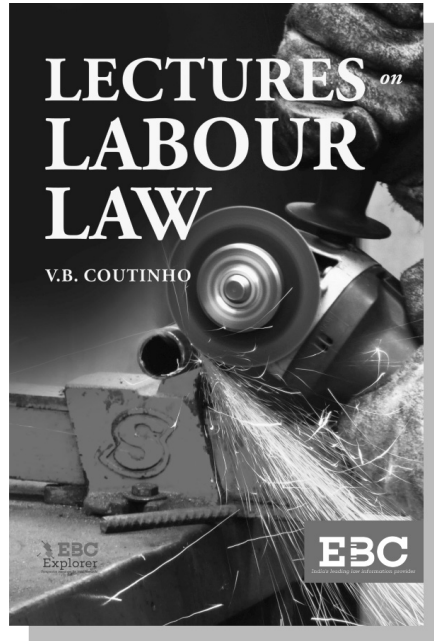
---

# Lectures on Labour Law

by V. B. COUTINHO

## *Simplifying Labour Law for Students!*

The learned author has written the book with the primary objective of making the understanding of labour law and the grasping of its fundamentals easy for law students. The work provides the gist and important aspects of the topics/issues involved in the labour law legislations in simple terms supported with illustrations for the complete understanding of the law.



Additional Online learning resources like important case law, **Useful Links** etc. available on: [www.ebcexplorer.com](http://www.ebcexplorer.com)

**2019 Edition  
Price: Rs. 295**

### **Notable Features:**

- The work aims to train the students both in the analysis of the law and the case law that has emerged while interpreting the law.
- Discusses important aspects of labour legislation, such as, settlement of industrial disputes, protection and control of special class of labour such as, children, adolescents and women, etc.
- **The work will help improve students' practical knowledge of the subject.**

Order Online at **// [www.ebcwebstore.com](http://www.ebcwebstore.com)**



Trade Helpline No.: 09935096019, Call 1800 1800 6666 (Toll Free)  
Mail us at: Eastern Book Company, 34, Lalbagh, Lucknow-226001

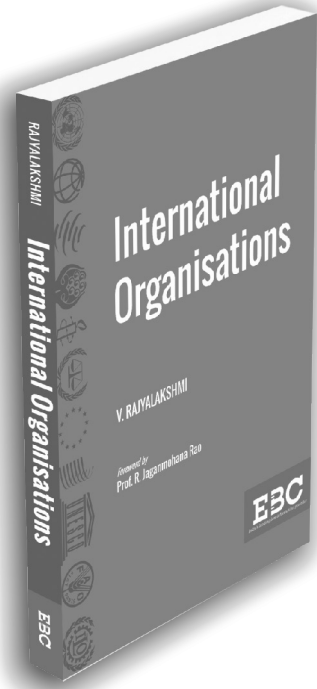
---

---

# INTERNATIONAL ORGANISATIONS

by Prof. V. Rajyalakshmi

**The course content is organised as prescribed by the UGC for the subject of “International Organisations: Law, Practice and Future”.**



The work is an immensely useful contribution to the literature on the subject and provides the much awaited reading material for the students and other interested readers for a comprehensive understanding on the subject of the International Organisations.

The book is specifically custom-made to meet the academic requirements of post-graduate students of law (LLM) pursuing specialised studies in the subject of international law. The book is divided into six parts covering topics like Importance and Evolution of International Organisations and International Legal Personality; United Nations as a Constitutional and Political System; NGO; Peaceful Change through United Nations, etc.

---

**2018 Edition | Price: Rs. 495**

Order Online at // [www.ebcwebstore.com](http://www.ebcwebstore.com)

---

**EBC**

Trade Helpline No.: 09935096019, Call 1800 1800 6666 (Toll Free)  
Mail us at: Eastern Book Company, 34, Lalbagh, Lucknow-226001

---

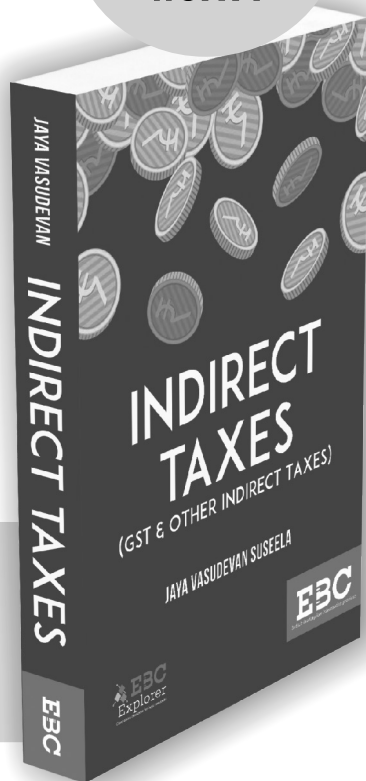
# INDIRECT TAXES

(GST & Other Indirect Taxes)

by **Jaya Vasudevan Suseela**

A comprehensive guide to indirect tax law in general and GST in particular with special emphasis on the legislative shift from the origin based system of taxation to destination based system. It elucidates the various concepts under indirect tax law, covering from customs law to goods and services tax law with the help of critical analysis of the Supreme Court, High Courts and Tribunal decisions in a simple way.

**A first of  
its kind  
work !**



**A must have book  
on Indirect Tax Law  
for law students!**

#### **Notable features include:**

- **Covers the syllabus of LL.B. on Indirect Taxes.**
- Topic wise discussions on all topics related to GST.
- Fully updated with latest legislative and case law developments.
- Detailed explanation of the existing laws and the newly introduced GST law.



Also included additional learning resources on [www.ebcexplorer.com](http://www.ebcexplorer.com)

**2019 Edition | Price: Rs. 525**

Order Online at **/// www.ebcwebstore.com**



Trade Helpline No.: 09935096019, Call 1800 1800 6666 (Toll Free)  
Mail us at: Eastern Book Company, 34, Lalbagh, Lucknow-226001



# INTERNATIONAL COMMERCIAL ARBITRATION

*An Introduction*

Rohith Murugan Subramoniam  
Navya Jain

Foreword by Sumeet Kachwaha

Prologue by Datuk Prof. Sundra Rajoo Nadarajah

Introduction by Justice A.K. Sikri

2019 Edition  
Price: Rs. 395



## INTERNATIONAL COMMERCIAL ARBITRATION

AN INTRODUCTION

ROHITH M. SUBRAMONIAM  
NAVYA JAIN

Foreword by  
Sumeet Kachwaha

Prologue by  
Datuk Prof. Sundra Rajoo Nadarajah  
Introduction by  
Justice A.K. Sikri

EBC  
Explorers

EBC  
Explorers

**EBC**  
Explorers

Additional online learning  
resources on [www.ebcexplorer.com](http://www.ebcexplorer.com)

### Reviews:

“This book would serve as an extremely useful introductory guide to those who are interested in International Commercial Arbitration.”

– **K.K. Venugopal**  
Attorney General for India

“The authors' have researched deeply in bringing out this marvellous piece of academic work. The fact that the book incorporates the latest Indian and Foreign case laws is also a great feature. This book has very meticulously showed and discussed the legislative intent of the law. From a practitioner's point, this book is a great start for any amateur to learn about this field.”

– **Satya Pal Jain**

Add'l. Solicitor General of India & Member, Law Commission of India.

Order Online at  [www.ebcwebstore.com](http://www.ebcwebstore.com)

**EBC**

Trade Helpline No.: 09935096019, Call 1800 1800 6666 (Toll Free)

Mail us at: Eastern Book Company, 34, Lalbagh, Lucknow-226001