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EDITORIAL NOTE

The Gujarat National Law University ('GNLU') Student Law Review ('GSLR') continues its journey as a flagship, student-run, double-blind peer-reviewed journal dedicated to fostering a culture of rigorous legal scholarship. Since its inception in 2020, the Review has remained steadfast in its objective of promoting academic research that meaningfully engages with pressing socio-legal concerns through doctrinal depth and interdisciplinary analysis. The preparation of the present Volume VI has been marked by the same zeal and commitment that animated its earlier editions, as the Editorial Board, contributors, and reviewers collectively sought to ensure that the pieces presented herein not only reflect contemporary debates in law and policy but also push the boundaries of legal thought and practice. In times of rapid legislative reform, judicial reinterpretations, and evolving global challenges, this Volume seeks to provide a platform for scholarly dialogue that is both intellectually stimulating and socially relevant.

In the first Article titled **Denial and Disclosure: Access to Answer Scripts in Public Examinations** under the RTI Act, **Debargha Roy** and **Sarthak Sahoo** critically examine the evolving contours of the right to information in the context of high stakes public examinations, tracing its constitutional and statutory foundations and analysing the conflicting judicial approaches in *CBSE v. Aditya Bandopadhyay* and *Angesh Kumar* to reveal how transparency has been both affirmed and curtailed. Through a careful balance of doctrinal analysis and pragmatic concerns, the authors propose a nuanced framework that upholds candidates' right to access their evaluated scripts while addressing the administrative difficulties of examining bodies, making this piece a timely and thought-provoking intervention in the discourse on fairness, accountability, and the integrity of public examinations.

Akshat Agarwal in his Article, ***'Til Novation Do Us Part?:* Saving the Severability of Arbitration Clauses from Novation**, examines the application of the doctrine of severability on arbitration clauses when the principal contracts have been novated. The author highlights that Indian courts have consistently upheld this doctrine to resolve disputes in cases of repudiation, frustration or breach of the principal contracts but have failed to extend this when the principal contracts are novated. Through a comprehensive analysis of theoretical justifications and examination of

arbitration clauses, the author advocates for a reconsideration of the current judicial approach, which is based on outdated precedents such as *Heyman v. Darwins* and *Union of India v. Kishorilal Gupta*, in light of the evolved policy of promoting arbitration under the Arbitration and Conciliation Act, 1996. The author, thus, proposes that arbitration agreements, unless explicitly novated, should survive the novation of principal contracts to ensure the commercial expectations of parties, and preserve the efficiency of arbitral processes.

Akshay Pathak and **Shivansh Pathak**, in their Article **Equal Opportunity Undermined: The Impact of the Madhya Pradesh High Court's Amendment and The Apex Court's Judgement on Judicial Appointments**, critically examine the 2023 amendment to the Madhya Pradesh Judicial Service Rules in light of recent Supreme Court decision. The amendment introduces a dual eligibility requirement of either securing 70% marks in all law exams on the first attempt or having three years of legal practice. The authors argue that this criterion, while ostensibly in compliance with *All India Judges' Association v. Union of India*, distorts the idea of merit and violates Article 14 of the Constitution. Drawing on the Shetty Commission's recommendations, the article contends that the new rules impose unjustified barriers, perpetuate disparities in academic evaluation, and deter talented candidates due to systemic flaws and economic limitations. The authors conclude by emphasizing the need for equitable and inclusive reforms focused on judicial training rather than rigid eligibility thresholds.

Tanvi Agarwal and **Khushi Saraf** in their Article, **Beyond the Bars: Analysing the Paradigm for Reproductive Justice in India**, offers an incisive exploration into the evolving legal and ethical discourse pertaining to prisoners' procreation rights in India. The authors trace the jurisprudential developments while situating the debate within broader constitutional principles and comparative frameworks. The paper balances doctrinal analysis with pragmatic policy suggestions, advocating for reforms like parole-based procreation rights. The arguments are carefully weighed against penological objectives, and remain sensitive to the rights of spouses and unborn children. The integration of ethical theories, international practices, and the Turner Test from U.S. law showcases a sophisticated approach to comparative constitutionalism. Overall, this article is a significant contribution to the expanding literature on reproductive justice and prison reform, and spurs essential questions about dignity, personhood, and the purpose of punishment.

Mass tort litigation in India remains burdened by systemic inefficiencies, rendering meaningful compensation for victims a persistent challenge.

In their article, **Compensation Conundrums: The Challenges to Mass Tort Litigation in India**, **Anubhav Kumar Das** and **Ananya Tripathi** offer a layered critique of the country's tort law framework, centring their analysis on the Bhopal Gas Tragedy. The Article argues that prevailing liability regimes in India fall short of deterring corporate misconduct, particularly in cases involving large-scale harm. It highlights the inadequacy of existing doctrines and draws on comparative insights from the U.K. and the U.S.A. to propose a more responsive architecture. The Article also interrogates India's evolving approach to Bilateral Investment Treaties, suggesting that future treaty frameworks must reconcile investor protection with public welfare imperatives, particularly in the context of environmental and health risks. What emerges is a call for structural reform, ranging from the codification of state liability and modernisation of tort adjudication to the creation of inclusive, victim-led legal pathways.

In her Article, **BNS and Animal Welfare: Is the Reformed Law just a Bark without a Bite for Animal Welfare?**, **Stuti Malik** critically examines whether the Bharatiya Nyaya Sanhita, 2023 substantively enhances animal protection or merely re-packages existing criminal law provisions. The author examines the contested recognition of animals as juristic persons by tracing inconsistent judicial decisions from progressive High Court rulings to the Supreme Court's recent anthropocentric retreat in *Animal Welfare Board of India v. Union of India*. Through a meticulous statutory analysis, the author compares the impact of provisions of both BNS, 2023 and IPC, 1860 in protecting animals, highlighting the limitations posed by the requirement of mens rea in prosecuting mischief against animals. The discussion addresses proportionality in enhanced punishments and their deterrence value, while identifying gaps such as inadequate penalties for indirect harm and the omission of bestiality protections. The author link animal cruelty to human violence and advocates a shift towards ecocentric jurisprudence that recognises the intrinsic value of all sentient life.

In his Article, **Conceptualising a Framework for Admissibility of Police Confessions: Bridging Judicial Gaps and Legal Challenges**, **Manav Pamnani** explores the complex and often controversial status of police confessions under Indian law. Through a doctrinal and case law-based analysis, he looks at how inconsistent court decisions and unclear legislation have left

the legal position on such confessions uncertain. Recognising the tension between constitutional protections, especially under Article 20(3) and the practical use of confessions in criminal trials, the author closely examines key judgments and legislative gaps. What stands out is his effort to move beyond just identifying the problem: he proposes a detailed, structured model that lays down clear procedural safeguards and judicial guidelines to determine when and how police confessions should be admissible in court. By suggesting presumptive rules, procedural checks, and a set of judicial tests, the article aims to make the process more rights-focused and consistent.

The legal framework with regard to green financing has been evolving in response to India's increasing commitment to environmental sustainability under the Paris Agreement, particularly after the Reserve Bank of India introduced the Green Deposit Framework in 2023. **Bipasha Kundu** provides a thorough analysis of the framework in this article, along with focus on green financial products in India. It highlights the serious loopholes in the framework, including its lack of enforcement, insufficient disclosure requirements, etc through thorough empirical research of disclosure practices by Scheduled Commercial Banks. The author also talks about specific reforms to increase transparency, investor trust, and the widespread use of green deposits, including regulatory incentives, flexibility in interest rate offers, and penalty-backed compliance. This provides valuable strategy for strengthening India's green finance regime and ensuring that environmental goals are met with institutional accountability.

Sriram Chockalingam Arunachalam in his Article titled **Custodial Concerns: Is the BNSS Promulgating a Higher Standard of Draconian Laws Concerning the Remand of Accused Persons?** examines the practical implications and potential violations arising from Section 187 of the Bharatiya Nagarik Suraksha Sanhitha, 2023, which replaces the remand provisions under Section 167 of the CrPC. The author argues that although framed as a decolonising, citizen-centric reform, the revised language expands inherent police powers and dilutes procedural safeguards for accused persons. The author underscores the practicalities that may follow suit by key changes in the text such as the removal of the phrase "*otherwise than in custody of the police*" and the introduction of "*or in parts*" and "*during the initial forty days or sixty days*". The article links these changes to possible constitutional violations under Articles 20(3) and 21, highlighting increased risks of custodial violence and coerced confessions, and calls for reinstating procedural limits under the previous Code.

Vanshika Agarwal and **Ruhika Mandal** in their Article, **Transferring Justice: A Comparative Legal Inquiry into the Trial of Children as Adults** undertake a comprehensive comparative analysis of the juvenile justice systems across jurisdictions while examining the controversial practice of the prosecution of minors as adults. The authors argue that this practice undermines the rehabilitative objectives of juvenile justice, and is ineffective in deterring crime, by drawing support from legislative analysis, precedents and empirical study. Their comparative study reveals divergent trajectories in juvenile justice philosophy: the U.S. shifted from punitive approaches in the late 20th century back to rehabilitation, whereas India moved towards increased punitiveness post the 2012 Nirbhaya case, with the Juvenile Justice Act, 2015 allowing 16–18-year-olds to be tried as adults for heinous offences. Integrating insights on adolescent brain development with recidivism data and international human rights standards, the authors call for reforms grounded in restorative justice, balancing accountability, rehabilitation, victims' rights, and alignment with global child rights frameworks.

The successful culmination of **Volume VI** would not have been possible without the unwavering support of our Faculty Editors, whose guidance has been instrumental in sustaining the academic rigour of this initiative. We extend our sincere gratitude to Prof. (Dr.) S. Shanthakumar, Director, GNLU, and Prof. (Dr.) William Nunes, for their constant encouragement and institutional backing. We also acknowledge the tireless efforts of the entire Editorial Board, whose dedication, especially in navigating the challenges of the rigorous editorial process, has ensured the high standards of the Review. At a time when academic spaces face both new opportunities and increasing constraints, we hope that this Volume serves as a meaningful platform for discourse that bridges legal theory and practice. We invite our readers to engage critically with the diverse contributions, and we remain confident that the pieces herein will provoke reflection, debate, and further research.

Govinda Asawa
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ARTICLE

DENIAL AND DISCLOSURE: ACCESS TO ANSWER SCRIPTS IN PUBLIC EXAMINATIONS UNDER THE RTI ACT

*Debargha Roy & Sarthak Sahoo**

ABSTRACT

Examinations conducted by public authorities in India, whether to grant academic qualifications (matriculation, higher secondary) or for recruitment (civil services, bank recruitment), are large scale exercises with an exceptionally high volume of candidates. In a context where limited seats and opportunities are fiercely contested, the outcome of a single examination can decisively shape a candidate's career, aspirations, and future. With candidate numbers rising annually and more professional and academic avenues failing under centralized examinations, their need for transparency, accountability, and efficiency in their conduct has become more urgent than ever. One critical means to ensure transparency is by allowing candidates access to their evaluated answer scripts. Due to lack of standardization of the process to access answer scripts across different examination bodies, candidates have resorted to the use of the RTI Act to call upon respective examination bodies to seek evaluated copies of their answer scripts. In 2012, the Supreme Court, in Aditya Bandhopadhyay, validated such disclosures under the RTI Act, upholding the candidate's right to information guaranteed by the Constitution. However, in 2018, the Court, in Angesh Kumar, marked a departure by holding that evaluated answer scripts cannot be granted in case of Civil Services Examinations on account of administrative difficulties. In this paper, we argue the right of candidates appearing for public examinations to access evaluated versions of their answer scripts under the RTI Act, and develop a framework which balances candidate's right to information, and administrative difficulties faced by public bodies conducting large scale examinations.

Keywords: Right to Information Act, Civil Services Examinations, Public Examinations, Education Law

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I. INTRODUCTION

"In a system where one exam can change the course of a student's life, the fairness of that exam becomes a question of justice, not just pedagogy."

In India, social mobility and individual aspirations often rest on the anvil of public examinations. Whether they require crossing a certain threshold to obtain an academic qualification (such as matriculation or graduation), or performing relatively better as compared to other similarly placed candidates to obtain a coveted opportunity for education or employment, examinations conducted by public authorities in India remain high stakes and carry significant implications on the candidates. These claim to provide an equal-opportunity, objective, and meritocratic system for the determination of educated and eligible candidates.

Naturally, candidates rely on these exams, often preparing for years, to score well and secure the jobs or qualifications they desire. For example, no less than nine (9) lakh candidates appeared for the coveted Civil Services Examination ('CSE') in 2024.[1] Similarly, more than two (2) lakh students appeared for the CBSE's secondary school board examinations (10th grade in a K-12 system) in 2024.[2] Doing well in these exams allows candidates to obtain fame in the short run amongst family and newspaper dailies,[3] along with financial and job security in case of examinations for employment, and recognised academic qualifications in case of academic examinations. Given the high stakes involved in such public examinations, candidates experience high stress and anxiety[4], sleep disturbances[5],

[1] PIB Delhi, *Union Public Service Commission Announces Final Results of Civil Services Exam 2024'*(Press Information Bureau, 22 April 2025), https://www.pib.gov.in/PressReleasePage.aspx?PRID=2123422, (accessed 6 June 2025).
[2] Central Board of Secondary Education, *Press Note: Declaration of Results of Class X, 2024' CBSE/CE/RESULT-X/2024,* https://www.cbse.gov.in/cbsenew/documents//PRESS_NOTE_DECLARATION_CLASS_X_RESULT_2024_2105 2024.pdf (accessed 9 June 2025).
[3] PTI, *Civil Services Exam Topper Shakti Dubey Scores 51.5%; UPSC Releases Score Cards*, *The Hindu* (26 April 2025), https://www.thehindu.com/news/national/civil-services-exam-topper-shakti-dubey-scores-515-upsc-releases-score-cards/article69494427.ece, (accessed 6 June 2025).
[4] Sree Ram Thiriveedhi & Ors., *A Study on the Assessment of Anxiety and Its Effects on Students Taking the National Eligibility cum Entrance Test for Undergraduates (NEET-UG) 2020,* https://www.ncbi.nlm.nih.gov/pmc/articles/PMC10523350/, accessed 19 June 2025.
[5] Anonna Dutt, *Insomnia Alert: Before Exams, 70% Indian Kids Go Sleepless'*, Hindustan Times (24 Feburary 2018), https://www.hindustantimes.com/health/insomnia-alert-before-exams-70-indian-kids-go-sleepless/story-PJubRKr23TeGgqMCPRDliL.html, accessed 19 June 2025.

depression and reduced self-esteem[6], physical symptoms like headaches, stomach-aches, and other somatic complaints[7], burnout and lower self-confidence[8], social withdrawal[9], and in extreme cases, contribute to suicidal thoughts[10]. Therefore, ensuring the integrity of these exams is a delicate and important objective.

The Union Government recognizes this imperative in guarding these exams' authenticity and integrity. For example, Parliament has enacted the Public Examinations Act 2024 to combat paper leaks and cheating.[11] In civic society, infractions on the part of the authorities conducting these examinations don't go unnoticed. Candidates are quick to seek remedies, political and legal, to ensure that the exam processes are stringently followed to deliver fair outcomes.[12]

One mode of improving at these exams, seeking accountability from examining authorities, and occasionally electing for reassessment, is the ability to access answer sheets after the declaration of results. Usually, examination rules speak to whether such a right is vested in candidates or not. However, after the introduction of the Right to Information Act 2005 ('RTI Act'), these rules have become somewhat irrelevant.

The RTI Act, a legislation otherwise aimed at allowing citizens to seek information from public authorities, has been used by candidates to seek copies of their answer sheets, examination instructions, model answer keys, as well as other material available with the examining authorities. The

[6] Pragnya Pillarisetti & Ors., *Depression, Anxiety, Stress, and Insomnia among Foreign Medical Graduates Appearing for Foreign Medical Graduates' Examination in India: A Cross-Sectional Study*, (2024) 33(1) Industrial Psychiatry Journal, https://journals.lww.com/inpj/fulltext/2024/33001/depression,_anxiety,_stress_and_insomnia_among.21.aspx, accessed 19 June 2025.

[7] RA Mary & Ors., *Test Anxiety Levels of Board Exam Going Students in Tamil Nadu, India,* (2014) BioMed Research International, https://doi.org/10.1155/2014/578323, accessed 19 June 2025.

[8] Tess Jagiello & Ors., *Academic Stress Interventions in High Schools: A Systematic Literature Review*, (2024) Child Psychiatry & Human Development, https://doi.org/10.1007/s10578-024-01667-5, accessed 19 June 2025.

[9] *Id.*

[10] National Crime Records Bureau, *Cause-wise, Age-wise and Gender-wise Distribution of Suicides During 2022 Open Government Data (OGD) Platform India,* https://www.data.gov.in/resource/cause-wise-age-and-gender-distribution-suicides-during-2022, accessed 19 June 2025.

[11] Public Examinations (Prevention of Unfair Means) Act, 2024, No. 1, Acts of Parliament, 2024 (India).

[12] Nootan Sharma, *UP Public Service Commission's Exam Schedule Sparks Protests, Aspirants Demand "1 Day, 1 Shift" Format*, *ThePrint* (6 November 2024), https://theprint.in/india/up-public-service-commissions-exam-schedule-sparks-protests-aspirants-demand-1-day-1-shift-format/2344298/, accessed 6 June 2025.

RTI Act has been praised as a tool to seek transparency in the marking structure and the overall examination process[13], subsidised the costs of accessing mark sheets from Rs. 1000 to a meagre amount of Rs. 2 per page,[14] and empowered students to exercise their fundamental right to information.[15] These requests have been met by an inconsistent and sometimes delayed, but largely positive response.[16] Today, a candidate can be said to have a right to get copies of their answer sheet (and other such material) via the RTI Act, which has been entrenched by the Supreme Court of India in its *CBSE v. Aditya Bandopadhyay* decision ('Aditya Bandyopadhyay').[17]

However, subsequent to *Aditya Bandyopadhyay,* public authorities, as well as High Courts have been inconsistent in their application of the judgment.[18] In part, this is attributable to the fact that candidates seek material beyond the answer sheet, such as raw scores (which have not been rationalised to level with other candidates),[19] instructions to the examiner,[20] and model answer[21] keys areas which *Aditya Bandhyopadhyay* remains silent. The plurality of such documents has allowed public authorities to justify denial of information through a variety of exemptions under the RTI Act, and thereby led to Courts interpreting such cases inconsistently.[22]

These have culminated, however, to a point where the Supreme Court in its 2018 decision in *UPSC v. Angesh Kumar* ('Angesh Kumar') has held that the right to answer sheets under the RTI Act can be

[13] Shamsul Bari & Ruhi Naz, *Making public exams transparent,* The Daily Star, 15 January 2018, https://www.thedailystar.net/opinion/perspective/making-public-exams-transparent-1519834, accessed 8 June 2025.
[14] Vidya Raja, *CBSE To Now Provide Copies Of Board Exam Answer Sheets At Rs 2/Page: Facts To Know*, https://thebetterindia.com/163526/cbse-exam-revision-answer-sheet-price/, accessed 9 June 2025.
[15] Sandy Feinzig & Swasti Rana, *The Importance of Right to Information in Education: Putting a Human Face on a Fundamental Right' (Commonwealth Human Rights Initiative)*, https://www.humanrightsinitiative.org/programs/ai/rti/india/articles/Imp%20of%20RTI%20in%20Edu.pdf.pdf, accessed 18 June 2025.
[16] Tanvi, *This Lawyer's Fight Is Why You Now Get Answer Sheets at Rs 2/Page Under RTI*, The Better India, 4 May 2019,https://thebetterindia.com/180952/delhi-high-court-lawyer-rti-answer-sheet-revaluation-cost-india.
[17] CBSE v. Aditya Bandopadhyay, (2011) 8 SCC 497.
[18] Kerala PSC v. State Information Commission, (2016) 3 SCC 417; Tithi Parna Das v. State of W.B., 2017 SCC OnLine Cal 454; National Insurance Co. Ltd. v. MSH Beig, 2014 SCC OnLine Del 6467.
[19] UPSC v. Angesh Kumar, (2018) 4 SCC 530.
[20] ICAI v. Shaunak H. Satya, (2011) 8 SCC 781.
[21] Haryana Public Service Commission v. State Information Commr., 2011 SCC OnLine P&H 428.
[22] KERALA PSC, *supra* note 18.

denied based on the third recital of the preamble of the RTI Act.[23] Despite being a clear effacement of the coordinate bench judgment in *Aditya Bandyopadhyay,* in *Angesh Kumar,* the Court claims this rule of law to source this interpretative discovery from *Aditya Bandyopadhyay* itself.[24] At present, while a candidate may request for her corrected answer scripts from her board exams by the CBSE as a matter of her right to information, she cannot do so in case of the civil services examinations conducted by the UPSC or any other public body, on account of administrative difficulties.

In this paper, we argue that the jurisprudence on the fundamental right to information read with the intent of the RTI Act recognises the right of every candidate appearing for an examination conducted by a public body to access evaluated copies of their answer scripts, with reasonable restrictions. In doing so, we critique the 2018 decision of the Supreme Court in *Agnesh Kumar* which denied this right to candidates who appeared for the civil services examination conducted by UPSC.

To that end, we shall begin by (i.) tracing the evolution of the RTI Act, and dive into the role played by it to support information access. Following which, (ii.) we analyse the decision of the Supreme Court in *Aditya Bandyopadhyay* which interpreted the right of candidates to access evaluated answer scripts, and (iii.) contrast it with the Supreme Court's decision in *Agnesh Kumar*, which denied the right to UPSC candidates. We, then, (iv.) aim to develop a legal framework which balances candidate's right to information, and rationally views administrative difficulties faced by public bodies conducting examinations, in consonance with the RTI Act, and (v.) ultimately conclude with a call for judicial intervention to streamline in process of information access concerning public examinations through the RTI Act in the interests of justice and dignity of candidates appearing for such examinations.

II. THE EVOLUTION OF RIGHT TO INFORMATION

(A) CONSTITUTIONAL FOUNDATIONS OF RIGHT TO INFORMATION

The earliest push for information as a civic entitlement can be traced to the Constitution. Article 19(1)(a), which guarantees the fundamental right to freedom of speech and expression, was often

[23] UPSC v. Angesh Kumar, (2018) 4 SCC 530.
[24] ANONNA DUTT *supra* note 5.

understood as containing a corollary to receive information. This interpretation comports with international trends. For example, Article 19 of the Universal Declaration of Human Rights, also guarantees the right to free expression, while recognizing within it the right to "*receive and impart information and ideas"*.[25] This was subsequently also codified in the International Covenant on Civil and Political Rights.[26]

The first coherent presentation of this link came about in the 1970s by the *State of U.P. v. Raj Narain* decision of the Supreme Court ('Raj Narain').[27] As part of parallel proceedings against Indira Gandhi for electoral malpractice, Narain had sought access to the bluebook, a security booklet outlining the equipment used and plans made for Gandhi's visits.[28] The government refused to provide access to the bluebook, citing concerns of national security under Section 123 of the Indian Evidence Act 1872. Mathew J, speaking by way of a concurring judgment, held that:

> In a Government of responsibility like ours, where all the agents of the public must be responsible for their conduct, there can be but few secrets. The people of this country have a right to know every public act, everything that is done in a public way, by their public functionaries. They are entitled to know the particulars of every public transaction in all its bearing. *The right to know, which is derived from the concept of freedom of speech, though not absolute, is a factor which should make one wary, when secrecy is claimed for transactions which can, at any rate, have no repercussion on public security*. To cover with veil of secrecy, the common routine business, is not in the interest of the public. Such secrecy can seldom be legitimately desired. It is generally desired for the purpose of parties and politics or personal self-interest or bureaucratic routine. The responsibility of officials to explain and to justify their acts is the chief safeguard against oppression and corruption [...][29]

[25] Universal Declaration of Human Rights (adopted 10 December 1948), UNGA Res 217 A(III), art 19.
[26] International Covenant on Civil & Political Rights, (adopted 16 December 1966, entered into force 23 March 1976), 999 UNTS 171, art 19.
[27] State of U.P. v. Raj Narain, (1975) 4 SCC 428.
[28] PRASHANT BHUSHAN, THE CASE THAT SHOOK INDIA, Penguin Books 2017, 36-37.
[29] State of U.P. v. Raj Narain (1975) 4 SCC 428.

In its disposition, the Court stated that the bluebook was to be produced to the judge seized of the proceedings, who would then decide if the claim of privilege for reasons of state had merit or not.[30] A similar advance on the logic, if not practice, of the constitutional foundations of the right to information was made by its decisions in *Union of India v. Assn. for Democratic Reforms* ('Assn. for Democratic Rights'),[31] and *People's Union for Civil Liberties (PUCL) v. Union of India* ('People's Union for Civil Liberties') decisions.[32]

(B) JUDICIAL EXPANSION: FROM RAJ NARAIN TO PUCL AND ADR

In its 2002 *Assn. for Democratic Reforms* decision, the Supreme Court directed that the Election Commission call for information on all candidates' elections on their criminal antecedents, assets, and public finance liabilities.[33] This view was developed on the basis that:

> [...] the citizens' right to know, which is derived from the concept of "freedom of speech and expression". The people of the country have a right to know every public act, everything that is done in a public way by the public functionaries. MPs or MLAs are undoubtedly public functionaries. Public education is essential for functioning of the process of popular government and to assist the discovery of truth and strengthening the capacity of an individual in participating in the decision-making process. The decision-making process of a voter would include his right to know about public functionaries who are required to be elected by him.[34]

In support of this position, it cited a catena of case law since *Raj Narain* that had crystallised the link between free expression and the right to know. Subsequently, Parliament enacted an amendment to the elections statute, which, though formally codifying the right to information in respect of such political candidates, excluded crucial questions, including criminal antecedents, assets, and educational qualifications.[35] It further held, via Section 33-B of the Representation of the People Act, 1956, that

[30] *Id.*
[31] Union of India v. Assn. for Democratic Reforms, (2002) 5 SCC 294.
[32] People's Union for Civil Liberties (PUCL) v. Union of India, (2003) 4 SCC 399.
[33] Union of India v. Assn. for Democratic Reforms, (2002) 5 SCC 294 [80].
[34] Union of India v. Assn. for Democratic Reforms, (2002) 5 SCC 294.
[35] Representation of the People (Third Amendment) Act 1956, § 2, No. 2, Acts of Parliament, 1956 (India).

no court could direct the furnishing of the aforementioned information.[36] In *People's Union for Civil Liberties,* the Supreme Court struck down Section 33-B. In doing so, it developed a nexus between the right to free expression and the 'right to know' in the following terms:

> Firstly, it is to be made clear that the judgment rendered by this Court in Assn. for Democratic Reforms has attained finality. The voters' right to know the antecedents of the candidates is based on interpretation of Article 19(1)(a) which provides that all citizens of this country would have fundamental right to "freedom of speech and expression" and this phrase is construed to include fundamental right to know relevant antecedents of the candidate contesting the elections.[37]

Accordingly, in a slow evolution of case law leading up to *People's Union for Civil Liberties*, the Supreme Court constructed an interpretative foundation for the right to information to be included as a fundamental right under the right to free expression.

(C) CIVIC MOBILISATION AND ADVOCACY FOR THE RTI ACT

This shift to the creation of a right to information was not arbitrary. It came against a backdrop of a variety of social and civic initiatives to institute this right as a matter of law. From around 1994, a union by the name of the Mazdoor Kisan Shakti Sangathan started popular efforts for the creation of a law that increased accountability and transparency, especially with respect to better working conditions for workers and fair wages in Rajasthan.[38] As one source describes the motivation for such an upheaval:

> Poor farm and rural labourers were being denied the minimum wage and not receiving entitlements from poverty alleviation schemes. In order to be paid, labourers on the public payroll who build roads, canals, buildings, schools, etc., sign daily logs called muster rolls. People were aware that local officials had engaged in corruption, but it was impossible to

[36] *Id.*
[37] People's Union for Civil Liberties (PUCL) v. Union of India, (2003) 4 SCC 399 [16].
[38] Commonwealth Human Rights Initiative, *Right to Information: India*, https://www.humanrightsinitiative.org/programs/ai/rti/india/history.htm, accessed 9 June 2025.

> prove it without access to the muster rolls. MKSS began to demand access to the muster rolls from local bodies and were met with strong resistance, including claims by the local authorities that the muster rolls were "secret documents." However, MKSS countered this resistance with local rallies, hunger strikes, and sit-ins.[39]

Amidst this gathering momentum, the National Campaign for People's Right to Information ('NCPRI') was formed in 1996.[40] With the support of the Press Council of India, led by Justice Sawant, NCPRI released the draft of the RTI Bill that year itself. The Union government, recognising the emergent civic consciousness behind the right to information, referred the Bill to a committee led by H.D. Shourie.[41] This was then subsequently submitted to a Parliamentary committee.[42] In 2002, the Freedom of Information Bill was passed and in 2003, the President assented to the Bill.

However, this populist pressure was not the only reason why the 1990s saw the right to information pick up steam. There was also a similar legal mobilization, this time among state governments, which passed their own right to information legislations respectively. Between 1997 and 2002, the state governments of Tamil Nadu,[43] Goa,[44] Rajasthan,[45] Maharashtra,[46] Karnataka,[47] and Delhi,[48] all had passed their own laws on the question.

However, despite the polycausal pressures that fast tracked the gestation and churn for the Freedom of Information, it never entered into force.[49] Claims are divided as to whether the Act was beset with

[39] ARTICLE 19, *Access to Information: An Instrumental Right for Empowerment*, (July 2007) 26, https://www.article19.org/data/files/pdfs/publications/ati-empowerment-right.pdf, accessed 9 June 2025.
[40] Amita Baviskar, *Is knowledge power?: the Right to Information Campaign in India'*, Institute of Development Studies, September 2007), https://rtiworkshop.pbworks.com/f/2006-00-IN-Is-Knowledge-Power-The-Right-to-Information-Campaign-in-India-Amita-Baviskar.pdf, accessed 9 June 2025.
[41] *Id.*
[42] Ministry of Personnel, Public Grievances and Pensions, *Parliament Passes Freedom of Information Bill*, (*Press Information Bureau*, 16 December 2002), https://archive.pib.gov.in/release02/lyr2002/rdec2002/16122002/r1612200229.html.
[43] The Tamil Nadu Right to Information Act, 1997, No. 24, Acts of Tamil Nadu State Legislature, 1997 (India).
[44] Goa Right to Information Act, 1997, No. 28, Acts of Goa State Legislature, 1997 (India).
[45] Rajasthan Right to Information Act, 2000, No. 13, Acts of Rajasthan State Legislature, 2000 (India).
[46] Maharashtra Right to Information Act, 2002, No. 31, Acts of Maharashtra State Legislature, 2003 (India).
[47]. Karnataka Right to Information Act, 2000, No. 28, Acts of Rajasthan State Legislature, 2000 (India).
[48] Delhi Right to Information Act, 2002, No. 22, Acts of Delhi State Legislature, 2005 (India).
[49] Ruma Pal, *Information and Fundamental Rights,* (2009) 10 SCC J-49, 52-53.

structural problems that diluted the right to information or that government aversion to the radical nature of the Act had triggered this somnolence.[50]

In any event, this laxity coupled with a potential change of political dispensation, animated a zeal to revise the Act. This is why in the build up to the 2004 general elections, the Indian National Congress promised a more strong RTI regime as a core feature of its promise.[51] After the Congress' coalition victory in 2004, the NCPRI draft was sent to the National Advisory Council, which suggested its own modifications, finally developing an RTI Bill.[52] This was then subject to another round of scrutiny by a Parliamentary committee.[53] Finally, in May 2005, the RTI Act was passed by both houses, and received Presidential assent the month after.

Over the past two decades, the RTI Act has not only operated as a tool for public accessibility and transparency, it has become a token for the public interest-based nature of governance. This is why attempts to amend the RTI Act have either been unsuccessful[54], or thoroughly unpopular.[55] Even today, dispensations struggle with the particulars of its impact in courts.[56] This paved the way for the emergence of RTI as a constitutional culture that called for transparency as a public value.

III. ADITYA BANDHOPADHYAY (2012) AND PUBLIC EXAMINATIONS

(A) BACKGROUND AND THE PARTIES' ARGUMENTS

[50] Madhavi Divan, *From Secrecy to the Freedom of Information — A Reluctant Transition'*, (2003) 8 SCC J-60, 71-74.
[51] Aruna Roy & MKSS Collective, *Excerpt: The RTI Story; Power to the People by Aruna Roy with the MKSS Collective'*, The Hindustan Times (13 April 2018), https://www.hindustantimes.com/books/excerpt-the-rti-story-power-to-the-people-by-aruna-roy-with-the-mkss-collective/story-V5AWqGRa84dCxyoVsR2o4L.html, accessed 9 June 2025.
[52] Anuja,*Eight years of the Right to Information Act*, LIVEMINT (10 October 2013) https://www.livemint.com/Politics/LOL1i67xjQHTe3FgIB5y4J/Eight-years-of-the-Right-to-Information-Act.html, accessed 9 June 2025.
[53] *Id.*
[54] Himanshu Jha, *How India's Data Protection Law Weakens Citizens' Right to Information*, The Diplomat (12 August 2023) https://thediplomat.com/2023/08/how-indias-data-protection-law-weakens-citizens-right-to-information/, accessed 9 June 2025.
[55] Id.
[56] *Verdict reserved on DU's plea against CIC order on PM Modi's degree disclosure'*, The New Indian Express (28 February 2025), https://www.newindianexpress.com/cities/delhi/2025/Feb/28/verdict-reserved-on-dus-plea-against-cic-order-on-pm-modis-degree-disclosure, accessed 9 June 2025.

Having established the ascendent evolution of the right to in formation in Indian jurisprudence, we may now turn to how the Supreme Court understood its application in *Aditya Bandhopadhyay*. This was a seminal case in cementing the way the RTI Act affirmed an examinee's right to know and see their evaluated answer sheets. We shall first present the case's context and the arguments of the parties. Subsequently, we shall summarise the Court's findings on the RTI's application to public exams. Thereafter, we will examine the safeguards for examiners presented by the Court. Finally, we shall note certain gaps left underdeveloped by the judgment.

In this case, a candidate who had written his secondary school examination sought to inspect his answer sheets and submit them for re-evaluation.[57] The candidate argued that he was entitled to such information under Section 3 of the RTI Act. He further argued that his answer sheet must be reevaluated by the examining authority.

The Central Board of Secondary Education ('CBSE'), the examining authority for that exam, resisted this claim, arguing that per its own bylaws, no inspection or re-evaluation could be made in this manner.[58] The CBSE argued that this right was extinguished by two sources. Firstly, it pointed to its examination bye-law 61(iv), which stated that "*[n]o candidate shall claim, or be entitled to, revaluation of his/her answers or disclosure or inspection of the answer book(s) or other documents*".[59] To support its argument, it also cited the Supreme Court's decision in *Maharashtra State Board of Secondary Education v. Paritosh Bhupeshkumar Sheth* ('Maharashtra State Board of Secondary Education').[60] In that case, a rule under the state education board's examination regulations which prohibited re-evaluation or inspection, similar to bye-law 61 in this case, was challenged. The Court tested the validity of the rule against Article 14 of the Constitution, including the principle of natural justice, and upheld it. To CBSE, this would control the field.[61] Secondly, and alternatively, it claimed that Section 8(1)(e) of the RTI Act would exempt the disclosure of answer sheets.[62] That Section prohibits disclosure when the information holder is acting in a fiduciary capacity and a larger public interest is not served by its disclosure.

[57] CBSE v. Aditya Bandopadhyay, (2011) 8 SCC 497 [2].
[58] ANONNA DUTT *supra* note 5.
[59] See Examination Bye-Laws of the Central Board of Secondary Education 1995, bl 61(v).
[60] Maharashtra State Board of Secondary & Higher Secondary Education v. Paritosh Bhupeshkumar Sheth, (1984) 4 SCC 27.
[61] *Id.*
[62] CBSE v. Aditya Bandopadhyay, (2011) 8 SCC 497 [9].

(B) THE COURT'S ANALYSIS

The division bench decision of the Court comprehensively outlined the application of RTI to public examinations. At the outset, it recognised that the sought materials, the candidate's evaluated answer scripts, were "*information*" under the RTI Act, an essential requirement for the right to information under Section 3 to arise. While information includes "*records*" and "*documents*" per the Act,[63] the Court observed that a submitted answer sheet would qualify as both.[64] It further held that after an examiner had evaluated the answer sheet, it would obtain the character of an "*opinion*", also a covered category under "*information*".[65] Accordingly, citizens were held to have a right to seek answer sheets under Section 3. The Court stated that neither of the arguments by CBSE had merit and could extinguish the right conferred by Section 3 of the Act.[66]

Firstly, with regard to the application of its bye-laws prohibiting such disclosure, it stated that the decision of *Maharashtra State Board of Secondary Education* merely held that a rule like byelaw 61 was not violative of the Constitution or the principles of natural justice. However, it did not opine on the applicability of the rule when in conflict with a superior statutory provision, i.e., Section 3 of the RTI Act.[67] Accordingly, without disturbing the findings of *Maharashtra State Board of Secondary Education* or commenting on the *vires* of bye-law 61, the Court held that the right to seek copies of answer sheets under Section 3 was vested in candidates, the latter right emanating from a superior statute, i.e. the RTI Act.[68]

Here, it is pertinent to remember the trite law that statutes supersede all forms of delegated legislation, including rules, regulations, and bye-laws.[69] Even in the absence of such a principle, Section 22 of the Act provides that it shall have force notwithstanding anything contained in any other law in force.[70]

[63] Right to Information Act, 2005, § 2(f)., No. 22, Acts of Parliament, 2005 (India).
[64] CBSE v. Aditya Bandopadhyay, (2011) 8 SCC 497 [23].
[65] *Id.*
[66] MADHAVI DIVAN *supra* note 51.
[67] Union of India v. Assn. for Democratic Reforms, (2002) 5 SCC 294 [80].
[68] *Id.*
[69] ITW Signode India Ltd. v. CCE, (2004) 3 SCC 48; Babaji Kondaji Garad v. Nasik Merchants Coop. Bank Ltd., (1984) 2 SCC 50.
[70] Right to Information Act, 2005, § 22., No. 22, Acts of Parliament, 2005 (India).

Thus, even if the bye-laws had *equivalent* force of law, it is doubtful whether they'd be able to restrict the right contained in Section 3. It is necessary to caveat here that bye-law 61 did not merely restrict the inspection of answer sheets, but also their re-evaluation. While the former prong of bye-law 61 was superseded by Section 3, the latter was not "*a relief available under the RTI Act*".[71] Accordingly, that part of bye-law 61 would stay operative.

Secondly, on the second exemption from disclosure claimed under Section 8(1)(e), the Court explained that the information would have to at least be held in a fiduciary capacity. Explaining that term, the Court stated:

> The term "fiduciary" refers to a person having a duty to act for the benefit of another, showing good faith and candour, where such other person reposes trust and special confidence in the person owing or discharging the duty. The term "fiduciary relationship" is used to describe a situation or transaction where one person (beneficiary) places complete confidence in another person (fiduciary) in regard to his affairs, business or transaction(s). The term also refers to a person who holds a thing in trust for another (beneficiary). The fiduciary is expected to act in confidence and for the benefit and advantage of the beneficiary, and use good faith and fairness in dealing with the beneficiary or the things belonging to the beneficiary. If the beneficiary has entrusted anything to the fiduciary, to hold the thing in trust or to execute certain acts in regard to or with reference to the entrusted thing, the fiduciary has to act in confidence and is expected not to disclose the thing or information to any third party.
>
> There are also certain relationships where both the parties have to act in a fiduciary capacity treating the other as the beneficiary. Examples of these are: a partner vis-à-vis another partner and an employer vis-à-vis employee. An employee who comes into possession of business or trade secrets or confidential information relating to the employer in the course of his employment, is expected to act as a fiduciary and cannot disclose it to others. Similarly, if on the request of the employer or official superior or the head of a department, an employee furnishes his personal details and information, to be

[71] CBSE v. Aditya Bandopadhyay, (2011) 8 SCC 497.

> retained in confidence, the employer, the official superior or departmental head is expected to hold such personal information in confidence as a fiduciary, to be made use of or disclosed only if the employee's conduct or acts are found to be prejudicial to the employer.[72]

Having laid this background, the Court stated that the term could be understood in a "*philosophical and very wide sense"* or in a "*normal and well recognised sense*". It found that the latter sense was more appropriate per the text of the RTI Act.[73] This latter sense would require "*a specific beneficiary or beneficiaries who are to be expected to be protected or benefited by the actions of the fiduciary"*. Here, two potential fiduciary relationships arise.[74] First, there could be one between the examining body and the examinee. Second, there could be one between the examining body and the examiner, responsible for evaluating the answer sheets concerned.

We may now see whether the Court found fiduciary relationships in these two possibilities or not. First, it went on to find that no such relationship existed between the CBSE (the examining body) and the candidate (the examinee) in the legal sense, though it may so exist in a philosophical sense. This was because there was no individual relationship of *protection or benefit* between the body and the examinee, nor was it akin to the recognised kinds of fiduciary relationships.[75] Having established this, no exemption under Section 8(1)(e) could be sought. Only this finding being necessary to the determination of the question at hand, the Court then proceeded to analyse as *obiter* whether Section 8(1)(e) would apply even if such a fiduciary relationship *did* exist. There, it held that the exemption was aimed at preserving the disclosure of the beneficiary's information to a *third party*. Since the information sought belonged to the examinee (as the beneficiary), the examining authority could not use the exemption to restrict disclosure.[76] In fact, to the contrary, such a relationship would mean that the examining authority has the obligation to make *full disclosure* of the information concerned to the examinee:

[72]CBSE v. Aditya Bandopadhyay, (2011) 8 SCC 497.
[73] AMITA BAVISKAR *supra* note 41.
[74] *Id.*
[75] *Id.*
[76] The Tamil Nadu Right to Information Act, 1997, No. 24, Acts of Tamil Nadu State Legislature, 1997 (India).

> One of the duties of the fiduciary is to make thorough disclosure of all the relevant facts of all transactions between them to the beneficiary, in a fiduciary relationship. By that logic, the examining body, if it is in a fiduciary relationship with an examinee, will be liable to make a full disclosure of the evaluated answer books to the examinee and at the same time, owe a duty to the examinee not to disclose the answer books to anyone else. If A entrusts a document or an article to B to be processed, on completion of processing, B is not expected to give the document or article to anyone else but is bound to give the same to A who entrusted the document or article to B for processing. Therefore, if a relationship of fiduciary and beneficiary is assumed between the examining body and the examinee with reference to the answer book, Section 8(1)(e) would operate as an exemption to prevent access to any third party and will not operate as a bar for the very person who wrote the answer book, seeking inspection or disclosure of it.[77]

Second, it went on to find that no such relationship existed between the examining body and the examiner either. It reasoned that the transaction between those parties was sometimes in the nature of expert services with consideration, or other times as an employee acting as the agent of the examining body. In neither case was a fiduciary relationship established.[78] The court, however, did hint at the existence of a fiduciary relationship between these parties for the period of time that the answer sheet was in the custody of the examiner; and thus, the examiner would have the obligation not to disclose the answer sheet, save for when sought by the examining authority.[79]

(C) THE EXAMINER'S INTERESTS

Having established a general, unqualified right to seek answer copies under Section 3, the Court then analysed how to deal with the harms of such disclosure. This includes threats to the physical safety of the examiner, as well as their future capacity to carry out their professional duties. To that end, the Court directed that the details and particulars, including name and any identifying information of the

[77] Goa Right to Information Act, 1997, No. 28, Acts of Goa State Legislature, 1997 (India).
[78] Delhi Right to Information Act, 2002, No. 22, Acts of Delhi State Legislature, 2005 (India).
[79] RUMA PAL *supra* note 50.

examiners, would be 'removed, covered, or otherwise severed from the non-exempted part of the answer books.'[80] This would serve to balance the interests of the examiners as well as the examinees. Incidentally, the Court also dealt with the timelines that an examining authority may be obligated to store the answer sheets without destroying them. It held that the RTI Act does not compel public authorities to preserve information for twenty years, and that public authorities could continue to apply their prescribed or designed timelines with respect to information under their aegis.[81] However, the Court did not aim to clarify the minimum period and manner in which such information shall be preserved in order to give full effect to the RTI Act, which we shall deal with in the subsequent sections of this paper.

Finally, and this shall turn crucial in our critique of *Angesh Kumar* below, the Court analysed, as a matter of generality, the structure and functions of the RTI Act. It stated that contrary to the perception that the RTI Act makes Section 3 a *norm*, and all exemptions contained in Section 8 as *exceptions* to the norm, the correct approach would be to construe them as distinct interests that are competing against each other.[82] It concluded by noting that while the right to information was a cherished right, seeking sundry information may have a counterproductive effect on administrative efficiency. Thus, it stated that:

> The [RTI] Act should not be allowed to be misused or abused, to become a tool to obstruct the national development and integration, or to destroy the peace, tranquillity and harmony among its citizens. Nor should it be converted into a tool of oppression or intimidation of honest officials striving to do their duty. The nation does not want a scenario where 75% of the staff of public authorities spends 75% of their time in collecting and furnishing information to applicants instead of discharging their regular duties. The threat of penalties under the RTI Act and the pressure of the authorities under

[80] ANUJA *supra* note 53.
[81] HIMANSHU JHA *supra* note 56.
[82] Maharashtra State Board of Secondary & Higher Secondary Education v. Paritosh Bhupeshkumar Sheth, (1984) 4 SCC 27.

> the RTI Act should not lead to employees of a [sic] public authorities prioritising "information furnishing", at the cost of their normal and regular duties.[83]

To note, this portion of the Court's judgment did not concern the disposition of the legal issues under question, and thus do not form part of the *ratio decidendi* in any event.[84] That the Court could make a clear attempt at exploring how such 'competing interests' under the RTI Act could be realistically adopted. The lack of it, we find, made it ambiguous, and eventually led *Angesh Kumar* Court to extend it against the interests of examinees appearing in UPSC examinations.

(D) A RETROSPECTIVE ON ADITYA BANDHOPADHYAY

There are a few significant areas that *Aditya Bandhopadhyay* left underdeveloped. Firstly, in paragraph 61 and 62, it presented a vague and orphaned theory of the RTI Act's structure and purpose. By not applying it to the facts at hand, the Court made its *dicta* ambiguous for future cases. The "*balance*" between interests would turn to the absolute discretion of every judge, with little preformulated guidance to its steps and substance.

Secondly, in sticking to the facts of evaluated answer sheets, the Court did not provide explicit indication on if other examination materials could be incorporated into "*information*" or not. However, its reasoning was used in subsequent cases to include them into the scope of the RTI Act.

Thirdly, as discussed above, in rightly trying to balance the massive administrative onus that would fall on public authorities if they had to store information for twenty years, the Court's declaration that authorities could use their prescribed timelines did not account for the timelines for RTI's Act's remedies.

Finally, in trying to balance the interests involved, the Court failed to sufficiently clarify the pragmatic conditions that were necessary to assist government efficiency. Being considerations of public policy,

[83] CBSE v. Aditya Bandopadhyay, (2011) 8 SCC 497.
[84] Krishena Kumar v. Union of India, (1990) 4 SCC 207 [20]; Career Institute Educational Society v. Om Shree Thakurji Educational Society, (2023) 16 SCC 458 [6]; State of Gujarat v. Utility Users' Welfare Assn., (2018) 6 SCC 21 [111]-[114].

these are independent mechanisms that the state must employ to ensure the effective implementation of the RTI Act while ensuring governmental efficiency.

Over the course of the next two parts of this paper, we shall examine how some of these shortcomings led to restrictions on the RTI's effective exercise by students, followed by which we shall present an alternative framework to understand the RTI Act that covers the concerns here.

Aditya Bandhopadhyay was a watershed moment in RTI's jurisprudential development. It conclusively declared evaluated answer sheets to be "*information"* under the RTI Act, by and large rendered examining bodies' own rules preventing disclosure, and negated the strongest exemption against disclosure: the fiduciary relationship exemption.
After the Supreme Court's decision in *Aditya Bandhopadhyay,* there was a massive upsurge in the number of RTI cases that came to court, predominantly to do with public examinations, where the decision's jurisprudential expositions would be dispositive.

To put this rise into context, the SCC Online legal database states that *Kesavananda Bharati v. State of Kerala* (1973) — arguably the Supreme Court of India's most significant decision in its history has been referenced 1,022 times over the past 52 years.[85] In comparison, the barely 13-year old *Aditya Bandhopadhyay* has been referenced over 5,880 times. A bulk of these are 'tribunal and commission' decisions, probably referring to the statutory information commissions. Nonetheless, this illustrates the force that decision of the Court has carried into the public sphere.

IV. ANGESH KUMAR (2018) AND COMPETING INTERESTS

(A) THE CONTEXT AND COURT'S ANALYSIS

It is precisely in this juxtaposing context that we examine the Court's decision in *UPSC v. Angesh Kumar* (2018).[86] We shall first examine the context of the case, then we shall examine its reasoning and how

[85] Kesavananda Bharati v. State of Kerala, 4 SCC 225.
[86] UPSC v. Angesh Kumar, (2018) 4 SCC 530.

it interfaced with *Aditya Bandhopadhyay*. Later in the part, we shall argue that *Angesh Kumar* is both *per incuriam* and bad in law.

In this case, candidates who had been unsuccessful in the Civil Services (Preliminary) Examination 2010 sought copies of their raw and scaled marks, cut offs for all subjects, scaling methodology, model answers, and results of all candidates.[87] A single judge bench and division bench of the High Court of Delhi directed disclosure.[88] The Supreme Court reversed it.

Per *Aditya Bandhopadhyay,* the Court had to ask itself three simple questions: was the examining body a "*public authority*", was the sought material "*information*", and did any exemption (especially the fiduciary relationship one) listed under Section 8 of the RTI Act apply? If the Court found that the answers were affirmative, affirmative, and negative respectively in keeping with *Aditya Bandhopadhyay*, it should have directed disclosure like the two judgments delivered by the High Court below.

However, it did not undertake any of this analysis. It did not explicitly disagree with the idea that the examining authority was a public body or that the information sought after qualified as such under the RTI. Nor did the Court make a finding that the sought information was protected under Section 8 (the listed exemptions), 9 (protecting copyright), or 11 (protecting third party interests). Accordingly, the Court should have recognised the candidates' right to information under Section 3, and directed the disclosure of the material sought.

To the contrary, the Court used a different *modus operandi* to assess restrictions on the disclosure of information under the RTI Act. It sourced this restriction from the third recital to the Act, which reads as: *"AND WHEREAS revelation of information in actual practice is likely to conflict with other public interests including efficient operations of the Governments, optimum use of limited fiscal resources and the preservation of confidentiality of sensitive information*";[89]

[87] *Id.*
[88] Angesh Kumar v. Union Public Service Commission, 2011 SCC OnLine Del 5686; Union Public Service Commission v. Angesh Kumar, 2012 SCC OnLine Del 3591.
[89] Right to Information Act, 2005, No. 22, Acts of Parliament, 2005 (India).

The UPSC, the examining body in that case, argued that:

> The exclusion by Sections 8, 9 and 11 is not exhaustive and parameters under third recital of the Preamble of the Act can also be taken into account. Where information is likely to conflict with other public interest, including efficient operation of the Government, optimum use of fiscal resources and preservation of confidentiality of some sensitive information, exclusion of right to information can be applied in a given fact situation.[90]

The Court agreed with this analysis, stating that:

> …it is clear that in interpreting the scheme of the Act, this Court has, while adopting purposive interpretation, read inherent limitation in Sections 3 and 6 based on the third recital in the Preamble to the Act. While balancing the right to information, public interest including efficient working of the Government, optimum use of fiscal resources and preservation of confidentiality of sensitive information has to be balanced and can be a guiding factor to deal with a given situation dehors Sections 8, 9 and 11. The High Court has not applied the said parameters.[91]

Interestingly, we find that the above-mentioned observation implied that the Court had *already read in* such limitations under the RTI Act. Accordingly, the *Angesh Kumar* Court purports to have been acting out of respect for precedent, and not making a new finding of law. The case it cites to *show* that this has *already* been the Supreme Court's *modus operandi* was *Aditya Bandhopadhyay*. To support this view, it cites the *dicta* of that judgment where the Court warns against the misuse of the RTI Act, and the hortatory calls it makes for a careful use of its provisions to balance the efficiency of public bodies.[92] Finally, the Court provided a long list of public policy issues with the disclosure of Civil Services Examination's ('CSE') information.[93] It observed that such information cannot be furnished mechanically, as different academic bodies may have different requirements, which will require a

[90] UPSC v. Angesh Kumar, (2018) 4 SCC 530 [4].
[91] PRAGNYA PILLARISETTI *supra* note 6.
[92] CBSE v. Aditya Bandopadhyay, (2011) 8 SCC 497.
[93] Specifically, it referred to Prashant Ramesh Chakkarwar v. UPSC, (2013) 12 SCC 489.

tailored balancing analysis. It concluded by stating that "*if a case is made out where the Court finds that public interest requires furnishing of information, the Court is certainly entitled to so require in a given fact situation*".[94]

(B) CRITICISM OF ANGESH KUMAR

At the outset, we may note that *Angesh Kumar* does not profess to make a specific and clear distinction between CSE examinations and other examinations. While it lays out problems with the disclosure of CSE material in particular, it does not explain how this changes the statutory entitlements provided under the RTI Act in respect of such exams.[95] Put another way, while public policy implications may actually distinguish between CSE exams and other exams, its legal relevance is not articulated by the Court.

For example, the Court observes that the release of raw scores (which are yet to be rationalised) may have the potential of embarrassing the original examiner.[96] However, the Court does not clarify how it affects the students' entitlement to disclosure of the answer scripts under the RTI Act. At best, this attempts to make a *public policy* argument about how the balance should be understood by legislators. In any case, the Court fails to consider that *Aditya Bandhopadhyay's* holding on confidentiality of examiners means that there's no public disclosure of who the examiner is, with the raw score concerned. Thus, there is little harm in the release of raw scores, as the name and details of the examiner are to be removed at the time of such disclosure.

Further specifically, the Court also fails to analyse the corresponding increasing civic entitlements when it comes to CSE exams. It is undoubtedly the case that these exams may normatively require a different balancing exercise as compared to others; owing to its high stakes and public interest nature. However, this also implies a corresponding increase in stakes for the candidates entitled to a right to information. Thus, reasons for transparency *also* increase in this balancing analysis. The Court fails to consider either of these facts.

[94] UPSC v. Angesh Kumar, (2018) 4 SCC 530.
[95] PRAGNYA PILLARISETTI *supra* note 6.
[96] Central Board of Secondary Education, *Press Note: Declaration of Results of Class X, 2024 CBSE/CE/RESULT-X2024,*https://www.cbse.gov.in/cbsenew/documents//PRESS_NOTE_DECLARATION_CLASS_X_RESULT_2024_21052024.pdf, (accessed 9 June 2025).

Having established these logical and balancing lapses by the Court, *Angesh Kumar* is also *per incuriam* and bad in law. This is for four reasons. To briefly preview: first, *Angesh Kumar* misreads *Aditya Bandhopadhyay* in its analysis, and thus does not follow precedent. Second, even if *Angesh Kumar* had accurately read *Aditya Bandhopadhyay*, its reasoning still fails under its own established rubric. Third, even if *Angesh Kumar's* reasoning was successful, it still conflicts with *Aditya Bandhopadhyay's ratio.* Finally, even if *Angesh Kumar* did not violate *Aditya Bandhopadhyay's ratio,* it would be violative of larger bench judgments that prohibit creating operative rights and obligations out of the preamble of a statute.

Firstly, *Angesh Kumar* fails to represent the observations of the *Aditya Bandhopadhyay* Court accurately. In paragraphs 61 and 62, the *Aditya Bandhopadhyay* Court *does* put weight on considerations that the RTI Act is capable of misuse. It further, admittedly, states that there are 'several other public interests' that need to be balanced with the right to information.[97] These are "*difficult to visualise and enumerate*" all kinds of.[98] However, *none* of these observations *authorise* or *find* an obligation on *Angesh Kumar* to engage in a balancing analysis of the specific right to information claim and all the possible public interests that could potentially be in conflict with it. It does not provide a specific way to counter such misuse. It does not create a new ground of restriction either – which is precisely what the *Angesh Kumar* Court interpreted the *Aditya Bandhopadhyay* Court to do.

This reading of *Aditya Bandhopadhyay* is also demonstrably false, as when dealing with its own facts, the *Aditya Bandhopadhyay* Court does not engage in this extra-statutory balancing. If there lay exemptions outside Section 8, then they should have been analysed by the Court in that case, as the candidate's request for information did not fall under any of the listed grounds of Section 8.

Secondly, a more accurate interpretation of paragraphs 61 to 62 shows us that the Court actually exhorts a purposive interpretation of the RTI Act, including Section 8 in particular. This implicitly authorises the Court to read that Section in an expansive manner beyond the confines of the plain

[97] CBSE v. Aditya Bandopadhyay, (2011) 8 SCC 497.
[98] *Id.*

text. This *could* have been used by the *Angesh Kumar* Court to expansively read one of the exemptions contained in that Section, and prevent the disclosure of answer sheets. However, the *Angesh Kumar* Court does not do so. Instead, it creates an independence balancing analysis *outside* of Section 8 – a legally groundless move. This former approach would have had stronger support from the text of the *Aditya Bandhopadhyay* judgment, notwithstanding its legal tenability as a matter of statutory construction.

Thirdly, even if the *Angesh Kumar* Court's reading of *Aditya Bandhopadhyay* is accurate, it would be of little consequence. In the latter judgment, the concerned observations are made *after* the analysis of the petitioner's case. As previously established, paragraphs 61 to 62 are *obiter dicta*, and do not *bind* the Court. To the contrary, the *ratio* of *Aditya Bandhopadhyay* binds the Court. And as per that *ratio*, if none of the exemptions under Section 8 are met as a matter of statutory text, then the information must be disclosed.

In *Angesh Kumar,* the Court does not mention a specific exemption under Section 8. Thus, to not allow disclosure would make it *per incuriam* for conflicting with the judgment of a coordinate bench delivered earlier. In our view, however, the *per incuriam* status would continue to apply even if the *Angesh Kumar* Court had undertaken an expansive interpretation of Section 8 to prevent disclosure – a fairer reading of *Aditya Bandhopadhyay* — as even *that* would only be authorised by *dicta,* and be in conflict with its *ratio.*

Nor does the *Angesh Kumar* Court distinguish *Aditya Bandhopadhyay,* something it could have done without risking violating the latter's *ratio.* Had it explained how CSE exams have specific public interest requirements which lay outside the scope of *Aditya Bandhopadhyay*, it could have avoided this breach of judicial discipline. Instead, its current approach of putatively respecting precedent, and even basing its own decision out of *Aditya Bandhopadhyay* only worsens the jurisprudential landscape of the RTI Act.

Finally, and most importantly, the approach of the *Angesh Kumar* Court is bad in law as it violates a core tenet of statutory interpretation: that the preamble of a statute cannot be read to *create* an operative right or obligation. Where a statute is clear in its operative part, the 'the preamble cannot control the

enacting part'.[99] This is why a catena of decisions have held the preamble to be an intrinsic *aid* to interpretation.[100] Although it may help the Court interpret the law, the preamble of a statute is not the law itself. Even if *Aditya Bandhopadhyay* was exactly as *Angesh Kumar* understood it, and the latter was not *per incuriam*, it would still be errant in law for this reason.

Before we conclude this part, it is to be noted that the petitioners in *Angesh Kumar* had also sought the results of *other* candidates apart from the examinee-applicant themselves. *Angesh Kumar* was, in our view, correct in preventing the disclosure of those results. Its use of a unitary – and in our view faulty – reasoning to prevent disclosure *generally* should not mean that the information belonging to other candidates lose protection *specifically*. Our view on this point is based in Section 11 of the RTI Act, which provides a specific procedure necessary to be satisfied before third-party information is disclosed.

This position was important to take, as it conflicts with the decision of the High Court at Allahabad in *U.P. Coop. Institutional Service Board v. Anand Kumar Singh*.[101] In that case, the Court *permitted* the disclosure of OMR sheets of *other* candidates, on the grounds that other candidates had no expectation of confidentiality in respect of their answer sheets. This, in our view, is patently mistaken. *Angesh Kumar*, had it not taken the dubious route of reinterpreting *Aditya Bandhopadhyay,* could have explicitly overruled that case.

(C) JURISPRUDENTIAL AND SCHEMATIC SHORTCOMINGS

The *Angesh Kumar* judgment has three distinctly negative effects on the state of RTI jurisprudence as related to public examinations. *Firstly*, the Court does not draw clear lines about what types of exams its declaratory part applies to. This means there is little guidance over whether future Courts should understand the judgment to apply to the UPSC's Union's CSEs or the State's CSEs. This is further

[99] Chintapalli Achaiah v. P. Gopalakrishna Reddy, 1965 SCC OnLine AP 104.
[100] Doypack Systems (P) Ltd. v. Union of India, (1988) 2 SCC 299; Commr. of Customs v. Dilip Kumar & Co., (2018) 9 SCC 1.
[101] U.P. Coop. Institutional Service Board v. Anand Kumar Singh, (2012) 95 ALR 152.

confusion when it comes to applying the same rationale to *other* examining bodies, such as the National Testing Agency or the CLAT Consortium.

Secondly, the Court's unclear analysis of *Aditya Bandhopadhyay*, along with basing its decision on the latter's *dicta*, all without either distinguishing or even mentioning its *ratio* provides febrile ground for greater confusion amongst High Courts and information commissions on how to deal with the issues concerned. They shall be unable to square both judgments, and will be forced to misinterpret at least one of them. The hallmark of the rule of law is consistency, and besides being bad in law, *Angesh Kumar* makes the RTI Act confusing to apply.

Finally, the most egregious harm of *Angesh Kumar* in the abstract is its implicit recognition of a new rule of law: that a statute's preamble can create new operative rights and obligations. This sets a bad precedent, as Courts may liberally neglect the democratic wisdom and choice of the legislature to effectuate its own policy choices.
This shift is not good for proponents' purposive readings of statues either. Because of how much discretion it gives to judges, this new rule of law may discourage legislators from including expansive and comprehensive preambles in statutes, which may in turn lead to difficulties for Courts to read them purposely in the first place.

Having established the reasons why *Angesh Kumar* has negative jurisprudential implications, it may be important to zero down on the wider schematic conflicts and borrowings between it and *Aditya Bandhopadhyay*.

The *Aditya Bandhopadhyay* Court does not consider Section 8 an *exception* to Section 3, which admittedly creates a *norm*. Instead, both Sections are considered to be distinct *sources* of legislative interest that are to be balanced against each other – they are a balance of two *norms*. However, *Angesh Kumar* abuses this distinction to argue that they are *independent* norms that can operate in a vacuum.

This logical sleight of hand allows the Court to argue that the interests can exist independently of the *statutory limit* placed on them by each other. Thus, according to us, a more accurate understanding of

the RTI Act would place both of these norms in an interdependent position. To expand on this, the next section shall develop a broader framework of how the RTI Act should look at balancing the competing interests in a complex issue like public examinations.

V. A SYNTHETIC FRAMEWORK FOR BALANCING

(A) BALANCING RTI AND INSTITUTIONAL EFFICIENCY

It has been noted in a catena of judgements that the object of the RTI Act is to balance the right to information and the need to protect the institutional interest,[102] make optimum use of limited resources[103] and preserve confidentiality of sensitive information.[104] In *Aditya Bandhopadhyay* as well, the Court noted the need for emphasis on other public interests which could be confidentiality, fidelity, and fiduciary relationships, efficient operation of governments etc.[105] Thus, the Act must be used to establish an equilibrium between the competing right to information for the information-seeker and constraints that may apply on part of the public institution from which information has been sought. In case of an examinee's right to know, such a balancing attempt must factor in the impact of an examination on an individual's life and livelihood. Such assessment of impact, we argue, cannot be based on the nature of an examination, such as provisioning the RTI Act for academic exams as against competitive exams. Such a distinction merely perpetrates the observation that one type of examination has a higher role against the other in one's academic and professional pursuits.

To that extent and as discussed in the previous section, we disagree with the view taken in *Angesh Kumar* wherein the Court has attempted to create a distinction of the Civil Services Examination as against "*other academic bodies*".[106] Although the Court does not give any reason for such distinction, it may be presumed that the Court accounted for higher stakes, greater public interest and heightened risk of misuse. Such distinction suffers from fallacies — *one*, that the distinction is unclear as there is

[102] Chief Information Commr. v. High Court of Gujarat, (2020) 4 SCC 702 ; ICAI v. Shaunak H. Satya, (2011) 8 SCC 781.
[103] *Id.*
[104] *Id.*
[105] CBSE v. Aditya Bandopadhyay, (2011) 8 SCC 497.
[106] UPSC v. Angesh Kumar, (2018) 4 SCC.

no clarity on what comprises an 'academic body'; and *two*, that higher stakes and greater public interest also necessarily indicate higher stakes for the applicant, thereby furthering the need for transparency in the process.

(B) RTI AND THE SCOPE OF ACCESSIBLE INFORMATION

We must clarify on what comes under the ambit of information that can be sought by an examinee from the examination body. In this regard, we rely on *Aditya Bandhopadhyay,* that there is an existence of the right to know and demand one's evaluated answers, and call for the need for clarity on other material such as examination instructions, model answer keys, etc. That access to evaluated answer scripts ensures that candidates can verify whether their performance has been fairly and accurately assessed, guarding against arbitrariness or error, whereas examination instructions provide clarity on procedural expectations and assessment norms, enabling accountability in the conduct of the examination itself. However, while model answer keys help examinees understand the standards against which they were judged, allowing for scrutiny of the marking criteria, and other relevant material (such as examiner remarks, marking schemes, or moderation records) helps uncover systemic issues or inconsistencies in evaluation, promoting institutional integrity.

We acknowledge that, in addition to access to evaluated answer scripts, examination instructions, and model answer keys, the scope of "*other relevant material*" that may be sought by the applicant can vary depending on the nature of the examination. Hence, we would call for a more nuanced approach that may depend from one examination to another. However, such an approach must be authorised by the statute, or sourced is a disciplined reading of its provisions in light of its object and purpose. The *Angesh Kumar* Court, although trying to recognise this balance, fails to justify it based on the RTI Act's operative text and stated purpose.

(C) SAFEGUARDING ANONYMITY AND HARMONISING RTI TIMELINES

That there is a need for adequate safeguards to protect the anonymity of those involved in the examination process. The Supreme Court, in *Aditya Bandhopadhyay*, however, rightfully noted that disclosures must acknowledge the need to protect the identity of the examiner, question paper-setter,

among other individuals involved, to ensure their physical safety, anonymity and future capacity to serve professional duties.[107] While there may not a fiduciary relationship between the examiner and the examination body, the justification of 'other public interests' must be applied in case of protection of anonymity of the examiners so that they are able to perform their duties without any fear in case of an answer sheet from their assigned lot were to be sought under Section 6(1) the RTI Act.

Furthermore, there is a need to harmonise the timelines for the procedure under the RTI Act and preservation of information and records by the examination bodies. While the Court in *Aditya Bandhopadhyay* is correct in noting that the ambit of the RTI Act does not encompass the right to direct a public authority, i.e. the examination body in this case, to preserve the records for each examination beyond what is prescribed as per its governing by-laws, the Court remains silent on the need to harmonise such conflicting timelines insofar as ensuring that the applicant is able to exercise the tool of RTI meaningfully. In case of CBSE, its bye-laws provide that answer scripts may be preserved for three months after announcement of results.[108] However, in case of an RTI application, the concerned Public Information Officer has 30 days to respond to such a request by either providing the information sought or rejecting the application with sufficient reasons.[109] In such a case, the applicant may prefer first appeal within 30 days from the date the information or decision was received from the Public Information Officer ('PIO'), or from the date the information was due if no response was provided.[110]

A second appeal may be filed within 90 days from the date the first appellate authority's decision was received, or within 90 days after the expiry of 45 days from the filing of the first appeal if no decision has been received.[111] Thus, the timelines under the RTI Act go beyond those provided for preservation of records by the examination bodies, such as CBSE.

[107] CBSE v. Aditya Bandopadhyay, (2011) 8 SCC 497.
[108] Examination Bye-Laws of the Central Board of Secondary Education 1995, bl 62.
[109] Right to Information Act, 2005, § 7, No. 22, Acts of Parliament, 2005 (India).
[110] Right to Information Act, 2005, § 19(1), No. 22, Acts of Parliament, 2005 (India).
[111] Right to Information Act, 2005, § 19(3), No. 22, Acts of Parliament, 2005 (India).

While the Court in *Aditya Bandhopadhyay* notes the overriding feature of the RTI Act over bylaws and rules governing the examination bodies, it fails to clarify that pending final resolution of the records sought by an applicant, the examination body must preserve such records under the ambit of an RTI application. This is to ensure that an applicant is able to exhaust her remedies under the Act effectively.

(D) ADMINISTRATIVE BURDEN AND SYSTEMIC REFORM

Finally, we come to the elephant in the room — the need for optimal use of public resources, the excessive burden posed by voluminous RTI applications on examining authorities, and the corresponding checks against the overextension of the RTI regime. The challenge is not illusory. With the number of candidates appearing for competitive and qualifying examinations increasing annually, examination bodies are under immense pressure to maintain administrative efficiency while ensuring transparency. This growing demand has led to a proportionate rise in RTI requests seeking answer scripts, model keys, and evaluation guidelines, often within a narrow post-result time window. As a result, public authorities, many of which are already resource-constrained, face genuine institutional difficulties in processing a flood of such applications without diverting substantial personnel and logistical resources from their core examination functions.

This practical constraint, however, must not become a reason to whittle down a candidate's constitutionally recognised right to information. Instead, the appropriate way forward lies in a dual approach: "*institutional reform",* and "*procedural streamlining*". First, examining bodies must invest in digitisation and proactive disclosure mechanisms, including online access to evaluated scripts, standardised marking schemes, and anonymised model answers within a reasonable timeframe after result declaration. This would not only reduce the volume of RTI applications but also foster a culture of transparency ex ante. As the first step, every evaluated answer script must be digitised for record-keeping. Second, the examination bodies or relevant rule-making authorities should consider issuing standard operating procedures (SOPs) that guide examination authorities on how to respond to information requests in a timely, structured, and consistent manner, with the aid of technology. Finally, a graded fee structure for non-core information or excessive requests may be envisaged — not as a deterrent, but as a filter to distinguish bona fide from speculative or vexatious applications.

In sum, the burden imposed by RTI applications should not be resolved by restricting the scope of the right itself. Rather, it must be addressed through administrative innovation, targeted investment, and normative clarity. As the jurisprudence rightly reminds us — the right to information is a tool for empowerment, not obstruction; a means for accountability, not inefficiency.

VI. CONCLUSION

This paper has traced the doctrinal and institutional journey of a deceptively simple question: can a candidate see her own evaluated answer script? In answering that, we engaged with the evolution of the right to information — from its constitutional genesis under Article 19(1)(a) to its legislative embodiment in the RTI Act. We analysed *CBSE v. Aditya Bandhopadhyay* as a landmark assertion of this right, and its partial eclipse in *Angesh Kumar*, where administrative difficulty was erroneously elevated to a ground for withholding access.

We argued that transparency in examinations is not just a discretionary courtesy but a fundamental right that secures individual dignity, fosters institutional accountability, and upholds the integrity of the state's meritocratic promise. Through our proposed framework, we addressed the legitimate concerns of administrative overload and examiner anonymity, while reinforcing the need to synchronise record-keeping with the RTI regime, institutionalise proactive disclosures, and move towards a technologically enabled disclosure mechanism. As a limitation, we acknowledge that subsequent to the Supreme Court's decision in *Angesh Kumar*, several High Courts and Information Commissions have adjudicated on the disclosure of answer scripts across various examinations.[112] However, this paper confines itself to the central jurisprudential tension between *Aditya Bandhopadhyay* and *Angesh Kumar*, and does not engage with the post-*Angesh Kumar* developments at the High Court or Commission level. This is because a bulk of the cases following these decisions rely on them, thus making them our central concern.

[112] See Sajal Kanti Biswas v. Tripura Public Service Commission (TPSC), 2024 SCC OnLine Tri 892; Mahesh Kumar v. State (NCT of Delhi), (2021) 2 HCC (Del) 780; K. Ramesh v. Telangana State Public Service Commr., 2023 SCC OnLine TS 180.

But beyond law and logistics lies a deeper moral claim. It is here that Amartya Sen's distinction between *niti* (just institutions) and *nyaya* (realised justice) becomes crucial.[113] The state may design a robust examination system which is objective, standardised, and merit-based on paper. But if the individual is denied her ability to verify and question how she was judged, the system, however well-designed, remains *niti* without *nyaya*. Justice, as Sen reminds us, is not about perfect procedures in the abstract, but about the removal of manifest injustice in experience. A denial of one's evaluated answer script in a high-stakes exam, that can decide careers and futures, is precisely such a manifest injustice. In a democracy that promises equality of opportunity, it cannot be that the state evaluates a citizen in secret, refuses to show her the basis of judgment, and then invokes resource constraints as an excuse. The more consequential an exam is to a citizen's life, the more exacting must be the state's obligation to be transparent and fair. For in the life of a candidate, an answer script is not merely information. It is her effort, her aspiration, and her proof of merit — a testimony of how she was judged by the system. And justice demands that it be seen.

[113] Amartya Sen, *The Idea of Justice* (Penguin Books 2010) ch 1.

ARTICLE

'TIL NOVATION DO US PART?

SAVING THE SEVERABILITY OF ARBITRATION CLAUSES FROM NOVATION

Akshat Agarwal[*]

ABSTRACT

The doctrine of severability is one of the most fundamental principles of arbitration law. Severability allows for the separation of the arbitration clause from the principal contract, such that the arbitration clause is deemed to be a separate agreement altogether. This doctrine ensures that the validity of the arbitration clause is independent of the legal status of the principal contract. Courts have applied this doctrine when the principal contract is repudiated, frustrated, or breached. However, courts have not extended this doctrine in cases where the principal contract is novated. Courts have consistently held that an arbitration clause perishes with the novation of the principal contract. The reasoning generally rests on the observations made by outdated authorities. Arbitration law itself has immensely evolved, and the policy followed by Indian courts has been to promote arbitration rather than to stifle it. The existing literature has largely affirmed this trend. In this piece, I show how this position contradicts the principles of severability. I argue that the doctrine of severability can also be applied when the principal contract is novated. The underlying rationales for the doctrine of severability apply equally well when the contract is novated. I further analyse the implications of holding that the arbitration clause survives the novation of the principal contract. I also consider whether advocating for such a position makes the arbitration clause indestructible. I conclude my arguments by advocating for a reconsideration of the position that an arbitration clause perishes with the novation of the principal contract.

Keywords: Contract, Novation, Arbitration Agreement, Severability

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I. INTRODUCTION

The doctrine of severability is an important principle in promoting the success of arbitration while settling disputes between two parties. This doctrine allows for the separation of an arbitration clause from the underlying contract. Even if the underlying agreement has a contractual defect, parties can submit their dispute to arbitration.[1] In other words, the fate of the underlying contract does not decide the fate of the arbitration clause contained therein.

This special status given to an arbitration clause *vis-à-vis* other clauses of a contract is essential for an effective arbitral process.[2] An arbitration clause is viewed as a separate agreement in itself. This principle has been incorporated in the UNCITRAL Model Law on International Commercial Arbitration ('UNCITRAL Model Law'),[3] and the Arbitration and Conciliation Act, 1996 ('Arbitration Act') has followed suit.[4] Indian courts have applied the doctrine of severability to allow the parties to settle their disputes via arbitration when there is a repudiation, frustration, or breach with respect to the principal contract. In these cases, the performance of the principal contract is affected but the arbitration clause is kept alive for dispute resolution.[5] The position changes, however, when the principal contract has been novated.

Governed by Section 62 of the Indian Contract Act, 1872, novation of a contract means that the original contract is extinguished and completely substituted by a new contract.[6] In the context of contracts with arbitration clauses, this means that the principal contract is substituted by a new contract. While deciding the fate of arbitration clauses in case of novation, courts have held that the arbitration clause perishes with the novation of the principal contract.[7] Courts have reasoned that even though an arbitration clause is distinct from other clauses, it is still an integral part of the principal contract, and has no existence of itself without the principal contract.[8] The Delhi High

[1] STEPHEN M. SCHWEBEL ET AL., INTERNATIONAL ARBITRATION: THREE SALIENT PROBLEMS 1 (2nd ed. Cambridge University Press 2020) [hereinafter "SCHWEBEL"].
[2] *Id.*
[3] United Nations Commission on International Trade Law, UNCITRAL Model Law on International Commercial Arbitration, art. 16, cl. 1, U.N. Doc. A/40/17 (1985) [hereinafter "UNCITRAL Model Law"].
[4] Arbitration and Conciliation Act, 1996, §16(1).
[5] Union of India v. Kishorilal Gupta & Bros., (1959) SCC OnLine SC 6, ¶¶9-10 [hereinafter "Kishorilal"].
[6] Lata Construction & Ors. v. Dr. Rameshchandra Ramniklal Shah & Anr., (2000) 1 SCC 586, ¶10 [hereinafter "Lata Construction"].
[7] M/s Young Achievers v. IMS Learning Resources Pvt. Ltd., (2013) 10 SCC 535, ¶7 [hereinafter "Young Achievers"]; Sanjiv Prakash v. Seema Kukreja & Ors., (2021) 9 SCC 732, ¶10 [hereinafter "Sanjiv Prakash"].
[8] Kishorilal, *supra* note 5, at ¶8.

Court recently reiterated that an arbitration clause in a contract perishes with its novation in the case of *Kashyap v. Mist Avenue* ('Mist Avenue').[9]

On the face of it, connecting the fate of the principal contract with the fate of the arbitration agreement contradicts the doctrine of severability. This piece explores the application of the doctrine of severability when the principal contract is novated. Existing literature supports the courts' position that the arbitration clause perishes when the principal contract has been novated. This is based on the logic that an arbitration clause is a component of the principal contract, and has no independent existence.[10] Authors have also argued that novation implies that the parties mutually acquiesce to supersede the contract along with the arbitration clause. Therefore, the arbitration clause cannot survive a novation.[11]

In this piece, I argue that the doctrine of severability should be applied even when the principal contract is novated. Courts should not conclude that the arbitration clause has perished solely because the principal contract is novated. To establish this, in Part II of this piece, I discuss the theoretical reasons behind applying the doctrine of severability. I argue that these reasons are equally applicable to instances of novation. In Part III, I criticise the reluctance of Indian courts to apply the doctrine of severability when the principal contract is novated. Such a position detracts from the evolution of arbitration law and the policy of promoting arbitration. In Part IV, I discuss how an arbitration clause from a former contract can be applied to disputes arising out of the novated contract. This shows how saving the arbitration clause can give effect to the commercial expectation of the parties to resolve their disputes through arbitration. In Part V, I discuss how an arbitration clause in a previous contract can be extinguished. This is to show that applying severability to cases of novation does not make the arbitration clause indestructible.

[9] B.L. Kashyap & Sons Ltd. v. Mist Avenue Pvt. Ltd., (2023) SCC OnLine Del 3518 [hereinafter "Mist Avenue"]; *See* also Simranjeet, *Arbitration Clause in a contract will perish with its novation: Delhi High Court*, SCC ONLINE BLOG, (June 08, 2023), https://www.scconline.com/blog/post/2023/06/08/arbitration-clause-in-a-contract-will-perish-with-its-novation-delhi-high-court/.

[10] Kunal Kumar, *Impact of Assignment and Novation on Arbitration Agreements*, INDIACORPLAW (February 06, 2018), https://indiacorplaw.in/2018/02/impact-assignment-novation-arbitration-agreements.html.

[11] Sairam Bhat & Lianne D'Souza, *Implications of Novation of Contracts on Arbitration Clauses: A Case Comment on Sanjiv Prakash v. Seema Kukreja & Ors.,* CEERA BLOG (October 28, 2023), https://ceerapub.nls.ac.in/implications-of-novation-of-contracts-on-arbitration-clauses-a-case-comment-on-sanjiv-prakash-v-seema-kukreja-ors/.

II. APPLYING THE THEORY OF SEVERABILITY TO NOVATION

The doctrine of severability is backed by strong theoretical justifications that allow courts to separate the arbitration agreement from the principal contract. This is done to promote the success of arbitration as a dispute settlement mechanism. In this part, I discuss three such theoretical justifications: (a) the intention of the parties to arbitrate; (b) the stand-alone nature of an arbitration clause; and (c) the admitted position principle. I argue that these justifications apply equally when the principal contract is claimed to be novated.

(A) THE INTENTION OF THE PARTIES TO ARBITRATE

This principle states that by incorporating an arbitration clause, parties have intended to adopt an alternate mode of dispute resolution outside the normal civil court remedy. By severing the arbitration clause from the principal contract, the intention of the parties is given effect.[12] Therefore, even if the validity or existence of the principal contract is challenged, the dispute can be settled through arbitration.

However, even when the principal contract is novated, this intention to arbitrate should be given effect. Arbitration law aims to promote the reasonable commercial expectation of parties to resolve their disputes through arbitration if they have mutually chosen this process.[13] In various cases of novation, the new contract did not have any arbitration clause though the original contract had contained an arbitration clause. The novated contract does not even specify a new mode of dispute resolution.[14] It may be argued that by choosing not to incorporate an arbitration clause in the novated contract, the parties have impliedly discarded arbitration as a mode of dispute resolution. However, the parties may not have incorporated a dispute resolution clause through civil courts either. In such a situation, it cannot be presumed that the parties have elected to resolve their dispute by the regular court process. Such presumption runs contrary to the intention of the parties who had agreed in the former contract to resolve their disputes through arbitration.

The objective of arbitration law is to promote arbitration as a dispute settlement mechanism and not stifle it.[15] The intention of the parties to subject their disputes to arbitration can survive the

[12] SCHWEBEL, *supra* note 1, at 3-4.
[13] Jahnavi Sindhu, *Fraud, Corruption, and Bribery - Dissecting the Jurisdictional Tussle between Courts and Arbitral Tribunals,* 3 IND. J. ARB. L. 23, 30 (2014).
[14] *See* Young Achievers, *supra* note 7, at ¶7.
[15] Maa Enterprise v. Union of India (2015) SCC OnLine Cal 10485, ¶3 [hereinafter "Maa Enterprise"].

suggested novation of the original contract, especially if the novated contract itself has no alternate dispute resolution clause. This is because the arbitration agreement can be relevant if the *situs* of the dispute between the parties relates to the original contract. Further, parties may even dispute whether the principal contract was successfully novated in the first place. In such a scenario, the only available dispute resolution mechanism intended by the parties is the arbitration agreement that formed part of the original contract.[16] The position may be different if the novated contract contains an alternative dispute resolution clause. Then the intention of the parties would be clear that they wanted to reject arbitration as a mode of dispute resolution. However, in the absence of an alternate mode of dispute resolution, parties' intention to discard arbitration cannot be presumed. This approach is consistent with the principle that parties to an arbitration agreement, as rational business persons, are likely to have intended to have all their disputes arising out of their commercial relationship to be decided through arbitration, unless the parties explicitly indicate their intention to the contrary.[17]

(B) THE STAND-ALONE NATURE OF AN ARBITRATION CLAUSE

There may be two possible counter-arguments to the presumption of parties' intention to arbitrate when the principal contract has been novated: first, since the arbitration clause is a part of the principal contract, the novation of the principal contract should imply the novation of the arbitration clause as well; second, if the novated contract does not contain an arbitration clause, then it may imply that the parties have rejected arbitration as a mode of dispute settlement. These counter-arguments can be dealt with by understanding the stand-alone nature of arbitration clauses.

An arbitration clause, although incorporated in the principal contract, is an agreement in itself. This position is reflected by domestic and international arbitration statutes alike.[18] In other words, parties assenting to a contract containing an arbitration clause, bind themselves under not one, but two agreements.[19] It follows that, theoretically, there is no distinction between an arbitration clause and a separate arbitration agreement signed by the two parties.[20] Treating the arbitration clause as

[16] Aditya Prasanna Bhattacharya et al., *Indian Golf Union and the Lingering Ghost Common Law Severability in India,* 37 ARB. INT'L. 153, 165 (2021) [hereinafter "Bhattacharya"].
[17] Fiona Trust & Holding Corp. v. Privalov [2007] UKHL 40, ¶13 (Lord Hoffmann) (HL) [hereinafter "Fiona Trust"].
[18] UNCITRAL Model Law, *supra* note 3, at art. 16 cl. 1; Arbitration and Conciliation Act, 1996, §16(1).
[19] SCHWEBEL, *supra* note 1, at 5.
[20] Andrew Rogers & Rachel Launders, *Separability - The Indestructible Arbitration Clause,* 10 ARB. INT'L. 77, 84 (1994).

a separate agreement in itself allows for an effective arbitration process. The arbitration clause, being a separate agreement, is not tainted when there is a dispute with respect to the principal contract.[21]

I argue that the arbitration clause should be treated as a separate agreement even in the case of novation. The argument is premised on the understanding that the arbitration clause between two parties constitutes a mutual promise in itself. Therefore, the parties' agreement to arbitrate constitutes a quid pro quo in itself, which is separate from the underlying principal contract.[22] This can resolve the two possible counter-arguments raised above. Firstly, if there are two agreements, then the novation of one agreement cannot ipso facto imply the novation of the other. Novation requires the extinguishment of the previous contract.[23] In cases where only the principal contract is novated and does not contain an arbitration clause, the arbitration agreement stands as it is. The principal contract may be extinguished but the arbitration agreement is not. Secondly, if the arbitration clause survives as a separate agreement, the intention of the parties to arbitrate can be inferred from that arbitration agreement. Even if the novated principal contract does not contain an arbitration clause, a separate arbitration agreement still exists. The surviving arbitration agreement indicates the intention of the parties to resolve their disputes via arbitration, particularly when the novated contract itself does not contain an alternate dispute resolution clause.

(C) THE ADMITTED POSITION PRINCIPLE

The doctrine of severability also becomes important because a challenge to the principal contract may not be an admitted position between the parties. If the arbitration clause were not considered a separate agreement, then any party could evade the arbitration process by challenging the validity of the principal contract.[24] For instance, a party may allege that the contract is void or frustrated, but this is an allegation and not an admitted position that both parties agree to. Through this principle, the doctrine of severability enables parties to arbitrate independently of the status of their contract.[25]

[21] *Id.* at 77.
[22] *See* GARY B. BORN, INTERNATIONAL ARBITRATION: LAW AND PRACTICE 52-55 (3rd ed. Wolters Kluwer 2021).
[23] Sasan Power Ltd. v. North American Coal Corp. (India) Pvt. Ltd., (2016) 10 SCC 813, ¶71.
[24] SCHWEBEL, *supra* note 1, at 4.
[25] Mulheim Pipecoatings GmbH v. Welspun Fintrade Ltd., 2013 SCC OnLine Bom 1048, ¶27 [hereinafter "Mulheim"].

This principle is also applicable to cases of novation. Parties may enter into a contract containing an arbitration clause and subsequently enter into another contract. Therefore, novation of the former contract may not be an admitted position between the parties and that by itself may be a source of dispute. If this principle were not applied to cases of novation, then any party could claim that the previous contract is novated. This would allow the party to escape their contractual obligation to settle disputes through arbitration.[26] Therefore, the severability of arbitration clauses is important even in cases of novation. Novation of the contract itself may not be an admitted position between the parties.

This Part has explained some theoretical justifications behind the doctrine of severability. These justifications, however, are equally relevant when the principal contract containing the arbitration clause is novated. Part III discusses how Indian courts, contrary to the position advanced in this Part, have refrained from applying the doctrine of severability in cases of novation.

III. SEVERABILITY AND NOVATION: COURTS GO THEIR OWN WAY

Indian courts have been steadfast in upholding the principle of severability when the validity or performance of the principal contract is disputed. This is premised on the understanding that an arbitration clause is collateral to the principal contract. The arbitration clause relates to dispute resolution, and not to the performance of the contractual obligations.[27] They, however, shy away from recognising the severable nature of arbitration clauses when it comes to novation. In this Part, I refer to the two landmark cases in arbitration law: *Heyman v. Darwins,*[28] and its Indian counterpart, *Union of India v. Kishorilal Gupta* ('Kishorilal').[29] I explain how the principles enunciated in these two cases have been routinely applied to the novation of contracts with arbitration clauses, thus resulting in the non-application of severability with regards to the arbitration clauses.

(A) FROM HEYMAN TO KISHORILAL

In *Heyman v. Darwins* ('Heyman'), the House of Lords clarified how an arbitration clause is distinct from other contractual clauses. The arbitration clause sets out a procedure for dispute resolution while the other clauses set out mutual obligations between the parties. Therefore, the arbitration

[26] Bhattacharya, *supra* note 16, at 165.
[27] National Agricultural Coop. Marketing Federation India Ltd. v. Gains Trading Ltd., (2007) 5 SCC 692, ¶6.
[28] Heyman v. Darwins Ltd., [1942] AC 356 (HL) [hereinafter "Heyman"].
[29] Kishorilal, *supra* note 5.

clause can be enforced independent of the status of the principal contract.[30] The principles enunciated in this case form the bedrock of the doctrine of severability.

The House of Lords was amenable to saving the arbitration clause when there was a contractual dispute concerning performance or breach.[31] However, it stopped short of extending the principle of severability where the parties had substituted the principal contract with a new one. The Lords stated that the effect of novation was to treat the contract as if it had never existed. If the contract did not exist, then the arbitration clause contained therein also did not exist.[32] Owing to this logic, the Lords held that a novated contract cannot be submitted to arbitration based on an arbitration clause in the previous contract.

However, even in English jurisprudence, the doctrine of severability has come a long way. The English Arbitration Act, 1996, provides that the doctrine of severability extends even when the principal contract becomes ineffective or does not come into existence.[33] The English courts in *Fiona Trust v. Privalov* ('Fiona Trust') further affirmed the extent of the doctrine of severability as being to protect the commercial expectations of the parties to submit their disputes to arbitration.[34] Particularly in the context of novation of arbitration agreements, the "commercial expectation" line of reasoning in *Fiona Trust* was followed by the English Courts in *Rawlinson & Hunter Trustees SA v. ITG Ltd.* ('Rawlinson & Hunter').[35] In this case, the principal contract, the Loan Agreement, contained an arbitration clause which was novated by a Deed of Novation. Although both the principal contract and the novated contract contained an arbitration clause, the jurisdictional seat in each clause was different. Disputes between the parties arose under the principal contract. Instead of following the *Heyman* reasoning that an arbitration clause perishes with novation, the Court relied on *Fiona Trust* to give recognition to the commercial expectations of the parties. The court held that the arbitration clause within the Loan Agreement was applicable since the dispute arose under the Loan Agreement. The clause in the novated contract was restricted to the novated contract only and could not be extended to the principal contract.[36] Although the Court does not go so far as to say that arbitration clauses survive novation of the principal contract due to the

[30] Heyman, *supra* note 28 (Lord Macmillan).
[31] Heyman, *supra* note 28 (Viscount Simon).
[32] Heyman, *supra* note 28 (Lord Macmillan).
[33] Arbitration Act 1996, c. 23, § 7 (Eng., Wales & N. Ir.).
[34] Fiona Trust, *supra* note 17, at ¶31 (Lord Hope of Craighead).
[35] Rawlinson & Hunter Trustees SA v. ITG Ltd., [2014] EWHC 3764 (Ch).
[36] *Id.* at ¶¶18-26.

doctrine of severability, the case does indicate a departure from the outdated principle of *Heyman,* where the arbitration clause perishes with novation. If the Court were to follow that logic, it could have disregarded the arbitration clause in the Loan Agreement altogether.

Admittedly, while comparative jurisprudence extensively addresses severability in cases of contract termination or invalidity, no foreign court has directly ruled that arbitration clauses survive the novation of the principal contract. However, comparative jurisprudence also indicates that courts prioritise the parties' intention and commercial expectations over an outdated principle that conclusively extinguishes an arbitration clause when the principal contract is novated. In addition to *Rawlinson & Hunter*, the Singapore Appellate Court also gave effect to the intention of the parties to arbitrate while addressing the novation of an arbitration agreement. In *BXH v. BXI*, the parties entered in to a Distributor Agreement, the principal contract, containing an arbitration clause. Through an Assignment and Novation Agreement, the principal contract was extinguished and the rights and obligations stood transferred to BXI. BXI initiated arbitration proceedings over payment disputes, however, BXH disputed the jurisdiction, claiming that the arbitration clause did not stand transferred to the novated contract. The Court held that even the arbitration clause from the principal contract stood transferred to BXI*,* and BXI had a right to arbitrate.[37] Therefore, the Court closely interpreted all the agreements between the parties to infer their intention to arbitrate even after novation instead of jumping to the conclusion that the arbitration clause, and by extension, the intention to arbitrate, stood extinguished due to novation.

However, the Indian Supreme Court chose to follow a line of reasoning similar to that of *Heyman,* in *Kishorilal.* The Court held that the operative force of an arbitration clause depends on the existence of the principal contract. Thus, when a contract is superseded by a new contract, the arbitration clause falls with it.[38] In other words, *Kishorilal* followed in the footsteps of *Heyman* since both cases sealed the fate of an arbitration clause according to the status of the principal contract. This reasoning is flawed insofar as it contradicts the theoretical justifications of severability as was discussed in Part II. Despite this, Indian courts have resonated with the reasoning of *Kishorilal.*

[37] BXH v. BXI, (2020) SGCA 28, ¶¶63-69.
[38] Kishorilal, *supra* note 5, at ¶9.

(B) PARROTING THE PRINCIPLE: "ARBITRATION CLAUSE PERISHES WITH NOVATION"

Courts have consistently held that an arbitration clause perishes with the novation of the principal contract. In *Young Achievers v. IMS Learning* ('Young Achievers'), the Court relied on *Kishorilal* and *Heyman* to hold that when a contract is superseded due to novation, the arbitration clause perishes with it.[39] In *Sanjiv Prakash v. Seema Kukreja ('Sanjiv Prakash')*, the Delhi High Court repeated the Supreme Court's position with respect to the novation of a contract containing an arbitration clause. In this case, the Court further reasoned that an arbitration agreement, being a creation of an agreement, can be destroyed by a subsequent agreement.[40] The Court, however, failed to sever the arbitration agreement from the principal contract. There may be an agreement destroying the principal contract through novation. However, an arbitration agreement is another agreement in itself. The fate of the principal contract should not affect the arbitration agreement. Most recently, in *Mist Avenue*, the Delhi High Court reiterated that an arbitration clause perishes with the novation of the principal contract.[41] The Court also placed its reliance on *Kishorilal*.

Admittedly, in cases after *Kishorilal*, courts may be constrained to follow *Kishorilal* with respect to novation because of its precedential value as it was decided by a three-judge bench. Although *Heyman* and *Kishorilal* are authoritative judgments, they were delivered prior to the UNCITRAL Model Law, and the Arbitration Act, 1996. The position of arbitration law as a mode of dispute resolution has evolved significantly. The ratio of *Kishorilal* is subject to Section 16(1)(b) of the Arbitration Act. The impact of the Arbitration Act on *Kishorilal* was acknowledged by the Supreme Court in *National Insurance v. Boghara Polyfab* ('Boghara Polyfab'). The Court acknowledged that although *Kishorilal* had held that the arbitration agreement perishes if the contract is void, this dictum stands modified in light of Section 16(1)(b), which provides that the void nature of the contract does not *ipso facto* make the arbitration clause invalid.[42] Therefore, a two-judge bench in *Boghara Polyfab* recognised the limited relevance of the *Kishorilal* position on severability due to Section 16(1)(b). However, even with the benefit of the observations in *Boghara Polyfab,* the Supreme Court, in *Young Achievers*, failed to give the doctrine of severability its full due. The Supreme Court parroted its own reasoning given in *Kishorilal* on the question of novation without acknowledging how the nature of severability under the Arbitration Act has expanded beyond

[39] Young Achievers, *supra* note 7, at ¶7.
[40] Sanjiv Prakash, *supra* note 7, at ¶10.
[41] Mist Avenue, *supra* note 9, at ¶24.
[42] National Insurance Co. Ltd. v. Boghara Polyfab Pvt. Ltd., (2009) 1 SCC 267, ¶16.

Kishorilal.[43] This is indicative of how Indian courts have limited the scope of the doctrine of severability when it comes to novation.

For instance, in both *Heyman* and *Kishorilal*, the Courts had held that an arbitration clause also perishes when the principal contract is alleged to be void ab initio. This was based on the logic that the status of the arbitration clause is dependent on the existence of the principal contract. This same line of argument was used in these judgments to refrain from applying severability when the principal contract is novated.[44] With respect to the void nature of the principal contract, this position has been statutorily overturned. The UNCITRAL Model Law and the Arbitration Act allow the tribunal to sever the arbitration clause even if the principal contract is declared void.[45] Therefore, the arbitration law has evolved to save the arbitration clause even when the principal contract is discovered to be legally non-existent from inception. This is in line with the policy of promoting arbitration.[46] Therefore, when the principal contract is discovered to be void since its inception, the arbitration clause is saved by the statute. However, when the contract is novated, courts have held that the arbitration clause falls with the principal contract. This position seems to apply the doctrine of severability inconsistently. This is because the effect of declaring a contract void is similar to novating the contract such that the principal contract is legally put out of existence. Yet, in the former case, the arbitration clause is saved by applying severability, while in the latter, courts deem that the arbitration clause does not survive.

Even if courts deem that an arbitration clause survives the novation of the principal contract, the next question that arises is: What will be the scope of such an arbitration clause? An arbitration clause may be designed so that it governs the rights and liabilities under the original contract. Even if it survives, the words of the arbitration clause may not extend its applicability to the rights and liabilities of the parties arising out of the novated contract. Thus, even if such an arbitration clause is kept alive, it may not be applicable because the disputes with respect to the novated contract may fall outside its scope. This is another line of argument that courts have adopted to avoid saving the arbitration clause from novation.[47] Part IV discusses how the limited scope of an arbitration

[43] *See* Bhattacharya, *supra* note 16, at 154.
[44] Heyman, *supra* note 28 (Lords Macmillan and Porter); Kishorilal, *supra* note 5, at ¶10.
[45] UNCITRAL Model Law, *supra* note 3, at art. 16 cl. 1; Arbitration and Conciliation Act, 1996, §16(1)(b).
[46] N.N. Global Mercantile Pvt. Ltd. v. Indo Unique Flame Ltd., (2021) 4 SCC 379, ¶4.11; *See also* In Re: Interplay between Arbitration Agreements under Arbitration and Conciliation Act, 1996 and Stamp Act, 1899, (2024) 6 SCC 1, ¶¶98-100.
[47] *See* Dadri Cement Company v. Bird & Co. Pvt. Ltd., 1973 SCC OnLine Del 232, at 613.

clause is not a sufficient reason in itself to allow the clause to perish with the novation of the principal contract.

IV. SCOPE OF ARBITRATION CLAUSES POST-NOVATION

Traditionally, arbitration clauses have been framed in such a manner that they pertain to disputes arising out of the principal contract.[48] A standard arbitration clause may look like this: *"all disputes arising out of or in connection with the present contract"*.

While the specific words used may differ, usually the scope of the arbitration clause is restricted to the principal contract.[49] Such arbitration clauses may serve no purpose even if they are saved when the principal contract is novated. Novation implies that the parties have extinguished their previous rights and duties, and have replaced them with a new set of rights and duties. Therefore, the scope of the arbitration clause gets extinguished. The new contract may not fall under its scope given the words of the clause. One may argue that because of this, applying the doctrine of severability to novation serves no purpose. However, I argue that irrespective of the actual phrasing of the arbitration clause, the doctrine of severability should be applied. The arbitration clause does not lose its relevance even when the principal contract is novated. In this regard, I advance two reasons: firstly, courts have adopted a broader approach in interpreting arbitration clauses even beyond the scope of literal words; secondly, even if a literal interpretation is adopted, arbitration clauses can be broadly framed to cover disputes arising out of the novated contract. In other words, the question of the existence of the arbitration clause post-novation is separate from whether the dispute falls within the scope of the surviving arbitration clause.

(A) BROAD INTERPRETATION OF ARBITRATION CLAUSES

On the face of it, the scope of an arbitration clause seems to be limited by the phrasing of such a clause. However, arbitration law has evolved to allow a liberal interpretation of the arbitration clause to widen its scope. This position was adopted by the House of Lords in *Fiona Trust*. The Lords rightly acknowledged the change in policy towards arbitration post-1996.[50] The Lords held

[48] David Horton, *Infinite Arbitration Clauses,* 168 U. PA. L. REV. 633, 639 (2020) [hereinafter "Horton"].
[49] Irene Welser & Susanne Molitoris, T*he Scope of Arbitration Clauses- Or "All Disputes Arising out of or in Connection with this Contract" in* Austrian Yearbook of International Arbitration 17 (Alexandre Petsche et al. eds., Wolters Kluwer 2012) [hereinafter "Welser"].
[50] Fiona Trust, *supra* note 17, at ¶31 (Lord Hope of Craighead).

that the arbitration clause should be given a broad construction to give effect to the intention of the parties to resolve the disputes arising out of their relationship.[51] In the case of novation, while the principal contract is novated, the relationship between the parties subsists. The scope of the arbitration clause can be broadened beyond its words because the relationship between the parties subsists.

The reasoning of the House of Lords in *Fiona Trust,* favouring the broad interpretation of arbitration clauses, was echoed by the Bombay High Court in *Mulheim Pipecoatings v. Welspun Fintrade*.[52] The High Court held that, while interpreting arbitration clauses, the business understanding of the parties to settle their disputes through arbitration should be given a robust meaning.[53] It follows that a restrictive interpretation of the arbitration clause by limiting it only to the principal contract may frustrate the commercial expectations of parties. In *Maa Enterprise v Union of India*, the Calcutta High Court discussed how the arbitration law has moved away from interpreting arbitration clauses in a literal manner. The traditional view of interpretation has been discarded to promote arbitration beyond the words of the contract.[54]

From the above cases, one can conclude that the literal words of an arbitration clause are not a bar to widening the scope of such a clause. Therefore, even in cases of novation, the arbitration clause from the previous contract can be saved to settle disputes arising from the novated contract. This is effective particularly when the novated contract does not specify a dispute resolution mechanism. Courts do not have to constrain the application of the arbitration clause by its literal construction. Thus, a broad interpretation of the arbitration clause can make the doctrine of severability relevant even when the principal contract is novated.

(B) BROADLY WORDED ARBITRATION CLAUSES WITH A WIDE SCOPE

Despite the aforementioned reasons for interpreting an arbitration clause broadly, Indian courts may be inclined towards restricting the arbitration clause to its literal words. In *Gaya Electric Supply v. Bihar,* the Supreme Court held that the disputes covered by an arbitration clause depend on how

[51] Fiona Trust *supra* note 17, at ¶13 (Lord Hoffmann).
[52] *See The Indian Fiona Trust?,* INDIACORPLAW (August 24, 2013), https://indiacorplaw.in/2013/08/the-indian-fiona-trus.html.
[53] Mulheim *supra* note 25, at ¶27.
[54] Maa Enterprise, *supra* note 15, at ¶3.

the clause is constructed.[55] The Court relied on *Heyman* where Lord Viscount stated that an arbitration clause must be constructed according to the language used and the accompanying circumstances.[56] If such a literal construction is adopted, the arbitration clause, even if it survives, may be restricted to the principal contract and not extend to the novated contract.

The standard arbitration clauses indeed include phrases such as "*disputes arising out of or in connection with the present contract*". However, arbitration clauses can also be worded broadly to not be limited to the principal contract. There are strikingly wide arbitration clauses that are phrased as "*any dispute arising between the parties*".[57] Such arbitration clauses can extend to any dispute between the two parties, and are not limited to the principal contract.[58] Therefore, such clauses can be applied to disputes arising out of the novated contract even if a literal construction of words is adopted. For instance, consider the arbitration clause in the principal contract in the case of *Young Achievers*. The relevant portion of the clause was drafted as follows:

> 20. Arbitration— **All disputes and questions** whatsoever which may arise, either **during the substance (sic subsistence**) of **this agreement or afterwards**, between the parties shall be referred to the arbitration of the Managing Director of IMS Learning Resources (P) Ltd. or his nominee and such arbitration shall be in the English language at Mumbai...[59]

The language of the clause, notably the words "*this agreement and afterwards*", indicates that the scope of the arbitration clause is not restricted to the principal contract, namely "*this agreement*". Rather, the scope extends to all disputes that may arise even "*afterwards*", i.e., after the subsistence of the principal contract. If such an arbitration clause is saved by the doctrine of severability, it can be constructed to apply to disputes arising out of the novated contract. When parties to an agreement novate a contract, they extinguish the terms of the former contract. However, this does not imply that they have also extinguished their commercial relationship. The parties have instead chosen to be bound by new terms. Even if Viscount Simon's method of interpreting an arbitration clause

[55] Gaya Electric Supply Co. Ltd. v. State of Bihar, (1953) 1 SCC 211, ¶8.
[56] Heyman, *supra* note 28 (Viscount Simon).
[57] Welser, *supra* note 49, at 25.
[58] Horton, *supra* note 48, at 639.
[59] Young Achievers, *supra* note 7, at ¶5.

through its language is followed, the language of such a wide arbitration clause does not limit its scope to the principal contract. It can be applied to "*any dispute between the parties*".

In any case, merely because disputes arising out of the novated contract may not be covered by an arbitration clause does not justify the non-application of the doctrine of severability to that clause. The scope of an arbitration clause is a separate question from its severability. Courts cannot rule out the possibility that the arbitration clause contained in the principal contract can be broadly constructed to cover disputes arising out of the novated contract. The arbitration clause may also be explicitly worded to cover disputes beyond the principal contract. The doctrine of severability is relevant for upholding the commercial expectations of the parties to resolve their disputes through arbitration. This is particularly important when the novated contract does not contain any mechanism for alternative dispute resolution. To achieve an effective arbitral process, the parties may have no other option but to fall back on the arbitration clause contained in the principal contract.

Therefore, saving the arbitration clause after the principal contract becomes novated may serve the purpose of dispute resolution for the novated contract. If the arbitration clause is saved from the principal contract's novation, then a relevant question is how the parties can extinguish such an arbitration clause. The objective of novation is to extinguish the prior terms and obligations that existed between the parties.[60] If the arbitration clause is saved from the principal contract's novation, then does that make the arbitration clause indestructible? In Part V, I discuss how an arbitration clause can be extinguished even if the clause is severed from the novated principal contract.

V. DESTROYING THE ARBITRATION CLAUSE POST-NOVATION

Parties may indeed wish to change their mode of dispute resolution once they have novated the principal contract. On the face of it, the doctrine of severability may appear as an obstacle if the parties with to change their mode of dispute resolution from the principal contract. This is because severability will keep the arbitration clause of the previous agreement alive. However, the doctrine of severability cannot supersede the parties' intention. Therefore, the arbitration clause cannot remain operative if the parties have expressed their intention to extinguish it.

[60] Lata Construction, *supra* note 6, at ¶10.

As argued in Part II, an arbitration clause is presumed to be a separate agreement altogether. Therefore, if the parties intend to extinguish the arbitration clause, they should agree to directly novate the arbitration agreement and not the principal contract. This corresponds with the position of law in India. Since the arbitration clause is seen as a distinct agreement, the legal status of the clause can be challenged on grounds that relate directly to the arbitration clause and not the principal contract alone.[61] In other words, if an arbitration clause is claimed to be extinguished or inoperative, the grounds for such a claim should be specific to the arbitration clause. A challenge to the principal contract may not necessarily translate into a challenge to the arbitration clause that forms a separate agreement altogether.[62] Based on this, I suggest that an arbitration clause can be destroyed if that clause itself is novated. This is because, by novating or changing the terms of the arbitration clause in the new contract, the parties are directly novating the arbitration agreement itself. Mere novation of the principal contract will not result in the novation of the arbitration clause if the doctrine of severability is applied.

There may be two situations with respect to novation: (a) the parties may only novate the principal contract and leave the arbitration agreement untouched. In such a scenario, the doctrine of severability can be applied to save the arbitration clause from the previous contract. (b) The parties choose to alter the arbitration clause or switch to another mode of dispute resolution in the novated contract. In such a scenario, the arbitration clause contained in the principal contract perishes. This is not because the principal contract is novated but because the arbitration clause or agreement itself is novated. Thus, an arbitration clause can also be extinguished without offending the principles of severability.

The case of *Young Achievers* represents situation (a). In this case, the novated contract did not contain an arbitration clause. It also did not specify any other mode of dispute resolution.[63] The scope of the arbitration clause in the principal contract was very wide, in the sense that it covered disputes arising between parties even after the subsistence of the principal contract.[64] However, the Court followed the principles of *Kishorilal,* and held that the arbitration clause perished with the novation of the principal contract. Had the Court applied the doctrine of severability, the arbitration clause could have been saved. Whether the arbitration clause could be used to settle disputes arising out of the novated contract would depend on how the court would have

[61] Bhattacharya, *supra* note 16, at 156.
[62] Mulheim, *supra* note 25, at ¶46.
[63] Young Achievers, *supra* note 7, at ¶6.
[64] Young Achievers, *supra* note 7, at ¶5.

constructed the scope of the arbitration clause, as argued in Part IV. However, the Court chose not to apply the doctrine of severability at all because the principal contract had been novated. Several cases of novation represent situation (b).[65] For instance, consider the dispute resolution clause in the principal contract (the MoU) in *Sanjiv Prakash*:

> 12. All disputes, questions or differences, etc. arising in connection with this MoU shall be referred to a **single arbitrator in accordance with and subject to the provisions of the Arbitration Act, 1940,** or any other enactment or statutory modification thereof for the time being in force.[66]

Now consider the dispute resolution clause in the novated contract (the shareholders' agreement) in *Sanjiv Prakash*:

> LEGAL DISPUTES
>
> 16.1. In the event of any dispute between the shareholders arising in connection with this agreement (a legal dispute), **they shall use all reasonable endeavours to resolve the matter on an amicable basis.** If any Shareholder serves formal written notice on any other Shareholder that a legal dispute has arisen and the relevant shareholders are unable to resolve the dispute within a period of thirty (30) days from the service of such notice, then **the dispute shall be referred to the Managing Director of the senior management company identified by Reuters** as having responsibility for India (the Reuters Managing Director) and the Chairman of the Company. **No recourse to arbitration under this agreement shall take place unless and until such procedure has been followed.**[67]

In these instances, even if the courts sever the arbitration clause from the principal contract, the arbitration clause from the principal contract would remain inoperative. This is because the clause itself has been novated. Courts, however, have not applied this line of reasoning. Instead, they have continued to repeat the dictum: "*arbitration clause perishes with the novation of the principal contract*". In *Sanjiv Prakash,* the dispute resolution clause in the novated contract does not provide for

[65] *See* Sanjiv Prakash, *supra* note 7; Larsen & Toubro Ltd. v. Mohan Lal Harbans Lal Bhayana, (2015) 2 SCC 461 [hereinafter "Mohan Lal"]; Mist Avenue, *supra* note 9.
[66] Sanjiv Prakash, *supra* note 7, at ¶2.5.
[67] Sanjiv Prakash, *supra* note 7, at ¶16.1.

arbitration as the first mechanism to settle disputes. The Court could have observed that the arbitration agreement in the principal contract itself stood novated by the new arbitration agreement. However, the Court tied the fate of the arbitration clause with the principal contract, and held that novation of the principal contract itself led to the extinguishment of the arbitration clause.[68] Admittedly, in *Larsen & Toubro v. Mohanlal*, the Supreme Court acknowledged that the arbitration clause contained in the former contract could not be applied because the novated contract had a materially different arbitration clause. The Court concluded that the arbitration clause itself had been novated.[69] Thus, the Court appears to suggest that the novation of the arbitration clause itself is the reason for the arbitration clause in the principal contract becoming inoperative. However, the judgment does not go as far as extending the doctrine of severability to instances of novation.

Even in the recent case of *Mist Avenue*, the Delhi High Court held that the arbitration clause was inoperative because it perished with the principal contract's novation. However, the High Court could have reached the same conclusion, had the doctrine of severability been applicable to an arbitration clause when the principal contract is novated. In *Mist Avenue,* the novated contract stated that the parties had submitted themselves to the exclusive jurisdiction of the Delhi High Court.[70] In other words, the parties had explicitly rejected the option of arbitration, thereby novating the arbitration agreement itself. In such a scenario, the doctrine of severability could not have saved the operation of the arbitration clause contained in the former contract.

Thus, the doctrine of severability does not make the arbitration clause indestructible or infinitely inoperative. Severability is intended to give effect to the intention of the parties to arbitrate. If the parties intend otherwise, then severability cannot supersede the parties' intention.[71] Even where the principal contract is novated, the arbitration clause can be severed. If the arbitration clause itself has undergone novation, either the parties have changed the terms of arbitration or switched to another mode of dispute resolution, then it will perish. Therefore, the application of severability to cases of novation does not make the arbitration clause indestructible.

VI. CONCLUSION

[68] Sanjiv Prakash, *supra* note 7, at ¶10.
[69] Mohan Lal, *supra* note 65, at ¶15.
[70] Mist Avenue, *supra* note 9, at ¶5.
[71] Bhattacharya, *supra* note 16, at 157.

The doctrine of severability facilitates the intention of the parties to settle their disputes through arbitration. One of the fundamental principles of severability is that the arbitration clause contained in a contract is presumed to be a separate agreement altogether. In other words, the arbitration clause exists independent of the status of the principal contract. Through this piece, I have demonstrated how courts have taken a contrary position when the principal contract is novated. By parroting the dictum "*arbitration clause perishes with the novation of the principal contract*", courts have failed to sever the arbitration clause from the legal status of its principal contract. I have shown how this trend is inconsistent with the theoretical principles of severability. Further, I have argued how the arbitration clause from the former contract can be used to settle disputes arising out of the novated contract, depending on the scope of such arbitration clause. Application of severability to arbitration clauses after the novation of the principal contract is in line with how arbitration law has evolved. At the same time, severability does not make the arbitration clause indestructible. Parties can materially alter or reject arbitration in the novated contract. Severability ensures that the status of the arbitration clause remains independent of the principal contract. The merits of severability should not be restricted, and the courts should extend severability to cases where the principal contract is novated.

ARTICLE

EQUAL OPPORTUNITY UNDERMINED: THE IMPACT OF THE MADHYA PRADESH HIGH COURT'S AMENDMENT AND THE APEX COURT'S JUDGEMENT ON JUDICIAL APPOINTMENTS

Akshay Pathak & Shivansh Pathak[*]

ABSTRACT

This paper examines the 2023 amendments to the Madhya Pradesh Judicial Service (Recruitment and Conditions of Service) Rules, 1994, which introduced a controversial eligibility criterion for the Junior Division post of Civil Judge. The amendment requires candidates to either achieve a minimum of 70% in all law degree examinations, including undergraduate and postgraduate programs, on their first attempt, or possess three years of legal practice experience. While the amendment was intended to align with the Supreme Court's directives in Second All India Judges' Association v. Union of India, it undermines the spirit of the Court's ruling and the recommendations of the Shetty Commission, which sought to make judicial appointments more equitable and merit-based. Moreover, the paper also looks into the recent Supreme Court judgment mandating the compulsory three-year practice for appearing to the civil judge junior division exam. This paper argues that the new criteria distort the selection process by creating an uneven playing field, potentially violating the fundamental right to equality. The distinction between students scoring above 70% and those below, as well as between those with three years of practice and those with less, could perpetuate discrepancies in merit assessment. Equating high-score students with merit without any uniform criterion of judging different students may ultimately hinder the principle of substantive equality. Moreover, mandating a three-year practice for appearing in the exam without adequate reasons disregards the findings of the Shetty Commission, which emphasised that early-stage legal practice often fails to impart meaningful experience and may, in fact, discourage talented graduates from entering judicial service The paper concludes that the new rules may not only compromise the quality of judicial appointments but also contravene the principles of fairness and equal opportunity enshrined in the Indian Constitution.

Keywords: Lower Judiciary, Madhya Pradesh Judicial Service (Recruitment and Conditions of Service) Rules, 1994, Shetty Commission, Equality, Appointments.

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I. INTRODUCTION

The discussion of appointments to the lower judiciary in India has historically been divisive and has raised issues related to equity, merit, and the effectiveness of the legal recruitment process. The Supreme Court attempted to address these concerns by eliminating the requirement that applicants for lower judicial service must have three years of legal experience, as part of its historic ruling in the Second *All India Judges' Association v. Union of India* case.[2] This decision, based on the Shetty Commission's recommendations, removed the restrictive eligibility requirements of three years of practice. However, the Madhya Pradesh High Court instituted a different set of requirements that, although seemingly compliant with the Supreme Court's order, have caused a great deal of debate.

The High Court of Madhya Pradesh in 2023 brought an amendment to the Madhya Pradesh Judicial Service (Recruitment and Conditions of Service) Rules, 1994,[3] whereby, rule 7(g) was added and a new eligibility requirement was introduced for the Junior Division post of Civil Judge.[4] This requirement was that the candidate must be either an exceptional law graduate with a *"brilliant academic career"* who passed all exams with at least 70 per cent on the first attempt, or a practising advocate for three years.[5] The High Court took this action, ostensibly to successfully implement paragraph 32 of the Supreme Court's ruling in *All India Judges' Association v. Union of India.*[6]

Firstly, the authors here try to demonstrate that the High Court's new eligibility criteria violate the spirit of the Supreme Court's ruling and the recommendations of the Shetty Commission,[7] even though it appears to comply with the court's direction. Through the new amendment, the students are given two options either to achieve at least 70% marks in all semesters of a law degree or to practise for three years to become eligible to take the exam. However, the use of two criteria runs the risk of distorting the selection process and making it difficult to determine which candidates are the most deserving, thereby undermining the true intent of the Supreme Court judgement and the Shetty Commission. The paper will also examine the recent apex court judgement in *All-India*

[2] All India Judges' Association & Ors. v. Union of India & Ors., (2002) 4 SCC 247.
[3] The Madhya Pradesh Judicial Service (Recruitment and Conditions of Service) Rules, 1994, r. 7(g).
[4] *Id.*
[5] *Id.*
[6] All India Judges' Association & Ors. v. Union of India & Ors., (2002) 4 SCC 247.
[7] Justice Jagannatha Shetty, First National Judicial Pay Commission Report, (November, 1999).

Judges Association v. Union of India,[8] which mandated a three-years practice as a compulsory requirement for appearing for the civil judge exam. However, it is important to note that the Court, in its judgment, largely accepted the recommendations of various High Courts without delving deeply into the reasoning behind the necessity of such a criterion or exploring whether less restrictive alternatives could achieve the same objective. In this context, the analysis of the Madhya Pradesh High Court's amendment itself highlights the inherent issues with such a requirement and demonstrates why it may be constitutionally and practically problematic.

Secondly, the authors argue that the provisions of the new amendment run counter to the right to equality enshrined in the Constitution. The amendments make a classification between the students, which, although seemingly designed to recognise academic excellence and merit, when looked at from a holistic perspective, ends up in an uneven and potentially discriminatory selection process. This ultimately undermines the constitutional guarantee of equal opportunity and fair treatment for all candidates.

This paper is divided into three key parts. Part I sets the stage by providing the legal and historical background, including the recommendations of the Shetty Commission and the relevant Supreme Court judgments. Part II critically examines the 2023 amendment to the Madhya Pradesh Judicial Service Rules in light of the Shetty Commission's original intent, highlighting interpretative inconsistencies. Part III evaluates the constitutional validity of the 70% eligibility criterion, with a focus on Article 14 and its implications for substantive equality and meritocracy in judicial appointments.

Although this rule was challenged in the Apex Court through a special leave petition in which the petitioner was asking for a specific relief which did not pertain to the merits of the case, and same was dismissed. This was explicitly observed by the Supreme Court in the order in which no such additional reasons were given by the Court for its validity, leaving the core legal and constitutional questions surrounding the rule unexamined.[9]

[8] All India Judges Assn. v. Union of India, (2025) SCC OnLine SC 1184.
[9] Devansh Kaushik v. State of Madhya Pradesh & Anr., MANU/SCOR/63085/2024; Garima Khare v. High Court of M.P., (2024) SCC OnLine SC 4819

This situation raises significant concerns, especially as it may prompt other state judiciaries to implement similar criteria. Recently, during a judge's meeting, the Kerala High Court resolved to adopt comparable standards for appointing civil judges.[10] A recent press release from the Bar Council of India ('BCI') also mentioned plans to apply to the Supreme Court to introduce similar criteria for judicial examinations.[11] These developments could set a troubling precedent, further entrenching inequities in the judicial recruitment process across the country. Furthermore, the ongoing legal and judicial responses to such eligibility criteria further underscore the contentious nature of these amendments and their potential consequences. On 20th March 2025, the High Court of Himachal Pradesh decided to halt the recruitment process for Civil Judge positions, citing pending writ petitions challenging such eligibility conditions.[12] Similarly, on March 4, the Supreme Court stayed the recruitment process for the Judicial Magistrate of First Class ('JMFC'), Civil Judge-Junior Division in Gujarat, acknowledging the unresolved constitutional and procedural concerns raised in the petition in the Apex Court.[13] These developments highlight the growing judicial scrutiny over such amendments and reflect broader concerns regarding their compliance with constitutional principles.

II. THE SHETTY COMMISSION: A TURNING POINT FOR JUDICIAL REFORMS

The Shetty Commission, officially known as the First National Judicial Pay Commission, was constituted by the Government of India in 1996 under the leadership of Justice K. Jagannatha Shetty, a former judge of the Supreme Court of India. Its primary mandate was to examine and recommend improvements in the service conditions, pay scales, and overall working environment of the subordinate judiciary across India. The Commission's recommendations were intended to

[10] Tellmy Jolly, *Kerala High Court Resolves to Revise Selection Rules for Civil Judge (Junior Division), Minimum Three Years of Practise Needed to Apply*, LIVELAW (July, 20 2024), <https://www.livelaw.in/news-updates/kerala-high-court-amend-selection-rules-civil-judge-junior-division-revises-eligibility-criteria-263963?fromIpLogin=90344.90243096752>.

[11] *Press Release Dated 02.01.2021,* BAR COUNCIL OF INDIA (Jan. 02, 2021), https://images.assettype.com/barandbench/2021-01/95928fda-6777-4e1d-be8d-53b42b08b703/Press_Release_dated_02_01_2021.pdf.

[12] *Press Release, Himachal Pradesh Public Service Commission, Himachal Pradesh Judicial Service (Main) Examination -2024 scheduled to be held w.e.f. 30-03-2025 to 03-04-2025 is hereby put on hold till further direction* (Mar. 20, 2025), https://highcourt.hp.gov.in/pdf/HPJS67bbcf10-5925-4fc3-8d7f-bc3dc8488e45.pdf.

[13] Debby Jain, *Civil Judges' Recruitment: Gujarat & Karnataka HCs Suspend Selection Process To Await Supreme Court Judgment On Minimum Practice Condition*, LIVELAW (March 18, 2025), <https://www.livelaw.in/top-stories/supreme-court-civil-judges-recruitment-process-kept-in-abeyance-to-await-judgement-on-minimum-eligibility-criteria-gujarat-karnataka-286755?fromIpLogin=35289.43463368859>.

address systemic challenges that had long plagued the lower judiciary, including inadequate salaries, lack of infrastructure, and the inability to attract top legal talent.[14]

The establishment of the Shetty Commission came in response to growing concerns about the deteriorating conditions of the subordinate judiciary and its impact on the administration of justice. In particular, the Commission's mandate was driven by the Supreme Court's ruling in the case of *All India Judges' Association v. Union of India,*[15] where the Court emphasised the need for reforms to uplift the working conditions of judicial officers and make judicial services a more attractive career option for the brightest legal minds.

The Shetty Commission's scope extended beyond just pay scales; it delved deeply into the foundational issues of recruitment, training, and career progression for judicial officers. It recognized that the quality of justice delivered by the judiciary was intrinsically tied to the competence and morale of its officers. Therefore, the Commission sought to create a more merit-based, transparent, just, fair and reasonable system for judicial appointments, while also addressing the challenges posed by the existing rigid structures of recruitment and promotion.[16]

One of the Commission's most transformative recommendations concerned the entry requirements for the lower judiciary. The long-standing practice of requiring a minimum of three years of legal experience for candidates seeking to join the judicial service was seen as a barrier to attracting fresh, highly qualified law graduates.[17] The Commission observed that this requirement often discouraged young talent, who, after three years of legal practice, found the judiciary less appealing as a career option compared to other lucrative opportunities.[18] Instead, the Commission proposed that academically brilliant law graduates could be directly recruited and undergo intensive post-selection training, thus eliminating the mandatory practice requirement.[19] The Shetty Commission's proposals were groundbreaking, as they not only sought to improve the material conditions of judicial officers but also aimed to ensure that the judiciary would be staffed by individuals who were both intellectually capable and committed to public service. By advocating

[14] Justice Jagannatha Shetty, First National Judicial Pay Commission report, Preface (November, 1999).
[15] All India Judges' Association & Ors. v. Union of India & Ors., (2002) 4 SCC 247.
[16] *Id.*
[17] Justice Jagannatha Shetty, First National Judicial Pay Commission report, 8.33 (November, 1999).
[18] *Id.*
[19] Justice Jagannatha Shetty, First National Judicial Pay Commission report, 8.35 (November, 1999).

for a modernized approach to judicial recruitment, the Commission laid the groundwork for a more efficient and effective judicial system, one that could deliver justice with greater speed, quality, and integrity.

III. UNVEILING THE SHETTY COMMISSION'S TRUE INTENTIONS ON JUDICIAL APPOINTMENTS

In the case of *All India Judges' Association v. Union of India,*[20] the Supreme Court opined that the eligibility criterion requiring a minimum of three years of practice is no longer "*mandatory*" for applicants seeking to enter the judicial service. However, the High Court of Madhya Pradesh reinstated the three-year rule, by introducing an alternative qualification "*a brilliant law graduate with a brilliant academic career, demonstrated by achieving at least 70% marks in all semesters of a law degree, coupled with a two-year intensive training program,*" and made the three years of practice optional to the same.[21] The High Court views these qualifications as equivalent to the practical knowledge gained through three years of legal practice. According to the High Court, the impugned rules do not make three years of law practice mandatory but provide an optional entry path into the lower judiciary.[22] In essence, these rules are making the three-law practice rule optional, not mandatory, therefore they are in line with the Supreme Court judgement.[23] Nevertheless, it is important to note that the Supreme Court's use of the term "*not mandatory*" aimed to remove the compulsory three-year law practice requirement, thereby enabling fresh law graduates with a brilliant academic career to enter the lower judiciary without facing such a barrier. The Supreme Court's judgment, based on the Shetty Commission's findings, intended to attract top talent to the judicial service by eliminating this restrictive criterion. In reaching this conclusion, the Supreme Court relied on the findings of the Shetty Commission, noting:

> With time, experience has shown that the best talent which is available is not attracted to the Judicial Service. A bright young law graduate, after 3 years of practice, finds the Judicial Service not attractive enough. It has been recommended by the Shetty Commission, after taking into consideration the views expressed before it by various authorities, that the need for an applicant to have been an Advocate for at least 3 years

[20] All India Judges' Assn. (3) v. Union of India, (2002) 4 SCC 247.
[21] Devansh Kaushik v. The State of Madhya Pradesh, 2024 SCC OnLine MP 2272.
[22] *Id.*
[23] *Id.*

> should be done away with. After considering all the circumstances, we accept this recommendation of the Shetty Commission and the argument of the learned Amicus Curiae that it should be no longer mandatory for an applicant desirous of entering the Judicial Service to be an Advocate of at least three years' standing.[24]

From the foregoing paragraph, three things can be inferred; firstly, the intention of the court while using the term not mandatory is to allow fresh law graduates to enter the lower judiciary. Secondly, as evidenced by the final lines of the relevant paragraph, the Supreme Court abolished the mandatory three-year practice rule by fully adopting the Shetty Commission's recommendation without any modifications. Thirdly, the Supreme Court in the case left two important terms without interpretation, namely, a bright young law graduate and mandatory.

Given that the Supreme Court had fully adopted the Shetty Commission's recommendation concerning the three-year practice rule[25], the High Court had adopted the definition of the term, a bright young law graduate from the Shetty Commission, as "*an outstanding law graduate who has a brilliant academic career with training*".[26] And further interpreted the term "*mandatory*", as used in the All-India Judges' case, through the lens of the Shetty Commission's findings and observed:

> The earlier position was that a candidate needed to have practice for three years before he seeks to compete in the exam. A window was created to allow outstanding law graduates with a brilliant academic career to participate in the exam, ostensibly on the ground that a brilliant law graduate with a brilliant academic career who undergoes a two-year intensive training may substitute a three-year experience of an advocate. The intention of the recommendation by the Shetty Commission was probably to the effect that a three-year practice can be equated only with such a law graduate who is an outstanding law graduate and who has a brilliant academic career with training. Therefore, one who does not possess the said requirement would necessarily have to practise for three years to compete in the exam.[27]

[24] All India Judges' Association & Ors. v. Union of India & Ors., (2002) 4 SCC 247.
[25] *Id.*
[26] Devansh Kaushik v. The State of Madhya Pradesh, 2024 SCC OnLine MP 2272.
[27] *Id.*

Hence, as per the High Court, the term "*mandatory*"—as used in the All-India judges' case— means mandatory in the restrictive sense, implying that if the three-year rule is no longer mandatory, it does not contravene the Supreme Court's intention even if it restricts fresh law graduates. In essence, the High Court maintains that the main intention of the Supreme Court while using the term "*not mandatory*" is to just change the mandatory nature of the "*three-year rule*". Consequently, it follows that even if the three-year practice rule remains restrictive for fresh law graduates entering the lower judiciary, it would not contravene the Supreme Court's judgment if it were not mandatory. However, it raises the question: was this truly the Supreme Court's intention?

To support this reasoning, the High Court referred to the recommendations of the Shetty Commission. According to the High Court, the Shetty Commission considered three years of legal practice equivalent to the qualifications of an outstanding law graduate with a brilliant academic career and intensive training.[28] The High Court maintained that these two qualifications are of equal standing and could substitute for one another.[29] Consequently, since the impugned rules make the "three years of practice rule" optional and offer it as a substitute for the qualifications of an outstanding law graduate with a brilliant academic career and training, the High Court argues that this aligns with the intentions of the Shetty Commission's recommendations and does not contravene the Supreme Court's directions.[30] However, this raises another question: was this truly the intention of the Shetty Commission?

If the answer to the above two questions posed by the discussion so far is affirmative, then the Shetty Commission must have equated three years of legal practice with the qualifications of a law graduate possessing an outstanding academic career and training. If this is not the case, then given the Supreme Court's adoption of the Shetty Commission's recommendations concerning the three-year rule without alterations, the High Court's judgment would be inconsistent with these recommendations and thus legally unsound in light of the Supreme Court's ruling.

[28] Devansh Kaushik v. The State of Madhya Pradesh, 2024 SCC OnLine MP 2272.
[29] *Id.*
[30] *Id.*

(A) SHETTY COMMISSION'S INTENTION VERSUS HIGH COURT INTERPRETATION

In light of the above paragraph, to find whether the High Court judgement is consistent with the Supreme Court judgement, it is necessary to determine "*whether the Shetty Commission's recommendations explicitly or implicitly suggest that three years of law practice can be a substitute (alternative eligibility criteria) to a law graduate with a brilliant academic career and training*?"

In this regard, if the Shetty Commission deemed the three-year practice requirement at the bar equivalent to a fresh law graduate, it likely addressed this issue in the chapter titled "*Whether There is Need to Prescribe Three Years Standing in the Bar?*".[31] This is because no other section of the report explicitly or implicitly addresses this specific question. Under the chapter, the Commission, before forming its own opinion, took note of the opinions of various eminent jurists and High Courts across India.[32] The majority of jurists, as noted by the commission, favoured the selection of "brilliant young law graduates with intensive training post-selection" over the requirement of a three-year law practice.[33] While the various High Courts offered distinct perspectives, nearly all concurred that the three-year law practice rule should be abolished and replaced by the recruitment of young graduates with intensive training. As per the Punjab and Haryana High Court, the initial three years of legal practice provide neither experience nor income for lawyers due to a lack of work, rendering the requirement ineffective for improving judicial service efficiency. Instead, it discourages young law graduates from pursuing a career in judicial service by causing frustration from inactivity during this period.[34] The Allahabad High Court had elaborated more on the inefficacy of the three-practice rule. It argued that the addition of a three-year practice requirement would extend the waiting period for advocates to become judges to nine years after completing the 10+2 course, typically finished by age 18 or 19, thereby making them eligible for judicial service only at 28. This prolonged waiting period would likely deter top law graduates, who might seek other career opportunities instead of pursuing judicial service.[35]

The Calcutta High Court offered more incisive reasons, elucidating why the three-year law practice requirement is entirely ineffective. According to the Calcutta High Court, during the initial three

[31] Justice Jagannatha Shetty, First National Judicial Pay Commission report, 8.20 (November, 1999).
[32] Justice Jagannatha Shetty, First National Judicial Pay Commission report, 8.21 (November, 1999).
[33] Justice Jagannatha Shetty, First National Judicial Pay Commission report, 8.21 (November, 1999).
[34] Justice Jagannatha Shetty, First National Judicial Pay Commission report, 8.23 (November, 1999).
[35] Justice Jagannatha Shetty, First National Judicial Pay Commission report, 8.24 (November, 1999).

years, the aspirants do not fully commit to practice, aiming instead for judicial service. In addition to this, three valuable years are lost from their service tenure. The Calcutta High Court was of the view that the three-year practice does not provide a comprehensive understanding of advocacy or judicial functions, as the aspirants often practice narrowly and negligently, gaining neither the skill nor the knowledge of court work and formalities. Moreover, as per the Calcutta High Court, even if the aspirant is somehow able to accumulate sufficient know-how of advocacy or judicial functions, they will not be ready to forgo their established practices to enter judicial service.[36] In light of the foregoing reasons, the Calcutta High Court has expressed the view that a three-year period of law practice is inadequate, proposing that intensive training post-recruitment can compensate for the limited knowledge gained in three years, attracting better talent and lowering the entry age into service.[37]

In the end, considering the views expressed by eminent jurists and honourable high courts, the Commission noted:

> The Commission largely shares these views. They are indeed weighty. It is a common experience that unless a senior takes special interest in his junior during the initial period of three years, there is no scope for acquiring any useful knowledge about case law and Court procedure. If intensive training is given to young and brilliant law graduates, it may be unnecessary to prescribe three years of practice in the Bar as a condition for entering the judicial service. It is not the opinion of any High Court or State Government that induction to service of fresh law graduates with a brilliant academic career would be counterproductive.[38]

In light of above-stated paragraph, it is clear that the Shetty Commission concluded that the three-year practice rule is completely ineffective by adopting the reasoning expressed by jurists and high courts. Further, the Commission preferred the recruitment of fresh law graduates over aspirants who have undergone three years of practice. In reaching this conclusion, the Commission did not equate three years of practice with the qualifications of a brilliant law graduate with intensive training. Instead, it viewed the latter as a more effective way to attract top talent into the judicial

[36] Justice Jagannatha Shetty, First National Judicial Pay Commission report, 8.25 (November, 1999).
[37] *Id.*
[38] Justice Jagannatha Shetty, First National Judicial Pay Commission report, 8.26 (November, 1999).

service. To this end, the extended interpretation "*three years of practice is equivalent to an outstanding law graduate who has a brilliant academic career with training*" falls flat in light of the Shetty Commission's intention not to prescribe three-year law practice as a criterion to recruit Judicial officers.

From the preceding discussion, it becomes evident that the three-year practice rule cannot replace the value of a fresh law graduate with an exemplary academic record. As previously noted, the MP High Court interpreted the intention of the Shetty Commission as equating three years of legal practice with a brilliant academic career supplemented by intensive training. However, a comprehensive analysis of the discussion reveals that the Commission, at no point, equated three years of legal practice with a fresh law graduate with a brilliant academic career accompanied by intensive training. On the contrary, the Commission consistently favoured fresh law graduates with a brilliant academic career and intensive training. Therefore, it follows that the impugned rules cannot bring three-year law practice even as optional eligibility in light of the Shetty commission's intention.

(B) THE SHETTY COMMISSION'S TRUE INTENT V. THE JUDICIAL MISFIRE: EXAMINING THE HIGH COURTS NEW CRITERIA IN LIGHT OF THE COMMISSION'S PURPOSE

It is clear from the above discussion that the Shetty Commission aimed to create a fair, merit-based system for judicial appointments, recommending the removal of the mandatory three-year legal practice requirement and advocating for the direct recruitment of brilliant law graduates. However, the Madhya Pradesh High Court's 2023 amendments reintroduce barriers by setting dual criteria - 70% academic marks or three years of practice. To examine how the High court misinterprets the Commission's recommendations, creating new obstacles rather than aligning with the Commission's vision of equitable judicial recruitment, we must determine answer to the question; "*does the criterion "a fresh law graduate with brilliant academic career as defined in impugned rules as a fresh law graduate with at least 70% marks in all semesters of a law degree" align with intention of the recommendation of Shetty commission?"*

In light of the High Court's interpretation of the impugned rules, a brilliant academic career for a fresh law graduate is defined as achieving at least 70% aggregate marks across all semesters of an undergraduate law degree.[39] As previously mentioned, the MP High Court interpreted the term

[39] Devansh Kaushik v. The State of Madhya Pradesh, 2024 SCC OnLine MP 2272.

"*bright young law graduate,*" as used in the All-India Judges' case, in the context of the Shetty Commission's recommendations to signify a fresh law graduate with a "*brilliant academic career*".[40] Since the Shetty Commission did not explicitly define "*brilliant academic career*," the High Court construed this term according to the impugned rules, concluding that it denotes a fresh law graduate who has attained at least 70% aggregate marks throughout their law degree.[41] Indeed, the Shetty Commission report does not expressly specify what constitutes a "*brilliant academic career*" for fresh law graduates. Nevertheless, the report provides the idea as to who can be a fresh law graduate with a "*brilliant academic career*". The Shetty Commission in its Report has observed thus:

> If it is not out of place to mention, that the students coming out of the Institutes like National Law School of India University, Bangalore are better equipped and more informed than a junior advocate with three years' standing. The students from the National Law School of India University are the favourites for campus selection by multinationals. Every year, multinational companies land at the school campus and select students for the final year by offering them a fat salary of Rs.20,000 to Rs.25,000. The entire purpose of establishing the National Law School of India University is to produce good law graduates to enrich the Indian Bar. That purpose has been practically defeated by insisting upon three years of Bar practice as a precondition for entering the judicial service.[42]

From the Shetty Commission's observation in its report recommending the removal of the three-year law practice requirement as a mandatory eligibility criterion, it can be construed that graduates from the National Law School of India University, Bangalore ('NLSIU'), can be considered as fresh law graduates with a brilliant academic career. While not all, at least some of these graduates may indeed possess the potential to be classified as having a brilliant academic career. Hence, if the impugned rules are in line with the Shetty Commission, the rules must not contradict the intention of the Shetty Commission to induct law graduates from NLSIU into the judiciary. However, contrary to the Shetty commission's intention, the great tragedy is that a gold medallist graduate from NLSIU is not eligible to appear for the Madhya Pradesh Judicial Service Exam.[43]

[40] *Id.*
[41] *Id.*
[42] Justice Jagannatha Shetty, First National Judicial Pay Commission report, 8.33 (November, 1999).
[43] Devansh Kaushik v. The State of Madhya Pradesh, 2024 SCC OnLine MP 2272.

This disqualification stemmed from his score of 66.2% in his five-year law degree. To this end, it is evident that the eligibility criteria for the Madhya Pradesh Judicial Service Exam contradict the Shetty Commission's intention of recognising the potential of graduates from prestigious institutions like the NLSIU. The disqualification of a gold medallist graduate from NLSIU, based solely on his 66.2% score, highlights the inconsistency in the application of these rules, thereby undermining the merit-based assessment and inclusion of academically brilliant candidates in the judiciary.

Moreover, the Shetty Commission Report provided a broad framework without laying down precise criteria, resulting in potential for arbitrary application. While the Commission acknowledged that fresh graduates from premier institutions like the NLSIE, could, by virtue of their academic excellence, be better equipped than practicing advocates with three years' standing, it stopped short of laying down precise and uniform criteria for recognizing such merit. The absence of specific benchmarks created a grey area open to inconsistent application.

This ambiguity was unfortunately exploited in the context of the Madhya Pradesh High Court. Instead of using the Shetty Commission's observations to create an inclusive, merit-driven framework, the Madhya Pradesh High Court endorsed eligibility criteria that further entrenched unfairness. By imposing a rigid and arbitrary cutoff, such as requiring a minimum percentage that even a gold medallist from NLSIU could not meet. The authorities effectively sidelined candidates whom the Shetty Commission had envisioned as assets to the judiciary.

(C) THE SHETTY COMMISSION'S TRUE INTENT V. THE JUDICIAL MISFIRE: EXAMINING THE SUPREME COURT'S LATEST JUDGMENT IN LIGHT OF THE SHETTY COMMISSIONS REPORT

From the discussion above, it becomes apparent that the true intent of the Shetty commission was to abolish the three-year practice in the strictest sense, which was later also endorsed in the Third *All India Judges' Association & Others v. Union of India*[44] judgement. The reason given by the commission was that after three years of practice, the aspirants did not find the lower judiciary lucrative enough to join. However, the reason cited throughout the recent apex court judgement for the reintroduction of the three-year practice was that fresh law graduates, upon their entry into judicial service, begin to show behavioural and temperament problems and do not show enough

[44] All India Judges' Assn. (3) v. Union of India, (2002) 4 SCC 247.

respect towards the bar.[45] The court reasoned that candidates who have no experience at the Bar were not able to handle court proceedings properly. However, it is doubtful whether the mandatory practice at the bar would instil subjective traits as humility and respect in the judges. Moreover, the law commission also twice reasoned that it is unsustainable to assume that a mere few years of practice would adequately prepare someone for the judiciary.[46] A fact recognised by the Shetty commission as well, which also reasoned that instead of mandating a practice requirement, a more suitable approach would be to incorporate a more rigorous training for the candidates with a larger duration.[47] However, despite the recommendations, even today, most of the states continue with a meagre one or two years of training. Instead of strengthening the training programmes for the judges, the apex court, without going into the reasoning mandated the three years of practice.

What needs to be noted is whether the benefits of the three years of practice outweigh the systemic drawbacks it introduces. The question that warrants serious consideration is whether mandating legal practice is truly the least restrictive and most effective means to enhance the efficacy of the judiciary. Furthermore, it is essential to evaluate whether the reinstatement of the three-year practice rule is supported by empirical evidence or merely based on anecdotal assumptions. The blanket generalisation that fresh law graduates lack courtroom discipline or temperament ignores individual capabilities and disregards the broader systemic issues such as inadequate mentorship during early legal practice and the absence of uniform, structured exposure to real legal work. In contrast, a well-designed and intensive judicial training program, rooted in pedagogy, ethics, courtroom procedure, and hands-on experience, would offer a far more equitable and efficient alternative to assess and cultivate judicial competence. By mandating experience over merit and structured learning, the judiciary risks alienating talented female aspirants and those coming from humble backgrounds who can't afford to practise with meagre pay for three years. This reinforces socio-economic barriers, ultimately undermining its own objective of ensuring access to the best and brightest minds in the legal profession.

[45] *Id.*
[46] *Formation of an All India Judicial Service* (Law Com No 116, 1986); *Training of Judicial Officers* (Law Com No 117, 1986).
[47] Justice Jagannatha Shetty, First National Judicial Pay Commission report, (November, 1999).

IV. CHALLENGING MERITOCRACY: A CRITICAL EXAMINATION OF JUDICIAL SERVICE RULES IN LIGHT OF ARTICLE 14

One of the primary contentions raised by the petitioners in the case was that the new rule violates the right to equality enshrined in Article 14 of the Constitution of India, rendering it bad in law. The High Court, without delving into the nuanced repercussions the new rules may have on the candidates, mechanically analysed them and concluded that the classification is between an outstanding law graduate and others, and that this classification helps in fulfilling the objective of selecting the best candidate.[48] The court concluded that because the rules apply uniformly to all candidates and do not deny equal opportunity to the petitioners, they do not violate Article 14 of the Constitution.[49] However, given that the rules affect the fundamental rights of the citizens it is cardinal to analyse the same from a more discerning and holistic perspective.

Article 14 does not mandate that all laws must be general or uniformly applied to everyone.[50] It recognises that not every law can have a universal application because individuals differ from one another in nature and circumstances.[51] Article 14 forbids class legislation but does not prohibit classification or differentiation; however, such classification must be reasonable and have a rational nexus to the purpose of the law.[52] In the case of *State of West Bengal v. Anwar Ali Sarkar*[53], the Supreme Court devised a twin test for reasonable classification. The Court held that for a classification to pass this test, two conditions must be fulfilled: firstly, the classification must be based on an intelligible differentia which distinguishes those grouped from others, and secondly, this differentia must have a rational relation to the object sought to be achieved by the Act.[54] The court noted: *"The differentia which is the basis of the classification and the object of the act are distinct things and what is necessary is that there must be a nexus between them, i.e. the object of the law and the grouping".*[55]

[48] Devansh Kaushik v. The State of Madhya Pradesh, 2024 SCC OnLine MP 2272.
[49] *Id.*
[50] Kedar Nath Bajoria v. State of West Bengal, AIR 1953 SC 404.
[51] Chiranjit Lal Chowdhuri v. The Union of India, (1950) SCC 833.
[52] Ram Krishna Dalmia v. S.R. Tendolkar, (1958) SCC OnLine SC 6.
[53] State of West Bengal v. Anwar Ali Sarkar, (1952) 1 SCC 1.
[54] *Id.*
[55] *Id.*

(A) UNINTELLIGIBLE DIFFERENTIA IN UNIVERSITY MARKING STANDARDS

The expression intelligible differentia means difference capable of being understood, which should be reasonable and not arbitrary.[56] The classification must not be "arbitrary, artificial, or evasive," but must instead be grounded in a tangible and significant distinction that is just and reasonable concerning the legislative objective.[57] Through this rule, a classification is sought to be achieved between the students scoring more than 70 % of marks in their three or five-year law degree and those achieving less than that. Based on these groupings, different options are provided for the students; those scoring above the 70 % criteria can directly appear for the civil judiciary exam, and those below the criteria will have to practise in the court for three years, and only then will they be eligible to appear for the exam. It has repeatedly been held that to determine the reasonableness of classification, the Court must look beyond the ostensible classification and apply the test of 'palpable arbitrariness' in the context of the felt needs of the times.[58] What the Court has to see is whether the classification made is just considering all aspects. The validity of the rule has to be judged by assessing its overall effect.[59] On the surface, the classification may appear reasonable as a means to distinguish between meritorious and non-meritorious students. Yet, upon closer examination and considering its broader impact on students, this classification seems to be primarily based on marks assigned by various universities, where grading and assessment standards often vary widely and are far from uniform. Some universities may be more liberal in marking, and some universities may enforce stricter criteria, resulting in inconsistencies that challenge the fairness and accuracy of such classifications. While the Bar Council of India may prescribe the standard of legal education in universities, it does not prescribe any objective criteria for the evaluation of student performance and marking across these diverse institutions.[60] The classification based solely on a 70% academic threshold fails to account for extenuating circumstances that may affect a student's academic performance.

For instance, students from economically or socially disadvantaged backgrounds, first-generation learners, or those facing personal or health-related hardships may be unable to score above the 70% mark despite being equally capable or even more committed to the legal profession. This,

[56] M.P. JAIN, INDIAN CONSTITUTIONAL Law (Lexis-Nexis Butterworth 2016).
[57] R.K. Garg v. Union of India, AIR 1981 SC 2138.
[58] Ram Krishna Dalmia v. S.R. Tendolkar, (1958) SCC OnLine SC 6.
[59] Md. Usman & Ors v. State Of Andhra Pradesh & Ors, 1971 AIR 1801.
[60] The Bar Council of India Rules of Legal Education, 2008.

combined with the absence of a standardised evaluation system across universities, may result in two students of equal merit being treated unequally, undermining substantive equality, a cornerstone of modern constitutional jurisprudence. As a result, the classification based on university marks lacks a standardised yardstick.

The Supreme Court has noted in the case of *Dinesh Kumar (Dr) v. Motilal Nehru Medical College* that:

> The standard of judging at these different qualifying examinations cannot, by its very nature, be uniform. Some universities may be very liberal in their marking, while others may be strict. There would be no comparable standards based on which the relative merits of the students can be judged. It would be wholly unjust to grant admissions to students by assessing their relative merits with reference to the marks obtained by them, not at the same qualifying examination where the standard of judging would be reasonably uniform but at different qualifying examinations held by different State Governments or universities where the standard of judging would necessarily vary and not be the same. That would indeed be blatantly violative of the concept of equality enshrined in Article 14 of the Constitution.[61]

Further, in the same judgement, the apex court noted, *"unquestionably no admissions can be allowed to be made on the basis of marks obtained at different examinations held by different universities."*[62] Therefore, by using words such as unquestionably, the apex court has made its position very clear that the marks granted by different universities by no means can be used as a standard to judge the merit of the students. Although the judgement concerns admission to the MBBS course, yet, it elucidates clearly that any attempt to judge the merit of students based on examinations held by different universities where the standard of judging is far from uniform may constitute a violation of Article 14 of the Constitution.

The High Court while rejecting the contention of different universities having different standards of checking and markings, opined that this is an assumption without any basis or data to support it.[63] The High Court noted that the grant of marks is professor-centric and not university-centric.[64]

[61] Dinesh Kumar (Dr) v. Motilal Nehru Medical College, (1985) 3 SCC 22.
[62] *Id.*
[63] Devansh Kaushik v. The State of Madhya Pradesh, 2024 SCC OnLine MP 2272.
[64] *Id.*

However, by saying so, the High Court has accepted the possibility of factors other than the merit affecting the marks of the student. The High Court failed to consider that different examining bodies have different standards of marking, different syllabi, etc., and hence, a student who appears for the examination conducted by an examining body which is stringent in granting marks will be discriminated against.[65] Such standards depend on several human factors, the method of teaching, and the examination and evaluation of answer papers.[66] The candidates who obtained very high marks in the examination where evaluation is liberal would have got lesser marks had they appeared for the examination of a university where stricter standards were applied.[67] The result obtained by a student in an examination held by one University cannot be compared with the result obtained by another candidate in an examination of another University.[68] The subjects taught and examined may be the same, but the standard of examination and evaluation may vary, and variations are inevitable.[69] Therefore, attempting to use marks granted by different universities as a standard to judge the merit of students would inevitably lead to unfair discrimination. It is thus clear that the classification sought to be created is not based on reasoned and justified distinction and is hence arbitrary and not an intelligible differentia.

(B) THE ABSENCE OF RATIONAL NEXUS: THE FLAWED RELATIONSHIP BETWEEN ACADEMIC CRITERIA AND JUDICIAL MERIT

Further, the basic objective of the rule, as per the high court, is to select outstanding law graduates with a brilliant academic career for the judicial services.[70] It can be argued that the classification has a rational nexus with the objective of the rule, as the candidate with a percentage above a certain threshold in an exam may indicate merit. However, this is possible only when there is uniformity in the exam in terms of assessment methods, grading scales, and academic rigour. Supreme Court in the case of *St. Stephen's College v. University of Delhi*, averred that *"The merit judging by percentage of marks secured by applicants in different qualifying examinations with different standards may not lead to proper and fair selection"*.[71] Further, in the interest of selecting suitable candidates, it is imperative that a common examination of a certain standard is prescribed; this alone will balance

[65] Minor Nishanth Ramesh v. State of Tamil Nadu, 2006 (2) LW 1.
[66] St. Stephen's College v. University of Delhi, (1992) 1 SCC 558.
[67] Dr. Preethi Srivastava v. State of M.P., 1999 7 SCC 120.
[68] Shri Chander Chinar Bada Akhara Udasin Society v. State of J&K, 1996 (5) SCC 732.
[69] *Id.*
[70] Devansh Kaushik v. The State of Madhya Pradesh, 2024 SCC OnLine MP 2272.
[71] St. Stephen's College v. University of Delhi, (1992) 1 SCC 558.

the competing equities of having competent students.[72] A less meritorious student appearing in the examination held by a university where the standard of evaluation is liberal would secure a march over a more meritorious student who appears in the examination where the standard of marking is strict.[73] Therefore, in the absence of a common yardstick to judge the merit of a candidate, selection based solely on certain marks does not reliably translate into the selection of the most meritorious candidate.

The High Court observed that the direction of the Hon'ble Supreme Court in the All-India Judges' case is to allow "brilliant law graduates with a brilliant academic career" to compete.[74] Notably, the apex court in the All-India Judges' case reflected upon the analysis and accepted the recommendations of the Shetty Commission. What a "*brilliant law graduate with a brilliant academic career*" means has neither been defined in the Shetty Commission report nor by the apex court. The high court interpreted this to mean a candidate who has achieved an aggregate of 70% marks or higher. It is pertinent to note one peculiar observation that the Shetty Commission report made that the students coming out of the Institute like National Law School of India University (NLSIU) Bangalore are better equipped and more informed than a junior advocate with three years of standing.[75] The report subsequently observed that *"The entire purpose of establishing the National Law School of India University is to produce good law graduates for enriching the Indian Bar. That purpose has been practically defeated by insisting upon three years of Bar practice as a pre-condition for entering the judicial service".*[76] A surprising fact in the Madhya Pradesh High Court case is that one of the petitioners, Mr Devansh Kaushik, a gold medallist graduate from NLSIU, was barred from taking the Madhya Pradesh Judicial Service Exam. This disqualification stemmed from his score of 66.2% in his five-year law degree.[77] This raises a crucial question: is the objective of selecting the most meritorious candidate for the judiciary and consequently enhancing the quality of justice for the litigants being fulfilled? When a gold medallist of the prestigious NLSIU is not meritorious enough as per the rule, it calls into question whether the criteria truly reflect the intent to select the most capable candidates for the judiciary. The validity of the rule has to be judged by assessing its overall effect.[78] The question is, judging the new rules and their consequences overall, does it align with the intended objective

[72] Dr. Preethi Srivastava v. State of M.P., 1999 (7) SCC 120.
[73] Dinesh Kumar (Dr) v. Motilal Nehru Medical College, (1985) 3 SCC.
[74] Devansh Kaushik v. The State of Madhya Pradesh, 2024 SCC OnLine MP 2272.
[75] Justice Jagannatha Shetty, First National Judicial Pay Commission report, 8.20 (November, 1999).
[76] *Id.*
[77] Dinesh Kumar (Dr) v. Motilal Nehru Medical College, (1985) 3 SCC.
[78] Md. Usman & Ors v. State Of Andhra Pradesh & Ors, 1971 AIR 1801.

of promoting meritocracy and enhancing judicial excellence, as envisioned by both the Supreme Court's directives and the Shetty Commission's recommendations? The provisions of the rule warrant scrutiny, to say the least.

Moreover, according to the Madhya Pradesh High Court, the objective articulated by the apex court in the All-India Judges' Association case[79] was to ensure the quality of judgments delivered by judges, contingent upon their merit. Consequently, the marks according to the high court become a deciding factor in deciding the merit. In simple terms, the basic objective is to select the most meritorious and bright law graduate for the services. It is pertinent to note that the apex court in the same judgement averred that,

> With the passage of time, experience has shown that the best talent which is available is not attracted to the judicial service. A bright young law graduate, after 3 years of practice, finds the judicial service not attractive enough. It has been recommended by the Shetty Commission, after taking into consideration the views expressed before it by various authorities, that the need for an applicant to have been an advocate for at least 3 years should be done away with.[80]

Therefore, the alternative provided for securing the 70% marks, i.e. to practise for three years, does not fit squarely with the objective of promoting meritocracy and enhancing judicial excellence, to say the least. While the objective of selecting meritorious candidates is crucial, the current rules and the classification in it do not seem to be based on an intelligible differentia that has a rational nexus to the objective sought to be achieved. Therefore, the authors believe that the current rules, as given by the high court, are arbitrary and violative of Article 14 of the Constitution.

V. CONCLUSION & SUGGESTIONS

The Madhya Pradesh High Court's amendment to the Judicial Service Rules, while ostensibly aligning with the Supreme Court's directives, ultimately undermines the spirit of the Supreme Court's ruling and the recommendations of the Shetty Commission. By introducing a dual eligibility criterion that requires either a minimum 70% aggregate score in law exams or three years

[79] All India Judges' Association & Ors. v. Union of India & Ors., (2002) 4 SCC 247.
[80] *Id.*

of legal practice, the amendment creates an uneven playing field and distorts the selection process. The High Court's interpretation of a "bright young law graduate" as a candidate with a brilliant academic career, defined by the impugned rules as achieving at least 70% marks in all semesters, is inconsistent with the Shetty Commission's intention. The Commission favoured the recruitment of fresh law graduates from prestigious institutions over the three-year practice requirement. However, the disqualification of a gold medallist from NLSIU highlights the flaws in the High Court's application of these rules. Moreover, the Shetty Commission's findings do not support the High Court's argument that three years of practice can be equated with a brilliant academic career and intensive training. The Commission consistently viewed fresh law graduates with brilliant academic records and training as superior to those with three years of practice.

Until a uniform criterion for evaluating judicial candidates is established across the state, imposing a specific numerical threshold for eligibility remains unjustified. Instead of mandating a practice requirement, judicial training should be enhanced with a more rigorous and extended induction program tailored to equip newly inducted judges with the necessary skills. Unfortunately, reforms in judicial training have been largely overlooked.

A report by the Vidhi Centre for Legal Policy highlights that many State Judicial Academies lack the faculty to provide structured training for new judges.[81] Moreover, with 79% of advocates with less than two years of experience, earning less than Rs. 10,000 per month,[82] requiring three years of legal practice places an undue financial burden on aspirants, discouraging them from pursuing a judicial career. Even those willing to practice may gain little substantive experience, as they are likely to focus on exam preparation rather than courtroom learning. Such a requirement risks deterring talented candidates from judicial service, ultimately weakening the quality of the judiciary. Therefore, such a restrictive criterion for entry into judicial services shall not be imposed. Instead, the focus should be on enhancing judicial training programs and improving the quality of judicial service examinations to ensure the selection of meritorious candidates with strong analytical and legal reasoning skills. A critical aspect of the controversy lies in the violation of Article 14 of the Constitution. The High Court concluded that the new rules do not deny equal opportunity, as they apply uniformly to all candidates. However, this mechanical analysis fails to account for the

[81] *Schooling the Judges: The Selection and Training of Civil Judges and Judicial Magistrates,* VIDHI CENTRE FOR LEGAL POLICY (2019), https://vidhilegalpolicy.in/wp-content/uploads/2019/12/JudicialAcademies.pdf.
[82] *Id.*

nuanced implications of the classification between outstanding law graduates and others. The arbitrary nature of relying on marks from various universities, which often have differing grading standards, raises significant concerns about fairness and meritocracy. The Supreme Court has previously emphasised that admissions or selections based on varying standards across different institutions violate the principle of equality enshrined in Article 14. Furthermore, the amendment's reliance on a 70% threshold does not necessarily correlate with a candidate's ability to perform effectively in the judiciary. The Supreme Court's earlier findings indicated that the best talent is often deterred from judicial service due to restrictive criteria, suggesting that the current rules may perpetuate barriers rather than promote meritocracy. In conclusion, the Madhya Pradesh High Court's amendment, while attempting to comply with the Supreme Court's directives, ultimately fails to uphold the principles of fairness, equal opportunity, and merit-based selection that were central to the Court's ruling and the Shetty Commission's recommendations. The provisions of the rule warrant careful scrutiny, as the new criteria risk perpetuating discrepancies in merit assessment and could hinder the judiciary's goal of attracting the highest calibre candidates. This, in turn, may set a dangerous precedent, encouraging other states to adopt similar criteria for judicial appointments.

ARTICLE

BEYOND THE BARS: ANALYSING THE PARADIGM FOR REPRODUCTIVE JUSTICE IN INDIA

Tanvi Agarwal & Khushi Saraf *

ABSTRACT

It is well established in law that parenthood and reproductive rights fall squarely under Article 21 of the Indian Constitution as they form a fundamental aspect of human dignity and bodily autonomy. The extension of this right to prisoners has, however, been a matter of debate in the legal and human rights circles. This has also been reflected in several cases where the Courts granted procreation rights to prisoners. However, the developing Indian jurisprudence on procreation rights of prisoners involves complex social, ethical and legal considerations. The State's security interests, coupled with the rights of unborn children, provide a strong case against granting procreation rights to prisoners. In that light, this paper aims to contribute to a deeper understanding of the challenges and opportunities surrounding reproductive rights in prisons. It traces the evolving legal jurisprudence in India and identifies gaps in the existing legal and policy framework. Through a nuanced analysis, it advocates for progressive reforms such as conjugal visits and liberalised parole rules. The paper advocates for the introduction of legislative amendments to include provisions for the right to procreation, complemented by policy changes to develop a new parole system. This dual approach would help cure the existing legislative lacunae, so as to balance the rights of prisoners with penological objectives and ensure fair treatment while also upholding societal values, human ethics and dignity.

Keywords: Procreation, Reproductive Rights, Parole, Female Prisoners' Rights

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I. INTRODUCTION

Procreation and the idea of bearing children go to the very roots of human existence as it offers the continuity of familial legacy. It serves as the basis for human evolution, the very foundation of the family unit, and by extension, society itself in India.[1] Parenthood and reproductive rights form a fundamental aspect of human dignity and bodily autonomy.[2] It is inclusive of, but not limited to, the right to procreate and the right to raise children in a healthy and supportive environment. These are internationally recognized under treaties such as the Universal Declaration of Human Rights ('UDHR'),[3] International Covenant on Civil and Political Rights ('ICCPR'),[4] Convention on the Elimination of All Forms of Discrimination Against Women ('CEDAW'),[5] and International Covenant on Economic, Social and Cultural Rights ('ICESCR').[6] Despite being a signatory to these treaties, India has largely overlooked reproductive rights in its penal system by choosing not to explicitly deliberate or legislate on the issue of reproductive rights of prisoners. While the issue has gained significant traction in the recent past,[7] there is a need for an advanced debate on the socio-legal complexities, consideration of the policy framework and involvement of the major stakeholders. There is an emerging need to devise radical remedies in accordance with constitutional ideals and plug the lacunae in the penal system.

In this light, the present paper seeks to contribute to a more robust understanding of the challenges and opportunities surrounding the reproductive rights discourse. We argue that prisoners' reproductive justice is rooted in Article 21 of the Constitution, and it must be facilitated through legislative amendments and penal policy reforms. Rather than seeking blanket rights or restrictions, the paper advocates for tailored, individualised decisions based on proportionality, prisoner conduct, nature of crime, etc. To that end, Part II of the paper delves into the ethical and legal dilemmas of the present issue, and how the same have potentially affected the legal discourse. Part III provides a backdrop to the developing legal jurisprudence in India on the procreation rights of

[1] Tanvi Kapoor, *Rethinking Motherhood: A Feminist Exploration of Social Construction of Motherhood in India,* 1(4) IJPSL (2021).
[2] Nand Lal v. State of Rajasthan, 2022 SCC OnLine Raj 678 [hereinafter "Nand Lal"].
[3] G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948), art. 3.
[4] International Covenant on Civil and Political Rights (adopted Dec. 16, 1966 UNGA Res 2200A (XXI) (ICCPR) art. 2, 3, 6(5), 7, 10, 23(1)-(2), 26.
[5] Convention on the Elimination of All Forms of Discrimination against Women, (adopted on Dec. 18, 1979 UNGA Res 34/180 (CEDAW) art 10(h), 12(1), 14(2)(b), 16(e).
[6] International Covenant on Economic, Social and Cultural Rights (adopted on Dec. 16, 1966 UNGA Res 2200A (XXI) (ICESCR) art. 12.
[7] Jasvir Singh v. State of Punjab, (2015) Cri. L.J. 2282 [hereinafter "Jasvir Singh"].

prisoners so as to acknowledge the arguments of all stakeholders. Part IV analyses the rights of the prisoners vis-à-vis other stakeholders who have a vested interest in granting such rights to prisoners. Part V discusses the solutions to the persisting problem by analysing the system of conjugal visits and parole through the lens of both policy and legislation. Part VI offers concluding remarks.

II. THE CONUNDRUM OF REPRODUCTIVE RIGHTS: ETHICAL AND LEGAL PERSPECTIVES

The tussle between procreation and incarceration requires a deep analysis, evaluating both legal and ethical arguments. This section of the paper tries to unravel these considerations, acknowledging the various arguments.

(A) ANALYSING THE ETHICAL CONSIDERATION OF THE DEBATE

The primary reason for stripping off the parenthood rights of prisoners is based on the common perception that prisoners cannot expect the same set of freedoms to be given to them as given to a law-abiding citizen.[8] The right to procreate is seen to be inconsistent with the prisoner's status.[9] The proponents of this argument believe in putting prisoners on a lower pedestal by subjecting them to increasingly harsh and inhumane conditions.[10] If a convict is put on the same pedestal as a non-convict, the entire concept of prisons as a tool for punishment becomes questionable. This is in alignment with the principle of "*just deserts*" or the retributive theory of punishment. Retribution emanates from the idea that "*criminal behaviour constitutes a violation of the moral or natural order and having offended the order, requires payment of some kind*".[11] Thus, these theorists believe that incarceration and the subsequent deprivation of rights is a tool of moral condemnation. Retributivists believe that a defendant must only be punished to the extent necessary as to restore the balance of nature.[12] The situation is particularly pricky when it comes to death row convicts who wish to preserve their genetic line despite the heinous crimes they have committed. For instance, a situation arose in the United States of America where a death row convict sought

[8] A Convict Prisoner in the Central Prison v. State of Kerala, 1993 Cri LJ 3242.
[9] Richard Guidice Jr., *Procreation and The Prisoner: Does The Right to Procreate Survive Incarceration and Do Legitimate Penological Interests Justify Restrictions on The Exercise of the Right*, 29(6) FORDHAM URB. L. J. 2277 (2002) [hereinafter "Guidice"].
[10] *Id.*
[11] David A. Starkweather, *The Retributive Theory of "Just Deserts" and Victim Participation in Plea Bargaining*, 67 IND. L.J. 855 (1992).
[12] *Id.*

permission to give birth to a child after killing his last two children.[13] Here it was argued that allowing prisoners to procreate is morally repugnant and goes against the very ideals of a prison institution. Scholars have deemed the loss of procreation rights as a "*natural consequence of imprisonment*".[14] They hold that providing prisoners with reproductive rights is not in tandem with the punitive nature of prisons, and thus, they should naturally be deprived of such rights.

On the other hand, the supporters believe that the reproductive rights of prisoners overlap with their possible future reintegration into society, as prisons are increasingly being seen as reformatory institutions.[15] This rehabilitative theory of punishment views prisons as not merely retributive, but transformative and integrationist.[16] This theory rests on the idea that a prisoner's crime is not innate, but stems from societal conditions within their particular community. From this perspective, prisons ought to be viewed as reformatory structures like hospitals where offenders receive the necessary care, giving them the chance to better themselves and, upon their release, the ability to contribute to societal development.[17] Establishing conjugal relations would help create a normalising effect, reducing the probability of violence and criminal behaviour within and outside prison settings.[18] The supporters of this thought view giving birth to children as a tool for fostering a sense of responsibility and familial ties.[19] It reinforces responsibility, self-worth, and relational bonds, thereby promoting social reintegration. Along the same line, there exists the utilitarian theory which focuses on the good of the community and maximisation of social welfare.[20] Thus, from a utilitarian standpoint, if granting reproductive rights reduces prison violence, promotes psychological well-being, or lowers recidivism rates, then the policy is justified, even if the individual committed a serious crime. The traces of these theories can also be found in judicial decisions such as *Sunil Batra v. Delhi Administration*, where the Supreme Court had observed that the cardinal goal of the institution of prison is based on correctional principles to bring about a

[13] Rachel Michael Kirkley, *Prisoners and Procreation: What Happened Between Goodwin Prisoners and Procreation: What Happened Between Goodwin and Gerber?,* 30(1) PEPPERDINE L. REV. 93 (2002) [herenafter "Kirkley"].
[14] Helen Codd, *Policing Procreation: Prisoners, Artificial Insemination and the Law*, 2(1) GENOM. SOC. POL. 110 (2006).
[15] P. K. Pandey*, Prisoners' Right to Procreate and Conjugal Visits in India: A Critical Analysis*, 12(1) THE LEGAL ANALYST 10 (2022).
[16] Namita Wahi, *A Study of Rehabilitative Penology as Alternative Theory of Punishment*, 14 NAT'L L. SCH. INDIA REV. 95 (2002).
[17] *Id.*
[18] Stewart J. D'Alessio et al., *The Effect of Conjugal Visitation on Sexual Violence in Prison*, 38(1) AM. J. CRIM. JUST. (2012).
[19] Prarthana Sen, *Conjugal Visits a Right Step in Jail Reforms*, DECCAN HERALD (Jan. 26, 2023), https://www.deccanherald.com/opinion/conjugal-visits-a-right-step-in-jail-reforms-1184666.html#:~:text=A%20conjugal%20visit%20is%20one,tradition%2C%20custom%2C%20and%20religion.
[20] Dhruv Sanjeev Purkar, *Application of Utilitarianism Theory of Punishment in Rarest of Rare Crimes*, 4 IND. J. INTEGRATED RES. L. 640 (2022).

change in the conscience of the inmates, and any deviance from these goals would just be counter-productive and irrational.[21] These reformatory and rehabilitative goals have been consistently upheld by the Indian judiciary in several different contexts for they lie at the heart of the institution of prison.[22] These reformatory goals do not reduce prisoners to a lower pedestal or strip them of their rights, but rather seek to slowly reintegrate them into society as equals.[23] Prisoners ought not to be scared primarily on the basis of the crimes committed by them. Hence, importing the same to grant reproductive rights is in line with the correctional goals of prisons.

(B) EXPLORING THE LEGAL DIMENSION

The right to life and liberty under Article 21 has been given a narrow meaning by the utilitarian and retributive theorists. Rights under Article 21 are not absolute, and they can be taken away in accordance with the procedure established by law.[24] Hence, in the larger interest of the state and to protect the rights of the victims, it may be prudent to have a restriction on the exercise of the reproductive rights conferred on prisoners by Article 21. The victims and their families affected by heinous crimes, such as murder or rape or large-scale economic crimes, have an interest in keeping the prisoners away from enjoying equal rights, given the pain they have endured. Additionally, Courts have held that prisoners who invite incarceration by their actions cannot expect the same set of freedoms as a free citizen.[25] It is reasoned on the ground that prisoners are not equal to other citizens and thereby, certain rights of prisoners can be curtailed. Moreover, since fundamental rights such as the right to cohabitation are restricted due to conviction, many other aspects of marriage, for instance, sexual intercourse and the rearing of children, are also taken over by imprisonment.[26] Incidentally, the right to procreate also falls under the ambit of these unavailable rights.[27]

However, this narrow interpretation of the right to life and liberty has been consistently rejected by the judiciary, especially since *Maneka Gandhi v. Union of India*, where the Supreme Court recognised the value of human dignity as an inseparable facet of one's personality.[28] This right to

[21] Sunil Batra v. Delhi Administration, (1978) 4 SCC 494 (28).
[22] Kharak Singh v. The State of U. P. & Ors., 1963 AIR 1295; Francis Coralie Mullin v. The Administrator, Union Territory of Delhi, (1981) 1 SCC 608.
[23] *Id.*
[24] INDIA CONST. art. 21; Bachan Singh v. State of Punjab, AIR 1980 SC 898.
[25] A Convict Prisoner in the Central Prison v. State of Kerala, (1993) Cri LJ 3242 (2).
[26] Upneet Lalli, *Enlarging Scope of Prisoner's Right to Visitation: A Critique of Right to Procreation*, 1(2) CJHRP 176 (2018).
[27] Guidice, *supra* note 9.
[28] Maneka Gandhi v. Union of India, (1978) 1 SCC 248 [28].

human dignity is available to all, including prisoners and under-trial convicts.[29] These rights, though curtailed to a certain extent, are not static.[30] While prisoners may be deprived of certain rights, such as the right to move freely across the country or the right to practice a profession, these are surrendered for the safety of the state and to maintain the rule of law. However, certain rights enshrined under Article 21 form the very basis of human existence and must be available to all, irrespective of the status of their conviction.

In *State of A.P. v. Challa Ramkrishna Reddy*,[31] the Court reiterated that prisoners do not lose their status as human beings due to the mere fact that they have been convicted. To that end, in a 2019 case before the Madras High Court, the Court held that when a convict visits his spouse in the hospital, their meeting should not be monitored and the privacy of the convict and his spouse should be respected.[32] Courts have also upheld prisoners' right to marry. In *Regina Begum v. The State*,[33] the Court relied on Article 16(1) of UDHR and Article 23(2) ICCPR to hold that the right to marriage is a human right, and the same must be granted to prisoners. Ergo, given the expansive definition given to Article 21 and the rights of prisoners, as understood from the decisional practices of the Courts, we argue that Article 21 should be inclusive of the right to beget children and make safe reproductive choices. In fact, *Kundan Singh v. State Govt. of NCT Delhi* ('Kundan Singh') has recognised that right to life includes the right to create life,[34] and that reproductive autonomy lies at the very heart of a dignified human life. Prisoners should not be denied their right to procreate by the mere reason of conviction.

To test the permissibility of reproductive rights on the touchstone of the constitution, one must refer to the proportionality test given by the Apex Court in *K.S. Puttaswamy v. Union of India* ('Puttaswamy').[35] The four prongs of the test require one to prove that the measure taken to restrict a fundamental right, first, has a legitimate goal, second, is a suitable means to reach that goal, third, creates the least amount of restriction possible on the fundamental right, and fourth, does not disproportionately impact the right holder.[36] Herein, the goal is punitive punishment, maintaining

[29] Francis Coralie Mullin v. The Administrator, Union Territory of Delhi, (1981) 1 SCC 608.
[30] Charles Sobraj v. Superintendent, Central Jail, Tihar, (1978) 4 SCC 104.
[31] State of A.P. v. Challa Ramkrishna Reddy & Ors., (2000) 5 SCC 712.
[32] Rahmath Nisha v. The Additional Director General of Prisoner & Ors., AIROnline 2019 Mad 244.
[33] Regina Begum v. The State, 2025 SCC OnLine Mad 101.
[34] Kundan Singh v. The State Govt. of NCT Delhi, (2023) SCC OnLine Del 8364 [hereinafter "Kundan Singh"].
[35] KS Puttaswamy v. Union of India, (2017) 10 SCC 1 (248) [hereinafter "Puttaswamy"].
[36] *Id.*

order and discipline in the prison setting, and mitigating the administrative risks, costs, and ensuring justice is served to the victims. However, if prisoners were to be deprived of their reproductive rights, their personal dignity and autonomy would be disproportionately impacted. Moreover, technological development allows for IVF medically supervised procedures to be adopted, or a case-to-case permission without a complete denial. As far back as early 2000s, prisoners across the jurisdictions have been allowed to reproduce from prisoners on a case-to-case basis through artificial insemination.[37] In Israel, Yigal Amir, the assassin of former Israeli Prime Minister, was allowed to procreate by artificial means, and public abhorrence, moral outrage or heinousness of the crime was not considered to be a valid excuse for depriving his human dignity, identity and autonomy.[38] On a similar footing, in the European Court of Human Rights' case of *Dickson v. UK*, the Court found that the system of proving "*exceptional circumstances*" to avail artificial insemination was held to be disproportionate, for it was the only way to reproduce, and it placed an undue burden on prisoners.[39] Though it was a country-specific remark, the Court noted that the burden on the state and the security concerns were minimal.[40] Thus, decisional practices across jurisdictions show that a blanket restriction may be disproportionate, excessive, and may not be the least restrictive means to achieve the penological goals. It impinges on bodily autonomy and individual liberty, causing grave and irreversible harm. Blanket bans fail to account for individual circumstances, such as the prisoner's sentence length, security risk, or rehabilitation potential.

Further, violations of Article 21 in protecting a prisoner's right to human dignity attracts violation of Article 14, which enshrines the right to equality and equal protection of the law.[41] Both Article 14 and Article 21 are fundamental rights that are available to both prisoners and freemen.[42] Article 14 violation is assessed on a two-pronged test — intelligible differentia and rational nexus.[43] Intelligible differentia requires that a clear distinction be made between two groups of people, while rational nexus ensures that this classification has a reasonable connection with the purpose

[37] Sigrid Vertommen, *Babies from Behind Bars: Stratified Assisted Reproduction in Palestine/Israel*, in *Assisted Reproduction Across Borders* (Merete Lie & Nina Lykke eds., 1st ed. 2016); Heidi Nicholl, *Rabin's Killer Given Go-Ahead to Father Child* (June 18, 2006), https://www.progress.org.uk/rabins-killer-given-go-ahead-to-father-child/.
[38] Dobrin v. Israel Prison Service, HCJ 2245/06.
[39] Dickson v. United Kingdom, App. No. 44362/04, Eur. Ct. H.R. (Grand Chamber) (Dec. 4, 2007).
[40] *Id.*
[41] V. Nivedha & Dr. Neelampandey, *Problems of women prisoners and the role of the judiciary in protecting the rights of the prisoners*, 3(4) INT'L. J. SOC. IMPACT 13 (2018).
[42] T.V.Vatheeswaran v. State of Tamil Nadu, (1983) 2 SCC 68 [hereinafter "Vatheeswaran"].
[43] State of West Bengal v. Anwar Ali Sarkar, 1952

that is sought to be achieved by the law.[44] Denial of procreation due to incarceration fails to satisfy the rational nexus test for no penological goal is served by denying the right to procreate. Denial of reproductive rights is not logically connected to the length of the sentence since the purpose of incarceration is to merely deprive physical liberty, and not complete deprivation of personhood. For instance, in cases of low-risk prisoners or prisoners who have shown good conduct consistently, no rational nexus exists when prisoners are denied procreation right. Another facet that requires due consideration is that women or old age prisoners whose biological clocks are ticking may face asymmetric impact for their reproductive possibility may be irreversibly extinguished. Thus, an outright blanket denial of this right may amount to discriminatory classification to prisoners who are differently situated and may completely ignore these contextual vulnerabilities.

Additionally, the reproductive rights of prisoners also emanate from the right to privacy. The right to privacy is inclusive of the right of an individual to be free from illegitimate state intrusion in personal decisions of procreation, contraception and family relations.[45] *Puttaswamy* also explored this dimension of reproductive rights, holding them to be integrated with the individual's right to privacy, dignity and bodily integrity.[46] Childbearing and child raising are very intimate aspects of one's life, and the intervention of the state goes against the constitutional ideals enshrined under Article 21. The state intervention should only be restricted to creating a conducive situation for the prisoners to fulfil their wishes of begetting children and must not go to the extent of making a decision or influencing the decisions of prisoners to procreate.

The complex ethical and legal dimension of reproductive rights is not only deeply intertwined with human dignity but also with broader social implications and the evolving nature of penal institutions. This interplay warrants a need to trace the judicial perspective of how reproductive rights have developed in India in the past decade.

[44] State of Kerala & Anr. v. N. M. Thomas & Ors., 1976 AIR 490.
[45] Lauren Kuhlik, *Pregnancy Behind Bars: The Constitutional Argument for Reproductive Healthcare Access in Prison*, 52 HARV. C. R.-C.L.L. REV. 501 (2017).
[46] Puttaswamy, *supra* note 35; Suchita Srivastava v. Chandigarh Administration, (2009) 9 SCC 1 (22).

III. EVOLUTION OF THE REPRODUCTIVE RIGHTS OF PRISONERS

The discourse on prisoners' rights has undergone a significant change due to the changing perception of prisons as something beyond a tool of punishment. While the Courts have refused to meddle with the jurisdiction of the prison authorities.[47] They have, at the same time, acknowledged and responded to situations where prison officials unconstitutionally infringed upon the rights of prisoners.[48] The Supreme Court has time and again upheld the importance of the rights of prisoners beyond the four walls of the prison,[49] and has acknowledged the connotation of 'liberty' as something more than physical liberty.[50] Evidently, the judiciary has actively developed mechanisms to defend prisoners' rights by interpreting constitutional provisions liberally in their favour which guarantees everyone the right to life and personal liberty. For instance, many High Courts have granted parole to prisoners as they have a right to marry a partner of their choice.[51]

In the last decade, the question of reproductive rights has come up before the Courts in several cases. Courts have recognised that having children is essential for the preservation of one's lineage, a principle that finds resonance in Indian philosophical traditions and cultural norms..[52] Starting in 2012, a PIL was filed before the Andhra Pradesh High Court in the case of *Ms. G. Bhargavi v. State of Andhra Pradesh* ('G. Bhargavi'), where the petitioner sought conjugal visits to their spouse in prison.[53] The Petitioner argued that denying conjugal visits, particularly during prime reproductive years, infringes upon both the prisoner's and their spouse's procreative rights, potentially leading to psychological distress and marital discord. The State opposed the plea, citing concerns related to resource constraints, prison security, and administrative disruption, and contended that existing parole and furlough provisions sufficiently protect familial ties. While the Court refrained from granting relief, emphasising the issue as a matter of policy, it acknowledged the need to balance state interests with the reproductive rights of prisoners, and urged reconsideration of the Prison Rules. It was held that conjugal visits fall within the ambit of policy considerations, and thus warrants limited judicial intervention.

[47] Ms. G. Bhargavi, President M/s Gareeb Guide (Voluntary Organisation) v. State of Andhra Pradesh, 2012 SCC OnLine AP 635 [hereinafter "G. Bhargavi"].
[48] State of A.P. v. Challa Ramkrishna Reddy & Ors., (2000) 5 SCC 712.
[49] Vatheeswaran, *supra* note 42.
[50] Kharak Singh v. The State of U. P. & Ors, (1963) AIR SC 1295 (28).
[51] Cecilia Fernandes v. Inspector General, Prisons, Panaji, Goa, 2017 SCC OnLine Bom 46.
[52] Nand Lal, *supra* note 2.
[53] G. Bhargavi, *supra* note 47.

Two years later, Punjab and Haryana High Court saw a similar petition in the landmark case of *Jasvir Singh v. State of Punjab* ('Jasvir Singh'), where the husband, a death row inmate, and the wife, a life imprisonment convict, sought to enforce their right to procreate, and were even open to artificial insemination.[54] The Court referred to *G. Bhargavi*, but refused to adopt its ratio completely. The Court took a proactive approach stating that even though the duty of facilitating conjugal visits is vested with the executive, the Courts must retain a supervisory role as prisons as an extension of the justice delivery system.[55] Thus, the treatment of its inmates cannot be left solely to executive discretion.[56] The Courts are duty bound to safeguard prisoners' rights, irrespective of financial constraints borne by the State.[57] Herein, the Court explicitly recognised that the right to procreation survives incarceration as ensconced in Article 21 read with the UDHR.[58] The Court also recommended certain factors - gravity of the offence, likelihood of absconding, good behaviour, duration of sentence etc., - to be taken into account while allowing the right to reproduction to a prisoner.

In *Meharaj v. State* ('Meharaj'), before the Madras High Court, a life convict was allowed leave to assist his wife as she was undergoing artificial insemination, which was held to be an "*extraordinary*" situation.[59] The Court interpreted Rule 20 of the Tamil Nadu Suspension of Sentence Rules, 1982 ("*any other extraordinary reason*") to include procreation and invoked Article 21 to protect the couple's rights. Though the judgement did not refer to any of the above cases, it recognised the importance of conjugal relations in a prisoner's life to maintain relationship between prisoner and his family, to reduce recidivism and to incentivize them for good behaviour.[60] The Madras HC based its reasoning in reformative justice and internationally recognised principles under ICCPR.

Recently, the Delhi High Court was called upon to decide a similar case in *Kundan Singh*, where the Court decided that even if the state prison rules do not allow for the granting of parole on the ground of procreation, nothing bars the Courts to go beyond the black letters of the law.[61] It decided in favour of procreation as a fundamental right under Article 21 as the prisoner was of an

[54] Jasvir Singh, *supra* note 7.
[55] *Id.* at ¶ 89.
[56] *Id.*
[57] *Id.*
[58] *Id.* at ¶ 95.
[59] Meharaj v. The State represented by its Secretary to Government of Tamil Nadu, (2022) SCC OnLine Mad 381 (24).
[60] *Id.* at ¶ 17.
[61] Kundan Singh, *supra* note 34, at ¶ 20.

advanced age, and any more delay might have resulted in biological infertility. The Court also held that this right is not available in those cases where the convict already has a child or is not of advanced age. Additionally, such relief was only meant for procreation and not for fulfilling conjugal relations or any other duties.

The slew of the judgements highlights how prisoners' reproductive rights is increasingly being viewed as a human right that deserves due recognition. The Courts have markedly shown a more proactive approach instead of a passive approach moving forward from *Jasvir Singh*. The hitherto inconsistent standard seen in *G. Bhargavi*, has been implicitly dismissed as observed in *Jasvir Singh*, *Meharaj* and *Kundan Singh*. The recognition of international human rights standards has further strengthened the normative basis for reproductive rights. However, the *Kundan Singh* judgement has again sparked the debate of incarceration versus procreation,[62] inviting the need to weigh the rights and interests of various stakeholders affected in the process.

IV. BALANCING INTERESTS: STAKEHOLDERS IN PROCREATION RIGHTS DEBATE

Prisoners' right to procreation should not be viewed in isolation for it has opened a pandora's box concerning the rights and interests of others involved in the discussion. This Part discusses the various nuances while assessing the prisoners' rights as there may be overlapping interests of other stakeholders. This Part considers the State and its penological objectives, the unborn children, and conjugal rights of spouses of prisoners, who have a vested interest in the present issue. This Part also suggests how the rights and interests could be balanced.

(A) HARMONISING 'PENOLOGICAL OBJECTIVES' WITH PRISONERS' INTERESTS

As there is no inherent conflict between the right to procreate and incarceration,[63] the states should allow the establishment of facilities to exercise that right while behind bars, albeit subject to reasonable restrictions, social order, and security concerns. Along a similar line, Justice Surya Kant, in *Jasvir Singh*, discussed the need to subject prisoners' right to procreate to the penological interests

[62] N Venkatesh Kamath, *Do prisoners have a fundamental right to procreate?,* THE LEAFLET (Jan. 08, 2024), https://theleaflet.in/do-prisoners-have-a-fundamental-right-to-procreate/#:~:text=Other%20high%20courts%20on%20prisoners'%20right%20to%20procreate&text=positively%20observed%20that%20Article%2021,the%20procedures%20established%20by%20law.

[63] Jasvir Singh, *supra* note 7, ¶ 95.

of the State.[64] To quote Justice Suryakant, "…*Such a right, however, is to be regulated as per the policy established by the State which may deny the same to a class or category of convicts as the aforesaid right is not an absolute right and is subject to the penological interests of the State*".[65]

The penological interests of the State generally include institutional security, rehabilitation of prisoners, and deterrence of crime.[66] Prison administrators generally argue that the restrictions on prisoners' rights are in furtherance of the government's interests of rehabilitation, order, and security.[67] Prison officials across jurisdictions believe that allowing procreational facilities in prisons would be a significant drain on resources or create serious security risks.[68] May consider the following: Concerns have been raised about the logistical challenges posed by assisted reproductive technology procedures in prison settings, including the risk of misuse or breaches of protocol, such as sending semen specimens to outsiders.[69] This would, in turn, impose an additional burden on the already understaffed prison officials, for they would have to be extra cautious in carrying out searches.[70]

Importantly, the financial brunt of these procreational activities is generally borne by the state in the form of creating infrastructures for allowing private conjugal visits, additional medical staff, and further nurturing children of the female convicts when they give birth so as to ensure hygiene and further future development of the child.[71] Herein, scholars believe that taxpayers should not take up the burden of financing the procreational activities of prisoners.[72] Furthermore, this financial assistance would likely to reduce the availability of other programs and facilities offered to all prisoners to balance the funds. Therefore, upholding the rights of a certain class of prisoners may be detrimental to the overall welfare of all prisoners.[73]

[64] Jasvir Singh, *supra* note 7.
[65] Jasvir Singh, *supra* note 7, ¶ 95.
[66] Sarah L. Dunn, *The "Art" of Procreation: Why Assisted Reproduction Technology Allows for the Preservation of Female Prisoners' Right to Procreate*, 70(6) FORDHAM L. REV 2573 (2002) [hereinafter "Dunn"].
[67] *Id.*
[68] Jaime Escuder, *Prisoner Parents: An Argument for Extending the Right to Procreate to Incarcerated Men and Women,* 2002(1) UNI. CHICAGO LEGAL FORUM 271 (2002) [hereinafter "Escuder"].
[69] *Id.*
[70] Anamika Singh & Anupal Dasgupta, *Prisoners' Conjugal Visitation Rights in India: Changing Perspectives*, 4(2) CHRIST UNI. L. J. 73, 87 (2021) [hereinafter "Anamika Singh"].
[71] Kirkley, *supra* note 13.
[72] Anamika Singh, *supra* note 70.
[73] Kirkley, *supra* note 13.

Like most other rights for prisoners, the implementation of the right to procreate is also mired with hurdles owing to the lack of resources. To that end, courts have, in the context of medical facilities held that it is the duty of prison authorities to provide for medical care to prisoners despite the lack of facilities available. In *Qayamuddin v. State of U.P.*,[74] a prisoner was denied crucial medical facility due to lack of available personnels. Inadequate health care facilities have been consistently rejected as an excuse to deny prisoners right to timely treatment.[75] These catenae of judgements have recognised that state resources and administrative challenges cannot be the sole reason for denying fundamental rights to prisoners. While a blanket denial of such rights remains questionable, they can be assessed on a case-by-case basis. Thus, there is a need to look at prisoners' right to procreate from the lens of the penological objectives of the State.

(B) RIGHTS OF THE UNBORN CHILD VERSUS RIGHTS OF THE PRISONER

Article 39(f) of the Indian Constitution places an obligation on the State to ensure that children are given opportunities and facilities to develop in a healthy manner.[76] When extended to incarcerated individuals, the pursuit of procreation rights raises ethical and policy dilemmas, especially in balancing these rights with the welfare of the potential child.

The problem of childbirth in prisons is of grave concern, as most facilities provide substandard and potentially dangerous prenatal care.[77] Such situations pose a threat not only to the child but also to mothers, for they develop the risk of vaginal infections or may even haemorrhage.[78] Furthermore, given the poor state of hygiene in prisons, inadequate medical care, and insufficient nutritional support, mothers are highly likely to develop diseases or infections and pass them on to their children.[79] This lack of prenatal and postnatal care received by children impacts their brain development and causes stunted physical growth.[80] This has been highlighted in the landmark judgement of *R. D. Upadhyay v. State of Andhra Pradesh* ('R.D. Upadhyay'), where the Court also

[74] Qayamuddin v. State of U.P., 2024: AHC: 182237.
[75] R. Ramalingam v. The Principal Secretary to Government & Others, W.P. (MD) No. 2024 of 2025.
[76] INDIA CONST. art. 39(f).
[77] Stuti Shah, *2024 India Prison Nursery Report,* CHILDREN OF INCARCERATED CAREGIVERS (2024), https://cicmn.org/wp-content/uploads/2024/05/India-Report-Finalized-Version.docx.pdf; Crystal M. Hayes et al., *Reproductive Justice Disrupted: Mass Incarceration as a Driver of Reproductive Oppression*, 140 AM. J. PUB. HEALTH (2020).
[78] *Id.*
[79] Kirkley, *supra* note 13.
[80] Tata Institute of Social Sciences, *Children of Women Prisoners: The Invisible Trial*, PRAYAS (2018) [hereinafter "Tata Institute of Social Sciences"].

acknowledged how the prison environment is not congenial to the upbringing of children.[81] *R.D. Upadhyaya* has identified the dearth of nutritious food, educational facilities, crowded environment, poor experience of a family life, display of violence and aggression as a common sight etc. as persistent problems with the prison system.[82] Moreover, the ability of prisoners to appropriately raise children and effectively parent them is also doubtful in such cases, posing serious ethical concerns.

Multiple studies have documented the social stigma and emotional distress experienced by children of incarcerated parents.[83] Society' perception of their parents' incarceration often translates into discrimination, isolation, and low self-esteem for these children who are deemed to be criminal by the virtue of being born to one. Studies have also shown how children are also given an equal burden of punishment, socially and morally, as is given to their parents.[84]

The issue of the "*single parent epidemic*" also crops up wherein children are deprived of the love of one parent at a very tender age.[85] The problem is all the more exacerbated when both the parents are prisoners, and the child is given up to the relatives of the inmates or child welfare institutions.[86] A study by Tata Institute of Social Sciences has reported how children are left with mental scars as these institutions may profoundly impact a child's social and emotional growth in the early years of their lives as their development is entirely dependent on the staff of these institutions.[87] Thus, the stigma of having incarcerated parents, dubious caregiving environment, an unstable family environment, and irregular contact with parents may cause significant psychological and social issues.[88] Studies show how these children develop anti-social behaviour by default, inevitably throwing them into the deep ditches of crime.[89]

[81] R. D. Upadhyay v. State of Andhra Pradesh & Ors, (2006) AIR 2006 SC 1946 [20] [hereinafter "R.D. Upadhyay"].
[82] *Id.*, at 15; Tata Institute of Social Sciences, *supra* note 80.
[83] Kirkley, *supra* note 13, at 121.
[84] West Bengal Correctional Home, Integrated Developmental Support Programme to Prisoners' Children Living Back Home in Community for Mainstreaming and Reintegration (2006) [hereinafter "West Bengal Correctional Home"].
[85] Guidice, *supra* note 9, at 2322.
[86] *Id.*
[87] Tata Institute of Social Sciences, *supra* note 80.
[88] Tata Institute of Social Sciences, *supra* note 80.
[89] West Bengal Correctional Home, *supra* note 84.

The best interests of children should be a consideration that needs to be factored in the process of allowing prisoners the right to procreate. Herein, it is important to note that the aim of the Paper is to argue for procreation rights for the prisoners and suggest remedies to overcome the existing hurdles in the process. For the purposes of this paper, the authors only discuss the interests of the children during the prenatal care period and the postnatal stage falls outside the scope of the paper.

(C) ADDRESSING SPOUSES' RIGHT TO PROCREATE

Imprisonment of family members not only affects the individual emotionally, but also their family members as a collateral damage. More pertinently, the spouses of the incarcerated may suffer from sexual frustration, coupled with the inability to procreate. The question of innocent spouses' right to procreate has recently dawned upon the judiciary,[90] where it has been argued that spouses of prisoners should not be deprived of their right to procreate owing to the incarceration of their husbands or wives. Given that the prisoner's spouse is innocent and her sexual and emotional needs tied to marital life are affected, the prisoner should be granted a cohabitation period with his spouse to safeguard these needs. Rajasthan High Court, in *Nand Lal v. State*, emphasised the procreation rights of spouses and held that a woman should not be left to suffer without her husband, and then subsequently without a child despite there being no fault of her own.[91] This judgement is reflective of the growing recognition of State's responsibility to balance punitive measures with the rights and dignity of innocent individuals affected by incarceration.

Denial of procreation rights to innocent spouses is not only a violation of human dignity and liberty under Article 21 but also a right to equality violation under Article 14, where spouses are denied their rights, which are available to others.[92] Moreover, it would help in instilling a familial bond and help prisoners and their spouses alleviate emotional stress after staying years apart owing to incarceration. It would also positively impact the psychological and emotional well-being of the spouses and act as a source of hope and company due to the prolonged imprisonment of their counterparts.

[90] Nand Lal, *supra* note 2.
[91] Nand Lal, *supra* note 2.
[92] Anamika Singh, *supra* note 70.

V. WHERE THERE IS RIGHT, THERE IS REMEDY

While it is settled in law that reproductive rights are constitutionally recognised, the issue that lies in the path now is to identify the different means available to remedy the situation. Further, an assessment of its viability is essential and which shall be done from first, a policy perspective. Further, the most compatible means to ensure reproductive rights within the current administrative and infrastructural system would require additional support from the legislation to ensure a more uniform application of the right across Indian states. Therefore, the second sub-section deals with the rights from a legislative perspective.

(A) A POLICY PERSPECTIVE

Here, we shall explore two means of guaranteeing the reproductive rights to prisoners namely, conjugal visits and parole in light of the policies developed surrounding the same in India.

1. Conjugal Visits

Worldwide, countries like Russia, Canada, Germany, Spain amongst others are gradually but steadily embracing the idea on the widely accepted grounds that conjugal visits play a significant role in maintaining family ties, reducing recidivism and combatting the problem of sexually transmitted diseases.[93] Unfortunately, the current penological framework in India only allows very short visits, lasting for a mere twenty minutes in a noisy, crowded room.[94] Interestingly, the British had also implemented a *mulaaqat* system in the colonial era.[95] The system of *pakki* and *kacchi mulaaqat* was such that the former allowed prisoners to meet their families and spouses one-on-one in isolation.[96] Along a similar line, open prisons like those created in the states of Rajasthan and Maharashtra make space for convicts to reside with their families, allowing for recreational space.[97] However, to use these open prisons for the purposes of procreation would require it to

[93] *What is The Status of Conjugal Rights for Prisoners in India?*. THE INDIAN EXPRESS (Jan. 25, 2018), https://indianexpress.com/article/what-is/what-is-the-state-of-conjugal-rights-for-indian-inmates-5038969/.
[94] *Id.*
[95] Manish Chandra Pandey, *Convicts need? Pukki Mulaqat*, HINDUSTAN TIMES (April 27, 2006), https://www.hindustantimes.com/india/convicts-need-pukki-mulaqat/story-wnbP3GlfDTsIyWlezAlwDO.html [hereinafter "Manish Chandra Pandey"].
[96] Upneet Lalli, *Prison Bars & The Right to Procreation*, THE TRIBUNE (March 12, 2015), https://www.tribuneindia.com/news/archive/comment/prison-bars-the-right-to-procreation-52299.
[97] Shirin Jaiswal, *A Prison Without Bars or Walls: Are Open Prisons the Correctional and Reformatory Facilities India Needs?*, CITIZENS FOR JUSTICE AND PEACE (Jan. 21 2021), https://cjp.org.in/a-prison-without-bars-or-walls/.

be equipped with additional facilities like creating a private room for the convict and their spouse. Punjab is the first state in India to make way for this by setting up rooms with a bed and attached washroom to provide privacy to the couple to consummate their relationship.[98] This facility is provided to only those prisoners who satisfy conditions like having good behaviour and being convicted for less serious offences.[99]

This model of "*open prison*" when assessed in isolation to the policy of "*who*" will be the beneficiaries of the same seems like an ideal model for policymakers to further work on. However, there are inherent barriers present in the Indian prison system that would hinder a country-wide implementation of the conjugal visit system. There would be administrative and financial barriers that would create hindrances for the prisoners to avail these facilities.[100] In *Jasvir Singh's* case, the Court remarked on issues present in the jails, like overcrowding, which have not been adequately dealt with.[101] This situation of overcrowding, coupled with understaffing in Indian prisons, would hinder the manner in which the basic rules are adhered to.[102] For example, the Model Prisoners Act, 2023 prescribes conducting a search of visitors entering the premises to meet the prisoners in accordance with state rules.[103] Once the provision regarding conjugal visits is added, it would require conducting extensive search of these visitors who will be interacting with the prisoners in closer proximity than ever. It would exacerbate the effective implementation of this rule with existing situation of understaffing and overcrowding in prisons. This would hamper the penological interest of the state in ensuring security thereby disturbing the balancing of interests of the stakeholders involved. The conjugal visit system has security concerns associated with it. To ensure effective implementation of this system, these concerns need to be mitigated. Few ways in which the administration can deal with the same would be to put in place a battery of security measures like scanning through metal detectors, sniffing via dogs, frisking and having a prior schedule system to keep a track of the spouses entering the prison amongst others.[104] On the

[98] Geeta Pandey & Arvind Chhabra, *Punjab: Hundreds Enjoy New Conjugal Visit Rooms in India Jails*, BBC (Oct. 21, 2022), https://www.bbc.com/news/world-asia-india-63327632.
[99] Press Trust of India, *Punjab prisons become first to allow conjugal visits for low-risk inmates*, BUSINESS STANDARD (Sept. 20, 2022), https://www.business-standard.com/article/current-affairs/punjab-prisons-become-first-to-allow-conjugal-visits-for-low-risk-inmates-122092000477_1.html.
[100] Anamika Singh, *supra* note 70.
[101] Jasvir Singh, *supra* note 7, at ¶ 38.
[102] Anamika Singh, *supra* note 70.
[103] The Model Prisons and Correctional Services Act, 2023, §37.
[104] Joe Hiller, What it takes to hold your love: Prison visitation and rights to intimacy in Colombia, KINGS' COLLEGE LONDON (July 25, 2023), https://www.kcl.ac.uk/what-it-takes-to-hold-your-love-prison-visitation-and-rights-to-intimacy-in-colombia.

financial front, the innocent taxpayer would have to face the brunt of financing these facilities for the prisoners.[105] Additionally, the poor state of infrastructural facilities would further hinder the implementation of conjugal visits as it would place an additional burden on prison authorities to create private spaces in an already cramped prison environment. For similar reasons, the *mulaaqat* system was ultimately abolished in colonial India as well.[106] Keeping these factors in mind, while the long-term goal would be addressing these hurdles, in the present implementing the conjugal visiting scheme seems an arduous task.

2. Parole

Given the infeasibility of conjugal visits, parole emerges as a more viable option for procreation due to several practical and logistical advantages. The provisions of parole, furloughs, and temporary release have been viewed as instrumental in achieving the goals of re-socialisation and integration into society. Parole allows inmates to temporarily rejoin their families and have a free social life, ensuring better emotional and psychological support, which is crucial for procreation and family bonding.[107] Adopting the system of parole for procreation bypasses the need for extensive infrastructure changes within prisons, such as creating private spaces for conjugal visits, which can be challenging in overcrowded and under-resourced facilities.

Moreover, parole comes with its own set of advantages which helps in the process of balancing out the interests of all the stakeholders involved as discussed previously. For example, it ensures that the rights of the spouses of the prisoners are not infringed upon by allowing them to procreate.[108] It also offers more privacy to couples and helps in strengthening familial relationships.[109] Further, being incarcerated in prisons leads to being constantly surrounded in the company of hardened criminals which can be causes several vices which in turn can be remedied through periods of compassionate parole.[110] On the front of protecting the interests of the unborn child, the period of parole could possibly be utilised by the prisoners to their advantage by engaging

[105] Anamika Singh, *supra* note 70.
[106] Manish Chandra Pandey, *supra* note 95.
[107] Sushree Saswati Mishra, *Revisiting the concept of parole system in India: Critical Analysis*, 7(3) NUJS J. REG. STUD. 82 (2022) [hereinafter "Sushree Saswati Mishra"].
[108] Procunier v. Martinez, 416 U.S 396 (1974).
[109] E Hawk, Improving post-incarceration outcomes: The power of family engagement, EHAWK (Nov. 28, 2023), https://blog.ehawksolutions.com/improving-post-incarceration-outcomes-with-family-engagement#rehabilitation-and-family-strengthening-programs.
[110] Babu Singh v. State of Uttar Pradesh, 1978 AIR 527.

in counselling and other preparatory programs, which could guide them towards becoming better parents for the benefit of the child. It also offers them an opportunity to access the requisite medical care and fertility treatments that may not necessarily be available within the precincts of prisons. Additionally, arrangements for parole would necessarily ensure that female pregnant inmates deliver in hospitals to avoid the unhygienic precincts of prisons. This is important especially in light of the guidelines laid down in *R. D. Upadhyay* as well as the Modern Prison Manual, 2021 which advocate for the inmate giving birth outside the prison as ensures that the child is born in the safe and hygienic vicinity of a hospital and ensures proper care to the child.[111] Not only is it crucial for the maintenance of hygiene, but also takes care of the emotional challenge faced by the mother when they are in excruciating pain during labour without their partner.[112] Having a healthy environment with spousal support is crucial in ensuring a positive child-birthing process. Therefore, it tackles the interests of the children during the prenatal stage.

However, one has to bear in mind the possible misuse of the parole system. For instance, in a case, the accused belonged to a rich political party and was sentenced to life imprisonment on grounds of murder.[113] A parole was granted on grounds like performing last rites of grandmother, administering business and taking care of his aged mother.[114] However, it was found that the accused was enjoying the nightlife before coming back from the parole and his mother was also in good health and was seen attending programmes.[115] Such misuse of the parole system is common in cases of influential people like it was also noted in the case of Bibi Jagir Kaur. Here, a former Cabinet Minister of Punjab was actively involved in the death of her daughter but due to her position was given a parole just after four months of imprisonment.[116] This highlights another misuse of parole which gives the incarcerated an opportunity to the incarcerated to commit crimes during the duration of the parole. For instance, in a case the accused was serving life imprisonment for murdering his first wife but during the period of parole he also murdered his second wife and children.[117]

[111] R. D. Upadhyay, *supra* note 81; The Model Prison Manual, 2021.
[112] Abirami Kirubarajan et. al., *Pregnancy and Childbirth During Incarceration: A Qualitative Systematic Review of Lived Experiences*, BJOG (March 25, 2022).
[113] Sidharth Vashisht @ Manu Sharma v. The State (N.C.T. of Delhi), AIR 2010 SC 2352.
[114] Sushree Saswati Mishra, *supra* note 107, at 77.
[115] *Id.* at 78.
[116] Shamik Ghosh, *After four months in jail, former Punjab minister Jagir Kaur given parole*, NDTV (Aug. 08, 2012), https://www.ndtv.com/india-news/after-four-months-in-jail-former-punjab-minister-jagir-kaur-given-parole-496084.
[117] Saibanna v. State of Karnataka, JT 2005(5) SC 564.

Thus, while scope of misuse exists for parole, if properly regulated it can emerge as a much more effective system to balance the inmates' reproductive rights and human rights with financial and logistical considerations, that were involved with conjugal visits.

(B) A LEGISLATIVE PERSPECTIVE

The following sub-sections firstly, recognise the existing gaps and lacuna in the Indian legislation and secondly, suggest a way to resolve this issue by drawing out a comparative study from the United States of America.

1. Lacuna in the Legislation

To understand the root cause of the issue, it is necessary to delve into legislation regulating prisoners at both the central and state levels. At the Central level, there are certain legislations like the Unlawful Activities (Prevention) Act, 1967 and Prevention of Money Laundering Act, 2002 which impose additional restrictions over and above the Criminal Procedure Code, 1973 like giving an opportunity to the public prosecutor of being heard on the bail application before release.[118] These statutes impose exceptionally high thresholds for the grant of bail, often resulting in prolonged pre-trial incarceration. In such contexts, the question of accessing conjugal visits or parole becomes almost moot, as the legal framework itself creates structural barriers to even basic liberties. Moving on to specific legislation pertaining to the justice system, neither the Model Prison Manual, 2016 nor the Model Prisons and Correctional Services Act, 2023 explicitly recognise procreation as a ground for parole. Similarly, there is no legislation which confers conjugal rights to prisoners.[119] This absence of legislation to regulate this issue further trickles down to the state level. For instance, the Punjab Good Conduct Prisoners (Temporary Release) Act, 1962, does not provide for procreation as grounds for parole. In the *Jasvir Singh* case, the Court issued the directive that until a proper legislation or policy framework was created to accommodate this need, the expression "*any other sufficient cause*" to grant parole would be read to include conjugal visits as a valid ground.[120] The Act also further subjected granting of this right to good behaviour, the quantum of sentence awarded, or the nature of the offence committed.[121] Similarly, Kundan Singh

[118] The Unlawful Activities (Prevention) Act, 1967, §43D; Prevention of Money Laundering Act, 2002, §45.
[119] The Model Prison Manual, 2016; The Model Prisons and Correctional Services Act, 2023.
[120] Jasvir Singh, *supra* note 7, at 75; The Punjab Good Conduct Prisoners (Temporary Release) Act, 1962, §3(1)(d).
[121] The Punjab Good Conduct Prisoners (Temporary Release) Act, 1962, §4.

dealt with the Delhi Prisoner Rules, 2018 which does not provide for procreation as a ground for parole.[122] Here, parole was granted only after being recognised as a constitutional right that is it would fall within the ambit of Article 21 of the Indian Constitution.[123] It must also be noted that the Court granted this right only upon fulfilment of the conditions laid down for giving parole.[124] Furthermore, in the state of Kerala, the Kerala Prisons and Correctional Services (Management) Act, 2010, does not provide for procreation as a ground for parole. But like the other States, the Kerala High Court read the provision on parole in this state legislation to allow parole to a life convict to undergo IVF treatment.[125] A coherent reading of the rules on parole in the states of Maharashtra, Kerala, Karnataka, West Bengal and Madhya Pradesh reveals that parole has been broadly classified as two types: ordinary parole and emergency parole. In Delhi, it is identified as regular and custody parole whereas Madhya Pradesh uses the term leave instead of parole.[126] Emergency parole/ leaves deal with situations of exigency like death, serious illness or marriage of family members amongst others. The time duration for this is comparatively less. So, it is traditionally unlikely that procreation would be included as a ground for emergency parole or leave.

However, regular parole/ leave is a much broader category capable of including procreation as a ground. There are disparities in the state laws for this provision. These discrepancies are two-fold: firstly, the number of days for which the parole is granted and secondly, the eligibility criteria for granting parole. For instance, the number of days granted differ from 30 days in Karnataka (which can be extended up to 60 days but not exceeding 90 days), 42 days in Madhya Pradesh, 56 days in Delhi to 60 days in Kerala, among others.[127] Further, one of the eligibility criteria for granting parole is that the prisoner has to serve a minimum period of his sentence before he can be released on parole. For computing this period there is discrepancy between the states like the states of Kerala, Madhya Pradesh and Maharashtra include the period of parole towards calculating the total days spent in jail whereas Delhi does not.[128] This difference in computing eligibility criteria along with other criteria can make a significant impact on who is the beneficiary of the parole system in India.

[122] Kundan Singh, *supra* note 34, at 14.
[123] *Id.* at 13, 14.
[124] The Delhi Prisoners Rules, 2018, r. 1210.
[125] Abhaya V. Venu v. State of Kerala, WP (Crl.) 723 of 2023; The Kerala Prisons and Correctional Services (Management) Act, 2010, r. 73.
[126] The Delhi Prisoners Rules, 2018; The Madhya Pradesh Prisoners Leave Rules, 1989.
[127] Leena Indise, *Parole System in India: A Comparative Analysis*, 3(3) IJLSI 583 (2020).
[128] *Id.*, at 584.

A collective analysis of several such state legislations along with their respective High Court pronouncements reflects a trend of firstly, procreation not being an explicit ground for parole and no provision to accommodate conjugal visits and secondly, even though the Courts have granted a right to parole on procreation grounds they have been subjected to conditions mentioned under the respective state statutes. A repercussion of this current patchwork system is that there is disparity in the conditions under which parole is granted from one state to another creating problems like consistency, fairness, and lack of trust in the prison reformative system.

2. An American Case Study

Prison is a subject under the State List as per the Seventh Schedule to the Indian Constitution, where each state has the right to formulate its own laws and policies to reform prisons.[129] To legislatively remedy the lacuna in the current law, the state legislatures can take a two-pronged approach. Firstly, all states can incorporate an express provision making procreation as a ground for granting parole and have an exclusive provision permitting conjugal visits for the purposes of procreation. Secondly, it has to be kept in mind that the Court has noted that this right is not absolute in nature and is subject to the penological interests of the State.[130] Each state can formulate its own conditions under which parole or conjugal visits would be allowed for procreation. However, it is argued that to minimise the disparity, each state should formulate its laws adhering to a common set of metrics. This approach would minimize the disparity and ensure that the classification of prisoners who are not beneficiaries of this right is "*reasonable*" and largely consistent across states.

Here, it is observed that American jurisprudence on prisoner's rights can help formulate a basic model for the Indian states to develop upon. At the outset it is pertinent to note the differences between the prison system in both the countries. Firstly, the United States has a retributive approach towards prison systems where their main aim through prisons is to reduce the crime rates.[131] However, while this might have been the case for colonial India, the country has

[129] Ministry of Home Affairs, Prison Reforms- Center State Division, https://www.mha.gov.in/MHA1/PrisonReforms/home.html#:~:text='Prisons'%20is%20a%20State%20subject,of%20the%20respective%20State%20Governments.
[130] Jasvir Singh, *supra* note 7, at 95.
[131] Brenda de Oliveira Morsch, *Retribution vs. Restoration: Tendencies of the Criminal Justice System*, MASTER'S THESES (2019) 2; Daniel Small, *Too much justice: Questioning the United States' pursuit of retribution*, SOC. JUST. EQ. J. 84 (2020).

progressively moved towards seeing prisons as restorative system.[132] Secondly, in terms of administration, in India the jail administration is entrusted to state governments whereas in the United States in addition to state administration there are federal prisons managed by federal agencies.[133] Further, while overall the United States has advocated for the procreative rights of the prisoners, critics argue that such reforms also reflect deeper systematic issues.[134] These include overcriminalisation, racial disparities and socio-economic roots of mass incarceration.[135] For instance, in the United States not every person found guilty is sent to prison but is rather placed in what is called "*supervision*".[136] This included methods like parole and probation which were initially intended to rehabilitate and provide support.[137] However, most people turned in supervision rather than in prisons where they were bound by extremely stringent rules and even a minor violation of these rules for example, changing address without notice or missing a meeting resulted the individual being sent to prison.[138] These where not crimes but just violations of the rules.[139] Further, these rules were unfairly applied against the black and brown communities and people under supervision were not provided adequate support like mental healthcare facilities or a stable housing.[140] Therefore, supervision became another means to punish and control people instead of helping them thereby contradicting the underlying causes of incarceration.[141] However, there are underlying similarities as well. The United States Constitution guarantees a set of fundamental rights like the right to be free from discrimination, the right to marry, and the right to be childless, amongst others.[142] These rights are similar to the ones guaranteed under the Indian Constitution.[143] On the front of prisoners, the United States Supreme Court ('US SC') has recognised that a prisoner is entitled to all the above-mentioned constitutional rights that are in line with their status as a prisoner and do not interfere with the legitimate penological objectives

[132] Devang Pandey & Prithwish Ganguli, *Restorative Justice in India: A Critical Examination of Its Application in the Criminal Justice System*, SSRN (Dec. 29, 2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5075204.
[133] Shailesh Mishra & Dr. Sanjeev Kumar Chadha, *Prison Administration in India and USA: A Comparative Study*, 8(3) VAICHARIKI 245 (2018).
[134] Human Rights Watch, *Revoked: How Probation and Parole Feed Mass Incarceration in the United States* (July 31, 2020), https://www.hrw.org/report/2020/07/31/revoked/how-probation-and-parole-feed-mass-incarceration-united-states [hereinafter "Human Rights Watch"].
[135] *Id.*
[136] Lola Butcher, *Why Probation and Parole Don't Work as Advertised*, KNOWABLE MAGAZINE (Feb. 21, 2024), https://knowablemagazine.org/content/article/society/2024/making-parole-probation-effective.
[137] *Id.*
[138] Human Rights Watch, *supra* note 134.
[139] *Id.*
[140] *Id.*
[141] *Id.*
[142] Escuder, *supra* note 68.
[143] INDIA CONST. arts. 14 & 21.

of the prison system.[144] Similarly, in *Jasvir Singh*, Justice Surya Kant had made an analogous observation in the context of the prisoners in India.[145] Further, the courts in the United States have recognised the right to procreation as a fundamental right of the prisoners.[146] The commonalities in the approach taken to deal with the prison reformation system by both countries make the US an ideal guiding model for India to work upon.

In its landmark judgement in *Turner v. Safley* ('Turner'), the US SC laid down four factors popularly known as the "*Turner Test*" used to determine whether a policy limiting a prisoner's right was reasonable in nature.[147] The issues at dispute, in this case, were two prison policies restricting communication between the prisoners and restricting marriage between them. However, the ability of the Turner Test to judge the reasonableness of any prison policy makes it relevant to our discussion. The four factors laid down are: firstly, presence of a "*valid, rational connection*" of the prison policy to a legitimate governmental interest;[148] secondly, the existence of alternative means for prisoners to exercise the right;[149] thirdly, the impact of granting the right on prison resources[150] and fourthly, absence of ready alternatives.[151] As previously noted, there has been discrepancy in state laws when it comes to the eligibility criteria for asking for parole. The effect of this discrepancy can be minimised to an extent by using the factors of the Turner Test to form a basic structure to be followed while formulating the parole laws. The application of the Turner Test can be understood in light of the 2024 judgement by the Karnataka High Court granting parole to a murder convict for fulfilment of the conjugal duties with his new wife.[152] Applying the first factor of the Turner Test, it can be observed how the murder convict could pose a direct threat to the government's penological interest of ensuring peace and order. While the threat to peace and security has to be kept in mind, the second factor sheds light on the fact that the convict and his wife would not have ready alternative means to enjoy their right to progeny as the convict was facing life imprisonment. Further, the convict had gotten married during the earlier parole granted to him so his wife did not have a chance to exercise her right to progeny.[153] For the third factor,

[144] Pell v. Procunier, [1974] 417 US 822.
[145] Jasvir Singh, *supra* note 7.
[146] Gerber v. Hickman, 264 F.3d 887.
[147] Turner v. Safley, 482 U.S 82 (1987).
[148] *Id.*, at 89.
[149] *Id.*, at 90.
[150] *Id.*
[151] *Id.*
[152] X v. State of Karnataka, 2024 SCC OnLine Kar 53.
[153] *Id.*

granting parole would not have a detrimental impact on draining the prison resources as it is short-term burden rather than a systematic strain. Lastly, for the fourth factor, there is no lesser restrictive means to achieving the goal of procreation. Through this rationale, a convict to undergo imprisonment for life who would have otherwise not been permitted general parole,[154] can get the same on grounds of procreation and analysing his unique conditions. The Karnataka High Court also took care of the concerns arising under the first factor of the Turner Test. It directed the convict to mark his attendance weekly in the jurisdictional police station as well as directed the Superintendent of Prison to issue strict instructions to be followed by the convict during his parole period.[155]

Therefore, using these factors of the Turner Test as a basic outline, the state-legislatures in India can formulate their own policies outlining the conditions upon non-fulfilment of which the right to the procreation of the prisoners could be curbed. For example, in formulating policies for conjugal visits, reference can be made directly to the case of *Overton v. Bazetta* ('Overton'), which dealt with revising the prison visitation policies and saw the application of the Turner Test.[156] Pertinent to our discussion here is the policy in question in *Overton* regarding forbidding former convicts from the visitors list unless they were members of the immediate family of the convict and were approved by the prison administrators.[157] A parallel is drawn here to check the reasonableness of a policy in India forbidding a spouse who is a former convict from conjugal visits. In *Overton*, applying the Turner Test to the facts of the case saw satisfaction of the first factor as prohibiting former convicts would align with the State's goal of preventing future crime.[158] This is similar to the penological objectives of the State as argued previously which aims at institutional security and peace and order.[159] Applying the second factor, the US SC remarked that the alternatives must only be available and need not be ideal.[160] Alternatives to conjugal visit for purposes of procreation exist in the form of artificial insemination.[161] Regarding the third factor, accommodating a former convict's need for a conjugal visit would cause reallocation of the prison

[154] The Karnataka Prisons and Correctional Services Manual, r. 641.
[155] *Id.*
[156] Overton v. Bazzetta, 539 U.S. 126, 129 (2003) [hereinafter "Overton"].
[157] *Id.*
[158] *Id.* at 133-34.
[159] Dunn, *supra* note 66, at 2573.
[160] Overton, *supra* note 156, at 135.
[161] Dr. Shruti Goyal, *Conjugal Rights of Prisoners*, BHARATI L. REV. (2018), https://docs.manupatra.in/newsline/articles/Upload/22A58DF8-EA77-472B-B0B5-F06ECDF5EB61._Goyal_Dr._Asst._Prof._57-73_Family.pdf.

resources as apart from the usual reallocation for conjugal visits, prison authorities would have to take extra precautionary measures, conduct an extensive search and monitor the former convicts. For the last factor, similar to what was held in Overton, it would be difficult for the convicts to present alternatives that could protect the interests of the prison without having a *de minimus* impact on the penological goal.[162] Therefore, it can be argued that a policy that restricts a spouse who is a former convict from conjugal visits unless approved by prison administrators would be a reasonable policy in India. This policy can also be extended to the idea of parole where any prisoner whose spouse is a former convict shall be not be granted parole for purposes of procreation.

Similarly, for classifying which prisoner should be given the right, this test can be applied. It is argued that high-risk prisoners and serious offenders should not be given the right on the application of the test using a similar rationale as above. Considering this test as a broad framework and proceeding forth with other policy considerations in a similar manner would significantly help reduce the ambiguities and disparities within the states.

VI. CONCLUSION

While these reforms are contemplated upon, it is necessary to keep in mind the interests of the various stakeholders involved in this process and ensure that their rights are balanced and upheld. As discussed in this paper, there is a current lacuna in law that does not have any legislation or policy providing procreation as a ground for parole or accommodating any explicit provision for conjugal visits hampering the interests of the prisoners. At present, the best way to remedy this situation would be to bring in legislative amendments in all the state legislations to incorporate procreation as a ground for parole. Further, as this right is not absolute in nature, it shall be subjected to conditions mentioned by the respective state legislatures. It is argued that a basic framework must be outlined for these conditions, which can be kept in mind by the state legislatures while granting the right to procreation to reduce arbitrariness and disparity. Inspiration from the United States jurisprudence has been taken to lay down this framework.

However, it is imperative to note that the fructification of these legislative amendments need to assessed in the context of policies and their implementation in light of administrative,

[162] Overton, *supra* note 156, at 136.

infrastructural and financial hurdles. Amongst the alternatives that can be explored presently to give the right of procreation to prisoners, parole emerges as a more feasible option over conjugal visits and the states should take appropriate measures to balance the competing interests, ensuring that the penal system remains just and humane while safeguarding the broader interests of society.

ARTICLE

COMPENSATION CONUNDRUMS: THE CHALLENGES TO MASS TORT LITIGATION IN INDIA

Anubhav Kumar Das & Ananya Tripathi[*]

ABSTRACT

A curative petition was filed by the Union Government to grant additional compensation to the victims of the Bhopal Gas Tragedy but was rejected by the Supreme Court in 2023, with one of the reasons being a breach of obligations by the Union. The Union Government was entrusted with the responsibility to facilitate adequate compensations and create the required medical insurance for the victims, which it failed to undertake. After having faced the most tragic Bhopal Gas Tragedy, and multiple other man-made and preventable accidents that claimed the lives of the innocent, it is high time that we solidify procedural mechanisms that would provide prompt compensation and justice, in an economically viable manner. Existing legal mechanisms have been incapable of addressing mass tort claims. The primal issue with the nation is, never holding the designated authorities appropriately responsible. Social Action Litigation plays a significant character in the jurisprudential development of claims involving mass victims but targeted efforts are needed to expedite compensation for the victims. This Article proposes class action suits, and a wider scope for Public Interest Litigation as possible restitutions along with judicial forward-ism while dealing with mass tort cases to facilitate adequate and swift compensation. It goes ahead to examine the judicial and legislative approach towards dealing with mass torts cases and reimbursing compensation. The Article attempts to strike a balance between collective remedy while addressing individual suffering. Furthermore, numerous legislative bottlenecks are discussed which restrain the process. The arguments are substantiated by existing legislation, case laws, and constitutional analysis.

Keywords: Mass Torts, Victim Compensation, Bhopal Gas Tragedy, Class Action Suits.

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I. INTRODUCTION

On May 13, 2024, the collapse of a giant illegal hoarding in Ghatkopar, Mumbai, during a storm, resulted in 17 deaths and over 70 injuries. Following the incident, the Brihanmumbai Municipal Corporation ('BMC') declared the structure unauthorised. While the director of the advertising firm responsible for the hoarding was arrested and charged under Sections 304 (culpable homicide not amounting to murder), 338 (grievous hurt by act endangering life), 337 (hurt by act endangering life), and 34 (common intention) of the Indian Penal Code, 1860 ('IPC'), the accountability of other officials, including former Assistant Municipal Commissioner of Ghatkopar East, Gajanan Bellale, remains under investigation.[1]

Similarly, the fire at the TRP Game Zone in Rajkot, Gujarat, which killed 27 people, including nine children, exposed systemic regulatory failures. Reports indicate that a fire had previously broken out at the same location in 2023,[2] yet no corrective measures had been taken. While the Game Zone's owners were arrested, there has been minimal accountability for public officials responsible for enforcing safety norms. The incident reflects broader institutional lapses, including a lack of fire safety compliance, inadequate inspections, and weak enforcement mechanisms. Reactive measures, such as the Bruhat Bengaluru Mahanagra Palike shutting down eight unlicensed gaming zones in Bengaluru post-disaster appear to be more performative than substantive[3].

These cases highlight India's persistent failure to effectively address mass torts, and civil wrongs causing large-scale harm. The legal and institutional frameworks remain inadequate in ensuring accountability, victim compensation, and preventive governance. Key questions arise: Are existing laws sufficient to deter negligence and enforce liability? Do institutions possess the capacity to

[1] Gopal Keshav, *Ghatkopar hoarding collapse: BMC chief summoned for questioning; investigation intensifies*, TIMES OF INDIA (June 22, 2024), https://timesofindia.indiatimes.com/city/mumbai/ghatkopar-hoarding-collapse-bmc-chief-summoned-for-questioning-investigation-intensifies/articleshow/111182675.cms.

[2] Sudeep Lavania, *Rajkot game zone, where 27 died, saw fire break out in 2023 as well: Police report*, INDIA TODAY (May 31, 2024), https://www.indiatoday.in/india/story/gujarat-rajkot-trp-game-zone-fire-sit-police-team-preliminary-findings-2546279-2024-05-31.

[3] Express News Service, *BBMP closes 8 gaming zones operating without fire licence in Bengaluru'*, INDIAN EXPRESS (June 17, 2024), https://indianexpress.com/article/cities/bangalore/bbmp-closes-gaming-zones-operating-fire-licence-bengaluru-9397152/.

investigate and prosecute systemic failures? This Article examines these issues, assessing whether India's legal system is equipped to manage mass torts and deliver justice.

The term "*mass tort*" lacks a formal legal definition, but generally refers to situations where numerous tort claims arise from a single incident or similar wrongful conduct.[4] While distinct from class actions, the concepts intersect in addressing collective harm, with class action lawsuits serving as a key procedural mechanism to consolidate such claims. A class action enables one or more plaintiffs to file suit on behalf of a larger group with similar grievances, thereby streamlining litigation for widespread negligence cases like the Ghatkopar hoarding collapse or Rajkot game zone fire. Unlike mass torts, where individual claims may proceed separately for a mass claim, class actions resolve common legal and factual issues collectively, offering judicial efficiency and consistent outcomes, though their effectiveness in India remains limited by the absence of a robust legal framework akin to more developed jurisdictions. In India, the foundation for class actions is found in Order I Rule 8 of the Code of Civil Procedure, 1908 ('CPC') which permits individuals with a shared interest, though not necessarily the same cause of action, to jointly pursue claims with court approval.[5] Class actions in India mainly appear as Public Interest Litigations, ('PIL')[6] and in consumer disputes,[7] such as cases between homebuyers and builders. Recently, corporate disputes have also seen class action potential with Section 245 of the Companies Act, 2013, which specifies the thresholds for defining a "class.".

For the benefit of readers, this Article is divided into three parts. The first part explores the legislative and jurisprudential landscape of mass torts in India, using major cases such as the Bhopal Gas Tragedy and other relevant cases to highlight institutional frameworks and legal inadequacies. We address these bottlenecks by examining recommendations from the Law Commission and other sources. In the second part, we discuss significant legislative amendments and analyse the Parliament's effectiveness in addressing mass torts through key legislations such as the Factories Act, 1948. The third part delves

4 ROBERT COOTER & THOMAS ULEN, LAW AND ECONOMICS 268 (Pearson 2016).
5 CODE CIV. PROC. § 11; Order I Rule 8.
6 Kachwaha & Partners, *A General Introduction to Class and Collective Actions in India*, LEXOLOGY (Apr. 21, 2023), https://www.lexology.com/library/detail.aspx?g=a80b7dff-fbc8-4552-8110-7e619662a45e.
7 Curare Legal, *Class Action Complaints Under The Consumer Protection Law In India*, MONDAQ (Feb. 2, 2021), https://www.mondaq.com/india/dodd-frank-consumer-protection-act/1031896/class-action-complaints-under-the-consumer-protection-law-in-india.

into a crucial factor inhibiting tort litigation in India. We examine insights from scholars like Prof. Upendra Baxi, who introduced the concept of Social Action Litigation ('SAL'), and Marc Galanter. A small section is dedicated to identifying system deficiencies, such as high court fees and the prohibition on lawyers charging contingency fees, along with recommendations for improvement. Additionally, we explore the judiciary's role as a catalyst for change, emphasizing the impact of PILs and judicial activism, with notable contributions from Supreme Court judges like Justice Krishna Iyer and Justice Bhagwati. In conclusion, India's mass tort landscape reveals systemic challenges and gaps within its legal framework. Addressing these issues through legislative reform, judicial activism, and policy recommendations can enhance access to justice. Strengthening SAL and embracing judicial innovations are vital steps toward effective redressal of mass torts.

II. THE JURISPRUDENCE OF MASS TORTS IN INDIA

The central argument forwarded in this paper states that the jurisprudence of mass torts in India is still maturing. Even after numerous cases and legislations, the nation struggles to deal with cases involving mass compensations. This paper proposes class action suits as the most effective way to deal with these mass tort cases. More than defining the characteristics of class action suits, the paper is focused more on determining how these characteristics suit the Indian context and calling out the challenges arising from the same.

Astonishingly, a nation with a legal history dating back to time immemorial has a novice and unrefined jurisprudential development of mass torts. The case of *Union Carbide Corporation v. Union of India*[8] was the de-facto starting point of the jurisprudence of mass torts in India.[9] It was a consequence of this case that "*tort law, an archetypal branch of private law, got interwoven into public law*".[10] Acknowledging the number of cases and degree of damage caused, the Union of India assumed the right to represent the victims.[11] This led to the evolution of the doctrine of "*parens patriae*". Apart from constitutionalising private law, this eased out the requirement of locus standi for tortious cases as well. Tracing down,

[8] Union Carbide Corpn. v. Union of India, (1991) 4 SCC 584.
[9] Arpita Gupta, *Mass Tort Jurisprudence and Critical Epistemologies of Risk: Dissolution of Public–Private Divide in the Indian Mass Tort Law*, LIVERPOOL L. REV. (2019).
[10] *Id.*
[11] Charan Lal Sahu v. Union of India, (1990) 1 SCC 613, ¶¶ 36, 74, 100.

not much after the nation encountered an oleum gas leak at the Shriram Food and Fertilized Industries Plant.[12] Besides stating the general directions, the Supreme Court went on to set out a principle of absolute liability to increase accountability for enterprises engaged in inherently dangerous activities.[13] The principle of strict liability established by *Rylands v. Fletcher*[14] was analysed and the scope of the same was narrowed down.[15] Apart from corporations, the principle was placed on government authorities, even in the absence of direct fault, because they are relied upon to ensure public safety.[16] The absolute liability rule is founded upon a modification of strict liability.[17] It places complete liability on a person, authority or corporation, without any exception.[18] The principle of polluter pays was evolved to compensate a multitude of victims of pollution was evolved later.[19] It imposes the liability on the polluter to compensate the victims of pollution. These cases form the bedrock of the jurisprudence of mass torts in India. Although remarkable, the position of mass torts in India is still in a nascent stage. The Bhopal Gas Leak Disaster (Processing of Claims) Act, 1985 gave the Government locus standi to file a case on behalf of the victims, which was faulty on multiple grounds.[20] The legislative inadequacy could be confronted on the grounds of technical impossibility and practical inoperability to enact separate legislation to remedy each case of mass torts.

Tickling down these environmental hazards gave rise to multiple legislations that fall under the purview of public nuisance. The Environment Protection Act, 1986 was enacted to legislate and coordinate Central and State activities enumerated under the Water Act, 1974, and the Air Act, 1981.[21] All these statutes have a liberal locus standi that allows for citizen suits and prosecution for non-compliance with statutory provisions.[22] The loophole with this Act is that it failed to directly account

[12] M.C. Mehta v. Union of India, (1987) 1 SCC 395.
[13] *Id.* at ¶ 31.
[14] Rylands v. Fletcher, (1868) UKHL 1, L.R. 3 H.L. 330.
[15] M.C. Mehta v. Union of India, (1987) 1 SCC 395, ¶ 31.
[16] Municipal Corpn. of Delhi v. Subhagwanti, 1966 SCC OnLine SC 22.
[17] Bharat Parmar & Aayush Goyal, *The Rule of Strict Liability in Indian Perspective*, MANUPATRA, https://docs.manupatra.in/newsline/articles/Upload/2D83321D-590A-4646-83F6-9D8E84F5AA3C.pdf.
[18] *Id.*
[19] Indian Council for Enviro-Legal Action v. Union of India & Ors., (1996) Supp. (1) S.C.R. 507.
[20] Charan Lal Sahu v. Union of India, (1990) 1 SCC 613, ¶¶ 97, 98.
[21] T.R. Subramanya & Shreyasi Bhattacharya, *The Evolution of Tort Law and Related Developments in India after the Bhopal Gas Leak: An Assessment*, 2 CMR. U. CONTEMP. LEGAL AFF. 32, 52 (2020).
[22] The Environment (Protection) Act, 1986, § 15, 16, 17, No. 29, Acts of Parliament, 1986 (India); Water (Prevention and Control of Pollution) Act, 1974, § 49, No. 6, Acts of Parliament, 1974 (India); and Air (Prevention and Control of Pollution) Act, 1981, No. 14, Acts of Parliament, 1981 (India).

for civil prosecution and tortious liability, which diminishes the compensatory benefits given to the victims. As the doctrine of polluter pays and strict liability developed through various cases[23], the interpretation of these statutes gained a wider connotation, which now encompasses mass compensations as well. The legislative codification of the principle of polluter pays and strict liability was incorporated in the Public Liability Insurance Act, 1991 ('PLIA').[24] The PLIA mandated compulsory insurance in order to provide compensation to the victims of any prospective industrial accidents.[25] Technically, a conscious effort to exclude accidents taking place due to radioactivity was taken, possibly to exempt the government from any such liability arising out of the Act. To undo this lacuna, the Civil Liability for Nuclear Damage Act, 2010 was passed to include civil liability and prompt compensation to victims of nuclear accidents.[26]

The last decade saw an expeditious growth toward mass tort cases, mostly in light of mass compensations and greater accountability of the producers, industries, management, enterprises, etc.[27] A distinctive feature of developments made in this decade is that legislations, other than those dealing with environmental damages and strict liability, were brought with the provisions addressing mass torts through "class action suits". Notably, the Companies Act, 2013 enables the shareholders and depositors to file class action suits before the National Company Law Tribunal ('NCLT') against the company, its directors, auditors(including firms), experts, advisors, consultants, and other persons.[28] Although the Consumer Protection (Amendment) Act, 1993 expanded the definition of "*complainant*" to include "*one or more consumers, where there are numerous consumers having the same interest*", the clause gained practical articulations after the Consumer Protection Act, 2019 was passed.

Solidifying the legislative and judicial action and recommending further changes, the Law Commission of India has, time and again, made recommendations to add and update provisions pertaining to mass torts. Various reports have been made, proposing the establishment of environmental courts and

[23] Vellore Citizens Welfare Forum v. Union of India & Ors., 1996 (5) SCC 647; In Re: Gas Leak at LG Polymers Chemical Plant, 2020 SCC OnLine NGT 129.
[24] Public Liability Insurance Act, 1991, § 3, No. 6, Acts of Parliament, 1991(India).
[25] *Id.* § 4.
[26] Civil Liability for Nuclear Damage Act,2010, §§ 4, 7, No. 38, Acts of Parliament, 2010 (India).
[27] National Green Tribunal Act, No. 19, Acts of Parliament, 2010 (India); E-Waste (Management Rules) 2016 (India); Hazardous and Other Wastes (Management and Transboundary Movement) Rules 2016 (India).
[28] Companies Act, 2013, § 245, No. 18, Acts of Parliament, 2013 (India).

tribunals, fast-tracking procedures for compensatory relief to the victims of accidents, including those of mass accidents, providing relief and compensations to slum dwellers and pavement dwellers when they are displaced, and making amendments in the CPC.[29] As already mentioned, the jurisprudence of mass torts in India is cradled in its nascent stage, and the further evolution of the same requires an efficient hammer to break the same.

III. TRACING COMPENSATIONS THROUGH LANDMARK JUDGMENTS

The tort law which is largely influenced by the British common law system in India, likewise stays largely uncodified. Certain aspects of the law were codified to serve a larger purpose, such as the Motor Vehicles Act, 1988 and the Consumer Protection Act, 1986[30]. Torts is often inhibited as a neglected subject in India, starting from law schools to the Courts. These trends further facilitate an environment that negate the application of mass torts, considering its complications, range of application, subtle nuances, places where the common principles of tort have limitations. This is despite the infamous Bhopal Gas Tragedy leading to more than 3,700 casualties and 570,000 injuries[31]. Several birth-related deformities can be traced till date.

(A) THE FAILURE OF INDIAN TORT LAW IN MASS DISASTERS

Oftentimes, such cases attract mere civil or departmental proceedings leading to disciplinary action or, at most, criminal proceedings. Often the cause of action they initiate is to trigger criminal action. This remains largely the case, irrespective of the scale of suffering in the Bhopal Gas Tragedy. There exists a criticism of how the executive and judiciary handled the tragedy. Prof. Upendra Baxi has expressed profoundly about the event in his writings.[32] His theoretical framework, particularly in

[29] LAW COMMISSION OF INDIA, REPORT NO.186: PROPOSAL TO CONSTITUTE ENVIRONMENT COURTS, 2003, LAW COMMISSION OF INDIA, REPORT NO.138: LEGISLATIVE PROTECTION FOR SLUM AND PAVEMENT DWELLERS, 1990, LAW COMMISSION OF INDIA, REPORT NO.150: SUGGESTING SOME AMENDMENTS TO THE CODE OF CIVIL PROCEDURE (Act No. 5 of 1908), 1994.

[30] Surendra Singh Chandrawat, *Origin and Development of Law of Tort in India*, 2 J. L. TORTS CONSUMER PROT. L. 12, 12–16 (2019).

[31] BHOPAL GAS TRAGEDY RELIEF AND REHABILITATION DEPARTMENT, BHOPAL, IMMEDIATE RELIEF PROVIDED BY THE STATE GOVERNMENT, Archived from the original on 18 May 2012.

[32] Upendra Baxi, *Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India*, 4 THIRD WORLD LEGAL STUD. 107 (1985); Upendra Baxi, *Human Rights Responsibility of Multinational Corporations, Political Ecology of Injustice: Learning from Bhopal Thirty Plus?,* 1 BUS. HUM. RTS. J. 21, 21-40 (2016).

works like "*The Future of Human Rights*",[33] integrates transformative constitutionalism with global human rights norms, but this risk privileging cosmopolitan interpretations over subaltern legal pluralism. However, his reliance on judicial minds to drive social change may inadvertently reinforce legal centralism, marginalising non-state justice systems.

Another scholar important in this topic, and especially in this case, is Prof. Marc Galanter. His works, particularly his critique of formal equality in "*Competing Equalities*",[34] highlights how legal systems favour entrenched power structures. While his analysis of institutional bias remains influential,[35] it can be argued that his framework underestimates the transformative potential of strategic litigation and social mobilisation, as seen in later PIL victories,[36] neglecting dynamic judicial interventions that have expanded rights, such as India's right to privacy or environmental justice jurisprudence.

It is true when looked at in the light of very few tort law cases that ever placed itself in every law student's mind. The arena of tort law, especially mass tort leading to class action suits, requires major investment in terms of funds and manpower, collectively with a set of nuanced skills of investigation, discoveries, and years of experience drawn from practice. There has been a unique trend of seldom holding the authorities accountable. It is claimed by various news reports and the protesting labour unions that the Government of India and State Governments may have known about the potential of such an accident and may have neglected safety protocols in place to mend a collaboration with Union Carbide India Limited ('UCIL').[37] Not that the Union Carbide Corporation ('UCC') was the only party to be made accountable but also the authorities in place. This could have happened if the victims had the opportunity to represent themselves. Through the use of a class action lawsuit, one or more plaintiffs can file a claim and pursue it on behalf of a larger group of people referred to as a "*class*." Basically, this mechanism lets courts handle matters that would be too complicated to handle if each person in the class, those whom have been harmed by the defendant, had to be listed as a named

[33] UPENDRA BAXI, THE FUTURE OF HUMAN RIGHTS (Oxford University Press 2006).
[34] MARC GALANTER, COMPETING EQUALITIES: LAW AND THE BACKWARD CLASSES IN INDIA (Oxford University Press 1992).
[35] P.B. Mehta, *India's Unlikely Democracy: The Rise of Judicial Sovereignty*, 18(2) J. DEM. 70-83 (2005).
[36] *Id.*
[37] Vijay K. Nagaraj & Nithya V. Raman, *Are We Prepared for Another Bhopal?*, SEMINAR, 52-58 (Dec. 2004), https://www.india-seminar.com/2004/544/544%20nagaraj,%20raman.htm.

plaintiff.[38] With a few exceptions, the outcome of a class action lawsuit affects every member and typically bars them from bringing their own claims. All class members, even those who may not have been aware of the lawsuit, are impacted by the verdicts or settlements in these cases. A class action might tie someone to its decision without their ever knowing about the case, in contrast to standard procedural due process. Courts must therefore proceed with extreme caution to guarantee that the matter is appropriate for handling as a class action and that all procedural safeguards are followed. This can be very difficult and costly, especially if there are hundreds or thousands of plaintiffs in the class.

(B) DOCTRINAL AND PROCEDURAL BARRIERS TO JUSTICE

The Indian law is based on the principle of *parens patriae*. This doctrine empowers Courts or the State to exercise jurisdiction and intervene as a parent, thereby ensuring the wellbeing of its citizens. But the invocation of this doctrine restricts in cases like these, the ability to bring forward one's own case. Judge Keenan of the United States District Court for the Southern District of New York, while dismissing the case, mandated the Indian courts by the doctrine of *forum non conveniens*, to determine the cause of action, hold liability and award damages to the victims.[39] Although, the Union Government filing a petition representing the victims was considered a bad idea.

The Central Government, acting as the representative of the victims, has a duty to gather and present these views to the court before any settlement is reached. Although individual notices to all victims may not be necessary, the court suggests that public notices, potentially through mass media, could be an effective means of inviting victims' input. The Court also addresses the broader grievances of victims, noting that not all victims file individual cases, which can lead to their concerns being overlooked. This insurance would cover at least 100,000 people. The petitioners strongly criticised the guidelines for medical evaluation and the outcomes of those evaluations, arguing that the official categorisation of only 40 cases of total permanent disablement is shockingly disconnected from the realities of the disaster. Some petitioners even jest that if these figures were accurate, the UCC should

[38] Hansberry v. Lee, 311 U.S. 32, 41, 61 S.Ct. 115, 118 (1940).
[39] In Re: Union Carbide Corp. Gas Plant Disaster, 634 F. Supp. 842 (S.D.N.Y. 1986).

be entitled to a refund from the settlement amount. In response, the Court proposed that future contingencies be managed by securing an appropriate medical group insurance cover from the General Insurance Corporation of India or the Life Insurance Corporation of India, with no upper limit on liability, and an eight-year coverage period from the time of the disaster and those born subsequently who might inherit or develop conditions linked to the disaster's effects. This insurance arrangement is intended to ensure the settlement remains flexible and open-ended, addressing the needs of both existing and future victims. The critics followed with a five-judge bench of the Supreme Court order endorsing the compensation pool of USD 470 million, encompassing more than two thousand victims[40].

The Supreme Court, when challenged with the constitutionality of the Bhopal Compensation Act in *Charan Lal Sahu v. Union of India* (Charan Lal Sahu'),[41] upheld the said Act using the same *parens patriae* doctrine, and defined the victims as "*legally disabled*", and that the State must protect them.[42] The bench believed that justice has been served through the settlement, and that it is allowed to do some bit of wrong for a greater good[43]. Charan Lal SahuA fire tragedy in the cinema hall of Delhi killed fifty-nine people and more than hundred people injured. Such awards are not just unequitable with the quantum of compensation awarded by mature jurisdictions, like the United States ('U.S.'), but also unjust to the victims. The judges, while deciding the compensation in the Bhopal case, held that factors a judge must consider when evaluating the fairness of a class action settlement include the complexity, expense and likely duration of the litigation, as well as the reaction of the class to the proposed settlement. The judge also examines the stage of the proceedings and the amount of discovery completed, along with the risks of establishing both liability and damages. Another consideration is the risk of maintaining the class action through trial, as well as the defendants' ability to withstand a greater judgment. Additionally, the judge evaluates the reasonableness of the settlement fund in light of the best possible recovery and the risks associated with litigation. The judge also emphasised the limited scope of review in determining fairness, acknowledging that the very purpose of a settlement is to avoid the uncertainties and costs of a prolonged trial. The goal is to reach a resolution that is reasonable, given

[40] Union Carbide Corpn. v. Union of India, (1991) 4 SCC 584.
[41] Charan Lal Sahu v. Union of India, (1990) 1 SCC 613.
[42] *Id.* ¶¶ 36-37.
[43] *Id.* ¶ 124.

the potential outcomes and the inherent risks of continuing the litigation process.[44] On the nature of settlements, the judgment emphasised that a settlement must be informed but should not necessarily match the full amount of the claim or what plaintiffs might expect if they were entirely successful in litigation. It highlights that the Bhopal Gas Disaster (Processing of Claims) Act, 1985, is a unique piece of legislation designed to address a specific, one-time situation. This Act gives the Union of India the exclusive right to represent all claimants, effectively removing the ability of individual claimants to pursue any legal action against the UCC and the UCIL. The constitutionality of this arrangement was upheld in *Charan Lal Sahu*.[45]

(C) COMPARATIVE LESSONS AND PATHWAYS FOR REFORM

In the U.S., mass tort settlements utilising damage averaging, compensation amounts vary widely based on claim severity and settlement structures. For example, in the Vioxx settlement, payouts ranged from modest sums for minor injuries to millions for severe cases, with most claimants receiving amounts determined by point-based grids. High-value claims often received USD 500,000–500,000–1.5 million, while low-value claims were overvalued at USD 50,000–50,000–100,000 despite lower trial values.[46] Similarly, The Deepwater Horizon disaster led to a USD 20.8 billion settlement, covering civil and criminal penalties and economic damages for Gulf States[47]. In the PFAS contamination case, DuPont and affiliates settled for USD 1.2 billion, while 3M is negotiating a USD 10 billion payout to avoid trial over water contamination claims. Over 4,000 plaintiffs, including Stuart, Florida, seek compensation for cleanup costs and damages.[48]

The Bhopal Gas Tragedy was also one of the biggest industrial leaks, a disaster that haunted a city for generations to come. A hefty compensation fund would not just compensate the victims but also set a precedent. India's tort law, largely uncodified and underutilised, failed to address mass torts

[44] Union Carbide Corpn. v. Union of India, (1991) 4 SCC 584, ¶135.
[45] Upendra Baxi, *Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India*, 4 THIRD WORLD LEGAL STUD. 107 (1985).
[46] Rony Kishinevsky, *Damage Averaging—How the System Harms High-Value Claims*, 95 TEXAS L. REV. (2017).
[47] U.S. Department of Commerce, *Deepwater Horizon oil spill settlements: Where the money went*, NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION (Apr. 20, 2017).
[48] Carey Gillam & Shannon Kelleher, *Top US chemical firms to pay $1.2bn to settle water contamination lawsuits*, THE GUARDIAN (June 02, 2023).

effectively due to systemic neglect, procedural limitations, and inadequate compensation mechanisms, as evidenced by cases like the Bhopal and Uphaar tragedies. The reliance on doctrines like *parens patriae* and limited judicial activism further restrict victims' access to justice and equitable remedies.

IV. LEGISLATIVE INEFFICIENCY

It would be untrue that no attempts were made to address the bigger question of justice, namely, "*compensation*". Afterall, justice should not be just done but seen to be done. The absence or lack of proper compensation is not just and fair. In fact, in certain cases, it benefits the victims more if adequate compensation is paid rather than just putting a few culprits behind the bars.

The jurisprudence on compensation for rights violations remains inconsistent due to the absence of codified standards or judicially settled principles governing its quantification.[49] While *Nilabati Behera v. State of Orissa*[50] introduced factors such as age, earning capacity and severity of harm, compensation continues to be awarded on a case-specific and discretionary basis, lacking uniform application. This has resulted in arbitrary outcomes, with some cases awarding interim compensation without legal clarity on its scope or basis. The absence of coherent judicial reasoning or established guidelines renders compensation an ineffective and unpredictable remedy, thereby weakening its role as a deterrent against state excesses and as restitution for victims.

(A) THE FACTORIES ACT, 1987

In that way, the Factories Act was amended in 1987 and Chapter IVA became a part of it.[51] The newer provisions introduced mandate the State Government to form a "*site appraisal committee*" to inspect sites for setting up or expanding factories with hazardous substances.[52] Section 41B requires the factory occupier to disclose information about hazardous substances to various stakeholders, including government officials, workers, local authorities, and nearby residents. The occupier must also establish and publicise policies on worker health and safety, on-site emergency plans, disaster

[49] M.C. Mehta v. Union of India, AIR 1987 SC 1086, 1091.
[50] Nilabati Behera v. State of Orissa, 1993 AIR 1960.
[51] The Factories Act, 1948, Chapter IVA, No. 63, Acts of Parliament 1948 (India).
[52] *Id.* § 41A.

control measures, and government-approved protocols for handling hazardous substances. These disclosures aim to ensure safety and transparency for both workers and the public.[53] The amendments to the Factories Act introduced several responsibilities for factory occupiers, particularly those handling hazardous processes. Under Section 41D, the Central Government can establish an inquiry committee to investigate health and safety failures. Section 41E allows the government to impose emergency safety standards if existing ones are inadequate. Section 41F sets permissible exposure limits for toxic substances, exemplified by the methyl isocyanate levels linked to the Bhopal Gas Tragedy. The amendments also mandate worker participation in safety management through safety committees, acknowledging workers' rights to warn about imminent dangers. Non-compliance with Sections 41B, 41C and 41H now carries mandatory imprisonment and fines, with increased penalties for ongoing violations. Additionally, Section 7-A outlines general duties for occupiers to ensure worker health, safety, and welfare. The general penalties for violating the Act are detailed in Section 92.

Despite the 1987 amendments to the Factories Act, some commentators criticize the unamended Section 118, which penalizes inspectors for unauthorized disclosures of manufacturing information, potentially clashing with Chapter IVA. However, Section 118 exempts disclosures made in executing the Act, and Section 117 grants immunity for actions taken in good faith. The Act is also criticized for not mandating full disclosure of information to mitigate disasters. The Factories Act is set to be repealed by the Occupational Safety, Health, and Working Conditions Code, 2020, ('OSH Code')[54] which offers broader coverage, including new definitions for hazardous processes and substances. The OSH Code mandates safety officers in factories with 250 workers handling hazardous processes, though this threshold is seen as a step backward. Additionally, penalties for violations have been significantly reduced from imprisonment to fines, raising concerns that this could undermine deterrence and industry responsibility.

[53] *Id.* § 41B.
[54] The Occupational Safety, Health and Working Conditions Code, 2020, No. 37, Acts of Parliament, 2020 (India).

(B) THE PUBLIC LIABILITY INSURANCE ACT, 1991 AND IT'S SHORTCOMINGS

The PLIA[55] was enacted following the Bhopal Gas Tragedy and the Oleum Gas Leak case[56], where the Supreme Court introduced the concept of absolute liability[57], departing from the strict liability principle of *Rylands v. Fletcher*.[58] Absolute liability mandates that hazardous industries bear complete responsibility for any harm caused, without exceptions, irrespective of precautions taken. This principle aimed to ensure better compensation for victims and greater deterrence for companies. However, in the UCC case, the Supreme Court controversially treated this doctrine as mere obiter,[59] not fully applying it to award compensation. The Government of India owned 22% of the stake in UCC, and this evasion from application of principle of absolute liability could be attributed to diplomatic collusion with the judiciary.[60]

The PLIA mandates that owners of enterprises handling hazardous substances obtain insurance policies to cover 'no fault' liability for accidents, with a policy cap of fifty crore rupees. Critics highlight that the Act excludes victims of accidents involving un-notified hazardous substances. Insurance companies required a liability ceiling, leading to a 1992 amendment that capped overall liability.[61] Additionally, owners must contribute to the Environment Relief Fund ('ERF').[62] Compensation is paid first by the insurer, then from the ERF, and finally by the owner if needed. Interim compensation from the ERF must be refunded once full compensation is awarded[63].

Though designed to provide relief to victims of hazardous substance accidents, the PLIA is criticised for its outdated compensation caps. The maximum relief for fatal accidents is INR 25,000 with lower amounts for injuries, property damage, and loss of wages, rendering them inadequate in today's

[55] The Public Liability Insurance Act, 1991, No. 6, Acts of Parliament, 1991.
[56] M.C. Mehta v. Union of India, (1987) 1 SCC 395.
[57] *Id.* at 421.
[58] Rylands v. Fletcher, (1868) LR 3 HL 330 (HL).
[59] Union Carbide Corpn. v. Union of India, (1991) 4 SCC 584, 607-608.
[60] *The Bhopal Disaster and Its Aftermath: a Review,* NATIONAL LIBRARY OF MEDICINE (Aug. 6, 2024), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1142333/.
[61] Vikram Raghavan, *Public Liability Insurance Act: Breaking New Ground for Indian Environmental Law*, 39 J. IND. L. INST. 96, 96-115 (1997).
[62] The Public Liability Insurance Rules, 1991, Rule 10(3), Gazette of India, pt. II sec. 3(i) (1991) (India).
[63] Environment Relief Fund Scheme, 2008, Gazette of India, pt. II sec. 3(i) (2008) (India).

context. These caps, set in 1991, have not been adjusted for inflation, making them practically ineffective. The INR 25,000 cap in 1991 would equate to INR 1,70,975 in 2021 due to cumulative inflation.[64] The compensation under PLIA is significantly lower than what is provided under other laws, such as those governing labour, motor vehicles, and railways, raising questions about its efficacy. Additionally, the implementation of PLIA has been poor, with many owners failing to obtain mandatory insurance and the ERF remaining largely unutilised, despite accumulating significant funds. Despite amendments to the Factories Act and the PLIA, India's legal framework inadequately addresses compensation for victims of industrial disasters, with outdated caps, weak enforcement, and reduced deterrents under new laws like the OSH Code. The shift to absolute liability intended to ensure justice remains underutilized, limiting meaningful redress and accountability.

The outdated compensation caps under the PLIA remain unchanged despite their acknowledged inadequacy, raising questions about the underlying reasons. Legislative inertia appears to be a primary factor, as there have been no significant efforts to amend the Act since its inception in 1991. Parliamentary records reveal sporadic discussions, such as during the 1992 amendment debates, where the focus was on interim relief rather than revising caps, but no substantive action followed.[65] Industry lobbying may further explain the stagnation; insurance companies and corporations have resisted higher liability limits due to increased financial burdens, as evidenced by the 1992 amendment capping indemnity limits to appease insurers.[66] Administrative inefficiency, as highlighted by the Ministry of Environment, Forest and Climate Change's ('MoEFCC') poor enforcement record,[67] compounds the issue. Without targeted reforms addressing these barriers, the PLIA's compensation framework will continue to fall short of its intended purpose.

[64] INFLATION TOOL, *Value of 1992 Indian Rupees today* (Dec. 29, 2024), https://www.inflationtool.com/indian-rupee/1992-to-present-value.
[65] *Third Session (1992) Tenth series, Vol. IX No. 13*, LOK SABHA DEBATES (Apr. 06, 2025), https://eparlib.nic.in/bitstream/123456789/3371/1/lsd_10_3rd_12-05-1992.pdf.
[66] T.R. Subramanya & Aaditya Dighe, *Public Liability Insurance: Its Relevance, Application, Shortcomings and the Way Forward*, 5 J. ENVIRON. L. POL. DEVT. 17, 17-37 (2018).
[67] Ministry of Environment, Forest & Climate Change, *Environment Ministry Directs CPCB to Ensure Better Implementation of Public Liability Insurance Act, 1991*, PRESS INFORMATION BUREAU (Sept. 7, 2015), https://www.pib.gov.in/newsite/PrintRelease.aspx?relid=126680.

In 2024, the Government has introduced sweeping reforms to the Public Liability Insurance framework through the amendments, marking a significant step forward in environmental protection and victim compensation. These revised rules establish clearer procedures for filing claims related to industrial accidents, including standardized forms for relief applications and environmental restoration funding requests. The amendments notably increase financial safeguards by raising insurance limits to INR 250 crores per unit, with INR 500 crores annual cap for multiple incidents. A robust adjudication process now mandates resolution within six months, while new provisions require industries to publicly disclose victim compensation rights.[68] Yet, we are far from providing real and effective relief to victims.

The PLIA could benefit significantly by incorporating key provisions from the National Environment Tribunal Act[69] ('NETA') to strengthen its environmental compensation framework. Firstly, PLIA should adopt NETA's progressive standing provision that allows recognised environmental organisations to file claims on behalf of affected communities,[70] thereby enhancing access to justice. Secondly, removing the arbitrary compensation caps under PLIA, as NETA has done, would ensure adequate relief for victims of environmental damage.[71] Thirdly, PLIA should establish specialised environmental adjudication bodies with technical expertise, similar to NETA's tribunal system,[72] rather than relying solely on District Collectors. Fourthly, incorporating NETA's broader definition of environmental damage,[73] and its linkage with the ERF[74] would create a more comprehensive compensation mechanism. Lastly, PLIA should extend its limitation period for claims beyond the current restrictive timeframe,[75] aligning with more progressive environmental legislation. These adaptations would transform PLIA from a limited liability mechanism into a robust instrument for environmental justice, better equipped to address contemporary challenges of industrial pollution and ecological damage, while maintaining its core principle of no-fault liability.

[68] The Public Liability Insurance (Amendment) Act, 2024, No. 6, Acts of Parliament, 2024 (India).
[69] The National Environment Tribunal Act 1995, No. 27, Acts of Parliament, 1995 (India).
[70] *Id.* § 4 (e).
[71] *Id.* § 5 (2).
[72] *Id.* § 8.
[73] *Id.* § 2(a) & (d).
[74] *Id.* § 22(1).
[75] The Public Liability Insurance Act, 1991, § 6(3), No. 6, Acts of Parliament, 1991(India).

The stark reality of India's absolute liability regime reveals a system crippled by weak enforcement and structural failures. Despite the National Green Tribunal ('NGT') imposing INR 645 crores in environmental compensation, a mere INR 2.2 crores was deposited into the ERF,[76] and a INR 1,062 crores of unutilised funds remain stale,[77] while victims await justice. The NGT's theoretical powers are neutered by frivolous appeals, judicial delays, and a lack of proactive enforcement. Meanwhile, fundamental flaws persist: government undertakings handling hazardous materials remain exempt under PLIA, while the Advisory Committee,[78] largely dominated by industry leaders, holds fewer than required meetings[79] and exhibits a clear conflict of interest.

The ERF's systemic dysfunction stems from institutional disregard for legal mandates and accountability gaps. Despite NGT Rules requiring separate accounts for tribunal awards[80], deposits are inexplicably classified under "*Others*", violating statutory provisions. The MoEFCC's failure to track NGT ordered deposits[81] exposes alarming coordination failures between the NGT, Collectors, and Fund Manager. Collectors compound this by delaying disbursals, only INR 7 crore of Sterlite's INR 100 crores fine reached victims in five years.[82] Worse, courts themselves undermine the ERF's purpose; the Supreme Court's diversion of Sterlite's fine to a Collector instead of the ERF reflects a troubling normalisation of bypassing the designated compensation mechanism. This institutional apathy renders environmental justice illusory.

Without strict enforcement, transparency reforms, and the removal of corporate and state carve-outs, even the best legislative amendments will remain obsolete, perpetuating a regime where liability is absolute in name but illusory in practice.

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[76] *The Report on Management of Environment Relief Fund,* VIDHI CENTRE FOR LEGAL POLICY 15 (2020).
[77] Press Trust of India, *No compensation paid from Environment Relief Fund since 2019: Govt*, THE ECONOMIC TIMES (Apr. 05, 2025), economictimes.indiatimes.com/news/india/no-compensation-paid-from-environment-relief-fund-since-2019-govt/articleshow/.
[78] The Public Liability Insurance Act, 1991, § 21, No. 6, Acts of Parliament, 1991 (India).
[79] *RTI response from HSM Division,* MoEFCC (Sept. 25, 2019).
[80] The National Green Tribunal (Practices and Procedure) Rules, 2011, § 35(4), Gazette of India, pt. II sec. 3(i) (2011) (India).
[81] Tarika Jain, *Underutilisation of Environmental Relief Fund defeats the "Polluter Pays" principle*, THE INDIAN EXPRESS (Apr. 5, 2025), https://indianexpress.com/article/opinion/columns/environmental-relief-fund-pollution-india-7142247/.
[82] *Id.*

(C) A CRITICAL COMPARISON WITH DEVELOPED JURISDICTIONS

India can learn critical lessons from global environmental liability frameworks to strengthen its corporate accountability mechanisms. The U.S. model of strict liability under laws like Comprehensive Environmental Response Compensation, and Liability Act,[83] coupled with heavy fines and criminal penalties, offers a deterrent approach that India's weak enforcement lacks. The program's Hazardous Substance Superfund Trust Fund, financed by industry taxes and penalties, ensures cleanup even when responsible parties evade payment, a model India could replicate to address its weak enforcement and funding gaps.[84] The National Priorities List ('NPL') systematically targets high-risk sites, while mandatory cost recovery from polluters, covering 70% of cleanups by 1996, ensures corporate accountability. Additionally, expedited settlements for minor contributors, de minimis parties, reduce litigation burdens, and natural resource damage claims compel restoration beyond basic cleanup. India's framework lacks such standardised risk assessment, dedicated funding, and robust enforcement. The key gaps that adopting these measures could bridge, ensuring faster, and more equitable environmental remediation.[85]

China's centralised environmental courts and real-time pollution monitoring demonstrate how technology and institutional reforms can overcome bureaucratic delays.[86] Additionally, countries like Austria have identified 7,000 hazardous sites, estimating cleanup costs at USD 2 billion, funded partly by taxes on industrial waste. Canada's provinces manage most cleanups, while the federal government addresses publicly owned sites, with costs shared through general tax revenues. Denmark has about 500 hazardous sites, with cleanup costs ranging from USD 1-3 billion, funded by responsible parties or the government if insolvent.[87]

[83] The Comprehensive Environmental Response, Compensation, and Liability Act, 1980, 42 U.S.C. §§ 9601–9675 (2012).
[84] U.S. Congressional Budget Office, *Analyzing the Duration of Cleanup at Sites on Superfund's National Priorities List*, (1994).
[85] MARK REISCH & DAVID MICHAEL BEARDEN, CONGRESSIONAL RESEARCH SERVICE REPORT FOR CONGRESS SUPER FUND FACT BOOK (CNIE 1997).
[86] Genia Kostka & Jonas Nahm, *Central–Local Relations: Recentralization and Environmental Governance in China*, THE CHINA QUARTERLY 567, 567-582 (2017).
[87] *New Alternatives Advanced for Financing Site Remediation*, 13(2) THE HAZARDOUS WASTE CONSULTANT., 1.13, 1.13-1.15 (1995).

Courts in India frequently award compensation for rights violations under public law. However, such remedies often prove ineffective due to systemic flaws. The ad-hoc quantification of compensation, in the absence of statutory guidelines, results in inconsistent awards. Additionally, delayed disbursement by state agencies further undermines the effectiveness of redressal. Moreover, the weakening of institutions like the National Human Rights Commission and tribunals such as the National Consumer Disputes Redressal Commission ('NCDRC'), and Motor Accidents Claims Tribunal ('MACT') has reduced government engagement in compensation matters. Since a significant portion of such compensation is paid by government bodies, this institutional decline leads to either delayed or inadequate payouts. In cases involving private entities, the enforcement of compensation awards imposes additional costs on claimants, further diminishing access to effective redress. By adopting stricter liability laws, stronger regulatory bodies, and tech-driven enforcement, India can align with global best practices while ensuring sustainable development.

V. BHOPAL COMPENSATION ACT: A LEGISLATIVE ATTEMPT

The Bhopal Gas Leak Disaster (Processing of Claims) Act, 1985 was passed with the objective that claims arising out of the Bhopal gas leak disaster be dealt with speedily, effectively, equitably, and to the best advantage of the claimants.[88] The Court recognised that there was an absence of any existing mechanisms that were effective, and the Fatal Accidents Act, 1855 had turned too obsolete to cater to the demands arising.[89] As already stated in Part II, the Act gave the Government, locus standi to represent the victims of the Bhopal gas tragedy, and invoked the doctrine of *parens patriae*.[90] Although the objective mentioned in the Preamble does not directly coincide with the Act enabled by the legislation, the Government claimed to act under its sovereign powers to protect the *salus populi*.

Section 3 of the Act, gave the Central government an "*exclusive*" right to substitute the victims, and Section 4 of the Act allowed individual petitioners to proceed with their claims at their own cost.[91] This added to an ambiguity, thus defeating the purpose of the Act. The duality of rights given to the

[88] Bhopal Gas Leak Disaster (Processing of Claims) Act, 1985, Preamble, No. 2, Acts of Parliament, 1985 (India).
[89] Charan Lal Sahu v. Union of India, (1990) 1 SCC 613, ¶¶ 168-169.
[90] *Id.* at ¶¶ 36, 74, 100.
[91] Bhopal Gas Leak Disaster (Processing of Claims) Act, 1985, §§ 3-4, No. 2, Acts of Parliament, 1985 (India).

victims along with the Central Government institutionalised the proceedings to make it more complicated, and hence delayed the procedure.[92] Apart from the procedural irregularities and consequential ineffectiveness, the duality of rights contravenes Article 14 of the Indian Constitution. Article 14 forbids class legislation but does not forbid classification based on reasonable grounds.[93] This "*reasonable classification*" must not be evasive and shall be based on substantial grounds.[94] Section 3(1) of the impugned Act provides for a general provision giving the power to the Central Government to represent the "*claimants*" that includes "*every person who has made, or is entitled to make, a claim for all purposes connected with such claim in the same manner and to the same effect as such person*".[95] Section 3(2) lays down a detailed description of Section 3(1), to include all possible existing grounds under the Central Government's representation.[96] However, Section 4 makes a classification, allowing the claimant to be represented by a legal practitioner "*if such person so desires, permit at the expense of such person*".[97] The existence of classification in the Act is not debatable. The grounds of this classification should have determined the legality of the Act.

The two criteria to test a reasonable classification are- intelligible differentia as the foundation of that classification, and the existence of a rational nexus to the object sought to be achieved by the statute in question.[98] The ground of classification, as per Section 4 is the desire and financial capability of the claimant. The desire of a person is whimsical in nature and is subject to manipulations and alterations, thus, fails to be a reasonable ground of distinction. Deeming economic capacity as a ground of distinction is discrimination against the victims who were rendered incapacitated by the disaster to represent themselves as their right to represent themselves is violated, and they are left at the mercy of the government for representation and compensation. This nullifies the first criterion of there being an intelligible differentia. Continuing to examine the validity of the second criterion, the objective of

[92] Charan Lal Sahu v. Union of India, (1990) 1 SCC 613, ¶¶ 97-98.
[93] *Constitutional Law of India - Chapter 7 - Right to Equality* (Aug. 07, 2024), http://student.manupatra.com/academic/abk/constitutional-law-of-india/CHAPTER-7.htm.
[94] R.K. Garg v. Union of India, AIR 1981 SC 2138, 1981 11 TAX CAW REV. 277 (SC).
[95] Bhopal Gas Leak Disaster (Processing of Claims) Act, 1985, § 3(1), No. 2, Acts of Parliament, 1985 (India).
[96] *Id.* § 3(2).
[97] *Id.* § 4.
[98] *Constitutional Law of India - Chapter 7 - Right to Equality* (Aug. 07, 2024), http://student.manupatra.com/academic/abk/constitutional-law-of-india/CHAPTER-7.htm.

the Act was to process the claims in a speedy, effective, and equitable manner.[99] Thus, the statute encumbers the government to provide monetary relief to the citizens. This could have been reasonably done without substituting the claimants and representing them. Rather, an interim relief or maintenance could have been granted by the government to enable the victims till actual claims get processed. The objective laid out, was either way not accomplished as the struggle of those petitioners still goes on, after 41 years of the tragedy. Many victims received inadequate compensation, often as low as INR 25,000 despite losing family members or suffering lifelong health issues.[100] Legal battles continue, with activists seeking additional compensation of INR 7,844 crores.[101] The role of the Central Government should have been of an executive body, enabling the victims and not substituting them. Hence, we find no rational nexus of the action with the object sought to be achieved by the statute. Thus, it now becomes comfortable to believe that there was no reasonable classification, and the Act violated Article 14 of the Indian Constitution.

Alongside the violation of Article 14, the intention of the State could be challenged on multiple grounds. The claimants were considered incapable of sustaining a legal battle and "*to look after their own interests effectively or purposefully*" with the powerful corporation, and hence, the State came to act as a *parens patriae*.[102] The Court considered the victims unmatched to the multinational companies.[103] Although, this may not be a reasonable ground for the Central Government to substitute the claimants but, even if we consider the prima facie reasons as justified, the reasons for not notifying the "*real claimants*" of the nature of proceedings and settlement, particularly under Order XXIII Rule 3-B of the CPC, still remains unanswered.[104] Such incapable victims could not be expected to have comprehended or contemplated the settlement, so it became the responsibility of the de jure representative to inform them. These grounds to challenge the legislative intent become even more well-founded when the pecuniary interests of the Union of India are looked into. Surprisingly, the

[99] Bhopal Gas Leak Disaster (Processing of Claims) Act, 1985, No. 2, Acts of Parliament, 1985 (India).
[100] Pheroze L. Vincent, *Compensation salt in death wound: 40 years later, Bhopal victims' fight continues*, THE TELEGRAPH ONLINE (Dec. 02, 2024).
[101] Bhopal Gas Leak Disaster (Processing of Claims) Act, 1985, No. 2, Acts of Parliament, 1985 (India).
[102] *Id.*
[103] *Id.*
[104] *Id.*

"*claimants*" hold 22% stake in Union Carbide Corporation, the respondents.[105] The doctrine of *dominus litis* is a fundamental principle of civil litigation, that deems the claimant as "*master of the suit*" with rights to determine the parties to the suit.[106] With the government assuming an unwarranted position of the claimant, the victims were deprived of this right.

The Bhopal Gas Leak Disaster (Processing of Claims) Act, 1985 was invalid as it violated Article 14 of the Constitution. If, for once, we let aside the validity of the Act to focus on the contributions it made, nothing substantial could be chalked out. It could be safely said that even the "*petitioners*" were not happy with the legislations that they drafted, and the compensations reimbursed via that. This could be backed by the curative petition filed by the Union Government in 2010 to grant additional compensation to the victims.[107] The inefficiency of the Union Government is highlighted in the judgment given by the Supreme Court quashing the petition. The Constitutional Bench held that the government was entrusted to create necessary medical insurance, in order to facilitate adequate compensations, which it failed to do.[108] Hence, it was held to be gross negligence on part of the Union as a welfare state.[109] However, to put it on amiable grounds, the legislation could be seen as a need for the given period in the absence of other mechanisms established. This could be considered as a one-time solution brought to counter the dire need of the situation. It is practically and legally not possible for the government to represent the claimants for every case of mass torts, irrespective of the degree of damage caused. Even in the Oleum Gas Leak case, despite the magnitude of damage caused, the doctrine of *parens patriae* was not invoked, the claims were processed via normal course, and no legislative interruption was made.[110]

Substituting this, India can take inspiration from the American model of mass torts litigation. Rule 23 of Federal Rules of Civil Procedure[111] provides legal qualifications for class action suits. The

[105] *The Bhopal Disaster and Its Aftermath: a Review,* NATIONAL LIBRARY OF MEDICINE (Aug. 6, 2024), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1142333/.
[106] S. S. Rana & Co., *Plaintiff Is the Dominus Litis- India*, LEXOLOGY (June 01, 2023), https://www.lexology.com/library/detail.aspx?g=6a6f7dd6-dc7d-4cdd-88a2-8da4de6307b4.
[107] Union of India v. Union Carbide Corpn., 2023 SCC OnLine SC 264.
[108] *Id.* ¶49.
[109] *Id.*
[110] M.C. Mehta v. Union of India, (1987) 1 SCC 395.
[111] Federal Rules of Civil Procedure of 1937 Rule 23- Class Actions.

classification involved numerosity, commonality, typicality, and adequacy of representation.[112] The court appoints fiduciary to protect every petitioner's interest[113] rather than a sovereign assuming the position of universal representative of the petitioners.

With the ever-evolving jurisprudence of mass torts and an increasing number of mass torts cases that involve civil compensation, we need an established mechanism that would uncomplicate the judicial process and facilitate the victims by alleviating the burden of filing an individual suit. This process should not overshadow the rights of the victims to represent themselves and determine the discourse of their claims.

VI. THE UPRISING OF JUDICIAL ACTIVISM

Upendra Baxi substitutes the word PIL with SAL.[114] His idea derives from the notion that while PIL is extracted from Anglo-American jurisdictions, the idea behind it is something different in the context of India. But be it PIL or SAL, the judges of the constitutional courts are responsible for facilitating a regime of public activism through judiciary. The wider scope of execution of writs gave rise to PIL or SAL. The secret lies in constitutional interpretation.[115] For example, the PIL filed by Ms. Kapila Hingorani exposing the violations of Human Rights and Fundamental Rights towards undertrial prisoners in Bihar was based on news articles in the Indian Express solely.[116] In 1980, two law professors wrote a letter to the Indian Express describing the plight of detainees in Agra for the purpose of a petition,[117] which later was followed by a writ[118] by a third-year law student. Between 1980 and 1982, the majority of the approximately seventy-five PIL writs filed were initiated by social activists rather than individual lawyers or lawyer groups.[119] This trend was largely due to a unique

112 Samir D. Parikh, *The New Mass Torts Bargain*, 91 FORDHAM L. REV. 123 (2022).
113 *Id.*
114 Upendra Baxi, *Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India*, 4 THIRD WORLD LEGAL STUD. 107 (1985).
115 Upendra Baxi, *Introduction to K.K. Mathew, Democracy, Equality and Freedom*, 22 IND. L. REV. (1980).
116 Hussainara Khatoon v. State of Bihar, 1980 SCC (CRI) 40.
117 Dr. Upendra Baxi v. State of Uttar Pradesh, 3 SCALE 1136 (1981).
118 Uhinnamma Sivdas v. State (Delhi Administration), W.P. No. 2526 of 1982.
119 Azad Rickshaw Pullers v. Punjab, 1 SCR 366 (1981); Fertilizer Corp. Kamgar Union, Sindri v. Union of India, 2 SCR 52 (1981); Municipal Council Ratlam v. Vardichand, 1980 (1) SCR 47; R.K. Garg v. Union of India, AIR SC 2138 (1981); A.K. Roy v. Union of India, 3 SCALE 1601 (1981); I.M. Chagala v. Union of India, SCALE 1959 (1981).

development during that time. Much of the SAL activity emerged from letters sent by individuals to Justice P.N. Bhagwati, who served both as a Justice of the Supreme Court and the Chairperson of the National Committee for the Implementation of the Legal Aid Scheme. These letters often cited investigative reports from newspapers and magazines, and Justice Bhagwati frequently transformed these letters into writ petitions by bringing them before the Court. He argued that the rule of law would be "*substantially impaired*" if no one had the standing to seek judicial redress for public wrongs or injuries. Hence, it is "*absolutely essential*" for the rule of law to draw people away from taking matters into their own hands and instead bring them to the courts. Allowing breaches of public duties to go unaddressed due to lack of standing would, according to him, "*promote disrespect for the rule of law*", potentially lead to corruption, and encourage inefficiency. Moreover, it could create opportunities for the "*political machinery*" to become "*a participant in the misuse or abuse of power*". Finally, he highlighted that the newly emerging social and economic rights require a different approach to enforcement.[120]

Now, how would the Courts facilitate an environment of compensation without the legislation? Accomplishing such a significant jurisprudential achievement requires not only vision but also meticulous attention to the practical details of how rights violations are proven. Without a careful approach, a jurisprudence of state liability for constitutional violations would not be sustainable. The challenges of proving such cases are particularly severe in instances of state repression, and a recurring pattern of argumentation by State counsel exacerbates these difficulties.

The state counsel often denies any or all allegations of torture or terror through affidavits questioning the standing, credibility, and reliability of information provided by the social activists, sometimes even attributing ulterior motives to them. Various aspects of evidence and procedure laws are invoked to obstruct the disclosure of documents crucial for proving fundamental rights violations. Even if documents are disclosed, there is always the possibility that their evidentiary value will be challenged, often through the tactic of conducting multiple investigations. The problems of SAL are similar to those of Class Action Litigations. If and when tomorrow we introduce and develop such concepts, we need to deal with similar issues. Justice Bhagwati introduced the concept of socio-legal

[120] I.M. Chagla v. P. Shiv Shankar, 4 SCALE 1975.

commissions of inquiry. The Court[121] has utilised various methods for fact-finding, such as directing social activists, teachers, and researchers to submit detailed reports funded by the State. Medical specialists have also been called upon to provide comprehensive reports in cases involving torture or mistreatment. In the case of *Olga Tellis v. State of Maharashtra,*[122] a review and investigation were mandated by the Bombay High Court. Additionally, district judges have been tasked with ascertaining facts and monitoring the implementation of the Court's directives in specific instances. For example, in the Kanpur undertrial rape cases[123], the District Judge was directed to conduct an investigation and submit a report.

PIL or SAL in India is closely akin to class action suits, as both enable collective redress for broad violations affecting groups rather than individuals. In PIL or SAL, courts assume a proactive role, sometimes broadening procedural norms to admit cases on behalf of disadvantaged or marginalized groups. This mirrors class actions, where representatives act for affected individuals sharing common legal grievances. Both remedies prioritise social justice, addressing systemic harms by holding institutions accountable. Like class actions, PIL and SAL seek not only individual relief but also structural changes and policies to prevent future rights violations. Courts, expanding procedural norms and employing socio-legal commissions for fact-finding, aim to ensure accountability and social justice. However, challenges like state counsel obstruction, evidentiary hurdles, and inadequate compensation persist, requiring innovative frameworks for compensatory justice against fundamental rights violations.

Addressing these complex questions is significantly more challenging than simply compelling the state to take specific actions under the Court's expanding jurisdiction. The difficulty lies in the need for substantial and innovative changes to the traditional legal framework. Positively, we see broadening locus standi, narrowing the scope of documents for which the government can claim privilege, developing new methods of fact-finding in public interest litigation, and creating preventative measures to avoid the recurrence of rights violations in similar cases. However, these advancements

[121] Hira Lal v. Zilla Parishad, W.P. No. 1869/80-81 (India).
[122] Olga Tellis v. State of Maharashtra, 1986 AIR 180.
[123] Munna v. State of U.P., (1982) 1 SCC 545.

are only meaningful if the fundamental constitutional issues concerning citizens' rights against state violations are fully addressed and resolved. Ultimately, this involves holding the state accountable for compensatory arrangements in cases where fundamental rights have been violated. The challenge of establishing appropriate compensation for such violations remains daunting. How can we adequately compensate young individuals who have been unjustly detained for years, losing their childhood and social connections? How do we compensate those who have been blinded while in custody or subjected to inhumane torture? What should a court do under fundamental rights jurisdiction when it finds young people imprisoned solely to enable sexual assaults by their warders?

VII. RECOMMENDATION

India's tort law framework, rooted in British common law, remains ill-equipped to address mass torts, as seen in tragedies like Bhopal and Uphaar. From a law and economics perspective, weak liability rules fail to deter corporate negligence, while doctrines like *parens patriae* and forum limitations restrict victim redress. Compared to mature jurisdictions like the U.S, European Union and United Kingdom ('U.K.'), etc., India lacks robust mechanisms such as class actions or economic deterrence models to hold multinational corporations accountable.

(A) THE ECONOMICS OF LIABILITY: INCENTIVES AND DETERRENCE IN MASS TORTS

From a law and economics perspective, if a tortfeasor faces no liability threat, they lack the incentive to take precautions, particularly in mass tort scenarios. Most mass torts fall into a "unilateral care model" where only the injurer has the capacity to prevent harm. Statutory obligations in India, such as those under the Factories Act and the PLIA, impose duties on establishment owners to prevent injuries from accidents involving hazardous substances. Liability rules like no-fault, strict, negligence, or absolute liability dictate how damages are allocated in accidents. Economic analysis of tort law seeks to establish optimal care levels by choosing an appropriate liability rule to deter injurers from risky behaviours. In the U.S., the "*Hand Rule*," established by Judge Learned Hand, assesses negligence by weighing the cost of precautions against the probability and severity of injury, but Indian courts have yet to apply this economic analysis framework. In India and other global south countries, Multi-National Corporations ('MNC') may evade liability for tortious acts they would be accountable for in

their home countries, due to weaker regulatory frameworks and cultural factors. While victims in developed nations often receive fair redress, those in developing host states, where torts like pharmaceutical misadventures or gradual environmental damage are harder to detect, often do not. For example, in the Bhopal Gas Tragedy, the parent company UCC used the corporate veil defence to argue that it was not liable for the actions of its subsidiary UCIL. Although Indian law allows for piercing the corporate veil when justified, corporate entities frequently avoid liability by leveraging limited liability and separate corporate personality principles.

(B) CORPORATE ACCOUNTABILITY GAPS

India's Companies Act, 2013, imposes Corporate Social Responsibility ('CSR') obligations on large companies, including environmental protections. However, CSR often remains more of a "*soft law*" tool than a true deterrent against corporate negligence, as many MNCs resist human rights obligations, particularly in global south jurisdictions where they wield significant economic influence. Although CSR is mandated, these duties lack strict enforcement mechanisms, resulting in minimal deterrent value against corporate negligence or harm. India's engagement in Bilateral Investment Treaties ('BITs') has also influenced its liability landscape. While BITs initially aimed to attract foreign investment, adverse arbitral rulings have shown they can expose India to costly liability. Consequently, India revised its 2015 Model BIT to include protections for human health and the environment. The India-Brazil BIT, 2020 reflects this approach, advocating for investment that adheres to labour, environmental, and health laws rather than compromising standards to attract investors.

Recommendations to strengthen protections against corporate negligence in India include enhancing regulatory frameworks for liability enforcement, reducing corporate reliance on limited liability to evade responsibility, and explicitly incorporating economic analyses like the Hand Rule in judicial decisions. Encouraging stricter compliance with CSR obligations beyond soft law could increase corporate accountability, as would harmonising domestic standards with international human rights norms. Additionally, a more balanced BIT policy would protect host states from pro-investor biases, allowing India to safeguard its public and environmental interests effectively.

(C) PATHWAYS TO REFORM: LEGAL, INSTITUTIONAL, AND COMPARATIVE SOLUTIONS

To address the challenges posed by large industries, particularly foreign MNCs, India must undertake a comprehensive approach that includes sensitising and reforming attitudes within state institutions, legal practitioners, and the judiciary. This requires tailored laws and policies that prioritise the rights of affected communities and society at large. India should assert its economic sovereignty while balancing foreign investment interests through a clear, assertive policy framework, both domestically and internationally. The inclusion of protective clauses in new BITs would help promote investment while safeguarding India's environmental, health, and economic priorities as a host state.

Furthermore, fostering rights-based awareness among the population, especially in regions affected by poverty and illiteracy, is essential. This can empower individuals to collectively assert their rights in the face of violations. Legal reforms are also needed to modernise the judiciary to handle complex mass tort cases, including allowing contingency fees and litigation funding under regulated conditions. Class action suits should be encouraged as effective remedies in mass tort cases over PILs.

Judges and lawyers would benefit from education on comparative tort law advancements, particularly from the U.S., enabling them to handle mass tort cases more effectively and ensure fair, timely compensation. Like the Restatement (Third) of Torts[124] has achieved partial success in the U.S., with courts adopting its streamlined liability frameworks, such as intentional harm and negligence.[125] However, resistance persists due to its departure from traditional doctrines. While influential in modernising tort law, its implementation remains uneven, with some states retaining Second Restatement principles,[126] reflecting judicial caution toward expansive liability standards. India has the opportunity to critically examine and incorporate the best of such legislative pieces. Likewise, the U.K.'s Crown Proceedings Act[127] provides a compelling blueprint for India to reform its tort jurisprudence by codifying state liability. India should enact similar legislation to abolish the outdated

[124] The Third Restatement of Torts includes standalone restatements on the following topics: Products Liability (1998); Apportionment of Liability (2000), Liability for Physical and Emotional Harm (2010); Liability for Economic Harm (2020); Intentional Torts to Persons (completed in 2021); Remedies, Medical Malpractice, Defamation and Privacy, and Miscellaneous Provisions.
[125] Restatement (Third) on Torts: Liability for Physical Harm, 2010, § 5 & 6.
[126] Restatement (Second) of Torts, 1965.
[127] Crown Proceedings Act 1947, 10 & 11 Geo. 6 c. 44 (U.K.).

sovereign immunity doctrine, which creates judicial inconsistency.[128] Furthermore, the adoption of the U.K.'s broad liability standard which is holding the state accountable for its employees' torts unless explicitly exempted, while incorporating safeguards to prevent frivolous claims. A dedicated Tort Claims Act would harmonise liability principles.

Additionally, executive and legislative actions should focus on establishing robust monitoring, and enforcement mechanisms, possibly introducing specialized regulators where necessary to address emerging risks in a balanced manner, supporting both regulatory oversight and business-friendly policies.

VIII. CONCLUSION

This Article began with an ultimate dispositive issue of compensation to the victims of mass torts. Numerous events that shook the public conscience failed to gain appropriate legal assistance, and the victims remained ill-compensated. To trace down these inefficiencies and lacunae, we went on to delineate the systematic development of mass torts in India. This narrative begins with the Bhopal Gas Tragedy, when an ill-equipped judiciary was tasked with determining the liability of the tortfeasors and determining the compensation for an overwhelming number of victims. The government intervened by bringing legislation to facilitate. The system came crashing down, revealing the incompetence of the mechanisms. The major contribution of the case was to blur the lines between private law and public law and liberalise the scope of locus standi. Later, a multitude of cases unfolded, which contributed to the seriousness of the issue. Each of these armed the judiciary to deal with mass tort cases. The legislative developments during the initial phases focused on mass torts causing environmental damages and, hence disabling the victims. This, along with the simultaneous cases developed the doctrines of absolute liability and polluter pays. The legislative enactments still have, in multiple forms, incorporated forms of class action suits to deal with mass torts, but they have always been highly targeted and limited in scope. Those which are applicable to a comparatively general context are proven to be insufficient and blunt in nature. Along with this, outdated compensation

[128] Kasturi Lal Ralia Ram Jain v. State of U.P., AIR 1965 SC 1039; N Nagendra Rao v. State of Andhra Pradesh, AIR 1994 SC 2663.

caps and non-utilization of funds do make these legislative enactments ineffective. The Bhopal Compensation Act stands disqualified of Article 14 and is even questioned based on efficiency and material productiveness. The problem centres around the authorities being seldom held accountable. This has been the case with both legislative and judicial initiatives. The only recourse to the same would be the victims themselves representing themselves in the court of law, rather than them being called "*legally disabled*". This would lead to a targeted, victim-centric resolution that will have an impact on the authorities accountable, via integrating mass victims, suffering from the same cause and asking for the same resolution. Social Action Litigation is the closest akin to class action suits in India. Apart from being bound by similar redressal mechanisms and scope, the challenges pummelling them are also similar. But for SALs to function, the state shall be held responsible for compensatory arrangements to protect citizen's rights against the state.

This creates a complete picture as to how the issues of mass torts are dealt with in the nation and the regime of compensation via class action suits. Positively, no radical reforms are required to inculcate class action suits into the system, mere systematic reforms like strengthening CSR measures, providing for direct accountability and revising pro-investor biases in BIT's would suffice. Harmonization of domestic laws with international standards to foster the public interests and rights is recommended. Everything boils down to incorporating economic analysis into judicial decisions because justice, in this case, is the only economically viable alternative.

ARTICLE

BNS AND ANIMAL WELFARE: IS THE REFORMED LAW JUST A BARK WITHOUT A BITE FOR ANIMAL WELFARE?

Stuti Malik[*]

ABSTRACT

The Bhartiya Nyaya Sanhita, 2023 was introduced as a step to modernise India's existing criminal legal framework. However, its effectiveness in safeguarding the welfare of animals remains debatable. Animals form an integral part of our society, but lawmakers often fail to take their existence into account while formulating laws. This article critically analyses the animal welfare provisions under BNS and tries to identify whether it portrays any real change or is merely a reiteration of the old laws stated in the Indian Penal Code, 1860. It argues that though it is commendable that the BNS aggravates the punishments, it fails in addressing critical matters not limited to but including protection against bestiality and punishment for non-fatal acts of cruelty. The article goes further to castigate the anthropocentric bias that pervades the legal structure of India, where animals are treated as nothing more than property with no legal personality, while their intrinsic value as living beings is ignored constantly by the law. It also investigates the profound relationship between animal cruelty and human violence based on studies by criminologists who expose depressing relationships between the two acts of violence with different victims. It further points out that proper animal welfare laws are not only a moral imperative in terms of necessity but also a stakeholder in the well-being of society in general. The article attempts to develop an eco-centric approach to law which goes beyond punishment and strives for greater respect for the rights of animals, resonating with the hallmark of compassion and justice. By proposing some such reforms to grant legal personality to animals, inflict tougher penalties for cruelty, and eliminate loopholes existing in the current criminal legal framework for the protection of animals, all life forms are proposed to be valued by law.

Keywords: Animal Rights, Bhartiya Nyaya Sanhita (BNS), Juristic Personality of Animal, Ecocentrism, Legal Reforms

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I. INTRODUCTION

"The Greatness of a Nation and its Moral Progress can be Judged by the Way its Animals are Treated."

-Mahatma Gandhi

Our society is composed of not only humans but animals as well. However, in the same society, the silent suffering of animals is often overlooked. Human nature is such that without imposition of sanctions, regulation of their behaviour becomes difficult. From conducting illegal animal races for cash betting[1], paying no regard to the extreme physical strain put on them for their own entertainment, to dumping them alive into the river with their mouth and legs tied,[2] what supplements this behaviour of humans towards animals is the insufficiency of laws[3] for their protection as well as the ignorance of the importance of other species in this ecosystem.

Therefore, human interaction with other life forms often results in cruel and sadistic outcomes depending on human convenience. Although legislation for animal welfare such as the Wild Life (Protection) Act,[4] Article 48A of the Indian Constitution,[5] Prevention of Cruelty to Animals Act, 1960,[6] etc. do exist, they are negligible in bringing a change in society mainly due to its inability to create deterrence owing to insufficient penalties imposed by such legislations.[7] The Federation of Indian Animal Protection Organisation's 2020 report[8] indicates that there have been 20,000 deliberate and heinous crimes against animals in India during the past decade. On average, five stray animals were lethally harmed each day in acts of violence. The true number may be at least tenfold greater, as indicated by the research, suggesting 50 animal fatalities daily and an average of two creatures being indiscriminately slaughtered every hour in a nation renowned for its commitment to non-violence and the practice of ahimsa as a lifestyle. The Bharatiya Nyaya Sanhita,

[1] Vijay Singh, *Cracking the whip on animal cruelty, activists stop yet another illegal horse cart race*, TIMES OF INDIA (February 23, 2025, 10:51 AM), https://timesofindia.indiatimes.com/cracking-the-whip-on-animal-cruelty-activists-stop-yet-another-illegal-horse-cart-race/articleshow/118497662.cms.

[2] The Week News Desk, *Animal cruelty in Telangana: 21 dogs die after miscreants throw animals into river with mouth and legs tied*, THE WEEK (January 07, 2025, 16:34 PM), https://www.theweek.in/news/india/2025/01/07/animal-cruelty-in-telangana-21-dogs-die-after-miscreants-throw-animals-into-river-with-mouth-and-legs-tied.html.

[3] Bhavya Johari, *The Palpable Dichotomy Between Animal Cruelty Laws and Implementation – Is There a Way Forward for Indian Jurisprudence?*, J. ANIMAL L., ETHICS & ONE HEALTH (LEOH), 122, 123 (2024).

[4] The Wild Life (Protection) Act, 1972, No. 53, Acts of Parliament, 1972 (India).

[5] INDIA CONST. art. 48A.

[6] The Prevention of Cruelty to Animals Act, 1960, No. 59, Acts of Parliament, 1960 (India).

[7] Somak Ghoshal, *Penalty for Torturing an Animal in India Is Less Than the Price of a Cup of Coffee*, HUFFPOST (July 7, 2016, 09:08 AM), https://www.huffpost.com/archive/in/entry/penalty-for-torturing-an-animal-in-india-is-less-than-the-price_n_10856308.

[8] WORLD ANIMAL PROTECTION, https://api.worldanimalprotection.org/country/india (last visited June 13, 2025) [hereinafter, "World Animal Protection"].

2023 ('BNS') kindled some hope for a reformed legislation that seeks to change this narrative and offer a legal shield for the voiceless souls. Bringing in more stringent punishments for acts of violence against animals, it functioned as a beacon of hope. But is the BNS able to do justice in dealing with animal welfare?

This paper aims to objectively evaluate this question by analysing the animal welfare provisions contained in the BNS. It seeks to ascertain if the new legal framework genuinely enhances protections for animals or only implements superficial revisions. The paper also suggests reforms which could pave the way for a more just legal system for the non-human beings. To answer the question, the paper firstly examines the need for recognising animals as "*juristic persons*" and establishes why the existing legal framework in India is unable to adequately protect the welfare of animals. Secondly, the paper compares the BNS and the repealed Indian Penal Code, 1860 ('IPC') and looks into the changes brought by the new Act and lacunas within the same. Thirdly, the paper critically analyses the inadequacy of the new criminal Act in protecting animals. Fourthly, reforms in the existing criminal laws have been suggested, to accord better protection to animals against criminal actions towards them. Fifthly, the paper seeks to explain the link between animal cruelty and violence against human beings, so as to establish a correlation between acts of violence against both. Through this it highlights the need to pay due regards to reform existing legal framework, aiming to adequately deter acts of violence against animals, which may also aid in reducing violence against humans. Finally, the paper concludes by urging to incorporate reforms in criminal laws in India to provide better protection to animals and to take a shift from the present anthropocentric approach to an eco-centric approach, accounting for not only the welfare of humans but that of animals too.

II. ARE ANIMALS JURISTIC PERSONS?

The term "*person*" has been derived from the Latin term "*persona*". In simple terms, a person is a being who has rights and duties. A person might be a "*legal person*" or a "*natural person*". Natural persons include persons who are both "*in-law*" or "*in fact*". A person "*in fact*" refers to a human being as a biological entity, existing in reality.[9] A person "*in law*", on the other hand, is any being or entity recognised by law as having rights and duties—this includes both natural and juristic

[9] Elvia Arcelia Quintana Adriano, *Natural Persons, Juridical Persons and Legal Personhood*, 8(1) MEXICAN LAW REVIEW 101 (2015), https://www.sciencedirect.com/science/article/pii/S1870057815000062.

persons.[10] Every natural person includes within their ambit legal persons, but every legal person is not a natural person.

Salmond, a renowned jurist belonging to the Analytical School of thought, describes a "*legal personality*" as "*beings that are either real or imaginary, who for the purpose of legal reasoning are treated in greater or less degree in the same way as human beings*".[11] The purpose of recognising any being as a legal personality is to "*ease the interaction with them through the process of law*".[12] To extend protection to animals it is imperative to recognise them as a juristic personality. Only on such recognition arise certain rights associated with their existence and on infringement of such rights liability may exist in law.

(A) EVOLUTION OF JURISTIC PERSONALITY OF ANIMALS

In Ancient times, animals were considered as legal persons having rights to sue as well as be sued.[13] Instances could be seen where animals were charged and tried. Keeton gave some instances of the same in his book wherein he mentioned Greek laws where animals and trees could be tried for offences against human beings.[14] Further, an incident in Germany can also be used as evidence that animals were given legal personality, where a cock that was accused of continuous crowing was tried and as it failed to establish its innocence, it was executed.[15] A popular tale of the Muslim Emperor Jahangir can be used to support the stance of the legal personality of animals in ancient India where a bull was produced before the king and it was thought that the bull came forward to complain against his master.[16] This tale envisages the right to sue animals.

But, in modern times, animals are no longer "*legal persons*" in the eyes of law.[17] Rather than being accorded legal personality, animals are treated as mere objects of protection under animal welfare

[10] World Animal Protection, *supra* note 8.
[11] John H. Farrar, *Salmond and Corporate Theory*, 38 V.U.W.L. REV. 925, 926 (2007).
[12] DR. AVTAR SINGH & DR. HARPREET KAUR, INTRODUCTION TO JURISPRUDENCE 351 (3rd ed. 2011).
[13] Pranjal Pranshu, *A Study of Animals as Legal Persons*, 1 (1) INDRAPRASTHA L. REV. 1 (2020), https://indraprasthalawreview.in/wp-content/uploads/2020/10/ggsipu_uslls_ILR_2020_V1-I1-09-pranjal_pranshu.pdf [hereinafter, "Pranjal Pranshu"].
[14] Asanka Edirisinghe, *Nature as a Sentient Being: Can Rivers Be a Legal Person?,* 33(2) WILEY ONLINE LIBRARY 224 (2024), https://onlinelibrary.wiley.com/doi/full/10.1111/reel.12529.
[15] V.D MAHAJAN, JURISPRUDENCE AND LEGAL THEORY 332 (5th ed. 2012).
[16] Simran Mishra, *The Concept of Legal Personality*, LEGAL-LORE, (June 9, 2025) https://www.legallore.info/post/the-concept-of-legal-personality.
[17] Animal Welfare Board of India v. Union of India, (2023) 9 SCC 322.

legislation.[18] Though some would say that laws against cruelty to animals reflect legal recognition, such laws are only designed to regulate human behaviour and not to recognise any rights on the part of animals. This view is supported by the anthropological school of jurisprudence, which argues that law is neither an abstract nor a universal concept, but an evolutionary phenomenon of the customs, beliefs, and socio-cultural values of a society.[19]

Sir Henry Maine, one of the foremost pioneers of the anthropological school of jurisprudence, rightly stated "*The law does not fall from the sky. It tends to develop as an expression of a society's peculiar culture, and values*".[20] From this viewpoint, laws prohibiting cruelty to animals reflect not an acknowledgement of the existence of animal rights, but the moral and ethical norms followed by the society in respect of treating non-human life. The anthropological school thus, in this context, insists on viewing such developments within the law as expressions of society's attitude towards animals and not as enunciations of legal personhood granted to animals. This perspective is especially relevant in explaining the limitations of India's current legal framework, which offers protection to animals primarily when human interests or sentiments are involved. It highlights that any meaningful shift toward recognising animals as legal persons requires a deeper cultural and moral transformation within society—one that sees animals as rights-bearing beings rather than as objects of moral concern alone. For example, in some states such as Tamil Nadu, cow slaughter is banned.[21] The reason behind this ban is not that the legislators recognised animal suffering but because cows hold a sacred position in Hindu religion and cultural practices.[22] Thus, this aligns with the anthropological school's reasoning that law is a result of human convenience.

Furthermore, these criminal regulations continue to fall short of delivering genuine justice to animals since penalties against cruelty are mostly insignificant, enforcement is faint, and animals do not have immediate legal standing. This transition from considering animals as judicial entities to mere recipients of limited legal protection is a cause of concern regarding the efficacy of modern legal systems in maintaining animal welfare.

[18] The Wildlife (Protection) Act, 1972, § 39, No. 53, Acts of Parliament, 1972 (India).
[19] Shreya Sahni, *Henry Maine and Anthropological School of Jurisprudence*, BLACK N' WHITE JOURNAL (October 19, 2020), http://bnwjournal.com/2020/10/19/henry-maine-and-anthropological-school-of-jurisprudence/ [hereinafter, "Shreya Sahni"]
[20] *Id.*
[21] The Tamil Nadu Animal Preservation Act, 1958, No. 10, Act of Tamil Nadu State Legislature, 1958 (India).
[22] Shakeel Sobhan, *The politics behind India's beef bans*, DW (Dec. 23, 2024), https://www.dw.com/en/beef-ban-india-holy-cows-bjp-hindu-anemia/a-71144039.

(B) JUDICIARY & RECOGNITION OF ANIMALS AS A JURISTIC PERSONALITY

The Indian judiciary being the harbinger of upholding the supremacy of law and recognising rights & liberties of individuals, on several instances, has provided inconsistent views concerning the debate around animals and their consequential juristic personality.

In the landmark case of *Animal Welfare Board of India v. A. Nagaraja & Ors.* ('Nagaraja'),[23] the Hon'ble Supreme Court of India for the first time extended the ambit of Article 21[24] of the Constitution of India to safeguard the rights of animals as well. The Apex Court stated that animals have a right to live with "*honour and dignity which cannot be arbitrarily deprived of and its rights and privacy have to be respected and protected from unlawful attacks*".[25] The Apex Court also stated, "*Animals have also a right against the human beings not to be tortured and against infliction of unnecessary pain or suffering*".[26]

Thus, the Apex Court recognised that animals do have a right to life which cannot be abridged by human actions and if this right is infringed then strict actions can be taken by the appropriate courts against such person. It is pertinent to note that in the instant case, the Apex Court had not explicitly recognised animals as a juristic personality.

The Hon'ble High Court of Uttarakhand further solidified the stance on the juristic personality of animals in the case of *Narayan Dutt Bhatt v. Union of India* ('Narayan Dutt').[27] The Court, relying on the *Nagaraja* case[28] held, *"the entire animal kingdom including avian and aquatic are declared as legal entities having a distinct persona with corresponding rights, duties, and liabilities of a living person*".[29] They accorded animals a similar recognition of having a juristic personality as that of corporations, idols, holy scriptures and rivers. The Court also recognised the citizens throughout the state of Uttarakhand as loco parentis for the welfare as well as the protection of animals.

[23] Animal Welfare Board of India v. A. Nagaraja, (2014) 7 SCC 547 [hereinafter, "Nagaraja"].
[24] INDIA CONST. art.21.
[25] Nagaraja, *supra* note 23, ¶ 51.
[26] *Id.* ¶ 51.
[27] Narayan Dutt Bhatt v. Union of India, 2018 SCC OnLine Utt 645 [hereinafter, "Narayan"].
[28] Nagaraja, *supra* note 23, at 23.
[29] Narayan, *supra* note 27, ¶ 99.

A similar stance was taken by the High Court of Punjab & Haryana in the case of *Karnail Singh v. State of Haryana*.[30] The Court established that "*there is nothing inherent in the concept of legal personality preventing its extension to animals*". The Hon'ble Court opined that there would be more effective protection of animal interests than what is currently available under animal welfare legislation if animals were covered under the ambit of "*legal persons*".[31] In furtherance of the same, the court held that "*The entire animal kingdom including avian and aquatic are declared as legal entities having a distinct persona with corresponding rights, duties and liabilities of a living person. All the citizens throughout the State of Haryana are hereby declared persons in loco parentis as the human face for the welfare/protection of animals*".[32]

Recently, the Apex Court retracted the recognition of animals as a juristic personality causing a dent in the protection of animal rights in the case of *Animal Welfare Board of India v. Union of India.*[33] The Apex Court held, "*While the protection under Article 21 has been conferred on person as opposed to a citizen, which is the case in Article 19 of the Constitution, we do not think it will be prudent for us to venture into a judicial adventurism to bring bulls within the said protected mechanism*".[34] The Apex Court further stated "*We do not think Article 14 of the Constitution can also be invoked by any animal as a person. While we can test the provisions of an animal welfare legislation, that would be at the instance of a human being or a juridical person who may espouse the cause of animal welfare*".[35] Thus, the Apex Court denied the position of animals as a juristic personality, highlighting the anthropocentric nature of the society we are living in wherein everything is centred around the human being.

With the above-mentioned rulings granting legal personality to animals being overturned by the Hon'ble Supreme Court,[36] animals are back to being considered as "*property*" in India as observed in the *Narayan Dutt,*[37] with very few exceptions where rights are accorded, and laws are intended to prevent needless suffering of animals. This observation underlined that such classification is representative of a legal tradition in which protection is connected with the economic value of animals, as opposed to recognizing them as beings endowed with inherent rights.[38]

[30] Karnail Singh v. State of Haryana, 2019 SCC OnLine P&H 704 [hereinafter, "Karnail Singh"].
[31] *Id.* ¶ 86.
[32] *Id.* ¶ 29.
[33] Animal Welfare Board of India v. Union of India, (2023) 9 SCC 322 [hereinafter, "Animal Welfare Board"].
[34] *Id.* ¶ 24.
[35] Animal Welfare Board, *supra* note 33.
[36] Karnail Singh, *supra* note 30.
[37] Narayan, *supra* note 27, ¶ 92.
[38] Narayan, *supra* note 27, ¶ 27.

(C) RECOGNITION OR RELUCTANCE?

As can be concluded from the above discussion, the Indian judiciary has been taking an oscillating stance regarding the juristic personality of animals, which undermines the evolution of animal rights within the legal framework. Though the Uttarakhand,[39] and Punjab & Haryana High Courts[40] have viewed animals as legal persons with rights and obligations similar to juristic persons, the Hon'ble Supreme Court has been reluctant to accord such status, thereby upholding an anthropocentric approach that restricts animals to objects of protection.[41] This judicial inconsistency undermines the legal position of animals and obscures attempts to avail them of greater safeguards against cruelty and exploitation.

The non-existence of an authoritative precedent confirming animals as juristic persons leaves animals' rights at the mercy of judicial discretion rather than having a concrete legal principle. This absence of uniformity not only hinders the enforcement of present legislation regarding animal welfare but weakens safeguards which could otherwise be enjoyed by them. A definite and binding precedent identifying animals as juristic persons would provide for greater accountability, improve legal remedies against cruelty, and change the focus from mere prevention of harm to active promotion of animal rights.

India's legal framework has historically drawn upon comparative constitutional and international jurisprudence to evolve innovative legal principles. In the present case of extending legal personhood to animals, India has an opportunity to learn from international legal developments and suit them into its constitutional jurisprudence. Significantly, the Constitutional Court of Ecuador, in its historic judgment in January 2022, declared animals as legal persons, noting that, "*This Court warns that animals should not be protected only from an ecosystemic perspective or with a view to the needs of human beings, but mainly from a perspective that focuses on their individuality and intrinsic value*".[42] This ruling represents a paradigm shift from anthropocentrism to recognition of non-human entities on the basis of rights and reiterates that legal subjectivity is not the prerogative of human beings alone.

[39] Narayan, *supra* note 27, at 29.
[40] Karnail Singh, *supra* note 30.
[41] Animal Welfare Board, *supra* note 33.
[42] Municipality of Cotacachi v. Ministry of Environment (Los Cedros case), Judgment No. 1149-19-JP/21, Constitutional Court of Ecuador.

The rationale of the Ecuadorian Court is especially instructive to India, where the judiciary has been indecisive regarding the issue of animal personhood. In adopting a jurisprudence that recognises animals as right-holders[43], Ecuador shattered the fallacious premise that the ability to bear rights must be linked to the ability to bear duties—a notion that has long obstructed animals' entitlement to legal rights. The inclusion of such reasoning within Indian jurisprudence would not only enhance the ethical base of animal welfare law but would also be in tune with India's constitutional vision of justice, dignity, and compassion for all living creatures. It would enable India to transcend the old vision of animals as property and embrace a new, inclusive, and morally consistent regime of law that is attuned to the rising standards of justice in a contemporary constitutional democracy.

III. ANIMAL PROTECTION THROUGH CRIMINAL LAWS IN INDIA

While criminal law is commonly perceived as a bulwark, protecting us from injustice, but when it comes to protecting animals, this wall does not seem to exist. Even with the existence of legal provisions promoting animal welfare, things are far from good—loopholes, ineffective enforcement, and light punishments trickle down the laws, meaning that such protection ends up being more of an illusion than a reality. This part examines the legal protection afforded under India's criminal law and how the IPC, and its replacement, the BNS, categorise and punish crimes against animals. From cruelty and mischief to bestiality, this examination probes into the legislative intent, judicial understanding, and the changing attitude of Indian law. More significantly, it assesses whether so-called legal changes actually strengthen animal welfare or simply repackage the same legislation under a new guise, leaving animals as vulnerable as ever.

(A) FROM BRITISH INK TO INDIAN REFORM: THE IPC - BNS SHIFT

The BNS enacted on 1st July 2024, replaced the IPC. The primary aim of this replacement was to modernise the criminal legal framework in India but unfortunately, the BNS, 2023 offers the same food in a different packet, *i.e.*, it is more or less similar to the IPC, 1860. The essential question here is whether the introduction of this reformed criminal code extended greater protection to animals as compared to the IPC, 1860. To answer this, the author has analysed the provisions of IPC and BNS, 2023 which aims to aid in animal welfare.

[43] *Id.* ¶ 125.

(B) THE DEFINITION OF "ANIMAL"

Defining the term "*animal*" is essential to remove the ambiguity around the extension of its scope of protection. In common parlance, humans are also categorised as animals. Therefore, it is essential to clearly state which entities will be covered under the ambit of the term "*animals*". Section 47 of the Indian Penal Code defines the term animal as "*any living creature, other than a human being*".[44] Thus, all the provisions under this Act concerning "*animals*" would extend to those living creatures not being human beings.

Section 2(2) of the Bhartiya Nyaya Sanhita also gives a clear definition of the term "*animal*". It is pertinent to note that the definition is the same as that mentioned under the Indian Penal Code. Section 2(2) states, "*animal means any living creature, other than a human being*".[45] Therefore, there is no change in what is covered under the term "*animal*" under the BNS as compared to the Indian Penal Code.

(C) MISCHIEF AGAINST ANIMALS: SECTION 428 & 429 OF INDIAN PENAL CODE, 1860 AND SECTION 325 OF BHARTIYA NYAYA SANHITA

Under Section 428 of the IPC, 1860, "*Whoever commits mischief by killing, poisoning, maiming or rendering useless any animals or animal of the value of the ten rupees or upwards*"[46] would be penalised with imprisonment which may extended to 2 years or with a fine or both.

The term "*maiming*" implies a permanent injury[47] affecting the use of limbs or any other parts of the body of the animal. For an act to be categorised as maiming, there shall be a privation of use of some limbs or body parts and there shall be a permanent injury and not a mere disfigurement.[48] Maiming includes amputation of any body part or any other injury which would permanently affect the speed or endurance or use of the animal.

The provision, although covers instances of cruelty towards animals which result in their death or any kind of permanent injury which renders them useless, fails to cover other such instances where

[44] PEN. CODE. § 47.
[45] The Bhartiya Nyaya Sanhita, 2023, § 2(2), No.45, Acts of Parliament, 2023 (India).
[46] PEN. CODE. § 428.
[47] *Narain Singh,* (1905) UBR (PC) 25: (1902) 3 Cri LJ 107.
[48] Anna Laxman Bhintade v. Emperor, AIR 1916 Bom 220: (1916) 17 Cri LJ 253 (Bom): (1961) 18 Bom LR 289.

animals do suffer but the acts do not lead to any permanent injury as can be seen in the case of *Anna Laxman v. Emperor*,[49] where one-half of the mare's ears were cut off but this did not affect the animal's hearing, it was held that this act would not come under the ambit of "*maiming"* and thus the accused would not be liable under Section 428.

Section 429 of the Indian Penal Code, 1860 states "*Whoever commits mischief by killing, poisoning, maiming or rendering useless, any elephant, camel, horse, mule, buffalo, bull, cow or ox, whatever may be the value thereof, of any other animal of the value of fifty rupees or upwards shall be punished with imprisonment or either description for a term which may extend to five years, or with fine, or with both*".[50]

This provision is similar to Section 428 of the IPC, 1860 with the difference being, that it covers only specific animals and animals which are of a value of more than Rs.50. As it garners protection to animals of a higher value, its punishment is also enhanced.[51]

To hold a person liable under the said provisions, *mens rea* plays a key role. These provisions will only apply where there is a deliberate attempt on behalf of the accused to commit mischief.[52] For instance, in a particular case, the accused intended to throw a stone at a person, but it accidentally fell on the person's calf and the calf died. It was held that the accused is not punishable under Section 428 as there was no intention to kill the calf.[53]

Section 428 and Section 429 are archaic and insufficient to meet contemporary needs of protecting animals from cruelty. These provisions made the punishment severity dependent on the financial value of the animal, which resulted in an illogical ranking of animals based on their monetary valuation, with higher monetary value animals receiving more legal protection. This valuation-oriented methodology is both arbitrary and immoral, not taking into account the fact that all animals, irrespective of their monetary worth, are entitled to be protected from suffering.

[49] *Id.*
[50] PEN. CODE. § 429.
[51] RATANLAL & DHIRAJLAL, LAW OF CRIMES: A COMMENTARY ON INDIAN PENAL CODE, 1860 3317 (Bharat Law House 2023).
[52] Haji Abdul Hamid v. Raja Ram, 1956 SCC OnLine All 249, (1957) All LJ 124.
[53] Johri v. State, AIR 1970 Raj 203: 1970 Cri LJ 1259 (Raj).

From the Anthropological School of Jurisprudence point of view, such provisions are indicative of the then-prevailing socio-economic circumstances under which they were formulated—a period in which animals were largely viewed as property or economic resources.[54] As Sir Henry Maine stated, law develops in synchronisation with social customs and morals[55], therefore, the continued existence of these provisions indicates the necessity for law to develop based on changing ethical values that increasingly acknowledge animal sentience and their inherent value over and above their economic use. The substitution of these provisions under Section 325 of the BNS, 2023, was needed to close this unequal treatment and ensure similar legal protection for all animals.

Section 325 of BNS states, "*Whoever commits mischief by killing, poisoning, maiming or rendering useless any animal shall be punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both*".[56]

It is relevant to highlight that the said provision has merged Sections 428 and 429 of the IPC and the maximum years of imprisonment has been increased from 2 years to 5 years. The said provision has also done away with categorising animals and related punishments based on their values. The said provision intends to remove any discrimination with regard to different species of animals for penalising the offender as was the case with Section 429 of the IPC.

Section 325 is clear, and unambiguous and does not leave room for any other interpretation. It outlines what constitutes animal cruelty in explicit terms and provides for severe penalties for those who inflict harm upon animals.[57] By providing harsher punishments, this Section also aims to create a deterrence among the people which may reduce the incidents of animal cruelty.

For instance, it is pertinent to refer to the tragic case of a pregnant elephant herein, who died after consuming a pineapple laced with explosives.[58] The firecrackers in the pineapple caused severe

[54] Garly L. Francione, *Animals, Property, And Personhood*, THE PHILOSOPHER (January 2021), https://www.thephilosopher1923.org/post/animals-property-and-personhood.
[55] Shreya Sahni, *supra* note 19.
[56] The Bhartiya Nyaya Sanhita, 2023, § 325, No.45, Acts of Parliament, 2023 (India).
[57] Arpita Sen, *Unveiling Section 325 of Bhartiya Nyaya Sanhita*, REFLECTIONS.LIVE (July 19, 2024, 07:35 PM), https://reflections.live/articles/7289/unveiling-section-325-of-bhartiya-nyaya-sanhita-article-by-arpita-sen-16559-lysqm0r4.html.
[58] India Today Web Desk, *Palakkad, Kerala: Pregnant Elephant Dies Standing in Water After Eating Pineapple Laced with Explosives*, INDIA TODAY (Sept. 24, 2024), https://www.indiatoday.in/india/story/kerala-pregnant-elephant-dies-

injuries to the elephant which ultimately led to her death. Under the IPC, 1860, the accused, if convicted, would have faced relatively lenient punishments but under the new Section 325 of BNS, the accused, if convicted, could face up to 5 years of imprisonment as well as a hefty fine for the act.

Thus, it enhances the principle of proportionality in criminal law.[59] Proportionality ensures that the severity of punishment aligns with the gravity of the offense,[60] thereby reinforcing both deterrence and justice. The act of intentionally causing serious hurt or killing an animal in a cruel manner, e.g., feeding explosives as could be seen in the above discussed case,[61] is not a mere accident or negligence but a case of malicious intent or gross negligence. The old legal position under the IPC, 1860, gave lenient punishment, as could be seen under Section 428 and 429 of IPC, and did not take into consideration the enormity of pain caused. By increasing the punishment to five years, the law now acknowledges the gravity of the offense and treats such offenses with the seriousness they merit.

Additionally, a low threshold of punishment under earlier laws led to poor deterrence as could be inferred from the rising instances of animal cruelty,[62] and offenders were able to get away with little to no consequence, for instance, a person alleged for dragging a dog tied to his car could get away with fine up to Rs.100 or a jail term of 3 months if convicted.[63] Raising the punishment guarantees that people would consider twice before committing such cruelty, as the threat of heavy fines and longer period of imprisonment is a better deterrent. But it is pertinent to note that the requirement of mens rea is still an important factor in deciding criminal liability. An important instance of the same could be seen in the cases involving road accidents. Road accidents are a major cause of concern in India. Like humans, animals also fall victim to rash driving, over

standing-in-water-after-locals-feed-her-pineapple-laced-with-explosives-1684830-2020-06-02 [hereinafter, "Palakkad"].

[59] Hadi Dachak, *The Principle of Proportionality of Crime and Punishment in International Documents*, 8(4) INTERNATIONAL JOURNAL OF MULTICULTURAL AND MULTIRELIGIOUS UNDERSTANDING 684 (2021), https://www.researchgate.net/publication/358656817_The_Principle_of_Proportionality_of_Crime_and_Punishment_in_International_Documents.

[60] *Id.*

[61] Palakkad, *supra* note 58.

[62] Arushi Singh, *Human Losing Humanity: Rising Instances of Animal Cruelty in India, land where they are worshipped*, THE NEW INDIAN EXPRESS (June 19, 2020, 3:06 PM), https://www.newindianexpress.com/nation/2020/Jun/19/humans-losing-humanity-rising-instances-of-animal-cruelty-in-india-land-where-they-are-worshipped-2158506.html.

[63] Explained Desk, *The Law Against Animal Cruelty and the Ridiculously Low Fines for Offenders*, THE INDIAN EXPRESS (September 22, 2022, 15:21 PM), https://indianexpress.com/article/explained/law-against-animal-cruelty-and-the-ridiculously-low-fines-for-offenders-8164339/.

speeding, etc. If a person dies as a result of negligent driving in the absence of any intention of the driver to kill the person, the driver may still be charged under Section 281[64] and Section 106[65] of BNS, 2023, though Section 106 has currently been put on hold by the legislators. However, no such provision is provided under BNS, 2023 to protect animals, who often fall prey to such negligent and rash driving. The driver is generally not held liable under Section 325 of BNS for killing an animal through rash driving as there is an absence of mens rea which is an essential element to constitute an offence under the said provision.

The case of *Prathap Kumar G. v. State of Karnataka* ('Prathap Kumar')[66] highlights the abovementioned issue wherein the driver of a car hit a pet dog. The Hon'ble Karnataka High Court rejected the charges of Section 428 and 429 of IPC, 1860 (now Section 325 of BNS) against him stating that the essential element of these charges is mens rea. As there was a lack of *mens rea* on the part of the driver, he was not held liable. The court observed that for the offence to be established, there must be criminal intent or animus. Since the petitioner had no prior connection with the complainant, their family, or the deceased pet dog, and no enmity was shown, it cannot be said that the petitioner had any intent to harm the dog.[67] This case highlights the loophole in the existing law where a person can escape liability by establishing the absence of a guilty mind.

This strict reading of mens rea raises serious questions regarding its operation in negligent animal harm cases. Though intention is a prerequisite for establishing certain offenses like offence under Section 325 of BNS, the wider application of mens rea in terms of recklessness and negligence cannot be disregarded. A person does not necessarily have an intent to harm an animal, yet if they drive carelessly with full awareness of the possible results, their fault cannot be swept away. The present legal structure, as noted in *Prathap Kumar*,[68] introduces a loophole in which liability may be avoided simply by establishing the non-existence of direct intent while ignoring the equally relevant factor of reckless conduct. This concern rightfully highlights the anthropocentric approach of the lawmakers.

[64] The Bharatiya Nyaya Sanhita, 2023, §281, No.45, Acts of Parliament, 2023 (India).
[65] The Bharatiya Nyaya Sanhita, 2023, §106, No.45, Acts of Parliament, 2023 (India).
[66] Prathap Kumar G v. State of Karnataka, Criminal Petition No. 1133 of 2019, High Court of Karnataka. [hereinafter, "Prathap Kumar"]
[67] *Id.* at ¶13.15.
[68] Prathap Kumar, *supra* note 66.

Additionally, the lack of strict liability provisions for fatal animal injuries from careless driving signifies an underlying prejudice in legal safeguards. Though human life is appropriately valued, the absolute absence of accountability for taking the life of an animal reduces them to mere commodities in the eyes of the law. A less judgmental and more comprehensive legislative response is needed - one that breaks free from the classical necessity of mens rea and imposes responsibility for gross negligence, just like the case with road accidents involving human fatalities is dealt with.[69] The legislation needs to acknowledge that negligent and reckless driving is not just a matter of human safety, but of general ethical accountability. Implementing provisions for punishing such offenses, even in the absence of intent, would help sealing the legal gap through which offenders escape liability as could be seen in the *Prathap Kumar*.[70] Instituting strict liability for instances wherein gross negligence causes the death of animals will make sure that justice is meted out, reinforcing the fact that all life - be it human or animal-ought to be legally protected.

(D) PUNISHING INDIRECT HARM: SECTION 326 OF BHARTIYA NYAYA SANHITA

Instances have been reported where people have not directly harmed animals but have done the same indirectly through mediums such as poisoning the water which the animals drink from.[71] The BNS has covered such instances under Section 326 which accords punishment for diminution of supply of water which may be used by animals for drinking. Sadly, the provision is unjust and discriminates among animals as it only includes "*animals which are property*". Thus, an act of the offender which tends to attract an offence under Section 326(a) will not fall under the said provision if the said act impacts only a stray animal that is not a property.

While Section 325 of BNS makes a progressive shift by according protection to animals from direct forms of cruelty, Section 326 reflects a regressive step by garnering discriminatory protection. It continues to tie legal protection to animal's status as "*property*". This selective recognition undermines the broader goal of establishing an inclusive and compassionate legal framework, thereby falling short of achieving true legal progress in the realm of animal welfare.

[69] The Bhartiya Nyaya Sanhita, 2023, § 281, No.45, Acts of Parliament, 2023 (India).
[70] Prathap Kumar, *supra* note 66.
[71] Mazhar Ali, *2 Nilgais, 16 Goats dies after drinking poisoned water from Chanda Pond*, THE TIMES OF INDIA (March 20, 2021), https://timesofindia.indiatimes.com/city/nagpur/2-nilgais-16-goats-die-after-drinking-poisoned-water-from-chanda-pond/articleshow/81593865.cms.

(E) THE OMISSION OF BESTIALITY PROTECTIONS UNDER THE BHARTIYA NYAYA SANHITA, 2023

Section 377[72] of the IPC, 1860 extends protection to animals against bestiality- a form of sexual abuse that animals, being non-verbal beings, cannot consent to.[73] As per the said provision, whoever voluntarily has carnal intercourse against the order of nature with any animal shall be penalised with imprisonment for life or a term which may be extended to 10 years and shall also be liable to pay a fine. Bestiality can be *per anum* or *vaginam*. One of the primary reasons behind the criminalisation of bestiality is that animals do not possess the capability to communicate their consent.[74]

Unfortunately, several instances have been seen in India where animals have been subjected to sexual assaults by men as can be seen in the incident of a Bengal Monitor lizard allegedly gang-raped in Maharashtra.[75] Although this incident is currently under trial, but the prima facie evidence recovered by the Maharashtra Forest Department includes a recording of the accused gang-raping the voiceless animal. Perversion of men have engulfed countless other species of animals including dogs,[76] cows,[77] goats,[78] and the list goes on. The unfortunate reality is only when other people report the case can any action be taken in such instances. Animals are incapable of voicing the injustices faced by them and thus are easy targets or predators.

With the introduction of BNS as a "*reformed law*", there was some hope for an improved safeguard mechanism for animals against bestiality. With rape laws against women becoming more stringent,[79] there was hope that the lawmakers would take an eco-centric approach to the offence

[72] PEN. CODE. § 377.
[73] B.J. Holoyda, *Bestiality Law in the United States: Evolving Legislation with Scientific Limitations*, 12 (12) ANIMALS 1525 (2022), https://pmc.ncbi.nlm.nih.gov/articles/PMC9219431/.
[74] Mabel Chandra, Nitin Nishad & Mahesh Tripathi, *Bestiality: A Cruelty Towards Animals*, 15 INDIAN J. FORENSIC MED. & TOXICOLOGY 3414 (2021).
[75] India Today Web Desk, *Bengal Monitor Lizard Raped in Maharashtra, 4 Arrested*, INDIA TODAY (Apr. 14, 2022), https://www.indiatoday.in/india/story/bengal-monitor-lizard-raped-maharashtra-3-held-sahydari-tiger-reserve-1937027-2022-04-13.
[76] Indo-Asian News Service, *Man Caught Raping Stray Dog in Karnataka, Arrested*, NDTV (December 14, 2024, 21:39 PM), https://www.ndtv.com/india-news/man-caught-raping-stray-dog-in-karnataka-arrested-7249159.
[77] Press Trust of India, *Madhya Pradesh Man Charged for Raping 2-Year-Old Cow: Cops*, NDTV (March 06, 2023, 15:04 PM), https://www.ndtv.com/india-news/man-booked-for-raping-calf-in-mp-village-3838089.
[78] HT News Desk, *UP Man, Accused of Raping Mother, Arrested for Sexually Assaulting and Killing Pregnant Goat: Report,* HINDUSTAN TIMES (October 31, 2024), https://www.hindustantimes.com/india-news/up-man-accused-of-raping-mother-arrested-for-sexually-assaulting-and-killing-pregnant-goat-report-101730358034042.html.
[79] Ministry of Home Affairs, *Crimes Against Women and Children Given Precedence Under BNS,* PRESS INFORMATION BUREAU (March 11, 2025, 5:55 PM),

of rape. But this hope shattered when the BNS Bill was passed. One of the most astonishing changes brought in by the BNS is the omission of protection from bestiality to the animals. In the landmark case of *Navtej Singh Johar & Ors v. Union of India,*[80] the Hon'ble Supreme Court of India decriminalised consensual sexual conduct between adults of the same sex. Thus, the Hon'ble Apex Court held that Section 377 of the IPC is unconstitutional to the extent that it criminalised homosexuality. But the Supreme Court also stated, "*However, if anyone, by which we mean both a man and a woman, engages in any kind of sexual activity with an animal, the said aspect of Section 377 Indian Penal Code, 1860 is constitutional and it shall remain a penal offence under Section 377 Indian Penal Code, 1860*".[81] Thus, the Apex Court upheld Section 377 to the extent that it criminalised sexual activity with animals or bestiality. The Court never intended to do away with this part of the provision.

However, the absence of the said protection which safeguarded animals against sexual activity that they are subjected to by humans is a critical failure of the legislators and can be considered as a regressive step towards extending protection to the animals, especially considering the increase in such brutalities against the animals. For instance, recently a man attempted to sexually assault a cow in Kasaragod but the police did not register any case against the offender stating that there is no provision in the BNS, 2023 under which the police could charge the offender for the said act.[82] Bestiality, though may be considered as a moral wrong,[83] has been rigged off its status of being a legal wrong. Thus, the legislators have indirectly permitted acts of unnatural sex with animals. Now, unless the animals do not ultimately die due to this heinous act (in such scenario the perpetrator could be held liable under Section 325 of BNS), the perpetrator can roam free without any prosecution.

Though the constitutionality of Section 377 IPC, 1860 was often questioned as it criminalised consensual same-sex relations, the penal provision of bestiality had long been recognised to be necessary in the interest of the protection of animals from sexual exploitation. By wholly letting

https://pib.gov.in/PressReleaseIframePage.aspx?PRID=2110361#:~:text=In%20the%20Bharatiya%20Nyaya%20Sanhita,for%20the%20offences%20against%20women.

[80] Navtej Singh Johar & Ors v. Union of India, 2018 10 SCC 1.

[81] Navtej Singh Johar & Ors v. Union of India, 2018 10 SCC 1, 139.

[82] Onmanorama Staff, *Man Attempts to Sexually Assault Cow; No Provision in Bhartiya Nyaya Sanhita to Register Case, Say Police*, ONMANORAMA (July 16, 2024, 04:17 PM), https://www.onmanorama.com/news/kerala/2024/07/16/sexually-assault-cow-bharatiya-nyaya-sanhita-no-provision-case.html [hereinafter, "Man Attempts to Sexually Assault Cow"].

[83] Stephen Wigmore, *Bestiality Is Worse Than Eating Meat*, THE CRITIC (July 7, 2021), https://thecritic.co.uk/why-bestiality-is-worse-than-eating-meat/.

go of Section 377 in the BNS, the state has inadvertently left animals vulnerable to abuse in this context.

The failure to provide alternate remedies for sexual crimes against animals weakens the support of animal rights policies and indicates a grave failure to bring human responsibility in providing care to animals in synchronization with modern requirements of law. Unless the animal is killed or rendered useless through the act of sexual assault, even Section 325 of BNS (mischief) cannot be invoked. Cases such as that of Kasaragod[84] should be a wake-up call for lawmakers to restore the older protection against unnatural sex with animals on an urgent basis. It is practically impossible to prosecute these offenders for such offences in the absence of any relevant provision under the BNS, 2023 which reflects a serious shortcoming in the "*reformed*" law with regard to the protection of animals.

IV. DO REFORMS BROUGHT IN BY BNS GARNER BETTER PROTECTION FOR ANIMALS?

Laws evolve to reflect society's values, but sometimes, progress masks unintended regressions. The BNS, brought forth as a much-needed change to India's criminal laws, to erase its colonial traces, has reformed certain aspects of animal protection such as removing the discriminatory value-based distinction of animals to accord protection, and increasing the punitive actions but has inadvertently left out legal safeguards against bestiality and continued the unfair segregation of animals based on its utility. In an effort to fine-tune the law, have we made animals more vulnerable than they were before?

Apart from this lacuna, the BNS is anthropocentric: garnering protection to animals based on their usefulness to humans.[85] Human suffering is duly recognised and addressed in our legal framework through plethora of legislations,[86] but animal pain goes unnoticed except in instances of its death or for any financial loss which such harm might cause to the animal's owner.[87]

[84] Man Attempts to Sexually Assault Cow*, supra* note 82.
[85] PEN. CODE. § 429.
[86] The Protection of Children from Sexual Offences Act, 2012, No. 32, Acts of Parliament, 2012 (India); The Bhartiya Nyaya Sanhita, 2023, No.45, Acts of Parliament, 2023 (India); The Protection of Women from Domestic Violence Act, 2005, No.43, Acts of Parliament, 2005 (India) etc.
[87] PEN. CODE. § 429.

This section examines these vital gaps-inquiring into whether or not the BNS, through its pursuit of reform, undermined protections for animals. Through a discussion of decriminalization of bestiality, the limited applicability of animal welfare provisions, and the absence of liability for negligence, this section lay bare a legal system that is not yet capable of preserving the dignity and rights of non-human life.

(A) DECRIMINALISATION OF ACTS WHICH DO NOT RENDER AN ANIMAL USELESS OR PERMANENTLY DISABLE THEM

The life of any living being is as precious as that of human beings as per ecocentrism. A person who assaults another human being that does not lead to any permanent injury can still be held liable under the BNS, 2023. Yet, when an animal is subjected to an assault that does not lead to any permanent injury or renders it useless, there is no recourse under BNS to punish the assaulter. Section 325 of BNS deals with only those acts which lead to death or permanent injury that renders the animal useless.

The BNS, 2023 is anthropocentric and tends to reduce the animals as commodities which is clearly highlighted by the above-mentioned provision which punishes the offender only when the act makes them useless for humans. It implies that the suffering of an animal is only legally significant when it interferes with its utility to humans, instead of recognizing that any harm caused to an animal, whether temporary or permanent, is a cruelty that should be punished by law. In contrast, laws directed towards protection of rights of humans do not operate on the same principles as discussed above for the case of assaults. But with animals, the lack of permanent disablement results in the perpetrator of the act being let off even if the action caused pain, distress, or temporary suffering.

This is symptomatic of the underlying lacuna in the legislative framework- failure to acknowledge that animals are not sentient entities who have an inherent right to not be harmed.[88] A more eco-centric paradigm of legislation would change the frame of reference away from the animal's economic utility or functional importance to its entitlement to live a life free from cruelty and

[88] Mary Anne Warren, *A Critique of Regan's Animal Rights Theory*, 2(4) BETWEEN THE SPECIES (1987) 433, 433, https://rintintin.colorado.edu/~vancecd/phil308/Warren.pdf.

torment, so that all acts of violence against the animal are penalised, independent of the scale of injury.

(B) PUNITIVE REFORMS UNDER BNS: A STEP TOWARDS ECO-CENTRIC JURISPRUDENCE.

According to laws centred around granting protection to human beings, crimes involving causing grievous injuries or death via violence are harshly punished, for example see Section 302 and 304 of IPC. Increased punishment reduces the gap between animal protection legislation and human welfare laws by taking into account the fact that animals, also, are entitled to legal protection from cruelty and violence. The new law under BNS represents a progressive move towards an eco-centric legal framework where animals are not regarded simply as property or goods but as living creatures who can feel pain and suffering by providing greater punishment for inhumane acts. Section 325 thus confirms, in a way, moral duty towards animals. This is a crucial departure from anthropocentric legal traditions and is indicative of an emerging eco-centric jurisprudence- one which understands the interconnectedness of all life systems and attempts to establish environmental and animal ethics within the legal structure.

V. ESSENTIAL REFORMS FOR ENHANCING PROTECTION OF ANIMALS UNDER THE BHARTIYA NYAYA SANHITA, 2023: EMBRACING AN ECO-CENTRIC VIEW

For far too long, laws have viewed animals through a narrow lens- only for their utility and disregarded for their individuality, as evident from the provisions of IPC.[89] In its 2020 report, Animal Protection Index gave India a 'C' overall ranking[90] recognising India's efforts in animal welfare protection but highlighting the room for reforms, also highlighting India as being a moderate performer under the Sanctioning Cruelty category. India's farmed animal protection legislation[91] also achieved an "*E*" indicating a poor performance. Even after recent attempts within the BNS, 2023 to bolster legal protection, the spirit of reform lags where it counts most: acknowledging animals as entities with their own rights, needs, and dignity. In between the lines

[89] PEN. CODE. § 428-429.
[90] WORLD ANIMAL PROTECTION, ANIMAL PROTECTION INDEX (API) 2020, REPUBLIC OF INDIA: RANKING C (2020).
[91] The Prevention of Cruelty to Animals Act, 1960, No. 59, Acts of Parliament, 1960 (India).

of penal codes, a hidden injustice lingers- stray animals left out, careless harm ignored, and the cry of the voiceless lost amidst anthropocentric concerns.

This section is not just a critique but aims to provide a blueprint for change. It calls for a change in the legal framework- from property to person, from lenience to accountability, from human-centred morality to eco-centred ethic. These changes are not simply legal imperatives, but moral obligations, calling for a system where animals are no longer an afterthought in law but rightful objects of justice and mercy.

(A) RECOGNITION OF ANIMALS AS JURISTIC PERSONALITY

The legal framework regulating animal protection in India has been inadequate in safeguarding their well-being and rights.[92] Despite incremental reforms in laws, such as the BNS, animals remain treated as property[93] and not as living beings worthy of legal protection. One of the core challenges to enhancing animal protection legislation is the lack of juristic personality for animals, which prevents them from being subjects of rights as opposed to objects of human ownership and utilization.[94] In their 2020 report, the Federation of Indian Animal Protection Organisations found that there were 863 cases of animal cruelty that lacked legal remedies about the incident.[95] This data clearly highlights the glaring disconnect between the prevalence of animal cruelty and the responsiveness of the legal system.

Although the Indian judiciary has granted juristic personality to non-human entities like rivers,[96] temples,[97] and idols,[98] giving them legal status and protection, it has been reluctant to give the same status to animals.[99] The Supreme Court's failure to accord animals status under Article 21[100]

[92] Madvi Sudan & Prof. (Dr.) Savita Nayyar, *The Evolution and Impact of Animal Welfare Laws in India: A Legal and Ethical Analysis*, 12(1) JOURNAL OF EMERGING TECHNOLOGIES AND INNOVATIVE RESEARCH 877, 879 (2025), https://www.jetir.org/papers/JETIR2501111.pdf.
[93] Narayan, *supra* note 27
[94] Pranjal Pranshu, *supra* note 13.
[95] ANIMAL LEGAL & HISTORICAL CENTER, IN THEIR OWN RIGHT – CALLING FOR PARITY IN LAW FOR ANIMAL VICTIMS OF CRIMES (2021).
[96] Mohd. Salim v. State of Uttarakhand, 2017 SCC OnLine Utt 367.
[97] Commr., Hindu Religious Endowments v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt, (1954) 1 SCC 412.
[98] Mohammad Siddiq v. Mahant Suresh Das, 2019 SCC OnLine SC 1482.
[99] Animal Welfare Board*, supra* note 33.
[100] Animal Welfare Board, *supra* note 33.

undermines their legal position even further, making it harder to apply stronger protection against cruelty and exploitation.

The above-mentioned analysis of the BNS highlights that there is an urgent need to bring reforms to the existing provisions to enhance the protection of animals under the Act. The first step towards bringing these reforms would be the recognition of animals as a juristic personality by the judiciary. To declare animals as juristic persons would represent a much-needed change in legal philosophy, which aid in protecting the interests of animals on the account of them being juristic persons, irrespective of human ownership or economic interest. This change is important in promoting a stronger legal system that places emphasis on the protection and welfare of animals.

(B) MENS REA IN ANIMAL CRUELTY: THE NEED FOR STRICTER LIABILITY STANDARDS

As highlighted in the third part of this paper, the requirement of mens rea under the current animal welfare provisions of BNS creates an unjust barrier to justice in cases of animal cruelty. The stringent need of establishing the existence of mens rea in instances of harm caused to animals restricts liability and enables most criminals to go unpunished, especially in scenarios where carelessness or rash conduct inflicts pain or death on animals. This makes it more difficult to prosecute wrongdoers unless clear intent could be established.

The BNS should punish instances where humans inflict harm upon animals for the sake of their pleasure, though the harm inflicted does not result in any permanent injury to the animals. A harm is a harm no matter whether it renders the animal useless or not. No matter what type of injury it results in, any sort of suffering shall not be left unpunished especially if there was mens rea involved. For instance, an individual who throws stones at a dog for fun and gravely injures it in the process, or burns an animal using firecrackers, or intentionally amputates an ear or a tail without inflicting permanent disability, ought not to be let off punishment simply because the animal did not suffer a permanent injury. Such behaviour may be punished by a minimum term of imprisonment of three months, extendable to three years based on how grave the offence is, and a fine of ₹50,000 or more, as well as community service in animal shelters for a stipulated period. Such punishments would not only be proportionate to the moral wrongfulness of such acts but also act as a deterrent against causing pain to animals under the guise of "*minor*" or "*non-fatal*" injury.

Additionally, for certain acts, the element of mens rea shall be overlooked similarly as it is overlooked when the same act is committed against any person. For instance, only intentionally killing an animal attracts liability under Section 325 of the BNS and not when the act is done negligently as in the case of rash driving.[101] This needs to be looked at by the legislators as the accused who committed the negligent act resulting in the killing of the animal shall be held liable in a similar manner as if the act was done against a human being.

(C) GAPS IN DETERRENCE: EVALUATING PUNISHMENTS FOR ANIMAL PROTECTION UNDER THE BHARTIYA NYAYA SANHITA

The punishments prescribed under the BNS have increased as compared to the IPC, but are still insufficient to create any deterrence in the society concerning the protection of animals.[102] Though the punishment for an offence under Section 325 of BNS can be imprisonment extended up to 5 years, it is still a bailable offence.[103] Additionally, the amount of fine to be imposed is also not explicitly stated in the said provision. It is up to the courts to decide what is the appropriate amount of fine that should be imposed which leaves scope for arbitrariness. The courts might impose a fine which might be less in proportion to the crime. Therefore, a minimum amount of fine should be stated in the Act and the minimum amount shall be such that it creates a deterrence in the society[104] to not cause harm to the animals and the provisions with regard to the protection of animals against sexual abuse by humans should be reintroduced in the BNS, 2023.

(D) REINTRODUCTION OF SAFEGUARD AGAINST BESTIALITY

In the silence of law, some of the darkest crimes continue to go unheard. Among them is the disturbing act of bestiality, which hides amongst the moral blind spots of our legal system. With the complete omission of incorporating the protection accorded under Section 377 in BNS, a gap has been left in the legal framework which can be easily exploited by perverted humans. With an

[101] Prathap Kumar, *supra* note 66.
[102] Somak Ghoshal, *Penalty For Torturing An Animal In India Is Less Than The Price Of A Cup Of Coffee*, HUFFPOST (July 07, 2016, 09:08 AM), https://www.huffpost.com/archive/in/entry/penalty-for-torturing-an-animal-in-india-is-less-than-the-price_n_10856308.
[103] The Bhartiya Nagarik Suraksha Sanhita, 2023, sched. 1.
[104] Eberhard Feess et al., *The Impact of Fine Size and Uncertainty on Punishment and Deterrence: Theory and Evidence from the Laboratory*, 149 J. ECON. BEHAV. & ORG. 58 (2018), https://www.sciencedirect.com/science/article/pii/S0167268118300520.

increase in instances of bestiality,[105] and no explicit provision under BNS addressing these acts of sexual abuse against animals, the welfare of animals is under jeopardy. Bestiality is not only an extreme form of cruelty but also poses serious public health and psychological concerns.[106] It reflects a violent, deviant behavioural pattern that could escalate to harm against humans- as seen in the 2016 Kerala rape case,[107] where the accused had prior complaints of animal abuse before he moved on to his human victim.

Reintroducing a standalone offence of bestiality within the BNS would be a strong expression of a commitment to animal welfare, an important amendment to fill in the legislative void, and an unambiguous indication that such activities are unacceptable. It is imperative for the dignity of animals as well as for the moral integrity of the law.

(E) ADDRESSING THE ISSUE OF ANTHROPOCENTRISM

Both the IPC and the BNS continue to have an anthropocentric structure that considers animals as property and not as entities with intrinsic value. Offences against animals under the IPC were serious only if the animal was of financial value or if the act was against public morality as could be inferred from a clear reading of its provisions as discussed in Part II of the paper. The BNS, in its imposition of stricter punishments in certain provisions such as Section 325, continues this legacy in excluding protection from animals that do not belong to humans, such as in Section 326(a), which leaves stray or unowned animals out of legal protection. This demonstrates an ongoing concern with human ownership as opposed to the animal's right to protection.

Malicious cruelty claims thousands of animals in India each year.[108] If victims of these acts were humans, the offenders would have faced severe punishments. But most animal abusers never even

[105] Nagbhushan Mallikarjun Hanagandi, *Bestiality: A Rising Concern in India*, CENTRE FOR ADVOCACY AND RESEARCH IN ENVIRONMENT AND ANIMAL PROTECTION, ENVIRONMENTAL LAW & POLICY BLOG (Feb. 11, 2021), https://careapnusrl.wordpress.com/2021/02/11/bestiality-a-rising-concern-in-india/.
[106] Sujata Satapathy, Rajanikanta Swain, Vidhi Pandey and Chiitaranhan Behera, *An Adolescent with Bestiality Behaviour: Psychological Evaluation and Community Health Concerns,* 41(1) INDIAN JOURNAL OF COMMUNITY MEDICINE 23 (2016), https://pmc.ncbi.nlm.nih.gov/articles/PMC4746949/. [hereinafter, "Kerala"]
[107] TNN, *Accused in Kerala Rape Case involved in bestiality with goats and dogs, killed them*, TIMES OF INDIA (June 20, 2016, 10:57 AM), https://timesofindia.indiatimes.com/city/kochi/accused-in-kerala-rape-case-involved-in-bestiality-with-goats-and-dogs-killed-them/articleshow/52826884.cms [hereinafter, "Kerala Rape Case"].
[108] Admin, *Animal Cruelty in India*, HELPLOCAL (Jan. 15, 2021), https://helplocal.in/blog/animal-cruelty-india-definition-types-solutions-organizations/.

make it to court.[109] Why? Because of the belief that there are serious crimes against people flooding the criminal justice system, crimes against animals are simply perceived as "*less important*".[110]
In the 2016 Kerala rape case,[111] it was found during the investigation that the accused had several complaints of sexual abuse against animals and bestiality against him. But these charges were never investigated, and he was never tried for these allegations. Would such an unfortunate rape incident have occurred if the accused was penalised for his acts of abuse against animals? Might it have made any difference if he was timely recognised as a social threat?

In India, the laws are anthropocentric in nature. Animals are rarely accounted for by the lawmakers. The National Crime Records Bureau's annual report[112] is a testimony of the same. This report is critical as the policymakers and law enforcement agencies emphasised it while formulating laws. However, the statistics of crimes against animals are not covered under it.[113] The inclusion of crime rates against animals is the need of the hour to aid in making the current laws more efficient and to introduce laws to address the areas where we are currently lacking.

This legislative and institutional neglect reflects a broader philosophical limitation- one that can be addressed by shifting from an anthropocentric to an eco-centric framework. A turn to an eco-centric framework would go beyond this narrow understanding by an appreciation of the fact that animals have a right to legal protection regardless of their economic or relational status to humans. It would fill the current legal gap for stray or unowned animals, provide an assurance that cruelty is criminalised no matter the status of the victim, and insert animal welfare into a larger vision of justice. Unless this transformation happens, laws will continue to be selectively protective, rendering countless animals invisible to the justice system.

[109] Animal Legal Defence Fund, *Why Prosecutors Don't Prosecute*, ANIMAL LEGAL DEFENCE FUND (Jul. 31, 2025, 11:00 PM), https://aldf.org/article/why-prosecutors-dont-prosecute/.
[110] Arnold Arluke et al., *The Relationship of Animal Abuse to Violence and Other Forms of Antisocial Behavior*, 14 J. INTERPERSONAL VIOLENCE 963 (1999).
[111] Kerala, *supra* note 106, at 123
[112] MINISTRY OF HOME AFFAIRS, NATIONAL CRIME RECORDS BUREAU, CRIME IN INDIA 2022: STATISTICS VOLUME I (2023).
[113] Mishi Aggarwal, *Why NCRB Must Document Animal Abuse Data*, THE LEAFLET (Oct. 13, 2024), https://theleaflet.in/why-ncrb-must-document-animal-abuse-data/.

VI. THE LINK: CRUELTY TOWARDS ANIMALS & VIOLENCE TOWARDS HUMANS

While one may think that the issue regarding cruelty towards animals is constrained to animal welfare only, this is not the case. Various studies have proved that when a person abuses an animal, there are greater chances that he is likely to harm humans as well.[114] Violence is violence. Those who commit violence rarely limit their victim pool to a single specific species.[115] Animal abuse can be an indicator of other forms of deviant behaviour. A study published in Forensic Research and Criminology International Journal warns, "*Those who engage in animal cruelty were 3 times more likely to commit other crimes, including murder, rape, robbery, assault, harassment, threats, and drug/substance abuse*".[116] Researchers also found that approximately 50% of rapists and over 25% of paedophiles had childhood histories of harming animals.[117] A systematic and alarming correlation between animal abuse and human violence was discovered by Clifton Flynn in his 2011 analysis of the literature on the subject.[118]

Incidents of cruelty towards animals are typically viewed as isolated offences that have no relationship to other human behaviour. But they are anything but isolated acts of violence committed by abusers. An instance of an animal abuser gradually making humans their victims can be seen in the 2016 Kerala Rape case where the accused was found to be involved in bestiality with dogs and goats and killing them after engaging sexually with them.[119] In another case from Rajasthan, a man was arrested for allegedly raping a cow. On further investigation, it was discovered that the man had previously been arrested twice under the Protection of Children from Sexual Offences Act, 2012 ('POCSO Act').[120] Such instances further solidify the stance of the

[114] Animal Legal Defense Fund, *Animal Cruelty's Link to Other Forms of Violence*, ANIMAL LEGAL DEFENSE FUND (Dec. 2021), https://aldf.org/wp-content/uploads/2022/01/Animal-Legal-Defense-Fund-Link-Factsheet.pdf.
[115] *Id.*
[116] S.A. Johnson, *Animal Cruelty, Pet Abuse & Violence: The Missed Dangerous Connection*, 6(5) FORENSIC RES. CRIM. INT'L J. 403, 403 (2018) [hereinafter, "Johnson"].
[117] B.C. Henry & C.E. Sanders, *Bullying and Animal Abuse: Is There a Connection?*, 15 SOC'Y & ANIMALS 107, 108 (2007) [hereinafter, "Henry & Sanders"].
[118] C.P. Flynn, *Examining the Links Between Animal Abuse and Human Violence*, 55(5) CRIME L. & SOC. CHANGE 453 (2011), https://link.springer.com/article/10.1007/s10611-011-9297-2 [hereinafter, "Flynn"].
[119] The Times of India, *Accused in Kerala Rape Case Involved in Bestiality with Goats and Dogs, Killed Them,* TIMES OF INDIA (Jun. 20, 2016, 10:57 AM), https://timesofindia.indiatimes.com/city/kochi/accused-in-kerala-rape-case-involved-in-bestiality-with-goats-and-dogs-killed-them/articleshow/52826884.cms.
[120] Rahul M., *Rajasthan Bestiality Horror: Man Rapes Cow in Alwar, Booked for Unnatural Sex*, FREE PRESS J. (Jan. 13, 2024, 05:29 PM), https://www.freepressjournal.in/india/rajasthan-bestiality-horror-man-rapes-cow-in-alwar-booked-for-unnatural-sex [hereinafter, "Rahul"].

presence of a link between acts of abuse against animals and violence against humans in this society.

A closer look at the relationship between animal cruelty and human violence reveals that aggression against animals is not a random act but a sign of a larger psychological attitude toward violence. The research cited[121] provides an alarming pattern—people who are cruel to animals are much more likely to commit violent crimes against people. This implies that animal cruelty is not just a single act of cruelty but an expression of a harmful pattern of behaviour that is extended to society as a whole. Psychological explanations, like the Violence Graduation Hypothesis, states "*early animal cruelty provides the individual with the opportunity to learn first-hand about violence, practice violence on available targets (animals), and be desensitised to the consequences of violent behaviour*".[122] The observation that close to half of rapists and one-fourth of paedophiles examined had backgrounds of animal abuse[123] further establishes the argument that violence is not species-specific but a deeply ingrained behavioural inclination that increases as it is allowed to go unchecked. Additionally, the examples given, including the Kerala rape case[124] and the Rajasthan case,[125] are not exceptions but part of an overall pattern that can be observed across societies.

These cases show that perpetrators of violent offenses against people tend to have a record of committing sexual and physical abuse on animals as well, substantiating the contention that animal cruelty is an early indication of impending threats to public security. The judicial system does not usually handle the abuse of animals as a significant crime as can be deduced from its conviction rate being as low as 2%[126] , yet it ignores the fact that its serious nature concerns public security. If such violent propensities are recognised and dealt with at the level of animal cruelty, preventive steps may be initiated before such violent propensities turn into more atrocious crimes. Neglecting the connection between animal cruelty and human violence not only continues to cause injury to animals but also allows for a culture of violence to develop, ultimately risking human lives as well.

[121] Johnson, *supra* note 116; Henry & Sanders, *supra* note 117; Flynn, *supra* note 188.
[122] Glenn D. Walters, *Testing the Specificity Postulate of the Violence Graduation Hypothesis: Meta-Analyses of the Animal Cruelty–Offending Relationship*, 18(6) AGGRESSION AND VIOLENT BEHAVIOUR, 797 (Dec. 2013), https://www.sciencedirect.com/science/article/pii/S1359178913001031.
[123] Henry & Sanders, *supra* note 117.
[124] Kerala Rape Case, *supra* note 107.
[125] Rahul*, supra* note 120.
[126] A.K. Rana & N. Kumar, *Current Wildlife Crime (Indian Scenario): Major Challenges and Prevention Approaches*, 32 BIODIVERS. CONSERV. 1473 (2023), https://link.springer.com/article/10.1007/s10531-023-02577-z.

VII. CONCLUDING REMARKS

In the case of *T.N. Godavarman Thirumulpad v. Union of India,*[127] it was rightly stated, "*Laws are man-made, hence there is likelihood of anthropocentric bias towards man, and rights of wild animals often tend to be of secondary importance but in the universe man and animal are equally placed, but human rights approach to environmental protection in case of conflict, is often based on anthropocentricity*".

Laws at present have succeeded extending protection to the life and liberty of humans. But animals have been kept in the shadows of such protection. The reforms brought in by BNS, 2023 are insufficient as it has only brought minimal changes to the existing provisions of the IPC, 1860. No new provisions have been included to extend or enhance the protection of animals from criminal acts. The BNS, 2023 has even omitted the existing protective provisions which can be considered as a regressive step by the lawmakers.

The legal framework must evolve to honour the spirit of true justice. Animals merit protection from not only violence in and around them but every form of cruelty that diminishes their existence. Human-centric laws must break out; hence an eco-centric approach should substitute this, and dignity and respect must be accorded to the animals. Though there are laws against animal cruelty, they are often aimed at public morality, for example cow slaughter banned in several states[128] not because it violates the right to life of the animal but because it is against religious sentiments of certain group of people), or human convenience, for example, the use of animals in laboratory for testing pharmaceuticals and cosmetics is justified as claiming to be a scientific necessity and for human benefit[129] but the pain and eventual euthanasia of animals is often disregarded, and not at acknowledging animal rights as inherent and independent of human interests.

An eco-centric perspective goes beyond this limitation by considering animals as individuals with inalienable rights, not commodities or simply objects of human concern. It strives for equal

[127] T.N. Godavarman Thirumulpad v. Union of India, (2013) 8 SCC 204.
[128] Express News Service, *The States Where Cow Slaughter is Legal In India*, THE INDIAN EXPRESS (Oct. 08, 2015, 09:00 AM), https://indianexpress.com/article/explained/explained-no-beef-nation/.
[129] Heather Dunnuck, *Save the Animals: Stop Animal Testing*, LONE STAR COLLEGE (June 13, 2025) https://www.lonestar.edu/stopanimaltesting.htm#:~:text=However%2C%20many%20people%20believe%20that,is%20generally%20not%20a%20consideration.

protection for all animals, regardless of their usefulness to human beings, understanding that they are part of the ecosystem with their own function and inherent value. To fill the gaps revealed in the BNS, 2023, it is crucial to realign the legal system to respond to this eco-centric approach. As formulated in this paper, this realignment has to start with the official recognition of animals as juristic persons so as to bestow upon them enforceable rights and advance their legal standing above that of being mere property. In addition, there is an imperative need to reintroduce certain penal provisions to criminalise activities like bestiality that find no mention under the existing legislative framework. Legal protection should also be extended to stray and unowned animals so that protection is not limited to ownership alone. Secondly, the statute needs to include the standards of strict or vicarious liability to meet harm resulting from negligent or reckless behaviour, irrespective of the existence of mens rea. Finally, the imposition of stringent sentencing guidelines, such as non-bailable categories and compulsory minimum penalties, is critical in order to ensure efficient deterrence and eradicate judicial randomness.

These suggestions as a whole constitute a tangible guide for legislators, policymakers, and animal welfare campaigns. Animal legal protections cannot be symbolic or subject to conditions; they have to be substantive, enforceable, and part of the wider moral push of valuing non-human life for legal purposes.

If, as Mahatma Gandhi stated, it is to be a measure of our country's greatness in how it treats its animals, then reforms must carry with them the notions of compassion, accountability, and true change.

ARTICLE

CONCEPTUALISING A FRAMEWORK FOR ADMISSIBILITY OF POLICE CONFESSIONS: BRIDGING JUDICIAL GAPS AND LEGAL CHALLENGES

Manav Pamnani[*]

ABSTRACT

Most criminal law cases today inevitably involve confessions from the accused before police officers or while in police custody. Although evidence law generally affirms the inadmissibility of such confessions, the legal jurisprudence surrounding this issue remains highly contested. Courts have often taken contradictory stances, particularly regarding the exception that allows the admissibility of confessions if they lead to the discovery of facts. This paper aims to limit these inconsistencies by proposing a conceptual framework or model to guide courts in determining the admissibility of police confessions. The principles outlined in this model can help assess whether a specific confession should be admitted, thus promoting judicial consistency, protecting the rights of the accused, and ensuring that justice is served by admitting relevant confessions, provided they are not obtained through force or coercion. To develop this model, the paper seeks to comprehensively study judicial precedents, and analyse the trends and rationale of the courts while deciding such cases. This study begins by contextualising the current legal position of the admissibility of police confessions, before elucidating the need of developing a comprehensive model to guide and simplify the decision-making process of courts. It then conducts a detailed case survey, the findings and conclusions of which have been used in conceptualising the model. The practical implications of proposing such a framework include reducing judicial discretion by setting concrete procedural benchmarks and transitioning towards a rights-based regime. The geographical scope of the study is limited to India, focusing primarily on judgments from higher courts, including High Courts of various States and the Supreme Court of India.

Keywords: Admissibility, Case Survey, Conceptual Model, Evidence, Police Confessions

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I. INTRODUCTION & BACKGROUND: NAVIGATING THE NECESSITY & IMPORTANCE OF THIS RESEARCH STUDY

The law of evidence is integral to the legal field due to its importance and utility in almost every case litigated before courts. In order to enable final determination of the rights and liabilities of the parties to a suit or proceeding, furnishing evidence in support of the respective cases is non-negotiable. The law of evidence categorically and systematically lays down a schematic set of principles or rules which governs the admissibility of various forms of evidence that are presented in courts with the aim of proving or disproving the facts of a case. Among the plethora of legalities that govern evidence law, one particular area is largely contested, namely, the admissibility of police confessions. Although the Indian Evidence Act ('IEA') under Sections 25[1] and 26[2] clearly stipulates that confessions given by the accused to a police officer or while in custody of the police cannot be proved in courts of law, Section 27[3] creates an exception by stating that confessions falling under the ambit of Sections 26 and 27 may be proved if the confession leads to the discovery of a fact. Similarly, the newly enacted Bharatiya Sakshya Adhiniyam ('BSA') in Section 23[4] retains the position present earlier in the IEA with respect to the admissibility of police confessions.

The judicial application of these provisions, especially the exception that makes confessions admissible if it leads to a discovery of a fact, has been varied with interpretations and positions adopted by courts being contradictory in several cases. The reason behind these contradictory stances is the fact that the wording of the provision, especially the exception, is ambiguous and unclear which ultimately leads to inconsistent rulings. Moreover, the subjectivity is further increased in cases, depending on specific facts and circumstances wherein judicial interpretation has been tailored to effectively decide the case at hand. These factors often result in contradictory outcomes, thus subjecting the rights of the accused to varied judicial discretion. Although an inherent element of the BSA, as seen in the "*may presume"* cases wherein courts make factual assumptions based on the circumstances of the case, excessive discretion can potentially make the rights of the accused subservient to the perspectives of the judiciary. Such excessive discretion not only leads to doctrinal inconsistency but also exposes the accused to arbitrary outcomes. An over-

[1] The Indian Evidence Act, 1872, § 25, No. 1, Acts of Parliament, 1872 (India).
[2] The Indian Evidence Act, 1872, § 26, No. 1, Acts of Parliament, 1872 (India).
[3] The Indian Evidence Act, 1872, § 27, No. 1, Acts of Parliament, 1872 (India).
[4] Bharatiya Sakshya Adhiniyam, 2023, §23, No. 47, Acts of Parliament, 2023 (India).

reliance on subjective judicial interpretation, especially in cases involving personal liberty, generates unpredictability and undermines the normative legitimacy of the criminal justice system. Therefore, without a framework of objective standards, whether in the form of statutory guidance or a coherent line of judicial precedents, decisions about the admissibility of confessions risk becoming reflections of individual judicial attitudes rather than principled determinations.[5] The consequence is a jurisprudence where outcomes hinge less on the law itself and more on who happens to be applying it. This ultimately erodes the foundational values of equality before the law and due process.

Additionally, by stipulating the stringent norm of police confessions being inadmissible as a whole, based on the presumption that confessions made to the police have been obtained by force or coercion, several relevant confessions are denied admission, which negatively affects an effective, fair and just resolution of the case. This is particularly problematic in India where the accused is inevitably taken to the police station for investigation, questioning or arrest. It is uncontested that involuntary confessions made out of fear or due to force or coercion should not be admissible. However, the ambit of this restriction should not be extended to such a large extent that relevant facts are excluded based on mere assumptions.

This necessitates the introduction of a model or conceptual framework to determine whether a particular case justifies admitting confessions made to the police. Although such a framework cannot always be rigidly followed due to law being inherently a dynamic field that is subject to variations based on the facts and circumstances, having a well-designed model will serve as a guiding framework which courts can consider while deciding matters related to police confessions. This would lift the rights of the accused to a higher pedestal, thus ensuring an optimum balance between judicial discretion, a fair and consistent outcome and safeguarding the rights of the accused.

This paper seeks to evolve this model or conceptual framework after undertaking a comprehensive legal survey of judicial decisions and analysing the rationale that courts have adopted to justify their decisions. In doing so, it answers the following research questions:

[5] Gautam Bhatia, *The Core and the Periphery*, CONSTITUTIONAL LAW AND PHILOSOPHY (May 28, 2025), https://indconlawphil.wordpress.com/author/gautambhatia1988/#:~:text=So%20beyond%20praise%20and%20criticism,discretion%20from%20being%20so%20decisive%2C.

(a) What are the legal and theoretical foundations behind the exclusion of police confessions under Sections 25 and 26 of the IEA and Section 23 of the BSA?
(b) How have Indian courts interpreted the exception under Section 27 of the IEA, and its counterpart in the BSA, regarding the admissibility of confessions leading to the discovery of a fact?
(c) What are the key judicial precedents that highlight the inconsistent application of the admissibility exception, and what are the factors that have influenced these inconsistencies?
(d) In what ways does the ambiguity in statutory language, particularly in Section 27 of the IEA, contribute to judicial discretion, and how has this impacted the rights of the accused?
(e) What specific cases or trends demonstrate an over-reliance on judicial discretion in determining the admissibility of police confessions?
(f) How can a conceptual framework or model be designed to minimise inconsistencies and protect the rights of the accused while balancing judicial discretion to account for case-specific variations in the application of the law?
(g) What key principles should be incorporated into the proposed framework to ensure fairness in the treatment of confessions made to the police, especially in light of the dynamics between discovery of facts and confessions?

The answers to questions from (a) to (e) above have been elucidated in Part II which conducts a detailed legal and precedential analysis and those to questions (f) and (g) have been explained in the proposed model which forms Part III of this paper. Having established the aims and scope of this paper, the Part II comprehensively explores the legal and jurisprudential framework pertaining to the inadmissibility of police confessions in India.

II. EXPLORING THE INADMISSIBILITY OF POLICE CONFESSIONS: A PRECEDENTIAL & LEGAL ANALYSIS

There is a plethora of judicial precedents with respect to the admissibility of police confessions and putting forth a detailed explanation of all cannot fall within the scope of this paper as it would more accurately fall within the ambit of a line-by-line commentary. As mentioned previously, although this study's main emphasis is on the judgments by the High Courts of various States ('HC') and the Supreme Court of India ('SC'), a representative sample among all the available cases

decided by these courts have been carefully curated to meaningfully engage with the discourse on the admissibility of police confessions.

(A) INADMISSIBILITY OF CONFESSIONS TO AUTHORITIES THAT ARE INDUCED, FORCED OR COERCED

It is important to note that it is not only police confessions that are inadmissible but also any confession obtained by force or coercion exercised by the relevant authority, capable of exercising such power. This is stipulated under Section 22 of the BSA.[6] The test here is not the usual criminal law maxim of "*proof beyond reasonable doubt"* but is instead based on discretion given to the court, as is evident from the usage of phrases like "*appears to the court*" and "*opinion of the court*". The intricacies of this provision have been accurately explained in the *R v. Hodgson*.[7] In fact, in the Indian context, the landmark *Pyare Lal Bhargava v. State of Rajasthan* judgment explicitly upholds the same by stating that under this provision, the stringent rule of proof is waived and the Court is only required to form a prima facie opinion considering the circumstances of the case.[8] This section forms the foundation of the inadmissibility of police confessions since this provision states a general proposition of inadmissibility due to the confession being given to a person in authority whereas the following section provides for a specific instance of confessions given by an accused to a police officer. The term "*authority*" has been defined in several cases and it has been held to include customs officers,[9] intelligence officers,[10] and the Pradhan of a village,[11] among others. The legal position surrounding this provision is largely settled, which is to consider a confession inadmissible if it is made due to any inducement, force or coercion exercised by a person in authority, as has been held in cases including *Rangappa Hanamappa v. State,*[12] and the recent *Sadashiv Dhondiram Patil v. The State of Maharashtra*[13] decision. The confession falling within the purview of this provision is not presumed to be inadmissible per se. It depends on the facts and circumstances and varies on a case-to-case basis due to the requirement being adequate, reasonable satisfaction of the court. This means that even if a confession has been given to a person in authority, it can be admissible if the court reasonably believes it to made without any inducement, force or coercion. This is in

[6] Bharatiya Sakshya Adhiniyam, 2023, § 22, No. 47, Acts of Parliament, 2023 (India).
[7] R v. Hodgson, (1998) 2 SCR 449.
[8] Pyare Lal Bhargava v. State of Rajasthan, AIR 1963 SC 1094.
[9] Sevantilal Karsondas Modi v. State of Maharashtra, (1979) 2 SCC 58.
[10] Pon Adithan v. Dy Director, Narcotics Control Bureau, AIR 1999 SC 2355.
[11] Lallan Singh v. State of Bihar, (1969) 3 SCC 765.
[12] Rangappa Hanamappa v. State, (1953) SCC OnLine Bom 92.
[13] Sadashiv Dhondiram Patil v. The State of Maharashtra, (2025) 4 SCC 275.

contrast to the position on police confessions which are deemed to be inadmissible per se on the presumption that they are made involuntarily and not out of one's free will. The discourse on police confessions has been examined below.

(B) INADMISSIBILITY OF CONFESSIONS MADE TO POLICE OFFICERS AND IN POLICE CUSTODY

1. Rationale and Judicial Interpretation

Section 23 of the BSA prescribes the inadmissibility of police confessions. Sub-clause (1) mentions "*police officer*" and sub-clause (2) mentions *"police custody*" and both these clauses hold confessions made either to a police officer or while in police custody inadmissible. *The Pakala Narayana Swami v. Emperor* case,[14] although in the context of Section 162 of the Criminal Procedure Code ('CrPC'),[15] has succinctly summarised the major tenets of this provision. The rationale behind such a section is to protect the accused's fundamental right against self-incrimination, provided in Article 20(3)[16] of the Constitution of India, assuming that a confession made to a police officer is involuntary and forced. On a superficial analysis, the provision seems well-drafted but its interpretations have been largely contested.

The effect of this exclusionary rule is to apply a blanket exclusion to all confessions given to police officers, without testing their reliability, veracity, voluntariness and relevance. This might probably lead to extremely unjust outcomes because of refuting vital pieces of evidence such as the accused's own confession. Generally, confessions are more reliable than any other piece of circumstantial evidence due to the accused himself accepting the commission of an offence. It is unlikely and absurd to assume the falsehood of self-harming statements because no reasonable person would place himself in such a predicament. The only situation in which self-harming statements might not be true include cases wherein due to police torture or other forms of force and coercion, the accused admits his guilt to free himself of continued tormentous suffering. Therefore, it is crucial to strike a balance between admitting relevant police confessions and protecting the rights of the accused by disregarding forced or coerced statements. This is the reason behind introducing a detailed conceptual framework, particularly the reliability test and the objective test for voluntariness, which will be discussed in the latter half of this paper.

[14] Pakala Narayana Swami v. King-Emperor, (1939) SCC OnLine PC 1 [hereinafter "Pakala Narayana Swami"].
[15] CODE CRIM. PROC. § 162.
[16] INDIA CONST. art. 20, cl. 3.

2. Scope of Inadmissibility: Exploring the Definitions of "Police Officer" and "Police Custody"

Two recent judgements decided in 2024 reinforce the position that confessions made to police officers are inadmissible: The SC in *Sanju Bansal v. State of Uttar Pradesh*[17] held that confessional statements cannot be included in the charge-sheet since they are inadmissible as evidence. Furthermore, the SC in the *Allarakha Habib Memon v. State of Gujarat*[18] extended the inadmissibility to confessions made to medical officers preparing injury reports pertaining to the offence. This extension is completely unfounded because the rationale of the SC was that since the accused were brought before the medical officers by the police, their confessions cannot be relied upon. By delivering this judgment, the SC has extended the already-problematic presumption even further which cannot be considered as good law because it is unreasonable to assume that medical officers who have specialised in a discipline very different from the police force would use force or coercion to extract a confession that would be of no benefit to them. Additionally, this would risk the possibility of a violation of the code of conduct of the medical profession, thus negatively impacting their career prospects. Moreover, there was no evidence of force or coercion in this case which further makes this decision questionable and open to criticism. Instead of reading this situation into Section 23, it would be more appropriate to consider Section 22 of the BSA because a medical officer can be more accurately considered an "*authority*" rather than a "*police officer*".

The term "*police officer*" was explained in the *State of Punjab v. Barkat Ram* case which relied on the Police Act, 1861 to state that a police officer refers to a member of the police force who has been enrolled under the Police Act.[19] It additionally proposed the "*purpose test*" according to which a method of identifying police officers is by scrutinising their purpose which is to generally serve as an "*instrument for the prevention and detection of crime*". Based on this reasoning, it held that a Customs Officer under the Land Customs Act, 1924[20] falls outside the ambit of a police officer. In *Raj Kamar Karwal v. Union of India*,[21] the "*function test*" was introduced, according to which, "*real powers and functions*" of a police officer determine his designation. The *Tofan Singh v. State of Tamil Nadu* decision which followed,[22] overruled these precedents by holding that Section 25 of the IEA would only apply to a police officer or an officer who exercises all the powers of a police officer including

[17] Sanuj Bansal v. The State of Uttar Pradesh, (2024) SCC. OnLine SC 2335.
[18] Allarakha Habib Memon v. State of Gujarat, (2024) SCC OnLine SC 1910.
[19] State of Punjab v. Barkat Ram, (1962) 3 SCR 338. [hereinafter "Barkat Ram"].
[20] The Land Customs Act, 1924, No. 19, Acts of Parliament, 1924 (India).
[21] Raj Kumar Karwal v. Union of India, (1990) 2 SCC 409 [hereinafter "Raj Kumar Karwal"].
[22] Tofan Singh v. State of Tamil Nadu, AIR 2020 SC 5592.

the power of filing a police report under Section 173 of the CrPC.[23] It reached the conclusion that an officer under Section 53 of the Narcotic Drugs and Psychotropic Substances Act falls within the ambit of a police officer, thus differing from the *Raj Kumar Karwal v. Union of India* case on this point, which held to the contrary.[24] Therefore, although there has been a shift towards construing this definition liberally, based on the tests laid above, even the widest interpretation would not justifiably include a medical officer within the ambit of the meaning of police officer, thus reflecting the incorrect interpretation adopted by the SC in this case. Additionally, reading this case through the lens of Section 22 would also potentially have led to a different decision because as detailed previously, under Section 22, there is no prima facie presumption of inadmissibility as the utilization or force or coercion has to be proved to the satisfaction of the court.

In *Faddi v. State of MP*,[25] it was held that a FIR lodged by the accused does not fall within the ambit of a confession. Furthermore, in *Himmat Singh v. State of Gujarat*,[26] the Court introduced the "*nexus test*" according to which there has to be either a direct or an indirect nexus between the confession made and the police officer. This was held in the context of the requirement that a confession has to be "*made to*" a police officer. It has also been held that the bar of inadmissibility only applies to judicial proceedings, thus keeping departmental proceedings out of its purview, as held in the *Commissioner of Police, Delhi v. Narendra Singh* case.[27] The rationale behind this arises from a combined reading of Section 25 of the IEA, Section 162 of the CrPC, and the definition of offence under Section 2(n) of the CrPC,[28] which imply that the embargo applies only to criminal trials and not departmental proceedings. Departmental enquiries are not in the nature of judicial proceedings and have a different standard of proof of preponderance of probabilities rather than proof beyond reasonable doubt, thus making formal evidentiary rules as stipulated under the IEA inapplicable to them.

With regard to confessions made in police custody, the interpretation that has been accorded to the term "*police custody*" has been extremely wide. For example, the State of *Haryana v. Dinesh Kumar*[29] case held that arrest is not a pre-requisite to fall within the contours of police custody.

[23] CRIM. PROC. § 173.
[24] Raj Kumar Karwal, *supra* note 21.
[25] Faddi v. State of MP, AIR 1964 SC 1850.
[26] Himatsingh Badharsingh v. State of Gujarat, AIR 1965 Guj 802.
[27] Commissioner of Police, Delhi v. Narendra Singh, AIR 2006 SC 1800.
[28] CODE CRIM. PROC. § 2(n).
[29] State of Haryana v. Dinesh Kumar, AIR 2008 SC 1083.

Additionally, Sections 270 and 335 of the CrPC provide for custody different from the regular penal police custody such as cases of witness custody or custody due to unsoundness of mind. Cases such as *State of AP v. Gangula Satya Murthy,*[30] and *Harbansingh v. State*[31] categorically hold that the scheme of confessions under the IEA is not restricted to police custody but can be extended to any custody, provided police surveillance is present. This so-called "*pragmatic approach*" tremendously widens the operation of this provision, making it exclusionary to the extent that any confession made to a police officer, even when it can be reasonably ascertained that the confession was made voluntarily and without force or coercion cannot be admissible as evidence. This creates a false presumption of involuntariness, thus vitiating the very intention of the introduction of these safeguards due to the potential unjust outcome that is bound to be reached by excluding even reliable, relevant evidence that may prove essential to a fair resolution of the case. A factor exacerbating this problem is that a plain reading of Section 23 of the BSA suggests that confessions made to any police officer under any circumstances are considered inadmissible. This includes even statements made to off-duty police officers, out of police custody with no reasonable apprehension of threat or coercion. This was clearly established by the Telangana High Court in the *Macharla Ramesh v. State of Telangana* case which stated that confessions made to a police officer under any circumstances are inadmissible.[32]

3. Exceptions and Procedural Safeguards: The Role of Magistrates and Section 164 of the CrPC

One caveat to this provision is that confessions made to police officers in the presence of a magistrate are admissible. This is stated in the section itself as well as held in cases such as *Kartar Singh v. The State of Punjab.*[33] The *Jogendra Nahak v. The State of Orissa* case further stated that the procedure to be followed by the magistrate for recording the confession has to be in accordance with Section 164 of the CrPC.[34] Moreover, the term "*magistrate*" in this section refers only to a judicial magistrate and not an executive magistrate. This was held in the *Assam v. Anupam Das* case.[35] The rationale behind such a provision is based on the assumption that unlike a police officer, a magistrate will act impartially by upholding neutrality and fairness, especially if the procedure stipulated under Section 164 is followed. Moreover, the evidentiary weight will be greater because

[30] State of AP v. Gangula Satya Murthy, (1997) 1 SCC 272.
[31] Harbansingh v. State, AIR 1970 Bom 79.
[32] Macharla Ramesh v. State of Telangana, Criminal Revision Case No. 268 of 2022, Telangana High Court.
[33] Kartar Singh v. The State of Punjab, (1994) 3 SCC 569.
[34] Jogendra Nahak v. The State of Orissa, (2000) 1 SCC 272.
[35] State of Assam v. Anupam Das, (2007) SCC Online Gau 61.

the presence of a magistrate will ensure the voluntariness of the confession. However, even this is a mere assumption and there is no established evidence to show that this will be inevitably true. For example, even if there is no actual coercion, the accused might make a confession mainly because of the prevailing fear in his mind in the presence of authorities like the magistrate and the police officer. Additionally, there is nothing to preclude the possibility that even a magistrate might resort to force or coercion. These areas of analysis reveal that the provisions on police confessions might not be as flawless as they seem upon conducting a perfunctory evaluation.

(C) EXCEPTION TO INADMISSIBILITY: DISCOVERY OF FACTS CONSEQUENT TO THE STATEMENT OF THE ACCUSED

1. Doctrine of Confirmation and the Scope and Non-Conclusiveness of the Discovery

Under the evidence law in India, the admissibility of police confessions has only one exception that is stated in the proviso to Section 23. According to this exception, if discovery of a fact is made pursuant to a confession given by the accused, that part of the confession is admissible. In fact, this is the most contested provision in the part related to police confessions in the BSA. The principle underlying this section is the doctrine of confirmation, according to which, even if a confession is presumed to be involuntary under Section 23(1) and Section 23(2), if it leads to the discovery of a fact, it implies that the confession made is true, thus making it admissible. This section was explained in cases such as *State of UP v. Deoman Upadhyay*.[36] Courts have generally adopted a broad view of this provision. For example, in *Mohan Lal v. Rajasthan*,[37] it was held that it is not necessary for the discovery to pertain to the same offence that the accused is charged with. Additionally, in *Suresh v. State of Haryana* it was held that pursuant to the confession, if discovery is made, the accused will be duty-bound to justify his exclusive knowledge and failure to do so will lead to an inference against the interests of the accused.[38]

One caveat to this provision is that discovery is admissible but not necessarily reliable, as held in the *Mani v. State of T.N.* case.[39] This was reaffirmed in the *Vijay Thakur v. H.P.* case which stated that discovery cannot be solely relied on for conviction.[40] It can at most serve as circumstantial

[36] State of UP v. Deoman Upadhyay, AIR 1960 SC 1125 [hereinafter "Deoman Upadhyay"].
[37] Mohan Lal v. Rajasthan, AIR 2015 SC 2098.
[38] Suresh v. State of Haryana, (2015) 2 SCC 227.
[39] Mani v. State of Tamil Nadu, (2009) 17 SCC 273.
[40] Vijay Thakur v. State of Himachal Pradesh, (2014) 14 SCC 609.

evidence that has to be corroborated by other, independent evidence. The position till here is fairly settled. However, the major disagreement pertaining to this provision is whether Section 27 of the IEA is an exception to Section 25 or Section 26, which has been explored below.

2. Conflicting Judicial Interpretations on the Applicability of the Exception

One view as taken in the *Mohd. Arif @ Ashfaq v. State of NCT of Delhi* case is that Section 27 is an exception to Section 26 because only those confessions that are made in the custody of a police officer and lead to the discovery of facts can be admitted as evidence.[41] Since Section 26 discusses confessions made while in police custody, Section 27 is an exception to Section 26. This view has also been supported in the *Pakala Narayana Swami* case[42] and the *U.P. v. Deoman* case,[43] among others. The other view is that Section 27 is an exception to both Section 26 and 25, the rationale being that Section 27 was based on Section 150 of the CrPC[44] which covered both the phrases, "a person accused of any offence" and "in the custody of a police officer," which correspond to Section 25 and 26 respectively. This was held in the *Queen Empress v. Babu Lal* case.[45] The third view is that, Section 27 is an exception to Sections 24, 25 and 26, the rationale being that a confession given by an accused which leads to a discovery upholds the veracity of the confession, thus justifying a broad view. This has been supported in cases such as *Aghnoo Nagesia v. State of Bihar*.[46]

The differing approaches discussed above create inconsistencies in judicial practice. It is in these cases that excessive judicial discretion plays a major role, with courts reaching contradictory outcomes. The effect of these three cases is extremely different, which necessitates a plea for certainty. For example, if Section 27 is construed as an exception to Section 26 only, the confessions made in police custody which led to the discovery of a fact will be admissible. However, on the contrary if it is interpreted as an exception to Section 25 and 26 both, then even if the accused is not in police custody, his statement will be admissible provided it is made to a police officer and leads to the discovery of a fact. Furthermore, if it is construed as an exception to Section 24 also, even if the confession has been obtained by the use of force or coercion, it will

[41] Mohd. Arif @ Ashfaq v. State of NCT of Delhi, (2018) SCC OnLine SC 3473.
[42] Pakala Narayana Swami, *supra* note 14.
[43] Deoman Upadhyay, *supra* note 37.
[44] CODE CRIM. PROC. § 150.
[45] Queen Empress v. Babu Lal, ILR (1884) 6 All. 509.
[46] Aghnoo Nagesia v. State of Bihar, AIR 1966 SC 119.

be admissible, provided the condition of discovery is proved. This proposition is absurd because even if a discovery is made, the usage of forceful, compelling means will be directly violative of Article 20(3) of the Constitution. A statutory provision cannot trump a constitutional safeguard, thus negating this interpretation. It is important to note that one of the most recent SC decisions on this point is *Raja Khan v. State of Chhattisgarh*, which although does not discuss confessions in detail, upholds that Section 27 of the IEA is an exception to both Section 25 and 26.[47] This aligns with the *Perumal v. State* case[48] and the second view portrayed above but does not entirely settle the position. This is because, although it is one of the latest stances that the SC has adopted, it does not explicitly overrule or engage with precedents holding to the contrary. Moreover, as explained below, a literal interpretation of the proviso to Section 23 of the BSA seems to mandate presence in police custody for the exception to operate. This interpretation means that Section 27 operates as an exception only to Section 26 and not Section 25, which is contrary to the decision in this case.

A potential method of reconciling these positions is through the application of the rules of statutory interpretation and constitutional consistency. A harmonious construction approach would require that the provisions be read in a manner that furthers the overarching objective of the IEA[49] which is to ensure the reliability of evidence while protecting individual rights.[50] This would indicate that Section 27 functions not as a blanket exception to all three provisions but as a narrow evidentiary rule of admissibility limited to factual discoveries, subject to the confession's voluntariness. From a constitutional standpoint, applying Section 27 as an unrestricted exception to Section 24 would run afoul of Article 20(3), as mentioned previously. Thus, even the discovery of a fact pursuant to a confession cannot validate a statement extracted through coercion or inducement. This conclusion is also aligned with the doctrine of reading down, according to which, a statutory provision is construed in a narrow manner to ensure that it is in line with constitutional principles and safeguards.[51] Therefore, it is clear that Section 27 cannot operate as an exception to Section 24. In fact, the scheme of Section 23 of the BSA also supports this position wherein the exception has been framed as a proviso to Section 23 which is an amalgamation of the erstwhile

[47] Raja Khan v. State of Chhattisgarh, (2025) 3 SCC 314.
[48] Perumal Raja @ Perumal v. State Rep. by the Inspector of Police, (2024) SCC OnLine SC 12.
[49] Ananya Singh, *Interpretation of Statute: Analysis of the Rule of Harmonious Construction*, 6 INT. J. L. MANAG. HUM. 1774 (2023).
[50] Daksh Dhariwal & Niharika Verma, *Balancing Justice: Human Rights and the Law of Evidence in India*, SSRN (Oct. 30, 2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4962336.
[51] Authorised Officer, Central Bank of India v. Shanmugavelu, (2024) 6 SCC 641.

Sections 25 and 26, and not Section 22, which resembles Section 24 of the IEA. It is further undisputed that Section 27 is an exception to Section 26 because all the three positions identified above do not vary in their interpretation on this point. However, when it comes to construing Section 27 as an exception to Section 25, the lines become blurred. It can be argued that Section 23 of the BSA solves this debate to a large extent by adopting the second interpretation. However, this cannot be concluded with certainty because although the proviso operates for the entire section, a literal interpretation of the wording of the proviso indicates that for the exception to be applicable, the accused has to mandatorily be present in police custody. Therefore, this ambiguity subjects the accused's rights to judicial discretion, which leads to uncertainty, arbitrariness and contradictory outcomes.

3. The Scope of Discovery and Corresponding Judicial Interpretation

Another important element of this provision is that the discovery should pertain to a fact not within the pre-existing knowledge of the police officer. The rationale, as explained in the *State of NCT of Delhi v. Navjot Sandhu* case[52] is that the discovery will be meaningless if the knowledge is pre-existing, thus not satisfying the requirement of "discovery" in the first place. Additionally, the confession would fall within the ambit of the previous sections then since the primary condition of discovery will remain unfulfilled, thus making the confession inadmissible. Courts have generally considered the term "*discovery*" to include material and physical objects but not psychological facts, as held in the *Pulukuri Kottaya v. Emperor* case.[53] Additionally, the *Pershadi v. State of U.P* held that it includes not only the object discovered but also the place of discovery and other circumstantial surroundings.[54] Additionally, the confession or "*information*" in this case can be interpreted widely to include oral or written statements and also signs and gestures.[55] There have been other minor disagreements such as whether the term "*fact*" includes any other person or co-accused. The accepted position is that it cannot but there have been deviations as seen in the *Mehboob Ali v. State of Rajasthan* case.[56] Additionally, there have been points of conflict between Section 27 of the IEA and Section 162 of the CrPC also that have been identified and resolved and an analysis of this lies out of the scope of the paper.

[52] State (NCT of Delhi) v. Navjot Sandhu, (2005) 11 SCC 600.
[53] Pulukuri Kottaya v. Emperor, AIR 1947 PC 67.
[54] Pershadi v. State of UP, AIR 1957 SC 211.
[55] Khabiruddin v. Emperor, AIR 1943 Cal 644.
[56] Mehboob Ali v. State of Rajasthan, (2016) 14 SCC 640.

4. Problems with the Doctrine of Discovery and the Need for Reform

The major problem with Section 27 of the IEA and the Proviso to Section 23 of the BSA is that they in effect negate the very purpose of police confessions being admissible. This is because even if a discovery is made which aligns with the veracity of the confession, there is no assurance that the confession has been made voluntarily. Several critiques argue that Section 27's exception itself is a problematic workaround for coercive police tactics.[57] By allowing confessional statements to be admissible if they lead to the discovery of a fact, courts often accept evidence extracted under questionable circumstances, thereby blurring the line between voluntariness and compulsion.

This discovery-based admissibility further creates a perverse incentive for investigative agencies to extract statements through indirect pressure or coercion, knowing that a resulting discovery can lend legal legitimacy to an otherwise inadmissible confession. This goes against the very presumption on which police confessions are regarded inadmissible, which is that they are likely to be made due to the exercise of force or coercion. Moreover, even if the confession is proved to be true through discovery, a forced confession violates Article 20(3) of the Constitution. What exacerbates the problem further is that this provision is given a very wide interpretation which although serves the interests of justice at times, often prejudices the rights of the accused by admitting potentially coerced confessions. However, such claims, although legitimate, are not necessarily viable considering that Section 27 is rarely considered an exception to Section 24, as explored above. In any case, such interpretive ambiguity cannot be left unchecked. It necessitates a clearly defined, enforceable framework like the conceptual model proposed in this paper, that imposes strict procedural safeguards and limits judicial discretion to prevent miscarriages of justice.

(D) INTERRELATIONSHIP BETWEEN ARTICLE 20(3) OF THE CONSTITUTION AND POLICE CONFESSIONS

Article 20(3) of the Constitution of India falls within Part-III which prescribes a set of fundamental rights. It provides for the right against self-incrimination and states that no accused should be compelled to be a witness against themselves. This means that a confession made by an accused has to be voluntary and any use of force or coercion is unacceptable. The schematic trajectory of

[57] Anshul Ramesh & Andolan Sarkar, *The Irrationality of Section 27 of the Indian Evidence Act, 1872*, THE CRIMINAL LAW BLOG NLUJ (Oct. 30, 2020), https://criminallawstudiesnluj.wordpress.com/2020/10/30/the-irrationality-of-section-27-of-the-indian-evidence-act-1872/.

the admissibility of police confessions under the BSA is based primarily on this right. This is the reason behind declaring police confessions to be inadmissible, based on the presumption that confessions made to the police have been obtained by using forceful or coercive means and this violates the fundamental right against self-incrimination. The meaning of "*compulsion*" under Article 20(3) was explained in the State of *Bombay v. Kathi Kalu Oghad* case as a physical objective act, amounting to duress which makes the statement involuntary and exhorted.[58] Additionally, cases such as Selvi v. State of Karnataka explain the scope of Article 20(3).[59] This case held that intrusive techniques such a polygraph, electronic brain-mapping and narco-analysis, when utilised without the consent of the accused, violate Article 20(3) of the Constitution. Therefore, forceful confessions definitely attract the bar of Article 20(3). However, this right cannot be interpreted so widely that all forms of police confessions are considered to be inadmissible. The effect of this, as mentioned previously will be to ignore relevant voluntary statements that are essential to decide the case at hand.

Additionally, the proviso to Section 23 of the BSA, when read harmoniously with Article 20(3) reveals that only voluntary confessions which lead to discovery of facts can be admitted as evidence. This leads to a form of circular reasoning because if this is true, which it inevitably has to be, the entire framework of police confessions falls to the ground like a deck of cards. This is because the presumption that all police confessions are obtained through coercion would no longer hold uniformly (due to the difference in approaches between Section 23 of the BSA and its presumption), and the admissibility of confessions would hinge on subjective judicial interpretations of voluntariness. Consequently, the rigid exclusionary rule against police confessions would collapse, leading to inconsistent applications in court. The balance between safeguarding the right against self-incrimination under Article 20(3) and ensuring that critical evidence is not unjustly excluded would become precarious. In such a scenario, the legal framework may fail to uphold the constitutional safeguards meant to protect accused individuals from coerced or involuntary confessions while simultaneously undermining the evidentiary value of genuinely voluntary statements. This undergirds the importance of having a clearly defined model or framework that helps balance and reconcile these considerations.

[58] State of Bombay v. Kathi Kalu Oghad, AIR 1961 SC 808.
[59] Selvi v. State of Karnataka, (2010) 7 SCC 263 [hereinafter "Selvi"].

(E) KEY TRENDS AND GAPS IDENTIFIED

The preceding doctrinal analysis reveals a fragmented judicial landscape on the admissibility of confessions made to police officers. While certain judgments have attempted to clarify the scope of Sections 24 to 27 of the IEA, the broader jurisprudence continues to reflect a tension between evidentiary pragmatism and the constitutional imperative to safeguard personal liberty and protect the rights of the accused. Courts have oscillated between rigid exclusion and selective admissibility based on contextual factors such as the place of discovery, the nature of custody, or the identity of the recipient officer. For example, as elucidated above, there have been contradictory outcomes on the scope of the discovery rule and whether Section 27 is an exception to only Section 26, both Sections 25 and 26, or all the three preceding sections, namely 24, 25 and 26. Similarly, the term "police officer" has been construed differently by different judgments. Moreover, the automatic presumption of involuntariness with hardly any rebuttal mechanism, creates a glaring gap by rejecting confessions that may be voluntary and relevant.

As highlighted above, the proviso to Section 23 of the BSA and Article 20(3) of the Constitution differ from this approach by not automatically presuming involuntariness and accepting admissibility if the confessions made have not been coerced or forced. These inconsistencies have created legal uncertainty, while also vesting significant discretion in individual judges to determine admissibility on a case-by-case basis without clear doctrinal anchors. Moreover, the exclusionary framework, though rooted in valid historical concerns of custodial abuse, now stands at odds with contemporary procedural reforms and technological advancements that could enable safe, voluntary, and rights-compliant confessions. These findings indicate an urgent need for a structured, balanced, and safeguard-centric model to guide judicial decision-making and limit discretion. This model has been proposed in the section below and it seeks to address these doctrinal gaps and limit judicial inconsistencies by offering a principled framework that ensures both transparency and accountability in the admission of police confessions.

III. CONCEPTUALISATION OF THE MODEL

This is the primary portion of this analysis because although the problems and inconsistencies associated with the admissibility of police confessions have been identified above, mere identification does not serve any utility. A well-defined conceptual framework has been elucidated

in this section which comprises procedural guidelines that can be used by courts while deciding the admissibility of police confessions. This model has intentionally been framed in the form of a judicial checklist to foster comprehensive understanding, alongside raising the plea that the judicial decision-making pertaining to confessions has to be exercised in accordance with the guidelines stipulated in this model. Judicial consistency and concretization are essential to safeguard the accused's rights and uphold justice by striking a balance between inadmissibility and relevancy.

It is essential to point out that the proposed model rests on a normative shift in how Indian criminal jurisprudence conceptualises the police, not merely as potential instruments of coercion to be structurally distrusted, but as state agents constitutionally obligated to uphold personal liberty and bodily security. Therefore, based on this understanding, the model although presumes confessions to be involuntary, contains several provisions to rebut this presumption which is absent in the existing jurisprudence. This perspective does not seek to romanticise policing, but rather to anchor their evidentiary powers within a framework of rights-respecting accountability. If the police are to play a role in the evidentiary process, they must do so under a clearly articulated duty of care, subject to institutional and judicial checks. This requires the law to recognise that confessions made to police officers can, when obtained under procedurally controlled, transparently documented, and rights-compliant circumstances serve evidentiary value. Furthermore, the model makes clear that confessions have to be voluntary and explicitly rejects forced and coerced confessions, reinforcing the importance of respecting the fundamental rights of the accused (particularly article 21 of the Constitution)[60] and their bodily integrity. Therefore, the model introduces a duty-based, safeguard-centric framework which aims not merely to admit evidence, but to cultivate a rights-conscious investigatory culture, where liberty and legitimacy are not mutually exclusive. This re-conceptualisation becomes especially important in an era where technological progress makes it increasingly feasible to hold police actions accountable without compromising investigative efficacy. The safeguard pertaining to audio-visual recording which the model discusses is a means to achieving this objective. It is important to recognise that there are institutional challenges to the implementation of such technological techniques, particularly in a country like India. These include the lack of resources, awareness, and expertise in utilizing these devices efficiently. However, steps have to be taken towards gradually integrating these mechanisms to achieve the normative objectives that hold immense significance for the

[60] INDIA CONST. art. 21.

development of the criminal law jurisprudence in India. Thus, the proposed model aims to evolve a balanced framework which protects the rights of the accused while ensuring that relevant confessions are not denied admissibility.

The model that has been evolved in this paper is as follows:

Model Checklist: Guidelines for Admissibility of Police Confessions ('Model')

Guideline 1: Presumption of Involuntariness

1. General Rule: Any confession made to a police officer, or while in the custody of police, shall be presumed involuntary and inadmissible as evidence in any criminal proceeding, except as provided under the guidelines stipulated in this model.
2. Conditional Rebuttal: The presumption in Guideline 1(1) may be rebutted only if the conditions outlined in Guidelines 2, 3, and 4 of this Model are satisfied.

Guideline 2: Conditions for Rebuttal of Presumption

1. Judicial Oversight Requirement: A confession may only be admitted if made before a Judicial Magistrate under the following circumstances:
    - (a) The confession is recorded in compliance with Section 164 of the CrPC.
    - (b) The Judicial Magistrate is satisfied, after questioning the accused in camera, that the confession was made voluntarily and free from any inducement, threat, or coercion.
2. Cooling-off Period: A confession shall only be admissible if:
    - (a) A mandatory period of 48 hours has passed between the arrest and the recording of the confession.
    - (b) During this period, the accused has been informed of their right to consult with legal counsel and has been given the opportunity to do so.
3. Medical Certification: Prior to recording the confession, the accused shall undergo a mandatory medical examination by a certified medical officer, who shall:
    - (a) Certify that the accused is in a fit physical and mental condition to make a voluntary confession.
    - (b) Record any signs of physical injury or distress that may indicate coercion, which shall render the confession inadmissible.

Guideline 3: Procedural Safeguards for Confession Recording

1. Audio-visual Recording: All confessions made to a police officer, or in police custody, shall be recorded by audio-visual means. The recording shall:
    - (a) Begin from the moment the accused is brought before the Magistrate.

- (b) Capture the full duration of the questioning and confession without interruption.
- (c) Be stored in a tamper-proof format and presented to the court for independent verification.

2. Presence of Legal Counsel:

- (a) The accused must be given the option to have legal counsel present at the time of the confession.
- (b) If the accused waives this right, the waiver must be explicit, in writing, and recorded on the audio-visual record.
- (c) In cases where the accused is indigent or cannot afford legal representation, the State must be obligated to provide a competent legal aid lawyer, in line with Article 39A of the Constitution[61] and the directives in *Khatri v. State of Bihar,*[62] and *Hussainara Khatoon v. State of Bihar.*[63]

Guideline 4: Reliability Assessment

1. Reliability Test: Even if the conditions in Guidelines 2 and 3 are satisfied, a confession shall only be admissible if the court finds it to be reliable based on the following factors:

- (a) The nature of the interaction between the police and the accused, including whether the confession was made during custodial interrogation or freely outside such questioning.
- (b) The mental and physical state of the accused at the time of confession, as corroborated by medical records.
- (c) Any evidence of inducement, threat, or promise, whether explicit or implicit, made to the accused prior to the confession.

2. Burden of Proof: The burden of proving the voluntariness and reliability of the confession rests with the prosecution. The prosecution must prove beyond reasonable doubt that the confession was made voluntarily and is reliable, in accordance with the factors set out in Guideline 4(1).

Guideline 5: Limitations on Discovery Rule

1. Scope of Admissibility: The provisions of Section 27 of the Indian Evidence Act, 1872 (regarding the admissibility of information leading to the discovery of facts) shall be construed narrowly.

[61] INDIA CONST. art. 39A.
[62] Khatri v. State of Bihar, (1981) 1 SCC 627.
[63] Hussainara Khatoon v. State of Bihar, AIR 1979 SC 1369.

- (a) Only the portion of the confession directly leading to the discovery of material facts shall be admissible.
- (b) Any portion of the confession not directly leading to the discovery shall remain inadmissible unless independently verified under Guideline 4 of this model.

2. Judicial Scrutiny: The court must scrutinise the link between the discovered fact and the confession to ensure that:

- (a) The discovery would not have been made without the confession.
- (b) The discovery does not rely on any coerced or involuntary elements of the confession.

Guideline 6: Judicial Discretion

1. Objective Test for Voluntariness: The court shall apply an objective test to assess whether the confession was made voluntarily, free from coercion, and with full knowledge of the consequences. Factors to be considered include:

- (a) The duration of police custody prior to the confession.
- (b) The treatment of the accused while in custody, as corroborated by medical and custodial records.
- (c) The presence or absence of legal counsel during interrogation.

2. Proportionality and Necessity: The court shall consider whether admitting the confession is proportionate to the needs of justice, ensuring that the rights of the accused under Article 20(3) of the Constitution of India are not violated. Only confessions that serve a compelling evidentiary purpose and meet all conditions of this model shall be admissible.

Guideline 7: Exclusionary Rule

1. Exclusion of Tainted Confessions: Any confession found to be obtained by means of inducement, threat, coercion, or in violation of the safeguards provided under this Act shall be inadmissible in court.

- (a) Such exclusion shall apply irrespective of whether the confession contains truthful or corroborated facts.
- (b) The court may consider secondary evidence but shall exclude any confession that is tainted or improperly obtained.

2. Fruits of the Poisonous Tree Doctrine: Any evidence obtained as a result of an inadmissible confession shall also be inadmissible, unless:

- (a) The prosecution can prove that the evidence would have been discovered independently of the confession.

- (b) The confession, though tainted, did not play a decisive role in the discovery of such evidence.

Guideline 8: Restriction on Definition of Police Officer

Definition of Police Officer: For the purposes of this model, the term "police officer" shall be construed narrowly, in line with judicial precedents, including but not limited to the rulings in *State of Punjab v. Barkat Ram*,[64] and *Raj Kamar Karwal v. Union of India*.[65]

- (a) Confessions made to non-police authorities shall not automatically fall within the presumption of involuntariness unless a direct nexus with law enforcement is established.
- (b) In determining such a nexus, the court shall consider the proximity, control, and influence of the police over the confession-making process.

Guideline 9: Right to Appeal

Right to Challenge Admissibility: An accused whose confession is admitted into evidence under the provisions of this Act shall have the right to appeal the admissibility ruling.

- (a) The appellate court shall review the voluntariness and reliability of the confession de novo.
- (b) The burden of proof remains with the prosecution at all stages to justify the admissibility of the confession.

Explanatory Notes to the Model: There are certain guidelines in this model that require an additional explanation or clarification. These include:

- Guideline 2(2)(a): The rationale behind introducing such a cooling-off period is to ensure that the accused is uninfluenced by coercive pressures and is able to approach the confession with an open mind. It is important to note that a potential argument against this provision is that 48 hours is not sufficient to serve as the cooling-off period. However, extending the time period further might hinder timely investigation, risk loss of evidence, and adversely impact practical feasibility. Fixing this period at 48 hours ensures that an optimum balance is struck between procedural fairness and investigative efficiency. Similar safeguards are present in jurisdictions such as the United States, as seen in the *Maryland v. Shatzer* judgment, wherein a fourteen-day cooling-off period was upheld between recourse to a legal counsel and consequent break in

[64] Barkat Ram, *supra* note 19.
[65] Raj Kumar Karwal, *supra* note 21.

custody, and the initiation of re-questioning by the police.[66] Although this case upheld a fourteen-day period, it did so in a different constitutional context, specifically, the invocation of the right to counsel under the United States Sixth Amendment[67] and the associated Edwards rule,[68] which prohibits police from re-initiating interrogation once counsel is requested. That fourteen-day period was meant to break the coercive presumption created by prolonged custody, not to delay initial questioning per se. In contrast, the 48-hour cooling-off period proposed here operates at an earlier procedural stage, before the first confession and is aimed at countering the immediate psychological shock of arrest, rather than resetting a presumption after counsel has been invoked. Therefore, since the legal context is not equivalent and even in other jurisdictions, the cooling-off period is utilised for different purposes, the 48-hour cooling-off period prescribed here is sufficient, especially considering reasons such as investigative efficiency and prevention of delays.

- Guideline 3(2)(c): It is imperative to acknowledge that the right to legal counsel is important to protect the rights of the accused by providing access to a fair procedure including competent legal advice, representation, and assistance. Therefore, this right must be meaningful and not merely formal, thus necessitating the assistance of the State in situations where the accused is indigent and cannot afford legal representation.

- Guideline 5: This guideline evolves and finalises a fixed interpretation to the discovery rule under Section 27 of the IEA. Doing so is important because of the prevailing judicial inconsistencies and discretion highlighted previously, wherein the statutory framework is unclear as to whether Section 27 will operate as an exception to only Section 26, or both Sections 25 and 26. It upholds the prevailing notion of Section 27 not being an exception to Section 24, and settles the position by recognising Section 27 as an exception to both Sections 25 and 26. However, in doing so, it introduces objective thresholds such as a narrow interpretation of the discovery rule with admissibility only upon demonstrable proof of voluntariness, and the ambit of this guideline extending to only those discoveries made directly as a result of the confession with the Court, establishing a direct link and being objectively satisfied that the discovery could not have been made independent of the confession. Such a strict emphasis on directness is

[66] Maryland v. Shatzer, (2010) 559 U.S. 98.
[67] U.S. CONST. amend. VI.
[68] Edwards v. Arizona, (1981) 451 U.S. 477.

something that is lacking in the existing jurisprudence and is extremely important because it ensures that this discovery rule is not misused to make most confessions admissible by merely terming them as leading to the discovery of a fact. Moreover, developing and implementing this fixed, consistent, and clear guideline will insulate the accused from arbitrary evidentiary outcomes and uphold their due process rights, as discussed in cases such as *Selvi v. State of Karnataka,*[69] and *Maneka Gandhi v. Union of India.*[70]

- Guideline 7(2): The Fruit of the Poisonous Tree Doctrine is a metaphorical legal principle implying that evidence derived from an illegal search or seizure is inadmissible in court. It is based on the idea that if the initial source of evidence (the "tree") is tainted by illegality, any evidence subsequently obtained (the "fruits") is also tainted and unreliable.[71] This doctrine was first applied in India in the *Ukha Kolhe v. State of Maharashtra* case, wherein blood samples collected were considered inadmissible due to non-adherence to the prescribed procedure.[72] However, today, certain exceptions have been recognised to this rule, particularly in the United States, to strike a balance between effective fact-finding and the due process rights of the accused. These include using the illegally obtained evidence to impeach the credibility of the accused, inevitable discoveries, collecting evidence in good faith, evidence procured by illegal means by an independent source or third person, which in part is not obtained from a tainted source, and lastly, an indirect link between an illegal search and the evidence obtained.[73] In fact, even in India, cases have not followed this doctrine by explicitly holding that even illegally obtained evidence is admissible, thus bringing about a change in the reasoning initially upheld in the *Ukha Kolhe v. State of Maharashtra* decision. These precedents include *R.M. Malkani v. State of Maharashtra*,[74] and *Poorna Mal v. Director of Inspection of Income Tax*,[75] among others.

- Guideline 8(b): The assessment of the nexus to determine the definition of police officer is necessarily fact-specific and must be conducted on a case-to-case basis. However, before

[69] Selvi, *supra* note 61.
[70] Maneka Gandhi v. Union of India, (1978) SCR (2) 621.
[71] Kartik Gupta, *Admissibility of Unlawfully Obtained Evidence in International Arbitration*, 11 NLIU LAW. REV. 86 (2022).
[72] Ukha Kolhe v. State of Maharashtra, (1964) 1 SCR 926.
[73] Bharat Chugh & Taahaa Khan, *Rethinking the 'Fruits of the poisonous tree' doctrine: Should the 'ends' justify the 'means'?*, SCC TIMES (Jun. 15, 2020), https://www.scconline.com/blog/post/2020/06/15/rethinking-the-fruits-of-the-poisonous-tree-doctrine-should-the-ends-justify-the-means/.
[74] R.M. Malkani v. State of Maharashtra, (1973) 1 SCC 471.
[75] Poorna Mal v. Director of Inspection of Income Tax, (1974) 1 SCC 345.

reaching its conclusion, the court shall examine the totality of circumstances, including the timing, setting, and nature of interactions to decide whether the confession was effectively induced by police authority, even if made to a non-police official. Such judicial discretion, though broad, must be guided by constitutional safeguards under Article 20(3) and relevant precedents to prevent misuse or arbitrary application.

- Guideline 9: It is important to note that such a specific right to challenge admissibility does not currently exist in the Indian jurisprudence. The applicable Bharatiya Nagarik Suraksha Sanhita which has replaced the erstwhile CrPC contains a separate detailed chapter on appeals.[76] However, the provisions mainly include appeal from convictions[77] or from appealable judgments or orders[78] as a whole rather than a specific right to challenge admissibility. For example, Section 383[79] read with Section 390[80] provides for appeals against convictions for furnishing false evidence but there is no provision particularly dealing with the admissibility of evidence. Section 413 on the contrary reinforces the concept of an appeal being a statutory right by providing that no right of appeal shall lie except as prescribed by the Sanhita.[81] It can therefore be reasonably inferred that the current criminal law framework not only fails to provide for a right to appeal against the admissibility of evidence but also prohibits it. In fact, even under the Constitutional set-up, Article 136 which provides for the right to file a special leave petition cannot be invoked lightly and has to satisfy a high threshold.[82] This has been recently upheld in the *Universal Sompo General Insurance v. Suresh Chand* case[83] which relied upon *Dhakeswari Cotton Mills v. Commissioner of Income Tax, West Bengal*,[84] and held that the power under Article 136 is an exceptional and overriding power and has to be exercised sparingly and with caution. Therefore, in the absence of any specific recourse to challenge admissibility, incorporating this provision in the framework becomes crucial.

IV. CONCLUSION

[76] The Bharatiya Nagarik Suraksha Sanhita, 2023, § 413-435, No. 46, Acts of Parliament, 2023 (India).
[77] The Bharatiya Nagarik Suraksha Sanhita, 2023, § 415, No. 46, Acts of Parliament, 2023 (India).
[78] The Bharatiya Nagarik Suraksha Sanhita, 2023, § 421, No. 46, Acts of Parliament, 2023 (India).
[79] The Bharatiya Nagarik Suraksha Sanhita, 2023, § 383, No. 46, Acts of Parliament, 2023 (India).
[80] The Bharatiya Nagarik Suraksha Sanhita, 2023, § 390, No. 46, Acts of Parliament, 2023 (India).
[81] The Bharatiya Nagarik Suraksha Sanhita, 2023, § 413, No. 46, Acts of Parliament, 2023 (India).
[82] INDIA CONST. art. 136.
[83] Universal Sompo General Insurance v. Suresh Chand Jain, (2024) 9 SCC 148.
[84] Dhakeswari Cotton Mills v. Commissioner of Income Tax, West Bengal, (1955) 1 SCR 941.

This paper has examined the gap within the existing jurisprudence surrounding police confessions in India and has developed a model to efficiently amend and navigate the drawbacks associated with the current position. It has explored the rationale of the courts through a detailed analysis of several judicial precedents before suggesting a model that can serve as a guiding framework or even a mandatory structure through express legislative incorporation. However, it faces a few limitations that have to be acknowledged. Firstly, the analysis is majorly based on secondary sources and literature such as books, journal articles, and judgements without conducting any specific on-field reviews or real-life surveys. This might partially hamper the reliability of the findings due to the possibility of errors in the opinions relied upon and the widely persisting divide that exists in India between theoretical stipulations and practical implementation of the relevant norms. Additionally, the proposed framework might not be universally applicable, thus making any generalisation unwarranted. This is because the scope of this study is restricted to surveying precedents from the higher courts and does not comprehensively cover all possible cases, thus relying on a carefully curated sample while evolving a framework with the aim of applying it to every case concerning the admissibility of police confessions. Additionally, the facts and circumstances might vary, thus necessitating a departure from the established framework in order to meet the overarching ends of justice. Lastly, the geographical scope of this study is also limited to India and this might overlook certain important positions or decisions adopted in courts beyond the borders of the country, that can serve as important guiding points.

However, the necessity and importance of this paper is evident from the existing literature that either discusses these provisions academically or analyses the drawbacks while making a case for admissibility. The current literature on the topic can be broadly classified into two themes - 'analytical exploration of the admissibility of police confessions' and 'descriptive exposition of the admissibility of police confessions.' The former goes beyond a mere narrative description and includes analytical articles such as the one authored by Arghya Sengupta which discusses the admissibility of confessions made in the custody of a police officer and makes a case for their admissibility, provided certain procedural safeguards are maintained,[85] and the article written by Abhinav Sekhri which concerns the definition of a police officer to determine the instances in which confessions will be inadmissible.[86] Additionally, articles critiquing admissibility have also

[85] Arghya Sengupta, *Confessions in the Custody of a Police Officer: Is It the Opportune Time for Change*, 18 NATL. LAW SCH. INDIA REV. 31 (2006).
[86] Abhinav Sekhri, *Confessions, Police Officers and § 25 of the Indian Evidence Act, 1872*, 7 NUJS LAW REV. 55 (2014).

been published, the epitome of which is Manasa Sundar Raman's piece, arguing against admissibility on grounds of it violating Article 20(3) and deviating from voluntariness due to the possibility of threat, coercion, or inducement.[87] Furthermore, Amisha Shrivastava's blog article discussing the non-inclusion of police confessions in a charge sheet is also relevant in this context.[88] While such prior literature has meaningfully contributed to the ongoing discourse, ranging from analytical pieces to doctrinal expositions, this paper builds on the understanding by proposing a structured model to guide judicial decision-making. It seeks to engage with this existing body of work by drawing from the concerns and insights already raised, offering a conceptual framework that could serve as a potential solution to the interpretive and procedural uncertainties identified.

In doing so, it contributes to evolving a more consistent and rights-sensitive jurisprudence. The second theme identified above includes mainly academic literature or commentaries that explain the concept without delving into a deep analytical framework. They are therefore, majorly descriptive and largely state and explain the law by referring to scholarly literature and judicial precedents. The works that fall under this theme include commentaries and books by notable scholars like Nageswara Rao,[89] Ratanlal and Dhirajlal,[90] V.P. Sarathi[91] and Mulla,[92] among others.

What differentiates this paper from the rest is its detailed analytical exploration of this concept, its comprehensive case survey and trend examination, and its evolution or introduction of a comprehensive model to facilitate judicial consistency, safeguard the rights of the accused and uphold equitable principles such as fairness, justice and efficiency. It marks the first step in the jurisprudential evolution and history of police confessions by concretising an abstract model into a statutory framework, maintaining the plea that amendments aligned with this framework have to be introduced. The model should therefore be given practical effect by explicitly incorporating it in the BSA through a legislative amendment. The importance of this is evident from the fact that

[87] Manasa Sundar Raman, *Admissibility of Confessions made to the Police: From Exception to the Norm*, CONSTITUTIONAL LAW AND PHILOSOPHY (Jun. 7, 2015), https://indconlawphil.wordpress.com/2015/06/07/guest-post-admissibility-of-confessions-made-to-the-police-from-exception-to-the-norm-i/.
[88] Amisha Shrivastava, *Confession Before Police Cannot Be Included In Charge Sheet: Supreme Court*, LIVELAW (2024), https://www.livelaw.in/top-stories/confession-before-police-cannot-be-included-in-charge-sheet-supreme-court-263298.
[89] 1 V NAGESWARA RAO, THE INDIAN EVIDENCE ACT: A CRITICAL COMMENTARY (3rd ed. 2019).
[90] 1 RATANLAL & DHIRAJLAL, THE LAW OF EVIDENCE (27th ed. 2019).
[91] K.A. PANDEY, V. P. SARATHI'S LAW OF EVIDENCE (8th ed. 2023).
[92] 1 MULLA, COMMENTARY ON LAW OF EVIDENCE (15th ed. 2022).

almost every criminal case inevitably involves interaction with the police and so, regarding all confessions to be inadmissible will have the disastrous effect of keeping even relevant statements out of the court's purview, thus negatively affecting substantive justice considerations. It is thus hoped that amendments are brought about in the future to effectively balance the need for safeguarding individual rights with the imperative of ensuring that justice is served in criminal proceedings. This balance will help prevent the miscarriage of justice, where vital evidence is excluded, while simultaneously upholding constitutional protections against coerced or improperly obtained confessions.

ARTICLE

GREEN FINANCING REGIME IN INDIA WITH SPECIAL FOCUS ON THE GREEN DEPOSIT FRAMEWORK

*Bipasha Kundu**

ABSTRACT

Green Financing in India is gaining importance in light of its ambitious environmental goals, especially with respect to obligations under the Paris Agreement. Even though the existing body of literature focusses on isolated aspects of the Green Financing regime in India, there is a dearth of literature which lays out the taxonomy of Green Financial instruments available in India comprehensively. The Green Deposits Framework recently adopted by the Reserve Bank of India is a pioneering move in the sector of Green Financing. No doubt, it is a step in the right direction, but its inadequacies and scope for further improvement have not been researched as of yet. This paper aims to thoroughly explore the lacunae in the Green Deposit Framework and address how they can be resolved, in the broader context of the Green Financing regime in India.

Key Words: Green Financing, Green Financial Instruments, Green Deposit Framework, Disclosures

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I. INTRODUCTION

India is the fifth-largest economy in the world,[1] but its performance on the environmental front has not been nearly as stellar. It ranked 176th out of 180 countries in the Environmental Performance Index in 2024.[2] In the present, environmental protection cannot be isolated from economic growth. India has set very ambitious environmental goals for itself under the Paris Agreement. The Paris Agreement is a legally binding international treaty on climate change. It was adopted by 196 Parties at the UN Climate Change Conference ('COP21') in Paris, France, on 12 December 2015. It entered into force on 4 November 2016. Its overarching goal is to hold "*the increase in the global average temperature to well below 2°C above pre-industrial levels*" and pursue efforts "*to limit the temperature increase to 1.5°C above pre-industrial levels*". India has pledged to reduce the emissions intensity of its Gross Domestic Product by 45% from the 2005 level, increase the proportion of non-fossil fuel-based electricity to 50%, and increase forest cover to absorb 2.5 billion to 3 billion tonnes of Carbon Dioxide, all by 2030.[3] However, achieving these goals is expected to incur a significant cost, and Green Financing becomes an absolute necessity in this context.

In order to understand the Green Financing regime in India, it is prudent to have some clarity on what the term "*Green Finance*" implies. Green Finance is often interchangeably used with associated but distinct terms like Sustainable Finance and Climate Finance. Sustainable Finance includes investments with the objective to create an economically, socially and environmentally inclusive and sustainable world.[4] Climate Finance is that branch of financing which aims to achieve the cause of mitigation and adaptation actions with respect to climate change.[5] Green Finance is broader in its ambit than Climate Finance and comprises investments to support not just mitigation of climate change but other environmental objectives like industrial pollution control, water sanitation, or

[1] *The top 10 largest economies in the world in 2024*, FORBES INDIA (July 17, 2024), https://www.forbesindia.com/article/explainers/top-10-largest-economies-in-the-world/86159/1.
[2] *Environmental Performance Index*, YALE SCHOOL OF ENVIRONMENT (July 29, 2024), https://epi.yale.edu/measure/2024/EPI.
[3] *India's Updated First Nationally Determined Contribution Under Paris Agreement (2021-2030)*, GOVERNMENT OF INDIA, https://unfccc.int/sites/default/files/NDC/2022-08/India%20Updated%20First%20Nationally%20Determined%20Contrib.pdf.
[4] Labanya Prakash Jena & Dhruba Purkayastha, *Accelerating Green Finance in India: Definitions and Beyond*, CLIMATE POLICY INITIATIVE (June, 2020), https://www.climatepolicyinitiative.org/wp-content/uploads/2020/07/Accelerating-Green-Finance-in-India_Definitions-and-Beyond.pdf.
[5] *Id.*

biodiversity protection.[6] Adopting Green Finance can help corporations widen their base within the environmentally conscious community.[7]

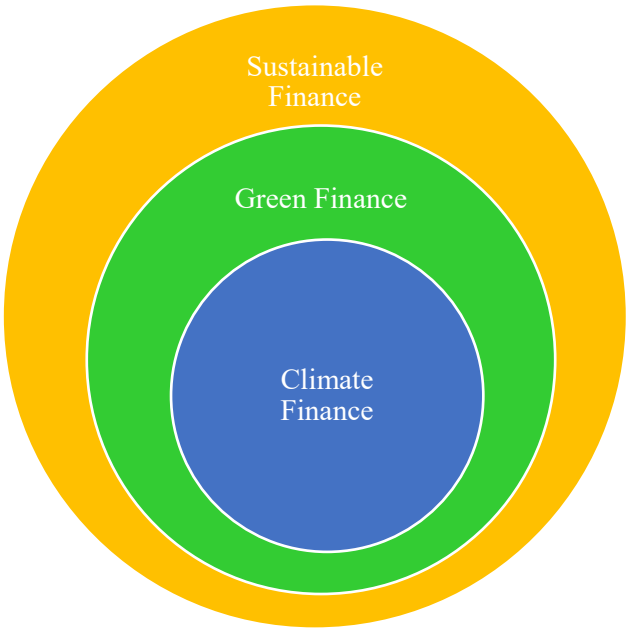

Figure I: Relation between Sustainable Finance, Green Finance and Climate Finance

The Reserve Bank of India ('RBI') recently adopted the Green Deposit Framework ('the Framework'),[8] which is a pioneering move considering that even though Green Deposits are available as a product in other jurisdictions like the United Kingdom, Portugal and Australia, they are fraught with regulatory lacuna.[9] The paper seeks to analyse the Green Financing Regime in India with a major thrust on the Framework and the possible lacunae it might have and to recommend specific amendments for further improvement.

In this paper, the author first explains the status of Green Financial Instruments in India and provides a comprehensive taxonomy in order to do so. Then, the author points out the salient features, including the disclosure requirements imposed by the Framework released by RBI. After

[6] Labanya Prakash Jena & Dhruba Purkayastha, *Accelerating Green Finance in India: Definitions and Beyond*, CLIMATE POLICY INITIATIVE (June, 2020), https://www.climatepolicyinitiative.org/wp-content/uploads/2020/07/Accelerating-Green-Finance-in-India_Definitions-and-Beyond.pdf; Nannette Lindenberg, *Definition of Green Finance* (April, 2014), https://www.cbd.int/financial/gcf/definition-greenfinance.pdf.
[7] Parvadavardini Soundarrajan & Nagarajan Vivek, *Green finance for sustainable green economic growth in India*, 62 (1) AGRICULTURAL ECONOMICS (2016).
[8] *Framework for acceptance of Green Deposits*, RESERVE BANK OF INDIA (April 11, 2023).
[9] VAISHALI VERMA, GREEN DEPOSIT FRAMEWORK: FINANCING A SUSTAINABLE FUTURE IN INDIA 557-578 (Palgrave Macmillan, 2024).

that, the author critically analyses the possible deficiencies in the Framework and reflects on how the Regulated Entities have adhered to the Framework so far by conducting an empirical analysis taking into account the Annual Financial Statements of the Scheduled Commercial Banks, the findings of which are provided in the Annexure. Finally, the author summarises the key findings and provides recommendations to improve the Framework in future.

II. GREEN FINANCIAL INSTRUMENTS IN INDIA

Green Financial Instruments are those instruments which forward the cause of green financing in either of the following ways:

i. environment-friendly nature (for example, paperless banking).[10]
ii. the way the financial instruments are used (for example, green bonds).[11]
iii. the way in which assets are transferred through them (for example, online banking).[12]

In India, there are primarily the following types of Green Financial Instruments[13]:

i. Green Equities, which include Green Equity Indices and Green Venture Capital.
ii. Green Debt Instruments, which include Green Deposits, Green Bonds and Green Loans.
iii. Risk Sharing Tools, which include Green Insurance and Guarantees.
iv. Other tools, which include Green Banking and Capacity Building Tools.

The regulatory framework in India surrounding green financial instruments has been evolving rapidly, and regulators across the board are coming up with regulations and frameworks with respect to different aspects of green financing.[14] As pointed out before, the focus of the paper is

[10] Prerana Sarma & Arup Roy, *Green financial instruments in India: a study on its current status and future prospects*, 26 (2), INT'L J. BUS. INNOVATION & RESEARCH (2021).
[11] *Id.*
[12] *Id.*
[13] Prerana Sarma & Arup Roy, *Green financial instruments in India: a study on its current status and future prospects*, 26 (2), INTERNATIONAL JOURNAL OF BUSINESS INNOVATION AND RESEARCH (2021); Shreyansh Jain, *Financing India's Green Transition*, ORF ISSUE BRIEF (May 12, 2023), https://www.orfonline.org/research/financing-indias-green-transition-60753; Abhilash, Sandeep S. Shenoy, Dasharathraj K. Shetty, Lumen Shawn Lobo & Subrahmanya Kumar N., *Green Bond as an Innovative Financial Instrument in the Indian Financial Market: Insights From Systematic Literature Review Approach*, 13 (2), SAGE OPEN (2023); Gopal K. Sarangi, *Green Energy Finance in India: Challenges and Solutions*, ADBI WORKING PAPER SERIES, Working Paper 863 (August, 2018), https://www.adb.org/sites/default/files/publication/446536/adbi-wp863.pdf.
[14] Ulka Bhattacharyya, *Understanding the Regulatory Framework for Sustainable Finance in India*, NATIONAL LAW SCHOOL BUSINESS LAW REVIEW, https://www.nlsblr.com/post/understanding-the-regulatory-framework-for-sustainable-finance-in-india.

to analyse the Green Deposit Framework[15] adopted by RBI in 2023. RBI also came up with the Draft Disclosure Framework on Climate-related Financial Risks on 28th February 2024[16] to encourage Regulated Entities to focus on climate-related financial risk management. However, other regulators have come up with initiatives with respect to green financing as well. The Securities & Exchange Board of India ('SEBI') has expanded the definition of green debt securities in the SEBI (Issue & Listing of Non-Convertible Securities) Regulations, 2021 ('SEBI NCS Regulations')[17] to include blue bonds (these relate to the management of water and marine sector), yellow bonds (these relate to solar energy) and transition bonds (these bonds raise funds for transitioning into a more sustainable form of operations) effective from 2nd February, 2023 so that the definition aligns with the Green Bond Principles ('GBP') of International Capital Market Association ('ICMA'), which are recognised by International Organization of Securities Commissions ('IOSCO').[18] SEBI has also released a circular on 3rd February, 2023 to provide guidelines on how to check the practice of greenwashing.[19] The International Financial Services Centre Authority has also introduced a Guidance framework on Sustainable and Sustainability linked lending by financial institutions for IFSC Banking Units and Finance Company / Finance Units in the International Financial Services Centre.[20]

(A) GREEN EQUITIES

Green equities enable investors to invest in "*green*" projects or activities through avenues like mutual funds, exchange traded funds and equity indices.[21]

1. Green Equity Indices

In India, Bombay Stock Exchange has introduced green equity indices called *Greenex* and *Carbonex*. The National Stock Exchange has also introduced such indices, namely, Nifty 100 ESG Index and Nifty 100 Enhanced ESG Index.

[15] *Framework for acceptance of Green Deposits*, RESERVE BANK OF INDIA (April 11, 2023).
[16] *Draft Disclosure framework on Climate-related Financial Risks,* RESERVE BANK OF INDIA (Feb. 28, 2024).
[17] SEBI (Issue & Listing of Non-Convertible Securities) Regulations, 2021, Regulation 2 (q).
[18] *Consultation Paper on Expanding the Scope of Sustainable Finance Framework in the Indian Securities Market,* SEBI (Aug. 16, 2024).
[19] *Circular on Dos and don'ts relating to green debt securities to avoid occurrences of greenwashing*, SEBI (Feb. 03, 2023).
[20] *Guidance framework on Sustainable and Sustainability linked lending by financial institutions,* IFSCA (April 26, 2022).
[21] Jeremie Fosse et al., *Green Finance in the Mediterranean*, EUROPEAN INSTITUTE OF MEDITERRANEAN (Dec., 2017), https://www.iemed.org/wp-content/uploads/2017/12/IEMed_Policy_Study3_Green-finance-in-the-Mediterranean.pdf.

2. Green Venture Capital

Green venture capital is a unique avenue which enables investors to invest in "green" ventures which not only provides them financial returns but also plays an important role in enhancing sustainable development.[22] In India, there are several prominent examples of such funds, for example:

i. The Bureau of Energy Efficiency established the Venture Capital Fund for Energy Efficiency with a corpus of Rs. 210 crores and a tenure of 10 years to invest in energy-efficient projects.[23]

ii. The Green India Venture Fund is a private sector initiative that aims to finance projects related to Clean Development Mechanism.[24]

iii. National Clean Energy and Environment Fund established to finance renewable energy sector.[25]

(B) GREEN DEBT INSTRUMENTS

There are three kinds of green debt instruments – green deposits, green bonds and green loans. Entities give out green loans to finance "*green*" projects. Green deposits and green bonds are products offered to investors and the proceeds of which are used to finance "*green*" projects. Only green bonds among these can be traded in the securities market, and hence, come under the ambit of SEBI NCS Regulations. Green deposits, as discussed, are regulated by the Green Deposit Framework introduced by RBI. RBI also regulates entities like IREDA (which is structured as a Non-Banking Financial Company)[26] which provide green loans.

1. Green Deposits

[22] Jelena Randjelovic, Anastasia R. O'Rourke & Renato J. Orsato, *The emergence of green venture capital*, 10(4) BUSINESS STRATEGY AND THE ENVIRONMENT (2003).

[23] *Venture Capital Fund for Energy Efficiency*, BUREAU OF ENERGY EFFICIENCY, available at https://www.beeindia.gov.in/sites/default/files/VCFEE_0.PDF (Last visited on July 29, 2024).

[24] *Green India Venture Fund,* IFCI VENTURE CAPITAL FUNDS LTD., available at https://www.ifciventure.com/funds-givfaboutfund (Last visited on July 29, 2024).

[25] *National Clean Energy and Environment Fund*, available at https://doe.gov.in/files/circulars_document/NCEF_Brief_post_BE_2017_18.pdf (Last visited on July 29, 2024).

[26] Our Profile, IREDA, available at https://www.ireda.in/home (Last visited on April 2, 2025).

Green Deposits are instruments akin to fixed deposits where the investor invests a fixed amount of money with any of the Regulated Entities for a fixed tenure which allows them to receive a fixed rate of interest, but unlike ordinary fixed deposits, the proceeds of green deposits can only be allocated to "*green*" projects and activities as defined in the Framework.[27]

2. Green Bonds

Green Bonds are those bond instruments, the proceeds of which are earmarked for financing / refinancing, either partially or fully, "green" activities or projects.[28] Financial institutions at the regional, national or international level may issue green bonds.[29] There are different types of green bonds that are issued by financial institutions, the prominent ones are the following[30]:

i. Use of Proceeds Bond: The proceeds of these bonds are earmarked for financing "green" activities or projects. In case the issuer of the bond liquidates, the lender has recourse to other assets of the issuer of the bond. The credit rating of these bonds is the same as that of other bonds of the issuer.[31]

ii. Green Revenue Bond: In this kind of bond, the issuer's revenue from sources like taxes and fees form the collateral for the debt.

iii. Green Project Bond: In this kind of bond, the lender has recourse only to those assets of the issuer which are connected to the underlying "*green*" project.

iv. Green Securitised Bond: In this kind of bond, several "*green*" activities or projects are grouped together, and in the event of liquidation of the issuer, the lenders have recourse to the assets linked to any of the projects which have been grouped together.

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[27] Ayush Mishra, *Investing in green deposits: How are they different; what do they do*, BUSINESS STANDARD. March 13, 2024, available at https://www.business-standard.com/finance/personal-finance/investing-in-green-deposits-how-are-they-different-what-do-they-do-124031300292_1.html; *How are green deposits different from regular fixed deposits? Mrin Agarwal answers*, THE ECONOMIC TIMES, June 7, 2023, available at https://economictimes.indiatimes.com/markets/expert-view/how-are-green-deposits-different-from-a-regular-fixed-deposit-mrin-agarwal-answers/articleshow/100807042.cms?from=mdr.

[28] *The Green Bond Principles*, INTERNATIONAL CAPITAL MARKET ASSOCIATION, available at https://www.icmagroup.org/assets/documents/Regulatory/Green-Bonds/Green-Bonds-brochure-150616.pdf (Last visited on July 29, 2024).

[29] Arunabha Ghosh, Kanika Chawla, Anjali Jaiswal, Sameer Kwatra, Meredith Connolly, Nehmat Kaur, Bhaskar Deol, Anna Mance, Douglass Sims, Sarah Dougherty, Jeff Schub & Rob Youngs, *Greening India's financial market: how green bonds can drive clean energy deployment*, NATIONAL RESOURCES DEFENCE COUNCIL, April, 2016, available at https://www.nrdc.org/sites/default/files/india-financial-market-green-bonds-report.pdf.

[30] Abhilash, Sandeep S. Shenoy, Dasharathraj K. Shetty, Lumen Shawn Lobo & Subrahmanya Kumar N., *Green Bond as an Innovative Financial Instrument in the Indian Financial Market: Insights From Systematic Literature Review Approach*, Vol. 13 (2), SAGE OPEN (2023); *The Green Bond Principles*, INTERNATIONAL CAPITAL MARKET ASSOCIATION, available at https://www.icmagroup.org/assets/documents/Regulatory/Green-Bonds/Green-Bonds-brochure-150616.pdf .

[31] *Explaining Green Bonds*, CLIMATE BONDS INITIATIVE, available at https://www.climatebonds.net/market/explaining-green-bonds (Last visited on July 29, 2024).

3. Green Loans / Concessional Debts

The terms of these loans are easier as compared to ordinary loans offered in the market. This is done in order to promote energy-efficient projects and technologies.[32] Green Building Finance, Green Vehicle Finance are examples of the same, and soft loans by IREDA.[33]

(C) RISK SHARING TOOLS

These tools are concerned with the management and mitigation of risks associated with "*green*" projects or activities.

1. Green Insurance

There are several kinds of green insurance, the prominent ones are listed below:[34]

i. Pollution legal liability insurance: Accidents caused by pollution or emission of hazardous substances come under the ambit of this insurance.

ii. Weather insurance: Risks associated with climate change and extreme weather conditions come under the ambit of this insurance.

iii. Renewable energy insurance: "*Green*" projects or activities in the renewable energy sector come under the ambit of this insurance.

2. Guarantees / Credit Enhancement

The Indian Solar Generation Guarantee Facility, offered by the Asian Development Bank was one of the pioneering partial risk guarantee facilities offered in India.[35] Another example of guarantee facility in the context of green financial instruments is the credit enhancement scheme launched by the India Infrastructure Finance Corporation Limited.[36]

[32] Priyanka Goel, *Green Finance: A step towards sustainable financial system*, Vol. 5, ABHINAV-INTERNATIONAL MONTHLY REFEREED JOURNAL OF RESEARCH IN MANAGEMENT & TECHNOLOGY (2016).

[33]Shreyansh Jain, *Financing India's Green Transition*, ORF ISSUE BRIEF, May 12, 2023, available at https://www.orfonline.org/research/financing-indias-green-transition-60753.

[34] Prerana Sarma & Arup Roy, *Green financial instruments in India: a study on its current status and future prospects*, Vol. 26 (2), INTERNATIONAL JOURNAL OF BUSINESS INNOVATION AND RESEARCH (2021).

[35] *Report and Recommendation of the President to the Board of Directors*, ASIAN DEVELOPMENT BANK, April, 2011, available at https://www.adb.org/sites/default/files/project-documents//44941-01-ind-rrp.pdf.

[36] *India Infrastructure Finance Company Limited*, DEPARTMENT OF FINANCIAL SERVICES, available at https://financialservices.gov.in/beta/en/page/india-infrastructure-finance-company-ltd-iifcl (Last visited on July 29, 2024).

(D) Other Tools

1. Green Banking

Green Banking refers to the host of banking activities that are carried out in a way to promote a zero or minimal adverse impact on the environment and a reduction in the carbon footprint.[37] Some examples of green banking practices would be to encourage paperless transactions, send correspondence to customers via electronic means to avoid wastage of paper, offer products of which proceeds will be used to finance "*green*" projects or activities, etc.[38]

2. Capacity Building Tools

Capacity building tools are those tools that contribute towards the dissemination of information and monitoring of information furnished related to the performance of corporations with respect to environmental goals. In this context, the SME Rating Agency is concerned with the green rating of Micro, Small and Medium Enterprises in India.[39] The Confederation of Indian Industries also has GreenCo rating to measure how environment friendly the activities of enterprises are.[40]

[37] Rambalak Yadav & Govind Swaroop Pathak, *Environmental Sustainability Through Green Banking: A Study on Private and Public Sector Banks in India*, Vol. 6(8), OIDA INTERNATIONAL JOURNAL OF SUSTAINABLE DEVELOPMENT (2013); Nishikant Jha & Shraddha Bhome, *A study of green banking trends in India*, Vol. 2, INTERNATIONAL MONTHLY REFEREED JOURNAL OF RESEARCH IN MANAGEMENT & TECHNOLOGY (2013).

[38] *Green Banking*, INSTITUTE FOR DEVELOPMENT AND RESEARCH IN BANKING TECHNOLOGY, available at https://www.idrbt.ac.in/wp-content/uploads/2022/07/Green-Banking-Framework-2013.pdf (Last visited on July 29, 2024).

[39] *SMERA launches green rating*, BUSINESS STANDARD, January 21, 2013, available at https://www.business-standard.com/article/press-releases/smera-launches-green-rating-110041200106_1.html, 2024).

[40] *GreenCo Rating System*, CONFEDERATION OF INDIAN INDUSTRY, available at https://www.greenco.in/aboutgreencorating.php (Last visited on July 29, 2024).

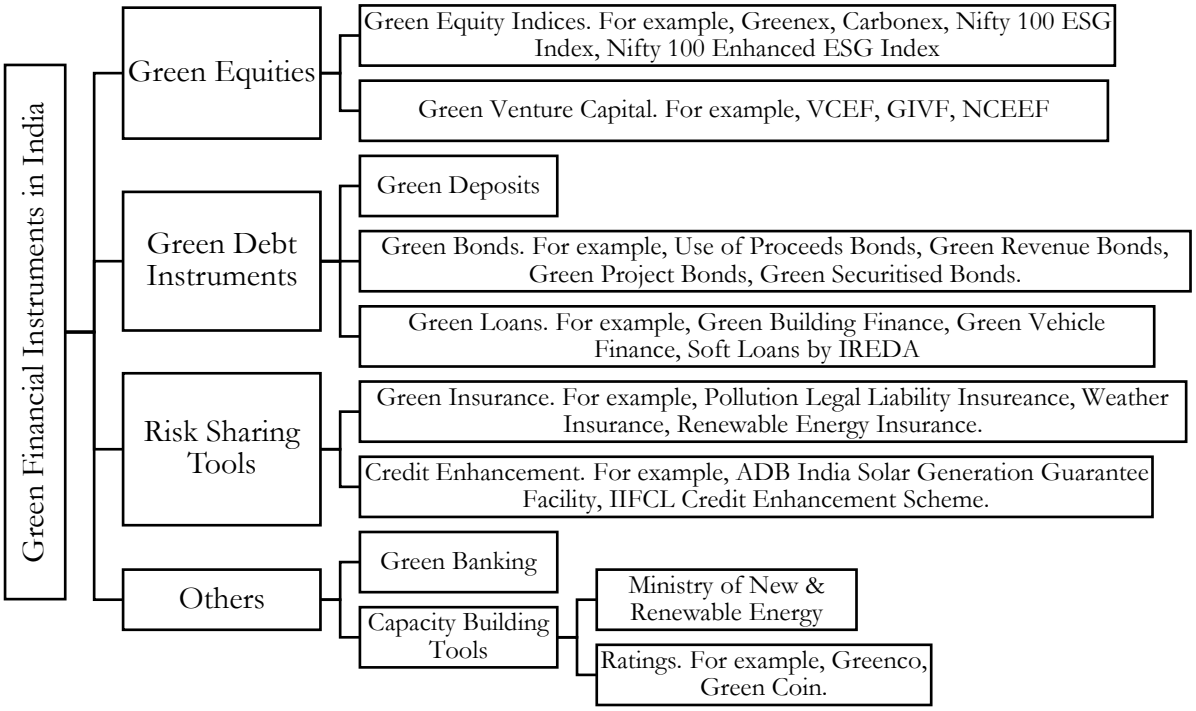


Figure II: Green Financial Instruments in India

III. THE GREEN DEPOSIT FRAMEWORK

On 11th April, 2023, RBI brought out the Framework in order to promote and regulate the acceptance of green deposits by the Regulated Entities.[41] The Framework came into force on 1st June, 2023 and applies to the following (who are collectively referred to as Regulated Entities):[42]

i. Scheduled Commercial Banks, also including Small Finance Banks but excluding Regional Rural Banks, Local Area Banks and Payments Banks.

ii. Non-Banking Finance Companies that take deposits, including Housing Finance Companies.

The Regulated Entities are required to come up with a framework of their own to finance Green Deposits and the same needs to be approved by its Board of Directors.[43] These frameworks need to have the following elements[44]:

[41] Reserve Bank of India, *Framework for acceptance of Green Deposits*, RBI/2023-24/14 (Issued on April 11, 2023).
[42] *Id.* at ¶1.
[43] *Id.* at ¶5.
[44] *Id.*

i. The "*green*" activities that would be considered eligible for allocation of funds raised from Green Deposits.

ii. The process of evaluating whether a prospective borrower's activity falls within the scope of "green" activities defined by their framework and whether the information provided by such prospective borrower is correct.

iii. Third-party Verification with respect to the allocation of proceeds of Green Deposits and Impact Assessment of lending of such proceeds. Impact Assessment will become mandatory (on paper) from the year 2024-2025. However, there is no penalty prescribed for not undertaking the Impact Assessment, which makes the so-called mandatory provision a "*toothless tiger*".

iv. Details about the temporary allocation of funds raised through Green Deposits.

The Framework also specified the "green" sectors to which funds raised from Green Deposits can be allocated.[45] Such sectors include renewable energy, energy efficiency, clean transportation, climate change adaptation, sustainable water and waste management, pollution prevention and control, green buildings, sustainable management of living natural resources and land use, and terrestrial and aquatic biodiversity conservation. Sectors like projects depending on fossil-fuel energy source, nuclear power generation, direct waste incineration, alcohol, weapons, tobacco, gaming, or palm oil industries, projects requiring biomass using feedstock originating from protected areas, landfill projects, hydropower plants bigger than 25 MW have been excluded from the ambit of "*green*" sectors.[46]

The Framework primarily places two disclosure requirements on the Regulated Entities, and they are listed below:

i. The Regulated Entities are required to publish portfolio-level information on funds raised through Green Deposits in their Annual Financial Statements.[47] Portfolio-level information includes data relating to the total amount raised through green deposits, the "green" sectors and sub-sectors in which the green deposits were used, total green deposit funds that have been allocated, amount of green deposit funds that have not been allocated, and temporary allocation of green deposit funds.[48]

ii. The Regulated Entities are also required to publish their framework on Green Deposits on their website.[49]

[45] *Id.*, ¶7.
[46] *Id.*, ¶7.
[47] *Id.*, ¶12.
[48] *Id.*, Annexure 2.
[49] *Id.*, ¶6.

In order to gain an insight into the efficacy and compliance of the Green Deposit Framework by the Regulated Entities, the author has undertaken a qualitative empirical study. In this study, the author has carefully analysed the Annual Reports and Green Deposit Policies of all Scheduled Commercial Banks which are publicly available, in the financial year 2023-2024. The author specifically focussed on the two disclosure requirements imposed by the Framework. The disclosure requirements, wherever fulfilled, were assessed with respect to the format laid down in the Appendix 2 of the Framework. For ease of reference, the data compiled has been presented in a tabular form in the Annexure of this paper.

IV. INADEQUACIES IN THE GREEN DEPOSIT FRAMEWORK

One of the primary tests of the efficacy of any policy or framework is whether it has been complied with sufficiently. This is because unless a framework is sufficiently adhered to, it becomes a major roadblock in the path of its implementation. RBI aims to provide an avenue for investors to achieve their sustainability goals while effectively protecting their interests on one hand and improving the flow of credit to green projects while checking greenwashing on the other.[50] In the context of the Green Deposit Framework, compliance is especially important to prevent instances of "*green washing*", which refers to misleading marketing of products and services as environmentally friendly, when in fact, they are not.

Even though it is not mandatory for the Regulated Entities to raise Green Deposits, the Framework necessarily applies when a Regulated Entity chooses to raise Green Deposits. However, there are no implications of non-compliance with the Framework.[51] This makes the compliance of the obligations prescribed by the Framework, i.e., publication of portfolio-level information on Green Deposit proceeds in the Annual Statement, and publication of their Green Deposit Framework on their website, completely voluntary in nature.

In order to examine the level of compliance by the Scheduled Commercial Banks, which are Regulated Entities with respect to the disclosure requirements, the author has examined their Annual Reports, and the findings are summarized in the Table provided in the Annexure.

[50] *Id.*, ¶ 1.
[51] VAISHALI VERMA, GREEN DEPOSIT FRAMEWORK: FINANCING A SUSTAINABLE FUTURE IN INDIA 557-578 (Palgrave Macmillan, 2024).

From the Table, it is seen that (in cases where the latest Annual Reports are available) there is a noticeable number of cases where the Regulated Entities have not disclosed Portfolio-level information about Green Deposits and / or uploaded their own Green Deposit Framework on their website. Disclosures are especially important in climate-related initiatives in the interest of transparency. They enable the stakeholders involved to make informed decisions.[52] As per the Framework, the allocation (or non-allocation) of funds has no impact on the returns paid to the customer opting for Green Deposits.[53] Hence, in the absence of adequate disclosures in the Annual Report of the Regulated Entities, it is not possible for the customer to know whether their deposits are being utilized for financing "*green*" projects or if it is just another instance of greenwashing. Green Deposits, in simple terms, are a variant of Fixed Deposits, but the difference lies in the utilization of funds raised through them. The major attraction of Fixed Deposits is assured returns and Green Deposits are an innovative way to tap into this segment of investors who would otherwise invest in Fixed Deposits. Hence, assured returns are necessary to promote Green Deposits and protect investors. This leaves only one option to ensure that customers know where their deposits are being utilized and hold the Regulated Entities accountable, which is making disclosure of Portfolio-level information with respect to Green Deposits in their respective Annual Reports mandatory.

Moreover, differential rates of interest are prohibited in the case of Green Deposits.[54] What differential rates of interest in the context of deposits means is that the bank may offer a higher rate of return in case the depositor agrees to not withdraw the deposit pre-maturely and / or the amount of deposit is beyond a certain threshold.[55] Differential rates of interest can be an effective way to incentivize customers to opt for Green Deposits. Hence, RBI's prohibition on differential rates of interest in the context of Green Deposit may prove to be counter-productive in pushing the product to the mainstream. It may be argued that allowing differential rates of deposits for green deposits may lead to greenwashing as the Regulated Entities may market ordinary products as green to justify differential rates of interest. However, this problem can be effectively tackled if

[52] VAISHALI VERMA, GREEN DEPOSIT FRAMEWORK: FINANCING A SUSTAINABLE FUTURE IN INDIA 557-578 (Palgrave Macmillan, 2024).
[53] *FAQs - Framework for acceptance of Green Deposits*, RESERVE BANK OF INDIA, available at https://www.rbi.org.in/commonperson/English/Scripts/FAQs.aspx?Id=3545, question 2 (b) (Last visited on July 29, 2024).
[54] *Id.*, question 2 (a).
[55] *Banks can now offer differential rates to fixed deposit holders*, THE ECONOMIC TIMES, April 17, 2015, available at https://economictimes.indiatimes.com/industry/banking/finance/banking/banks-can-now-offer-differential-rates-to-fixed-deposit-holders/articleshow/46951792.cms?from=mdr.

the compliance requirements in the Green Deposit Framework are backed by sanctions so that the Regulated Entities have to clearly disclose the usage of the proceeds raised through green deposits in the portfolio-level information in their Annual Statements which would make it difficult to pass off ordinary products as green products.

Additionally, the Framework currently does not provide any incentive to the Regulated Entities to introduce Green Deposits and raise funds through them. One important aspect of the regulation is that it mandates the Regulated Entities to conduct impact assessments with the help of external firms for their lending from funds raised through Green Deposits from the financial year 2024-2025.[56] Such impact assessments are likely to have costs associated with them. One way to incentivize Regulated Entities to raise Green Deposits would be to exempt the proceeds of Green Deposits from the ambit of statutory reserve or liquidity coverage ratios.[57] Another way to incentivize Regulated Entities would be to allow deposit insurance in cases where a green project to which proceeds of green deposits were allocated defaults. In the absence of incentivization, it is possible that Regulated Entities simply choose not to offer Green Deposits at all, and this would be highly unfavourable to the promotion of Green Deposits as a mainstream product and to green financing, too, if the larger picture is considered.

[56] Reserve Bank of India, *Framework for acceptance of Green Deposits*, RBI/2023-24/14 (Issued on April 11, 2023), ¶10.
[57] *Green deposits: What, why, and how*, Deloitte, June, 2023, available at https://www2.deloitte.com/content/dam/Deloitte/in/Documents/risk/in-ra-Green%20Deposits%20POV_noexp.pdf.

Figure III: Disclosure in Public Sector Banks

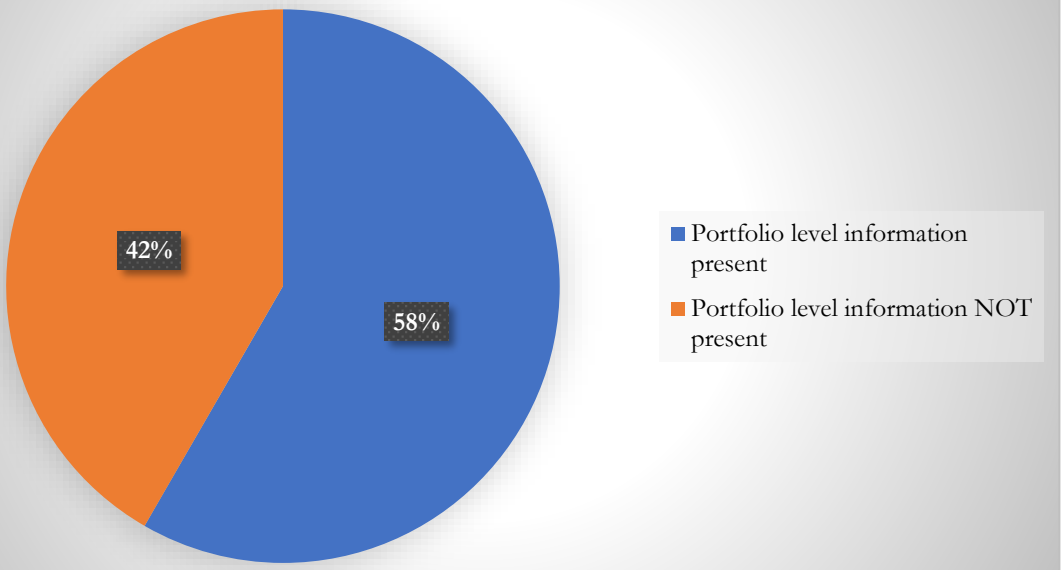
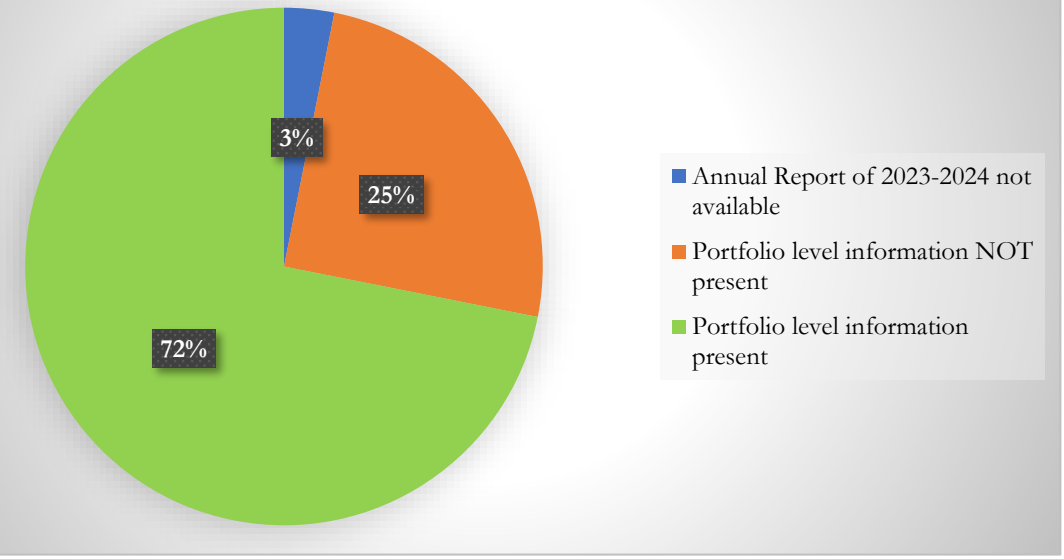


Figure IV: Disclosure in Private Sector Banks (Including Small Finance Banks)



V. CONCLUSION & SUGGESTIONS

The regulation of green financial instruments in India has picked up pace recently. There are several kinds of Green Financial Instruments being offered in India, which can be categorized into green equities, green debt instruments, risk-sharing tools, and other tools. One of the most recent kinds of Green Financial Instruments offered in India is the Green Deposit, which is a debt instrument. RBI has become a trailblazer when it comes to establishing a regulatory framework concerning Green Deposits. However, the effectiveness of the Green Deposit Framework can become scuttled due to some inadequacies in the same. The primary issue with it is the lack of sanctions backing the compliance requirements, which, in effect, goes to the root of its effective enforceability. It can be seen from the analysis of the Annual Financial Statements of the Regulated Entities that many of them have failed to upload portfolio-level information with respect to green deposits raised or have not shared their board-approved green deposit framework on their website. This reduces transparency and can potentially lead to greenwashing because the customers availing green deposit products have no way of knowing if at all the proceeds are being utilised for "green" projects unless the portfolio-level information is shared in the Annual Financial Statements. The absence of specific incentives for Regulated Entities also undermines its potential to become a mainstream product. However, the following changes can be brought about in the framework for increasing its overall efficacy:

i. Imposition of a fine on not disclosing portfolio-level information with respect to proceeds raised through Green Deposits. Allowing differential rates of interest in the context of Green Deposits

ii. Incentivizing Regulated Entities to raise Green Deposits by exempting the proceeds of Green Deposits from the ambit of statutory reserve or liquidity coverage ratios and providing deposit insurance in case the green project to which proceeds of green deposits had been allocated defaults.

VI. ANNEXURE

PUBLIC SECTOR BANKS[58]			
S. No.	**Name of Bank**	**Annual Report on Green Deposits**	**Whether Green Deposit Framework has been uploaded by the Bank.**
01.	Bank of Baroda	• Introduction of "bob Earth Green Term Deposit".[59] • Rs. 15,268 crore worth of outstanding amount for financing of renewable energy projects under the corporate credit segment present.[60] • Impact Assessment Report to feature in Annual Report from the financial year 2024-2025.[61] • Portfolio-level information (as per Appendix 2 of the Framework) **not present.**	Yes[62]
02.	Bank of India	• No mention of Green Deposits.[63] • Portfolio-level information (as per Appendix 2 of the Framework) **not present**.	No

[58] *List of scheduled commercial banks*, RESERVE BANK OF INDIA, available at https://rbi.org.in/hindi1/Upload/content/PDFs/APPEH23102021_AP1.pdf (Last visited on July 29, 2024); *Banks in India*, RESERVE BANK OF INDIA, available at https://www.rbi.org.in/commonperson/English/Scripts/BanksInIndia.aspx (Last visited on July 29, 2024).

[59] *Annual Report 2023-2024*, BANK OF BARODA, available at https://www.bankofbaroda.in/-/media/project/bob/countrywebsites/india/shareholders-corner2/2024/24-06/annual-report-14-12.pdf, page 12.

[60] *Id.*

[61] Id., page 281.

[62] *Framework for Green Deposits and associated Flow of Credit for Green Activities*, BANK OF BARODA, available at https://www.bankofbaroda.in/-/media/project/bob/countrywebsites/india/shareholders-corner2/2024/24-02/bank-framework-for-green-deposits-and-associated-flow-of-credit-for-green-14-18.pdf.

[63] *Annual Report 2023-2024*, BANK OF INDIA, available at https://bankofindia.co.in/documents/20121/570417/BOI_AR_2024_FINAL.pdf.

03.	Bank of Maharashtra	• Portfolio-level information (as per Appendix 2 of the Framework) mentions Green Deposits have not been raised in the financial years 2022-2023 and 2023-2024.[64]	Yes*[65] **A common Deposit Policy has mention of Green Deposits, but there is no dedicated Policy for the same.*
04.	Canara Bank	• Portfolio-level information (as per Appendix 2 of the Framework) mentions Green Deposits have not been raised in the financial year 2023-2024.[66]	Yes[67]
05.	Central Bank of India	• The portfolio of products includes Green Deposits.[68] • Rs. 40 crores raised under the Green Deposit scheme.[69] • Interest rates offered on Green Deposits are higher than those offered on ordinary fixed deposits.[70] • Portfolio-level information (as per Appendix 2 of the Framework) mentions	Yes[72]

[64] *Annual Report 2023-2024*, BANK OF MAHARASHTRA, available at https://bankofmaharashtra.in/writereaddata/documentlibrary/4348b28b-72df-4b0d-bc0c-769b99eaad01.pdf, page 236.
[65] *Deposit Policy*, BANK OF MAHARASHTRA, available at https://bankofmaharashtra.in/writereaddata/documentlibrary/907cd5d6-923f-4a96-b521-a3002dbf9855.pdf (Last visited on July 29, 2024).
[66] *Annual Report 2023-2024*, CANARA BANK, available at https://canarabank.com/UploadedFiles/Pdf/CB_Ar%20Report%20for%20uploading%20(1)-310524.pdf, page 398.
[67] *Green Deposit Policy and Lending Framework*, CANARA BANK, available at https://canarabank.com/UploadedFiles/Pdf/Green%20Deposit%20Policy-0808202310.pdf (Last visited on July 29, 2024).
[68] *Annual Report 2023-2024*, CENTRAL BANK OF INDIA, available at https://www.centralbankofindia.co.in/sites/default/files/CBI-IAR2024.pdf, page 14.
[69] *Id.*, page 86.
[70] *Id.*, page 245.
[72] *Framework for financing Green activities and Projects from acceptance of Green Deposits*, CENTRAL BANK OF INDIA, available at https://centralbankofindia.co.in/sites/default/files/2024-03/Financing-green-activities-and-projects.pdf.

		Green Deposits are being used in the renewable energy sector.[71]	
06.	Indian Bank	• Portfolio-level information (as per Appendix 2 of the Framework) mentions Green Deposits have not been raised in the financial year 2023-2024.[73]	No
07.	Indian Overseas Bank	• Green Deposit scheme has been introduced.[74] • Portfolio-level information (as per Appendix 2 of the Framework) mentions Rs. 26 lakhs have been raised through Green Deposits and have been allocated to renewable energy and clean transportation sector.[75]	No
08.	Punjab National Bank	• Portfolio-level information (as per Appendix 2 of the Framework) mentions Green Deposits have not been raised in the financial year 2023-2024.[76]	Yes[77]
09.	Punjab & Sind Bank	• No mention of Green Deposits.[78] • Portfolio-level information (as per Appendix 2 of the Framework) **not present**.	Yes*[79] **Uploaded as part of second-party opinion.*

[71] *Id.*, page 320.
[73] *Annual Report 2023-2024*, INDIAN BANK, available at https://www.indianbank.in/wp-content/uploads/2024/05/2023-24.pdf, page 322.
[74] *Annual Report 2023-2024*, INDIAN OVERSEAS BANK, available at https://www.iob.in/upload/CEDocuments/BSE_NSE_07062024_Annual_Report_2023_24.pdf, page.
[75] *Id.*, page 478.
[76] *Annual Report 2023-2024*, PUNJAB NATIONAL BANK, available at https://www.pnbindia.in/downloadprocess.aspx?fid=RxfEXRrMDOblDj4cPhDLDQ==.
[77] *Financing Framework – Green, Social and Sustainability Linked Projects*, PUNJAB NATIONAL BANK, available at https://www.pnbindia.in/downloadprocess.aspx?fid=batITYdayN7m8NtMvR/9Pg==.
[78] *Annual Report 2023-2024*, PUNJAB & SIND BANK, available at https://punjabandsindbank.co.in/system/uploads/document/2150_2024070312182717468.pdf.
[79] *Issuance of Second-Party Opinion on PSB's Green Deposit Policy and Green Financing Framework*, PUNJAB & SIND BANK, available at https://www.punjabandsindbank.co.in/system/uploads/document/2150_2024071115153094279.pdf.

10.	State Bank of India	• SBI Green Rupee Term Deposit introduced.[80] • Portfolio-level information (as per Appendix 2 of the Framework) **not present**.	No
11.	Union Bank of India	• UBI offers Green Deposits.[81] • Portfolio-level information (as per Appendix 2 of the Framework) mentions Green Deposits have not been raised in the financial year 2023-2024.[82]	Yes*[83] **Uploaded as part of second-party opinion.*
12.	UCO Bank	• Green Deposits to be introduced in the financial year 2024-2025.[84] • Portfolio-level information (as per Appendix 2 of the Framework) **not present**.	No
PRIVATE SECTOR BANKS[85]			
S. No.	**Name of Bank**	**Annual Report on Green Deposits**	**Whether Green Deposit Framework has been uploaded by the Bank.**

[80] *Annual Report 2023-2024*, STATE BANK OF INDIA, available at https://sbi.co.in/documents/17836/39646794/Annual_Report_2024.pdf, page 16 (Last visited on July 29, 2024).
[81] *Annual Report 2023-2024*, UNION BANK OF INDIA, available at https://www.unionbankofindia.co.in/pdf/UBI-IAR2024-Final-Stitched-Book-English-compressed-26-06-2024.pdf, page 38.
[82] *Id.*, page 348.
[83] *Second Party Opinion Sustainable Financing Framework*, UNION BANK OF INDIA, available at https://www.unionbankofindia.co.in/pdf/SPO%20-%20UBI%20Sustainable%20Financing%20Framework.pdf (Last visited on July 29, 2024).
[84] *Annual Report 2023-2024*, UCO BANK, available at https://ucobank.com/documents/d/guest/annual-report-2023-24, page 47.
[85] *List of scheduled commercial banks*, RESERVE BANK OF INDIA, available at https://rbi.org.in/hindi1/Upload/content/PDFs/APPEH23102021_AP1.pdf (Last visited on July 29, 2024); *Banks in India*, RESERVE BANK OF INDIA, available at https://www.rbi.org.in/commonperson/English/Scripts/BanksInIndia.aspx (Last visited on July 29, 2024).

01.	Axis Bank	• Portfolio-level information (as per Appendix 2 of the Framework) mentions Green Deposits have not been raised in the financial year 2023-2024.[86]	Yes*[87] **Sustainable Financing Framework doesn't specifically mention anything about Green Deposits.*
02.	Bandhan Bank	• Green Deposits have not been raised in the financial year 2023-2024.[88]	No
03.	CSB Bank	• Portfolio-level information (as per Appendix 2 of the Framework) mentions Green Deposits have not been raised in the financial year 2023-2024.[89]	Yes*[90] **Environment, Social, Governance Policy doesn't specifically mention anything about Green Deposits.*
04.	City Union Bank	• Portfolio-level information (as per Appendix 2 of the Framework) mentions Green Deposits have not been raised in the financial year 2023-2024.[91]	No
05.	DCB Bank	• No mention of Green Deposits.[92] • Portfolio-level information (as per Appendix 2 of the Framework) **not present**.	No

[86] *Annual Report 2023-2024*, AXIS BANK, available at https://www.axisbank.com/docs/default-source/annual-reports/for-axis-bank/annual-report-for-the-year-2023-2024.pdf, page 372.
[87] *Sustainable Financing Framework*, AXIS BANK, available at https://www.axisbank.com/docs/default-source/default-document-library/axis-bank-sustainable-financing-framework.pdf (Last visited on July 29, 2024).
[88] *Annual Report 2023-2024*, BANDHAN BANK, available at https://bandhanbank.com/sites/default/files/2024-07/Annual-Report-FY23-24-BBL.pdf, page 234.
[89] *Annual Report 2023-2024*, CSB BANK, available at https://www.csb.co.in/pdf/CSB_Bank_AR_2023-24_Final_C2C_31072024.pdf, page 280.
[90] *Policy on Environmental, Social and Governance*, CSB BANK, available at https://www.csb.co.in/pdf/ESG_Policy_17042024.pdf (Last visited on July 29, 2024).
[91] *Annual Report 2023-2024*, CITY UNION BANK, available at https://www.cityunionbank.com/assets/frontend/pdf/july24/ANNUALREPORT2023-24.pdf, page 146.
[92] *Annual Report 2023-2024*, DCB BANK, available at https://www.dcbbank.com/pdfs/DCB-Bank-Limited-Annual-Report-2023-24.pdf.

06.	Dhanlaxmi Bank	• No mention of Green Deposits.[93] • Portfolio-level information (as per Appendix 2 of the Framework) **not present**.	No
07.	Federal Bank	• Portfolio-level information (as per Appendix 2 of the Framework) mentions Green Deposits have not been raised in the financial year 2023-2024.[94]	No
08.	HDFC Bank	• Portfolio-level information (as per Appendix 2 of the Framework) mentions Green Deposits have not been raised in the financial year 2023-2024.[95]	Yes*[96] **Sustainable Financing Framework doesn't specifically mention anything about Green Deposits. Uploaded as part of second-party opinion.*
09.	ICICI Bank	• Green deposits are not an offered product as of yet.[97]	No
10.	IndusInd Bank	• Portfolio-level information (as per Appendix 2 of the Framework) mentions Green Deposits have not been raised in the financial year 2023-2024.[98]	No

[93] *Annual Report 2023-2024*, DHANLAXMI BANK, available at https://www.dhanbank.com/pdf/Annual-report-2023-24.pdf.

[94] *Annual Report 2023-2024*, FEDERAL BANK, available at https://www.federalbank.co.in/documents/10180/959761173/File+B+Annual+Report+for+the+Financial+Year+2023-24.pdf/af0ac1fa-793a-26cf-10d8-30fb9273b485?t=1723222911626, page 327.

[95] *Annual Report 2023-2024*, HDFC BANK, available at https://www.hdfcbank.com/content/bbp/repositories/723fb80a-2dde-42a3-9793-7ae1be57c87f/?path=/Footer/About%20Us/Investor%20Relation/annual%20reports/pdf/2024/july/HDFC-Bank-IAR-FY24.pdf, page 373 (Last visited on July 29, 2024).

[96] *Second-Party Opinion HDFC Bank Sustainable Finance Framework*, HDFC BANK, available at https://www.hdfcbank.com/content/bbp/repositories/723fb80a-2dde-42a3-9793-7ae1be57c87f/?path=/Footer/About%20Us/Corporate%20Governance/Codes%20and%20Policie/pdf/SPO_Sustainable_Finance_Framework.pdf, page 373 (Last visited on July 29, 2024).

[97] *Annual Report 2023-2024*, ICICI BANK, available at https://www.icicibank.com/content/dam/icicibank/managed-assets/docs/investor/annual-reports/2024/annual-report-of-icici-bank-2023-24.pdf, page 245.

[98] *Annual Report 2023-2024*, INDUSIND BANK, available at https://www.indusind.com/content/dam/indusind-corporate/investor-resource/latest-annual-report/annual_report_2023-24.pdf, page 317, page 317.

11.	IDFC Bank	• Green Deposits Product has been launched and has been titled PlanetFix Deposits.[99] • Portfolio-level information (as per Appendix 2 of the Framework) **not present**.	Yes[100]
12.	Jammu & Kashmir Bank	• Green deposits are not an offered product as of yet.[101]	No
13.	Karnataka Bank	• Bank is in the process of launching Green Deposits.[102]	Yes*[103] **Green Deposits mentioned in a common policy for deposits.*
14.	Karur Vysya Bank	• Green Deposits offered as a product since February, 2024.[104] • Portfolio-level information (as per Appendix 2 of the Framework) **not present**.	Yes[105]
15.	Kotak Mahindra Bank	• Green deposits are not an offered product as of yet.[106]	No* **Even though it's not uploaded, a board-*

[99] *Annual Report 2023-2024*, IDFC FIRST BANK, available at https://www.idfcfirstbank.com/content/dam/idfcfirstbank/pdf/annual-report/IDFC-FIRST-Bank-Limited-Integrated-Annual-Report-FY-2023-2024.pdf, page 113, page 113.

[100] *Policy on Green Deposits*, IDFC BANK, available at https://www.idfcfirstbank.com/content/dam/idfcfirstbank/pdf/corporate-governance/Policy-on-Green-Deposits.pdf (Last visited on July 29, 2024).

[101] *Annual Report 2023-2024*, JAMMU & KASHMIR BANK, available at https://www.jkbank.com/pdfs/annrep/Annual%20Report%202023-24%20_.pdf.

[102] *Annual Report 2023-2024*, KARNATAKA BANK, available at https://d3sdkw7nvdnqts.cloudfront.net/s3fs-public/2024-09/iarfy-%281%29.pdf, page 345.

[103] *Policy on Deposits*, Karnataka Bank, available at https://karnatakabank.com/sites/default/files/2024-02/policy-on-deposits---2023-24_0.pdf (Last visited on July 29, 2024).

[104] *Annual Report 2023-2024*, KARUR VYSYA BANK, available at https://www.kvb.co.in/docs/annual-report-for-the-financial-year-2023-2024.pdf, page 55.

[105] *KVB Green Deposit Framework*, KARUR VYSYA BANK, available at https://www.kvb.co.in/docs/green-deposits-and-financing-framework.pdf (Last visited on July 29, 2024).

[106] *Annual Report 2023-2024*, KOTAK MAHINDRA BANK, available at https://www.kotak.com/content/dam/Kotak/investor-relation/Financial-Result/Annual-Reports/FY-2024/kotak-mahindra-bank/Kotak-Mahindra-Bank-Limited-FY24.pdf, page 51.

			approved document called the Green Finance Framework exists in accordance with the Circular.[107]
16.	RBL Bank	• Portfolio-level information (as per Appendix 2 of the Framework) **not present**.	Yes*[108] **Sustainability Framework doesn't specifically mention anything about Green Deposits.*
17.	South Indian Bank	• Portfolio-level information (as per Appendix 2 of the Framework) mentions Rs. 56.21 crores have been raised as green deposits, out of which 51.53 crores have been allocated (51.03 crores to the Renewable energy sector and 0.50 crore to Clean Transportation sector).[109]	Yes[110]
18.	Tamilnad Mercantile Bank	• Portfolio-level information (as per Appendix 2 of the Framework) mentions Green Deposits have not been raised in the financial year 2023-2024.[111]	No
19.	Yes Bank	• Green Deposits have been offered since 2018.[112]	No* **Although the document has not been uploaded,*

[107] *Id.*
[108] *Sustainability Framework*, RBL BANK, available at https://www.rblbank.com/sustainability-framework (Last visited on July 29, 2024).
[109] *Annual Report 2023-2024*, SOUTH INDIAN BANK, available at https://www.southindianbank.com/userfiles/file/south_indian_bank_annual_report_2023-24_interactive.pdf, page 130-131.
[110] *Green Deposit Policy and Green Financing Framework*, SOUTH INDIAN BANK, available at https://www.southindianbank.com/userfiles/file/green_deposit_policy_and_green_financing_framework.pdf.
[111] *Annual Report 2023-2024*, TAMILNAD MERCANTILE BANK, available at https://www.tmb.in/doc/Annual-Report-2023-24.pdf, page 282.
[112] *Annual Report 2023-2024*, YES BANK, available at https://www.yesbank.in/pdf?name=integrated_annual_report2023_24.pdf, page 198.

		• Portfolio-level information (as per Appendix 2 of the Framework) mentions Green Deposits have not been raised in the financial year 2023-2024.[113]	*there exists a board-approved policy on Green Deposits.*[114]
20.	IDBI Bank	• Portfolio-level information (as per Appendix 2 of the Framework) mentions Green Deposits have not been raised in the financial year 2023-2024.[115]	No* **Although the document has not been uploaded, there exists a board-approved policy on Green Deposits.*[116]
SMALL FINANCE BANKS[117]			
1.	AU Small Finance Bank	• Rs. 652.63 crores have been raised through Green Deposits, out of which Rs. 127.72 crores have been allocated.[118] • Portfolio-level information (as per Appendix 2 of the Framework) mentions Rs. 95.94 crores have been allocated to the renewable energy sector and Rs. 31.78	Yes[120]

[113] *Id.,* page 465.
[114] *Id.,* page 195.
[115] *Annual Report 2023-2024*, IDBI BANK, available at https://www.idbibank.in/pdf/annualreport/IDBI-Bank-Annual-Report-2023-24.pdf, page 408.
[116] *Id.*, page 54.
[117] *Banks in India*, RESERVE BANK OF INDIA, available at https://www.rbi.org.in/commonperson/English/Scripts/BanksInIndia.aspx (Last visited on July 29, 2024).
[118] *Annual Report 2023-2024*, AU SMALL FINANCE BANK, available at https://objectstorage.ap-mumbai-1.oraclecloud.com/n/aubank2/b/Marketing/o/Annual-Report-FY24-Updated.pdf, page 224.
[120] *Green Deposit Policy*, AU SMALL FINANCE BANK, available at https://www.aubank.in/Notice-Slider-1-13-AUSFB-GD-Policy.pdf.

		crores have been allocated to the clean transportation sector.[119]	
2.	Capital Small Finance Bank	• Green Deposits have not been raised in the financial year 2023-2024.[121]	No
3.	Equitas Small Finance Bank	• Portfolio-level information (as per Appendix 2 of the Framework) mentions Green Deposits have not been raised in the financial year 2023-2024.[122]	No
4.	ESAF Small Finance Bank	• Annual Report of financial year 2023-2024 not available.[123]	No
5.	Suryoday Small Finance Bank	• Portfolio-level information (as per Appendix 2 of the Framework) mentions Green Deposits have not been raised in the financial year 2023-2024.[124]	No
6.	Ujjivan Small Finance Bank	• Portfolio-level information (as per Appendix 2 of the Framework) **not present**.[125]	No
7.	Utkarsh Small Finance Bank	• Portfolio-level information (as per Appendix 2 of the Framework) mentions Green Deposits have not been raised in the financial year 2023-2024.[126]	No

[119] *Annual Report 2023-2024*, AU SMALL FINANCE BANK, available at https://objectstorage.ap-mumbai-1.oraclecloud.com/n/aubank2/b/Marketing/o/Annual-Report-FY24-Updated.pdf, page.
[121] *Annual Report 2023-2024*, CAPITAL SMALL FINANCE BANK, available at https://www.capitalbank.co.in/storage/annual-report/Capital%20Small%20Finance%20Bank%20AR%202023-24.pdf, page 216.
[122] *Annual Report 2023-2024*, EQUITAS SMALL FINANCE BANK, available at https://ir.equitasbank.com/wp-content/uploads/2024/08/ESFBL-Annual-Report_2023-24.pdf, page 279.
[123] *Annual Reports*, ESAF SMALL FINANCE BANK, available at https://www.esafbank.com/report/esaf-small-finance-bank-annual-reports/.
[124] *Annual Report 2023-2024*, SURYODAY SMALL FINANCE BANK, available at https://www.suryodaybank.com/investor-corner/#financials, page 200.
[125] *Annual Report 2023-2024*, UJJIVAN SMALL FINANCE BANK, available at https://www.ujjivansfb.in/static/annual-reports/2023-24/pdf/ujjivan-complete.pdf.
[126] *Annual Report 2023-2024*, UTKARSH SMALL FINANCE BANK, available at https://www.utkarsh.bank/uploads/template_forty_pdf/Utkarsh_Small_Finance_AR_2023_24.pdf, page 255.

8.	North East Small Finance Bank	• No mention of Green Deposits.[127] • Portfolio-level information (as per Appendix 2 of the Framework) **not present**.	No
9.	Jana Small Finance Bank	• Portfolio-level information (as per Appendix 2 of the Framework) mentions Green Deposits have not been raised in the financial year 2023-2024.[128]	No
10.	Shivalik Small Finance Bank	• Portfolio-level information (as per Appendix 2 of the Framework) mentions Green Deposits have not been raised in the financial year 2023-2024.[129]	No
11.	Unity Small Finance Bank	• No mention of Green Deposits.[130] • Portfolio-level information (as per Appendix 2 of the Framework) **not present**.	No

Table I: Scheduled Commercial Banks' compliance with respect to disclosure requirements imposed by the Framework

[127] *Annual Report 2023-2024*, NORTH EAST SMALL FINANCE BANK, available at https://nesfb.com/pdf/Annual_Report_2024__1___2_.pdf.
[128] *Annual Report 2023-2024*, JANA SMALL FINANCE BANK, available at https://www.janabank.com/images/PDF/Annual-Report-2023-24.pdf, page 166.
[129] *Annual Report 2023-2024*, SHIVALIK SMALL FINANCE BANK, available at https://shivalikbank.com/assets/upload/annualreports/pdf/shivalik-sfb-ar-2023-24-c2c-09-11-2024.pdf, page 155.
[130] *Annual Report 2023-2024*, UNITY SMALL FINANCE BANK, available at https://theunitybank.com/docs/investors/annual-Report-2023-24.pdf.

ARTICLE

CUSTODIAL CONCERNS: IS THE BNSS PROMULGATING A HIGHER STANDARD OF DRACONIAN LAWS CONCERNING THE REMAND OF ACCUSED PERSONS?

*Sriram Chockalingam Arunachalam**

ABSTRACT

The Indian Legislature has recently passed the new criminal bills with the purported objective of promoting citizen-centric laws in the Indian Criminal Justice System. However, in contrast, their approach towards the law governing the remand of accused persons presents to be starkly antithetical in nature. This presents to be a problem of significant relevance, as the law contains the draconian potential to subject accused persons (even those who are innocent) to the terrors of extended police custody. Against this background, this paper primarily illustrates the essence of the amendments made to Section 167 of the Code of Criminal Procedure (now known as Section 187 of the Bharatiya Nagarik Suraksha Sanhitha) and its consequent implications. Thereafter, this paper discusses the pertinent ramifications that each of these implications carry, in an attempt to showcase the shortcomings and pitfalls of Section 187. Drawing from these ramifications and the effect of the legislation on the inevitable breach of fundamental rights, this paper deduces that, contrary to its objective, the Bharatiya Nagarik Suraksha Sanhitha promulgates a higher standard of draconian laws in regard to the remand of accused persons. Having recognized the consequences that the current legislation poses, this paper finally concludes by providing comprehensive solutions to specifically deal with each of the consequences.

Keywords: Bharatiya Nagarik Suraksha Sanhitha, Accused, Remand, Custodial Violence, Draconian

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I. INTRODUCTION

Amidst an agenda of promoting citizen-centric laws in the Indian Criminal Justice System through the new criminal bills, has the legislature failed in upholding this objective in a crucial pressure point of the system – *the remand of accused persons*?

In December 2023, the Indian Parliament passed the Bharatiya Nagarik Suraksha Sanhitha ('BNSS') as a successor to the Code of Criminal Procedure ('CrPC'), with a stated aim of decolonizing the criminal laws that were instituted by the British.[1] It has been claimed that the predecessor criminal laws, having been instituted by the British, granted greater powers to the police in furtherance of their objective of ensuring control, and that it was therefore draconian and non-citizen-centric in nature.[2] Therefore, the Government has invoked the rhetoric of decolonization and citizen-centricity to justify a need for this legal reform.[3] However, a plethora of questions arise. While a clear attempt has been made to shed the colonial vestiges as is evident in the name of the BNSS, has this attempt wholly fructified? Has the Criminal Justice System wholly become citizen-centric?

While the BNSS does indeed uphold this purported objective in regard to several legal phenomena, it is saddled with irregularities that appear to be contrary to its purported object; specifically, under Section 187 governing the remand of accused persons.[4] At the outset, it is pertinent to note that the notion of remand presents to be a crucial pressure point, since it governs the notion of pre-trial detention which contains within itself the potential for gross subjugation of the interests of accused persons regardless of their innocence. As it stands, in comparison to its counterpart section in the CrPC, Section 187 awards a greater magnitude of power to the police. In essence, these powers present to be detrimental, since it allows for increased duration in police custody of accused persons and for the expansion of the reach of police custody to the later stages of

[1] Awstika Das, *Parliament Passes Criminal Law Bills Seeking to Replace IPC, CrPC and Evidence Act*, LIVELAW (Dec. 21, 2023), https://www.livelaw.in/top-stories/parliament-criminal-law-bills-indian-penal-code-crpc-evidence-act-bns-bnss-bss-245122.

[2] Ayushi Sharma, *Bharatiya Nagarik Suraksha Sanhitha: No 'decolonisation' here*, DECCAN HERALD (Sept. 7, 2023), https://www.deccanherald.com/opinion/bharatiya-nagarik-suraksha-sanhita-no-decolonisation-here-2675972.

[3] Mrinal Satish et al., *Bharatiya Nyay Sanhitha: Decolonising or Reinforcing Colonial Ideas?*, THE WIRE (Jan. 30, 2024), https://thewire.in/law/bharatiya-nyay-sanhita-decolonising-or-reinforcing-colonial-ideas#:~:text=This%20piece%20focuses%20on%20the,broad%20and%20vaguely%20defined%20offences.

[4] Anup Surendranath & Zeba Sikora, *New Criminal law Bills endanger civil liberties*, THE INDIAN EXPRESS (Dec. 14, 2023), https://indianexpress.com/article/opinion/columns/new-criminal-law-bills-endanger-civil-liberties-9067305/.

investigation. This can inevitably result in a violation of Article 21 of the Indian Constitution given its consequences for the right to life through the inhumane and reinforced vehicle of custodial violence. Accordingly, this paper as a whole shall argue that Section 187 is draconian in nature and that it is in dire requirement of an amendment.

II. THE MAJOR DIFFERENCES IN WORDING BETWEEN SECTION 167 OF THE CRPC AND SECTION 187 OF THE BNSS AND ITS CORRESPONDING IMPLICATIONS

At first glance, it may appear that Section 167 of the CrPC and Section 187 of the BNSS are identical in nature by virtue of the use of similar language. However, upon careful examination, it can be observed **that subtle changes** have been infused into these provisions, disguising behind them a plethora of implications. These changes are the omission of the phrase *"otherwise than in custody of the police"*, the addition of the phrase *"or in parts",* and the addition of the phrase *"during the initial forty days or sixty days"*.

(A) REMOVAL OF THE TERM 'OTHERWISE THAN IN CUSTODY OF THE POLICE'

Primarily, the phrase "*otherwise than in custody of the police"* has been omitted from Section 187 of the BNSS. The effect of these words, as contained within Section 167 of the CrPC, implied that if a Magistrate was to authorize the detention of an accused person beyond fifteen days (upon being satisfied that there existed adequate grounds to do so), he only had the power to authorize judicial custody, and not police custody.[5] However, these words having been omitted from Section 187 of the BNSS, the subsequent effect alternatively is that the Magistrate now has the competency to even authorize police custody beyond fifteen days.

An accused in police custody is subject to interrogation by the police officers, while an accused in judicial custody is simply sent to prison, against whom no form of interrogation is permitted.[6] The implication, therefore, is that accused persons are now subject to extended periods of police interrogation (of up to sixty or ninety days) compared to only a maximum of fifteen days in the past.

[5] Chaganti Satyanarayana v. State of Andhra Pradesh, (1986) 3 SCC 141.
[6] K. Sudhamani, *Judicial Custody and Police Custody – Recent Trends*, OFFICIAL WEBSITE OF DISTRICT COURT, https://districts.ecourts.gov.in/sites/default/files/fct.pdf.

(B) ADDITION OF THE TERM 'OR IN PARTS'

Section 187 of the BNSS contains the addendum "*or in parts*", in comparison to Section 167 of the CrPC. While Section 167 of the CrPC bars the duration of police custody of an accused to fifteen days in the whole, Section 187 of the BNSS grants the Magistrate the competency to allow police custody for up to fifteen days in parts as well. Therefore, an accused may now be subject to interrogation in "*tranches*" (an aggregate of shorter periods of interrogation) spread out over a longer period of time (forty or sixty days as is limited by the proviso of this portion of this Section). Thus, the implication is that it expands the reach of police custody to the later stages of investigation.

(C) ADDITION OF THE TERM 'DURING THE INITIAL FORTY DAYS OR SIXTY DAYS'

Section 187 of the BNSS also grants the police additional powers in being able to seek custody of an accused at any time in the initial forty or sixty days (according to the seriousness of the offence). This marks a clear departure from Section 167 of the CrPC which states that such custody can only be sought within the first fifteen days after presenting the accused in front of the magistrate. Similar to the effect of the addendum of "*or in parts*", the implication of such a departure is simply that it expands the reach of police custody to the later stages of investigation. It does so, by allowing the police to take custody of an accused, even 25 or 45 days (according to the seriousness of the offence) after presenting the accused in front of the magistrate, as long as it complies with the 40- or 60-day limit (according to the seriousness of the offense) under Section 187(2). An additional implication is that this provision does not clarify or limit the situations in which investigation can be sought during the initial forty or sixty days.

III. THE RAMIFICATIONS OF SECTION 187 OF THE BNSS

As stated previously, Sections 187(2) and 187(3) of the BNSS differ from Section 167(2) of the CrPC in three major ways. However, this translates to two predominant implications which this paper shall analyse in depth. First, the extension of police custody period under Section 187(3). Second, the abrupt and tranched form of investigation under Section 187(2), which results in expanding the reach of police custody to the later stages of investigation. This paper shall now discuss the ramifications of each of these implications.

(A) THE RAMIFICATIONS OF SUBJECTING AN ACCUSED TO EXTENDED PERIODS OF POLICE INTERROGATION, STEMMING FROM SECTION 187(3)

1. Increased Risk of Custodial Violence

The gravest of consequences resulting from Section 187 of the BNSS is undoubtedly the increased risk of custodial violence, torture, and deaths. Upon the commencement of an investigation, the police's primary objective is to collect evidence with regard to the perpetrator of the crime to strengthen the case for a conviction against an individual.[7] In pursuance of such ends, the most predominant means that have historically been taken up is custodial violence. This involves subjecting an accused to physical abuse and violence to compel a confession in the police's favour.[8] This is fuelled by a multiplicity of factors such as work pressure, lack of training, etc.[9]

This issue was already of prominence even when there was a fifteen-day limit to police custody as stipulated in the CrPC. There are several examples of the same. A prominent example in this respect is the reported custodial death of P. Jeyaraj and J. Benicks, wherein they were arrested by the Tamil Nadu Police on 19 June 2020, and were later reported to have died in police custody three days later, as a result of custodial torture.[10] The prospect of custodial violence is also substantiated by statistics. For instance, it was observed that 80% of the 270 prisoners who were interviewed, admitted to having suffered custodial violence.[11] The effect of the same when the CrPC was also in force has also been observed in a line of judicial precedents such as *D.K. Basu v. State of West Bengal* ('D.K. Basu'), and *Nilabati Behera v. State of Orissa* wherein the Court observed that custodial violence was a widespread phenomenon and that its occurrence struck a blow at the rule of law. [12] In fact, the writ petition in the *D.K. Basu* case had been filed on account of the frequent complaints regarding custodial violence and deaths in police lockup.[13]

[7] Ashish Kulshreshtha*, Intricacies of Police Investigation, Role of Police in Criminal Justice System of India and Need to Reform*, 8 INT'L. J. CREATIVE RES. THOUGHTS 2245, 2245 (2020).
[8] Dipti Mohapatra, *Custodial Violence and Human Rights: Legal Implications*, 5 INT'L. J. RES. MANAGEMENT & SOCIAL SCIENCES 82, 83 (2017).
[9] *Id.* at 84-85.
[10] Poornima Murali, *TN Father-son Duo, Killed in Police Custody, Was Tortured for Over 7 Hours, Reveals CBI Chargesheet*, NEWS18 (Oct. 27, 202), https://www.news18.com/news/india/tn-father-son-duo-killed-in-police-custody-was-tortured-for-over-7-hours-reveals-cbi-chargesheet-3011255.html.
[11] 2 ANUP SURENDRANATH, DEATH PENALTY INDIA REPORT 20 (National Law University, Delhi Press 2016) [hereinafter "ANUP"].
[12] D.K. Basu v. State of West Bengal, (1997) 1 SCC 416; Nilabati Behera v. State of Orissa, (1993) 2 SCC 746; State of Madya Pradesh v. Shyamsunder Trivedi, (1995) 4 SCC 262.
[13] D.K. Basu v. State of West Bengal, (1997) 1 SCC 416.

Now, with Section 187 of the BNSS extending this limit fourfold or sixfold (depending on the offence), the effect now is exacerbated to an increased risk of custodial violence, as they are now granted the power of a prolonged period of interrogation. This essentially means that the police are now granted access to accused persons for a longer period of time. Consequently, by virtue of their desperation to secure evidence, an accused will now be subject to increased levels of custodial violence.[14] It is with this rigor that a multitude of authors assert that such legislation would be banal to the interests of accused persons, and that consequently it would reinforce a crime-control model.[15]

2. Elevated Susceptibility of Coerced Confessions and Wrongful Convictions

As previously stated, the use of custodial violence is predominantly in pursuance of forcing accused persons to confess. This was an issue of prominence even when there was a fifteen-day bar to police custody. For instance, in 2016, a Project 39A Report stated that 78.3% of the ninety-two persons interviewed, stated that they confessed due to torture and police brutality.[16] However, given the prolonged period of interrogation stemming from Section 187 of the BNSS, the likelihood of coerced confessions is even greater in comparison to an investigation under the CrPC,[17] as accused persons are now subject to potential violence and torture over a longer period of time, in lieu of which they are more likely to accede to the crime in question, regardless of whether they had actually committed it, to escape further pain.[18] Therefore, there is an elevated susceptibility of coerced confessions.

The adverse effect that extended police custody can have on the reliability of evidence, has also been observed in several judicial precedents. In the case *Ashish Jain v. Makrand Singh*, the Supreme Court had expounded upon this issue when it held that the disclosures by the concerned accused

[14] PRIYANKA MITTAL, *Bharatiya Nagarik Suraksha Sanhitha, 2023 & Criminal Procedure Code: A Comparison of Arrest and Investigation Procedure*, 5 JOURNAL OF RESEARCH ADMINISTRATION 9468, 9472 (2023) [hereinafter "PRIYANKA MITTAL"].; Parliamentary Standing Committee on Home Affairs, Report on The Bharatiya Nagarik Suraksha Sanhitha, 2023 (Report No. 247, 2023), Note of Dissent by Derek O'Brien, 18.

[15] Priyanka Agarwal, *BNSS Introduces Handcuffs and In-absentia Trials, Widens Preventive Detention, and Police Custody*, NEWSCLICK (Aug. 20, 2023), https://www.newsclick.in/bnss-introduces-handcuffs-and-absentia-trials-widens-preventive-detention-and-police-custody.

[16] ANUP, *supra* note 11, at 26.

[17] *Criminal Law Bills 2023 Decoded #15: Custody of Arrested Persons During Investigation*, THE P39A CRIMINAL LAW BLOG (Nov. 14, 2023), https://p39ablog.com/2023/11/criminal-law-bills-2023-decoded-15-custody-of-arrested-persons-during-investigation/#_ftn10 [hereinafter "P39A"].

[18] PRIYANKA MITTAL, *supra* note 14, at 9472.

were not voluntary since such evidence was extracted after the accused was grilled and interrogated multiple times.[19] This contributes to the undertone that extended or excessive police custody can undeniably result in coerced confessions. Additionally, in the case *Nathu v. State of Uttar Pradesh*, the Supreme Court propounded a presumption that prolonged custody preceding the making of the confession is sufficient to make the confession involuntary, unless otherwise proven.[20] The propounding of this presumption also contributes to the notion that prolonged police custody can inevitably result in coerced confessions. In addition, the implications of this law are more far-reaching in nature. It also increases the likelihood of wrongful convictions*, i.e*, the conviction of innocent persons. Given the prolonged period of police custody, it is likely that if an innocent is placed in police custody for investigation, the person is likely to agree to the crime despite his innocence, to be spared of torturous methods that may be exercised by the police.[21] This is a direct by-product of the prospect of coerced confessions.[22] Therefore, this presents to be a prominent issue of concern as well.

3. Excessive Psychological Toll

Another ramification is the excessive psychological toll that prolonged police custody can have on an accused person.[23] To begin with, the issue concerning the perpetuity of a psychological toll was already of prevalence when there was a fifteen-day bar on police custody period, given the fear of violence and torture,[24] and the notion of confinement before conviction. However, the current law expands this period fourfold or sixfold, thereby aggravating this psychological toll multi-fold and putting tremendous pressure on the accused.[25] To this end, an excessive psychological toll may have two further effects: First, it would lead to an increase in coerced confessions, given the mental pain of enduring extended detention may present to be an intervening factor in coercing an accused into making a confession in the police's favour. Second, it would severely deteriorate the mental health of accused persons. Against this background, it has been noted that prolonged police

[19] Ashish Jain v. Makrand Singh, (2019) 3 SCC 770.
[20] Nathu v. State of Uttar Pradesh, AIR 1956 SC 56.
[21] ABHINAYA S, *Critical Analysis on Section 187 of Bharatiya Nagarik Suraksha Sanhitha, 2023*, 7 International Journal of Law Management & Humanities 329, 337 (2024).
[22] KENT ROACH, *Wrongful Conviction, Wrongful Prosecutions and Wrongful Detentions in India*, 35 National Law School of India Review 250, 294 [hereinafter "ROACH"].
[23] Ishaan Singh and Kartikeya Misra, *Out of the frying pan, and into the fire: Extension of Police Custody under BNSS*, THE SOCIETY FOR ADVANCEMENT OF CRIMINAL JUSTICE (Feb. 4, 2024), https://www.nujssacj.com/post/out-of-the-frying-pan-and-into-the-fire-extension-of-police-custody-under-bnss#viewer-x293e479.
[24] *Mental Health and Prisons*, PRISON POLICY INITIATIVE, https://static.prisonpolicy.org/scans/mh_in_prison.pdf.
[25] ANUP, *supra* note 11, at 23; ROACH, *supra* note 22, at 294.

custody can increase the possibility and risk of depression, anxiety and somatization.[26] Furthermore, it has also been observed that prolonged police custody as a phenomenon can largely induce depression and somatization, as even compared to placing individuals in jails or prisons.[27] This makes it evident that prolonged police custody is a greater threat, in terms of the health consequences it poses, even in comparison to the conviction of accused persons in jails and prisons.

(B) THE RAMIFICATIONS OF EXPANDING THE REACH OF POLICE CUSTODY TO LATER STAGES OF INVESTIGATION AT ANY TIME DURING THE INITIAL FORTY OR SIXTY DAYS, STEMMING FROM SECTION 187(2)

1. Creates a Legal Loophole Wherein There is a Potential Vulnerability to Misuse

In essence, Section 187(2) creates a legal loophole. To begin with, the notion of prolonged police custody is primarily predicated and justified on the existence of an "adequate ground" to do so, as enshrined in Section 187(3).[28] However, by legislating Section 187(2) to allow police custody to be sought at any time during the initial forty or sixty days without requiring an adequate ground, the law essentially allows the police to create a situation similar to prolonged police custody in which an accused continues to be subject to increased police interrogation and an increased surveillance period even under Section 187(2). This is because the police are likely to have formulated a version of events in the advanced stages of investigation, and now that the BNSS grants the police officers unrestricted access to them at these advanced stages, they may subject the accused to greater levels of custodial violence at this stage in order to compel them into making coerced confessions, thus falling in line with their version of incidents proposed to be put forth before the Court.[29] This on the other hand could not have been possible via Section 167 of the CrPC which does not permit police custody for more than fifteen days from the date of arrest.

In *Anupam J. Kulkarni v. Central Bureau of Investigation* ('Anupam Kulkarni'), the Court dealt with this very issue of whether custody had to be sought within the first fifteen days of investigation. The opposing party had made a claim that in cases of grave crimes, valuable information may only be

[26] ERIC BLAUUW, *Psychopathology in Police Custody*, 21 INT'L. J. OF LAW & PSYCHIATRY 73.
[27] *Id.*
[28] Bharatiya Nagarik Suraksha Sanhita, 2023, §187(3), No. 46, Acts of Parliament, 2023 (India).
[29] P39A, *supra* note 17.

disclosed at a later stage of the investigation and that it would be difficult to complete the investigation within the first fifteen days. However, the Supreme Court dismissed this contention, and justified the strict initial fifteen-day bar by stating, "*The scheme of Section 167 is obvious and is intended to protect the accused from the methods which may be adopted by some overzealous and unscrupulous police officers".*[30] Therefore, the Court's reasoning underlines that if custody was allowed to be sought at a time beyond the first fifteen days, accused persons would fall prey to the methods adopted by overzealous and unscrupulous officers, similar to the consequences of prolonged police custody. The same was also reinforced by the case of *Budh Singh v. State of Punjab*,[31] wherein a three-judge bench reiterated the rationale provided in the *Anupam Kulkarni* case.

Section 187(2) thus allows for the police to emulate a situation of prolonged police custody in effect, even when there does not exist an adequate ground. Therefore, it creates a loophole and awards greater powers and discretion to the police, detrimental to the interests of accused persons with huge repercussions during the trial. In addition, the section runs contrary to the spirit of the predicament made in Section 187(3).

2. Perpetuates Increased Fear Among Accused Persons

The second of the consequences stemming from Section 187(2) is an increase in fear among accused person(s), especially those, for whom adequate grounds for further detention do not exist. Under Section 167(2) of the CrPC, such an accused could only be detained in custody for the first fifteen days after arrest. However, under Section 187(2) of the BNSS, the same accused could also be called into custody on the fortieth or sixtieth day. Unlike under Section 167 of the CrPC, this would subject an accused to the fear and uncertainty of being called in for investigation at any time over the course of two months from the initiation of investigation, and this can present to be detrimental to the integrity of an accused's personal liberty. This has been well substantiated by Justice V. Ramkumar in his article wherein he states, *"In such a case, the sword of Damocles in the form of police custody will be hanging over the head of the accused for the entire period of the [extended] detention*".[32] In addition, the increased police powers under Section 187(3) also contribute to the perpetuity of fear

[30] Central Bureau of Investigation, Special Investigation Cell - I v. Anupam J. Kulkarni, (1992) 3 SCC 141 [hereinafter "Anupam Kulkarni"].
[31] Budh Singh v. State of Punjab, (2000) 9 SCC 266.
[32] Justice V Ramkumar, *The Bharatiya Nagarik Suraksha Sanhitha, 2023 ("BNSS" For Short) At A Glance – Comments by Justice Ramkumar*, LIVELAW (Mar. 16, 2024), https://www.livelaw.in/top-stories/justice-ram-kumar-comprehensive-anaysis-bharatiya-nagarik-suraksha-sanhitha-2023-252551.

in accused persons, inasmuch as these individuals may fear the consequences that may emerge from remaining in police custody for a total of ninety days where they may be subject to increased custodial violence, as compared to a mere fifteen days in the past under the CrPC. Therefore, while Section 187 may have been intended by the judiciary to aid the police in justifiably securing a greater number of convictions, it has nevertheless, grossly subjugated the interests of accused persons in multiple ways.

IV. THE 'DRACONIAN' NATURE OF SECTION 187 OF THE BNSS

Through the ramifications discussed above, it is clear that at its crux, Section 187 of the BNSS exacerbates the already gruesome power dynamics between the police officers and accused persons, and tips the scale in the favour of the police, negatively affecting the basic rights of the accused guaranteed under the criminal justice system. Therefore, by virtue of this imbalance between the interests of the police and the interests of an accused, Section 187 presents to be draconian in nature.

The draconian nature of Section 187 is also evidenced by its potential to violate a series of fundamental rights guaranteed by the Constitution. The first and foremost fundamental right that Section 187 has the potential to violate is the right to life under Article 21 of the Indian Constitution. Against this background, it was observed in the case *D K Basu v. State of West Bengal*, *"The expression 'life or personal liberty' [in Article 21] has been held to include the right to live with human dignity and thus it would also include within itself a guarantee against torture and assault by the State or its functionaries".*[33] Furthermore, this case also clarified, *"Any form of torture of cruel, inhuman or degrading treatment would fall within the inhibition of Article 21 of the Constitution,* ***whether it occurs during investigation, interrogation or otherwise****".*[34] The same proposition was upheld by the Court in the case *Raghbir Singh v. State of Haryana*,[35] wherein "*torture*" was held to violate the right under Article 21. Thus, by virtue of these cases, it is clear that any perpetuance of torture (whether it occurs during investigation or otherwise) would possess the potential to violate Article 21. This is the exact consequence of Section 187. As stated in Part 3(A)(1), Section 187 of the BNSS perpetuates an increased risk of custodial violence and torture during the investigation stage by

[33] D.K. Basu v. State of West Bengal, (1997) 1 SCC 416.
[34] *Id.*
[35] Raghbir Singh v. State of Haryana, (1980) 3 SCC 70.

virtue of the prolonged police custody period. Therefore, in light of this increased risk, it is clear that Section 187 possesses the potential to violate Article 21. However, the potential of Section 187 to violate Article 21 is not limited to its consequences of custodial violence. It may violate Article 21 by prejudicing an accused person's right to a fair trial as well.

In this regard, the right to a fair trial has been read into the confines of Article 21 in multiple cases including *Sidharta Vashisht v. State (NCT of Delhi),* and *Nirmal Singh Kahlon v. State of Punjab*.[36] Against this background, Section 187 possesses the potential to violate the right to a fair trial, since prolonged police custody can be used as a vehicle to exert custodial violence and a psychological toll on accused persons – and this may inevitably induce the accused into confessed (regardless of whether he was guilty or not) to escape such pressures. This would undoubtedly violate an accused person's right to a fair trial, which lacks concrete safeguards against such a violation. Nevertheless, this violation is also exacerbated by the fact that accused persons are now subject to increased fear and uncertainty as illustrated in Part 3(B)(2), since the police have access to accused persons at the later stages of investigation, even in the absence of an "*adequate ground*". In essence, *"a sword of Damocles will always hang over their head".*

In addition, Section 187 possesses the potential to violate Article 20(3) of the Indian Constitution as well, namely, the right against self-incrimination.[37] As stated in the *Nandini Satpathy v. P.L. Dani*, this particular right protects the accused person from being required to disclose evidence or facts that can potentially incriminate him.[38] Against this background, Section 187 has the potential to breach this very constitutional provision. As illustrated in Part 3(A)(2), the perpetuity of prolonged police custody can extend the police's access to the accused persons, which may consequently elevate the susceptibility of coerced confessions. This will directly violate the right of self-incrimination under Article 20(3), since accused persons will inevitably be forced to confess. Thus, Section 187's potential to violate the fundamental rights of Article 20 and 21 contribute to the undertone that it is draconian in nature.

[36] Sidhartha Vashisht v. State (NCT of Delhi), (2010) 6 SCC 1; Nirmal Singh Kahlon v. State of Punjab & Ors., (2009) 1 SCC 441.
[37] INDIA CONST. art. 20(3).
[38] Nandini Satpathy v. P.L. Dani, (1978) 2 SCC 424.

V. THE SOLUTION TO ALL OF SECTION 187'S PROBLEMS

In furtherance of the discussion above, it is clear that Section 187 is indeed draconian in nature and saddled with problems. Therefore, an attempt needs to be made to reconcile the problems attached to Section 187, while ensuring to strike a conscious balance between the interests of accused persons and the interests of the Police. In this respect, I shall propose two solutions.

A. A RETAINMENT OF THE WORDS 'OTHERWISE THAN IN CUSTODY OF THE POLICE'

The first solution to these problems is a simple retainment of the words 'otherwise than in custody of the police' from Section 167 of the CrPC. The very retainment of this phrase would imply that the police is barred from holding accused persons in police custody for longer than 15 days. The rationale for this retainment is that it would significantly alleviate the risk of custodial violence and coerced confessions, which Section 187 currently suffers from. While this may simply be a revival of the predecessor law, it would better serve the interests of accused person(s), since their fundamental rights enshrined under Article 21 and 20(3) (as explained in Part 4) would not be as severely prejudiced. As a primary step, this retainment would go a long way in securing the interests of accused persons amidst the BNSS's aim to make the criminal laws more citizen-centric.

However, an important question may be posed to this very retainment which mirrors the intention behind the legislation of Section 187. What if an investigation is likely to take more than fifteen days, given the gravity of an offence? Wouldn't the investigation be hampered? The simple answer to this is that the investigation would not be hampered, since the recourse of prolonged judicial custody would still be available to the police to allow them to continue their investigation with no to minimal interference on part of the accused during the investigation.[39] This provision would still allow the police to continue with their investigations, albeit with the caveat that they do not have unrestricted access to the accused. Therefore, the proposed amendment would not hamper the interests of investigations by curtailing the extent of police custody. Furthermore, this solution would also create a balance between the interests of the accused and the police, as it would ascertain that the interests of accused persons are not jeopardised, while still providing for an ample timeframe to conduct interrogation through judicial custody.

[39] Anupam J. Kulkarni, *supra* note 30.

B. THE INCORPORATION OF PROVISOS TO SECTION 187(2) TO LIMIT THE INSTANCES IN WHICH CUSTODY CAN BE SOUGHT AT A TIME BEYOND THE FIFTEEN-DAY LIMIT

To reiterate, as explained in Part 3(B)(1), there exists a pertinent loophole in Section 187(2) which allows for the emulation of a situation of prolonged police custody, such as being able to seek police custody after the completion of forty days from presenting the accused in front of the Magistrate, even in the absence of an *"adequate ground"*. There can be a two-fold solution to this problem in the form of an addition of provisos to Section 187(2):

> Proviso I: Provided that the detention of the accused can be authorized at any time during the initial forty or sixty days, at a time after the first fifteen days, only if the Magistrate is satisfied that adequate grounds exist for doing so.
>
> Proviso II: Provided further that for the purposes of this section, 'adequate grounds' may involve instances where the detention of the accused was not secured within the first fifteen days either due to the conduct of the accused or due to extraneous circumstances beyond the control of the investigating officer.

By including the first proviso, the legislature can strike a balance between the predecessor version of the remand law in the CrPC and the current version in the BNSS. This particular proviso would mandate that police custody can be sought during the first forty or sixty days, only if *"adequate grounds"* existed. Currently, Section 187(2) of the BNSS lacks the requirement of an adequate ground for exercising this provision, and is thus susceptible to being misused. However, it is pertinent to note that the threshold for an *"adequate ground"* in this Section is not of the same level of the *"adequate ground"* required for exercising powers under Section 187(3) for extending police custody to sixty or ninety days. Thus, a second proviso can be added to clarify the scope of the *"adequate ground"*.

Against this background, in clarifying the scope of the *"adequate ground"* under Section 187(2), the second proviso draws from the concerns laid down by the Parliamentary Standing Committee with respect to Section 187(2). The committee claims that Section 187(2) does not clarify that the custody was not taken in the first fifteen days either due to the accused attempting to evade investigation or due to extraneous circumstances beyond the control of the investigating officer

such as when the accused is required to be hospitalized, and that it is therefore vulnerable to misuse.[40] Their contention also is that the invocation of this procedure be limited to ensure that it is not misused. Therefore, the second proviso addresses these concerns and incorporates them as formulations of *"adequate grounds"*. The rationale behind doing so is to ensure that the police furnish a reasonable basis to invoke this very provision, and that it is not available to exercise such powers to their whims. Taking into account the dire consequences that this provision poses, as illustrated in Part 3(B), there must be an onus on the legislature to ensure that it is only invoked in appropriate cases. In this respect, circumstances where an accused is required to be hospitalised, is indeed a rationale ground to seek the 15-day police custody at a later time, since the accused would otherwise be able to circumvent the conventional fifteen-day requirement laid down in the *Anupam J. Kulkarni*.[41] This was expressly endorsed by the Supreme Court in the case *V. Senthil Balaji v. CBI*.[42] Thus, if such grounds exist, then it would be appropriate to exercise powers under Section 187(2) and allow for custody to be sought within the forty-day or sixty-day period. Therefore, by incorporating these provisos, the situations in which this provision can be invoked can appropriately be limited to protect the interests of accused persons, and additionally, clarity can be brought to this Section.

VI. CONCLUSION

This paper began with one fundamental question - Has the legislature upheld their purported object of citizen-centric laws in regard to the remand of accused persons? The inevitable answer to this, as illustrated throughout this paper, is NO. This paper primarily delved into the implications of each of the changes in wording between Section 187 of the BNSS and Section 167 of the CrPC. After having discussed these implications, this paper considered the ramifications of each of these implications. These ramifications were, namely, the increased risk of custodial violence, an elevated susceptibility of coerced confessions, an excessive psychological toll, increased discretion to the police, and the perpetuity of a "*Sword of Damocles*". Through these ramifications, the paper concluded by stating that Section 187 was indeed draconian in nature and

[40] Parliamentary Standing Committee on Home Affairs, Report on The Bharatiya Nagarik Suraksha Sanhitha, 2023 (Report No. 247, 2023), 21.
[41] Anupam J. Kulkarni, *supra* note 30.
[42] V. Senthil Balaji v. The Deputy Director, 2024: MHC: 987.

that the legislature did not uphold the object of citizen-centric laws with respect to the remand of accused persons. At this standpoint, this paper also delved into the potential violations of Article 21 and 20(3) of the Indian Constitution to supplement its draconian nature.

To solve these problems and to uphold the object of citizen-centric laws, this paper proposed a two-fold solution. These solutions, namely, were to limit police custody to fifteen days and to include provisos to limit the instances when the custody of an accused could be sought at any time during the initial forty or sixty days, to codify the prohibition against the misuse of this provision. Furthermore, these problems can also be solved by clear and concise drafting for criminal procedure, which the current provision lacks. This can allow for a comprehensive provision that can be well-understood by the police and citizens alike, thus alleviating the perpetuity of any uncertainty and vagueness. To conclude, it is clear that to ensure the citizen-centric and non-draconian nature of the remand laws in India, it is of pertinent importance to bring amendments to provide safeguards to the accused person's rights and to limit the unfettered exercise of power in this regard. Through this, the remand laws in India can be cleared of being draconian in nature.

ARTICLE

TRANSFERRING JUSTICE: A COMPARATIVE LEGAL INQUIRY INTO THE TRIAL OF CHILDREN AS ADULTS

Vanshika Agarwal & Ruhika Mandal [*]

ABSTRACT

This paper by conducting a comparative legal analysis of the circumstances under which children in conflict with the law are tried as adults, with a focus on the United States and India, argues that transferring juvenile offenders to regular courts to be tried as adults is a flawed practice that undermines rehabilitation and fails to make communities safer. It examines the evolution of juvenile justice frameworks in both countries, exploring the shift from rehabilitative to punitive models and the legal mechanisms enabling the transfer of minors to regular courts. Through statutory analysis, case law, and empirical data, the paper evaluates the effectiveness and consequences of such transfers. While the U.S. initially embraced punitive reforms in response to rising juvenile crime, it has recently moved back toward rehabilitation. In contrast, India responded to the 2012 Nirbhaya case by enacting the Juvenile Justice Act, 2015 which marked a punitive turn and raises serious concerns. The study shows that transferring a child to be tried to regular court, has little impact on reducing youth crime, often violate international standards for children's rights, and lack consistent safeguards like psychological evaluations. By directly contrasting two distinct legal trajectories, this paper offers a cross-jurisdictional perspective that builds on current debates on juvenile justice. The paper thus argues for a balanced, restorative justice approach that prioritises rehabilitation and reintegration of young offenders while respecting victims' rights. This Article calls for child-centric reforms grounded in international standards and modern research on adolescent development.

Keywords: Children in Conflict with Law, Juvenile Waiver, Comparative Analysis, Juvenile Justice

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I. INTRODUCTION

The 1989 adoption of the United Nations Convention on the Rights of the Child ('UNCRC') marked a major advancement in the international recognition and protection of children's rights. As the most widely ratified treaty in international law, the UNCRC holds significant weight due to its broad scope and legally binding commitments.[1] It outlines the full range of rights owed to children in all aspects of their lives, including specific safeguards for those in conflict with the law.[2] The rights of children in conflict with the law are part of both international and regional legal systems and incorporate general human rights principles—such as the right to a fair trial—while introducing provisions tailored specifically to children.[3] Key protections are articulated in Articles 37 and 40 of the UNCRC, which affirm that any child accused or found guilty of breaking the law must be treated fairly, with full respect for due process guarantees.[4] These include the presumption of innocence, access to legal or appropriate assistance, and the right to a timely trial, all carried out in ways that consider the child's age and prioritize their best interests.[5]

In India, the term "*Children in Conflict with the Law*" ('CCL') refers to any individual below 18 years of age who is accused or adjudicated to have committed an offence, as outlined in Section 2(13) of the Juvenile Justice (Care and Protection of Children) Act, 2015.[6] International laws and frameworks on children's rights recognise that the State may limit a child's rights in certain situations, such as when the child is in conflict with the law, if it is considered necessary.[7] This reasoning is based on safeguarding the interests of others and society as a whole, with a focus on achieving rehabilitative

[1] KILKELLY, U. et al, *Introduction*, in CHILDREN IN CONFLICT WITH THE LAW. PALGRAVE CRITICAL STUDIES IN HUMAN RIGHTS AND CRIMINOLOGY (Palgrave Macmillan 2023).
[2] *Id.*
[3] HOLLINGSWORTH, KATHRYN, *Theorising Children's Rights in Youth Justice: The Significance of Autonomy and Foundational Rights*, 76(6) MOD. L. REV. (2013).
[4] Convention on the Rights of the Child, arts. 37 & 40, G.A. Res. 44/25, U.N. GAOR, 44th Sess., Supp. No. 49, at 167, U.N. Doc. A/RES/44/25 (Nov. 20, 1989) (entered into force Sept. 2, 1990).
[5] Ton LIEFAARD, *Juvenile Justice from an International Children's Rights Perspective, in* ROUTLEDGE INTERNATIONAL HANDBOOK OF CHILDREN'S RIGHTS STUDIES 234 (Wouter Vadenhole et al. eds., Routledge 2015).
[6] The Juvenile Justice (Care and Protection of Children) Act, 2000, §2(13).
[7] Ton Liefaard, *Juvenile Justice*, *in* THE OXFORD HANDBOOK OF CHILDREN'S RIGHTS LAW (Jonathan Todres and Shani M. King eds., Oxford University Press 2020).

and reintegrative measures for the child.[8] This emphasis sets juvenile justice apart from adult criminal justice, providing it with a distinct purpose and methodology. A comprehensive and detailed legislative regulation has been developed at both global and national levels, incorporating specific rules on the treatment of CCL.[9]

The 1980s witnessed a notable rise in juvenile crime rates across the globe,[10] leading to the development of a global framework for juvenile justice.[11] This paper conducts a comparative analysis of the legal systems of India and the United States ('U.S.') in relation to the transfer of CCL to regular courts. These two jurisdictions present contrasting approaches: India emphasizes a child-centric, rehabilitative model, while the U.S., known for its structured and widely practiced system of transfers, has historically adopted a more punitive stance—though it is now seeing a gradual shift toward rehabilitation. This contrast makes the U.S. a valuable comparator for evaluating the legal principles, procedural safeguards, and broader implications of such transfers.

Through this analysis, the paper seeks to evaluate the impact of these transfers on minors, assess their alignment with international standards on juvenile justice, and offer insights into potential reforms that balance public safety with the rights and rehabilitation of child offenders. The issue of transferring cases of juvenile offenders to regular courts raises critical legal and policy concerns at the intersection of justice, rehabilitation, and child protection. Given the significant variations in legal standards and thresholds across jurisdictions, it is essential to conduct a comparative analysis to better understand the underlying principles guiding such transfers.

Part II discusses how various countries prosecute CCL as adults. It highlights the differing legal thresholds, with many jurisdictions allowing minors aged 16–18 to face adult trials for serious crimes,

[8] ELIZABETH S. SCOTT AND LAURENCE STEINBERG, RETHINKING JUVENILE JUSTICE (Harvard University Press 2008).
[9] Jean Trépanier, *Children's Rights in Juvenile Justice: A Historical Glance*, *in* THE UN CHILDREN'S RIGHTS CONVENTION: THEORY MEETS PRACTICE (André Alen et al. eds., Intersentia 2007).
[10] Department of Economic and Social Affairs, *World Youth Report 2003 – The Global Situation of Young People* 189 (Nov. 8, 2024), http://www.un.org/esa/socdev/unyin/documents/worldyouthre port.pdf.
[11] United Nations Standard Minimum Rules for the Administration of Juvenile Justice, G.A. Res. 40/33, U.N. Doc. A/40/53 (1985); United Nations Convention on the Rights of the Child, G.A. Res. 44/25 (adopted on 20 November 1989 entry into force 2 September 1990); United Nations Rules for the Protection of Juveniles Deprived of their Liberty, G.A. Res. 45/113, 14 December 1990.

despite criticism from the Committee on the Rights of the Child ('CRC') urging for uniform juvenile justice protections for all under 18. Part III provides a brief overview of the development of the practice in the U.S. and India. Part IV traces the evolution of trying minors as adults in the U.S. and India. It explains that while the U.S. shifted from a rehabilitative to a punitive model in the late 20th century before returning to a rehabilitative approach, India moved toward a more punitive system after the 2012 Nirbhaya case. Part V explains the legal procedures for transferring CCL to regular courts in the U.S. and India, highlighting their distinct mechanisms and safeguards. It compares the U.S. methods—judicial waiver, legislative exclusion, and prosecutorial discretion—with India's system of preliminary assessment by the Juvenile Justice Board ('JJB') and potential transfer to the Children's Court ('CC') for adult trial. Part VI examines whether the transfer system reconciles the dilemma of balancing victims' rights with CCLs' rights. It ultimately advocates for a restorative justice model that prioritizes rehabilitation while acknowledging victim impact. Finally, Part VII concludes this discussion.

II. GLOBAL PERSPECTIVE: HOW DO VARIOUS JURISDICTIONS TRY CCL AS ADULTS

To understand in depth the treatment accorded to CCL, it is first important to see the juvenile justice framework around the world. The way different countries handle the trial of CCL as adults outlines a general framework that highlights both the similarities and differences in their legal responses.

Numerous other instruments have been adopted, both before and after the UNCRC, to highlight specific dimensions of how children interact with the justice system. They include the 1985 Beijing Rules,[12] and the 1990 Riyadh Guidelines[13] The Riyadh Guidelines for instance, highlight the importance of preventing juvenile delinquency as a means to lower overall crime rates and stress the need for enhanced cooperation among all stakeholders in juvenile justice, both internationally and nationally.[14] They advocate for implementing these guidelines with a child-centred focus and

[12] U.N. Standard Minimum Rules for the Administration of Juvenile Justice ("Beijing Rules"), G.A. Res. 40/33, annex, U.N. GAOR, 40th Sess., Supp. No. 53, U.N. Doc. A/40/53 (Nov. 29, 1985).
[13] U.N. Guidelines for the Prevention of Juvenile Delinquency ("Riyadh Guidelines"), G.A. Res. 45/112, annex, U.N. GAOR, 45th Sess., Supp. No. 49A, U.N. Doc. A/45/49 (Dec. 14, 1990).
[14] Family for Every Child, *Children in Conflict with the Law: Position Paper* (2022), https://familyforeverychild.org/wp-content/uploads/2022/07/Children-in-conflict-with-the-law-Position-paper.pdf.

underscore the crucial roles that family support, education, and community engagement play in preventing juvenile crime and reducing continued contact with the justice system.[15] The Beijing Rules on the other hand offer recommendations for handling children within the criminal justice system, covering aspects such as privacy protections, police training, and due process rights.[16] Notably, they include guidelines for diverting children away from formal judicial processes and emphasize the importance of considering children's emotional and intellectual development to prevent setting the age of criminal responsibility at an inappropriately low level.[17] Collectively, these establish a clear standard for safeguarding children's rights within the justice system.[18] Developed through international dialogue and norm-setting, they reflect a global consensus on how children in conflict with the law should be treated.

Building on these foundational standards, the CRC, which oversees the implementation of the UNCRC, plays a critical role in monitoring state compliance and offering interpretive guidance on juvenile justice. An examination of the CRC's Concluding Observations indicates that the practice of treating CCL as adult offenders is common across numerous jurisdictions, albeit to differing extents.[19] CRC has pulled up at least 59 states which carry out the treatment of CCL as adults depending on the nature of the crime or their age to reform their laws for violating the UNCRC,[20] a summary of which is as follows.

Statutes in several European nations include distinct processes for CCL responsible for grave crimes, reflecting a trend towards balancing juvenile accountability with protections based on age and maturity. For instance, in the Netherlands, juvenile court judges have discretion to impose adult sanctions on children aged 16 to 18, considering factors such as the severity of the offence and

[15] Ursula KILKELLY ET AL., CHILDREN IN CONFLICT WITH THE LAW: RIGHTS, RESEARCH AND PROGRESSIVE YOUTH JUSTICE (Palgrave Macmillan 2023).
[16] *Id.*
[17] *Id.*
[18] Ursula Kilkelly, *Youth Justice and Children's Rights: Measuring Compliance with International Standards*, 8 (3) YOUTH JUSTICE 187 (2008).
[19] Swagata Raha, *Highlights of the Concluding Observations by the Committee on Rights of the Child on Treating Juveniles as Adults*, CENTRE FOR CHILD AND THE LAW (Dec. 26, 2014).
[20] *Id.*

individual characteristics. [21] This approach acknowledges the need for flexibility in sentencing to address varied circumstances. Similarly, France's Juvenile Assize Court allows for prescription of sentences at par with adults for serious offences committed by 16 to 18-year-olds, indicating a recognition of the gravity of certain crimes while still maintaining a separate juvenile system.[22]

In contrast, the United Kingdom's (U.K.) practice of prosecuting children as young as 10 in regular courts for the most severe crimes is among the harshest globally,[23] raising concerns about the impact of such early exposure to adult judicial processes on a child's development and rights. For serious offenses like murder, manslaughter, and specific grave sexual or firearms crimes, children can be tried in the Crown Court.[24] In 2020, 665 children appeared before this higher court, with 252 receiving custodial sentences.[25] This approach reflects a highly punitive stance that prioritizes public safety but risks undermining the rehabilitative goals of juvenile justice and may have long-term negative effects on the child's well-being and reintegration.

Under Canadian law, prosecutors can apply to have CCL over the age of 14 to be tried as adults.[26] According to Debra Parkes, a prominent scholar in the field of juvenile justice and rights of CCL, it is typical for the youth responsible for grave offences to receive adult sentences. In her study of 102 youth murder cases, prosecutors pursued adult sentences in 89 instances, with 62 resulting in life sentences.[27]

In Japan, CCL above 16 years, committing grave crimes could be transferred to criminal courts and sentenced as adults.[28] In Sri Lanka, CCL aged 16 to 18 enter the formal justice system and are treated

[21] Criminal Code, 2012, §77b (The Netherlands).
[22] Milieu, *Study on children's involvement in judicial proceedings – contextual overview for the criminal justice phase – France* (2013), https://data.europa.eu/euodp/repository/ec/dg-justi/criminal-justice/contextual-overviews/France.pdf.
[23] Children and Young Persons Act, 1933, §50 (The United Kingdom); THE GUARDIAN, *Age of criminal responsibility must be raised, say experts* (Nov. 4, 2019), https://www.theguardian.com/society/2019/nov/04/age-of-criminal-responsibility-must-be-raised-say-experts.
[24] *Which Court?*, YOUTH JUSTICE LEGAL CENTRE, https://yjlc.uk/which-court/.
[25] Tim Bateman, *Bridging the Care-Crime Gap: Reforming the Youth Court?*, NAYJ BRIEFING (July 2021), https://thenayj.org.uk/cmsAdmin/uploads/reform_of_-youth_court-final-25th-october.pdf.
[26] Anna Mehler Paperny, *Canadian court to consider when minors can be sentenced as adults*, REUTERS (Oct. 15, 2024), https://www.reuters.com/world/americas/canadian-court-consider-when-minors-can-be-sentenced-adults-2024-10-15/.
[27] Debra Parkes, *'17 going on 23': Sentencing Young People to Life in Canada,* 48 (1) DAL. L.J. (2025).
[28] Concluding Observations of the Committee on the Rights of the Child, Japan, U.N. Doc. CRC/C/JPN/CO/3 (2010).

similarly to adults, and are held in prisons alongside adult offenders, which further impedes their rehabilitation and adjustment back into the community.[29] In Singapore, CCL of 16 years of age and older are prosecuted as adults and must comply with the same legal procedures and rules that apply to adult defendants in court.[30] Unlike most countries, child offenders in Singapore as young as 7 years can be convicted and sent to life imprisonment for certain offences.[31] In Saudi Arabia, child offenders below 18 years can be convicted to both death penalty and life imprisonment.[32] Similarly, in Brazil, proposed constitutional amendments have sought to allow courts to try and sentence some CCL between 16-18 years as adults.[33]

A comparative analysis of juvenile justice practice in various jurisdictions shows wide variation in the balance states strike between accountability, public safety, and child protection. European systems, for example in the Netherlands and France, illustrate a middle-range response—permitting adult sanctions in exceptional conditions but maintaining a separate juvenile justice system. These tend to consider the age, maturity, and rehabilitative capacity of the offender, reflecting a proportionate response consistent with the UNCRC's underlying principles.

Alternatively, Anglo-American jurisdictions such as the U.K. and Canada demonstrate a more punitive approach, with children as old as 10 years in the UK being tried as adults in criminal courts and punished with harsh sentences. Canada's prosecutorial discretion to try youth over 14 years of age for an adult sentence, often life imprisonment, again demonstrates a trend toward deterrence and retribution, possibly contrary to international norms prioritizing reintegration and the best interests of the child.

[29] Jalashi Changa Lokunarangoda, *The Juvenile Justice System in Sri Lanka Through a Critical Eye*, UNAFEI (March 2023), https://www.unafei.or.jp/publications/pdf/RS_No115/No115_10_PART_TWO_Participants_Papers_02.pdf.
[30] Ang Bee Lian, *Understanding the Rehabilitative Approach for Youths who Commit Offences* (May 22, 2015), https://www.msf.gov.sg/what-we-do/odgsw/social-insights/2015-Understanding-the-rehabilitative-approach-for-youths-who-commit-offences.
[31] *Inhuman sentencing of children in Singapore,* CHILD RIGHTS INFORMATION NETWORK (Nov. 2010), https://archive.crin.org/sites/default/files/singapore_inhuman_sentencing.pdf.
[32] *Inhuman sentencing of children in Saudi Arabia,* CHILD RIGHTS INFORMATION NETWORK (March 2013), https://upr-info.org/sites/default/files/documents/2014-03/crin_upr17_sau_e_main.pdf.
[33] *Brazil: Reject Trying Children as Adults: Letter to the Senate*, HUMAN RIGHTS WATCH (Sept. 26, 2017), https://www.hrw.org/news/2017/09/26/brazil-reject-trying-children-adults.

Asian and Middle Eastern jurisdictions, including Japan, Singapore, Saudi Arabia and Sri Lanka, tend to exhibit more austere and punitive approaches. These jurisdictions commonly expose older adolescents to regular courts and, in a number of instances, expose them to severe punishments—such as life imprisonment or even death—to be imposed upon them for their juvenile crimes. In countries such as Singapore and Saudi Arabia, very low ages of criminal responsibility and the use of procedural legislation meant for adults create significant concerns regarding due process and children's rights.

This divergence underscores the tension between national security imperatives and international human rights obligations, with significant implications for the global harmonization of juvenile justice standards. Thus, in General Comment No. 10, CRC urges *"State parties that restrict the application of their juvenile justice rules to children under 16 years of age (or younger), or that permit exceptions where 16 or 17-year-olds are treated as adults, to amend their laws. The goal is to ensure the non-discriminatory and comprehensive application of juvenile justice rules to all individuals under the age of 18".*[34]

III. DEVELOPMENT OF THE PRACTICE OF TRYING OF MINORS AS ADULTS

This chapter examines how two large jurisdictions, the United States and India, have evolved and adapted their juvenile justice systems to support the practice of transferring minors to be tried as adults. Both started off with structures that prioritized rehabilitation, but their paths diverged due to domestic agendas and sensational criminal cases to end up with substantially different results and justifications for transfer policies.

(A) EVOLVEMENT OF JUVENILE TRANSFER IN THE U.S.

The minimum age at which juvenile offenders may be transferred to regular criminal court varies across U.S. states. In most States, juveniles aged fourteen and above are typically eligible for transfer.[35] For instance, Kansas law explicitly prohibits prosecuting individuals under the age of fourteen as

[34] United Nations Convention on the Rights of the Child, *General Comment No. 10 (2007) Children's rights in juvenile justice*, 38, U.N. Doc. CRC/C/GC/10 (Apr. 25, 2007).
[35] Patrick Griffin et al., *Trying Juveniles As Adults: An Analysis Of State Transfer Laws And Reporting,* JUVENILE OFFENDERS AND VICTIMS: NATIONAL REPORT SERIES (September 2011).

adults.[36] In contrast, Georgia permits juveniles of any age, including those thirteen or younger, to be tried as adults if they are charged with offenses punishable by death or life imprisonment without parole.[37] Additionally, several states empower juvenile court judges to waive their jurisdiction and transfer cases to regular court. These include Alabama (for offenders aged fourteen or older),[38] California (for those at least sixteen),[39] and Georgia (for juveniles aged fifteen and above).[40] Pennsylvania law also requires child offenders charged with murder to be tried as adult offenders, regardless of their age.[41] In New Jersey, the law mandates that juvenile courts conduct judicial hearings before transferring juveniles aged fifteen and above who are charged with offenses such as murder, sexual crimes, serious property offenses, or drug trafficking.[42] This means that transfers are determined at the discretion of the juvenile court judge, rather than occurring automatically under statutory requirements. Thus, in the background of the varied and diverse state laws regarding juvenile transfer in the U.S. it becomes necessary to examine the stance of the U.S. Supreme Court and evolution of judicial jurisprudence.

Since the establishment of separate courts for juveniles, judges were given authority to transfer certain CCL to regular criminal courts.[43] The U.S. Supreme Court, in *Kent v. United States*,[44] ('Kent') set standards for judicial waiver hearings and mandated that juvenile courts offer some procedural protections to youths before making waiver decisions.[45] The *Kent* decision highlighted that withdrawing juvenile court protections was an important act that required due process by appellate courts. For instance, *Kent* outlined a set of crucial factors that judges must take into account.[46] These factors include the seriousness of the alleged offense and whether it was committed in a violent,

[36] KAN. STAT. ANN. § 38-2347(a)(1) (2006) (July 1, 2014).
[37] GA. CODE. ANN. § 15-11-39 (1981) (enacted 2013).
[38] ALABAMA CODE § 12-15-203 (2023).
[39] CAL. WELF. & INST. CODE § 707 (WEST 2024).
[40] GA. CODE. ANN. § 15-11-39 & 15-11-5 (1981) (enacted 2013).
[41] 42 PA. C.S.A. § 6302(1)(i), 6355(e).
[42] N.J. STAT. ANN. § 2A:4A-26.1(a)–(c).
[43] DAVID ROTHMAN, CONSCIENCE AND CONVENIENCE: THE ASYLUM AND ITS ALTERNATIVES IN PROGRESSIVE AMERICA (Routledge 2002).
[44] Kent v. United States, 383 U.S. 541 (1966).
[45] Barry C. Feld, *Reference of Juvenile Offenders for Adult Prosecution: The Legislative Alternative to Asking Unanswerable Questions,* 62 MINN. L. REV. 515 (1978).
[46] Kent v. United States, 383 U.S. 541 (1966).

aggressive, or premeditated manner, particularly if it involved harm to persons rather than property.[47] Judges must also assess whether there is sufficient evidence to support the charges and if the case would be better handled under regular court procedures.[48] Additionally, the court must evaluate the juvenile's maturity, mental and emotional development, past criminal record, and whether the juvenile system can still offer meaningful rehabilitation while ensuring public safety.[49] These factors aim to ensure that such a serious decision is not made arbitrarily but with a balanced view of both accountability and the child's potential for reform.

In *In Re: Gault*, the U.S. Supreme Court extended four key constitutional rights to juveniles in the court system that were earlier available only for adults in criminal court.[50] These rights included "*adequate written notice of the charges or allegations*",[51] "*the right to counsel*",[52] "*the right against self-incrimination*",[53] and "*the right to confront witnesses*".[54] This decision significantly transformed the juvenile justice system, shifting it from its informal roots to a better structured and formal process.[55] There was demonstration in *In Re: Gault*, that constitutional protections can be integrated with juvenile court's rehabilitative approach.[56] In *In Re: Winship*, the Supreme Court ruled that juveniles, like adults in criminal court, are entitled to the standard of proof "*beyond a reasonable doubt*" when facing criminal charges, replacing previous threshold of "*preponderance of evidence*".[57]

There was a significant rise in juvenile violence starting in the middle of the 1980s and continuing through the beginning of 1990s.[58] This period saw an alarming surge in gun violence perpetrated by the young adults and adolescents, much of which was perpetrated by minor boys in the major urban

[47] *Id.*
[48] *Id.*
[49] *Id.*
[50] In Re: Gault, 387 U.S. 1 (1967).
[51] *Id.*
[52] *Id.*
[53] *Id.*
[54] *Id.*
[55] Alicia N. Harden, *Rethinking the Shame: The Intersection of Shaming Punishments and American Juvenile Justice*, 16 U.C. DAVIS J. L. POL. 107 (2012).
[56] *Id.*
[57] In Re: Winship, 397 U.S. 358 (1970).
[58] Donna M. Bishop, *Juvenile Transfer in the United States, in* REFORMING JUVENILE JUSTICE (Josine Junger-Tas and Frieder Dünkel eds, Springer 2009) [hereinafter "Donna M. Bishop"].

centres of the country.[59] The media reacted to this wave of violence with intense and sensationalized reporting. The depiction of young offenders shifted dramatically, moving away from the previously sympathetic images of vulnerable but reformable youths to threatening portrayals of calculating, ruthless, and emotionless adolescent "*super predators*", who were projected to reach a population of 270,000 by 2010.[60]

The increase in offences by CCL in 1980s, and the widespread fear regarding so-called super predators, led to a response by the legislatures at the federal level and in all States, except one, who amended their legislations to speed up the transfer system of minors to criminal courts.[61] Justices of the juvenile courts were seen as too stringent in applying waiver proceedings, leading to the creation of alternative procedures that either removed their authority over transfer decisions or significantly limited their discretion.[62]

In response, states adopted legislations that led to a reduction in scope of juvenile court jurisdiction.[63] Legislations of this nature frequently permitted the juvenile transfer of minors at earlier age and those who committed lesser serious offence than what was the earlier norm.[64] The end of 20th century saw almost every jurisdiction enacting legislation that permitted and/or made it more convenient to transfer juveniles to regular courts, resulting in thousands of CCL being moved to criminal courts.[65] Thus, the U.S. implemented "*get tough*" policies showing lack in rehabilitative notions of justice.

The early 21st century has witnessed a shift back to the founding principle of rehabilitative justice within the juvenile justice process, driven largely by advancements in neuroscience.[66] These scientific

[59] *Id.*
[60] J. DiIulio, *The coming of the Super-predators*, THE WEEKLY STANDARD (Nov. 19, 1995); *The Superpredator Myth, 25 Years Later*, EQUAL JUSTICE INITIATIVE (July 4, 2014), https://eji.org/news/superpredator-myth-20-years-later/.
[61] Donna M. Bishop, *supra*, note 58.
[62] *Id.*
[63] Larry Cunningham, *Substantive Limitations on the Power of Family Courts to Commit Delinquent Juveniles to State Custody: Analysis and Critique*, 55 SYRACUSE L. REV. 87, 96 (2004).
[64] N. Connell, *A Defense of Senate Bill 1391: The California Law that Abolishes Transferring Juveniles under Sixteen to Criminal Court*, 51 SETON HALL L. REV. (2021).
[65] L. Knoke, *No Evil, Hear No Evil: Applying the Sight and Sound Separation Protection to All Youths Who are Tried as Adults in the Criminal Justice System*, 88 FORDHAM L. REV. 791, 797 (2019).
[66] C. M. Berryessa and J. Reeves, *The Perceptions of Juvenile Judges Regarding Adolescent Development in Evaluating Juvenile Competency*, 110 J. CRIM. L. & CRIMINOLOGY 551, 559 (2020).

developments have validated what early juvenile justice reformers believed: children are fundamentally different from adult criminals, reducing their culpability and increasing their need for reform.[67]

In the past twenty years, numerous States, such as New York and California, amongst others, have worked to undo the strict legislations from the punitive times, enacting measures to limit the transferring of CCL to adult criminal courts and increasing the age of majority to extend juvenile court jurisdiction to the CCL.[68] Jurisdictions have also allocated more funds to "*community-based treatment programs*" and lowered the rates of juvenile incarceration.[69] Some have also implemented comprehensive diversion programs, allowing prosecutors to divert cases and, if completed successfully, keep juveniles out of the courtroom.[70] Today, while justice process for CCL is now similar to that of adults in terms of formalities and constitutional safeguards, recent legislative changes clearly signal a return to the system's rehabilitative focus.[71]

(B) EVOLVEMENT OF TRYING JUVENILE OFFENDERS AS ADULTS IN INDIA

The Juvenile Justice Act, 1986 ('1986 Act') was the first attempt by the Government in India towards putting together a specific law for the youth in the country.[72] This 1986 Act took a child friendly stance, with the primary objective being the rehabilitation and reformation of "*delinquent*" children.[73] Due to such a stance, community-based welfare organizations and informal networks were involved, including juvenile homes, special homes, and observation homes.[74] The 1986 Act was repealed with the passage of the Juvenile Justice (Care and Protection of Children) Act, 2000 ('2000 Act'), which was India's principal juvenile justice law,[75] until the passage of the Juvenile Justice (Care and Protection of Children) Act, 2015 ('2015 Act').

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[67] J. Gupta-Kagan, *Beyond "Children Are Different": The Revolution in Juvenile Intake and Sentencing*, 96 WASH. L. REV. 425, 445 (2021).
[68] R. J. Bonnie et al., *Reforming Juvenile Justice: A Developmental Approach*, NATIONAL RESEARCH COUNCIL (2013).
[69] *Juvenile Corrections Reform in California*, CENTRE OF JUVENILE CRIME JUSTICE.
[70] *What is Diversion in Juvenile Justice?,* ANNIE E. CASEY FOUND BLOG (Oct. 22, 2020), https://www.aecf.org/blog/what-is-juvenile-diversion.
[71] Erin Fitzgerald, *Put the Juvenile Back in Juvenile Court*, 68 VILLANOVA L. REV. 367 (2023).
[72] The Juvenile Justice Act, 1986.
[73] The Juvenile Justice Act, 1986.
[74] The Juvenile Justice Act, 1986, Chapter II.
[75] Saini S., "*The Juvenile Justice (Care and Protection) Act, 2000- An Analysis and Critique*", S.S. GLOBAL LAW FIRM (Aug. 09, 2024), https://ssglawfirm.in/the-juvenile-justice-care-and-protection-act-2000-an-analysis-and-critique/.

In line with the special approach adopted by the 2000 Act in the early detection and management of juvenile delinquency, the terminology for "*delinquent*" and "*neglected*" children was changed to "*juveniles in conflict with law*" and "*children in need of care and protection*" respectively.[76] The term "*juvenile in conflict with law*" might be used to describe a juvenile[77] who has purportedly committed a crime and for all such children the adjudicating authority would be the JJB, and not the Juvenile Court as was designated under the 1986 Act.[78] As per Section 15(g) of the 2000 Act, the JJB possesses the authority to place a child in a specialised facility for a minimum duration of two years if the child is between the ages of seventeen and eighteen, and for any other juvenile until they no longer qualify as a juvenile.[79] This, is, however, subject to the proviso, which states "having regard to the nature of offence and circumstances of the case" the JJB may reduce the period of stay as they deem fit.[80] The arbitrary nature of this proviso was underscored in *Sunil Ojha v. State of NCT (Delhi)* where it was held that the JJB has "*ample*" power to reduce the period of stay in the place of safety.[82] Though the reasons for making such a decision needs to be recorded,[81] there have been no guidelines laid down on when such a discretionary power of the JJB can be used. In *Hari Ram v. State of Rajasthan* ('Hari Ram'), it was clarified that even in cases involving CCL's that have been disposed of, the State Government or the JJB has the authority, either suo motu or upon an application, to review the case of the juvenile. If the juvenile's period of detention exceeds the maximum period specified under Section 15 of the Act, which is three years, the order would be for the immediate release of the juvenile.[82] In *Vijay Narayan Patil v. State of Maharashtra*, the High Court of Bombay relied on *Hari Ram* and held that the petitioner is bound to be released under Section 15(g) as he had already been imprisoned for fourteen years.[83] If the detenu was a juvenile when the offence was committed and had been convicted of the same but is now above the age of 18 then no order under Section 15(g) can be passed.[84] A significant drawback

[76] G. S. Bajpai et al., *Impact and Implementation of Juvenile Justice Act 2000*, NATIONAL LAW UNIVERSITY, DELHI (2018), https://nludelhi.ac.in/download/publication/iijj2000.pdf.
[77] §2(k) of the 2000 Act defines 'juvenile' *as a person who has not completed eighteenth year of age.*
[78] The Juvenile Justice (Care and Protection of Children) Act, 2000, §4.
[79] The Juvenile Justice (Care and Protection of Children) Act, 2000, §15(g).
[80] *Id*
[81] Sunil Ojha v. State (NCT of Delhi), 2007 Cri LJ 3068 (Del).
[82] *Id.*
[81] Mukesh v. State of Delhi, 2011 SCC OnLine Del 5346.
[82] Hari Ram v. State of Rajasthan, (2009) 13 SCC 211; Rashid v. State Govt. of NCT Delhi, 2015 SCC OnLine Del 8502.
[83] Vijay Narayan Patil v. State of Maharashtra, 2009 SCC OnLine Bom 1246
[84] T. Lakshmi v. The State, 2014 SCC OnLine Mad 202.

of the 2000 Act was the contradiction of the "*best interest principle*" and the "*right to participation*" principle. The best interest principle is essentially the fundamental legal and ethical standard that ensures all decisions affecting a child prioritise their overall well-being, safety, development, and dignity, taking into account their individual needs and rights[85] while the right to participation principle holds that every child is entitled to express their views in all matters affecting them, and such views must be given due consideration in accordance with the child's age and level of maturity.[86] Thus, while the best interest principle allows adults to make decisions on behalf of the child, it may at times undermine the child's right to participate, especially when the child's own views are disregarded in favour of what adults consider to be best, leading to a paradox.

In 2012, the country was rocked with the Nirbhaya rape case, where six men, including a 17-year-old minor, viciously raped a young woman, inflicting upon her severe injuries, leading to her death.[87] The 17-year-old, on account of being juvenile, was tried by the JJB based on the provisions of the 2000 Act and was released after serving for three years in a special home. This led to vast public outcry as the majority felt that the juvenile accused was treated "*too leniently*" and his conduct was too "*demonic*" even while he was a juvenile.[88] Demands of this juvenile being tried as an adult due to the heinous nature of the crime were not implemented as the Courts were bound by the law to try the perpetrator as a juvenile and what was said to be an "*emotional aftermath*" of the Nirbhaya case, the 2015 Act.[89] The most notable change brought about by this 2015 Act was the trying juveniles between the ages of 16-18, as adults for heinous offences like rape and murder committed by them. This was a significant departure from the previous Acts which required all offenders under 18 to be tried by the juvenile justice system in the country. Further, clearer classification was introduced as the 2015 Act distinctly classifies crimes into petty, serious and heinous. The establishment of CCs, and streamlining the

[85] Alexander Weihrauch, *The Principle of the Best Interest of the Child,* HUMANIUM (Mar. 02, 2021), https://www.humanium.org/en/the-principle-of-the-best-interest-of-the-child/.
[86] *Guidelines for Conducting Preliminary Assessment Under Section 15 of the Juvenile Justice Act*, NATIONAL COMMISSION FOR THE PROTECTION OF CHILD RIGHTS (Apr. 2023).
[87] Mukesh & Anr. v. State Government for NCT of Delhi & Ors., AIR 2017 SC 2161.
[88] *Juvenile accused treated 'too leniently' in India, no lessons learnt from Nirbhaya case: HC*, ECONOMIC TIMES (Sept. 17, 2024), https://economictimes.indiatimes.com/news/india/juvenile-accused-treated-too-leniently-in-india-no-lessons-learnt-from-nirbhaya-case-hc/articleshow/113416981.cms?from=mdr.
[89] Nizam Azeez Sait, *Juvenile Justice Act, 2015; An Emotional aftermath of the dreaded 'Nirbhaya Incident'; A Step Backward*, LIVELAW (Mar. 11, 2016), https://www.livelaw.in/juvenile-justice-act-2015-emotional-aftermath-dreaded-nirbhaya-incident-step-backward/.

adoption and child-care processes were some of the positive changes brought about by the 2015 Act to fill in the lacunae in the previous legislations.

Thus, the juvenile justice systems have evolved distinctly in both the U.S. and India. Both countries started with a rehabilitative approach to juvenile justice. However, there was a landmark shift to punitive and retributive approach to CCL in the U.S. in the late 20th century while the system was still in initial development in India. As the U.S. shifted to a rehabilitative approach again in the recent years, the Nirbhaya case led India to adopt a more punitive and retributive stance.

IV. PROCESS OF TRYING CCL AS ADULTS

This section critically analyses the legality, structure, and implications of such transfer mechanisms under international law, with an Indian-American comparative framework. It discusses how international instruments such as the UNCRC encourage an exclusive juvenile justice system which honours the developmental disparities of children and safeguards their rights. In spite of these tenets, many jurisdictions still allow for the adult prosecution of juveniles under their laws—India via the 2015 Act, and in United States via waiver legislations. This Part continues to discuss the justification behind these transfer mechanisms, recent judicial incursions, and the long-term success of adult prosecutions, raising evidence that such procedures can in reality perpetuate recidivism and deter the chances for meaningful rehabilitation.

(A) LEGALITY OF THE JUVENILE TRANSFER MECHANISM UNDER INTERNATIONAL LAW

1. Legality of the Juvenile Transfer Mechanism under International Law

UNCRC Article 40(3) advocates for a dedicated justice system for children, stating that "*States Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law*".[90] UNCRC Article 40(1) mandates that children involved in criminal justice proceedings be treated in a way that considers their age and

[90] U.N. Convention on the Rights of the Child art. 40(3), G.A. Res. 44/25, U.N. GAOR, 44th Sess., Supp. No. 49, U.N. Doc. A/RES/44/25 (Nov. 20, 1989) (entered into force Sept. 2, 1990).

prioritises their reintegration into society.[91] The CRC Committee emphasises that the juvenile justice system should acknowledge that "*children differ from adults in their physical and psychological development, and their emotional and educational needs*", which form the basis for the reduced culpability of children in conflict with the law.[92] This principle also implies that children should be treated distinctly from adults, with state interventions focusing primarily on the individual interests of the child offender and their future role in society.

The Inter-American Commission on Human Rights ('IACHR') has both built an expanding collection of judgments and decisions that are particularly significant for juvenile justice.[93] The IACHR called on the U.S. to reinstate the full jurisdiction of the juvenile justice system, and its control to oversee all stages of judicial proceedings involving CCL.[94] According to the IACHR, as of 2016, approximately 200,000 children were tried each year in U.S. adult criminal courts, and were held in adult penitentiaries in violation of their right to special protection and to be tried in a specialised juvenile system.[95] It also recommended that the U.S. reverse its waiver laws as these laws do not adequately guarantee children the right to a specialised justice system.[96]

2. Legality of the Transfer System of India under International Law

The enactment of the 2015 Act saw the disregard of domestic standards for pre-legislative consultations, as well as the UNCRC's stipulations under Articles 3 and 12, which mandate that executive and legislative bodies take into account the best interests of children and their perspectives before passing a law.[97] There were no efforts made to gather the opinions of children who would be impacted by the legislation.

[91] *Id.*
[92] *Id.*
[93] Inter-American Commission on Human Rights, *Juvenile Justice and Human Rights in the Americas*, OEA/Ser.L./V/II (July 13, 2011).
[94] Inter-American Commission on Human Rights, *Children and Adolescents in the United States' Adult Criminal Justice System 54* (2018).
[95] *Id.*
[96] *Id.*0
[97] *Pre-Legislative Consultation Policy*, MINISTRY OF LAW AND JUSTICE (2014); CRC, General Comment No. 12, *The Right of the Child to be Heard*, U.N. Doc. CRC/C/GC/12 (2009).

The 2015 Act gives CCL tried and convicted as adults a chance for a fresh start by allowing their records to be destroyed and preventing their conviction from being used to disqualify them in the future.[98] These rights are deprived as such records would be maintained even in cases where the CCL passes the rehabilitation assessment undermining the restorative justice element at the core of the CRC justice system.

The 2015 Act diverges from Article 37(b) of the UNCRC and Rule 13(1) of the Beijing Rules, as it mandates that deprivation of liberty is the only sentencing option for a child found guilty by the CC after trial.[99] Under this law, the child is to be placed in a secure facility until the age of 21, after which they may be transferred to an adult prison if they do not pass the reformation assessment.[100] The 2015 Act bans the death penalty but only prohibits life imprisonment without the possibility of release, leaving room for life sentences that may not allow for rehabilitation or parole.[101] This stance undermines the spirit of Article 41 of the UNCRC, which urges States to maintain "*more conducive*" measures.[102]

(B) OVERVIEW OF THE LEGAL FRAMEWORK IN THE US

1. The Transfer Process

All states employ at least one statute method to try certain CCL as adults.[103] While the specifics of state transfer laws differ significantly, the 3 common methods are that of the judicial waiver, legislative offense exclusion, and prosecutorial direct file.

(i) Juvenile Waiver

[98] The Juvenile Justice (Care and Protection of Children) Act, 2015, §§24(1) & (2).
[99] Convention on the Rights of the Child, art. 37(b), Nov. 20, 1989, 1577 U.N.T.S. 3 (entered into force Sept. 2, 1990); U.N. Standard Minimum Rules for the Administration of Juvenile Justice ("Beijing Rules"), r. 13(1), G.A. Res. 40/33, annex, U.N. GAOR, 40th Sess., Supp. No. 53, U.N. Doc. A/40/53 (Nov. 29, 1985).
[100] The Juvenile Justice (Care and Protection of Children) Act, 2015, §20(2)(ii).
[101]The Juvenile Justice (Care and Protection of Children) Act, 2015, §21.
[102] Convention on the Rights of the Child, art. 41, Nov. 20, 1989, 1577 U.N.T.S. 3 (entered into force Sept. 2, 1990).
[103] P. Griffin, *Different from Adults: An Updated Analysis of Juvenile Transfer and Blended Sentencing Laws with Recommendations for Reform*, NATIONAL CENTRE FOR JUVENILE JUSTICE AND JOHN D. AND CATHERINE T. MACARTHUR FOUNDATION (2008).

In 45 states, statutes define the minimum age requirements along with categories of crimes that a court is permitted for transferring CCL. A juvenile court justice an relinquish jurisdiction after holding a hearing to assess whether a CCL is "*amenable to treatment*" or is a risk to public safety.[104] These personalised evaluations represent the conventional discretion that juvenile courts have historically exercised.[105]

Judges consider framework comprising 3 main factors being the CCL's age and remaining duration of juvenile court jurisdiction, evaluating CCL's "*amenability to treatment*" and potential risk to public order.[106] The CCL's age and remaining duration of juvenile court jurisdiction influence justices to more readily waive elder CCL compared to those that are younger.[107] Juvenile courts have a limited time—called the disposition period—during which they can supervise or rehabilitate a child. For older juveniles accused of serious crimes, this short period may not seem enough for appropriate punishment, leading judges to send them to regular courts where longer sentences are possible.[108] Secondly, judges assess the youth's "*amenability to treatment*", which is demonstrated through clinical evaluations and previous interventions.[109] Youths who have undergone multiple correctional interventions and have exhausted available juvenile treatment options are more likely to be transferred.[110] Lastly, judges evaluate the threat to public safety by considering factors such as the current offense, previous record, weapon use, and gang involvement.[111]

(ii) Legislative Offense Exclusion

Legislative offense exclusion often complements judicial waiver, prioritizes grave crimes, and embodies the retributive principles of criminal law.[112] Legislatures establish juvenile courts and have

[104] J. Fagan, *Juvenile Crime and Criminal Justice: Resolving Border Disputes*, FUTURE OF CHILDREN (2008).
[105] Barry C. Feld, *Reference of Juvenile Offenders for Adult Prosecution: The Legislative Alternative to Asking Unanswerable Questions*, 62 MINN. L. REV. 515 (1978).
[106] Jeffrey Fagan and Elizabeth P. Deschenes, *Determinants of Judicial Waiver Decisions for Violent Juvenile Offenders*, J. CRIM. L. & CRIMINOLOGY (1990).
[107] Marcy Rasmussen Podkopacz and Barry C. Feld, *Judicial Waiver Policy and Practice: Persistence, Seriousness, and Race*, 14 L. & INEQ. 73 (1996).
[108] *Juvenile Justice: Juveniles Processed in Criminal Court and Case Dispositions* (1995).
[109] *Id.*
[110] Marcy Rasmussen Podkopacz and Barry C. Feld, *The End of the Line: An Empirical Study of Judicial Waiver*, 86 J. CRIM. L & CRIMINOLOGY 449 (1996).
[111] J. C. Howell, *Juvenile Transfers to the Criminal Justice System: State of the Art*, 18 L. & POL. (1996).
[112] H. N. Snyder and M. Sickmund, *Juvenile Offenders and Victims: A National Report 2006*, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION (2006).

the authority to determine their jurisdiction, excluding certain youths based on age and the nature of the offense. For instance, many jurisdictions apply exclusion from juvenile court jurisdiction to CCL of 16 or older age who have allegedly committed first-degree murder, while others apply this exclusion to a broader range of offenses.[113] Setting the maximum age for juvenile court jurisdiction at 15 or 16—below the standard age of majority, which is typically 18—resulting in a significant portion of CCL being prosecuted as adults.[114]

(iii) Prosecutorial Waiver

Prosecutorial waiver, or direct-file, is another approach used by 15 jurisdictions to transfer certain CCLs to the criminal justice system.[115] In such jurisdictions, juvenile and criminal courts have simultaneous jurisdiction over specific age groups and types of crimes—usually involving elder CCL and heinous offences. The prosecution possesses the authority to determine the court the case will be heard at.[116]

In majority of jurisdictions with direct-file systems, legislations don't lay down any procedure to guide prosecution's determination on the choice of court.[117] Even though judges in juvenile waiver cases mostly have access to data from clinicians and court service staff regarding a CCL's maturity, sophistication, or suitability for treatment, prosecution generally does not have access to such personal information and primarily depend on police reports.[118] Although prosecutors are skilled in assessing the strength of the information and selecting charges, they do not contribute expert insights or offender-specific information when deciding whether a youth should be transferred or not.[119]

2. Recent Stance adopted by the US Supreme Court

113 P. Griffin, *Different from Adults: An Updated Analysis of Juvenile Transfer and Blended Sentencing Laws with Recommendations for Reform*, NATIONAL CENTRE FOR JUVENILE JUSTICE AND JOHN D. AND CATHERINE T. MACARTHUR FOUNDATION (2008).
114 United States General Accounting Office, "*Juvenile Justice: Juveniles Processed in Criminal Court and Case Dispositions*", (1995).
115 D.M. BISHOP & B. C. FELD, THE OXFORD HANDBOOK OF JUVENILE CRIME AND JUVENILE JUSTICE (OUP 2011).
116 D.M. Bishop et al., *Prosecutorial Waiver: Case Study of a Questionable Reform*, CRIME & DELINQ. (1989).
117 Barry C. Feld, *Legislative Exclusion of Offenses from Juvenile Court Jurisdiction: A History and Critique*, *in* THE CHANGING BORDERS OF JUVENILE JUSTICE: TRANSFER OF ADOLESCENTS TO THE CRIMINAL COURT (Jeffrey Fagan and Franklin Zimring, University of Chicago Press 2005).
118 D. M. Bishop, & Charles E. Frazier, *Transfer of Juveniles to Criminal Court: A Case Study and Analysis of Prosecutorial Waiver*, NOTRE DAME J. L. ETH. PUB. POL. (1991).
119 Stacy Sabo, *Rights of Passage: An Analysis of Waiver of Juvenile Court Jurisdiction*, FORDHAM L. REV. 64 (1996).

The U.S. Supreme Court in *Roper v. Simmons* ('Roper')[120] prohibited the use of capital punishment for individuals who were under 18 at the time of their crimes. In evaluating whether the capital punishment is constitutional, the Court considered whether it aligned with "*evolving standards of decency*". The Court examined state practices and international norms, including the UNCRC, leading to the conclusion that imposing the death penalty on minors did not conform to modern views of acceptable punishments. Additionally, the Court held that the capital punishment was disproportionate for CCL below 18 years. It demonstrated acceptance of neurobiological and social science evidence indicating that CCL are less mature, more prone to external influences, and have a greater capacity for change. Central to the Court's decision was the idea that these differences make individuals under 18 less culpable than adults. Although the *Roper* decision was limited to cases involving the death penalty, the underlying rationale of the Court's opinion suggests that few offenders under 18 should be treated as adults.[121]

In *Graham v. Florida* ('Graham'),[122] the Supreme Court expanded on the proportionality analysis established in *Roper,* and ruled that sentencing a CCL to life without parole for a non-homicide crime was unconstitutional. Both *Roper* and *Graham* provided three main arguments against punishing juveniles as harshly as adults, even when found criminally responsible. Firstly, CCLs' lack of maturity in displaying judgment and lower control over self, led them to behave impulsively and without fully understanding the results, which reduces their culpability. Secondly, CCL are greater prone to negative peer influence than adults, which further diminishes their criminal responsibility. The dependence of youth on parents and peers implies that some responsibility for their actions can be shared with others. Thirdly, CCLs' personalities are less developed compared to adults, meaning their crimes are less indicative of an inherently "*depraved character.*" The Court acknowledged that adolescents have reduced moral culpability and a higher potential for growth and change, reflecting their limited responsibility for past actions and an unformed, possibly redeemable character. This immaturity, being susceptible to bad influences, and temporary nature of their character undermined the retributive and deterrent justifications for severe punishments like the death penalty.

[120] Roper v. Simmons, U.S. 551(2005) 543.
[121] C. Haney et al., *Roper and Race: The Nature and Effects of Death Penalty Exclusions for Juveniles and the "Late Adolescent Class"*, 8 J. PEDIATR. NEUROPSYCHOL. 168 (2022).
[122] Graham v. Florida, 560 U.S. 48 (2010).

In *Miller v. Alabama* ('Miller'),[123] the Court held that juvenile offenders possess "*diminished culpability and greater prospects for reform*", necessitating that judges and juries be given the opportunity to consider the "*mitigating qualities of youth*" during sentencing, even in cases involving serious offenses. The Court stated that while life without parole might still be allowed, it could only be imposed on a juvenile after thorough judicial evaluation of their conditions and matureness. All three cases address the 8th Amendment to the United States Constitution, in particular the concept of "*cruel and unusual punishments*". The Supreme Court has held that a punishment is considered "*cruel and unusual*" if it is excessively harsh for the crime, applied in an arbitrary way, goes against society's sense of justice, or if a less severe punishment would be just as effective.[124] The Court in *Miller* determined that granting mandatory life imprisonment without parole to minor defendants at the time of their crimes was violative of the 8th Amendment.

3. Effectiveness of the Transfer Process

Jeffrey Fagan, a leading criminologist and Professor at Columbia Law School, in a key study, analysed 2,400 juveniles in New York and New Jersey, and found that those tried in regular courts were rearrested more frequently and quickly than those in juvenile courts. Even after adjusting for prior records, adult prosecution led to a 50% higher risk of violent crime rearrest, highlighting the long-term harms of transferring minors to regular courts.[125]

The Florida research team found that youths tried in regular courts had higher rates of re-arrest for violent felonies than those kept in the juvenile system.[126] The Task Force on Community Preventive Services conducted a review of all studies comparing recidivism rates between CCLs transferred to adults courts and those kept back in juvenile courts.[127] Despite the differences in jurisdictions, time periods, methodologies, and types of transfer policies examined, the findings were notably consistent.

[123] Miller v. Alabama 567 U.S. 460 (2012).
[124] Furman v. Georgia, 408 U.S. 238 (1972).
[125] J Fagan et al, *Be Careful What You Wish for: The Comparative Impacts of Juvenile versus Criminal Court Sanctions on Recidivism among Adolescent Felony Offenders*, COLUMBIA LAW SCHOOL WORKING PAPER NO. 03–62, (2003).
[126] Lanza-Kaduce et al, *Juvenile Offenders and Adult Felony Recidivism: The Impact of Transfer*, 28 J. CRIM. & JUST. (2005).
[127] Centre for Disease Control, *Effects on Violence of Laws and Policies Facilitating the Transfer of Youth from the Juvenile to the Adult Justice System*, MORBIDITY AND MORTALITY WEEKLY REPORT 56 (2007).

The Task Force arrived at the conclusion, that after returning to the society, CCL tried in regular courts exhibited high and fast rates of recidivism rates, particularly for violent crimes, compared to those processed in juvenile courts.

(C) OVERVIEW OF THE LEGAL FRAMEWORK IN INDIA

1. Types of Crimes Committed by CCL in India

The kinds of crimes committed by children can be divided into petty, heinous, and serious offenses.[128] Petty offenses are those, when the Bhartiya Nyaya Sanhita ('BNS') or any other applicable criminal law imposes a maximum penalty of three years in prison.[129] They include theft, pick-pocketing and mere assault. Serious offences are those which carry a carry a three- to seven-year prison sentence [130] and include kidnapping or abducting a person and subjecting them to grievous hurt or slavery, extortion or forgery. Heinous crimes are those which bear a minimum seven-year sentence [131] such as rape, murder and culpable homicide.

According to data from the National Crime Records Bureau ('NCRB'), theft and hurt accounted for the majority of crimes perpetrated by adolescents in 2022, which was followed by criminal trespass, attempt to commit murder, robbery and rape.[132] Additionally, less than 1% of all apprehensions each year were of girls, and 75% of minors arrested were between the ages of 16 and 18.[133] Summarizing the findings for the year 2022, 37,780 juveniles were apprehended in India, of which 7,844 children were apprehended for cognisable crimes committed under the IPC, of which 1,346 children were under the age of 16. 90 children below 16 were apprehended for heinous crimes such as murder and

[128] VIKASPEDIA, *Children in Conflict with Law* (Oct. 24, 2024), https://vikaspedia.in/social-welfare/women-and-child-development/child-development-1/children-in-conflict-with-law.
[129]The Juvenile Justice (Care and Protection of Children) Act, 2015, §2(45).
[130]*Id*, §2(54).
[131]*Id*, §2(33).
[132] *Crimes by Juveniles: Year- and Crime-type-wise Number of Juveniles Apprehended for IPC Crimes*, NATIONAL CRIME RECORDS BUREAU (2022).
[133] *Crimes by Juveniles from NCRB: Year- and Crime-type-wise Number of Juveniles Apprehended for IPC Crimes,* DATAFUL (OCT. 25, 2024), https://dataful.in/datasets/19963/.

rape, and 433 children below 18 were apprehended for the same.[134] Some notable trends that have been observed in juvenile crimes, with a rapidly changing society, are the increase in the use of firearms, the rapid rise in the instances of rash driving under the influence of alcohol and the general decrease in the number of offenses perpetrated by juveniles below the age of 16, with a consequent rise in the total number of crimes committed by minors between the ages of 16 and 18.[135]

2. An Analysis of the 2015 Act's Provisions with respect to Trying Minors as Adults

In response to public outcry over issues of public security and justice in cases of violence against women, particularly when minors were involved, the Government of India faced intense pressure. As a result, it introduced a provision allowing individuals aged 16 to below 18 years, accused of heinous offences, to be tried in regular courts.

(i) Legislative Framework and Classification of Offences

Every State Government is mandated to form one or more JJB's for every district.[136] The JJB exercises the same powers as a Metropolitan Magistrate or Judicial Magistrate First Class under the Code of Criminal Procedure, 1973.[137] It has exclusive jurisdiction over all proceedings involving CCL within its territorial limits.[138] The JJB conducts inquiries and is authorised to pass appropriate orders under Sections 8 and 17.

The 2015 Act classifies offences committed by minors into three categories- petty, serious and heinous. The JJB handles petty offenses through summary proceedings[139], while serious and heinous offenses committed by children younger than sixteen years of age are dealt by following the summons case procedure as laid down in the Bharatiya Nagarik Suraksha Sanhita[140] For such cases, the accused

[134] Aneesha Mathur, *Why Supreme Court called for guidelines to put juveniles under trial as adults*, INDIA TODAY (July 17, 2022), https://www.indiatoday.in/law/story/why-supreme-court-called-for-guidelines-to-put-juveniles-under-trial-as-adults-1976670-2022-07-17.
[135] S. Deepala., *Data: More Than 75% of Juveniles Apprehended for Crimes in 16 to 18 Age Group; 99% Are Boys*, FACTLY (June 03, 2024), https://factly.in/data-more-than-75-of-juveniles-apprehended-for-crimes-in-16-to-18-age-group-99-are-boys/.
[136] The Juvenile Justice (Care and Protection of Children) Act, 2015, §4.
[137] The Juvenile Justice (Care and Protection of Children) Act, 2015, § 8(2).
[138] *Juvenile Justice Act 2015- A Handbook for Field Administrators*, National Gender Centre.
[139]The Juvenile Justice (Care and Protection of Children) Act, 2015, §14(5)(d).
[140]*Id.* §14(5)(e).

is ordinarily summoned rather than arrested. Upon appearance, the particulars of the offence are explained, and the plea is recorded.[141] If the accused pleads guilty, the court may convict them on that basis. If not, the trial proceeds with the examination of witnesses, followed by the statement of the accused, any defence evidence, and final arguments. Finally, where children aged 16-18 are concerned, they are to stand trial, as adults, should they be accused of a heinous crimes.[142] The term "*heinous*" has been defined very broadly in the 2015 Act, with at least 46 offences in the country falling within such an ambit.[143] As affirmed in *Puneet S. v. State of Karnataka*, only the JJB has the authority to determine whether the offence is heinous or not.[144] In cases involving heinous offences, the JJB is empowered to conduct a preliminary assessment under Section 15, which must be completed within three months of the child's first appearance.[145] As a heinous offence includes one where the minimum punishment under the relevant criminal law in force is seven years or more, there are some difficulties in practice, as some offences under the BNS lack a minimum penalty yet stipulate a maximum sentence exceeding seven years of imprisonment.[146]

(ii) Preliminary Assessment by the JJB

To determine whether an offence committed was a 'heinous' one or not, the JJB needs to perform a preliminary assessment. The JJB is required to take into consideration certain factors, being (a) the child's capacity to perpetrate the act, both mentally and physically; (b) the competence to recognize the repercussions of the offense; (c) the environment and setting in which the crime was committed; and (d) previous criminal history, if any, along with the child's capacity for rehabilitation.[147] The JJB can seek the help of experienced psychiatrists, psycho-social workers, or other specialists for this evaluation.[148] As stressed on by the Supreme Court in *Thirumoorthy v. State*, this preliminary assessment and report by the JJB is mandatory in nature, without which the child cannot be convicted as an

[141] *Bharatiya Nagarik Suraksha Sanhita, 2023*, § 274.
[142] The Juvenile Justice (Care and Protection of Children) Act, 2015, §14(5)(f).
[143] Swagata Raha, *Treatment of Children as Adults under India's Juvenile Justice (Care and Protection of Children) Act, 2015*, 27 INT'L J. CHILDREN'S RTS. 780 (2019).
[144] Shri Puneet S. v. State of Karnataka, 2019 (4) AKR 662.
[145] The Juvenile Justice (Care and Protection of Children) Act, 2015, §15.
[146] Offences such as forgery of a valuable security, will [Section 338] and stealing property [Section 317] have no minimum sentence prescribe, yet have a maximum sentence exceeding seven years.
[147] The Juvenile Justice (Care and Protection of Children) Act, 2015, §15.
[148] *Id.*

adult.[149] After the preliminary assessment, the JJB has two options: Firstly, if it concludes that a juvenile trial should be held for the child, the child will be dealt with under the regular juvenile justice process.[150] Alternatively, if it recognises that the child should be tried as an adult, they will be moved to the CC, which is a Sessions Court with additional provisions for hearing crimes involving minors.[151] Then the juvenile concerned will face trial as an adult.

(iii) Psychological Analysis in the Preliminary Assessment

The JJB, while carrying out the preliminary assessment as mandated by Section 15, may look for the assistance of skilled psychologists, psychosocial workers, or other professionals in this evaluation.[152] While the legislature used the word may when drafting this provision, the Supreme Court has clarified that the JJB must enlist the assistance of seasoned psychologists, psychosocial workers, or other experts.[153] . The purpose of this requirement is to ensure that the evaluation provides an impartial and thorough understanding of the juvenile's mental and emotional condition, allowing the JJB to make well-informed decisions about whether the juvenile ought to be tried as an adult.[154] Though the necessity of involving a practicing professional in child psychiatry during the assessment has been mandated by the Supreme Court, as noted in *Barun Chandra Thakur v. Bholu,* ('Bholu')[155] there are currently no clear guidelines to assess the level of expertise and professionalism these specialists should possess. This lack of defined standards has led to inconsistencies in psychological evaluations, affecting the overall reliability and depth of the assessments, which are crucial for fair judicial outcomes.

(iv) Transfer to Children's Court

In contrast to the juvenile justice system in the U.S., where juveniles tried as adults are transferred to ordinary criminal courts where adults are prosecuted, in India, such juveniles are tried in specialised CCs formed exclusively for this purpose. Section 19 of this Act highlights the powers that have been

[149] Thirumoorthy v. State Represented by the Inspector of Police, 2024 INSC 247.
[150] The Juvenile Justice (Care and Protection of Children) Act, 2015, §15.
[151] *Id.* §18(3).
[152] *Id.* §15.
[153] Barun Chandra Thakur v. Master Bholu & Anr., (2023) 12 SCC 401.
[154] *Id*
[155] *Id.*

granted to the CC.[156] This type of court has the jurisdiction to try the minor as an adult, but it must also consider the child's unique requirements as well as the rehabilitation and reintegration principles. If the juvenile is convicted then the court may impose a sentence but must ensure that the child is not sent directly to an adult prison.[157] Instead, the child may serve part of their sentence in a juvenile home or special correctional facility until they turn 21, after which a review is conducted to decide whether the remaining sentence should be served in an adult prison.[158] The subjective nature of review by the CC has raised concerns over the possible victimisation of children from minority and underprivileged populations, as well as the arbitrary deprivation of liberty. Children who belong to the marginalised section of the society, may lack access to legal representation, social capital, rehabilitative support structures and thus may disproportionately be transferred to a CC to be tried as an adult. A child who has committed a similar crime, may just continue to be tried as a juvenile if they have the means and the necessary support for the same. If not convicted, then the child is sent back to the JJB for appropriate orders of rehabilitation and care. In usual circumstances, when the juvenile is not tried as an adult, the orders passed by the JJB include measures such as guiding involvement in community work or group counselling, letting the child leave with guidance or advise, imposing a fine (ensuring compliance with labour laws if the child is working), or releasing the child on probation in the custody of a parent or guardian, or appropriate facility for up to 3 years.[159] The child may be placed in a specialised facility for rehabilitative services, including schooling, skill acquisition, and treatment, for a duration of up to three years.[160]

(v) Sentencing

This Act further mandates that juveniles cannot be sentenced to death, or life in prison, irrespective of them being tried as an adult or as a minor without the possibility of release.[161] Thus, there is a prohibition on sentencing a child to death and life imprisonment without the possibility of parole. However, despite such protections offered by the law, juveniles being tried as adults, are often

[156] The Juvenile Justice (Care and Protection of Children) Act, 2015, §19.
[157] *Id.*
[158] *Id.*
[159] *Id.* §18; Karan v. State of Madhya Pradesh, (2023) 5 SCC 504; CCL (K) v. State of NCT of Delhi, 2025 SCC OnLine Del 1307.
[160] *Id.*
[161] The Juvenile Justice (Care and Protection of Children) Act, 2015, §21.

sentenced to life imprisonment without the chance of an early release due to the lack of explicit guidelines on trying children as adults.[162] Using judicial precedents, scientific reports, social statistics and international covenants, the authors of this paper will go onto argue to prove the ineffectiveness of such a provision of trying a child as an adult.

3. Case Studies

The implementation and conversely, the non-implementation, of trying minors as adults in India for heinous offences committed can be looked into with the help of several case laws and incidents of recent times. In *Bholu*., the Supreme Court stressed on the importance of having proper guidelines and framework to accurately perform a preliminary evaluation using Section 15 of the 2015 Act and determining when a juvenile should be sent to be judged in a regular court.[163]

The most evident acceptance of transfer appears where the offence is both sexually violent and fatal. On August 08, 2024, the Rohini District Court in Delhi tried a minor as an adult for the rape and murder of a five-year old.[164] The juvenile received a life sentence in jail and a fine cumulating to Rs. 20,000.[165] A near identical approach was taken by the Orissa CC where a minor was tried as an adult for the rape and killing of a five-year-old and received a 20-year prison sentence.[166] Offences like rape and murder fall in the category of 'heinous' and thus warrant the trying of minors as adults. Yet the Telangana High Court has warned that the preliminary assessment under Section 15 cannot be perfunctory. It set aside a JJB order which had conducted such assessment in barely a day without a

[162] R. Nagpal, *Rethinking Life Sentences for Juvenile Offenders*, IPROBONO (Aug. 06, 2024), https://i-probono.in/rethinking-life-sentences-for-juvenile-offenders/.
[163] Barun Chandra Thakur v. Master Bholu & Anr., Criminal Appeal No.950/2022.
[164] *Delhi Court sentences minor tried as adult to life imprisonment for the rape and murder of 5-year-old girl*, ANI (Aug. 8, 2024), https://www.aninews.in/news/national/general-news/delhi-court-sentences-minor-tried-as-adult-to-life-imprisonment-for-rape-and-murder-of-5-year-old-girl20240808013020/; *Man gets life term for brutal rape, murder of 5-year-old girl in Delhi*, HINDUSTAN TIMES (Aug. 07, 2024), https://www.hindustantimes.com/india-news/man-gets-life-term-for-brutal-rape-murder-of-5-year-old-girl-in-delhi-101723039885333.html; V. Upadhyay, *Delhi Court sentences juveniles to life for rape and murder of 5-year old girl in rare case,* TIMES OF INDIA (Aug. 08, 2024), https://timesofindia.indiatimes.com/city/delhi/delhi-court-sentences-child-in-conflict-with-law-to-life-for-raping-and-murdering-5-year-old-girl/articleshow/112360743.cms.
[165] *Id.*
[166] State of Orissa v. 'CCL', TR No.08 of 2021; *Orissa minor tried as adult, gets 20 yrs jail*, THE TIMES OF INDIA (Feb. 07, 2024), https://timesofindia.indiatimes.com/india/odisha-minor-tried-as-adult-gets-20-yrs-jail/articleshow/107470220.cms.

reasoned appraisal for mental capacity, understanding of consequences or the circumstances of the crime.[167]

Transfer has also been invoked, though more controversially, in crimes lacking a sexual component. In the Gurugram school murder incident, the JJB decided to try the minor as an adult, even when there was no occurrence of a rape.[168]

Distinct inconsistencies have also been witnessed in drunk-driving accidents. Apart from factors like the gravity of the crime committed, ancillary elements like the State's negligence in fulfilling its duty of care by allowing a minor to use an unregistered automobile in an inebriated condition as witnessed in the Pune car crash incident,[169] may also come into play, when the JJB makes its assessment as to whether or not an adult trial should be held for the minor. A similar incident of rash drunken driving by a minor was witnessed in Pune in May, 2024. Here, the police argued for trying the minor as an adult but the offender was initially released on bail and asked to spend 15 days assisting the traffic police and writing an essay about the accident.[170] This caused a great uproar in the country with proceedings still continuing to determine as to whether the minor should be tried as an adult or not. Similar instances have resulted in differing decisions on whether the minor should be tried as an adult or not.

Another circumstance which the juvenile justice system in India has been confronted with are egregious instances of one child against another. The most notable instance of such a circumstance is the Ryan International School murder case. Here, a student, 7 years of age, at the school was murdered by a Class XI student.[171] The JJB convened a committee to evaluate the mental and physical condition

[167] M.K. v. State of Telangana, Criminal Revision Case No.255 of 2023; Aiman J. Chishti, *Hyderabad Gang Rape; Telangana High Court Sets Aside Magistrate's Decision to Try Juvenile as Adult, Says Entire Assessment Done in One Day*, LIVELAW (Apr. 27, 2023), https://www.livelaw.in/high-court/telangana-high-court/telangana-high-court-hyderabad-gang-rape-sets-aside-magistrate-decision-juvenile-adult-227337.

[168] Barun Chandra Thakur v. Master Bholu & Anr., (2023) 12 SCC 401.

[169] Abraham Thomas, *Juvenile or adult? Crime and laws, India and abroad*, HINDUSTAN TIMES (May 24, 2024), https://www.hindustantimes.com/india-news/juvenile-or-adult-crime-and-laws-india-and-abroad-101716490217992.html.

[170] *Pune drunk driving accident kills 2: Teen Porsche driver gets bail on 4 conditions — write essay, work with police...,* LIVE MINT (May 20, 2024), https://www.livemint.com/news/india/pune-news-minor-porsche-driver-asked-to-write-essay-after-killing-two-in-drink-and-drive-case-11716187211709.html.

[171] *Id.*

of the accused and following these evaluations, the JJB determined that the accused had the mental capacity to comprehend the repercussions of his behaviour, and ordered that he be tried as an adult.[172] However, the Punjab and Haryana High Court remanded the case back to the JJB for reconsideration, after an appeal was filed against the JJB's decision.[173] The matter was subsequently escalated to the Supreme Court, which stayed the trial proceedings pending a final determination on whether the accused should face trial as a juvenile or adult. As of November 2021, the Supreme Court had not yet resolved this issue, and the trial had yet to commence. In October 2022, the Court granted interim bail to the accused, pending the final outcome of the case.[174]

4. Ineffectiveness of Trying Juveniles as Adults in India

When the Bill proposing that children be tried as adults was passed in the Parliament, it ignited a visible divide. On one end of the spectrum were lawmakers and sections of the public who saw harsher penalties as a solution to curb juvenile crime. On the other end, stood scholars and child rights experts who cautioned that punitive measures neither deter future offences nor account for the complex causes of youth delinquency. This section examines the authors' critique of the provision through scientific, social, and legal perspectives, highlighting the deeper conflict between retribution and rehabilitation.

(i) The Scientific Argument

It is a well-known fact that teenagers' decision-making, impulse control, and susceptibility to peer pressure are all impacted by the notable developmental variations between adolescents and adults.[175] The behaviour of juveniles suggests that the prefrontal cortex is inactive, with the amygdala—the region responsible for emotional regulation—governing behaviour. Parental counsel at this period instructs youngsters to contemplate before acting, emphasising the importance of reflection before action. Consequently, the majority of youth crime is driven by enthusiasm rather than rationality.

[172] *Id.*; *Ryan school murder case: Class 11 student confessed he killed Pradyuman Thakur, says CBI,* LIVE MINT (Nov. 09, 2017), https://www.livemint.com/Politics/acQQwygFhJcUqOdo2VkrbM/Ryan-School-murder-Accused-Class-XI-student-admits-killing.html.
[173] Francis Thomas v. Central Bureau of Investigation, 2017 SCC OnLine P&H 4506.
[174] Barun Chandra Thakur v. Master Bholu & Anr., 2022 SCC OnLine SC 870.
[175] Kayla Pope et al., *Developmental Neuroscience and the Courts: How Science is Influencing the Disposition of Juvenile Offenders*, 51 J. AM. ACAD. CHILD ADOLESC. PSYCHIATRY 341 (2017).

Research indicates that as adolescents develop, their likelihood of re-offending significantly diminishes; incarcerating minors for extended periods prolongs their confinement beyond the necessary duration for rehabilitation.[176] Consequently, juvenile criminals, due to their immaturity, are less likely to comprehend the repercussions of their actions and should be afforded the option for rehabilitation and transformation.

(ii) The Social Argument

When the 2015 Act was passed, some of the primary criticisms were regarding the inadequate implementation of nearly all facets of the older legislation, including vacant magistrate positions, insufficient physical infrastructure for case files, a markedly low ratio of probation officers to children, and a deficiency of trained social workers.[177] A significant problem for a nation such vast as India is the advocacy for revisions when the original legislation has never been implemented in its genuine essence. In nearly every district in India, case files are maintained in session courts, transported to the Observation Home on hearing days, with no dedicated police units for minors and probation officers hindered from doing necessary background checks due to excessive workloads. The ground reality was not taken into consideration before the new 2015 Act had caved its way in. Data shows that since 2021, around 5,128 minors have been waiting for the adjudication of their case,[178] further there have been very few instances where the JJB has taken into consideration the expert advice and opinion of psychologists. Furthermore, CCL accounts for only 1.2% of crimes reported. Based on this, an argument can, and is being made that the drastic changes brought about by the 2015 Act are not required in the Indian juvenile justice system.[179]

(iii) The Legal Argument

The Parliamentary Standing Committee on Human Resource Development, in its 264th report, asserted that the current juvenile justice system is both rehabilitative and reformative, acknowledging

[176] *The Case Against Trying Minors as Adults*, NEWS LAUNDRY (May 18, 2015), https://www.newslaundry.com/2015/05/18/the-case-against-trying-minors-as-adults.
[177] *Id.*
[178] *Juvenile crime rate highest in Delhi last year: NCRB data*, THE INDIAN EXPRESS (Dec. 6, 2023), https://indianexpress.com/article/cities/delhi/juvenile-crime-rate-highest-in-delhi-last-year-ncrb-data-9056140/.
[179] *Id.*

that the ages of 16 to 18 are particularly sensitive and critical, necessitating enhanced protection.[180] Therefore, it is unnecessary to subject minors to a distinct or adult legal system, as this would contravene Articles 14 and 15(3) of the Constitution.[181] The Supreme Court maintained the constitutionality of retaining all individuals under 18 years of age inside the juvenile justice system as per the previous 2000 Act in two consecutive decisions prior to the enactment of the 2015 Act.[182] When a child is transferred to the regular court system, two fundamental elements of a fair trial—the presumed state of innocence and the right to remain silent—may be compromised. Transferring a minor to a CC for an adult trial implies a prejudgment of the child's capacity and responsibility, so undermining the trial's impartiality. The Indian Supreme Court has ruled that laws that violate this assumption of innocence may violate the right to equality if they are deemed irrational or arbitrary, and the right to life and personal liberty if they are unjust, unfair, or unreasonable, even though the presumption of innocence is not guaranteed by the Indian Constitution.[183] While the presumption of innocence is not explicitly included within the scope of Article 21, the right to a fair procedure is unequivocally safeguarded.[184]

It has been held in *Selvi v. State of Karnataka*, that the accused possesses the right to decline answering any self-incriminating enquiries, and no negative inference may be derived from such silence.[185] Children, due to their developmental vulnerabilities, are less equipped to navigate adversarial processes. The harsh interrogation tactics and adult punitive approaches may compel them to incriminate themselves or undermine their ability to maintain silence. No legal framework, whether domestic or international, permits an age of liability which may vary with external fluctuations. A definitive threshold exists beyond which one is regarded as an adult. Most countries recognise a cut-off age of ten years for a child's capacity to possess criminal intent, and similarly, there exists an age

[180] Standing Committee on Human Resource Development, *The Juvenile Justice (Care and Protection of Children) Bill, 2014, Two Hundredth and Sixty-Fourth Report* (Feb. 2015) ¶ 3.21.
[181] INDIA CONST. arts.14 & 15 cl.3.
[182] Salil Bali v. Union of India & Anr., (2013) 7 SCC 705; Dr. Subramanian Swamy v. Raju, Thr. Member Juvenile Justice Board, 2013 8 S.C.R. 520.
[183] Swagata Raha, *Treatment of Children as Adults under India's Juvenile Justice (Care and Protection of Children) Act, 2015*, 27 INT'L J. CHILDREN'S RTS. 780 (2019).
[184] Ranjitsingh Bhramajeetsingh Sharma v. State of Maharashtra, 2005 5 SCC 294.
[185] Selvi v. State of Karnataka, 2010 7 SCC 263.

of juvenility that must be acknowledged. It is impossible to quantify mental development to designate an individual as an adult, and the law does not permit a case-by-case modification of requirements.

V. DOES THE TRANSFER SYSTEM BALANCE THE VICTIMS' RIGHTS WITH THOSE OF THE CCLS'

With the enactment of the 2015 Act, a paradigm shift from the rehabilitative theory to the retributory theory can be seen, by allowing for CCL to be tried as adults and with the creation of more stringent provisions.[186] Due to the failures of such model, as discussed above, it becomes essential to shift to a restorative justice model which balances the rights to victims in relation to those of the CCL.

Restorative justice perceives crime as harm inflicted on the victim and the community, seeking to mend that harm through the active involvement of the offender, the victim, and the community.[187] This approach is based on the belief that justice requires restoration for those who have suffered injury.[188] It allows victims to take part in the justice process and encourages offenders to recognize the harm their actions have caused, thereby improving their accountability to the victim and helping juveniles make amends for their actions.[189]

Restorative justice includes various intervention methods that promote active involvement from all parties, with Victim-Offender Mediation being one of the most well-known.[190] This process involves the victim and offender meeting with a trained mediator to discuss the incident, often after separate preliminary meetings.[191] During mediation, victims share the impact of the offense and the harm they experienced, while offenders explain their actions and respond to the victims' questions.[192]

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[186] *Critique of the Juvenile Justice (Care and Protection of Children) Bill, 2014,* CENTRE FOR CHILD AND THE LAW (May 06, 2015).
[187] T. M. Godwin, *The Role of Restorative Justice in Teen Courts: A Preliminary Look*, OFFICE OF JUSTICE PROGRAMS (2001), available at https://www.ojp.gov/pdffiles1/ojjdp/188356.pdf; M. M. Bunch, *Juvenile Transfer Proceedings: A Place for Restorative Justice Values*, 47 HOWARD L. J. 922 (2003).
[188] T. W. Jun et al., *Tackling Juvenile Delinquency: Enhancing Restorative Justice in Singapore,* NATIONAL UNIVERSITY OF SINGAPORE (Apr. 2013).
[189] Kate E. Bloch, *Reconceptualizing Restorative Justice*, 7 HASTINGS RACE & POVERTY L. J. 201 (2010).
[190] *Promoting Youth Justice Through Restorative Alternatives*, VERMONT AGENCY OF HUMAN SERVICES (Sept. 10, 2003), https://humanservices.vermont.gov/highlighting-promising-practice/circles-support-and-accountability-cosa-and-restorative-justice.
[191] *Id.*
[192] *Id.*

This restorative approach, when combined with subsequent rehabilitative efforts, offers advantages over a solely rehabilitation-focused system for both the offender and the victim. Restorative justice programs foster greater accountability among juvenile offenders, support their reintegration into society, and provide more satisfaction for victims.[193] Through interaction, offenders develop a sense of personal accountability, realising that their actions have created an obligation to the victim. This accountability helps them understand the consequences of their behaviour and take concrete steps to repair the damage and make amends.[194]

VI. CONCLUSION

A comprehensive analysis of the juvenile justice systems in the U.S. and India reveals key differences and evolving philosophies in addressing children who come into conflict with the law. Both nations have grappled with how to respond to serious offenses by minors, often oscillating between a welfare-oriented approach and a punitive stance. There is a need for a child-centric paradigm that ensures accountability in a manner consistent with the juvenile's capacity for change and dignity. To realign juvenile justice with this child-centred vision, there should be a statutory presumption that juveniles will not be transferred to regular courts with exceptions being limited to the rarest of rare cases permitted only after a rigorous and multidisciplinary evaluation of the child's circumstances and developmental capacities. A higher age of criminal responsibility should be uniformly developed.

Further, counselling, community service, victim-offender mediation, and the adult criminal system. Contemporary insights brought to light by neuroscientists can be integrated into juvenile sentencing and correctional frameworks to ensure proportionate accountability. As these studies show that adolescent brains are still developing, affecting impulse control, risk assessment, and character formation, legal responses must therefore calibrate accountability to a youth's developmental stage recognizing that most juveniles have a great capacity for reform if handled appropriately. This punitive trend that has been adopted by nations including India after the enactment of the 2015 Act conflicts

[193] Mark S. Umbreit, *Holding Juvenile Offenders Accountable: A Restorative Justice Perspective*, 46 JUV. FAM. COURT J. 32 (1995).
[194] Gauri Pillai and Shrikrishna Upadhyay, *Juvenile Maturity and Heinous Crimes: A Re-Look at Juvenile Justice Policy in India*, NUJS L. REV. (2017).

with the core principles of justice and child protection, which are upheld in both national and international laws. To truly serve the best interests of children and society, a balanced approach that emphasises restorative justice and prioritizes the well-being and development of the child is essential for meaningful legal reform.