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Re-imagining Marriage: Analysing the Emergence of Sologamy

Vishnudas Dwarakamai[1]

ABSTRACT

For many years, the institution of marriage has been crucial in maintaining cultural continuity, regulating society, and upholding the law. Marriage, which has historically been defined as a union between two people, has changed from being a patriarchal institution based on religious and cultural standards to a more pluralistic and personalised idea. The act of marrying oneself, or sologamy, is critically examined in this essay as a performative and symbolic challenge to traditional marriage norms. The study situates sologamy within broader discourses on identity, empowerment, and the legal boundaries of interpersonal relationships by tracing the historical evolution of marriage and comparing it with contemporary expressions of self-love and autonomy.

Utilising a variety of interdisciplinary sources, including media analysis, sociological theory, and legal literature, the study examines how sologamy is positioned both culturally and legally in various jurisdictions. Despite not having legal recognition in any nation, its increasing prominence in the US, UK, and India highlights its symbolic significance. The research highlights the ceremonial formalisation of personal commitment that sets sologamy apart from routine self-care practices. It also inquires whether current legal systems implicitly support or oppose such actions.

Divergent opinions are evident in public discourse and media representations: some view sologamy as a feminist declaration of independence and defiance of patriarchal standards. In contrast, others write it off as selfish or escapist. In response to these criticisms, the study emphasises how sologamy challenges conventional wisdom regarding emotional fulfilment and relationships. In the conclusion, the study makes the case that, although not being enforceable by law, sologamy signifies a cultural change in the way that intimacy, independence, and identity are viewed. In an increasingly individualistic society, it challenges academics and decision-makers to reevaluate the parameters of non-traditional partnerships and the growing range of personal expression.

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Keywords: Sologamy, Autonomy, Intimate Choice, Feminist Jurisprudence, Marriage Evolution, and Legal Recognition.

INTRODUCTION

Throughout history, marriage has served as a legal and cultural institution with roots in familial continuity, religious approval, and societal governance.[2] It is still firmly ingrained in Indian law frameworks and normative expectations, frequently seen as a rite of passage and a pillar of individual legitimacy[3]. But these conventional ideas are starting to be called into question by recent developments in identity politics, feminist jurisprudence, and individual autonomy. Sologamy, also known as self-marriage, is one of the most controversial trends. It is a symbolic act in which people pledge to themselves without a partner. Sologamy encourages critical investigation into the changing definitions of intimacy, selfhood, and legal personhood despite its lack of official legal status.

This essay uses doctrinal analysis, constitutional interpretation, and cultural critique to examine the consequences of sologamy within the larger socio-legal debate on autonomy and marriage. It examines how self-marriage challenges long-standing marital standards and reflects new forms of emotional agency by drawing on feminist legal theory and comparative jurisprudence. In the Indian context, where constitutional jurisprudence, particularly under Article 21, has progressively upheld the right to personal liberty, privacy, and intimate choice, the phenomenon is especially pertinent[4]. Despite not being recognised by law, sologamy could find implicit resonance in these changing constitutional norms.

Accordingly, the research is guided by the following questions.
How does sologamy contradict conventional legal definitions of marriage under Indian law? Which constitutional precepts, if any, lend credence to the idea that self-marriage is a sign of personal autonomy? What does the media's and society's perception of sologamy tell us about changing ideas of identity and selfhood? By tackling these issues, the study hopes to advance

[2] FLAVIA AGNES, LAW AND GENDER INEQUALITY: THE POLITICS OF WOMEN'S RIGHTS IN INDIA (Oxford Univ. Press 1999).
[3] Hindu Marriage Act, No. 25 of 1955, India Code (1955); Special Marriage Act, No. 43 of 1954, India Code (1954)
[4] INDIA CONST. art. 21.

new research on nontraditional intimate behaviours and how they relate to autonomy, culture, and the law.

METHODOLOGY

This study examines the socio-legal aspects of sologamy and how it defies traditional marital rules using a qualitative, multidisciplinary technique.[5] The study's main focus is doctrinal, entailing a careful examination of Indian legal frameworks like the Hindu Marriage Act, 1955, and the Special Marriage Act, 1954, as well as Article 21 constitutional provisions that protect individual freedom and self-determination.[6] To determine whether sologamy, although not being legally recognised, receives implicit support within broader constitutional interpretations, landmark rulings extending the extent of intimate rights are analysed.

The research uses secondary sources, including peer-reviewed journals, legal commentary, and academic materials retrieved through SCC Online, Manupatra, and SCOPUS, to place sologamy within changing cultural narratives. The writings of Rochona Majumdar, Archana Parashar, and Flavia Agnes offer important perspectives on gender, identity, and the symbolic meaning of marriage[7]. In countries like the US, Japan, and Brazil, where self-marriage has become more popular, a comparative legal lens is used to provide a more nuanced picture of how it is seen and treated by the law globally.

In order to capture public opinion and the cultural framing of sologamy, the methodology also incorporates media discourse analysis. To track how self-marriage is portrayed, whether as spectacle, escapism, or empowerment, news stories, interviews, memes, and social media narratives are examined. By integrating doctrinal research, comparative analysis, and cultural discourse, this triangulated method guarantees a multi-layered examination of sologamy as a legal aberration and a reflection of evolving ideas of autonomy and selfhood. To maintain academic integrity and consistency, all handwritten literature reviews and source summaries are kept in research notebooks and cross-referenced with the typed draft.

RESEARCH OBJECTIVE

[5] RONALD DWORKIN, LAW'S EMPIRE (Harvard Univ. Press 1986).

[6] Hindu Marriage Act, *supra* note 3; Special Marriage Act, *supra* note 3.

[7] Agnes, *supra* note 2; Archana Parashar, *Women and Family Law Reform in India*, 11 INDIAN J. GENDER STUD. 1 (2004).

The goal of the study is to determine whether the practice of self-marriage, in spite of its lack of official legal recognition, is consistent with Indian law's evolving constitutional values of autonomy, dignity, and intimate choice. Examining sologamy as a new socio-legal phenomenon that questions conventional ideas of marriage, intimacy, and legal personhood is the main goal of this study. It also seeks to investigate how media narratives, feminist jurisprudence, and comparative international viewpoints construct sologamy as a cultural spectacle or as a means of personal empowerment.

This research's contribution to current Indian legal scholarship on non-normative forms of intimacy is what makes it significant. There is little room for the analysis of symbolic and performative manifestations of self-defined commitment in the current legal discourse, which primarily conceptualizes marriage as a bilateral institution based on reciprocity, enforceable obligations, and family-centric norms. This paper emphasizes the conceptual shortcomings of current family law frameworks in addressing new practices of identity and autonomy by placing sologamy within constitutional jurisprudence, feminist legal theory, and cultural discourse. The study emphasizes sologamy's significance as a cultural practice that reflects broader changes in how autonomy, dignity, and personal choice are understood in modern society, rather than arguing for its legal recognition.

ANALYSIS

Doctrinal Gap: Why sologamy cannot qualify as marriage in law

Due to its failure to meet the doctrinal prerequisites of marriage under Indian law, sologamy presents the first and most evident obstacle to its inclusion in the legal framework. Marriage is explicitly considered to be a bilateral connection between "two persons" by both the Hindu Marriage Act of 1955 and the Special Marriage Act of 1954.[8] The laws govern cohabitation, maintenance, succession, and divorce procedures, rights, and duties that inherently need reciprocity. Sologamy, on the other hand, is a unilateral act in which a person commits to himself symbolically. Since no reciprocal legal obligations may be imposed against the self, self-marriage cannot be a legally recognised marriage under Indian law, according to strictly doctrinal reasoning.

[8] Hindu Marriage Act, *supra* note 3; Special Marriage Act, *supra* note 3.

Contract theory supports this restriction even more. The statutory form of marriage in India contains fundamental contractual features like mutuality, consent, and capacity, even if it is not legally contractual under Hindu law. [9]According to traditional contract law, two separate parties must make an offer and accept it, backed by consideration, for an agreement to be enforceable. This structure is destroyed by a unilateral act of self-marriage, making it null and void. This explains why, despite sologamy's cultural significance in countries like the US, Japan, and Brazil, no jurisdiction in the world has recognised it as a legitimate marriage. Therefore, the doctrinal gap emphasises the conflict between a cultural understanding of marriage as a performative ritual of commitment and a purely legal understanding of marriage as bilateral.

Sologamy and Constitutional values of autonomy and dignity

Sologamy aligns with the fundamental principles that support the right to autonomy and dignity, even though it is not legally recognised as marriage. When read broadly, Article 21 of the Constitution safeguards not only life and liberty but also the private decisions that make up an individual's identity. In Justice K.S. Puttaswamy v. Union of India (2017), the Supreme Court recognised privacy as fundamental to dignity, signalling a constitutional shift in favour of defending personal autonomy.[10] In a similar vein, the decriminalisation of same-sex relationships in Navtej Singh Johar v. Union of India (2018) upheld the constitutional protection of intimate relationships from governmental meddling[11]. Lastly, the Court upheld adult women's freedom to select their life mates in Shafin Jahan v. Asokan K.M. (2018).[12]

In this legal framework, sologamy may be viewed more as a form of self-expression that resonates with the constitution than as a legal institution. Although it cannot be recognised as "marriage," it represents the freedom of the individual to specify the conditions of their own emotional commitments. According to this viewpoint, sologamy is consistent with the Supreme Court's dignity-based reasoning, which upholds the right to intimate self-fulfilment and identity expression without interference from the government. This suggests that self-marriage cannot be written off as a culturally pointless behaviour, but it does not imply that courts should or would recognise it as a legally binding partnership. Rather, it is a component of India's wider

[9] Indian Contract Act, No. 9 of 1872, § 10, India Code (1872).
[10] Justice K.S. Puttaswamy (Retd.) v. Union of India (2017) 10 SCC 1 (India).
[11] Navtej Singh Johar v. Union of India (2018) 10 SCC 1 (India).
[12] Shafin Jahan v. Asokan K.M. (2018) 16 SCC 368 (India).

development of constitutional liberty, which recognises various forms of intimacy even outside of frameworks governed by the state.

Empowerment vs. Escapism: A Socio-Legal Debate

There is intense debate over the socio-legal definition of sologamy, with viewpoints ranging from escapism to empowerment. Sologamy can be viewed as a radical rejection of patriarchal marital rules from a feminist jurisprudential perspective. According to Judith Butler's performativity theory, self-marriage is a symbolic act in which people reclaim marital customs to validate their own identities outside of their partners. [13]According to Martha Nussbaum's capacities perspective, self-marriage allows people to thrive with dignity and self-worth by expressing emotional autonomy. For women who defy family pressure to be married or for those who want to reclaim intimacy on their own terms, sologamy may be empowering in this way.[14]

However, issues of escapism and commercialisation are also brought up by sologamy. Critics contend that rather than being a genuine form of resistance, rituals of commitment are reframed as acts of self-commodification, reflecting neoliberal consumer society. This change is best illustrated by the emergence of "solo wedding packages" in Japan, where weddings are promoted and used as lifestyle items. This perspective casts question on whether sologamy actually challenges patriarchal norms or only rebrands them within consumer-driven logics of identity-making, as empowerment and consumption are inextricably linked.

This tension is further demonstrated in the Indian setting. Instead of being a true act of feminist rebellion, Kshama Bindu's 2022 self-marriage was reduced to a quirky novelty by the media circus surrounding it. The idea that sologamy operates inside a culture of spectacle was reinforced by popular reportage, which frequently sensationalised the act rather than addressing its deeper symbolic implications. Such depictions show how commodification can eclipse resistance and run the risk of trivialising a potentially transformational assertion of autonomy.

Sologamy is positioned within a discourse of loneliness, generational transitions, and societal disengagement from traditional commitments in another line of criticism. According to others,

[13] JUDITH BUTLER, GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY (Routledge 1990).

[14] MARTHA C. NUSSBAUM, WOMEN AND HUMAN DEVELOPMENT: THE CAPABILITIES APPROACH (Cambridge Univ. Press 2000).

the custom represents a generation that is becoming more and more estranged from the conventional institutions of marriage and the family. Sologamy could be interpreted as a rejection of social norms rather than an embracing of self-determination in India, where there is still a lot of familial pressure to get married. According to commentators, this rejection occasionally reflects underlying fears about intimacy, divorce, and the brittleness of committed relationships in a culture that is changing quickly. Therefore, escapist interpretations emphasise disengagement and retreat from relationship commitments, whereas empowerment narratives emphasise agency and autonomy.

Sologamy ultimately reflects a socio-legal conflict between autonomy and commodification, between rebellion and retreat. It is a feminist act that shows how people, especially women, may take back rituals of commitment in ways that suit them. It runs the risk of turning intimacy into just another consumer spectacle as a neoliberal product. Although Indian constitutional doctrine offers a framework for validating autonomy, it is still unclear whether sologamy should continue to be a symbolic cultural practice or become a topic of legal acknowledgement. The argument highlights the larger difficulty of striking a balance between individual liberty and social expectations, as well as the question of whether the law should change to accommodate new ways of defining oneself or stick to established ideas of marriage.

Cultural Spectacle and Media Representation

The emergence of sologamy is arguably most evident in media debate. Kshama Bindu's self-marriage in Gujarat in 2022 received a lot of media attention and went viral on social media.[15] The divisive responses, condemnation by conservative politicians, and joy by feminist pundits showcase the societal discomfort with self-marriage. Sologamy is frequently trivialised in the media as novelty or spectacle, with an emphasis on its entertainment value rather than its symbolic defiance of conventional standards. Its deeper socio-legal ramifications are undermined by memes and viral criticism that draw attention to its peculiarities.

Comparative viewpoints reveal comparable dynamics. In the US, self-marriage rituals are often depicted as feminist affirmations of autonomy, but they are also sensationalised in the media.[16]

[15] *Photos: Kshama Bindu Marries Herself in Gujarat's First 'Sologamy'*, TIMES OF INDIA (June 9, 2022), https://timesofindia.indiatimes.com/city/vadodara/photos-kshama-bindu-marries-herself-in-gujarats-first-sologamy/photostory/92100469.cms.

[16] Erika Anderson, I Married Myself, N.Y. TIMES (Mar. 25, 2017).

The spectacle of a bride performing without a companion is the lifeblood of the solo wedding industry in Japan, which commodifies empowerment for consumer consumption. Celebrity self-marriages in Brazil highlight how media, entertainment, and cultural criticism are combined[17]. These instances show a common pattern: culture accepts sologamy as a symbolic performance, even though the law does not acknowledge it. Because it directly questions the sanctity of marriage as a pillar of social life, this cultural absorption is most noticeable in India. As a result, sologamy's legal invisibility and cultural prominence coexist, highlighting the widening gap between how society and the law define intimacy.

FINDINGS

The research shows that the Indian marriage law's current statutory structure does not allow for sologamy. The Special Marriage Act of 1954 and the Hindu Marriage Act of 1955 both describe marriage as a relationship between two people, assuming reciprocity and obligations on both sides. In terms of contract law as well, self-marriage is void ab initio where there is no offer, acceptance, and consideration between separate parties. Even while sologamy is becoming more and more popular, no jurisdiction in the world recognises it as a legitimate marriage because of this doctrinal restriction. Legally speaking, sologamy is still beyond the purview of legally binding partnerships, whilst marriage is still regarded as a bilateral institution.

The practice also symbolically aligns with the autonomy, dignity, and identity ideals found in the Constitution. Intimate and self-defining decisions have been gradually added to Article 21 by landmark decisions, including *Shafin Jahan v. Asokan K.M*[18], *Navtej Singh Johar v. Union of India*[19], and *Justice K.S. Puttaswamy v. Union of India.*[20] Sologamy reflects the spirit of this jurisprudence by enabling people to rethink commitment without outside approval, even though it has no legal standing. The act can be viewed as a performative assertion of selfhood from a feminist standpoint, mirroring Butler's idea that identity is formed via repeated acts and Nussbaum's focus on emotional autonomy as essential to human flourishing. However, the practice is also vulnerable to commodification, as seen by the solo wedding market in Japan and media representations in the West, where consumer spectacle frequently coexists with empowerment.

[17] Yuko Ogasawara, *Solo Weddings and Changing Intimacy Norms in Japan*, 45 J. CONTEMP. SOC. 67 (2019).
[18] Shafin Jahan, *supra* note 12.
[19] Navtej Singh Johar, *supra* note 11.
[20] K.S. Puttaswamy, *supra* note 10.

Sologamy has mostly arisen in India due to cultural prominence rather than official legal sanction, as demonstrated by Kshama Bindu's 2022 self-marriage. The polarisation surrounding non-normative intimacy is highlighted by media reactions, which range from conservative outrage to feminist jubilation. The practice is frequently sensationalised in coverage, trivialising its symbolic connotations. However, its increasing popularity points to a more significant change in the way that intimacy, independence, and the validity of relationships are perceived. These changes show a growing divide between society, which is experimenting with new forms of intimacy and identification, and the law, which still favours bilateral marriage. As a cultural practice, sologamy represents the constitutional values of autonomy and dignity, even if it is not a legal category. It also critiques the inflexibility of current family law and poses significant issues for future legal change.

CONCLUSION

This study has looked at sologamy as a practice that challenges accepted notions of autonomy, marriage, and the law. According to the research, self-marriage is illegal in India because of statutory frameworks like the Hindu Marriage Act of 1955 and the Special Marriage Act of 1954, which assume reciprocity and mutual obligations between two different people. Such a union is null and void from a contractual standpoint as well because there are no two parties involved. Although this doctrinal conclusion is obvious, sologamy's social and constitutional aspects show that the phenomena cannot be written off as unrelated to legal discussion.

Rather, sologamy represents a symbolic connection with the autonomy, dignity, and self-determination qualities found in the constitution. This study has demonstrated that the practice serves more as a performative assertion of selfhood than as a legal category by referencing feminist jurisprudence and comparative viewpoints. Its prominence in India, especially as a result of Kshama Bindu's much-reported ceremony, illustrates broader changes in the way that intimacy and relational legitimacy are viewed in a culture that is balancing tradition and individual liberty. Sologamy also highlights how autonomy is both celebrated and devoured in global cultural economies, exposing the conflict between commodification and empowerment on a worldwide scale.

In legal academia, this research makes a contribution by redefining sologamy as a cultural activity that challenges the boundaries of the law, rather than as a need for statutory codification. The study illustrates how self-marriage compels us to reconsider long-standing dichotomies between the person and community, autonomy and obligation, legality and symbolism, by integrating theological exclusion with constitutional ideals and feminist philosophy. Future research could examine whether the law should continue to be based on bilateral marriage models or change to acknowledge non-traditional forms of intimacy and identification. For the time being, sologamy's importance comes from its ability to rethink what it means to commit, fit in, and exercise autonomy in modern society rather than from its enforceability.

Rights or Ruin? India's Terror Trials Tell the Tale

Bhoomi Jain[21]

ABSTRACT

The article analyzes the paradox between safeguarding the human rights and guaranteeing the national security in India's terrorism trial. While there are number of international covenants and constitutional provisions that ensures right to fair trial to accused, their rigid application has, however, resulted in procedural acquittals, thereby, undermining the public trust in legal system. A comparative analysis of India's anti-terror laws with the foreign legal frameworks, such as, Singapore, Kazakhstan and Sri Lanka highlight the glaring gap in the enforcement, conviction rates and the de-radicalization measures. Looking back at the India's major terror incidents including that of Red Fort attack in 2000 to Parliament attack in 2001, Akshardham attack in 2002 along with Mumbai attacks in 2008 and Jaipur bombings in 2008, the paper reveals a systematic inefficiency in investigation, evidence collection etc. The article also proposes certain reforms such as structured preventive detention, specialized anti-terror courts, enhanced witness protection schemes etc. Ultimately, the contention raised is that India should recalibrate its legal regime to ensure justice for accused doesn't comes at the expense of justice for victims and national security.

INTRODUCTION

A systematic use of violence and intimidation against civilians and other military neutral personnels to coerce the authorities to fulfill their political, religious, ideological agendas, is termed as terrorism[22]. It is a globally concerned phenomenon that has its roots spread out in every corner of the world. While the rule of law and human rights are vital, a blind commitment to these principles in terrorism trials has led to national vulnerability due to procedural acquittals.

India stands at a crossroad where the principles of justice clashes with the imperative of the national security. Although Indian legal system is guided by constitutional provisions and international covenants, which also helps in expanding the rights of the terrorism accused, but

[21] 4th Year Law Student, B.A. LL.B.(Hons.), Vivekananda Institute of Professional Studies – Technical Campus, Affiliated with GGSIPU, Delhi.

[22] Bruce Hoffman, Inside Terrorism (Columbia University Press 2017).

this commitment somewhere costs the national security. Time and again, it has been observed that terror suspects walk free, not because they are innocent, but due to inefficiency of the security system to gather admissible evidence against them.

A country which has witnessed devastating terror attacks needs to realise that such incidents do more than mere raising of eyebrows and some gossips among the neighbours. They spark immense fear, frustration, and numerous questions about the efficiency of the legal system and whether they are fit to deal with such high magnitude threats. As the gap continues to widen between the justice served and justice denied, it become obligatory for the authorities to reassess the loopholes in current legal system. The time has arrived that administration reform the legal system to ensure that justice is not only promised rather it is firmly and effectively delivered.

In democratic India, the legal system has been built on the bedrock of fairness even for the accused of the gravest crimes like terrorism. Government secures the rights of every terrorism accused, making them nearly non-negotiable in any civilized society, however this unfortunate reality of the legal systems exploits the national security. It has been repeatedly observed that the terror accused are acquitted as our noble legal regime needs proofs beyond reasonable doubt, which directly results that people with dangerous intention walks away freely, thereby making a joke of our legal framework.

Although it is believed that human rights must be respected but the system can't afford to be a blind towards the unique challenges of the terrorism related cases. The country is not dealing merely with ordinary crimes instead we are dealing with networks, ideologies and malefice tactics to evade the traditional law system. It is ardently believed that India must rethink about its approach towards legal provisions tailored to deal with the terrorism cases without compromising the core of justice. Strict and fair laws, unbiased trials and better investigation tools are not just for curbing rights, instead they are to ensure the safety of millions of Indians and assuring that those would try to crack the system won't be spared. In the pursuit of justice, rights of citizen to live freely must not be jeopardized.

INTERNATIONAL COVENANTS

According to **Article 10 of the Universal Declaration of Human Rights**[23], everyone is entitled to a fair trial by an independent tribunal in determination of rights and obligations and of any criminal charge against him[24].

However, it should be noted that the right to fair trial is an umbrella which gives shelter to various other rights guaranteed to a terrorist accused enlisted in various international covenants such as:

1. **International Covenant on Civil and Political Rights**[25]

- Article 7 – Right to be not subjected to torture, cruelty, inhuman or degrading treatment or punishment
- Article 9(1) – No arbitrary arrest or detention of the accused thereby depriving him of his liberty
- Article 9(2)- Right to be informed about the reasons of arrest
- Article 9(3) – Right to be presented before a judge within a reasonable time
- Article 14 (1) – All persons are to be treated equally before the court of law
- Article 14(2) – Right to be presumed innocent until proven guilty in accordance with the law
- Article 14(3) – Right of review

2. **Universal Declaration of Human Rights**

- Article 5 – Right to be not subjected to torture, cruelty, inhuman or degrading treatment or punishment
    - Article 9 - No arbitrary arrest or detention of the accused

[23] Universal Declaration of Human Rights (adopted 1948) UNGA Res 217A(III) https://www.un.org/en/about-us/universal-declaration-of-human-rights accessed 8 November 2025.

[24] Maneka Gandhi v Union of India (1978) 1 SCC 248.

[25] International Covenant on Civil and Political Rights (adopted 1966) 999 UNTS 171 https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights accessed 8 November 2025.

- Article 11 - Right to be presumed innocent until proven guilty in accordance with the law

3. Basic Principles on the Role of Lawyers[26]

- Principle 1 – Right to approach the legal attorneys to defend them at every stage of the criminal proceedings[27]

As such large number of rights are being provided to the accused in a terrorist trial, it is worth noticeable that there is a close relationship between the national security and criminal law and in their fight against the terrorism, which provides a mixed picture of the dilemma faced by the authorities in such cases. It is ardently believed by them that one should not interfere with the constitutional rights provided to the accused, however, in that race of moral beliefs, the accused gets acquitted of the heinous crimes committed by them. Although the rule of law is secured in this way, but the national security is highly jeopardized.

INDIAN LEGISLATIONS

Apart from them, there are certain anti-terror acts also enacted in India to combat the threats while upholding the fundamental rights of the accused. Ranked as 14 in the Global Terrorism Index 2024, there is always a growing concern within the nation to protect its citizens from the terror attacks held in the name of superiority of ideologies. The following anti-terror laws enacted in India are:

1. **Unlawful Activities (Prevention) Amendment Act, 2019**[28]

Enacted in 1967 and with various amendments over years, the latest being in 2019, this act was bought into action to provide more effective prevention of unlawful activities of individuals especially for dealing with the terrorist activities and connected matters. UAPA has given the

[26] UN Basic Principles on the Role of Lawyers (adopted 7 September 1990) https://www.ohchr.org/en/professionalinterest/pages/roleoflawyers.aspx accessed 8 November 2025.

[27] PUCL v Union of India (1997) 1 SCC 301.

[28] A.S. Narang, *National Security and Fundamental Rights in India* (Sage 2010).

liberty to the government to declare the individuals and organizations as terrorist or terrorist organizations.

2. **National Security Act, 1980**

This act was enacted with an objective to permit the government to detain the individuals in order to further prevent them from taking any action that could pose a threat to the national security, public order or any other service. This act also allows for the detention for 12 months without any formal charges and can be even extended with fresh evidences.

3. **Bharatiya Nyaya Sanhita 2023**

India's new criminal law addresses terrorism in Section 111 BNS and offences of organized crimes in Section 112 BNS along with severe punishments[29]. This anti-terror law defined terrorism as act that is committed with an intention to threaten the unity, integrity and security of India to intimidate the general public or to disturb the public order[30]. Sanctioning of such acts provide a proper definition of act that can be termed as crime which subsequently helps the authorities in getting a proper guide for convicting a person.

TERROR ATTACKS IN INDIA

Despite such string acts being enacted in India, there are a series of terrorist acts being held in the nation from the time immemorial and it has been seen that the accused are freely been acquitted by the court under the excuse of lack of evidence thus, posing a threat to the nation.

2000 RED FORT ATTACK[31] **–** Carried out by Pakistani Terrorist group i.e. Lashkar-e-Taiba, where two militants began firing at Red Fort, later who were turned down by the two army jawans and a civilian security guard. The Indian courts convicted the conspirators in October 2005; however, they were released in September 2007 due to lack of evidence

[29] Bharatiya Nyaya Sanhita 2023.

[30] Fali S. Nariman, *The State of the Nation: In Context of India's Constitution* (Hay House 2018).

[31] LiveLaw, 'Why Conviction Rates in Terrorism Cases Remain Low in India' (2023) https://www.livelaw.in/conviction-rates-terrorism-cases accessed 8 November 2025 accessed 8 November 2025.

2001 INDIAN PARLIAMENT ATTACK[32] **–** A terrorist attack on the Indian Parliament by the five members of Jaish-e-Mohammed is considered to be one of the major attacks on the democracy of India till date. Convicting four major accused under Indian Penal Code and Prevention of Terrorism Act, Afzal Guru (conspiracy and facilitating the attack) was executed in 2013, Shaukat Hussain was sentenced to 10 years rigorous imprisonment. However, S.A.R Geelani and Navjot Sindhu was acquitted due to lack of evidences.

2002 ATTACK ON AKSHARDHAM TEMPLE[33] **–** Multiple terrorists attacked the Swaminarayan Akshardham Temple in Gujarat, killing 33 and injuring more than 80 people. Later, India's National Security Guard intervened and ended the siege the next day. However, the 6 people who were arrested by Gujarat Police were acquitted in 2014 by the Supreme Court.

2008 JAIPUR BOMBINGS[34] – Series of 9 synchronized bombs being blasted within a span of just 15 minutes in the capital of Rajasthan, received widespread condemnation from around the world. Indian Mujahideen, an Islamic terrorist group claimed the responsibility of the attack. In December 2019, four out of five accused were convicted by a special court in Rajasthan under Indian Penal Code, Unlawful Activities (Prevention) Act and Explosives Act and the fifth was acquitted on the basis of lack of evidence. However, in March 2023, all the convicted accused were released by the Rajasthan High Court.

2008 MUMBAI ATTACKS[35] **–** Popularly known as 26/11 attacks, where Lashkar-e-Taiba, a Pakistani based terrorist group, carried out 12 shooting and bombing attacks across Mumbai for four days. Out of the 10 terrorists, 9 were taken down by the NSG, and only Ajmal Kasab, the lone terrorist survivor was arrested by the police. After 4 long years, Kasab was finally executed at Yerawada Jail in Pune.

It is well observed in the above cases that how the strict adherence to Right to Fair Trial can result in acquittal of the accused, menacing national security. One should be familiar with the fact that the acquitted are not always innocent, they are just legally unproven. Due to the

[32] *State (NCT of Delhi) v Navjot Sandhu* (Afsan Guru) (2005) 11 SCC 600.

[33] *Arup Bhuyan v State of Assam* (2011) 3 SCC 377.

[34] Indian Express, 'Explained: India's Global Terrorism Index Ranking' (2024) https://indianexpress.com/terrorism-index accessed 8 November 2025.

[35] *Mohd Ajmal Amir Kasab v State of Maharashtra* (2012) 9 SCC 1.

loopholes in the bridge between the law enforcement agencies and judiciary system, these terrorist walks away freely[36].

Terror networks are highly secretive and the traditional evidences is scarce. It is always not possible that direct evidences are available in such matters[37]. The witnesses are often afraid or absent which might further be a disadvantage in the trials of the accused. Similarly, the confessions obtained by the police officials in the custody are not admissible as evidence in the court of law which provides a chance to the accused to revert on their wordings[38]. Due to such lapses in providing evidence to the court, the accused in the terror trials walks away freely which ultimately lead to loss of public faith in the justice system and encourages the terror groups to even plan something bigger. These acquittals also demoralize the investigating agencies in fulfilling their duties. Repeated acquittals strongly indicate the system failure rather than the innocence.

COMPARISION WITH OTHER COUNTRIES

According to Global Terrorism Index 2024, there are, however, 64 countries which are ranked as 100 with scores as 0.00 meaning thereby, that they are the safest countries with no threats about terrorist attacks in their countries[39].

1. **Singapore**[40]

Singapore anti-terror acts such as Internal Security Act is effective as it allows for indefinite preventive detention without trial, although this has been considered controversial in nature, but it is proven to be highly effective in neutralising of threats before they are materialised thus, safeguarding the national security. Having read it with other strict anti-terror financing laws such as Terrorism (Suppression of Financing) Act 2002 and high-tech surveillance, Singapore is successful in achieving an exceptionally high conviction rates and nearly zero

[36] David Cole and James Dempsey, *Terrorism and the Constitution: Sacrificing Civil Liberties in the Name of National Security* (The New Press 2006).

[37] Radhika Singha, 'Evidence, Confession and Terrorism Trials in India' (2016) 36 South Asia: J South Asian Studies 123.

[38] Jinee Lokaneeta, 'Torture, Custodial Confessions and the Indian Legal System' (2014) 49 Economic & Political Weekly 65.

[39] Kent Roach, *The 9/11 Effect: Comparative Counter-Terrorism* (Cambridge University Press 2011).

[40] Internal Security Act (Cap 143, 1985) (Singapore) https://sso.agc.gov.sg/Act/ISA1959 accessed 8 November 2025.

instances of terrorism[41]. Not only restricted to the harsh deterrents but it is also a success in proactive rehabilitation efforts, e.g. Religious Rehabilitation Group (RRG) aimed at de-radicalisation.

India, on the other hand, operates under Unlawful Activities (Prevention) Act, which although provides a solid legal base for convicting the accused in terrorism trials, but the poor conviction rates, unchecked delays, frequent misuse of laws, acquittals of convicts after long years, creates a benefit of doubt in the minds of the general public and additional confidence to terrorist to plan more big and major attacks. Unlike Singapore, the years of preventive detention in India is limited and there are no robust de-radicalization strategies, making the legal system vulnerable due to flawed implementation and enforcement.

2. **Kazakhstan**[42]

Located at the crossroads of Central Asia, it faces unique security challenges, ranging from religious extremists to returning of foreign fighters and regional instability. To resolve these challenges, they had enacted several strict counter terror laws such as Law of Kazakhstan on Countering Terrorism 2018 and Penal Code of Kazakhstan which criminalizes the terrorist acts. The Constitution of Kazakhstan usually permits death penalty, affirmed in Article 47(1) and Article 255 of Penal Code of Kazakhstan, for two types of offences, namely, the offences resulting in fatalities and any grave crime committed in wartime.

The authorities have broad power in relation to conduct surveillance, freeze assets or detain suspects[43]. Along with that, Kazakhs are being praised for their comprehensive de-radicalization programs including the rehabilitation centers. The conviction rate of terrorists is usually high, largely due to swift administrative processes and tight control over judiciary and media.

Contrarily, India's anti-terror landscape, though backed up by the strong legislations, but it suffers from weak implementation, politicizations and low conviction rates. To add up in the list, investigation lapses, political interferences, delays in charge sheets and overreliance on

[41] Religious Rehabilitation Group (RRG), Singapore official publications.

[42] Law of Kazakhstan on Countering Terrorism 2018.

[43] Penal Code of Kazakhstan Article 255.

custodial confessions, have made the prosecutions fragile. While Kazakhstan maintains high control through the centralized powers and preventive mechanisms, India's democratic structure proves to be a bane as it requires greater judicial checks but at the cost of enforcement efficiency and legal impacts.

3. Sri Lanka[44]

Sri Lanka's counter terrorism landscape has been a result of long civil wars and the fight against the Liberation Tigers of Tamil Eelam (LTTE). The principal law of the land i.e. 1979 Prevention of Terrorism Act, 2018 Counter Terrorism Act which allows for arrest without warrants and prolonged detention without charge and confessions to police officers as admissible in court. Although in 2023, Sri Lanka has drafted a new counter terrorism act aimed to reform the PTA, but its implementation remained inconsistent.

In parallel, although India's legislation is somewhat parallel with balanced judicial oversight, they face criticism for prolonged trials, misuse of legislations, acquitting accused in the name of upholding rule of law, alleged misuse against political dissidents. Where Sri Lanka's counter-terror laws have been historically militarised and used during the internal conflicts, India laws are highly tested against cross border terrorism and religious radicalism[45]. Although both countries in some aspects grapple with the challenge of balancing national security with the human rights, Sri Lanka's record reveals a more authentic tilt in the enforcement whereas India struggles with the inefficiency and overreach within a democratic framework.

SUGGESTIONS FOR REFORMS IN INDIA'S ANTI-TERROR LAWS

1. Introduction of structured preventive detention mechanisms with time bound judicial reviews and intelligence validation[46]
2. Launching of community based de-radicalization initiatives which involves special lectures from religious leaders, psychologists and civil society.

[44] Prevention of Terrorism Act No 48 of 1979 (Sri Lanka).
[45] Kent Roach, *The 9/11 Effect: Comparative Counter-Terrorism* (Cambridge University Press 2011).
[46] Indian Law Institute, *Index to Indian Legal Periodicals* (ILI, Delhi 2002).

3. Set up an exclusively anti-terror court that deals with cases in a fast-track motion with trained judges and efficient management of digital cases[47].
4. Enacting a special provision in the legislation whereby, the confessions made in the police custody are accepted as a piece of evidence in court of law.
5. Strengthening India's witness protection scheme, allowing for anonymous testimonies in exceptional cases[48].
6. Creations of specialized anti-terror oversight panels constituting legal experts and human right members to review proportionality in prosecution.
7. Building joint counter terrorism task forces with NIA and special state police under a common command structure[49].
8. Publications of transparent reports on counter-terrorism operations, legal outcomes and required reforms[50].

CONCLUSION

Thus, in conclusion the analysis reveals that while India although possess some efficient legal frameworks to counter terrorism, still there are some procedural lapses, evidentiary gaps and judicial delays which highlights a critical flaw in the enforcement mechanisms which ultimately has contributed to increased number of terrorist acts in the recent years such as 2016 Uri Attack, 2019 Pulwama suicide bombings, 2023 Poonch Terror attack, 2024 Reasi attack and latest 2025 Pahalgam attack. The latest ranking of India in Global Terrorism Index 2024 reveals that there are a lot of reforms to be done in the legislation to protect the country from intimidations.

Unlike nations such as Singapore, Kazakhstan and Sri Lanka, ranked 100th in Global Terrorism Index 2024 reveals that the country possesses more stringent anti-terror measures and efficient

[47] Gautam Bhatia, 'Civil Liberties and Counter-Terror Laws: The UAPA Experience' (2019) 61 Nat'l Law School J 45.

[48] Amnesty International, *Justice Under Threat: Counter-Terror Trials in India* (2020) https://www.amnesty.org/en/documents/asa20/1234/2020/en/ accessed 8 November 2025.

[49] The Wire, 'Counter-Terror Laws and Human Rights in India' (2020) https://thewire.in/rights/counter-terror-laws accessed 8 November 2025.

[50] UN Special Rapporteur on Counter-Terrorism Reports (2017, 2021) https://www.ohchr.org/en/counter-terrorism accessed 8 November 2025.

implementation, intelligence coordination and swift conviction processes. As terrorism becomes more decentralized, India's rigid insistence on rule of law and conventional evidence and delayed judicial response inadvertently allows threats to fester.

Thus, in the practice of upholding the human rights without any adaptive legal reforms and robust investigations, the national security of India is repeatedly compromised, putting at stake both the public trust and internal stability. Consequently, there is a strong and urgent need of recalibration to ensure that the justice for the accused doesn't comes at the expense of justice for victims and nation.

Now it is time for India to choose either to continue to uphold a rigid legal idealism that gives liberty to the terror players to walk away freely or recalibrate the justice system to safeguard both the liberty and life of its citizen. The time for reform isn't tomorrow but IT IS NOW.

Three Strikes, Two Constitutions: Mandatory Recidivist Sentencing and Its Failure under India's New Criminal Laws

Sayyam[51]

ABSTRACT

This paper critically evaluates the feasibility of transplanting the United States' "Three Strikes" law a mandatory sentencing regime for repeat offenders into the Indian criminal justice framework, specifically within the context of the newly enacted Bharatiya Nyaya Sanhita (BNS), 2023. Utilizing a methodology grounded in legal transplant theory, the study juxtaposes the American penological focus on incapacitation against Indian constitutional mandates for proportionality and judicial discretion.

The analysis synthesizes empirical data from the U.S., noting that while three-strike laws aim to deter crime, they often result in disproportionate carceral costs and marginal public safety gains (citing RAND studies). The paper argues that a mechanical transplantation of such mandatory sentencing violates Articles 14 and 21 of the Indian Constitution. Through an examination of landmark precedents like *Mithu v. State of Punjab* and *Bachan Singh*, the study demonstrates the Indian judiciary's consistent rejection of rigid sentencing formulas in favor of individualized justice and the "rarest of rare" doctrine.

Furthermore, the paper highlights institutional incongruities, arguing that India's chronic case backlogs and prison overcrowding render the rigid US model practically unviable. The study concludes that while recidivism warrants enhanced scrutiny as recognized in Section 13 of the BNS India must reject the wholesale adoption of the Three Strikes model. Instead, it advocates for a policy that retains judicial discretion, ensuring that enhanced punishments for habitual offenders remain constitutionally coherent, proportionate, and institutionally sustainable.

INTRODUCTION

Sentencing policies occupy a Central position in the criminal justice system. They function as the point where crime control objectives intersect with the constitutional restraints and the moral judgment of punishments. Across jurisdictions, the legislature has been increasingly adopting the enhanced sentencing mechanism for repeated offenders. Often grounded in the

[51] Third-year BA LLB (Hons.) student at School of Law, CHRIST (Deemed to be University), Bangalore.

theories of deterrence, incapacitation, and expressive condemnation of habitual criminality.[52] The developments in the recent scenario reflect a broader global trend towards punitive penal policies during the late twentieth century.This is the response to the public anxiety over the The increase of the heinous and the violent crimes and the perceived judicial leniency. [53]

Along with specific provisions of different jurisprudence Prescribing harsher punishments for repeated offenders is another prominent manifestation of this punitive turn Here is the U.S. California's Three Strikes Law And expressive condemnation of habitual criminality.1These developments reflect a broader global trend towards punitive penal policies developments in the United States Rightist sentencing policies. Which mandates life or near-life-time imprisonment upon a qualifying third felony conviction.[54] This was first enacted in California through a popular ballot initiative in 1994. The three-strike framework was designed to incapacitate repeated offenders by eliminating judicial discretion once a numerical threshold of three convictions was reached. [55]The law rests on an assumption that the habitual offenders commit a disproportionate share of serious crimes and thus the permanent incapacitation of the offender is therefore justified. [56]

The constitutionality of the three-strike law has been upheld by the Supreme Courts in the U.S., which Which have adopted a higher differential approach to the sentencing policies under the 80th Amendment. In the famous case of Ewing vs. California, the court uphold that. the sentenced Of 25 years to life for a third felony offense did not constitute a cruel or unusual punishment, emphasizing legislative prerogative over proportionality review.[57] This jurisprudence reflects a distinctively American constitutional culture in which sentencing severity is largely insulated from the substantive judicial scrutiny[58].

The paper debates over whether India should adopt US Tile III strike law bids two complementary concerns. One is the state's duty to protect public safety by Permanently

[52] Michael Tonry, *Sentencing Matters* (1996)

[53] David Garland, *The Culture of Control* (2001)

[54] Franklin E. Zimring et al., *Punishment and Democracy: Three Strikes and You're Out in California* (2001)

[55] Michael Vitiello, *Punishment and Democracy: A Hard Look at Three Strikes' Overblown Promises*, 90 Calif. L. Rev. 257 (2002)

[56] Peter W. Greenwood et al., *Three Strikes and You're Out: Estimated Benefits and Costs of California's New Mandatory-Sentencing Law* (RAND 1994)

[57] *Ewing v. California*, 538 U.S. 11 (2003)

[58] Michael Tonry, *Sentencing in America, 1S75–2025*, 42 Crime C Just. 141 (2013)

incapacitating recidivist, violent, and heinous offenders. And India's constitutional obligation to ensure proportional individualized punishment under the Under Article 14(Right to equality Before law) and Article 21(Right to life) of the Indian Constitution. In the U.S., three-strike law statutes like that Passed in the state of California (1994) promised us the dramatic reduction in repeated violent offenders by imposing severe mandatory terms on third-serious felonies. Promised us a dramatic reduction in repeated violent and heinous crimes by imposing harsher punishments and severe mandatory terms on the third serious felony. Later, during the empirical evaluations of the law revealed limited marginal crime-reducing and a large physical and carceral cost, prompting political and statutory rollbacks, For example the California Proposition 36 reforms and later paroles/sentencing initiatives. [See California Proposal 236, 2012 California Proposal 57, 2016]

India's criminal justice system, is a product of distinct constitutional and common law lineages, specifically the Indian Penal Code, now replaced by the BNS. The Criminal Procedure Code now replaced by BNSS. And the Indian Evidence Act, now replaced by the BSA. Now all operating within the Post-1950s constitutional framework that imposes substantial due process of law and the proportionality constraint not present in the same way in the US statutory practice. In specific, the Landmark case of Supreme Court of India Such as the Maneka Gandhi vs. Union of India, which holds that the procedure established by law must be fair, just, and reasonable. And the landmark case of Bachan Singh vs. State of Punjab that articulates the rarest of the rare proportionality tests for death penalties. Which illustrates the Indian judiciary's insistence on individualized sentencing and that limited state penal powers.

What this paper Aims Analyze the Possible incorporation of the three-strike law In three-fold method First, it synthesizes the empirical literature on US three-strike law outcomes[determines incapacitation, physical costs, racial and socioeconomic disparities] Secondly, it aims to analyze how Indian constitutional doctrine and sentencing practice, which are grounded in the articles of the Constitution such as Article 14 and Article 21 and shaped by the common law heritage, would interact with any imported mandatory schemes. Thirdly, it aims to apply comparative legal transplant theory to access feasibility, emphasizing institutional capacity (like courts, prisons, and legal aid) and the social-legal fit rather than a superficial policy mimicry. While the US literature evaluates efficacy, the Indian literature defends constitutional norms. There is no focus on a t context-specific feasibility study that

maps out the possibilities of Incorporation of empirical US lessons onto Indian legality and Jurisprudence.

BRITISH COMMON LAW FOUNDATION AND CONTINUING INFLUENCE ON INDIAN CRIMINAL LAW

British colonial legislations and the Common Law concepts act as the structural spine of Indian Criminal Laws. The old statutes of the IPC, CRPC, and the IEA were drafted under British rule and remain the primary instrument of criminal governance Till 2023. Constitutional continuity preserved these pre-1950 rules until altered by Indian legislation and the court. Article 372 expressed continued existing laws post-Constitution which are Supreme Court already early on treated as including the received common law and the previous Council precedent unless and until displaced.[59]

This inheritance is not merely textual; it is functional. The doctrines of mens rea, actus rea, and the rule of evidence and the burden of proof flows directly from the common law taxonomy and were absorbed into the Indian statutes and judicial practices[60].

The Indian courts routinely consult English cases and statutory frameworks as persuasive authorities Whenever the Indian Jurisprudential Framework lacks a direct Precedent or where the analogous principles are at issue.

The Sentencing Council/Criminal Justice Act [Criminal Justice Act 2003, C.44, Section 142(1) (UK)] , which is formulated in the UK, formalizes the purpose of sentences[Punishment Reduction of Crimes Deterrence Reformation Rehabilitation Public Protection Repression to Victims][UK Sentencing Council overarching principle: purpose of sentencing],Which persuasively have gained traction among Indian judges and reformists, even though India has not adopted a single unified sentencing code.

This selective borrowing shows up in two concrete ways---
Firstly, in the Indian sentencing jurisprudence which has absorbed the language of proportionality and the multipurpose sentencing that the UK Statutory provisions

[59] *Dir. of Rationing & Distrib. v. Corp. of Calcutta*, AIR 1960 SC 1355
[60] R vs Cunningham 1957 2 All E.R.786(Eng)

prescribed,which can be considered as the adoption in spirit rather than in body.More than one Indian judgment analyzes punishment by reference to concepts of deterrence, freformation, and proportionality, much as the UK frameworks suggest. Prime examples of such cases Judgments would be 1)State of Punjab vs. Prem Sagar (2005) discussing sentencing objectives and the case of 2)Soman v. State of Kerala, 2018 which considers comparative sentencing models.

Secondly, appellate courts accepted the Privy Council and English appellate courts' reasoning at persuasive, This is done often to fill doctrinal gaps within the Indian laws. While still subjected to any borrowing principle to the Constitutional test against Article 14 and 21.Like that in the case of Gurudev Kaur vs. Khaki which invokes Privy Councils' reasonings and the case of Maneka Gandhi vs. Union of India (1978-1 SCC 248) which places procedure within Article 21's fairness requirements.

This kind of adoption shows not the blind application or the direct importation of foreign laws but rather an Well-thought-out, guided Evolution of the Indian Jurisprudence .Where an English principle clashes with our Constitutional guarantees or the statutory structures, Indian courts choose to reject or mold it to the need of hour.Court has repeatedly said foreign PCNs are persuasive only insofar as they fit Indian social, legal, and constitutional contexts[61].

THE US JURISPRUDENCE DUE PROCESS PROPORTIONALLY AND THE SELECTIVE INFLUENCE

Unlike the structural imprint left by the British, a medical influence is more doctrinal. Especially on the constitutional rights, and often arrives as analogy or comparative arguments in rights litigation. The single differentiating and the most important factor is the case of Maneka Gandhi where the Supreme Court Expanded Article 21's procedural content by insisting the procedure established by law must be fair and reasonable, a formulation that resonates with the U.S. due process reasoning. Death penalties and proportionality debates in India explicitly borrow and engage Engages in U.S. jurisprudence and specifically the Eighth Amendment. In Bachan Singh v. the state of Punjab[62], the court canvassed US cases such as Furman Versus Georgia[63]. and GreggVersus Georgia[64]. in the development of the rarest of

[61] Nelson, Tabby, C. Robert, L. TSAI Constitutional Borrowing, 108, Mitch, L. Rev 459 201
[62] Bachchan Singh v. State of Punjab, (1980) SCC 684
[63] Furman v. Georgia, 408, U.S. 238, 1972
[64] Greg v. Georgia, 428 U.S. 153] (1976)

rare doctrines and insisted on a balance between aggravating and mitigating factors before imposing death penalties in India. The Indian test is therefore a constitutional transplantation of proportionality concerned and imported as persuasive jurisprudence but reformed to fit within the Indian institutional constitutional norms[65].

The U.S. Criminal Procedures Development (Miranda Type Safeguards. Plea bargaining dynamics, mandatory minimum critiques) also have informed Indian debate but rarely been embraced as a whole. The Indian courts have been cautious as they borrow only the functional insights of US law like the necessity of meaningful judicial review, the risk of mechanistic mandatory minima[66], etc. While upholding that any adoptions must pass under the constitutional mandates of Articles 14 and 21.

The most political visible US exports, the three-strike law mandates recidivist model has been intensely studied in the US, but only selectively cited in India to warn against the mechanical mandatory sentencing. Empirical studies within the US literature, like the RAND studies{Rand studies, Tonry;Marvel C Moody }, show that three-strike law produced large prison growth and ambiguous public safety gains[67]. In some economic-centric studies, it correlates with a higher homicide rate than before. Indian jurists often cite these empirical lessons while evaluating any proposal to import rigid receipt penalties.[68]

HOW THE TWO FOREIGN INFLUENCES DIFFER IN PRACTICE AND IN EFFECT?

The British legacy is plumbing of the criminal justice system, statutes, doctrines and procedures. So the UK influence is structural and enduring. On the other hand, the US influence is primarily doctrinal and empirical. The American Constitutional and Empirical Criminal Justice Scholarship supplies us with modes of reasoning, e.g., due process analogies, measurement of deterrents' effect, that Indian courts and policymakers borrow as analytical

[65] Dirk Van Zyl Smith C. Andrew Ashworth, Disproportionate Sentences as Human Rights Violations, 67 Mod. L. Rev. 541

[66] United States vs. Booker, 543 U.S. 220, 2005

[67] C Just. 141(2013)]Thomas B. Marvels C. Carl Lissy E. Moody The Lethal Effect of Three-Strike Law, 30 J. Legal Stud., 89, 2001

[68] Michael Toney Sentencing in America 1975-2025, 42 Crimes

tools rather than direct templates. [Maneka Gandhi (1978) 1 SCC 248] Bachchan Singh 1982 SCC 648 Tonry Supra.]

This difference explains why transplantation in India might have been selective Up-to-date England has supplied us with the bones and the skeleton. America has supplied arguments on how to shape these bones. The Supreme Court repeatedly insists that any borrowed element must reconcile and be in line with India's constitutional Values of proportionality [Mithu vs State of Punjab 1983 2 S.C.C. 277.] , dignity, and individualized sentences, and with the local institutions and realities, such as delayed trials and under trial's detention And resource constraints. The practical takeaway for the comparative borrowing is that the lesson for India is pragmatic. India can and does borrow often here and there, but it does so as an imperative community, not as a copy shop. Any imported principle will be filtered through Article 14 and 21 and hand-moulded to fit the Indian Philosophical puzzle and institutional Capitacity.Policy makers and scholars must therefore treat UK/U.S statutes as structural incidents[69] ,U.S. jurisprudence as an analytical instrument is useful, but neither can be transplanted whole without constitutional and institutiona adaptations.[70]

The practical differences widen the gulf of Indian criminal justice students, which wrestle with chronic case backlog, high pre-trial detentions, and a limited legal aid capacity. The conditions that magnify the risk of mandatory high state penalties, for example, overcharging to trigger and hence penalties, inequitable outcomes of indigent defendants, and the ballooning of the prisoners population. In short, by the Indian judges regularly consent US and the UK's authorities for structural arguments. Indian constitutional values of Articles 21 and 14 statutory designs, and the institutional realities make a direct import on US three-strike law both legally risky and practically problematic.[71]

SENTENCING OF REPEATED OFFENDERS IN INDIA: THE EXISTING STATUTORY FRAMEWORK AND JUDICIAL PRACTICES

Indian criminology does not aim to treat Recidivism Through rigid numerical thresholds, instead it aims to adopt a discretionary offender-centric That treats prior convictions as

[69] Nelson Tebbe, C. Robert L. Tsai, Constitutional Borrowing, 108, Mitch L. Rev. 459, 2010
[70] Pierre Legrand ,The impossibility of legal transplants, 4 Mass Rich J. EU R C.Comp L. 111 1997.
[71] Maneka Gandhi v. Union of India, 1978 1. SCC 248

Aggravating factor rather than automatic trigger for mandatory punishment like that in the US. The statutory recognition of repeated offenders primarily found in the BNSS and the BNS Which is supplemented with the judicial interpretation which are rooted in the constitutional principles.

Particularly the section 13 of the BNS 2023 Which prescribes an enhanced punishment where a person has been previously convicted for an offence under Chapter 10 or Chapter 17 of the SahitaAnd then Commits a subsequent offense within the same chapter. [72]The provisions simply do not create a separate offence, but merely permit the court to impose a higher sentence, which is within the statutory limits. Quotes has clarified that the Section 30 (previously Section 75) is enabling rather than compulsory, and its application is purely based on the judicial satisfaction regarding proportionality and culpability. [73]More importantly, procedural safeguards require a private conviction to be specifically charged and proved, ensuring due process before enhanced punishment.[74]

In addition to the punitive enhancement of punishment, preventive mechanisms exist under Criminal Procedures. Section Section 129 of the BNSS. An executive magistrate is required to require security for good behavior from a habitual offender.[75]However, codes have narrowly Conferred this mandate. That holding mere police suspension or registration of multiple FIRs do not suffice to brand a person as a habitual offender.[76]

The recent enactment of the Bharatiya Nyaya Sanhita (BNS), along with the BNSS (procedural code) and BSA (evidence code), represents a major paradigm shift in Indian criminal law. This transition has sparked significant constitutional debate, particularly regarding the enhancement of sentences, mandatory life imprisonment, and the treatment of "repeat offender" regimes. This discourse becomes even more critical when viewed alongside the POCSO Act (2012) and various state-level Habitual Offender laws.

[72] Bhartiya Nyaay Sahita Section 13
[73] State of Punjab v. Bawa singh, AIR 2015, SC 339
[74] K. Satwant Singh vs. State of Punjab, A.I.R. 1960 S.C. 266.
[75] Bhartiya Nagrik Suraksha Sahita ,Section 129
[76] Sabri vs Assistant Commissioner of Police , 2018 SCC OnLine Mad 2125

A central feature of the BNS is its explicit focus on incapacitating repeat offenders. Section 71 of the BNS mandates enhanced punishment for recidivism. It states that if a person previously convicted of specific serious offenses is convicted again of the same, they face a mandatory sentence of life imprisonment or death. This provision stands as one of the most vocal endorsements of "mandatory severity" in the Indian legal system, aiming to permanently deter and incapacitate habitual criminals.

This severity is echoed in other sections of the BNS designed to punish heinous crimes. Section 70 prescribes imprisonment for the "natural remainder of the person's life" for gang rape, while Section 66 allows for life imprisonment or death for other aggravated sexual offenses. Furthermore, Section 111, which addresses "Organized Crime," authorizes the death penalty or life imprisonment if the criminal activity results in death. Together, these sections signal the incorporation of a logic of "incapacitative sentences" directly into the penal code.

The procedural aspect, governed by the BNSS, reinforces this strict approach by introducing restrictions on the remission and commutation of life sentences. This effectively increases the severity of the punishment by ensuring that offenders serve longer terms, even if judicial discretion technically exists during the initial sentencing. While the BSA (evidence code) does not prescribe punishments itself, it facilitates convictions under these severe statutes, ensuring that the mandatory minimums are enforceable.

The POCSO Act remains a primary example of this trend toward mandatory minimums. Section 6 of the Act prescribes a minimum of 20 years of rigorous imprisonment, which can extend to life or death, continuing to be a major site for mandatory sentencing. However, the Supreme Court has consistently held that such provisions must still align with the principles of proportionality and fair trials. This tension is evident in laws like Section 19 of the Bombay Habitual Offenders Act (1959), which prescribes life imprisonment for registered habitual offenders upon subsequent convictions, raising ongoing questions about the balance between state security and individual rights.

The courts have judicially developed life sentencing clauses that have been replaced by the softening sentencing measures rather than being declared nugatory. Conversely, the court case Union of India v. S. Haran, notwithstanding the judicial discretion, allowed the life imprisonment for the remainder of natural life clauses to stand.

Judicial statements have emphasised that preventive provisions must not degenerate into instruments of harassment or of informal punishment. Judicial practices further demonstrate the resistance to mechanistic sentencing. The Supreme Court has repeatedly held that the sentencing must reflect a balance between the gravity of the offense, the circumstances of the offender, and the interests of society.[77] This philosophy directs its flows from the Article 21 of the Constitution which requires the deprivation of personal liberty to be just, fair, and reasonable. [78]Subsequently, even repeated offenders should be entitled to individualized considerations And new process, rather than predetermined outcomes.

Recent constitutional jurisprudence reinforces this approach.The Supreme Court has invalidated colonial-era practices of categorizing some communities as 'habitual criminals', holding that such a classification is vague, stigmatizing, and violative of the Articles 14 and 21.[79] These decisions Single-handedly Highlights a broader judicial unwillingness to accept status-based or statute-based punishment divorced from the individual culpability. Although the Indian law recognized recidivism as relevant, it deliberately Tries to avoid rigid sentencing formulas. Repeated offenders enhance judicial discretion rather than replacing it thus in theory Maintaining proportionality as the governing principle.

COMPARATIVE SENTENCING PHILOSOPHY: MANDATING PUNISHMENT VS. JUDICIAL DISCRETION IN INDIA AND THE UNITED STATES

The philosophical divide between Indian sentencing practice and the US mandatory sentencing regime, particularly the three-strike law, is stark.American street strike law statutes impose mandatory life or near-life sentences upon third qualifying conviction, significantly curtailing the judiciary's discretion.[80] The U.S. Supreme Court has upheld such schemes under the 8th Amendment, differing heavily to legislative judgment, even where punishment severity appears extreme. [81]

[77] State of Punjab v. Prem sagar (2008) 7 SCC 550.
[78] Maneka Gandhi vs Union of India, (1978) 1 SCC 248
[79] Sukanya Shanta vs Union of India, 2024 SCC Online SC 112.
[80] Ewing v. California, 538 U.S. 11, 2003.
[81] Lockyer v. Andre, 538 U.S. 63, 2003.

While the empirical and the scholarly literature raises serious concerns about the mandatory sentences, Michael Tonry's seminal study demonstrates that the mandatory penalties consistently fail to produce sustained deterrence, instead shifting sentencing power from judges to prosecutors and generating disproportionate outcomes.[82] . These findings undermine the utilitarian justification of advancing in support of three-strike regimes.

Moreover, the troubling part is that the three-strike law has an capacity. generate perverse incentives. Marvellous and Moody's Econometric analysis found that the state adopting a three-strike law experienced a statistically significant increase in homicide rates, attributing to offenders' incentive to eliminate witnesses and when facing severe mandatory penalties.[83] Such finding directly incapacitates the deterrence rationales that are underlying the mandatory sentences.

For a more normative perspective, mandatory punishment Raises acute proportionality concerns, Van Zyl Smith and Ashworth argue that grossly disproportionate sentences violate human rights norms by treating offenders as a means to an end rather than the right-bearing individuals.[84] While the U.S. constitutional doctrine permits such disproportionality outside the capital context, Indian law derives proportionality from Article 14 and Article 21, which Bring on heels The imposition of Disproportionate punishments.

Judicial discretion serves the institutional mechanism through which proportionality is to be realized. Unlike mandatory schemes,Discretionary sentencing allows the courts to calibrate punishment based on Offender-specific factors such as Age, socio-economic background, and temporal distance between prior communications. [85]Such flexibility seems to be absent from the three-strike law Where only the numerical threshold often overrides moral culpability.
Michael Vittiello's Reviews of California's three-strike experience further illustrate how populist penal policies can entrench excessive punishment while delivering limited public safety benefits. [86]The Indian judiciary has choose to consciously resisted such populist

[82] Michael Tonry's Mandatory Penalties, 16 Crime C.Just. 243 (1992)
[83] Thomas B. Marvell, C. Carlisle, E. Moody, "The Lethal Effect of the Three-Strike Law," 30 J Legal Study, 89, (2001).
[84] Dirk van Zyl Smit C Andrew Ashworth, *Disproportionate Sentences as Human Rights Violations*, 67 Mod. L. Rev. 541 (2004)]
[85] *Soman v. State of Kerala*, (2013) 11 SCC 382
[86] Michael Vitiello, *Punishment and Democracy: A Hard Look at Three Strikes' Overblown*

pressures, emphasizing the principled sentencing over symbolic severity. In comparative terms, the Indian discretionary sentencing framework aligns more closely with the constitutional proportionality Under the Indian Constitution. and human dignity than the mandated American model.

While it will be far fetched to say that discretionary doesn't have its own set of problems, Indian courts have preferred refining judicial standards over the abandonment of the discretionary powers of the courts altogether. Such steps Such steps can indirectly be assumed to be a commitment to individualized justice.

The Three Strike Law in the U.S. was introduced as a crime controller mechanism premised on incapacitation and deterrence, promising substantial reduction in serious crimes by mandating life or near-life sentences for the repeated offenders. Early policy advocated that the framework of the law, is an rational, responds to the public anxiety over the violent receiver, especially the Polly klaas case. But empirical evaluations conducted over the last three decades paint a far more complex and often critical picture.

One of the earliest comprehensive assessments was conducted by the RAND Corporation, which Talked about the projected effect of three-strike law on crime and prison populations. Rand estimated that if fully implemented, the law could reduce serious felons by approximately 22-34%, but only at the cost of a dramatic prison expansion and an annual expenditure increase of between $4.5B to $6.5B[87]. Crucially, Rand itself acknowledged that comparable crime reduction could be achieved through less punitive, alternating targeting of violent offenders, specifically undermining the necessity of an across-the-board three-strike law. [88]

Subsequent studies question whether even the projected benefits materialized or not. Zimmering, Hawkins, and Carning demonstrated that the population of offenders affected by the three-strike constituted a relatively small proportion of overall felony offenders. Meaning that the law's incapacitative effect was inherently limited. [89]Their analysis concluded that much

Promises, 90 Calif. L. Rev. 257 (2002)

[87] Peter W. Greenwood et al., *Three Strikes and You're Out: Estimated Benefits and Costs of California's New Mandatory-Sentencing Law* (RAND 1994)

[88] Peter W. Greenwood et al., *Three Strikes and You're Out: Estimated Benefits and Costs of California's New Mandatory-Sentencing Law* (RAND 1994)

[89] Franklin E. Zimring et al., *Punishment and Democracy: Three Strikes and You're Out in*

of the crime declining is attributed to the three-strike law overlapping with the broader national crime trend of the 1990s, making casual attribution tenouos.[90] The study repeated that some empirical evidence suggests Are counterproductive outcome. Marvell's and Moody's econometric studies found that the statistical increase in homicide. Also from a policy perspective, mandatory sentences under the three strikes substantially reduce judicial discretion while expanding prosecutional power. Michael Tonry observed that the mandatory punishment regime routinely shifts sentencing authorities from just to irrefutable. This shift undermines consistency and accountability while exacerbating judicial disparities against judges.

The physical and the social cost that the three-strike law brings further weakens its policy justification. Prison population expanded rapidly after the last impact meant, and the contribution to the severe overcrowding and long-term castration of aging prisoners with limited public safety returns. The early 2000s, even proponents considered that the three-strike laws imposed unsustainable budgetary burdens while delivering merely marginal additional crime control.[91]

Empirical consensus reflects the three-strike law has failed to achieve the ambitions of deterrence and capacitance goals in proportion to the economic, social, and human cost.

CONSTITUTIONAL COMPATIBILITY OF THE THREE-STRIKE MODEL WITH INDIAN JURISPRUDENCE

The Supreme Court of India has constantly Rejected mandatory sentences that eliminate judicial discretion. Specifically, in the Mittu v. State of Punjab, the court came to the conclusion of striking down Section 303 of the Indian Penal Code that mandated the death penalty for murder committed by a life convict Upholding that the complete exclusion of judicial discretion renders the punishment arbitrary and unconstitutional. [92] This principle was further reinforced in the Bachchan Singh v. State of Punjab case, where the court upheld the constitutionality of death penalty only by introducing the 'rarest of the rare' doctrine. Requiring

California (2001)

[90] Franklin E. Zimring et al., *Punishment and Democracy: Three Strikes and You're Out in California* (2001)

[91] Michael Vitiello, *Punishment and Democracy: A Hard Look at Three Strikes' Overblown Promises*, 90 Calif. L. Rev. 257 (2002)

[92] *Mithu v. State of Punjab*, (1983) 2 SCC 277

individualized balancing of aggravating and mitigating factors. [93]The three-strike law, if it mandates a life penalty for the third felony, irrespective of the gravity of the offense, would collapse the Constitutional framework by equating minor and grave offenses as equal for sentencing purposes, like in the case of Ewing v. California. Which might be ultra vires the constitutional and the institutional principles within the Indian jurisprudence.

Indian Constitutional jurisprudence also impels proportionality as a substantial requirement of the Article 21, Specifically, in the case of Sunil Batra v. Delhi Administration, the court held that even convicted prisoners retain their fundamental rights, and the punishment must not degrade human dignity.[94] Mandatory life sentences without parole would Come into conflict with this rehabilitative and dignity-based approach.

Judicial discretion in sentencing has been reaffirmed as a basic and a structural feature of the Indian criminal justice system. In the case of State of Punjab v. Prem Sagar The Supreme Court stressed that the sentencing must reflect a rational synthesis of deterrence, rehabilitation, and proportionality, cautioning against excessive legislative rigidity.[95]Comparatively, US. US Constitutional Doctrine Tolerates extreme sentences outcome due to legislative supremacy in penal policy, as illustrated in the Supreme Court's refusal to invalidate California Street Strike law in the Ewing v. California. [96]

TRANSPLANTATION - CAN A FOREIGN RULE, LIKE THE THREE STRIKE LAW, SURVIVE WITHIN THE INDIAN ATMOSPHERE?

Legal transplantation is the movement of a ruler or an institution from a jurisdiction into another. It's not just a simple copy-paste of text but a transfer that requires fit with the local institutions, cultures, and practices. [97] Scholars' discovery whether transplantation succeeds as needed packages or whether they must be remade locally. [98]While Watson's sanguine view treats law as a portable proposition that can safely travel and be usefully used between systems, Legard warns us that the law is embedded in a social meaning and rarely behaves the same in

[93] *Bachan Singh v. State of Punjab*, (1980) 2 SCC 684
[94] *Sunil Batra v. Delhi Administration*, (1978) 4 SCC 494
[95] *State of Punjab v. Prem Sagar*, (2008) 7 SCC 550
[96] *Ewing v. California*, 538 U.S. 11 (2003
[97] Alan Watson, Legal Transplants: An Approach to Comparative Law (2d ed. 1993)
[98] Pierre Legrand, The Impossibility of Legal Transplants, 4 Maastricht J. Eur. C Comp. L. 111 (1997)

a new home.[99] Recent developments and works on the constitutional borrowing refine this debate by offering a practical criterion that is fit, transparency, completeness, and yield to ask whether a borrowed doctrine fits and will produce the intended effect in the recipient polity. [100]

Thus, understanding applying the three-strike law in India and three immediate problems shows up. The first of which Institutional problems more specifically the institutional fitting Which requires Reliable Prosecutorial Records, Faster adjudication, ample prison capacity and parole/review mechanism for managing lifers[101]. which form the prerequisites for a successful adoption of the three-strike law.

The Indian criminal system directly opposes on many of those matrics. Huge case backlogs, chronic undertrial populations, limited legal aid, and overcrowded prisons.[102] A rule that depends on prompt, accurate conducting of prior felons will misfire in a system where convictions are delayed or uncertain. [103]

Secondly is the doctrinal and the constitutional fit. Indian constitutional doctrine, Article 14 and 21, demand individualized sentences and proportionality. A judicial stance repeatedly enforced by the Supreme Court. [104]A law such as the Three-Strike that imposes an automatic life sentence for any third felony clashes with the Bachchan Singh case that rejects mandatory mechanist punishment which extinguishes judicial assessment.[105] Tabby C. Tersai cautions that borrowing constitutional or rights-sensitive rules without ensuring the cultural and doctrinal compatibility risks judicial pushback and legitimacy loss.[106]

Third is the social-political and distributive fit. The three-strike law in the U.S. amplified racial and socio-economic disparities because enforcement and changing practices were read by country and community.[107] India's multicultural and And the existence of multiple Cost, class, and regional inequities make similar selective enforcement likely inaddition to the Watson's

[99] Alan Watson, Legal Transplants, supra; Pierre Legrand, supra
[100] Nelson Tebbe C Robert L. Tsai, Constitutional Borrowing, 108 Mich. L. Rev. 459 (2010)
[101] RAND Corp., Three Strikes and You're Out: Estimated Benefits C Costs (1994)
[102] National Crime Records Bureau prison statistics
[103] Pierre Legrand, supra
[104] Mithu v. State of Punjab, (1983) 2 S.C.C. 277; Bachan Singh v. State of Punjab, (1980) 2 S.C.C. 684.
[105] Mithu, supra; Bachan Singh, supra.
[106] Tebbe C Tsai, Constitutional Borrowing, supra
[107] Thomas B. Marvell C Carlisle E. Moody, The Lethal Effects of Three-Strikes Laws, 30 J. Legal Stud. 89 (2001)

transplant optimism underestimates how even institutional incentives will skew the outcomes of the ground.[108]Legrand's critique is worth repeating here as the rule that detaches from its original social meaning has strong affinity produces unintended social costs in the host system.[109]

1. The Methodological Is the TC tsai test Which gives us the evaluation that needs to be done before borrowing. The fit- that does the rule match institutional capacity
2. The completeness -which talks about the complementary institutions such as prisons, parole boards, legal aids in place
3. The yield- Will the rule produce the claimed public safety benefit once transplanted?

In the Indian context, a transplant is practically possible if it is molded for the Indian Institutional and jurisprudential needs, Such a transplant to stand a chance. We must be. A)Limited in scope, meaning to be only be extending to the violet felonies. B Aims to preserve judicial review and proportionality safeguards. C. Be piloted alongside investment in case management, legal aid, and prison capacity. Without these steps, transplantation risks constitutional invalidation and serious social acts. Exactly the hazards Legard and critics warn about[110].

Bottom line is Transplant theory forbid borrowing but it insists on an honest precondition. The three-strike law as packaged in the US might be a poor fit for India. Any borrowing must be selective, constitutionalized, (protected under 21) and institutionally supported.[111]

Reversing the research gap, absence of a context-specific analysis or transplanting US three-strike law into Indian criminal Jurisprudence.

There exists extensive literature on the three-strike law but it is fragmented between jurisdictional and methodological lines. The American scholarship primarily focuses on the empirical effectiveness, physical consequences, and the constitutional permissibility of the three-strike law within the United States without examining their suitability for transplantation

[108] Ian Watson, supra; Marvell C Moody, supra
[109] Pierre Legrand, supra
[110] Pierre Legrand, supra
[111] Disproportionate Sentences as Human Rights Violations, 67 Mod. L. Rev. 541 (2004)

into the foreign legal system. [112] These studies only assume the institutional capacity, the structuring and sentencing culture of the American criminal justice system but fail to answer whether such a regime can function in a jurisdiction where there is a fundamentally different constitutional commitment.

India Sentencing Scholarship, on the other hand, concentrates on the proportionality, judicial discretion, and the basic structure of the Constitution and the Constitution limits on punishment but do not stress these principles against the three-strike framework.[113] The Supreme Court has been successful in developing a robust jurisprudence rejecting mandatory punishment that excludes judicial discretion. Most notably in the *Mithu v. State of Punjab*[114], where the Court struck down the mandatory debt provisions as arbitrary and violative of Article 14 and Article 21. However, Indian courts have never been called upon to access a sentencing regime based on numerical receiverism threshold rather than the offense gravity. Comparatively, Constitutional scholars acknowledges that a legal borrower occurs frequently In between different jurisdictions But warns that transplantation without the understanding of the contextual adaptation can lead to systematic failure.Alan Watson argues that legal rules can migrate across systems but only where functional compatibility exists.[115]In contrast, Pierre pessimistic view contend that law is inseparable from its culture and institutional context Rejecting and thus rendering the Transplantation as conceptually flawed.[116]While the debate is well-developed in theory, it is notyet applied particularly to the post-constitutional system like that.

Unfortunately, no existing study synthesizes American empirical data,Indian Constitutional Doctrine and the transplant theories of accessing feasibility, proportionality, institutional capacity, and the social legal compatibility in a single framework. Thus, the literature fails to answer whether the US law is fundamentally flawed and is fundamentally incompatible with the Indian justice system. The absence constitutes the core research gap that the present study seeks to fill.

[112] Franklin E. Zimring, *Punishment and Democracy: Three Strikes and You're Out in California* (2001)
[113] M.P. Singh, Sentencing Policy in India, 42 J. Indian L. Inst. 1 (2000)
[114] *Mithu v. State of Punjab*, (1983) 2 SCC 277
[115] Alan Watson, *Legal Transplants: An Approach to Comparative Law* (2d ed. 1993)
[116] Pierre Legrand, The Impossibility of "Legal Transplants", 4 Maastricht J. Eur. C Comp. L. 111 (1997)

EVALUATING THE PROS OF THREE STRIKE LAW INCORPORATION INTO INDIA

The strongest argument in favour of the Strike Laws type sentencing system lies in its focus on recidivism. Criminal jurisprudence across jurisdictions has been traditionally treated to be repeating offenders as an aggravating factor on the assumption that the prior punishment having failed increases culpability justifies enhancing sanctions. The three-strike law seeks to formalize this institution by prescribing progressively harsh punishment for repeated offenders, particularly those convicted of serious or violent crimes. Michael Bitello, Punishment and Democracy, supra. From a penological perspective, such a law is justified on the grounds of deterrence and incapacitation. The main proponents argue that clear definition of consequences attached to the repeated criminal conduct may discourage further offending and protect society by removing persistent offenders from circulation.Richard S. Fray's Excessive Punishment Sentences, Punishment Goals, and the 80th Amendment. , 89minn.l.rev.571 2005 In societies where the violent divisive generates public anxiety, such an approach is often defended as a legitimate legislative response.

Another argument that supports three-strike law is the sentencing uniformity. Mandatory enhancement rules reduce variability in sentencing outcomes by constraining judicial discretion and ensuring that similar situations are handled similarly. This is often defended as promoting equality before the law and curbing arbitrary sentencing disparities within the judiciary. [Eric Luna and Paul G. Cassella, Mandatory Minimalism, 32 Cardozo L. Rev. 1 (2010)]. Particularly, in the Indian context, supporters may further point out that the Parliament has already shown willingness to impose several punishments on repeated offenders in particularly heinous crimes. Section 736E of the Indian Penal Code, introduduction of the Criminal Law Amendment Act, that permits life imprisonment for the remainder of natural life or death for repeated rape offenders. This indicates the Indian legal system that it does not reject enhanced punishment for recidivism in principle but applies it in selective cases involving grave harm.

ARGUMENTS AGAINST WHOLESALE ADOPTION

Despite these justifications, the It is against adoption of the US Strike law is substantially stronger. One of the most serious concerns is the erosion of judicial discretion which in turn

hurts the Article 21 and the basic structure of the Constitution. Indian sentencing jurisprudence has consistently emphasized individualized punishment, often referring courts to require and assess the nature of the offense, the circumstances of the offender, and the proportionality of the sentence. Mandatory escalation rules undermine this structural mechanism by converting sentences into a mechanical outcome rather than an individualized sentence. Scholars have long warned that mandatory sentencing regimes shift decisive powers from judges to prosecutors, charging decisions effectively determining punishment. (Michael Tondrey Mandatory Penalty 16 Crime and Just. 243 (1992)).

This problem is closely connected to the constitutional proportionality under the Article 21 of the Indian Constitution that requires the deprivation of personal liberty to be just and fair. The Supreme Court has, on many occasions, invalidated mandatory punishments that foreclose individual sentencing. The most notable Case is Mithu vs. State of Punjab. Where a mandatory death sentence for a class of offenders was struck down as arbitrary and unconstitutional. Thus a rigid 3-strike framework rises and risks reproducing the same defect by trying to punish primarily due to criminal history rather than the gravity of the offense.

There is also senior concern about Article 14 that To treat offenders disproportionately. who commit fundamentally voilate three different laws identically merely to satisfy a numerical threshold. Which in turn rises the spectre of arbiter-ness. (Abhinav Chandrachud, Wendsbury reformulated, 13, Oxford U. Commw. L. J. 191. (2013)) Indian Proportionality Reviews that Increasingly scrutinizes whether legislative classification be as a rational relationship to the objects and whether a less restrictive alternative is available. [Aparna Chandra, Proportionality in India, A Bridge to nowhere, University of Oxford, Hum. Rts. Hub J. 55(2020)]

Institutional capacity further weakens the case for transplantation. Indian prisons are severely overcrowded, and a mandatory life sentence for a broader category of reputed offenders would exacerbate a systematic stress. Without corresponding investment in infrastructure or rehabilitation, spekaing fromthe experience of the US Such law can overload the Indian instituions While in the US, the increase in incarceration was significant, and the limited marginal benefit in crime reduction, prompting a rollback through California's Proposition 36. (Judith Appal, et. al. California Proposition 36: A Success Right for Refinement and Replication, 3. Criminology and Pub. Pol. 585 (2004))

Modification rather than transplantation. Importantly, India is not under any obligation to adopt a foreign sentencing model in its entirety. Comparative constitutional practices show that legal borrowing is often selective and adaptive rather than wholesale buying. Even California's ultimate narrowed its three strikes regime to apply life sentences only where the third offense is serious or violent. [Bracket open, CAL. Penal Code section 667As amended by Proposition 36. [2012]].

If India were to draw from the three-strike idea, it would incorporate only the constructive elements while rejecting its most problematic features. Any adaptation should be limited to serious violent offences, preserve judicial discretion to depart in expressional cases, and allow for a periodic review or parole eligibility. Such a model would resemble enhanced habitual offender provisions already present within the Indian law rather than a rigid American transplant. Furthermore, the punishment of community service should be excluded from the three strikes of the law. As community punishment is only given for petty crimes.

CONCLUSION

The paper examined whether a U.S.-based three-strike law can be meaningfully incorporated into the Indian criminal justice system. The analysis demonstrated that, whether the underlying concerns, such as how to respond to persistent offenders, is legitimated, the wholesale adoption of the three-strike law would be doctrinally unstable and constitutionally invalid. Indian law already recognizes recidivism as an aggregating factor with provisions such as the Section 13 Bharatiya Nyay Sahita 2023 And often, Prescribes increased punishment for rape cases or cases of heinous Crimes. POSCO act in particular Gives minimum mandated punishments Of 20 years under Section 6 of the statute. The Indian Constitutional jurisprudence under Article 14 and 21 places substantive limits on punishment. The Supreme Court's rejection of mandatory sentencing in Mithu and its instances in the individualized reasoning, even in cases involving extreme punishment, such as in the case of *Union of India v. V. Sriharan*[117] upheld life-imprisonment-for-remainder-of-natural-life formulations when accompanied by judicial discretion.Such punishment without remission confirms constitutional resistance to mechanized sentencing schemes. The appropriate conclusion therefore is that India should not be lenient towards repeated offenders but it should resist plent legislative instruments that sacrifice constitutional coherence for symbolic toughness. That India is free to mold foreign

[117] *Union of India v. V. Sriharan*, (2016) 7 SCC 1.

ideas to its own needs and adopt only those elements which benefit it, rejecting the other. A careful calibration may enhance the framework within India for the tackling of repeated offenders and offer a more principled and sustained response to recevidism.

POLICY CONSIDERATIONS AND DIRECTIONS FOR FUTURE RESEARCH

From a policy perspective, law makers should prioritize evidence-based sentencing reform rather than the symbolic transplantation. India would greatly benefit from a systematic collection of recidivism data and development of a structured sentencing guideline that reduces disparity without eliminating judicial discretion. The creation of a sentencing commission, for example, is long recommended by scholars. Such institution could provide a forum for future Future Policy Recommendations and Considerations The future research should focus on:

1. The empirical pattern of repeating offenders in India
2. Its comparative analysis of the habitual offenders in the common law jurisdictions

The deeper doctrinal study of the doctrine of proportionality under Articles 21 and 41 in the context of enhanced sentencing would greatly benefit the Sentencing of repeated offenders with proportionality and in line with the principles of the Constitution under Article 14 and Article 21. Such research would allow India to refine its approach to recidivism without importing the Constitution and the institutional frameworks Such as the failings of three-strike law.

AI and Authorship: Unravelling the Legal Paradox of Machine Creativity

Riya Virdi[118]

ABSTRACT

"The creation of something new is not accomplished by the intellect but by the play instinct acting from inner necessity." - Carl Jung[119]

The concept of creativity has been transformed by Artificial the Artificial Intelligence AI. It is able to paint, compose, write and design and even to invent with a great ability. Nonetheless, one must wonder who is a copyright holder to what AI produces. Is it possible to consider a machine as an author? These queries are fundamental to the intellectual property (IP) law, which typically acknowledges human creativity as the symbol of authorship.

The paper will examine the legal quandary of AI-generated works, addressing the way different jurisdictions address the issue of authorship and ownership. It tends to look at case law such as Thaler v. United States Perlmutter (2023)[1], where the copyright of an artwork produced by an AI system was unregistered and United Kingdom, Copyright, Designs and Patents Act, 1988[120], which assigns copyright to whoever made the required arrangement to bring it into being. Another criterion that the study reviews is the Indian approach to view the Copyright Act, 1957[1], and the author is any individual who causes the coming up of the work.

The absence of transparency in regards to AI in India also provokes the question of innovation and protection. With the ongoing development of AI, the legal systems that regulate it will also have to change. The study stresses that not only human creators ought to be covered by copyright law but also they ought to be adjusted to technological reality by acknowledging human-machine cooperation.

The paper then ends by suggesting a hybrid model of law - according to which ownership of the AI-generated works should belong to human agents, participating in programming or

[118] Student of LLM at Lovely Professional University.
[119] Jung, C. G. (1971). The Portable Jung (J. Campbell, Ed.). Penguin Books.
[120] Copyright, Designs and Patents Act,1988(UK)

functioning of AI, with the sui generis (unique) right to safeguard AI-aided creations. This market strategy is the best way to strike a balance between innovation, ethics and commercial fairness.

Keywords: Artificial Intelligence, Copyright, Authorship, India, Intellectual Property, Legal Framework, Sui Generis Protection.

INTRODUCTION

The Artificial Intelligence has not acted as an instrument at all but has become a co-creator in various creative sectors. Since DALLE learns to draw the art, the ChatGPT is going to write the essay and the scripts, AI is now involved in creative actions which were viewed as the exclusive privilege of humans. This rise of machine authorship upsets traditional ideas of writing originality, expertise and rights.[121]

Recent research builds upon the three pillars of the traditional foundation of copyright e.g. originality, creativity, and human authorship. However, AI, as an algorithmic data processing, does not know or even think it should know that one is lawfully connected to the notions of consciousness and intent. Therefore the contradiction arises from the possession of creative output by a non-legal or individual person.

To illustrate this contrast:

Aspect	Conventional Works of Copyright	AI-Generated Works
Author	Human being	No human creator involved
Creativity	On individual competence and discretion.	Grounded on algorithmic training and data.
Ownership	Vested in creator automatically.	Uncertain - programmer, user, or none.
Legal Status	Recognized by existing laws	Most jurisdictions have not defined it.

[121] Samuelson,P(2019).Copyright and Creativity in the Age of Artificial Intelligence. Columbia Journal of Law & the Arts, 42(3),343-374.

According to the Indian law, Section 2(d) of the Copyright Act continues to associate authorship with human intervention. Nonetheless, this definition cannot be acceptable when the AI systems create content independently. Though AI policy of the Indian government acknowledges innovation in machine learning, it is yet to tackle the issue of ownership, as well as the issue of liability.

It is even more complicated when the pieces created by AI are put on sale. Who gets the royalties in case a movie engages the use of AI music? Unrecognized, conflicts might increase on ownership, profits and moral rights.[122]

The paper is therefore discussing the way the law can change to adapt to AI without eliminating human input. This is meant to create a balance of fairness and moral and commercial balance of creativity.

RESEARCH QUESTIONS

1. Is it possible to copyright AI generated works under the existing laws?
2. Who is supposed to be considered the owner of AI-generated works the programmer, the user, or AI?
3. To what extent does the Indian legal system stand in terms of the international standard of handling AI authorship?
4. What changes or new structures should be made towards India in order to close this legal gap?

HYPOTHESIS

Under the current legal framework, AI-generated works will not be eligible to obtain copyright protection due to the characterization of authorship, originality, and creativity based on the human agency. A modified or sui generis structure can however provide some level of balance to such works.

[122] Lemley, M. A., & Casey, B. (2020). Fair Learning and the Law of Machine Creativity. Stanford Law Review, 72(4), 1021–1072.

LITERATURE REVIEW

The debate surrounding whether Artificial Intelligence (AI) qualifies as an author as regards intellectual property law has spanned an extensive policy swamp in scholarly circles in the last twenty years. The discussion started with some initial speculations about machine creativity, which first gained wide usage in the early 2000s, as the archetypes of autonomous decision-making started to emerge in AI systems such as Deep Blue and subsequent IBM Watson. Some scholars, including Pamela Samuelson (2019)[1], have stressed the point that copyright protection is only possible to compensate human intellectual work. She claims that machines have no intent, judgment and moral personality whom she says are three pillars of authorship in law.

There are, however, contradictory opinions. In their article, Fair Learning and the Law of Machine Creativity (Stanford Law Review, 2020)[123], Mark A. Lemley and Bryan Casey say that whether AI-generated work will be excluded under the authority of the law would deter investment in AI-based tools of creativity. They suggest granting copyright to human operators or those operators, who are behind the AI and positioning them as constructive authors.

Hybrid frameworks have been postulated by different scholars internationally. The copyright laws of the United Kingdom, section 9(3) of the Copyright, Designs and Patents Act, 1988 consider the computer-generated work as authored by the individual who made the arrangements to generate such work. Though it is not a perfect model, it gives a compromise between complete exclusion and complete recognition. The position adopted by the U.S. on the contrary has been stern and fortified in Thaler, the U.S. copyright office said it would not grant copyright to an AI-generated artwork, Perlmutter (2023) reiterates that human authorship is a cornerstone requirement.

The legal systems in Asia are more dynamic. In Feilin v.[124] According to Baidu (2019), a Chinese court admitted that AI-generated output has limited copyright protection with human participation in the design and supervision of the output. The Copyright Office has also

[123] Lemley, M. A., & Casey, B. (2020). Fair Learning and the Law of Machine Creativity. Stanford Law Review, 72(4), 1021–1072.
[124] Feilin v. Baidu, Beijing Internet Court, China (2019).

investigated the guidelines that delineate the difference between the AI-generated and the AI-assisted works in Japan. Such changes indicate that legal perception of authorship is changing with technology.

According to the Indian perspective, the copyright law in India is personality-based according to the statement made by Dr. N. S. Gopalakrishnan, which says that creativity has to be the result of human intellect. Nevertheless, more recent reports indicate that India is starting to take into account the wider scope of the issues of machine learning in law and governance, including the AI for All (2021) and AI Responsible (2023) frameworks published by NITI [125]Aayog.

Immanuel Kant[1] and his moral philosophy are also mentioned as the subject of legal theorists, as the creativity can be regarded as an outcome of autonomy, which machines do not possess in the first place. In contrast, utilitarian views, including those which Jeremy Bentham espoused[126], argue in support of holding works under copyright in order to promote invention and social service, without requiring the author to be of good character. Such a conflict between ethical and economic reasons will precondition the current conflict regarding the legal status of AI.

The available literature therefore narrows down to a single point, the necessity of having a subtle legal change that will balance technology and human morals. Although none of the jurisdictions are fully prepared to accept AI as a writer, most of them are aware of the fact that they need to be prepared to face this possibility.

FINDINGS

The results of the current research indicate that the face-off of technologies, legal regulation, and ethical issues has brought to the fore one of the intricate problems of the 21st century. The fast development of Artificial Intelligence (AI) has long since ceased being a tool of human convenience. It can now make independent decisions, learn through data and generate texts, images and music that is creative. This broadening of the creative agency of AI has raised

[125] NITI Aayog. (2021). Responsible AI for All: Operationalizing Principles for Responsible AI. Government of India.
[126] Bentham, J. (1789/2007). An Introduction to the Principles of Morals and Legislation. Dover Publications.

significant alarm to the historical international borders of the intellectual property law especially to the copyright sector that traditionally depends on the human mind as the only source of originality and creativity.

- **The Anthropocentrism of the authorship-**

Jurisprudence on copyright still remains on the humanistic conception of creativity around the globe. The actual legal notion of authorship requires human minds, emotional outpouring and awareness of originality.[1] In contrast, AI is linked to algorithmic reasoning and prediction by probabilities instead of human intuition or feeling of beauty. In Thaler v. The court repeated that the protection of copyright is based on the human authorship (Perlmutter U.S. 2023)[127]. On the same note, the Delhi High Court in Tech Plus Media Pvt. Ltd. v. Jyoti Janda (2014)[1] reemphasized that the author should be an individual who applies a creative skill and judgment. Therefore, AI can support human creativity, but with the current legislation, it will not be able to substitute human authorship.

- **The Legislative Muddiness in Indian Case-**

Indian Copyright Act, 1957 never specifically considers the authorship of non-humans and/or automated authorship. Section 2(d)[128] defines the author as the individual who creates the work, however, it does not give any guidance in situations whereby the work being created is produced by the use of a machine and not by a human being. This exclusion has resulted in a gap in legislation, especially because AI works are increasingly being utilized in the fields of advertising, entertainment, journalism and design. There is no definite legal position, ownership is questionable, and the courts are ill-equipped to deal with future conflict of AI-generated creativity.

- **Dilemmas of Accountability and Ownership-**

Artificial intelligence creation creates overlapping claims of ownership. Authorship or ownership may be asserted by the developers that write an AI model, the companies that feed the AI model with data, and the end-users that control the AI product. An example is that when an opinion is drafted with the help of AI software in a law firm, who has copyright, the law

[127] Thaler v. Perlmutter, 2023 WL 5333236 (D.D.C. 2023).
[128] Indian Copyright Act, 1957. (1957). Government of India.

firm, the AI company, or the individual lawyer? The absence of the formulated statutory clarity endangers to set up an atmosphere prone to lawsuit and disputes. Moreover, it makes it more challenging to hold the responsible party in case AI recreates the copyrighted version or biases that the training data encompasses accidentally.

- **Ethical and Moral Complexities-**

The inception of AI as a creative force also creates profound ethical issues[1]. In case an AI-created work of art is plagiarism of an existent work of art or an AI-generated song is similar to an existing tune, responsibility identification is problematic. Conventional concepts of moral rights (guaranteeing the reputation of an author and his integrity) become insignificant when it is a non-human creator. Additionally, social issues such as transparency, plagiarism, and authenticity are more acute in the spheres like journalism and media, where AI will be capable of creating artificially human-like information.

- **Economic and Innovation Implications-**

Indirect impact of uncertainty in legal protection has got direct impact on innovation and investment. The businesses that create inventive AI systems will evade jurisdictions such as those in India, whereby, intellectual property rights are either undefined or ambiguous. Such unwillingness to innovate domestically may create a so-called law chill, killing the digital economy, serving as a deterrent to startups, and forcing innovations to countries with less flexible IP protection systems. The desire of India to be the world hub of digital innovation demands that legal changes be made in accordance with technological facts.

- **International Comparative Practices-**

There are diverse approaches taken by countries around the world in response to AI authorship. The copyright, design and patents Act (CDPA) 1988 of the U.K[129]. asserts the authors of computer-generated works as the individual who made the arrangements leading to the creation of the work. China[1] does not permit the protection of human-AI collaboration too much and focuses on the human input to the creativity. U.S. is stuck in its demanding of human authorship whereas Japan has taken a more lenient stance regarding promoting the use of AI in creative

[129] Copyright, Designs and Patents Act, 1988 (U.K.). (1988).

industries. The status quo in India has been closest to that of the U.S. yet, there has not been a statutory exposition which makes creators and policymakers in the country uncertain.

- **Cultural Concerns and Public Policy-**

Not having a legal take on AI-generated creativity also poses a threat of weakening human creators. Uncontrolled AI may mass-create the content and dismiss human artists, authors, and designers economically and creatively. An effective policy framework is important not only to the safeguarding of economic interests but also to the safeguards of cultural integrity, authenticity and equity.

To sum it up, the results show that AI at the moment cannot be considered an author on its own, however, its growing involvement in the creative process indicates that India needs to establish a hybrid legal system that would allow human-AI cooperation, hold AI accountable, and be just in creating innovations.

SUGGESTIONS

These results make it clear that to address the issue of AI generated works in India, a comprehensive approach to establish a related legal and ethical framework is urgently required. There should be an integrated strategy where authorship is upheld, innovation safeguarded and creative integrity ensured. The ensuing recommendations are a guide to reform and governance.

- The Copyright Act, 1957 was amended.
- The first step that can be taken the soonest is to make some amendments to the Indian Copyright Act, which should explicitly define AI-assisted and AI-generated work.
- Works based on the AI assistants should also involve the work in which the human influence and the ability of judgment are considerable.
- The works that are produced by AI are to be called AI-generated works in case AI acts independently.
- This differentiation will contribute to the increased fairness of the punishment as courts determine the extent of human participation and assign the authorship and responsibility.

1. **Introducing a Sui Generis Legal Framework-**

India can have an advantage by creating a sui generis regime, such as those found in the database protection laws of the European Union, to provide special protection to the works created by AI. [130]Such a system would be able to acknowledge ownership rights to the entities or individuals that start (then train or control) AI models, even in cases where the creative process is automated. This would ensure the safety of a necessary investment and encourage innovation without eroding the idea of human creativity.

2. **Awareness of Entropic Pagoda in authorship-**

The fundamental notion behind the authorship must be human. The law needs to acknowledge the centreboard as an author the person who makes conceptual or operational contributions to the output of an AI. As an example, when a movie editor relies on AI in order to create a new visual effect, or the designer creates a prototype using AI, they should be covered as the author. This guarantees that human creativity is the basis of protection of intellectual property.

3. **The Compulsory AI Disclosure and Transparency-**

Accountability should include transparency. The legislation must compel generators and organizations which operate with AI to reveal the extent of AI engagement, comprising of the datasets, algorithms, or models themselves. This disclosure would circumvent copyright infringements, minimize plagiarism, and develop trust in consumers. Also, the identification of the AI generated works might serve to make a distinction between the human generated ones, and the creative markets would be transparent.

4. **Design of an AI and Creativity Governance Board-**

Specialized AI and Creativity Board might be introduced within the Ministry of Electronics and Information Technology (MeitY). It may have the following duties:

- Checking and rating works produced by AI.
- Solving the issue of ownership and authorship.

[130] Gervais, D. J. (2022). The Machine as Author. Iowa Law Review, 107(5), 2051–2105.

- Tracking the practices in regard to ethical and copyright principles.
- Helping Parliament with the reforms it needs.
- Such a board would resemble a quasi-judicial regulatory body of Competition Commission of India (CCI) that governs it effectively.[131]

5. Acquiring experience with International Jurisdictions-

India can learn some lessons of other countries. The pragmatic nature of the U.K. has made sure that it places the authorship on the human controllers in order to hold them accountable. The partial-recognition of AI-assisted authorship in China can promote innovation and retain human control. The balanced and flexible model that Japan has achieved can be a perfect example to follow in India as the focus on technological advancements and creativity is not different.

6. Advocacy of Moral AI Use-

Creative industries call upon AI should be promoted by education, recommendations, and codes of conduct. Coming up with AI Ethics and Law in the curriculum of universities, law schools, and media institutions should equip upcoming professionals. Moreover, the industry associations may create voluntary AI ethics charters to assist in reasonable use of generative tools in advertising, journalism and art.

7. Economic Strategy and Public Policy-

The government should acknowledge that the law of AI authorship clarity is not a legal and economic imperative but is an economic one as well. Explicit policies would bring foreign capital to the booming AI market in India, as well as national entrepreneurs, and promote confidence in digital transformation. A balanced paradigm will make guaranteed that the development of human creativity and technology is not conflicting but is cooperative.[132]

[131] Ministry of Electronics and Information Technology (MeitY). (2023). IndiaAI Mission: Strategy and Guidelines for Responsible Artificial Intelligence. Government of India.

[132] European Commission. (2021). Artificial Intelligence Act – Proposal for a Regulation Laying Down Harmonised Rules on Artificial Intelligence. COM(2021) 206 final. Brussels: European Commission.

Likewise, AI is set to enter the world of the creative industry, yet, without a flexible legal framework, India will fall behind the rest of the digital economy. Transforming the copyright law, establishing specific governance, and instilling moralism in innovations will make India become a frontrunner in responsible AI-enhanced creativity, as well as make sure that the progress is legally safe and ethically sound.

CONCLUSION

"One must keep up with the times or law, since justice is always several steps behind when it never travels."

The idea of creativity as a human activity has been changed by Artificial Intelligence to a hybrid mode of reasoning, information, and layout. It has erased the line between creation and computation.[133] But this development has also exposed the ineffectiveness of the existing legal systems which are still based on anthropomorphic definitions of authorship.

The issue of the paradox of AI-generated works is not only the question of the law but also the question of morality and philosophy. Creativity that was perceived as the manifestation of a human soul is being aped with algorithms. However, machines do not experience emotion, passion and moral responsibility - things that make art meaningful. Hence, the task of AI should not be to steal human creativity but rather enhance it.

The Indian setting demands reform which is inevitable. India needs to reform its copyright system to consider AI-generated content, but keep human authorship as its fundamental value. Copyright act of 1957 cannot afford to be silent anymore on issues of algorithm authorship. The policymakers have to strike the right balance between supporting innovation and safeguarding against abuse.

Harmonization is of importance worldwide. As digital trade and AI ventures grow internationally there is a need to build international consensus to prevent contrary claims. AI consultations under the WTO and other methods of treaties such as TRIPS could offer a basic blueprint on cohesive standards.

[133] Perlmutter, S. (2023). Statement on Human Authorship Requirement. U.S. Copyright Office, Washington D.C.

Creativity will become a human imagination and machine intelligence in the future. The legislation should be changed to appreciate this partnership without the need to water down accountability. AI cannot be assumed to be a moral entity but only can be seen as an augmentation of human ability.

The responsibility of the law is to bring justice, not only to human beings, but also to the civilizations that they create with the help of technology. [134]The AI productions make us pause and consider answers to eternal questions: What is it to create? Who shall be praised on account of creation? And what about the law and innovation and integrity?

"In the symphony creation, man tunes the melody, and the mechanism is the keeper of the rhythm. The future is a coming thing together: they must know the song of the law.".

[134] WIPO (2022). Global AI and IP Dialogue – Policy Challenges and Opportunities.

Algorithmic Gatekeeping: The Role of Recommendation Systems in Music Streaming and Competition Law

Baani Pahwa[135]

ABSTRACT

The emergence of digital streaming platforms has brought about a significant change in the global music industry. With their algorithmic recommendation systems- services like Spotify and YouTube Music are now basically active curators of cultural consumption- rather than merely just being passive distributors. These systems basically determine what music listeners hear, which musicians are promoted, and who eventually gets paid royalties. The final goal of this paper is to basically analyse algorithmic gatekeeping in music streaming from the perspective of competition law- with a particular or special emphasis on the disparity or difference that exists, in power that results from a small nuber of platforms controlling promotion and discovery. Based on platform data and comparative studies- the paper also investigates how recommendation systems basically can either support or challenge market dominance by giving preference to some artists or labels while marginalising others.

Drawing on and considering comparative studies and platform data- the paper also explores how recommendation systems can just reinforce or disrupt market dominance- privileging or rather prioritising certain artists or labels while side-lining others. So it essentially speaks of and also argues that such algorithmic interventions- though technologically neutral on the surface- may amount to exercises of market power with implications under the Indian Competition Act of 2002. The paper also further highlights the relative absence of legal scrutiny on algorithmic bias in India and suggests the need for regulatory frameworks that balance innovation with fairness and transparency.

By situating this issue at the intersection of intellectual property, competition law, and digital regulation- the paper also aims to essentially contribute to emerging debates on platform accountability. It ultimately calls for a re-examination of how competition authorities conceptualize dominance and abuse in data-driven, algorithmically mediated markets.

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Keywords: Algorithms, Competition Law, Digital Platforms, Music Streaming, Recommendation Systems

INTRODUCTION

It is pertinent to note that, the contemporary music industry is no longer defined by radio broadcasts, compact discs, or even traditional record store shelves. Over the past decade- digital platforms such as Spotify, YouTube Music, and Apple Music have certainly transformed the way music is produced, distributed, and consumed.[136] It is also important to gauge that, at the centre or the heart of this transformation are algorithmic recommendation systems that shape user experience by curating playlists, suggesting new tracks or songs- and even influencing what kind of artists listeners are exposed to. For millions of users, these algorithms have become the invisible gatekeepers of cultural consumption, which is overlooked in daily life due to the lack of awareness about the same.

The growing influence of these systems, however, raises important questions of law and policy, specifically with regards to safeguards for the same. While copyright scholarship and discourse has basically already long debated ownership, royalty distribution, and even the impact of digital piracy- way less attention has been paid to the competitive consequences of algorithmic curation. Unlike earlier eras in the music industry- where a handful of or basically just a few selected major record labels dictated access, today it is the platforms themselves that control this very visibility and discovery.[137] This shift in power has profound implications: there is the possibility of bias in playlists that just cannot be rule out, preferential promotion of artists linked to major labels, or even the marginalisation of independent creators.

Against this backdrop, this paper examines algorithmic gatekeeping in music streaming services through the lens of competition law, particularly the Indian Act of 2002[138]. It further also argues that the dominance of platforms- combined with these rather opaque recommendation systems- basically creates new challenges for ensuring fair access and diversity in the digital marketplace. By situating the issue at the intersection of intellectual

[136] Arditi, D., 2018. Digital subscriptions: The unending consumption of music in the digital era. *Popular Music and Society*, *41*(3), pp.302-318.

[137] Guo, X., 2023. The evolution of the music industry in the digital age: From records to streaming. *Journal of Sociology and Ethnology*, *5*(10), pp.7-12.

[138] T*he Competition Act*, No. 12 of 2003, Acts of Parliament (India).

property and competition regulation, this study explores an area that remains relatively under-researched in Indian legal scholarship. In doing so, it highlights the need for greater transparency, accountability, and possibly regulatory intervention to ensure that algorithms do not become silent arbiters of cultural production in the twenty-first century.

STATEMENT OF PROBLEM

The structure of the music industry has changed significantly as a result of the emergence of rather new music streaming services. With the use of curated playlists and algorithmic recommendation systems- platforms such as Spotify, Apple Music, and YouTube Music have evolved into mechanisms that can determine which songs gain exposure and thus even consequent commercial success. This is derived from their ability and access to such a wide range of user data. Due to this change- platform operators now hold a new kind of power concentration, which has certainly marked an end to the major record labels' long-standing dominance.[139]

However, it becomes pertinent to note that complex issues are brought up by this seemingly increasing algorithmic control. Algorithmic gatekeeping can basically produce opaque and rather data driven barriers to entry that are challenging to identify and even more challenging to control, this is definitely in contrast to traditional anticompetitive behaviour, where power was used through price manipulation or exclusive licensing.[140]

For example, showing a self-preference all of the platform affiliated music, discriminatory playlist placements, or preferential promotion of specific tracks can skew or basically distort independent artists' access to the market and even possibly violate fair competition laws. There isn't much guidance on how the Competition Act of 2002[141] should evaluate such algorithmic practices in India, where competition law pertaining to digital platforms is still developing. Even the enforcement is basically made more difficult by recommendation systems' lack of transparency- since impacted parties frequently and usually lack the evidence necessary to establish discrimination or market foreclosure on paper. By critically analysing how algorithmic recommendation systems in music streaming platforms may affect the competitive

[139] *supra* at note 2.

[140] Hesmondhalgh, D., 2021. Is music streaming bad for musicians? Problems of evidence and argument. *New Media & Society*, *23*(12), pp.3593-3615.

[141] T*he Competition Act*, No. 12 of 2003, Acts of Parliament (India).

dynamics in the Indian music industry and whether current legal frameworks are sufficient to handle such algorithm-driven market power, this paper fills this particular gap.

RESEARCH QUESTIONS

i. How have music streaming platforms altered the traditional market structure of the music industry, particularly in terms of control over distribution and promotion?

ii. In what ways do algorithmic recommendation systems and curated playlists act as gatekeepers influencing music consumption patterns?

iii. To what extent can such algorithmic practices be scrutinized under the Competition Act, 2002, particularly under provisions relating to abuse of dominant position and anti-competitive agreements?

iv. What challenges arise in detecting and proving anti-competitive effects caused by opaque algorithmic decision-making processes?

v. What regulatory or legal interventions could ensure that recommendation systems promote fair competition and market access for independent artists?

SIGNIFICANCE

This research is rather significant because it engages with a rapidly evolving intersection of technology, law, and even market regulation- that has yet to receive focused attention of scholars and professionals in the Indian context. While much of the existing literature on music streaming focuses on copyright law and royalty distribution- there are very few studies that critically analyse this particular competition law dimension of algorithmic recommendation systems.[142] By examining algorithmic gatekeeping through the lens of Indian competition law- this paper brings or draws attention to a new and underexplored form of market power - in fact, one that is not based on ownership of intellectual property, but on control over digital visibility and consumer choice structures or architecture of the same.[143] In doing so, it highlights how data driven decision making can create subtle or feeble but then again, rather powerful entry

[142] Antal, D., Fletcher, A. and Ormosi, P., 2021. Music streaming: Is it a level playing field?. *Competition Policy International Antitrust Chronicle*, *2*(2).

[143] Lozic, J., 2019. Digitalization creates a new paradigm of the global music industry: The traditional music industry is under pressure of the streaming platforms. *Economic and Social Development: Book of Proceedings*, pp.179-190.

barriers for independent artists, with potential and rather adverse implications for cultural diversity and innovation in this creative economy.

The findings of this study aim to basically speak of a broader impact beyond the music industry- basically offering a framework to analyse algorithmic bias and self-preferencing on other digital platforms such as perhaps e-commerce marketplaces, video-streaming platforms, and app stores. This cross-sectoral or inter-sectoral relevance of sorts[144] makes the research particularly valuable for regulators, policymakers, and competition authorities who are currently grappling with questions of platform accountability in the digital economy.

Finally, the study aims to also contribute to the global discourse on platform regulation by situating the Indian experience within comparative perspectives- basically potentially informing future amendments to the Competition Act, 2002[145] and shaping policy debates on algorithmic transparency, fairness, and consumer welfare.

SCOPE AND LIMITATION

The scope of this research is set on exploring the impact of algorithmic recommendation systems and curated playlists on competition within the Indian music streaming market, but it also tries to call for a rather inter-sectoral application[146] to understand the harms of algorithmic gatekeeping in general also. It focuses on how these systems may influence visibility, market access, and consumer choice, and also further examines whether such practices could amount to anti-competitive conduct under the Competition Act, 2002 or not. The study also considers the role of regulatory authorities in addressing these issues and briefly draws parallels with global trends to contextualize the Indian scenario.[147]

Despite the broad applicability of its themes- as said above- this study is subject to several important limitations that define the boundaries of its conclusions as well. The most significant

[144] Potnis, D., Tahamtan, I. and McDonald, L., 2025. Negative consequences of information gatekeeping through algorithmic technologies: An Annual Review of Information Science and Technology (ARIST) paper. *Journal of the Association for Information Science and Technology*, *76*(1), pp.262-288.

[145] T*he Competition Act*, No. 12 of 2003, Acts of Parliament (India).

[146] Pałka-Suchojad, K., 2021. Who keeps the gate? Digital gatekeeping in new media. *Zeszyty Prasoznawcze*, (2 (246)), pp.91-100.

[147] Voinea, D.V., 2025. Reconceptualizing Gatekeeping in the Age of Artificial Intelligence: A Theoretical Exploration of Artificial Intelligence-Driven News Curation and Automated Journalism. *Journalism and Media*, *6*(2), p.68.

constraint is the inherent opacity of the "black box"[148] algorithms themselves as rather trade secrets that are proprietary. This means that the study is precluded from accessing source code or certain internal training data, rendering the findings primarily theoretical and doctrinal rather than empirically proven, as it would be difficult to do so. This is also actually compounded by the nascent and evolving state of jurisprudence in this area- meaning the paper's arguments are necessarily prospective, building on existing legal principles in the absence of a settled body of case law directly addressing algorithmic gatekeeping in India. It basically tries to connect existing jurisprudence to an evolving conception.

RESEARCH OBJECTIVES

- To examine how algorithmic recommendation systems and curated playlists shape visibility, promotion, and competition in the Indian music streaming market.
- To analyse whether algorithmic gatekeeping practices may amount to anti-competitive conduct under the Competition Act, 2002, particularly under provisions on abuse of dominance and market foreclosure.
- To explore the challenges posed by the opacity of algorithmic decision-making in assessing harm to competition and market access for independent artists.
- To suggest potential legal and policy interventions that could ensure fairness, transparency, and competitive neutrality in platform-driven music distribution and could further extend to other industries potentially.

I. DEFINING DOMINANCE AND FRAMING THE ABUSE: ALGORITHMIC GATEKEEPING UNDER SECTION 4 OF THE COMPETITION ACT, 2002

Traditional antitrust principles must be an rather, need to be revaluated in order to apply competition law to digital markets. Market power for music streaming services is basically rooted in their control over the sort of architecture of discovery- the algorithmic recommendation systems that serve as the rather new, powerful gatekeepers of cultural consumption- rather than just being a mere function of subscriber volume or just mere

[148] Durán, J.M. and Jongsma, K.R., 2021. Who is afraid of black box algorithms? On the epistemological and ethical basis of trust in medical AI. *Journal of medical ethics*, *47*(5), pp.329-335.

numbers.[149] According to India's competition framework, examining these systems necessitates two steps: first would be basically determining a platform's dominant position in a specific relevant market, and second would be developing a cogent or a rather persuasive theory of harm that basically frames its algorithmic practices as perhaps potentially abusive under Section 4[150] of the Competition Act, 2002. This analysis needs to go beyond crude or basically simplistic comparisons and take into account the distinct economic features of multifaceted, data driven platforms.

A. The Fallacy of Traditional Market Definition in Algorithmic Ecosystems

The foundational step for the CCI would perhaps be the delineation and a demarcation of the "relevant market", a task that is further complicated by the multi sided nature of music streaming platforms.[151] These platforms serve at least two distinct user groups: listeners (consumers) and content creators (artists or labels). While the consumer-facing market might be basically and rather broadly defined as the "market for online audio streaming services in India," this definition is rather inadequate as it fails to capture the competitive dynamics on the supply side- where the artists basically compete for algorithmic visibility- which is a non-monetary, yet crucial, form of currency that needs to be recognised.

A more sophisticated or rather comprehensive approach would be to define a two sided relevant market- basically acknowledging the interdependencies between the two sides. The value for listeners increases with more content, and the value for artists increases with more listeners (indirect network effects). Dominance, therefore, in that case cannot and would not be assessed solely by subscriber market share.[152]

Instead, the CCI must consider metrics that have to be unique to the digital economy. A key factor would be perhaps control over vast datasets of user behaviour. A platform's recommendation algorithm is a capital asset that appreciates with data- this basically means

[149] Hutchinson, C.S., 2022. Potential abuses of dominance by big tech through their use of Big Data and AI. *Journal of Antitrust Enforcement*, *10*(3), pp.443-468.

[150] T*he Competition Act* § 4, No. 12 of 2003, Acts of Parliament (India).

[151] Prey, R., 2018. Nothing personal: Algorithmic individuation on music streaming platforms. *Media, Culture & Society*, *40*(7), pp.1086-1100.

[152] Tim Ingham, *The 5 Most Important Numbers in the UK Music Streaming Market*, MUSIC BUSINESS WORLDWIDE (July 27, 2022), https://www.musicbusinessworldwide.com/the-5-most-important-numbers-in-the-uk-music-streaming-market/ (last accessed 4:02PM, 8th September, 2025).

that the more users listen, the more data is generated, and the more effective the algorithm becomes at retaining users and predicting hits.[153] This creates a powerful data feedback loop, which acts as a sort of barrier to entry for the new competitors. A new entrant- even with a superior interface, cannot replicate or copy basically the personalization capabilities of an one that possesses years of a vast record listener data. Therefore, in its assessment of dominance under the factors listed in the Act, the CCI should give significant weight to non-price factors also- such as the scale and scope of data collection, the sophistication of the platform's analytical capabilities, or even the intensity of indirect network effects.

The traditional SSNIP[154] (Small but Significant and Non-transitory Increase in Price) test that exists for market definition is largely irrelevant and becomes redundant in markets where services are often offered at a zero price to consumers (ad supported nature also), funded by data monetization. The true market power so, lies in the control over the flow of information and the ability to shape consumer choice architecture- which basically demands a more functional and less formalistic approach to defining dominance.

B. Algorithmic Discrimination as an 'Unfair Condition' under Section 4(2)(a)(i)

Once dominance is established, the central legal challenge basically comes to frame algorithmic curation as an "abuse." Section 4(2)(a)(i) of the Competition Act[155], prohibits the imposition of "unfair or discriminatory" conditions and it also provides the most technically challenging avenue. The nuance herein, basically lies in distinguishing between pro-competitive personalization versus say, anti-competitive discrimination. A platform will argue its algorithm is simply matching users with music they are likely to enjoy- a pro-consumer innovation. However, this neutrality is rather illusory is what is argued here- when the algorithm's utility function is optimized not for consumer welfare or cultural diversity, but for platform centric metrics like maximizing engagement time or minimizing royalty payouts rather.[156]

[153] Sánchez-Moreno, D., Gil González, A.B., Muñoz Vicente, M.D., López Batista, V. and Moreno-García, M.N., 2017, June. Recommendation of songs in music streaming services: Dealing with sparsity and gray sheep problems. In *International Conference on Practical Applications of Agents and Multi-Agent Systems* (pp. 206-213). Cham: Springer International Publishing.

[154] Mandrescu, D., 2018. The SSNIP test and zero-pricing strategies: Considerations for online platforms. *Eur. Competition & Reg. L. Rev.*, *2*, p.244.

[155] T*he Competition Act* § 4(2)(a)(i), No. 12 of 2003, Acts of Parliament (India).

[156] Araujo, C.S., Cristo, M. and Giusti, R., 2019, September. Predicting music popularity on streaming platforms. In *Simpósio Brasileiro de Computação Musical (SBCM)* (pp. 141-148). SBC.

This optimization can lead to a form of "auditory redlining,"[157] wherein the algorithm systematically under represents or reduces the visibility of certain genres, independent artists, or demographic groups that do not conform to the most commercially profitable listening patterns perhaps. The precedent set in the case of *Belaire Owner's Association v. DLF Ltd*[158]. , where the CCI condemned the imposition of one-sided terms is applicable here. Here, the terms of engagement are not in a written contract but are instead, sort ofencoded in the platform's opaque infrastructure.[159] An artist has no ability to negotiate with the algorithm or understand why their music is being sidelined. This information asymmetry creates a dependency that is ripe for abuse.

C. Leveraging Data Dominance: A Theory of Harm under Section 4(2)(e)

Perhaps the most sophisticated and forward looking theory relates to the principle of leveraging, prohibited under Section 4(2)(e)[160] of the Act. The CCI's decision in the *Google Android case*[161] provides a clear precedent, finding that Google unlawfully leveraged its dominance in the mobile market to basically favour its own apps. For music streaming platforms, the leveraged asset is not just market access- but along with that data dominance. A platform leverages its comprehensive knowledge of listener preferences and emerging trends to basically gain an advantage in adjacent markets.

A dominant streaming platform knows which unsigned artist is gaining traction in a specific city, what their fanbase demographic is, and what ticket price they could command or could be. If the platform uses this exclusive data to launch its own concert promotion arm or to sign emerging artists to its own label, for example, it is leveraging its data dominance to basically just foreclose competition in these secondary markets. A traditional record label or concert promoter cannot compete with a rival that has a perfect, real-time map of market demand. This is a more subtle form of leveraging than simple self-preferencing in search results; it is the

[157] Eidsheim, N.S., 2023. Rewriting Algorithms for Just Recognition: From Digital Aural Redlining to Accent Activism. In *Thinking with an Accent*. University of California Press.

[158] *Belaire Owner's Ass'n v. DLF Ltd.,* Case No. 19 of 2010, Competition Comm'n of India (India).

[159] Ferraro, A., Serra, X. and Bauer, C., 2021, August. What is fair? Exploring the artists' perspective on the fairness of music streaming platforms. In *IFIP conference on human-computer interaction* (pp. 562-584). Cham: Springer International Publishing.

[160] T*he Competition Act* § 4(2)(e), No. 12 of 2003, Acts of Parliament (India).

[161] *Google LLC v. Competition Comm'n of India*, Appeal No. 01 of 2023, CompAT (Mar. 29, 2023) (appeal from Case No. 39 of 2018, Competition Comm'n of India, Oct. 20, 2022) (India).

monopolization of market intelligence.[162] The Supreme Court's ruling in *CCI v. Co-Ordination Committee of Artists and Technicians of W.B. Film and Television*[163] confirms that the CCI has jurisdiction over creative industries, providing a foundation for investigating these complex, data-driven theories of harm and also basically ensuring that the digital music ecosystem remains a field of fair competition.

II. SURVEILLANCE CAPITALISM ENGINE: ECONOMIC INCENTIVES FOR ALGORITHMIC BIAS AND DATA EXTRACTION

To effectively regulate algorithmic gatekeeping, it is very crucial to understand why exactly these systems operate the way they do. Their design is not solely for user satisfaction but is basically deeply rooted in the economic model of the modern digital platform- which is a model Shoshana Zuboff has termed "surveillance capitalism"[164]. Music streaming platforms, in this view, are not just content distributors- but they are also data extraction machines that sort of commodify user behaviour.

Zuboff also argues[165] that the core business of platforms is the extraction of "behavioural surplus"- this means that user data that goes beyond what is necessary to provide the service. For a music streaming platform- the basic service is basically just playing a song the user selects. The behavioural surplus is everything else that it does- what you listen to, when, what you skip, what you add to playlists, your location while listening, and how your listening habits correlate with millions of others. This data is the raw material for creating "prediction products"[166] which are sophisticated models of user behaviour that can be used to influence and guide future actions. The algorithm is thus, engineered to keep users on the platform longer, generating more data points- which in turn basically refines the prediction products and enhances the platform's value.

[162] Rudkovska, N., 2020. EVOLUTIONARY STAGES OF DEVELOPMENT OF INTEGRATION FORMS OF THE MONOPOLIZATION PROCESS (44).

[163] *Competition Comm'n of India v. Co-Ordination Comm. of Artists & Techs. of W.B. Film & Television*, (2017) 5 SCC 17 (India).

[164] **SHOSHANA ZUBOFF,** *THE AGE OF SURVEILLANCE CAPITALISM: THE FIGHT FOR A HUMAN FUTURE AT THE NEW FRONTIER OF POWER* (2019).

[165] *Id.*

[166] Herteux, A., 2019. Behavioural capitalism and surveillance capitalism-a comparison of two interpretations of a development of capitalism, *Erich von Werner Society*.

This incentivizes formation of algorithmic bias[167] that can have anti-competitive effects. For instance, an algorithm may discover that mainstream, formulaic pop music consistently generates longer listening sessions and lower skip rates. So, it will naturally begin to favour such content- creating a feedback loop that basically marginalizes any other niche or experimental genres. Even though, this isn't born out of a malicious intent to harm independent artists the competitive harm is real as independent artists who do not fit this sort of commercial criteria are thus disadvantaged.

Another pertinent source is the NBER working paper on Spotify.[168] It demonstrates that placement on major editorial playlists has a "large causal impact on streaming numbers". This confirms that platforms have immense power to shape market outcomes. The decision of whose music to "over-promote" is an exercise of market power. When this power is used to favour platform affiliated content or partners, it moves from curation to anti-competitive self-preferencing.[169]

Furthermore, this data centric model creates an intersection with data protection law. The Digital Personal Data Protection Act (DPDP Act), 2023[170], mandates that the processing of personal data must be for lawful purposes and with user consent. Recommendation systems rely on user profiling, which is basically "processing" under the Act. Platforms are obligated to be transparent about this data collection and profiling. The opacity of recommendation algorithms may therefore not only be an issue for competition law- but also a problem of data protection principles if users are not adequately informed about how their data is used to shape their consumption patterns. This highlights need for legal intervention also.[171] The logic of surveillance capitalism[172] reveals that algorithmic bias is not an accident; it is a feature of a profit-maximizing system, making it a legitimate and necessary target for regulatory scrutiny.

[167] Ferrari, G., 2021. Big Tech strategies across markets: the role of self-preferencing in Digital Antitrust.

[168] Luis Aguiar et al., *Platform Power Struggle: Spotify and the Major Record Labels*, NBER Working Paper No. 33048 (2024).

[169] Rahbari, E. and Masoudi Tafreshi, A., 2024. Self-Preferencing in Digital Platforms: A Competition Law Analysis of Preferential Treatment and the Requirements for Ex-Ante Regulations. *Private Law*, *21*(1), pp.91-107.

[170] *The Digital Personal Data Protection Act*, No. 22 of 2023, Acts of Parliament, 2023 (India).

[171] Khandenwal, P., 2023. Tying, Self-Preferencing and the Digital Competition Bill: A Changing Landscape for Competition Intervention?. *Indian JL & Tech.*, *19*, p.68.

[172] Lyon, D., 2019. Surveillance capitalism, surveillance culture and data politics 1. In *Data politics* (pp. 64-77). Routledge.

III. PROVING HARM IN THE BLACK BOX: EVIDENTIARY CHALLENGES AND REGULATORY PATHWAYS FORWARD

While a theoretical contention similar to the one above can be made that algorithmic gatekeeping constitutes an abuse of dominance- translating this into a successful enforcement action is has many practical and evidentiary challenges. The core of the problem lies in the opacity of algorithms[173]- the proverbial "black box."[174] For an independent artist or label to bring a complaint to the CCI, they must not only allege harm but also provide credible evidence that the platform's algorithm systematically and unfairly disadvantaged them. This is an almost impossible burden given that algorithms are proprietary, complex, and constantly evolving.

A. The Asymmetry of Proof: Shifting from Causal Inference to Statistical Demonstration of Harm

The fundamental challenge in litigating algorithmic harm basically lies in the profound mismatch that exists between legal standards of proof and the actual reality of machine learning systems. Competition law has historically relied on finding a "smoking gun"[175]- which is a document, email, or basically just a clause in a contract- that demonstrates anti-competitive intent or a clear, causal link between an action and a market distortion. In the algorithmic context, this model collapses. There is no single line that just says, "suppress independent artists." Instead, harm emerges from the complex interplay of millions of data points and a utility function focussed towards platform centric goals- such as maximizing user engagement or ad revenue.

If an independent artist's music is de prioritized, the platform can argue that its models predicted, based on vast historical data, that users would have a higher probability perhaps to

[173] Eslami, M., Vaccaro, K., Lee, M.K., Elazari Bar On, A., Gilbert, E. and Karahalios, K., 2019, May. User attitudes towards algorithmic opacity and transparency in online reviewing platforms. In *Proceedings of the 2019 CHI Conference on Human Factors in Computing Systems* (pp. 1-14).

[174] Langer, M. and König, C.J., 2023. Introducing a multi-stakeholder perspective on opacity, transparency and strategies to reduce opacity in algorithm-based human resource management. *Human Resource Management Review*, *33*(1), p.100881.

[175] Munayyer, Y.E., 2015. *The smoking gun: Toward understanding the decisions behind repressive outcomes* (Doctoral dissertation, University of Maryland, College Park).

engage with a mainstream track. This is the problem of "algorithmic confounding,"[176] where the legitimate goal of personalization becomes a sort of a shield for discriminatory outcomes. Furthermore, the very nature of causation is rather different. Usually we just seek a linear, deterministic chain of events. In a machine learning model, outcomes are probabilistic.[177] The algorithm doesn't guarantee a song will fail- it just slightly lowers its probability of being recommended to millions of users, which basically amounts to market foreclosure.[178] Proving this requires access to the platform's training data, and the model's architecture- all of which are protected as trade secrets.[179] By that logic, for any complainant, the burden is not just high- it is structurally impossible to meet without regulatory intervention.

B. Proactive Regulatory Frameworks: Employing Competition Sandboxes as a Discovery Mechanism

Instead of merely trying to dissect past harms- the CCI should be empowered to foster a market for pro competitive algorithms. One approach, adapted from financial technology regulation, is the creation of a "competition sandbox."[180] This would be a controlled environment where tech companies, academics, and even the CCI itself could develop and test alternative recommendation algorithms based on principles of fairness, diversity, and contestability.

Imagine a scenario where the CCI- as a condition of approving a merger or as a remedy in an abuse of dominance case- requires a platform to participate in such a sandbox. Basically, for a set period, a small percentage of the platform's users could be randomly assigned to a "sandbox feed" powered by a transparent algorithm. By establishing a certain foundation, the CCI would be able to calculate the "opportunity cost" of the platform's current black box algorithm.[181] We

[176] Chaney, A.J., Stewart, B.M. and Engelhardt, B.E., 2018, September. How algorithmic confounding in recommendation systems increases homogeneity and decreases utility. In *Proceedings of the 12th ACM conference on recommender systems* (pp. 224-232).

[177] Schauer, F. and Spellman, B.A., 2020. Probabilistic causation in the law. *Journal of Institutional and Theoretical Economics*, *176*, pp.4-17.

[178] Kiay, A. and Nazaryan, F., 2022. Identifying the Effects of Algorithmic Gatekeeping in Media Platforms on the General Interests of Users. *Communication Research*, *29*(110), pp.43-67.

[179] Potnis, D., Tahamtan, I. and McDonald, L., 2025. Negative consequences of information gatekeeping through algorithmic technologies: An Annual Review of Information Science and Technology (ARIST) paper. *Journal of the Association for Information Science and Technology*, *76*(1), pp.262-288.

[180] Yang, Y., 2023. Practice and Exploration of Virtual Simulation System to Cultivate Cross-Border E-Commerce Talents in the Context of Big Data. *Journal of Big Data and Computing (ISSN: 2959-0590)*, *1*(1), p.31.

[181] Everingham, M.R., Pelster, N., Mueller, R.P. and Davidian, K., 2008, January. Preparation and Handling Large Quantities of JSC-1A Lunar Regolith Simulant for the 2007 Regolith Excavation Challenge. In *AIP Conference Proceedings* (Vol. 969, No. 1, pp. 268-273). American Institute of Physics.

could finally answer the question: how much more visibility would independent artists receive in a system not solely optimized for engagement?

C. Recalibrating Remedies: Counterfactual Auditing and Algorithmic Disgorgement

Even with better evidence- remedies must be tailored to the specific nature of algorithmic harm. Traditional remedies like cease and desist orders are insufficient as they do not compensate for past harm or deter future misconduct. This paper suggests that two innovative and rather new remedies should be added to the CCI's toolkit: counterfactual auditing and algorithmic disgorgement.

Counterfactual auditing basically moves beyond a simple compliance check. Instead of just asking, "Did the algorithm follow a set of rules?"- it asks a more profound question, which s- "What would the market have looked like but for the anti-competitive conduct?" This would basically involve regulatory appointed technical experts using the platform's own data to build simulation models.[182] These models would estimate the quantum of harm- for instance, the number of "lost streams" or the suppressed market share of independent music- by comparing the actual outcomes with a simulated baseline of a rather neutral algorithm[183] (perhaps informed by the results of a regulatory sandbox).

Apart from this, the CCI could employ the remedy of "algorithmic disgorgement."[184] This principle, borrowed from securities law- basically requires a wrongdoer to surrender the profits obtained from their illegal or unethical conduct.[185] A disgorgement order would require the platform to thus pay profits back. However, now, these funds should not simply go to the treasury but could be paid into a dedicated "Artist and Innovation Fund." This fund could then be used to provide grants, marketing support, and technical assistance to independent artists.

[182] Barredo-Arrieta, A. and Del Ser, J., 2020, July. Plausible counterfactuals: Auditing deep learning classifiers with realistic adversarial examples. In *2020 International joint conference on neural networks (IJCNN)* (pp. 1-7). IEEE.

[183] Lee, S.C., 2022. A black box approach to auditing algorithms. *Issues In Information Systems*, *23*(2).

[184] Goland, J.A., 2022. Algorithmic Disgorgement: Destruction of Artificial Intelligence Models as the FTC's Newest Enforcement Tool for Bad Data. *Rich. JL & Tech.*, *29*, p.1.

[185] Belkadi, L. and Jasserand, C., 2023, July. From algorithmic destruction to algorithmic imprint: generative AI and privacy risks linked to potential traces of personal data in trained models. In *ICML 1st Workshop on Generative AI and Law*.

So, this basically creates a powerful deterrent and ensures that the fruits of anti-competitive conduct are used to restore the competitive balance.

D. A Paradigm Shift in Platform Responsibility: The Doctrine of Information Fiduciaries

Another solution involves a fundamental re conceptualization of the legal relationship between dominant platforms and their users. Drawing on the work of Jack Balkin, it is argued that platforms controlling critical information infrastructure should basically be treated as "information fiduciaries."[186] Imposing a fiduciary duty would introduce two critical obligations: a duty of care and a duty of loyalty. The duty of care would require platforms to ensure their algorithms are robust or rather comprehensive, non-discriminatory, and definitely do not cause foreseeable harm to market participants. The duty of loyalty would basically be even more transformative. It would legally obligate the platform to act in the best interests of its users (both artists and listeners) and prohibit it from using its algorithmic power for self preferencing or to just exploit its users' data.

IV. THE SPECTRE OF ALGORITHMIC COLLUSION: TACIT COORDINATION IN PLAYLIST CURATION

Beyond the mere unilateral conduct of a single dominant firm, another pertinent existing threat to competition lies in the potential for algorithmic collusion. This is basically an issue in global antitrust jurisprudence where two or more dominant platforms, without explicit agreement, might coordinate their behaviour through the use of self learning algorithms.[187] In the context of music streaming, the recommendation and playlisting algorithms of major platforms could learn that prioritizing mainstream artists is the most profitable strategy. If all major platforms' algorithms independently converge on and then follow this strategy, it creates the same anti-competitive effect as an explicit cartel agreement. This presents an immense challenge for the CCI, requiring a fundamental revaluation of how "agreement" and "concerted practice"[188] are understood in the digital age.

[186] Balkin, J.M., 2015. Information fiduciaries and the first amendment. *UCDL Rev.*, *49*, p.1183.

[187] Gebicka, A. and Heinemann, A., 2016. Can Computers form Cartels? About the need for European institutions to revise the concertation doctrine in the information age. *Journal of European Competition Law and Practice*, (7), pp.431-441.

[188] Patakyová, M.T., 2020. Notion of anticompetitive agreement challenged in digital environment. *European Studies-the Review of European Law, Economics and Politics*, *7*(1), pp.237-252.

A. The Platform as a Digital Cartel Manager

The traditional "hub and spoke" cartel[189] basically involves a central entity (the hub- in this case like a supplier) facilitating collusion among downstream players (the spokes or like retailers). In the digital era, this model can be re conceptualized with the platform itself acting as the hub. The platform's algorithm, which sets the parameters for visibility and success, basically just becomes the coordinating mechanism through which otherwise competing entities can achieve a collusive outcome.

In that case, there is no need for the labels to communicate with each other. They need only communicate with the "hub"- the algorithm- by just feeding it data. These parallel inputs will teach the platforms' algorithms- which are basically built to identify and magnify trends- to prioritise this kind of content. As a result, independent artists are marginalised and major labels control the most valuable digital real estate creating a de facto market allocation. By designing its algorithm with a specific objective function- such as maximizing user session time- it basically then creates the very environment that makes this form of tacit coordination possible and profitable. The legal challenge under Section 3[190] of the Competition Act is basically now to frame this complex interaction as a form of agreement.

B. Algorithmic Monoculture and the Foreclosure of Innovation

A second, more passive form of algorithmic collusion arises not from strategic interaction, but from structural parallelism.[191] In a concentrated market- it is highly likely that the few dominant streaming platforms will utilize similar algorithmic architectures[192] and then basically train them on similar vast datasets of user behaviour, and optimize them for similar commercial objectives. This can lead the algorithms to independently and logically converge on identical or highly similar curation strategies, creating what can be termed an "algorithmic monoculture."[193] This concept, basically then describes a market that becomes dangerously

[189] Garrod, L., Harrington Jr, J.E. and Olczak, M., 2021. *Hub-and-spoke cartels: Why they form, how they operate, and how to prosecute them*. MIT Press.

[190] *The Competition Act* § 3, No. 12 of 2003, Acts of Parliament, 2003 (India).

[191] Caforio, V., 2025. Algorithmic Collusion in EU Competition Law: Decoding the Puzzle.

[192] Hanspach, P. and Galli, N., 2025. Algorithmic collusion: an interdisciplinary perspective. In *Research Handbook On Competition And Technology* (pp. 127-150). Edward Elgar Publishing.

[193] Zhang, L.H., Milli, S., Jusko, K., Smith, J., Amos, B., Revel, M., Kussman, J., Titus, L., Radharapu, B., Yu, J. and Sarma, V., 2025. Cultivating Pluralism In Algorithmic Monoculture: The Community Alignment Dataset, https://arxiv.org/abs/2507.09650 (last accessed 8:02PM, 10th September, 2025).

uniform. A music market dominated by a single "successful" algorithmic strategy becomes vulnerable to the foreclosure of innovation.[194]

The harm to competition is profound. It erects barriers to entry for artists who produce novel or experimental work. It also constitutes a long term harm to consumer welfare by reducing the diversity and resilience of the cultural ecosystem. For the CCI, tackling this issue requires a move towards structural remedies. Instead of just punishing behaviour, the CCI might need to consider interventions that mandate "algorithmic diversity,"[195]. This would break the monoculture and reintroduce a degree of and diversity into the market, ensuring that innovation is not just stifled.

C. Algorithmic Accountability

The greatest hurdle in applying Section 3[196] of the Competition Act to algorithmic collusion is the requirement to prove an "agreement" or a "concerted practice," which traditionally implies a "meeting of the minds." Proving this is nearly impossible when the actors are autonomous, self learning algorithms. To overcome this, a new evidentiary and legal standard is required: a shift from proving intent to establishing "algorithmic accountability."[197]

Under this standard, the CCI would not need to find evidence of something like human level communication or explicit agreement.[198] Instead, the inquiry would focus on two key elements. First, causality and effect- basically can it be demonstrated through data analysis that the parallel behaviour of the algorithms led to anti-competitive outcomes (like price stabilization, output restriction, market foreclosure) that are statistically unlikely to have occurred in a competitive market?

[194] Gur-Arieh, S. and Lee, C., 2025, June. Consistently Arbitrary or Arbitrarily Consistent: Navigating the Tensions Between Homogenization and Multiplicity in Algorithmic Decision-Making. In *Proceedings of the 2025 ACM Conference on Fairness, Accountability, and Transparency* (pp. 3336-3349).

[195] Sørensen, J.K. and Schmidt, J.H., 2016. An Algorithmic Diversity Diet?: Questioning Assumptions behind a Diversity Recommendation System for PSM.

[196] *The Competition Act* § 3, No. 12 of 2003, Acts of Parliament, 2003 (India).

[197] Diakopoulos, N., 2015. Algorithmic accountability: Journalistic investigation of computational power structures. *Digital journalism*, *3*(3), pp.398-415.

[198] Kemper, J. and Kolkman, D., 2019. Transparent to whom? No algorithmic accountability without a critical audience. *Information, Communication & Society*, *22*(14), pp.2081-2096.

Second, foreseeability- dealing with whether the firms should have reasonably foreseen that deploying these types of powerful, self-learning optimization algorithms in a highly concentrated market would create a significant risk of tacit collusion? This is sort of similar to a negligence standard. This re-frames the legal question. It is no longer "Did they agree to collude?" but rather "Did they take reasonable care to prevent their autonomous agents from colluding?" This standard of algorithmic accountability would place a proactive duty on dominant firms to design their systems with competition principles in mind.

V. CULTURAL HOMOGENIZATION AS A NON-PRICE HARM TO CONSUMER WELFARE

Competition law's traditional focus is basically on quantifiable economic harms- such as higher prices, reduced output, or stifled or rather reduced innovation. However, in cultural markets like music streaming- one of the most significant harms of algorithmic gatekeeping is qualitative and societal-[199] which is the erosion of cultural diversity. When recommendation systems, optimized for engagement and commercial appeal, create feedback loops that consistently favour mainstream genres and artists, the result is a gradual homogenization of the musical landscape. This constitutes a non-price harm to consumer welfare that the CCI is empowered to protect under its mandate.[200] The "interest of consumers" is not limited to just their financial interest but extends to the quality, variety, and diversity of the goods and services available to them.

The challenge naturally is in basically quantifying this harm. This requires moving beyond traditional economic metrics and developing new analytical frameworks. One approach could be to use bio-diversity indices, such as the Shannon or Simpson index[201], adapted for cultural products. By analysing the music available on a platform versus the much smaller subset that is actively recommended, the CCI could generate a "diversity score" for the platform's recommendations. A declining score over time, or a score that is significantly lower than a

[199] Yu, L., 2023. Personalized Recommendation, Publicness Erosion and Anti-Monopoly Measures in Digital News Market. *Law Sci.*, *2*, p.111.

[200] Srivastava, S. and Gupta, A., 2022. A Paradigmatic Analysis of Anti-Competitive Agreements and Cartelization-How India's Antitrust Watchdog Has Retaliated. *Issue 4 Indian JL & Legal Rsch.*, *4*, p.1.

[201] Morris, E.K., Caruso, T., Buscot, F., Fischer, M., Hancock, C., Maier, T.S., Meiners, T., Müller, C., Obermaier, E., Prati, D. and Socher, S.A., 2014. Choosing and using diversity indices: insights for ecological applications from the German Biodiversity Exploratories. *Ecology and evolution*, *4*(18), pp.3514-3524.

randomly generated recommendation set- could serve as quantitative evidence of homogenization.

This framing allows for a more robust and rather complete application of the Competition Act. The act of a dominant platform using its algorithmic power in a way that systematically reduces the variety of music reaching consumers can be framed as an abuse under Section 4(2)(b)(i)[202], which prohibits limiting or restricting the "production of goods or services or market therefor". Here, the "market" is not just for music in general, but for diverse and niche musical expressions.[203] Recognizing cultural homogenization as a cognizable harm would represent a significant evolution in Indian competition law- basically just affirming that in creative industries- consumer welfare is inextricably linked to the richness and diversity of the cultural ecosystem.

VI. PROMOTIONAL TOOLS AND THE INSTITUTIONALIZATION OF ALGORITHMIC BIAS

While much of the debate on algorithmic bias focuses on the organic and data focussed operation of recommendation systems- a more direct form of gatekeeping is emerging through the platform provided promotional tools. Services like Spotify's "Marquee" or "Discovery Mode" allow artists and labels to pay to have their music algorithmically promoted to targeted user segments.[204] On the surface, these are presented as democratic marketing tools, allowing artists to bypass traditional intermediaries and reach listeners directly. However, in a market controlled by a dominant platform- these tools can basically just function as a sophisticated form of digital payola.[205]

The competition law concern here is multi-faceted. First, these tools can exacerbate and increase the very biases they claim to overcome. An algorithm's primary signal is user engagement. When a major label pays to artificially inflate the initial exposure of a track, it basically generates user data and engagement signals. The algorithm, in turn, interprets this

[202] *The Competition Act* § 4(2)(b)(i), No. 12 of 2003, Acts of Parliament, 2003 (India).

[203] Buttigieg, E., 2009. *Competition Law: Safeguarding the Consumer Interest: a comparative analysis of US antitrust law and EC competition law* (Vol. 40). Kluwer Law International BV.

[204] LaGroue, J.A., 2025. *The Work of Music in the Streaming Age: How Algorithms and Artificial Intelligence Influence the Art, Industry, and Aura of Music* (Doctoral dissertation, The Pennsylvania State University).

[205] Buccafusco, C. and García, K., 2021. Pay-to-playlist: The commerce of music streaming. *UC Irvine L. Rev.*, *12*, p.805.

paid for popularity as organic interest[206], leading it to recommend the track even more widely. This creates a "rich get richer" dynamic,[207] where financial power can be basically directly converted into algorithmic favourability, drowning out organically emerging independent music. This practice could be scrutinized under Section 4(2)(a)(i)[208] as the imposition of a discriminatory condition.

Second, the very existence of these tools can create a soft form of tying or bundling, falling under Section 4(2)(d)[209]. While not a formal tie-in, there may be an implicit understanding that artists who heavily invest in a platform's promotional products will basically receive more favourable treatment in other areas- such as algorithmic visibility.[210] This creates pressure on artists to participate in the platform's paid ecosystem- and thus just reinforcing the platform's market power. Further, unlike the backroom deals of the radio payola era, digital payola is transparent, scalable, and built directly into the market's infrastructure. It represents a critical avenue for legal intervention.

VIII. COMPARATIVE ANALYSIS: GLOBAL REGULATORY APPROACHES TO ALGORITHMIC GATEKEEPING

The challenge of regulating algorithmic gatekeepers is a global one- and a comparative analysis of international approaches offers critical insights for India. The European Union has pioneered a proactive, *ex-ante* regulatory model through its Digital Markets Act (DMA)[211]- which basically imposes a set of upfront obligations on platforms designated as "gatekeepers." This basically includes a direct prohibition on algorithmic self-preferencing and mandates for data access- so offering a powerful blueprint for remedying the information asymmetry and biased curation.

[206] *Id.*

[207] Saygın, T.M., 2022. *Music Industry's Turbulent Relation with Streaming: Political Economy of Spotify* (Master's thesis, Middle East Technical University (Turkey)).

[208] *The Competition Act* § 4(2)(a)(i), No. 12 of 2003, Acts of Parliament, 2003 (India).

[209] *The Competition Act* § 4(2)(d), No. 12 of 2003, Acts of Parliament, 2003 (India).

[210] Bonini, T. and Magaudda, P., 2024. *Platformed! How streaming, algorithms and artificial intelligence are shaping music cultures*. Cham, Switzerland: Palgrave Macmillan.

[211] Kasikci Unalan, A., 2025. Ex-ante and Ex-post Enforcement Mechanisms in Digital Markets under EU Competition Law and Digital Markets Act.

In stark contrast, the United States has traditionally relied on a litigation-driven, *ex-post* enforcement model,[212] using its long-standing Sherman Act to bring large-scale antitrust lawsuits against tech giants like Google and Amazon after harm has occurred. [213]While this approach is flexible, it is often slow and rather resource intensive, and may basically even fail to address issues like emergent algorithmic collusion before a market has irreversibly "tipped." For India, the optimal path forward lies in a hybrid model that synthesizes the strengths of both. This would involve adopting the EU's proactive stance by legislatively defining a category of "Systemically Important Digital Intermediaries"[214] and applying clear, *ex-ante* rules against self-preferencing and other unfair practices. Simultaneously, India must retain and strengthen the CCI's existing *ex-post* enforcement powers, inspired by U.S. agencies, to investigate novel theories of harm and address unique market abuses. By blending the regulatory certainty of the European model with the enforcement flexibility of the American one, India can basically craft a rather forward looking legal framework.

FINDINGS

This research was undertaken to investigate the efficacy of the Competition Act, 2002[215], in addressing the anti-competitive harms that are posed by algorithmic gatekeeping in India's music streaming industry. The analysis basically reveals that while the existing legal framework contains the doctrinal foundations or seeds rather to tackle these challenges, its traditional application is insufficient. The findings of this paper are presented as follows, representing a call for a significant evolution in both legal interpretation and regulatory practice.

A. The Nature of Dominance in Algorithmic Markets is Defined by Data Control, Not Market Share Alone

The paper finds that traditional measures of dominance- like revenue or subscriber count- are insufficient for music streaming services now. Control over large, unique user behaviour

[212] Bignami, F., 2011. Cooperative legalism and the non-Americanization of European regulatory styles: The case of data privacy. *The American Journal of Comparative Law*, *59*(2), pp.411-461.

[213] Waldén, J. and Davoodi, B., 2024. Ex Post vs. Ex Ante Enforcement: Competition Law and the Digital Markets Act.

[214] Almeida, J.G.D., 2024. *Regulating competition in platform economy: European Union\'s Digital Market Act\'s challenges and opportunities and analysis from a developing economy perspective* (Doctoral dissertation, Universidade de São Paulo).

[215] *The Competition Act*, No. 12 of 2003, Acts of Parliament, 2003 (India).

datasets and the advanced algorithmic architecture based on them are basically the sources of true market power. As a result, the CCI evaluation of dominance needs to change to give more weight to elements like the volume of data gathered and the strength of indirect network effects than it does to conventional market share analysis.[216]

B. Algorithmic Abuse is an Emergent Property of System Design, Not Necessarily an Act of Malicious Intent.

This research finds that anti-competitive harm is not typically the result of an explicit "smoking gun" instruction to suppress certain artists, which is basically the norm in competition law. Instead, abuse emerges from the design of algorithms optimized for platform-centric goals rather than for market fairness or cultural diversity. This leads to several forms of cognizable abuse under Section 4[217] of the Competition Act:

- **Discriminatory Conditions:** Algorithmic prioritization of basically mainstream content is just an unfair and discriminatory condition for market access on independent or niche artists, violating Section 4(2)(a)(i).[218]
- **Denial of Market Access:**[219] The "algorithmic invisibility"[220] that results from this biased curation amounts to a de facto denial of market access under Section 4(2)(c).[221]
- **Data-Driven Leveraging:** Platforms leverage their dominance in the primary streaming market, which is built on user data, to gain unfair advantages in ancillary or basically other markets like artist management and live promotions, a clear violation of Section 4(2)(e).[222]

C. The Evidentiary Burden in Algorithmic Cases is Structurally Unfair and Requires a Regulatory Shift.

[216] Nuccio, M. and Guerzoni, M., 2019. Big data: Hell or heaven? Digital platforms and market power in the data-driven economy. *Competition & Change*, *23*(3), pp.312-328.

[217] *The Competition Act* § 4, No. 12 of 2003, Acts of Parliament, 2003 (India).

[218] *The Competition Act* § 4(2)(a)(i), No. 12 of 2003, Acts of Parliament, 2003 (India).

[219] Guin, R. and Gupta, A., 2025. Epistemic Injustice in the Digital Age: Social Media, Silencing, and the Politics of Credibility. *Journal of Humanities and Education Development*, *7*(3), p.618998.

[220] Glatt, Z., 2022. Precarity, discrimination and (in) visibility: An ethnography of "The Algorithm" in the YouTube influencer industry. In *The Routledge companion to media anthropology* (pp. 544-556). Routledge.

[221] *The Competition Act* § 4(2)(c), No. 12 of 2003, Acts of Parliament, 2003 (India).

[222] *The Competition Act* § 4(2)(e), No. 12 of 2003, Acts of Parliament, 2003 (India).

The paper finds that the current model for bringing a case before the CCI is functionally obsolete in the context of algorithmic harms. The opacity of the "black box" creates a profound information asymmetry- making it basically just impossible for an independent artist or label to prove that their harm was the result of anti-competitive conduct rather than legitimate personalization. The paper finds that an alternative or perhaps a more proactive regulatory posture is necessary to overcome this evidentiary deadlock. This includes empowering the CCI to conduct proactive algorithmic audits and establishing regulatory sandboxes to create evidence of what a competitively neutral market would look like.

D. The Scope of Competitive Harm Extends Beyond Unilateral Conduct to Systemic and Cultural Harms.

The investigation finds that the threat to competition is not limited to the actions of a single dominant firm but extends to systemic market failures facilitated by algorithms.

- **Algorithmic Collusion:** A significant, forward-looking threat is the emergence of tacit collusion under Section 3[223] of the Act, where the use of similar algorithms by dominant platforms leads to an "algorithmic monoculture."[224] This results in a market-wide suppression of innovation without any explicit agreement, a phenomenon that requires a new legal standard of "algorithmic accountability."[225]
- **Cultural Homogenization:** The paper finds that the systematic reduction in the diversity of discoverable music constitutes a tangible, non-price harm to consumer welfare. This can and should be recognized by the CCI as a form of market restriction under Section 4(2)(b)(i)[226], affirming that consumer interest in cultural markets includes variety and choice, not just price.

SUGGESTIONS AND RECOMMENDATIONS

Based on the findings that the current competition law framework is not well equipped to address the nuanced or the aforementioned harms of algorithmic gatekeeping, this paper puts

[223] T*he Competition Act* § 3, No. 12 of 2003, Acts of Parliament, 2003 (India).

[224] Gur-Arieh, S. and Lee, C., 2025, June. Consistently Arbitrary or Arbitrarily Consistent: Navigating the Tensions Between Homogenization and Multiplicity in Algorithmic Decision-Making. In *Proceedings of the 2025 ACM Conference on Fairness, Accountability, and Transparency* (pp. 3336-3349).

[225] O'Brien, J.D., Rubin, H., Wong, K. and Fazelpour, S., 2025. Epistemic Monocultures and the Effect of AI Personalization. In *Proceedings of the Annual Meeting of the Cognitive Science Society* (Vol. 47).

[226] T*he Competition Act* § 4(2)(b)(i), No. 12 of 2003, Acts of Parliament, 2003 (India).

forth a series of targeted recommendations. These suggestions are designed to create a more transparent and competitive digital music ecosystem in India, moving from a reactive basically to a proactive regulatory posture.

A. Legislative and Institutional Reforms:

❖ **Amend the Competition Act, 2002:**

The Act should be amended to explicitly recognize the unique characteristics of digital markets.[227] This includes formally defining concepts like "data dominance" as a factor in assessing a firm's market position and clarifying that "denial of market access" includes algorithmic invisibility and suppression.

❖ **Establish a Specialized Digital Markets Unit (DMU) within the CCI:**

The complexities of algorithmic systems require specialized expertise. A dedicated DMU- basically staffed with data scientists, engineers, and economists specializing in digital platforms- should be established. This unit would be responsible for conducting proactive market studies, developing technical tools for algorithmic auditing, and advising on enforcement actions and remedies in the digital sector.

❖ **Introduce a 'Duty of Care' for Dominant Platforms:**

A legislative amendment should be considered to impose a statutory "duty of care"[228] on platforms designated as dominant gatekeepers. This would require them to take reasonable steps to prevent their algorithms from basically causing foreseeable anti-competitive harm.

B. Proactive Regulatory and Enforcement Mechanisms:

❖ **Mandate Algorithmic Transparency and Explainability:**

For dominant platforms, the CCI should be empowered to mandate a baseline level of algorithmic transparency. [229]This would not require the disclosure of proprietary source code but could involve compelling platforms to provide clear, comprehensible documentation on the key parameters, objectives, and data inputs of their recommendation systems. This would

[227] Eng, V. and See, T., 2015. Competition Act 2010: the issues and challenges. *European Journal of Law and Economics*, *40*(3), p.587.

[228] Bayer, J., 2021. Rights and duties of online platforms. *Perspectives on platform regulation: Concepts and models of social media governance across the globe*, pp.25-45.

[229] Tao, L., 2024. *The 'Gatekeeper' Scope of the Digital Markets Act: An Analysis of Its Soundness and Compatibility of 'Dominant Position in the Competition Law*, NEL Rev., 10, p.108.

empower both regulators and market participants to better understand the entire system basically.

❖ **Implement a Regulatory Sandbox for Algorithmic Design:**

The CCI should pioneer a "competition sandbox"[230] for algorithmic recommendation systems. This would allow for the testing of alternative algorithms designed to promote objectives like cultural diversity or fairness. The data generated would provide an empirical baseline against which the anti-competitive effects of existing, practically these opaque algorithms could be measured.

❖ **Adopt a 'Shift in the Burden of Proof' in Prima Facie Cases:**

In cases where a complainant can demonstrate a prima facie case of significant harm on a dominant platform- the burden of proof should perhaps shift to the platform to demonstrate that its algorithmic actions were non-discriminatory and basically served a legitimate, pro-competitive purpose.

C. Development of Soft Law and Stakeholder Collaboration:

❖ **Facilitate a Multi-Stakeholder Code of Conduct:**

The CCI, in collaboration with the Ministry of Information and Broadcasting, could even perhaps facilitate the creation of a voluntary Code for Algorithmic Fairness[231] in Music Streaming. This would bring together platforms, major labels, independent artist bodies, and academics to develop industry best practices regarding data use, promotional tools, and algorithmic design, fostering a culture of accountability alongside formal regulation.

CONCLUSION

The advent of music streaming- which has been powered by sophisticated recommendation algorithms, has basically completely reshaped the creation, distribution, and consumption of music. In addition to providing certain new levels of personalisation and access- it has also concentrated a lot of and rather enormous gatekeeping power in the hands of a small number of powerful platforms. The results of this study indicate that market and technological advancements are essentially surpassing the existing Competition Act of 2002. By proposing

[230] *supra* at note 88.

[231] Biju, P.R. and Gayathri, O., 2024. Analysis of data policies, structural oppression and AI algorithms in India. *International Journal of Public Law and Policy*, *10*(4), pp.449-471.

new ideas like examining "algorithmic collusion" as a type of coordinated practice, recognising "cultural homogenisation" as a non-price consumer harm, and basically applying the doctrine of "Information Fiduciaries" to dominant platforms, this paper tries to go beyond a straightforward application of pre-existing doctrines.

Ultimately, this serves as a call for a paradigm shift of sorts. India needs to change its antitrust laws from being reactive and intent-focused to being proactive, effects-based, and basically just more structurally aware. The objective is to steer innovation in the direction of a more competitive and equitable future- not to stifle it. India can preserve the rather vibrant nature of its creative economy for future generations by making sure that algorithms serve the public interest of diversity and justice rather than just the private interest of engagement and profit. The stakes- the very future of our cultural landscape- demand that we rise to the challenge.

Conviction of Elected MPs and MLAs post-Election in India

Pranay Chaturvedi [232]

ABSTRACT

This research explores the high-stakes evolution of legislative integrity in India, tracing the transition from a system of procedural leniency to one of immediate accountability. At its core, the study examines the fundamental tension between a representative's right to the presumption of innocence and the public's right to an ethical, "untainted" government.

Historically, Indian legislators benefited from a legal safety net that permitted them to retain their seats while appealing criminal convictions, a loophole that critics argued fueled the criminalization of politics. This paper analyzes how the landmark Lily Thomas (2013) verdict dismantled these protections, establishing that disqualification must be instantaneous upon conviction. It further navigates the remaining judicial "safety valves," such as the exceptional power to stay a conviction, which remains the only narrow path for a politician to revive their career mid-tenure.

The heart of the investigation provides a timely critique of the 130th Amendment Bill (2025). This proposed legislation introduces a radical shift in Indian constitutional law by moving the trigger for removal from a final judicial verdict to a period of investigative detention. By requiring Ministers to vacate their office after 30 consecutive days in custody, the Bill directly challenges the phenomenon of "governing from jail."

Through a comparative lens contrasting India's automatic disqualification triggers with the more deliberative "recall" or "expulsion" processes used in the United Kingdom and the United States, this research raises a critical question: In the pursuit of constitutional morality, is India risking the weaponization of investigative agencies to destabilize the democratic mandate? The paper concludes that while purging the "taint of suspicion" is essential for restoring public trust, the legal framework must ensure that administrative efficiency does not come at the cost of the Rule of Law.

[232] 3rd Year Law Student, School of Law, CHRIST (Deemed to be University), Bangalore.

INTRODUCTION

The integrity of legislatures rests on clear, predictable consequences for criminal conviction. In India, Parliament has exercised its power under Articles 102(1)(e)[233] and 191(1)(e)[234] to prescribe disqualifications through the RPA, 1951. Section 8 of the RPA, read with Articles 101[235] or 190[236] on seat vacancies and Articles 103[237] or 192[238] on decision-making regarding disqualifications, creates a comprehensive framework that operates even when conviction occurs after election. The Supreme Court's decision in Lily Thomas (2013)[239] removed the previously available "grace period" for sitting legislators, making disqualification immediate on conviction, subject to the appellate court's exceptional power to stay the conviction itself.

RESEARCH PROBLEM

What is the present legal position in India when an elected MP/MLA is convicted after election, how do constitutional and statutory provisions interact with Supreme Court doctrine, and how does India's approach compare with attention to thresholds, timelines, institutional roles, and available relief with the U.K., U.S., Australia, Canada, and South Africa?

THE CONSTITUTIONAL AND STATUTORY ARCHITECTURE OF DISQUALIFICATION

Constitutional Foundations of Legislative Vacancy

The Indian system of legislative disqualification has its foundation in a two-fold system of constitutional provision and statutory application. Thus, while Articles 102(1)(e)[240] and 191(1)(e)[241] the Indian Constitution states that Parliament shall make provision for the manner in which a MEMBER OF THE LOK SABHA or /MEMBER OF THE STATE LEGISLATURE shall be disqualified for its membership, such a provision is not merely procedural but also substantive in nature. As a result of such disqualification, Articles 101(3)(a)[242] & 190(3)(a)[243]

[233] Constitution of India 1950, art 102(1)(e)
[234] Constitution of India 1950, art 191(1)(e)
[235] Constitution of India 1950, art 101
[236] Constitution of India 1950, art 190
[237] Constitution of India 1950, art 103
[238] Constitution of India 1950, art 192
[239] Lily Thomas v Union of India (2013) 7 SCC 653.
[240] Constitution of India 1950, art 102(1)(e)
[241] Constitution of India 1950, art 191(1)(e)
[242] Constitution of India 1950, art 103(a)
[243] Constitution of India 1950, art 192

state that the seat shall be vacated as a direct consequence of the enactment. Thus, while Articles 103[244] & 192[245] state that the PRESIDENT / GOVERNOR shall be the final authority in accordance with the 'obligatory opinion' of the ELECTION COMMISSION in these matters, the high office's role in such cases essentially lies in adjudication of disputes that pertain to the fact or legal effect of disqualification. Not only that, in cases of criminal offenses such disqualifications are usually self-executing, leaving little discretion in the hands of the executive except in the case when the legal status of the offense itself has been challenged in a court of law.

The Statutory Mechanism: Representation of the People Act, 1951

The Representation of the People Act (RPA), 1951, is the key legislative framework for maintaining the dignity of the electoral procedure. The Section 8 of this Act has a stratified structure of disqualification on the basis of the crime committed. Though Sections 8(1)[246], 8(2)[247], and 8(3)[248] relate to certain crimes such as corruption and communal disturbances, Section 8(3) tends to be the "catch-all" provision. This says that in any case of conviction liable to result in a jail term of two years or longer, the person will be automatically disqualified. This disqualification starts from the date of conviction and continues for six years from the date of release from jail. Though Section 11[249] waives this in the latter period after release from jail, there is no respite from the immediate vacation of the seat with the objective of keeping the legislative body clear of the person so long as he or she is serving his or her term.

JUDICIAL EVOLUTION AND THE "IMMEDIATE EFFECT" DOCTRINE

The Legacy of Lily Thomas: Abolishing the Grace Period

The modern landscape of legislative disqualification was fundamentally altered by the landmark judgment in Lily Thomas v. Union of India (2013)[250]. Prior to this ruling, Section 8(4)[251] The RPA provided sitting legislators with a three-month "protection window" to file an

[244] Constitution of India 1950, art 103
[245] Constitution of India 1950, art 192
[246] Representation of the People Act 1951, s 8(1)
[247] Representation of the People Act 1951, s 8(2)
[248] Representation of the People Act 1951, s 8(3)
[249] Representation of the People Act 1951, s 11
[250] Lily Thomas v Union of India (2013) 7 SCC 653.
[251] Representation of the People Act 1951, s 8(4)

appeal, during which their seat remained secure despite a criminal conviction. The Supreme Court struck down this provision as ultra vires, holding that Parliament could not create a discriminatory classification between a "candidate" and a "sitting member" for the purpose of disqualification. By affirming that a seat falls vacant the moment a disqualification is incurred, the Court ensured that the constitutional mandate for purity in the legislature takes precedence over the individual's right to exhaust appellate remedies while remaining in office.

Pre-Conviction Disqualification and the Separation of Powers

Despite growing concerns regarding the "criminalization of politics," the judiciary has maintained a strict boundary regarding its own power to expand disqualification grounds. In Public Interest Foundation v. Union of India (2019)[252], the Supreme Court declined to mandate disqualification at the stage where criminal charges are framed. Recognizing the doctrine of separation of powers, the Court held that while it could advocate for transparency and disclosure, the power to create new disqualification criteria remains an exclusively legislative function. Consequently, the Indian regime remains "conviction-centric," requiring a formal judicial finding of guilt before a representative is unseated, thereby protecting legislators from potentially motivated or frivolous prosecutions.

COMPARATIVE PERSPECTIVES ON GLOBAL STANDARDS

The "Automatic" Trigger vs. Institutional Discipline

India's regime of immediate, statutory disqualification is notably more rigorous than many of its global counterparts. In the United Kingdom, the Recall of MPs Act 2015 introduces a democratic check where constituents can remove an MP following certain criminal triggers, rather than relying solely on automatic vacation. In contrast, the United States relies heavily on internal institutional discipline; under Article I, §5[253] either House may expel a member with a two-thirds majority, but there is no general constitutional rule that automatically vacates a seat upon a standard criminal conviction. India's system aligns more closely with Australia, Canada, and South Africa, where disqualification is keyed to specific sentence thresholds such as Australia's one-year threshold under Section 44(ii)[254] though India's unique Lily Thomas doctrine makes the process exceptionally swift and difficult to interrupt.

[252] Public Interest Foundation v Union of India (2019) 3 SCC 224.
[253] Recall of MPs Act 2015, Art.1 s 5
[254] Commonwealth of Australia Constitution Act, s 44(ii)

Mechanism and Timing: Automaticity vs. Deliberation

The timing of a vacancy is a critical point of divergence in international practice. In India, following the Lily Thomas ruling, disqualification is immediate and self-executing upon the pronouncement of a qualifying conviction. The United Kingdom follows a similar automatic path for sentences exceeding one year under the Representation of the People Act 1981[255], but allows for a more deliberative "recall" process for shorter custodial sentences. The United States maintains a non-automatic approach; even a convicted member remains in office until their peers vote for expulsion, emphasizing the protection of the legislative branch from executive or judicial interference.

EMERGING TRENDS: THE 130TH AMENDMENT BILL, 2025

From Conviction to Custody: A Paradigm Shift for Executives

The introduction of the Constitution (One Hundred and Thirtieth Amendment) Bill, 2025[256] (introduced August 20, 2025), represents a significant normative shift in Indian constitutional law. While the RPA focuses on the status of a legislator upon conviction, this Bill targets executive office-holders. The Bill proposes to amend Articles 75[257], 164[258], and 239AA[259] to provide for the automatic removal of the Prime Minister, Chief Ministers, and other Ministers if they are detained in custody for 30 consecutive days for an offense punishable by five years or more. This moves the trigger for removal from a final judicial conviction to a period of prolonged detention, establishing a "custody-based" removal system that operates independently of the eventual trial outcome.

Impact on Political Incentives and Governance

The proposed 130th Amendment[260] resets the incentives for "governing from jail." By mandating resignation or automatic cessation of office after 31 days of detention, the law seeks to prevent administrative paralysis. However, it raises significant concerns regarding the "presumption of innocence" and the potential weaponization of investigative agencies to

[255] Representation of People's Act, 1981
[256] The Constitution (One Hundred and Thirtieth Amendment) Bill 2025.
[257] Constitution of India 1950, art 75
[258] Constitution of India 1950, art 164
[259] Constitution of India 1950, art 239AA
[260] The Constitution (One Hundred and Thirtieth Amendment) Bill 2025.

destabilize governments. While the Bill allows for reappointment upon release, it creates a temporary vacancy in high executive office based solely on detention, a departure from the conviction-centric approach of Section 8 RPA[261]. As it sits before a Joint Parliamentary Committee, it highlights a growing tension between protecting constitutional morality and maintaining democratic safeguards against executive overreach.

DETAILED CASE LAW ANALYSIS (FILAC)

Lily Thomas v. Union of India, (2013) 7 SCC 653[262]

Facts: Advocate Lily Thomas and the NGO Lok Prahari filed a writ petition challenging the constitutional validity of Section 8(4)[263] of the Representation of the People Act (RPA), 1951. Before this judgment, Section 8(4) acted as a "saving clause" for sitting legislators; it provided that if an MP or MLA was convicted of an offense mentioned in Section 8, the disqualification would not take effect for three months. If the member filed an appeal or revision within that period, the disqualification remained until the final disposal of the case. This allowed convicted individuals to continue participating in legislative proceedings, sometimes for years, while their appeals were pending.

Issue: The central issue was whether Parliament had the legislative competence under Articles 102(1)(e)[264] and 191(1)(e)[265] to create a separate class of disqualification rules for sitting members as opposed to candidates. Essentially, the Court had to decide if the Constitution allowed for a "deferred" vacancy of a seat once a disqualification had been incurred.

Law: The case revolved around the interaction between Articles 102[266] or 191[267] (which define disqualification) and Articles 101[268] or 190[269] (which mandates the vacation of seats). Specifically, Article 101(3)(a)[270] states that if a member becomes subject to any disqualification, their seat "shall thereupon become vacant."

[261] Representation of the People Act 1951, s 8
[262] Lily Thomas v. Union of India, (2013) 7 SCC 653
[263] Representation of the People Act 1951, s 8(4)
[264] Constitution of India 1950, art 102(1)(e)
[265] Constitution of India 1950, art 191(1)(e)
[266] Constitution of India 1950, art 102
[267] Constitution of India 1950, art 191
[268] Constitution of India 1950, art 101
[269] Constitution of India 1950, art 190
[270] Constitution of India 1950, art 101(3)(a)

Analysis: The Supreme Court ruled that the language of the Constitution is "affirmative and mandatory." It held that Articles 102(1)(e)[271] and 191(1)(e)[272] empower Parliament to make "one law" for both candidates and sitting members. By enacting Section 8(4)[273]Parliament had attempted to carve out an exception that the Constitution did not permit. The Court reasoned that once a person is disqualified by law, the seat falls vacant automatically and instantaneously. Parliament cannot use its legislative power to override the constitutional mandate that a disqualified person's seat must become vacant. This judgment removed the "three-month cushion" and made criminal accountability immediate.

Conclusion: The Court declared Section 8(4)[274] of the RPA ultra vires (beyond the power of) the Constitution. As a result, any sitting legislator now stands disqualified on the date of conviction, and their seat is deemed vacant immediately.

Navjot Singh Sidhu v. State of Punjab, (2007) 2 SCC 574[275]

Facts: Navjot Singh Sidhu, then a Member of Parliament, was convicted of culpable homicide not amounting to murder in a road-rage case and sentenced to three years of imprisonment. This conviction triggered immediate disqualification under the RPA. Sidhu resigned his seat and sought a "stay of conviction" from the appellate court so he could contest a by-election for the same seat. This was one of the first major cases to define the "safety valve" available to politicians after a trial court verdict.

Issue: The core question was whether a court, exercising powers under Section 430 of the BNSS, has the authority to stay a conviction (not just the sentence) specifically to allow a person to contest an election or retain a seat, and what standard of proof is required for such a stay.

Law: The Court interpreted Section 430[276] of Bhartiye Nagarik Suraksha Samhita, which allows an appellate court to suspend the "execution of the sentence or order" appealed against.

Analysis: The Supreme Court clarified that a "stay of sentence" only pauses the jail term, but the "disqualification" arises from the fact of the conviction itself. Therefore, a legislator remains disqualified even if they are out on bail. To revive their eligibility, they must obtain a specific stay of conviction. The Court held that this power is "exceptional" and should be

[271] Constitution of India 1950, art 102(1)(e)
[272] Constitution of India 1950, art 191(1)(e)
[273] Representation of the People Act 1951, s 8(4)
[274] Representation of the People Act 1951, s 8(4)
[275] Navjot Singh Sidhu v. State of Punjab, (2007) 2 SCC 574
[276] Bhartiya Nagarik Suraksha Samhita 2023, s 430

exercised only in "rarest of rare" cases. The applicant must demonstrate that if the conviction is not stayed, they will face "irreparable injury" that cannot be remedied even if they are later acquitted. In Sidhu's case, the Court granted the stay because he had voluntarily resigned on moral grounds and sought a fresh mandate from the people, which the Court viewed as a sign of bona fide intent.

Conclusion: A stay of conviction is the only legal remedy that can "wipe out" the disqualification pending appeal. However, it is not a matter of right and is granted only when the court is satisfied that the conviction could lead to a catastrophic and irreversible loss of a public career.

Public Interest Foundation v. Union of India, (2019) 3 SCC 224[277]

Facts: Petitions were filed in the interest of "cleaning up" Indian politics, asking the Supreme Court to disqualify individuals from contesting elections as soon as criminal charges are framed against them by a judge. The petitioners argued that since the framing of charges implies a prima facie judicial finding of involvement in a crime, it should be enough to bar a person from the legislature, given the long delays in Indian criminal trials.

Issue: Can the judiciary add new grounds for disqualification specifically at the pre-conviction stage to the list already provided by Parliament in the Representation of the People Act?

Law: The case touched upon the Doctrine of Separation of Powers and the limits of the Court's power to "legislate" under Article 142[278].

Analysis: A five-judge Constitution Bench expressed deep concern over the "criminalization of politics" but ultimately held that the Court cannot cross the line into the legislative domain. Under the Indian constitutional scheme, the power to prescribe disqualifications is vested exclusively in Parliament. The Court noted that the "presumption of innocence" is a fundamental right, and disqualifying someone before a trial is completed would be a violation of that principle. Instead of changing the law, the Court issued "directions" to political parties and candidates to publish their criminal antecedents in newspapers and on television to allow voters to make an informed choice.

Conclusion: The Court refused to expand disqualification to the charge-framing stage. India's system remains strictly conviction-centric, meaning a legislator's seat is safe until a formal judgment of guilt is delivered by a court of law.

[277] Public Interest Foundation v. Union of India, (2019) 3 SCC 224

[278] Constitution of India 1950, art 142

Lok Prahari v. Election Commission of India, (2018) 18 SCC 114[279]

Facts: This case was a follow-up to the Lily Thomas ruling. The petitioner challenged the idea that a disqualification is "wiped out" retrospectively if a court stays the conviction. They argued that once a seat becomes vacant under Article 101[280] or 190[281], it cannot be "revived" just because an appellate court grants a stay weeks or months later.

Issue: Does a stay of conviction granted by an appellate court have the effect of restoring the membership of a disqualified legislator, or does it only apply prospectively for future elections?

Law: Interaction between Article 101(3)[282] (vacation of seat) and Section 430[283] of the BNSS (stay of order).

Analysis: The Supreme Court clarified that the moment a conviction (carrying a sentence of 2+ years) is stayed by an appellate court, the disability caused by that conviction ceases to operate. The Court held that a stay of conviction has the effect of "suspending" the disqualification. If the stay is granted, the member's disqualification is lifted, and they are eligible to continue as a member or contest elections. The Court emphasized that the stay of conviction is a vital "check" to ensure that a potentially erroneous trial court judgment does not permanently destroy a democratic mandate before the higher courts can review the evidence.

Conclusion: The Court affirmed that a stay of conviction restores the status of the legislator. This confirmed the stay of conviction as the primary legal "relief" for sitting MPs and MLAs who face unseating due to a criminal verdict.

SYNTHESIS: JUDICIAL SAFETY VALVES VS. THE 130TH AMENDMENT

The Conflict of Triggers: Conviction vs. Custody

Under the established Lily Thomas doctrine, a legislator's seat is protected by the "presumption of innocence" until a trial court delivers a formal verdict of guilt. The trigger for vacancy is a judicial determination. Conversely, the 130th Amendment Bill[284] shifts this trigger to an investigative fact: 30 consecutive days of custody.

[279] Lok Prahari v. Election Commission of India, (2018) 18 SCC 114
[280] Constitution of India 1950, art 101
[281] Constitution of India 1950, art 190
[282] Constitution of India 1950, art 101(3)
[283] Bhartiye Nagarik Suraksha Samhita 2023, s 430
[284] The Constitution (One Hundred and Thirtieth Amendment) Bill 2025.

- Under RPA Section 8[285]: You are unseated because you are a convict.
- Under 130th Amendment: You are removed because you are unavailable to govern.

This moves the law away from the "conviction-centric" protection affirmed in Public Interest Foundation (2019)[286], creating a higher, more precarious standard of accountability for the Executive than for the Legislature.

The Inapplicability of "Stay of Conviction"

The most significant legal shift lies in the available relief. Under the Navjot Sidhu[287] and Lok Prahari[288] precedents, an MP or MLA can save their seat by obtaining a "Stay of Conviction" under Section 430 of the BNSS. This judicial order effectively "pauses" the disqualification. However, because the 130th Amendment[289] triggers removal based on detention rather than conviction, a "Stay of Conviction" is legally irrelevant. For a Minister in 30 day custody, the only "safety valve" is Bail. If an investigative agency successfully opposes bail for 31 days, the removal becomes automatic and self-executing, bypassing the appellate judicial protections that have guarded the careers of legislators since 2013.

Reversibility and Reappointment

A critical distinction introduced by the 2025 Bill is the concept of reversibility.

- **Representation of People's Act or Lily Thomas:**

Once a seat is vacant, a by-election is typically triggered. Even if a conviction is later overturned, the individual often cannot simply "walk back" into their old seat without a fresh election.

- **130th Amendment**

The Bill allows for reappointment once the person is released from custody or acquitted. This suggests that the removal is intended as a "functional suspension" rather than a permanent disqualification. It prioritizes the continuous operation of the office over the tenure of the individual.

[285] Representation of the People Act 1951, s 8
[286] Public Interest Foundation v. Union of India, (2019) 3 SCC 224
[287] Navjot Singh Sidhu v. State of Punjab, (2007) 2 SCC 574
[288] Lok Prahari v. Election Commission of India, (2018) 18 SCC 114
[289] The Constitution (One Hundred and Thirtieth Amendment) Bill 2025.

Constitutional Morality vs. Weaponization

The synthesis of these laws highlights a growing tension in Indian Constitutional Morality. The government justifies the 130th Amendment using the spirit of Manoj Narula (2014)[290], which urged that "tainted" persons should not hold high office.

However, by removing the requirement for a judicial verdict (Lily Thomas) and making removal dependent on the duration of custody, the law risks making the Permanent Executive (Investigative Agencies) the arbiters of the Political Executive's survival. Unlike the UK's "Recall" system or the US "Expulsion" system both of which involve democratic or peer-based deliberation the Indian 30-day rule is a mathematical, automatic trigger that leaves little room for judicial or political discretion.

FUTURE OUTLOOK: THE 130TH AMENDMENT AND THE BASIC STRUCTURE DOCTRINE

The future of executive accountability in India is likely to be defined by a high-stakes constitutional showdown over the 130th Amendment Bill. If passed, the Supreme Court will be forced to weigh the government's pursuit of "Constitutional Morality" , the idea that high office should be beyond suspicion against the "Basic Structure Doctrine." Legal scholars anticipate a challenge based on the Separation of Powers, as the Bill effectively allows the permanent executive (police and investigative agencies) to unseat the elected executive (the Prime Minister or Chief Ministers) simply by extending detention beyond 30 days. This shifts the power to "de-legitimize" a government from the legislature and the judiciary to investigative bodies, potentially disrupting the democratic mandate without a single trial court finding of guilt.

Furthermore, the Bill's departure from the "Conviction-Centric" model may be viewed as a violation of the Rule of Law and the Presumption of Innocence under Article 21[291]. Unlike the Lily Thomas framework, where a seat is vacated only after a rigorous judicial trial, the 130th Amendment[292] triggers removal based on a pre-trial investigative stage. The Supreme Court may find that such an automatic trigger, lacking judicial oversight of the likelihood of guilt, is arbitrary. However, if the Court views "Governing from Jail" as a separate constitutional crisis

[290] Manoj Narula v Union of India (2014) 9 SCC 1

[291] Constitution of India 1950, art 21

[292] The Constitution (One Hundred and Thirtieth Amendment) Bill 2025.

that paralyzes administration, it may uphold the amendment as a necessary functional safeguard, provided that robust protections against "motivated arrests" are integrated during the Joint Parliamentary Committee's current review.

Ultimately, the resolution of this conflict will determine whether the Indian Constitution evolves into a "zero-tolerance" model where even the suspicion of a serious crime is enough to pause a ministerial career. The survival of the 130th Amendment will depend on whether the judiciary perceives it as a genuine tool for ethical cleansing or as a potential instrument for political destabilization. As the Bill allows for reappointment upon release, the Court might treat it not as a permanent disqualification, but as a temporary administrative suspension, a distinction that could be the key to its survival under judicial scrutiny.

CONCLUSION

The evolution of disqualification law in India reflects an aggressive judicial and legislative push to resolve the "criminalization of politics," a phenomenon that has long threatened the integrity of the world's largest democracy. For decades, the legal system operated under a protective shield that allowed convicted legislators to retain their seats through prolonged appellate delays. The landmark ruling in Lily Thomas v. Union of India (2013)[293] shattered this status quo, establishing that the constitutional mandate for a "vacant seat" is immediate and self-executing. This shift moved the Indian legal regime from a state of procedural leniency to one of strict, conviction-centric accountability, where the only narrow "safety valve" remains the rare and exceptional judicial stay of conviction.

However, the introduction of the Constitution (130th Amendment) Bill, 2025[294], marks the beginning of an even more radical era. By proposing to unseat the Prime Minister, Chief Ministers, and Ministers based on 30 days of custody rather than a final conviction, the law seeks to codify "Constitutional Morality" as a functional requirement for high office. This transition from judicial finality to administrative necessity acknowledges that "governing from jail" is incompatible with the public trust. Yet, it simultaneously creates a constitutional paradox as it risks sacrificing the fundamental presumption of innocence and potentially weaponizing investigative detentions to destabilize democratically elected governments.

[293] Lily Thomas v. Union of India, (2013) 7 SCC 653
[294] The Constitution (One Hundred and Thirtieth Amendment) Bill 2025.

In summary, while the Lily Thomas framework successfully purged the legislature of proven convicts, the 130th Amendment attempts to purge the executive of the "taint of suspicion." The future of this legal landscape will depend on the judiciary's ability to harmonize these two goals. A sustainable model for India’s democracy must ensure that while the "halls of power" are kept clean, the "will of the people" is not subverted by arbitrary arrests. Ultimately, the integrity of the Indian legislature rests not just on the speed of removal, but on the fairness of the process that leads to it ensuring that accountability and justice remain two sides of the same constitutional coin.

A Critical Analysis on Police Brutality and Accountability Mechanisms Against SC/ST Communities

Akshaya S[295]

ABSTRACT

Police brutality in India has become a chronic human rights issue, especially against marginalized Scheduled Castes (SCs) and Scheduled Tribes (STs). Even with stringent constitutional protections under Articles 14, 15, 17, and 21, and statutory safeguards under the SC/ST (PoA) Act, 1989, and the new criminal laws, custodial violence persists on an institutionalized basis. Reports of the National Human Rights Commission and National Crime Records Bureau (NCRB) continued to record high numbers of custodial deaths, and these were disproportionately Dalit and Adivasi. Judgments like D.K. Basu v. State of West Bengal and Nilabati Behera v. State of Orissa have expounded protection against custodial torture, but gaps in implementation remain. Oversight mechanisms including the NHRC, State Human Rights Commissions (SHRCs), and Police Complaints Authorities (PCAs) have been weakened by lack of binding powers and political interference.

This paper undertakes a doctrinal and analytical examination of the legal framework governing police brutality and violence in custody, specifically pertaining to SC/ST communities. It examines the gap between the law and reality, bringing to light systemic injustices that support impunity as well as ingrained caste prejudice. Based on a review of Indian statutes, court rulings, and international comparisons, the study emphasizes the need for comprehensive reforms, from anti-torture legislation to more efficient independent oversight. The research concludes by stating that constitutional safeguards will be mere ideals and not legally enforceable rights until India tackles the caste context of custodial violence and strengthens its accountability institutions.

Keywords: Police brutality; Custodial violence; SC/ST; Constitutional safeguards; Accountability mechanisms; Human rights; Caste discrimination.

1. INTRODUCTION AND RESEARCH FRAMEWORK

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1.1 Introduction

The acts of police brutality in India can arguably be viewed as the worst version of state violence and is entirely contrary to the equality, dignity, and freedom that are ensured by the constitution. Although Scheduled Castes and Scheduled Tribes are relatively a higher victim of systemic exclusion and deep-rooted caste hierarchies, all citizens can become the victims of custodial abuse. Cases of torture and deaths in custody and arbitrary arrests provide serious questions on the effectiveness of the constitutional and statutory protections in India by exposing inherent bias in policing practices in the country.[296]

The Constitution ensures equality in the eyes of the law (Article 14), non-discrimination (Article 15), and elimination of untouchability (Article 17) and protection of personal life and liberty (Article 21).[297] To reinforce these assurances, the SC/ST (Prevention of Atrocities) Act, 1989 aims at preventing atrocities of caste, such as custodial torture.[298] Nevertheless, based on the empirical data, Dalits and Adivasis continue to be one of the most frequent targets of custodial torture and killings.

This systemic crisis is backed up by official data. In 202122, the National Human Rights Commission (NHRC) recorded 2,152 deaths on judicial custody and 155 deaths on police custody .[299] Out of 4,448 deaths due to custody that were recorded by the National Crime Records Bureau (NCRB) in 2020 - 2022, more than 952 were recorded in Uttar Pradesh alone.[300] However, no one is held accountable: 345 magisterial inquiries were initiated between 2017 and 2022, and 123 people were arrested, 79 were charged, and none found guilty.[301] Powerlessness is subtended by socio-economic weaknesses, statistics show that 71 percent of the deaths in custody were of the poor or marginalized individuals between 1996 and 2018, according to the NHRC data analysis (2018).[302]

[296] Usha Ramanathan, Custodial Violence and the Failure of Accountability in India, 37 Econ. & Pol. Wkly. 4159 (2002).
[297] INDIA CONST. arts. 14, 15, 17, 21.
[298] Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, No. 33 of 1989, INDIA CODE (1989).
[299] Nat'l Hum. Rts. Comm'n, Annual Report 2021–22 (2023).
[300] Nat'l Crime Records Bureau, Crime in India 2022 (2023).
[301] The Hindu, Low Convictions in Custodial Death Cases: Report (Jan. 15, 2023).
[302] Nat'l Hum. Rts. Comm'n, Custodial Deaths: Analysis 1996–2018 (2019).

Incursions by courts have set up great normative pillars. In the case of D.K. Basu the Supreme Court mandated protection of detention and arrest.[303] In Nilabati Behera v. The Court in State of Orissa found state liability and compensation on a custodial death.[304] These safeguards are, however, still weakened by the enforcement. There are documented regular trends of custodial torture, discriminatory policing, and registration refusal of the First Information Reports (FIRs) against the victims of SC/ST by civil society organizations, such as Human Rights Watch, Amnesty International, and National Campaign on Dalit Human Rights (NCDHR).[305]

Such failures are also a tarnishment of the international obligations of India. Although it has ratified the United Nations Covenant on Civil and Political Rights and the UN Convention against Torture (UNCAT) India still lacks a strong anti-torture law.[306] Caste discrimination, lack of control, and political indifference are all factors contributing to the institutionalization of custodial violence as is the case when there is a gap between the constitutional guarantees and the actual situation.

1.2 Statement of Problem

Though the constitution provides guarantees of equality, dignity, and non-discrimination, the Scheduled Castes (SCs) and Scheduled Tribes (STs) continue to suffer unproportional cases of police brutality in India. Custodial torture, extra judicial execution, arbitrary arrest, and caste-based humiliation are not just single incidences but a constant pattern that is reported by the National Human Rights Commission (NHRC), the Law Commission of India, and by civil societies groups, such as Amnesty International and the Human Rights Watch. Though there are legislative systems like the SC/ST (Prevention of Atrocities) Act, 1989, and the new law reforms presented in the form of the Bharatiya Nyaya Sanhita (BNS), Bharatiya Nagarik Suraksha Sanhita (BNSS), and Bharatiya Sakshya Adhiniyam (BSA), that are aimed at protection, their efficacy is tainted by the question of ineffective implementation. Other oversight bodies such as the NHRC, State Human Rights Commissions (SHRCs), Police Complaints Authorities and the special courts usually lack independence, enforcement ability

[303] D.K. Basu v. State of W.B., (1997) 1 S.C.C. 416 (India).

[304] Nilabati Behera v. State of Orissa, (1993) 2 S.C.C. 746 (India).

[305] Amnesty Int'l, Torture in 2020 Report: India (2021); Human Rights Watch, Bound by Brotherhood: India's Failure to End Custodial Violence (2016); Nat'l Campaign on Dalit Human Rights, Dalit Human Rights Documentation Report (2019).

[306] U.N. Treaty Collection, Status of Treaties: Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (2023).

and access by marginalized victims. Impunity is further ingrained through political interference and the delays in the procedure as well as prejudice on the basis of caste. Such failure on a systemic level underlines the necessity to critically analyze accountability mechanisms and reforms in order to ensure that the SC/ST communities gain real protection.

1.3 Research Questions

1. What role are the constitutional guarantees in Articles 14, 15, 17, and 21 playing in ensuring police brutality and custodial violence against the SC/ST communities are curtailed?
2. How effective are the SC/ST (Prevention of Atrocities) Act, 1989 and the new criminal codes (BNS, BNSS, BSA) in preventing police misconduct and where are there enforcement provisions missing?
3. What are the historic court rulings that have determined accountability in custodial violence cases on SC/ST victims?
4. To what extent do oversight institutions such as the NHRC, SHRCs, Police Complaints Authorities, and special courts hold the police accountable to crimes against the marginalized groups?
5. What can the international standards of human rights and comparative legal models tell us about reforming accountability mechanisms in India in order to safeguard SC/ST communities?

1.4 Significance of Research

The study is important since it analyzes the structural character of police brutality in India and especially its overrepresentation among Scheduled Castes (SCs) and Scheduled Tribes (STs). Regardless of the constitutional rights on equality, dignity and protection against discrimination, the SC/ST communities continue to be very susceptible to custody violence and institutionalized discrimination in the policing. The analysis of statutes and judicial pronouncement, and accountability mechanisms demonstrates that law and practice always remain at crossroad. Its results are added to theoretical literature, affect policy change, and enhance the advocacy of institutional responsibility, thus improving the safety of human rights and the fulfillment of the constitutional commitments to the marginalized groups.

1.5 Scope and Limitation of Research.

This research is limited to doctrinal and analytical examination of the problem of police brutality and accountability systems in India, and SC/ST population, in particular. It examines constitutional assurances, legislative guarantees, judicial case law and bodies including the NHRC, SHRCs and Police Complaints Authorities. The international comparisons are also used in the study to determine the best practice over reform. Yet, its shortcomings are its dependence on the secondary sources, statutes, judgments, official reports, and academic writings, without empirical fieldwork and interviews. Thus, the research does not directly evaluate on-the-ground enforcement or victim testimonies, although it provides a critical theoretical analysis.

1.6 Objectives of Research

To investigate constitutional protection under Article 14, 15, 17, and 21 in ensuring that the SC/ST communities are not subjected to police brutality.

To examine the effectiveness and role of the SC/ST (Prevention of Atrocities) Act, 1989, and new criminal laws (BNS, BNSS, BSA) as a preventative measure against custodial violence.

To examine seminal court decisions that influence accountability in custodial violence involving the SC/ST victims.

To assess how effective the mechanisms of oversight including NHRC, SHRCs, PCAs, and special courts are in terms of accountability.

To discuss the international experience and suggest the changes towards enhancing accountability in India.

1.7 Research Methodology

The given research paper follows a doctrinal/analytical approach in exploring the issue of police brutality against SC/STs in India. The doctrinal method is close to the study of the constitutional provisions, the statutory provisions including the SC/ST (Prevention of Atrocities) Act, 1989, the criminal laws BNS, BNSS, and BSA. It also discusses the applicable case law, which encompasses landmark cases like the D.K.Basu v. v. State of West Bengal, Nilabati Behera. Prakash Singh v. State of Orissa. To follow the history of judicial protection of custodial violence.

The analytical element assesses the difference between the written norms and the actual practice based on the secondary sources which include the reports of the NHRC, NCRB statistics, the cases of the Law Commission and the work of the human rights organizations.

International experience, especially the U.K and South Africa, is also taken into consideration in an attempt to come up with the successful models of accountability. This approach allows to have a comprehensive view of the strengths and weaknesses of the legal and institutional system in India. The study is restricted however to secondary data and does not participate in the empirical fieldwork and interviews.

2. LITERATURE REVIEW

According to legal experts like Usha Ramanathan, the failure of independent institutions of accountability is also the main reason why custodial torture continues to exist despite the existence of constitutional provisions. Her writing emphasizes the fact that in as much as Articles 14, 15, 17 and 21 ensure equality, dignity, and liberty, the rights have always remained a dream when put against the realities of police violence. The same analysis is reflected in the annual reports of the National Human Rights Commission (NHRC), where the number of custodial deaths is always high. The NHRC implies structural changes and increased accountability, but the results have only a recommendatory strength, which undermines their utility.

This discourse is given a critical level by international human rights organizations. Amnesty International and Human Rights Watch have elaborated on the use of characterization of torture that includes beatings, electric shocks, suspension of limbs to lack of food and water. These narratives provide a description of how violence has become tamed in police inquiries, compromising constitutional protections and international obligations in the ICCPR and the UNCAT. The importance of such documentation has been to place custodial violence not as the occasional excess, but as normal investigative practices that can be seen to disproportionately affect marginalized groups.

The civil society organizations have researched the caste aspect of custodial violence at length. The National Campaign on Dalit Human Rights (NCDHR) has reported that Dalaits and Adivasis that seek to report abuses have their First Information Report (FIR) denied routine registration, intimidation of complainants, and manipulation of inquiry when they do so. This agrees with the NCRB statistics that depicts disproportionate number of SC/ST individuals among victims to custodial deaths. The readings in this section help to understand that custodial

violence is not merely a state overreach issue, but also an indication of deeply held social stratifications that are replicated in policing organizations.

Another very important strand of literature is judicial interventions. Discussions on such rulings as D.K. Basu v. Nilabati Behera and State of West Bengal. The State of Orissa, and State of M.P. v. Shyamsunder Trivedi stress the leading role taken by the judiciary in the speech of safeguards against custodial violence. Such judgments added procedures of mandatory arrest memos, medical examinations and state liability of custodial deaths. However, critics claim that judicial principles have been applied in a manner that has not been very consistent so that victims are not really receiving any redress. Cases Discussions on Prakash Singh v. Union of India also point to the effort of the judiciary to re-organise policing by implementing Police Complaints Authorities, but this has not been followed by the states and has severely weakened its effect.

Comparative studies also provide further information because they place the custodial violence in India within a global frame. Police and Criminal Evidence Act, 1984 (PACE), which required the custodial records and independent supervision of the police is often cited as a successful example in the United Kingdom, as well as the South African Independent Police Investigative Directorate (IPID), which has the authority to bind the police. According to Indian commentators, this is one of the mechanisms that should have been adopted to enhance accountability, although they warn that as long as structural caste prejudice in law enforcement is not confronted directly, reforms will be inadequate.

When combined, the literature reveals how rich doctrinaire and institutional analysis can be, and how ineffective enforcement can be. The continued occurrence of custodial violence especially against SC/ST communities underscores the erosion of the law by poor institutions and institutional bias of caste. The aim of the present study is to fill these strands putting the doctrinal protections into the lived realities of caste-based vulnerability with the urgent need to have greater accountability mechanisms.

3. SCHEME OF STUDY (BODY OF THE PAPER)

3.1 Extent & Character of Police Brutality against SC/ST Groups

Police brutality in India is not an event but an organizational component of policing especially when one considers it through the caste prism. Statistical evidence that points to the troubling rates of custodial violence are accompanied by case studies and human rights reporting to point out that the Dalit and Adivasi communities are disproportionately targeted.

High rates of custodial deaths are regular occurrences that are reported by the NHRC and NCRB. In the period between 2010-2020 over 17,000 of these deaths were experienced throughout the country, indicating that the average was nearly five every day.[307] According to the data provided by NHRC, 2,152 individuals died in judicial custody and 155 individuals died in police custody in 20212022.[308] Half These figures demonstrate the extent of the problem and structural impunity. Notably, although all social groups experience the same level of custodial deaths, victims that belong to the marginalized communities are disproportionately hit. A 2019 NHRC study has indicated that SC/ST communities constituted a significant percentage of the nearly three-quarters of custody death cases among adult individuals between 1996 and 2018 who were members of socially and economically disadvantaged communities.[309]

Hansura Bai v. is one of such recent court cases. State of Madhya Pradesh (2025), in which caste prejudice was revealed at the various stages of the investigation since a tribal man died in custody. The officials of the police first were covered by their seniors regardless of the evidence of tortures and the family of the dead was threatened when they attempted to take legal action.[310] A good illustration of how institutionalized prejudice may diminish both investigation and accountability is this case, contributing to the trauma of marginalized families.

There have been rampant cases of police harassment of Dalit complainants recorded by the civil society organizations such as the National Campaign on Dalit Human Rights (NCDHR), and the National Dalit Movement on Justice (NDMJ). Cases of daily denial of registration of First Information Reports (FIRs) when Dalits complain of atrocities, intimidation of victims and witnesses and misuse of procedural discretion to derail investigations are reported.[311]

[307] Nat'l Crime Records Bureau, Crime in India: Statistics 2020 (2021).
[308] Ministry of Home Affairs, Answer to Unstarred Question No. 2128, Lok Sabha Debates (Mar. 22, 2022).
[309] Nat'l Human Rights Comm'n, Annual Report 2018–19 (2019).
[310] Hansura Bai v. State of M.P., W.P. No. 1123 of 2025 (M.P. H.C.) (pending).
[311] Nat'l Campaign on Dalit Human Rights, Justice Under Trial: Status of SC/ST Atrocity Cases in India (2018).

These findings corroborate past NHRC reports that portray police officials as the biggest perpetrators of human rights of the Dalits as they often promote and not prevent violence against the underprivileged groups.[312]

Some examples of police brutality that are not limited to deaths in custody include torture, wrongful detention, and extrajudicial executions. Amnesty International has recorded Indian methods of torture in custody such as lathi beatings, electric shocks, hanging by body parts and often justified as necessary to get a confession.[313]]. Such actions go against the United Nations Convention on the Protection of Civil and Political Right (ICCPR) which India has signed and constitutional protection in the form of Article 21.[314] The normalizing violence when investigating and those subjected to torture is the de facto habitual condition of resorting to violence when these groups are marginalized and do not have the financial or social capital to oppose or to seek any remedy.

The state and caste violence come together anew to replicate ancient stratifications in a democratic environment. The caste stigma of the contemporary police is evidenced by the inhumanity in custody of the SC/STs communities in the contemporary police, which has, according to academics, been largely over-policed and under-protected, in other words, over-policed and under-protected when it comes to the communities of Dalits and Adivasis (Hinds, 2003).[315] As the state institutions themselves turn into perpetrator agencies, the vulnerable populations are put in a further vulnerable place, both to police violence and to justice denial, by the systemic prejudice. Such reproduction of exclusion in a cycle, undermines the trust of the population in the rule of law, and contributes to the social alienation.

On the whole, the nature and the extent to which SC/ST populations are subjected to police abuse demonstrate that the caste-sensitive and systematic custodial violence is present in India. Police excesses against Dalits and Adivasis remain disproportionately the focal point of police misconduct and are supported by both statistical information as well as by case law such as Hansura Bai, and by NGOs and other monitoring organs. Instead of being aberrant, the practices are normal and the biases are ingrained in the law-enforcement machinery of India.

[312] Nat'l Human Rights Comm'n, Report on Atrocities Against Scheduled Castes (2004).
[313] Amnesty Int'l, India: Prisoners of the State – Torture and Detention in India (2011).
[314] International Covenant on Civil and Political Rights art. 7, Dec. 16, 1966, 999 U.N.T.S. 171.
[315] Usha Ramanathan, Torture and Custodial Death in India, 19(3) Hum. Rts. Watch J. 27, 35 (2007).

3.2 Statutory and Constitutional Protections against Ground Reality

The Indian constitutional arrangement aims to provide a great protection against state abuses, including attack during incarceration and police violence. Article 14; equality under the law and equal safeguards under the law; Article 15; caste-based discrimination; Article 17; the right against untouchability; and Article 21; the right to life and liberty of the self are all guaranteed. [316] Additionally, the Articles 32 and 226 give people the power to refer to the Supreme Court and High Courts in order to have these rights enforced. The combination of these provisions creates a constitutional fortress against arbitrary arrests, torture, and extra-judicial penalties.

Moreover, the legislature has come up with legislation that is aimed at protecting citizens. Section 57 of the Code of Criminal Procedure (1973) requires that an accused individual should appear before a magistrate with 24 hours of arrest. Section 167 is against detention of more than 15 days without an order by a court. In the event of a person who is being accused dying in custody, Section 176 requires magistrates to investigate the case.[317] The Bharatiya Nyaya Sanhita (BNS), 2023 has replaced the Indian Penal Code (IPC), 1860 which contained hurt, grievous hurt and culpable homicide, including torture and death in custody crimes.[318] The confessions can never be used in any form of evidence before a magistrate since the Section 25 [319] of the Indian Evidence Act of 1872 of the Indian Evidence Act of 1872, now superseded by the Bharatiya Sakshya Adhiniyam (BSA) of 2023, states that all confessions should be recorded in the presence of a magistrate. This is in accordance to the long-standing position of the judiciary not to rely on statements that were coerced on them. Notably, the vulnerability of Adivasis and Dalits to state violence, even of government officials, is recognized in the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989. Section 3(2) 7 of the Act outlaws a false arrest or abuse of process of law committed against SC/ST individuals, by their agents in the state, and Section 4 outlaws dereliction of duty by state agents in cases of atrocities.[320] The act therefore comes out clearly to recognize the fact that caste discrimination is rife in the state institutions including the police.

[316] INDIA CONST. arts. 14, 15, 17, 21, 32, 226.
[317] Code of Criminal Procedure, No. 2 of 1974, §§ 57, 167, 176.
[318] Bharatiya Nyaya Sanhita, No. 45 of 2023, §§ 105–113.
[319] Bharatiya Sakshya Adhiniyam, No. 46 of 2023, § 25.
[320] Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, No. 33 of 1989, §§ 3(2)(vii), 4.

Indian judicial interpretation has been very instrumental in enhancing constitutional protection against custodial violence by placing direct responsibilities to state authorities. In D.K. Basu v. The Supreme Court ordered procedural protection on arrest and detention such as writing of arrest memos, making medical checks of the detainees, and ensuring communication with relatives, in order to avoid custodial maltreatment and torture.[321] In Nilabati Behera v. The Court made the State under strict liability on custodial deaths and awarded monetary compensation as a civil remedy in the form of public law against the violation of Article 21 and affirmed that the State was responsible in the actions of its agents.[322] Equally, in State of M.P. v. Shyamsunder Trivedi, the Court stressed individual liability of police officers who have committed custodial violence and restated the idea that constitutional rights apply to state agents themselves.[323]

With all these judicial protection mechanisms, a broad disjuncture between law and practice still exists. In 2020-2022, NCRB documents indicate over 4400 custodial deaths in the country, although convictions are literally absent and prosecutions barely exist.[324]]. Empirical evidence also shows that Dalits and Adivasis are over-represented among victims of custodial violence, which proves the existence of caste-based discrimination beliefs in policing activities.[325] Amnesty International and the National Campaign on Dalit Human Rights report on cases of police denial of FIR registration on cases placed by Dalit complainants and active obstruction of investigations to benefit criminals, even though it is obligatory by the SC/ST (Prevention of Atrocities) law.[326] There is still an obstruction of effective enforcement by political interference, a lack of legal awareness amongst marginalized groups and ingrained caste hierarchies in police institutions.

Recent statutory changes like the Bharatiya Nagarik Suraksha Sanhita, 2023 which substituted the CrPC and nevertheless gave the police extensive discretionary authority in the context of investigation and preventive action are also a cause of concern. The critics point out that this

[321] D.K. Basu, supra note 8, at 423.
[322] Nilabati Behera, supra note 9, at 754.
[323] State of M.P. v. Shyamsunder Trivedi, (1995) 4 S.C.C. 262 (India).
[324] Ministry of Home Affairs, supra note13.
[325] Nat'l Human Rights Comm'n, supra note 14.
[326] Amnesty Int'l, India: Prisoners of the State (2011); Nat'l Campaign on Dalit Human Rights, Justice Under Trial, supra note 16.

discretion will lead to the encouragement of bureaucratic arbitrariness instead of taming abuse.[327] Therefore the constitutional guarantees are also weak in absence of institutional accountability.

Nevertheless, the constitutional and statutory protections have not translated into remedies despite all the efforts India has been making to eliminate custodial violence, rare convictions and systemic mistreatment against the SC/ST communities, despite the Atrocities Act.

3.3 Judicial Safeguards & Case Law

The Indian courts have played a major role in putting safeguards on police misuse and cruelty in custody. Trying to brid the divide between constitutional pledge and the harsh realities of abuse in custody, the Supreme Court and the High Courts have handed out several historic decisions. Nevertheless, despite these pronouncements coming up with significant rules of accountability and due process, their application has been rather spotty, which has exposed marginalized communities especially Scheduled Castes (SCs) and Scheduled Tribes (STs).

1. Nilabati Behera v. State of Orissa

In Nilabati Behera v. The Supreme Court, State of Orissa, the Court declared the State categorically responsible in cases of custodial death and did not alter the doctrine that constitutional redresses pursuant to Articles 32 and 226 might comprise compensation redresses of breaches to Article 21.[328] This case determined that the fact that the state authorities infringed the right to life places a non-delegable obligation upon the state authorities to protect those in custody. This understanding of the accountability of the high states forms a conceptual obstacle to impunity of Dalits and Adivasis who tend to have little social and political power. However, even though there is a theoretical value, it has not been implemented in a consistent way since that time, the wrongdoers are rarely ever prosecuted, and the reparation is usually delayed or inadequate.

2. D.K. Basu v. State of West Bengal

The historic ruling D.K. Basu v. The State of West Bengal provided extremely comprehensive rules in the protection of custodial maltreatment, including the terms of arrest memoranda,

[327] Indian Express, explained: What Are the Key Changes in Bharatiya Nyaya Sanhita, Bharatiya Nagarik Suraksha Sanhita and Bharatiya Sakshya Adhiniyam? (Dec. 25, 2023).

[328] Nilabati Behera, supra note 9, at 754.

medical examination, and informing family members.[329] The decision resonated with the judicial awareness that police torture was systemic in nature and that procedural protection was needed to prevent arbitrary government. Such guidelines subsequently shaped the legislative changes and were referred to in many High Court orders. In the case of SC/ST communities, D.K. Basu safeguards have been observed to adhere to only haphazardly. The findings by National Human Rights Commission and other NGOs show that when the cases of Dalit and Adivasi involve the arrested, the arrest processes are often circumvented and the protective spirit of the ruling is negated.

3. State of M.P. v. Shyamsunder Trivedi

The case State of M.P. v. Shyamsunder Trivedi was a clear sign of the difficulty in convicting in cases of custodial violence.[330] Although the Court did not deny the existence of so-called code of silence followed by police, it highlighted that those cases involving custodial death require a closer approach to the court. But the conviction rates in such a case are pathetically poor. This burden of evidence strengthens systemic discrimination against marginalized groups: the testimonies of victims are not trusted or believed, especially when they belong to the Dalit or tribal community, and police accounts are assigned more importance

4. Prakash Singh v. Union of India

In Prakash Singh v. The Court directed the reform of the police in Union of India to defend police against political involvement and to establish independent Police Complaints Authorities as a measure to deal with structural issues in policing.[331] Although the decision made no particular reference to the topic of custodial violence, the application of the focus on accountability measures to the SC/ST victims of police brutality will have an enormous effect. There has also been poor implementation with most of the states either diluting or non-observing the directives. Institutional barriers to accessing justice manifest in a disproportionate disadvantage to marginalized populations because they lack strong mechanisms of complaints.

5. Subhash Mahajan v. State of Maharashtra

[329] D.K. Basu, supra note 8, at 423.
[330] Shyamsunder Trivedi, supra note 28, at 270.
[331] Prakash Singh v. Union of India, (2006) 8 SCC 1.

Subash Mahajan v. Supreme Court decision. State of Maharashtra was criticized by diluting the protection of SC/ST Act.[332] The Court also came up with prerequisites like the previous issuance of sanctions against arrests of public servants and initial investigations before Critics argued that it was contravening the overall nature of the law which was to provide Dalits and Adivasis with strong defence against caste crimes like police misconduct. Although Parliament hastened to revise the Act to give it the intended severity, the incident demonstrated judicial ambivalence in making a complete devotion to the protection of the marginalized groups.

6. Hitesh Verma v. State of Uttarakhand

In the case of Hitesh Verma v. State of Uttarakhand, the Supreme Court restricted the meaning of the word atrocity under the SC/ST Act. State of Uttarakhand which believes that remarks or threats that are not related to the caste identity of the victim may not constitute a crime as per the Act.[333] That decision has the danger of reducing the in-the-field cases of caste discrimination during police meetings, although it is conceptually sound in containing abuse. Physical and caste-based humiliation are the usual consequences of police brutality to the Dalits and Adivasis and these filming narrow interpretations may undermine the possibility of law to provide remedies against these groups.

7. Hansura Bai v. State of M.P. (Pending)

The case of Hansura Bai v. is pending. The case of M.P., W.P. No. 1123 of 2025 (M.P. H.C.) reflects on modern issues of custodial death of tribal women.[334] A tribal woman was even alleged to be brutally murdered in prison and the appeal questions the state obligations as enforced in the SC/ST Act and Article 21 of the Constitution. Though this case is yet to be heard by the court, it is an example of the way that gender, caste and poverty come together to create the vulnerability of police detentions. Indian courts will be willing to transform symbolic statements into substantive accountability depending on the outcome.

Critical Appraisal

Collectively, the cases reflect the courts to waver between an appreciation of the rights of custody and due precaution in implementing responsibilities. On the one hand, D.K. Basu does support judgments like Nilabati Behera and the protection of fundamental elements of custodial

[332] Subhash Kashinath Mahajan v. State of Maharashtra, (2018) 6 SCC 454.
[333] Hitesh Verma v. State of Uttarakhand, (2020) 10 SCC 710.
[334] *Hansura Bai*, *supra* note 15 (pending).

jurisprudence by doctrines. But as choices such as the one taken by Subhash Mahajan and Hitesh Verma demonstrate, the judiciary does not appear to be ready to take entirely the revolutionary potential of protective laws. Moreover, due to the fact that the structural reforms suggested by Prakash Singh have not been implemented, poor accountability systems have persisted. Theoretically, the judiciary has been able to offer hope to the SC/ST populations, though, in real life, the judiciary has not helped much. The law is basically dreamy and cannot alter the truth of rampant violence by police unless it is applied on a regular basis.

3.4 Accountability Mechanisms & Oversight

The symbolic character of the accountability systems has been revealed through the continued practice of custodial violence, especially targeting the SC/ST communities where bodies such as NHRC, SHRCs, and Police Complaint Authorities have been unsuccessful to stop abuse or provide justice.

1. National Human Rights Commission (NHRC)

The Protection of Human Rights Act of 1993 requires its creation, the National Human Rights Commission, to investigate the deaths of persons in custody, provide prosecution and compensation recommendations.[335] As of 2020, the thousands of documented custodial deaths by the Commission showed a grossly disproportionate number of SC/ST people.[336] All the cases of death in custody should be inquired by a magistrate, as per the guidelines provided by NHRC, which has on some occasions provided financial aid to families of victims.[337] It is only limited to giving recommendations, but, these are not binding on state authorities. Since the state governments still break the law, the NHRC can only be as influential as a fact-finding organization, but not as an enforcement agency.

2. State Human Rights Commissions (SHRCs)

SHRCs were intended to offer local oversight at the state level. In real life, they are underfunded, politically appointed and lack investigative skills.[338] They do not have jurisdiction over central armed forces and their advice, similar to that of the NHRC is not

[335] Protection of Human Rights Act, No. 10 of 1993, INDIA CODE (1993).
[336] National Human Rights Comm'n, Annual Report 2019–2020 (2020).
[337] Id.
[338] Justice A.P. Shah, Efficacy of State Human Rights Commissions in India, 12 Nat'l Hum. Rts. L.J. 45 (2018).

binding. In rural Dalits and Adivasis, the lack of awareness, geographical inaccessibility, and fear of retaliation by the local police is an additional obstacle towards approaching SHRCs.

3. Police Complaints Authorities (PCAs)

In Prakash Singh v., the Supreme Court directed that the state and district levels set up independent PCAs that would investigate police misconduct allegations, such as claims of abusing custody. Union of India.[339] Most states have however failed to establish PCAs altogether or have done so feeblely, often having retired police officers doing this instead of unbiased civilians.[340] Research indicates that in the presence of PCAs, the latter are hardly ever addressed by Dalits and the Adivasis, who are afraid of being retaliated against and are not afraid of bias. [341] The institution design thereby repeats itself the same power imbalance it was expected to address.

4. SC/ST (Prevention of Atrocities) Act Oversight

In SC/ST Act of 1989, there are special provisions of protection against the offense committed by the state functionaries, such as police officers.[342] The Act also stipulates the establishment of Special Courts to oversee the swift trials and use of nodal officers to oversee the implementation. However, conviction rates are extremely low with the Act standing at about 30 percent nationwide.[343] Police often refuse to make formal complaints under the Act in custodial violence cases and such investigations are marred with unintentional decision-making delays and threats to the family members of the victims. It is one of the best illustrations of how institutional bias continues to inhibit SC/ST communities to be answerable.

5. Parliamentary and Law Commission Oversight

The problem of custodial violence has been raised as a systemic problem by parliamentary debates and Law Commission reports. In its 273 rd Report (2017), the Law Commission recommended an independent anti-torture act to bring India into compliance with international

[339] Prakash Singh, supra note 36, at 8.
[340] Arvind Verma, Police Accountability in India: Structural Reforms and the Role of Civil Oversight, 45 Indian J. Criminology 67, 74–75 (2017).
[341] Id. at 76.
[342] Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, No. 33 of 1989, India Code (1989).
[343] Nat'l Crime Records Bureau, Crime in India 2021 (2022).

law on the subject, under the UNCAT.[344] No such law has been enacted despite a number of draft bills, in large part because of the political opposition and the concern that it may restrict the police power. This legislative inertia reinforces the notion that the state condones, indeed wholeheartedly condones, custodial violence.

6. Civil Society and Media

Some of the civil society groups that have played a critical role in exposing the abuses included the National Campaign on Dalit Human Rights, Human Rights Watch, and Amnesty International among others. Their records of the caste trend of torture have kept the society aware of the vice. Amnesty International, human rights watch and National Campaign on Dalit Human Rights are only but a few of the civil society organizations that have played a great role in shedding light on abuses. Their witness of caste patterns of torture has kept the people aware of the issue.[345] The media investigations also emphasized the high-profile cases, like the custodial killings of Jayaraj and Bennix in Tamil Nadu in 2020 that stirred the whole nation. However, not much focus is given to sustained attention and most of the Dalit or Adivasi victims in rural settings rarely get any coverage and thus the abuses continue unabated.

Critical Gaps

India has three broad problems with its accountability systems namely structural caste bias, lack of enforcement power, and autonomy. PCAs remain ineffective, NHRC, SHRC recommendations remain routinely disregarded, and this situation is worsened by low conviction rates and lack of registration of cases undermining the statutory protection in the SC/ST Act. Even the institutions that are established to protect the marginalized communities often become barriers instead of justice avenues. This leads to a cycle of impunity whereby the police brutality is not punished, and people lose their confidence in the legal system, furthering the caste divide.

3.5 Comparative International Perspectives & Systemic Barriers

[344] Law Comm'n of India, 273rd Report on Implementation of "United Nations Convention Against Torture" (2017).

[345] Amnesty Int'l, Torture in 2020: India Report (2021); Nat'l Campaign on Dalit Human Rights, Dalit Human Rights Documentation Report, supra note 10.

The fight of the custodial violence in India is not a new phenomenon in the world as democracies around the world only vary in the level of accountability measures that restrict police impunity.

International Commitments and Comparative Insights

India is a signatory to the International Covenant on Civil and Political Rights that prohibits torture and arbitrary detention under Article 7 and 9 respectively.[346] It is also a signatory but still not a ratifier of UN Convention against Torture (UNCAT).[347] In comparison, other nations like the United Kingdom and South Africa have enacted anti-torture principles into the local legislation. The Police and Criminal Evidence Act (1984) of the U.K. brought about the concept of compulsory custody documentation, autonomous custody visitation and stringent prohibition of any confessions received as a result of coercion of the interlocutor.[348] The Independent Police Investigative Directorate (IPID) of South Africa investigates in-custodial deaths, and has the power to propose charges.[349] To eliminate custodial abuse, these structures underline the significance of legislative independency and overpowering authority. Instead, India relies on judicial decisions and weak commissions that do not have binding recommendations and the systemic impunity remains intact.

Systemic Barriers in India

There are several challenges that do not allow India to convert the commitments to action. To begin with, legislative apathy again and again, an independent anti-torture law has never been enacted.[350] There are numerous obstacles preventing the realization of Indian initiatives in the form of Secondly, the obstruction of oversight by the political sphere; state governments are constantly late and water down the creation of autonomous institutions, including Police Complaints Authorities.[351] Thirdly, caste bias is a structural force: Dalit and Adivasis are subject to specific police abuse and lack of remedies, becoming more vulnerable to custody torture.[352] Finally, but not the least, resource gaps ineffective training, forensic centers, and

[346] International Covenant on Civil and Political Rights, supra note 19.

[347] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85 (India signed but not ratified).

[348] Police and Criminal Evidence Act 1984, c. 60 (U.K.).

[349] Independent Police Investigative Directorate Act 1 of 2011 (S. Afr.).

[350] Law Comm'n of India, supra note 49.

[351] Prakash Singh, supra note 36, at 8.

[352] Nat'l Campaign on Dalit Human Rights, Dalit Human Rights Documentation Report, supra note 10.

monitoring systems underpin an addicted reliance on the application of coercive strategies as an investigation cut off.

Critical Reflection

As observed through the comparative experience, accountability can be achieved when institutions are granted independence, binding powers and resources. Because of the fact that India has always relied on court safeguards against institutional stagnation or legislative apathy, SC/ST communities are still overrepresented among the victims of police brutality. Without reforming the institutional weakness and structural caste prejudice, India risks perpetuating the cycle of brutality in detention which is not in line with its constitutional and international commitments.

4. FINDINGS

It emerges in the discussion that the police violence in India is structural, grounded on caste hierarchies and failures of institutions. The disproportionate influence on SCs and STs is that reveals an underlying disproportion between the constitutional principles and realities, wherein equality as embodied in law is not only not fully realized but actively as well as practically enacted.

4.1 SC/ST Communities' disproportionate vulnerability

Empirical data and case studies indicate that ethnic minorities are overrepresented among the victims of custodial violence. Impoverished and socially marginalized backgrounds were found to be the root cause of most deaths witnessed in custody according to recurrent findings by the National Human Rights Commission (NHRC).[353] This implies a structural prejudice against policing: SC/ST individuals are faced with a greater risk of being targeted, arrested, and tortured, usually based on weak or fabricated accusations against them.[354] The compound disadvantages caste stigma, economic poverty, and inaccessibility to legal services that victims often confront often make them more susceptible to them than upper-caste detainees.

4.2 Gap Between Constitutional Protections and Practice

[353] Nat'l Human Rights Comm'n, supra note 41.

[354] Usha Ramanathan, Custodial Violence and the Failure of Accountability in India, supra note 1.

Articles 14, 15, 17 and 21 of the Indian Constitution provide equality, dignity and non-discrimination.[355] Nilabati Behera, D.K. Basu and Shyamsunder Trivedi reiterated that the state has the responsibility of ensuring the elimination of custodial torture, and ensuring compensation to victims. Custodial fatalities are still high and are a good example of laxity in the enforcement. Effective protection of the SC/ST detainees has not been offered by statutory protection in the form of the SC/ST (Prevention of Atrocities) Act, the Code of Criminal Procedure and by the newly enacted Bharatiya Nyaya Sanhita (BNS) and Bharatiya Nagarik Suraksha Sanhita (BNSS) acts. The fact that violence is still present is a testimony to the lack of balance between the law on paper and the law on the street.

4.3 Institutional Failures in Accountability

Results also indicate institutional lapses in control. The NHRC and SHRCs are not binding and hence there is immense lack of adherence to their recommendations.[356] Police Complaints Authorities are either not established or they are structurally flawed as postulated by the Prakash Singh judgment. There are still lower than 30 percent conviction rates under the SC/ST Act, which is indicative of a systemic barrier to registration and prosecution of a case with custodial abuse involved.[357] As a matter of fact, accountability mechanisms have not succeeded in stopping the impunity cycle.

4.4 Entrenched Caste Prejudice in Policing

Qualitative reports suggest that caste is often the cause of the incidental character of custodial violence against Dalits and Adivasis. Cast insults, sexualized violence of Dalit women, and choosy unwillingness to file criminal cases against SC/ST victims are all seen in the testimonies collected by Amnesty International and the National Campaign on Dalit Human Rights (NCDHR).[358] Police strengthen caste systems in their detention centers as a continuation of the existing systems of social ordering. Such structural bias is a reason as to why the legal remedies were weakened in the implementation stage.

4.5 Weak Legislative and Political Will

[355] India Const. arts. 14, 15, 17, 21.

[356] Justice A.P. Shah, Efficacy of State Human Rights Commissions in India, 12 Nat'l Hum. Rts. L.J. 45 (2018).

[357] Nat'l Crime Records Bureau, supra note 48.

[358] Amnesty Int'l, Torture in 2020: India Report (2021): Nat'l Campaign on Dalit Human Rights, Dalit Human Rights Documentation Report, supra note 10.

Despite the constant recommendations made by the Law Commission of India and the international pressure that exists within the UNCAT regime, India has failed to enact an independent anti-torture law.[359] Watering down of reforms like establishment of independent PCAs is an issue that is perpetuated through political interference.[360] The phenomenon of legislative inertia is an indicator of a larger disposition to place emphasis on human rights issues as opposed to the concern of reducing the police power. This political reluctance keeps up a culture of culture of tolerance of violence in custody.

4.6 Comparative Insights

Comparative perspectives define that the excessive reliance on judicial safeguarding in India without a legislative support is not sufficient. The U.K. and South Africa have both set a statutory regime that vests binding powers to independent scrutiny agencies.[361] Failure of India to put in place similar reforms has left judicial guidelines as the frontline defence of which in the actual sense are not enforced. This observation restates the fact that it is not possible to implement best practices in other countries without eliminating structural obstacles in the homeland that include institutional sluggishness and caste prejudice.

4.7 Erosion of Faith in the Justice System

The loss of trust in the criminal justice system among the SC/ST communities appears to be the most remarkable one. The legal system appears to be colluding to protect those who have victimized and abused their family members and also obstructs the prosecution of offenders by intimidating them or dragging their cases.[362] Marginalized groups are afraid of police stations and jails, which are not their safe havens. This alienation undermines the constitutional entitlement to equality as a citizen and contributes to social exclusion.

5. SUGGESTIONS AND CONCLUSION

The institution of police brutality against SCs and STs lies on a structural level based on caste prejudice and inefficient accountability, which requires a full set of legislative, institutional, judicial, and social-cultural changes.

[359] Law Comm'n of India, supra note 49.
[360] Id.
[361] Police and Criminal Evidence Act, 1984, c. 60 (U.K.); Independent Police Investigative Directorate Act 1 of 2011 (S. Afr.).
[362] Human Rights Watch, Bound by Brotherhood, supra note 10.

5.1 Legislative Reforms

To begin with, India is in dire need of an independent anti-torture statute that complies with the U.N. Convention Against Torture (UNCAT), which it signed in 1997, but it never ratified.[363] It must expressly outlaw torture, require punitive penalties and establish victim-compensation schemes.[364] Blueprints of draft bills have already been presented by parliamentary committees and the 273rd Report of Law Commission (2017); the final element has been political will.[365] Second, the SC/ST (Prevention of Atrocities) Act, 1989 should be revised to render it more practically applicable in the context of custodial violence, such as compulsory registration of an FIR against custodial torture of the Dalits and Adivasis and their trial within a given time period under a special court supervision.[366]

5.2 Institutional Reforms

The complete implementation of Prakash Singh guidelines of the Supreme Court 2006 is required. These rules establish Police Complaints Authorities, and provide tenures on police officers.[367] PCAs should have binding authority and not be recommendatory in respect, according to the South African Independent Police Investigative Directorate (IPID) model.[368] Besides, NHRC and SHRCs should be endowed with the statutory ability to prosecute or enforce penalties rather than issue unenforceable advisories. Better training and support of forensic science would reduce the shortcuts in investigation by use of custodial torture.

5.3 Judicial and Procedural Safeguards

The D.K. Basu and Nilabati Behera protections should be extended to include video recording of any interrogation and independent medical examinations of the detainees within 24 hours of custody by the courts.[369] The magistrates should be sensitized to ensure that they actively investigate into allegations of tortures during remand hearings.[370] By implicating Article 226, the High Courts have the authority of creating custodial death monitoring cells to institute

[363] Convention Against Torture, supra note 52.
[364] Id.
[365] Law Comm'n of India, supra note 49.
[366] Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, supra note 3.
[367] Prakash Singh, supra note 36, at 8.
[368] Independent Police Investigative Directorate Act, supra note 54.
[369] D.K. Basu, supra note 8, at 423.
[370] Nilabati Behera, supra note 9, at 754.

conformity with orders. Judicial activism must go on pushing the legislature and the executive to systematic reform, in addition to formulating enforceable remedies on a case level.

5.4 Socio-Cultural and Community-Level Measures

Caste prejudice which is long established cannot be eliminated by legislation alone. Constitutional norms demand that police training institutes should contain anti-discrimination courses that emphasize on caste and tribal rights.[371] Community policing programs involving the inclusive community can help in restoring the people's trust towards the police among the SC/ST communities.[372] To help reach the population, external accountability, it is important to seek the involvement of civil society organizations like Amnesty International and NCDHR in monitoring and reporting mechanisms.[373]

5.5 International Engagement

India signing UNCAT would be placed under regular scrutiny by U.N. Committee Against Torture, which would create a diplomatic pressure and technical guidance as well.[374] The comparative analyses of the Police and Criminal Evidence Act 1984 of the U.K. and the IPID of South Africa reveal that the independence of the statutes, recordation and external check-ups is a necessity.[375] India will be forced to translate them in the Indian context, namely, making sure that SC/ST concerns are translated into law in the construction of statutes.

5.6 Conclusion

The fact that custodial violence on SCs and STs remains is a mockery to the frailty of the constitutional guarantee of equality and dignity in India. There are doctrinal precedents such as D.K. Basu, Nilabati Behera, and Shyamsunder Trivedi which have been determined but lack of enforcement have left them without their bite. There are institutions such as the NHRC and courts of the SC/ST Act, however, the systemic caste bias, political goodwill and non-enforcement make them ineffective. Finally, the task is twofold because, on the one hand, it is

[371] Nat'l Police Acad., Training Manual on Human Rights & Policing (2021)

[372] Sanjay K. Jha, Community Policing and Its Impact in India, 55 Indian J. Criminology 77 (2022).

[373] Amnesty Int'l, India: Torture in 2020 Report (2021): Nat'l Campaign on Dalit Human Rights, Dalit Human Rights Documentation Report, supra note 10.

[374] U.N. Office of the High Comm'r for Hum. Rts., Status of Ratification Interactive Dashboard (2023).

[375] Police and Criminal Evidence Act 1984, c. 60 (U.K.): Independent Police Investigative Directorate Act 1 of 2011 (S. Afr.).

necessary to break the established caste structures of police activity, and, on the other hand, to establish the independent accountability options that cannot be reflexed through the executive prism. This does not only require new laws but a cultural revolution of law enforcers where human dignity is valued at the expense of expediency.

When the measure of democracy is the treatment it metes out to its most vulnerable, the current tradition of custody that is practiced in India is a fundamental flunky of the constitution. The path forward involves systematic change, based on law, through independent institutions, guarded by watchful courts, and through social change. It is then that the police can be reinvented as not a muscle of oppression but as a guardian of constitutional morality to all citizens, even those who have long been pushed to the fringes.

Beyond Borders: A Comparative Study of India's Data Privacy Framework

Ravi Ranjan Sharma[376]

ABSTRACT

The digital period has turned personal data into a driver of economic growth, innovation, and governance. However, the arising transnational data transfer obligations and surveillance networks have, on the other hand, created deep challenges for states such as India to protect constitutional privacy rights while also complying with international regimes. This paper explores the tensions that arise from India's constitutional recognition of privacy in Justice K.S. Puttaswamy vs. Union of India (2017) vis-à-vis the obligations imposed by global regimes such as the EU's GDPR and the U.S. CLOUD Act. Through the study of constitutional law, international norms, and domestic legislations, including the Digital Personal Data Protection Act, 2023, this research assesses how India can establish a rights-respecting yet globally interoperable data governance model. Comparative lessons are drawn from other jurisdictions, and a set of normative guidelines is proposed to facilitate India's attempt to reconcile its privacy guarantees with the realities of global data flows and surveillance.

Keywords: Privacy Rights, Data Protection, International Data Transfers, Surveillance, GDPR, CLOUD Act, Constitutional Law, Digital Personal Data Protection Act, India, Global Governance.

INTRODUCTION

The digital economy has witnessed an unprecedented growth that now makes the flow of personal data a borderless transaction, spawning massive opportunities and raising questions of far-reaching legal and ethical considerations. As India stands among the largest digital economies in the world, it faces the double-edged challenge of assuring constitutionally protected privacy while interacting with international data regimes and surveillance networks. The landmark Justice K.S. Puttaswamy v. Union of India decision in 2017 declared privacy to be a fundamental right under Article 21 of the Constitution, describing it as inherent to dignity,

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autonomy, and liberty.[377] However, India today has to also reconcile with obligations arising from such frameworks as the GDPR of the EU[378], the CLOUD Act of the U.S.,[379] and arrangements for intelligence sharing, which call for cross-border access to data. This direct contradiction of constitutionalism with global interoperability creates an imperative need for the reconciliation of rights, obligations, and sovereignty.

STATEMENT OF THE PROBLEM

Since the constitutional framework upholds the right to privacy, India remains devoid of a harmonious legislation that could have aligned its domestic laws with international commitments. In the pursuit of a comprehensive privacy regime, the Digital Personal Data Protection Act, 2023, however, provides for exemptions to State surveillance in very broad terms and has not provided for an effective and truly independent oversight mechanism.[380] At the same time, the requirements for international adequacy, especially under the General Data Protection Regulation (GDPR), call for enhanced safeguards for data transfers, while global surveillance architectures subject information in the hands of Indian citizens to the scrutiny of foreign intelligence, thus leaving the question: Can India protect constitutional privacy rights in the face of global data governance?

RESEARCH QUESTIONS

1. How does India's constitutional right to privacy constrain or guide state practices on data protection and surveillance?
2. To what extent do international data transfer regimes challenge India's constitutional privacy framework?
3. How does global surveillance architecture affect India's data sovereignty and privacy protections?
4. Does the Digital Personal Data Protection Act, 2023 effectively balance constitutional guarantees with international obligations?

[377] *Justice K.S. Puttaswamy (Retd.) v. Union of India & Ors.*, (2017) 10 SCC 1, 32 (India).
[378] General Data Protection Regulation (Regulation (EU) 2016/679) art. 44 et seq. (EU).
[379] Clarifying Lawful Overseas Use of Data Act, Pub. L. No. 115-141, 132 Stat. 785 (2018) (U.S.).
[380] Digital Personal Data Protection Act, 2023, § 17 (India).

5. What lessons can India draw from other jurisdictions facing similar privacy versus globalization conflicts?
6. What reforms can harmonize India's constitutional privacy protections with global data governance?
7. How can domestic laws in India harmonise with extraterritorial demands without undermining fundamental freedoms?

SIGNIFICANCE OF RESEARCH

This research holds constitutional, legal, and policy significance. Constitutionally, it explores the scope of privacy rights amid globalization. Legally, it examines legislative adequacy in light of transnational obligations. From a policy perspective, it addresses sovereignty, human rights, and international cooperation in shaping a privacy-respecting digital future.

SCOPE AND LIMITATION OF RESEARCH

The study focuses on India's constitutional and legislative framework post-Puttaswamy, international data regimes like GDPR and the CLOUD Act, and comparative experiences from select jurisdictions. Technical cybersecurity issues and detailed economic implications lie beyond its scope, except where directly relevant to privacy law and governance.

OBJECTIVES OF RESEARCH

- To analyse constitutional privacy protection in India.
- To assess India's legislative response, especially the DPDPA, 2023
- To examine challenges posed by international data transfer regimes and global surveillance.
- To analyse/examine Indian case laws and international case laws that provide for harmonisation/integration
- To propose reforms harmonising privacy rights with global data governance.

RESEARCH METHODOLOGY

The research adopts a doctrinal and comparative methodology, relying on constitutional provisions, judicial decisions, legislative texts, international frameworks, and academic commentary. A qualitative approach is employed to analyze legal norms, institutional practices, and comparative jurisprudence.

Under primary data, the constitution, various indian legislations, and the American statutes are examined, and the judicial pronouncements of India and USA,

As part of secondary research, various scholarly articles in journals, commentaries, books, etc, are referred.

LITERATURE REVIEW

In these digital days, constitutional democracies are facing a unique challenge-forging a steel wall between imperatives of national security and the basic right to privacy. Mass surveillance has come to be considered a legitimate policy tool, crossing national frontiers and boundaries of laws and jurisdictions. The legal discourse now revolves around whether existing constitutional structures and international norms can adequately regulate state surveillance practices. This literature review examines three key dimensions of this debate: (1) the origin and evolution of global surveillance systems, (2) the fragmented implementation of international privacy norms across national constitutions, and (3) insights from comparative legal systems that frame the Indian *Puttaswamy* judgment in global perspective.

Origins of Global Surveillance and Constitutional Response

Surveillance has increasingly been used as a tool of state policy following the 9/11 attacks and had led to the construction of powerful surveillance architectures such as the PRISM program of the U.S. National Security Agency and the Tempora system in the UK. These systems operated largely in secrecy until 2013 when Edward Snowden revealed their existence. According to Milanovic (2015), the global system of surveillance represents enormous erosion to the old idea of sovereignty, considering that on issues of foreign surveillance, states are hardly held accountable under international human rights law.[381]

Milanovic goes against the assumption that surveillance outside the borders of a state is outside of international legal obligations. He claims that the ICCPR, especially Article 17, contains

[381] Milanovic, M., *Human Rights Treaties and Foreign Surveillance: Privacy in the Digital Age*, Harvard Int'l L.J. 56:1 (2015).

substantive privacy guarantees that are extraterritorial in nature. However, in practice, most states have adopted a narrow reading of their obligations, thus creating a systemic loophole that permits bulk data collection by these intelligence agencies with minimal scrutiny and no legal recourse.

Lachmayer and Witzleb (2014) show the trajectory of constitutional responses to surveillance in systems operating under the aegis of democracy, showing that even theoretically strong rule-of-law systems have failed to exercise any meaningful control over executive overreach. The authors identify an unholy pattern of disproportionate empowerment of security agencies that is often couched in vague legislative mandates and generously interpreted by courts in the name of national security.[382] They demonstrate that although constitutional doctrines recognize privacy rights, they generally yield to surveillance imperatives, particularly when foreign threats are brought into consideration.

Implementation of International Privacy Norms Across Jurisdictions

While there is agreement on a global scale that privacy is a fundamental right, strong divergence occurs in its enforcement from one jurisdiction to another. Mitsilegas (2015) criticized the current state of transatlantic legal cooperation by stating that while the European Union has, over time, progressively constitutionalised its approach to privacy through the Charter of Fundamental Rights and the case law of the Court of Justice of the European Union (CJEU), the United States has stuck to an interpretation of the Fourth Amendment based upon national security considerations that often exclude foreign nationals from privacy protection.[383] Europe's legal system is amongst those that, prehistoric enforcement, shows a strong judicial opposition to indiscriminate surveillance, inter alia, decisions like *Digital Rights Ireland* or *Schrems II*.[384] Mitsilegas contends that, under the justification of necessity, proportionality, and transparency, the CJEU makes for an example in global privacy governance. But because no such standards exist in any other major democracy, legal asymmetry arises to the detriment of "surveillance tourism," where clandestine agencies use lax regimes abroad to circumvent domestic restrictions.[385]

[382] Id.

[383] Mitsilegas, V., "Surveillance and Digital Privacy in the Transatlantic War on Terror: The Case for a Global Privacy Regime," Columbia Hum. Rts. L. Rev. 47 (2015).

[384] *Digital Rights Ireland*, Case C-293/12, 2014 E.C.R. I-3171; *Schrems II* (Data Protection Commissioner v. Facebook Ireland), Case C-311/18, 2020 E.C.R. __.

[385] Id.

The notion of constitutional pluralism is advanced by Lachmayer and Witzleb. They state that privacy is differently interpreted and implemented in different States because of cultural, legal, and political perspectives. For instance, Germany's "right to informational self-determination" presents a considerably stronger constitutional protection against mass collection of data than does the UK's *Investigatory Powers Act 2016*, which, in effect, legalizes bulk surveillance subject to its own regulatory controls.[2] Such differences prove an impediment to the harmonization of privacy rights, even at the international level.[386]

Framing the Indian Position: Puttaswamy in Global Context

The landmark judgment in the case of Justice K.S. Puttaswamy (Retd.) v. Union of India in 2017 was a turning point that transformed the canvas of constitutional jurisprudence by declaring the right to privacy to be a fundamental right under Article 21[387] of the Constitution of India. Delivered by a full bench consisting of nine judges, the judgment expressly overruled the procedure followed by the earlier rulings in M.P. Sharma v. Satish Chandra(1954) and Kharak Singh v. State of U.P. (1962), which denied that privacy has the status of a constitutional right.[388]

The Court observed that the privacy right is not an isolated right, that is, it is an extended concept recognized in other rights such as life, liberty, dignity, and freedom of expression under Part III of the Constitution. Justice D.Y. Chandrachud laid down in the lead opinion that "privacy is intrinsic to the freedoms guaranteed in Part III of the Constitution" and cannot be sacrificed on the altar of majoritarian impulses or administrative convenience.[389]

Most importantly, the Court laid down a three-pronged test comprising legality, necessity, and proportionality for assessing any state action infringing privacy.[390] This is very much in line with international courts' precedents, such as those of the European Court of Human Rights

[386] Lachmayer, K. & Witzleb, N., "The Challenge to Privacy from Ever Increasing State Surveillance: A Comparative Perspective," UNSW L.J. 37:2 (2014).
[387] *Justice K.S. Puttaswamy (Retd.) v. Union of India & Ors.*, (2017) 10 SCC 1, 32 (India).
[388] *M.P. Sharma v. Satish Chandra*, (1954) SCR 1077; *Kharak Singh v. State of U.P.*, (1962) 1 SCR 1 (India).
[389] *Puttaswamy*, 10 SCC at 32-33.
[390] Id. at 33-35.

(ECtHR) and is also in accordance with suggestions made by Mitsilegas concerning global privacy safeguards.[391]

The Puttaswamy judgment deals, in particular, with matters pertaining to global surveillance since it recognizes informational privacy and decisional autonomy as constitutional values. Furthermore, through judicial and statutory oversight, it cast doubt on indiscriminate data-collection practices in an indirect manner pursuant to national security law.

India, by this legal transformation, is placed within a broader horizon of constitutional movements wherein industrial nations consider privacy as a right of self-determination, similar to Germany's doctrine of informational self-determination and the EU's GDPR framework. Milanovic warns that judicial pronouncements risk remaining symbolic unless supported by legislative and institutional safeguards.[392] The schism between the constitutional vision and executive practice is glaringly evident while such Data Protection legislation is pending, and surveillance technologies are used without the necessary regulations.

Hence, the Puttaswamy verdict, being an assault on judicial order and a normative premise, demands the harmonisation of India's national laws with global privacy standards in the institutions of expanding state-level surveillance.

Jurisprudential Grounding: Privacy in a Functionally Differentiated Society

While doctrinal and comparative legal reflections help to map the legal form of privacy, they are often insufficient to explain why privacy is so controversial, least of all in an era where personal data flows with the greatest facility across borders as well as across institutions and systems. To meet this complexity, the sociological jurisprudence constructed by Katayoun Baghai supplies an influential theoretical framework.[393]

Building on Durkheim, Simmel, and Luhmann, Baghai argues that privacy is not just a right of the individual or a moral entitlement. It is instead the byproduct of how modern societies are constituted, communication systems that are functionally differentiated. That is to say that modern life is segmented into distinct systems: law, politics, economy, health care, religion, and mass media, each with its own set of operating rules. Privacy happens when the systems

[391] Mitsilegas, supra note 8, at 180-190.

[392] Milanovic, supra note 5, at 120-30.

[393] Katayoun Baghai, *Privacy as a Form of Social Coordination: A Sociological Perspective on Privacy Law*, 28 Yale J.L. & Human. 149 (2016).

interact with one another in an unplanned fashion. For example, should your history as a patient become part of your chances of receiving one of the bank's loans? Do personal relationships belong in your performance evaluations on the job? These are not just ethics or law matters; these are matters of one system intruding on the logic of the other. Baghai promotes the right to selective presentation of the self. In other words, one should have the right to decide how, when, and where aspects of one's personality should be presented based on the situation. But with the age of mass surveillance, the control falters. The data flows in large part unbeknownst to us through governments, corporations, and algorithms, making it nigh on impossible for the individual to present their digital persona. This theory gives new insight to the Indian Supreme Court decision in Puttaswamy. In short, the judgment was not just about surveillance or about Aadhaar but about redrawing the boundaries between the individual and the state on the one hand and the digital architecture that stands between the two on the other. In enlisting informational privacy as one of the constitutional rights, Puttaswamy strengthens Baghai's call to lawfully regulate the intersection and friction between social systems.

As global surveillance networks expand and legal norms struggle to keep pace, Baghai's framework acquires renewed relevance. It instructs us that privacy is not simply the protection of secrets but the enforcement of agency in the increasingly boundary-less world. Privacy thus is transformed not merely into a barricade against invasion but into a tool for ensuring compatibility and fairness between divergent legal, social, and technological dispensations.

CONSTITUTIONAL PRIVACY PROTECTION IN INDIA

The constitutional trajectory of privacy protection in India has transformed significantly, moving from one of flat fractional denial to an acceptance of a right to privacy as a constitutional right. The Supreme Court of India was then at the earliest stage of engaging with the concept. In M.P. Sharma v. Satish Chandra[394] (1954), the Court rejected the notion of the existence of a right of privacy within the confines of the search and seizure provisions in the Code of Criminal Procedure, on the basis that a right of privacy was neither expressly created in the Constitution. In Kharak Singh v. State of U.P.[395] (1962), a case in which the Court found the domiciliary visits by police officers unconstitutional, the Court nonetheless categorically

[394] *M.P. Sharma & Ors. v. Satish Chandra & Ors.*, AIR 1954 SC 300 (India).
[395] *Kharak Singh v. State of U.P.*, AIR 1963 SC 1295 (India).

held that a right to privacy was not a fundamental right under Part 3 of the Constitution. Both M.P. Sharma and Kharak Singh serve to underscore the hesitation of the apex Court to broaden the interpretation of fundamental rights, particularly under Article 21[396], with protections of the right to life and personal liberty.

However, during the 1970s, this stance began to change, with the Supreme Court extending the scope of Article 21. For instance, in Gobind v. State of M.P.[397] (1975), the Court suggested that the right to privacy was a component of the right to life, but that privacy could be limited for valid reasons of state interests, which can include things such as national security. In its subsequent decision in R. Rajagopal v. State of Tamil Nadu[398] (1994), the Court explicitly recognised the "right to be let alone," concluding that the unauthorised publication of private information about an individual without their consent would be an infringement of privacy, barring legitimate public interest. Likewise, in People's Union for Civil Liberties v. Union of India[399] (1997), the Court concluded that telephone tapping would violate privacy rights, unless it was authorised by law and had limits to protect such privacy rights. Through these cases, the Court moves toward understanding privacy as implicit in liberty, dignity, and autonomy, which are rights protected under Article 21.[400]

The historic decision in Justice K.S. Puttaswamy (Retd.) v. Union of India[401] (2017) represented a key development in India's privacy jurisprudence. A nine-judge bench of the Supreme Court unanimously concluded that the right to privacy is a fundamental right under Articles 14, 19, and 21 of the Constitution. The Court developed a three-part test for any interference with privacy: (1) there must be a valid law allowing for the interference, (2) the restriction must be for a legitimate state purpose, and (3) the restriction must be proportionate to the legitimate purpose. Importantly, the Court held that informational privacy is an integral aspect of personal liberty in the digital age and called for stronger data protection to protect individuals from state and non-state actors infringing upon individual autonomy and dignity. The decision also explicitly overruled M.P. Sharma and Kharak Singh and sought to align India's constitutional standards with global human rights treaties (for example, Article 17 of

[396] INDIA CONST. art. 21.
[397] *Gobind v. State of M.P.*, (1975) 2 SCC 148 (India).
[398] *R. Rajagopal v. State of Tamil Nadu*, (1994) 6 SCC 632 (India).
[399] *People's Union for Civil Liberties v. Union of India*, (1997) 1 SCC 301 (India).
[400] INDIA CONST. arts. 14, 19, & 21
[401] *Justice K.S. Puttaswamy (Retd.) v. Union of India*, (2017) 10 SCC 1 (India).

the International Covenant on Civil and Political Rights[402]) and the European Court of Human Rights.

After the Puttaswamy judgement, privacy law quickly took hold in multiple areas of law. In the Aadhaar judgement[403] (2018), for example, the Court validated the use of Aadhaar for state-sponsored welfare programs while striking provisions that would allow private entities to make use of Aadhaar data to prevent intrusions into privacy. Similarly, the Court reinforced the link between privacy, decisional autonomy, dignity, and personal liberty during the Navtej Singh Johar v. Union of India[404] (2018), which decriminalized homosexuality, and the Joseph Shine v. Union of India[405] (2018) ruling which decriminalized adultery. These judgements together illustrate that privacy in India is more than protection from intrusion of the state but also includes informational self-determination, bodily autonomy and decisional freedom when concerning personal relationships.

Despite this, significant challenges remain. The Act on Digital Personal Data Protection, 2023, introduces a long-awaited data protection regime that has drawn criticism for enabling the state to exempt itself from these provisions on grounds of national security, all the while lacking adequate judicial and parliamentary oversight. Surveillance regimes such as the Central Monitoring System (CMS) and NATGRID are implemented without any independent authorisation, placing into question the effectiveness of constitutional protections that arose from the Puttaswamy case. As a result, although the judiciary has constitutionalised privacy as a fundamental right, neither legislature nor institution has realised protections in practice, specifically in the context of rising digital surveillance and obligations to share data across borders.

Case Study: Puttaswamy and Beyond

Privacy is an important consideration in India's jurisprudence in *K.S. Puttaswamy v. Union of India* (2017) 10 SCC 1, 32 (India)[406] pending before the Supreme Court of India. The nine-judge bench affirmed privacy as a fundamental right under Article 21, grounding it in dignity,

[402] International Covenant on Civil and Political Rights, art. 17, Dec. 16, 1966, 999 U.N.T.S. 171.
[403] *K.S. Puttaswamy (Aadhaar) v. Union of India*, (2019) 1 SCC 1 (India).
[404] *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1 (India).
[405] *Joseph Shine v. Union of India*, (2019) 3 SCC 39 (India).
[406] *Justice K.S. Puttaswamy (Retd.) v. Union of India & Ors.*, (2017) 10 SCC 1, 32 (India).

liberty, and autonomy.[407] This right's limits were, however, tested by subsequent judgments like that in Aadhaar (2018) wherein it was held that limited state intrusion was permitted for welfare purposes while maintaining proportionality. There remain, nevertheless, unaddressed concerns pertaining to surveillance projects involving Aadhaar linking and facial recognition that have no explicit legislative safeguards.[408]

DATA LOCALIZATION VS. GLOBAL INTEROPERABILITY

A storm of debate rages over data localisation in data policy in India. On one hand, proponents argue that it ensures sovereignty and security, and that data localisation is needed considering the looming threats of foreign surveillance of Indian citizens' data. On the opposing side of the argument are those who see such restrictions as leading to economic isolation and clashing with trade obligations. GDPR adequacy, however, is not merely about localisation, but about rule-of-law safeguards, independent oversight, and effective remedies, none of which categories is sufficiently developed in India's DPDPA.[409]

COMPARATIVE JURISDICTIONAL ANALYSIS

- **European Union**: Through GDPR and *Schrems* litigation, the EU insists on high privacy standards even in cross-border data flows, invalidating mechanisms like Safe Harbor and Privacy Shield when found inadequate.[410]
- **United States**: With the CLOUD Act, U.S. law enforcement asserts extraterritorial reach, leading to conflicts with EU adequacy rules and raising sovereignty concerns for nations like India.[411]
- **Brazil and South Africa**: Both countries balance constitutional privacy rights with economic data flows through independent regulators (e.g., Brazil's ANPD) and strong legislative safeguards.[412]

[407] Id. at 40-42.

[408] *Justice K.S. Puttaswamy (Retd.) v. Union of India & Ors.*; *Aadhaar*, (2018) 10 SCC 1,

[409] Digital Personal Data Protection Act, 2023, § \[21] (India).

[410] *Schrems II*, Case C-311/18, 2020 E.C.R.

[411] US CLOUD Act, supra note 3.

[412] Brazil's Lei Geral de Proteção de Dados (LGPD), Law No. 13,709/2018 (Brazil); Protection of Personal Information Act, 2013 (South Africa).

India can learn from these models by ensuring its data protection authority has constitutional independence, transparent appointment processes, and powers for judicial oversight.

SURVEILLANCE ARCHITECTURE: CONSTITUTIONAL CONCERNS

The Central Monitoring System (CMS) and NATGRID are India's surveillance systems granted executive discretion, with little parliamentary oversight or scrutiny. Unlike the Investigatory Powers Act in the UK or the Foreign Intelligence Surveillance Court in the USA, India does not have independent judicial authorization for real-time surveillance and hence would be open to challenge on constitutional grounds as under Article 21.[413]

POLICY DEBATES: SECURITY VS. PRIVACY

The state often invokes national security to justify expanded surveillance powers. But under the proportionality tests from Puttaswamy, there has to be clear legislative backing, legitimate aims, and narrow tailoring. With broad exemption clauses such as those in Section 17, the DPDPA fails this test and runs the risk of being struck down, if challenged, for being unconstitutional.[414]

INSTITUTIONAL MECHANISMS FOR OVERSIGHT

Comparative models emphasize independent data protection authorities (like the EDPS in the EU and the ICO in the UK) as critical where otherwise rights and obligations would clash. India's proposed Data Protection Board is not independent of the executive and so would need some reforms if it is to be credible and comply with adequacy requirements.[415]

1.**Inadequate Surveillance Oversight**: India's privacy regime has no independent pre-authorization- or post-surveillance monitoring bodies and thereby undermines proportionality standards from Puttaswamy.

2.**Global Adequacy Requirements**: The GDPR requires independent regulators, narrow exceptions to surveillance, and effective legal remedies in respect thereof; India falls short in all these.

[413] India Const. art. 21; *Puttaswamy*, 10 SCC 1, 32 (India).
[414] Digital Personal Data Protection Act, 2023, § 17 (India).

3.**Lessons from Abroad:** The constitutional protection, followed by independent scrutiny and judicial accountability, are mechanisms that allow for protection of individual privacy in Brazil, South Africa, and the EU.

KEY RECOMMENDATIONS

1. **Independent Data Protection Authority**: Establish a constitutionally backed authority with financial and functional autonomy, modeled on EU regulators.
2. **Judicial Authorisation for Surveillance**: Mandate prior judicial approval for all interception orders, ensuring proportionality and necessity tests.
3. **GDPR Adequacy Roadmap**: Amend the DPDPA to limit executive exemptions, incorporate EU-style adequacy safeguards, and negotiate data transfer agreements recognising reciprocal protections.
4. **Parliamentary Oversight Committees**: Create bipartisan committees for continuous scrutiny of surveillance frameworks, modelled on the UK's Intelligence and Security Committee.
5. **International Cooperation Mechanisms**: Engage in OECD and G20 forums to harmonise cross-border data flow standards, preventing data protection fragmentation.

CONCLUSION

More constitutional privacy intrusions are occurring through global surveillance and data governance, which, in the digital age, stand strangling a constitutional democracy. India faces a very specific challenge arising from being a major digital economy of the world and hence a strategic partner in any kind of global security cooperation. The right to privacy established by the Supreme Court in Puttaswamy firmly established constitutional respect for the right of privacy under Article 21. Now, however, for the implementation of these principles of constitutionally recognised privacy in the globalised digital environment, more comprehensive reforms have to be undertaken-the institutional, policy, and legal.

This study found notable disconnects between constitutional standards and how they are currently being applied, particularly in issues of institutional oversight, legislative frameworks, and international cooperation frameworks. The broad surveillance exemptions in current law

and the insufficient forms of independent oversight risk constitutional compliance as well as international recognition of adequacy. Likewise, the absence of clear frameworks to assess intelligence cooperation agreements and cross-border data transfers against constitutional standards also creates uncertainty and the potential for constitutional violation.

That said, the research also reveals significant opportunities for India to develop innovative solutions that consciously balance constitutional privacy protection with legitimate security and economic interests. The comparative experience of democratic jurisdictions illustrates that strong privacy protection can co-exist with important security cooperation and digital commerce where the appropriate institutional enablers and legal frameworks are in place.

The recommendations in this research would create the possibility for India to emerge globally as a leader in democratic governance of the digital realm all while ensuring fidelity to constitutional values. These include establishing independent oversight bodies, narrowing surveillance exemptions for national security reasons, framework development for meaningful international cooperation, and investment in and development of privacy-preserving technologies. This possible ecosystem for privacy protections would provide a model for other democratic jurisdictions facing similar issues.

The implications of this effort extend well beyond India. As one of the world's largest democracies and digital economies, India's effort to balance constitutional privacy rights with global surveillance and data governance will shape the development of international norms in this area. An effective Indian model that shows constitutional privacy can be harmonized with robust security cooperation and economic development could become a template for other democracies and support the development of globally acceptable approaches to digital governance that respect human rights.

The way forward entails sustained political will, institutional creativity and international cooperation. The constitutional project in Puttaswamy lays the normative groundwork for this effort, but delivering on the promise of constitutional protection of privacy in the digital age will require the kind of large-scale reforms that are outlined in this study. The time for action is now, given that the pace of advancement of surveillance technologies and global frameworks to govern data is quickly outpacing the development of supportive laws and norms, making inaction more costly and more difficult.

Finally, India's advancement in constitutional privacy protection in the global digital context will be evaluated not merely against relevancy to domestic constitutional norms but also against its contribution to a future where technology promotes first and foremost human dignity and democratic ideals. The recommendations offered in this present study constitute a framework for achieving this difficult but vital aim.

Preliminary Enquiries in Indian Criminal Procedure: A Doctrinal Analysis of Their Legal Status and Safeguards

Maria Shreya[416]

ABSTRACT

Indian criminal procedure is founded on the principle that a First Information Report (FIR) must be registered immediately upon the disclosure of a cognizable offence. This mandate, rooted in Section 154 of the Code of Criminal Procedure, 1973, reflects a commitment to prompt investigation and accountability. However, contemporary policing practices have increasingly relied on pre-arrest and pre-FIR preliminary enquiries to assess complaints before formal registration. These enquiries, though justified as safeguards against false or malicious prosecutions, operate in a legally ambiguous space, often affecting personal liberty without the procedural protections attached to arrest or formal investigation. Judicial intervention sought to reconcile this tension by reaffirming the mandatory FIR rule while permitting narrowly tailored preliminary enquiries in exceptional categories. Subsequent jurisprudence consistently emphasised that such enquiries must remain exceptional and cannot substitute FIR registration.

The enactment of the Bharatiya Nagarik Suraksha Sanhita, 2023 (BNSS) marks a significant doctrinal shift by statutorily recognising preliminary enquiries under Section 173(3) for offences punishable with imprisonment between three and seven years. While the provision introduces formal safeguards, its vague standards particularly concerning "prima facie" assessment and the "nature and gravity" of offences, risk expanding police discretion and normalising procedural delay.

This paper argues that pre-arrest enquiries raise serious constitutional concerns under Articles 21, 20(3), and 22 of the Constitution, as they expose individuals to coercive state power without adequate legal protections. Drawing on Indian jurisprudence and comparative insights from the United Kingdom and the United States, the paper contends that without clearer statutory safeguards, transparency requirements, and judicial oversight, the codification of preliminary enquiries may undermine the mandatory FIR regime eroding constitutional guarantees of personal liberty. the constitutional promise of personal liberty.

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Keywords: Preliminary Enquiry, FIR Registration, Article 21, BNSS 2023, Police Discretion.

INTRODUCTION

Indian criminal procedure rests on a delicate balance between effective crime control and the protection of individual liberty. The law mandates that the police register a First Information Report immediately upon receiving information disclosing a cognizable offence.[417] At the same time, every investigation and arrest necessarily implicates personal liberty under Article 21 of the Constitution.[418] This structural tension has become increasingly visible in contemporary policing practices, particularly through the growing reliance on pre-arrest and pre-FIR enquiries.

In practice, police authorities frequently conduct informal verifications before registering an FIR or effecting an arrest and these pre-arrest enquiries often involve repeated summons, collection of "voluntary" statements, spot inspections and extended fact-checking to assess the credibility of a complaint.[419] While such practices are justified by the police as necessary to prevent false cases and unnecessary arrests, they operate within a legally ambiguous framework. Although these practices significantly affect the rights of the accused, The Code of Criminal Procedure, 1973, does not expressly recognize pre-arrest or pre-FIR enquiries. As a result, pre-arrest enquiries have operated within a legally ambiguous space, they are neither fully prohibited nor clearly regulated.

Judicial intervention attempted to clarify this ambiguity. In *Lalita Kumari v. Government of Uttar Pradesh*, a Constitution Bench held that registration of an FIR under Section 154 CrPC is mandatory upon receipt of information disclosing a cognizable offence.[420] The Court listed out a narrow exception permitting preliminary enquiries only in limited categories of cases such as medical negligence, corruption, family disputes, commercial transactions and cases involving unexplained delay and insisted that such enquiries be strictly time-bound.

[417] Bharatiya Nagarik Suraksha Sanhita, 2023, § 173 (India).

[418] Balhera, A. (2018) *A Study about First Information Report (FIR) and Its Various Aspects under Criminal Law*, 5 International Journal of Research 47–55.

[419] Belur, J., Tilley, N., Osrin, D., Daruwalla, N., Kumar, M. & Tiwari, V. (2015) *Police Investigations: Discretion Denied Yet Undeniably Exercised*, 25(5) Policing & Society 439–462.

[420] Lalita Kumari v. Govt. of U.P., (2014) 2 SCC 1

Subsequent decisions, including *Priyanka Srivastava v. State of Uttar Pradesh,*[421] reinforced the mandatory nature of FIR registration and cautioned against routine or open-ended preliminary enquiries. Despite this jurisprudence, the practice on the ground continued to diverge from the law as declared. Police authorities frequently engaged in "fact-checking" complaints before registering FIRs, often extending these enquiries over weeks or months. When conducted prior to arrest, such enquiries frequently involved repeated summons and informal questioning, creating a de facto restraint on liberty without the procedural safeguards that accompany formal investigation or arrest.[422] The absence of clear statutory standards enables arbitrary police discretion, undermines the mandatory FIR regime, and risks converting procedural delay into a form of punishment.

The enactment of the Bharatiya Nagarik Suraksha Sanhita, 2023 marks a significant shift in this landscape. For the first time, Parliament has explicitly recognised a limited pre-FIR enquiry under Section 173(3), thereby partially codifying what was previously governed only by judicial directions. While this statutory recognition seeks to bring clarity, it also raises fresh concerns regarding the scope of police discretion, the absence of detailed procedural safeguards, and the potential constitutional implications of legitimizing quasi-investigative powers before formal registration of an offence.

Accordingly, this paper examines the legal validity of pre-arrest enquiries under Indian criminal law, traces the evolution of judicial doctrine governing preliminary enquiries, and analyses how Section 173(3) of the BNSS restructures this regime. It argues that the statutory recognition of pre-FIR enquiries, without clear limits and accountability mechanisms, may institutionalize practices that were earlier treated as exceptional. The paper further contends that existing safeguards remain insufficient to prevent abuse of this quasi-investigative power.

1. HISTORICAL EVOLUTION OF PRELIMINARY ENQUIRIES

1.1. CrPC Silence and the Mandatory FIR Rule

The Code of Criminal Procedure 1973 contains no express provision permitting pre-arrest or pre-FIR enquiries. Section 154(1) CrPC mandates that every information relating to the commission of a cognizable offence "shall" be reduced to writing and registered as a First

[421] Priyanka Srivastava v. State of U.P., (2015) 2 SCC 657
[422] *supra* note 3, at 2.

Information Report (FIR).[423] On its face, the provision creates a rule of immediacy: once information disclosing a cognizable offence is received, the criminal law must be set in motion without delay.

Early Supreme Court jurisprudence firmly entrenched this position. In *Aleque Padamsee v. State of Maharashtra*[424], the Court held that police are duty-bound to register an FIR whenever the facts disclosed show that a cognizable offence has been committed, irrespective of doubts about truthfulness or complexity. The Court clarified that assessing credibility is not the function of the police at the registration stage; such determinations belong to investigation and trial. Failure to register could be remedied through judicial oversight under Sections 190 and 200 CrPC. FIR registration was thus treated as the statutory starting point of the criminal process.

Over time, however, the rigidity of this approach produced practical hardship. By the early 2010s, two competing concerns had emerged as victims complained of police refusal to register FIRs even in genuine cases, while accused persons alleged harassment through false or vindictive FIRs in private disputes such as matrimonial or commercial conflicts. Acknowledging this tension, the Law Commission in its 243rd Report (2012) noted *"the law on whether the registration of FIR could be postponed for a reasonable time is in a state of uncertainty"* and awaited judicial clarification.[425]

Statutorily, the CrPC offered no resolution. Section 154's mandatory language left little room for delay or informal "verification." Preliminary enquiries thus remained a judicial creation, operating without statutory sanction. While police practice sometimes involved informal fact-checking, such steps risked being invalidated as contrary to the statutory mandate.

Judicial sensitivity to misuse nevertheless surfaced in limited contexts. In *P. Sirajuddin v. State of Madras*[426], the Court suggested that before publicly accusing a public servant of corruption, a discreet preliminary enquiry was desirable to protect reputation. Likewise, *State of Haryana*

[423] Code of Criminal Procedure, 1973, § 154(1) (India).
[424] P. Sirajuddin v. State of Madras, (1970) 3 SCR 931
[425] Law Commission of India (2012) *243rd Report on Section 498A of the Indian Penal Code* (August 2012).
[426] P. Sirajuddin v. State of Madras, (1970) 3 SCR 931

v. Bhajan Lal[427] identified categories of cases where criminal proceedings amount to abuse of process, implicitly recognizing the dangers of malicious FIRs. Yet these decisions did not establish a general power to delay registration.

Importantly, a Constitution Bench in *K. Veeraswami v. Union of India*[428] rejected the idea of a pre-FIR hearing for the accused, warning that investigators must not assume an adjudicatory role. This reinforced the principle that FIRs cannot be withheld to test the merits of allegations. By the 2000s, the mandatory FIR doctrine had hardened. In *CBI v. Tapan Kumar Singh*[429] and *Ramesh Kumari v. State (NCT of Delhi)*[430], the Court reiterated that once information prima facie discloses a cognizable offence, registration is compulsory, and questions of genuineness are irrelevant at that stage. Thus, prior to *Lalita Kumari*, the law remained formally clear but practically contested as FIRs were mandatory, while preliminary enquiries survived only as uneasy judicial exceptions.

1.2. Lalita Kumari and Limited Preliminary Inquiry

The Constitution Bench in *Lalita Kumari v. Government of U.P.*[431] entrenched this mandatory FIR doctrine, as it held unanimously that upon receiving information disclosing a cognizable offence, the police must register an FIR. The Court did, however, carve out a narrow exception: if the complaint is ambiguous or not on its face a crime, police may undertake a "*limited preliminary inquiry*" solely to determine whether an offence is made out.[432] The enquiry was meant to operate within narrow limits. Its purpose was not to assess the truthfulness of the allegations or to gather evidence, but only to determine whether the information, on its face, disclosed the commission of a cognizable offence. If it does, an FIR follows. If not, the police may close the matter, but they must record reasons in the Station Diary (General Diary entry). The guidelines were strict: any such enquiry must be conducted by an officer above the rank of Sub-Inspector; it must be *time-bound*- ideally within 7 days (extendable to at most 15 days in rare cases) with any delay and its causes fully noted and its scope was confined to checking cognizability.[433] Crucially, *Lalita Kumari* listed five non-exclusive categories where

[427] State of Haryana v. Bhajan Lal, 1992 Supp. (1) SCC 335
[428] K. Veeraswami v. Union of India, (1991) 3 SCC 655 (India).
[429] CBI v. Tapan Kumar Singh, (2003) 6 SCC 175
[430] Ramesh Kumari v. State (NCT of Delhi), (2006) 2 SCC 677 (India).
[431] Lalita Kumari v. Gov't of U.P., (2014) 2 SCC 1 (India).
[432] Lalita Kumari v. Gov't of U.P., (2014) 2 SCC 1 (India).
[433] Lalita Kumari v. Gov't of U.P., (2014) 2 SCC 1 (India).

preliminary enquiries might apply such as matrimonial issues, commercial disputes, medical negligence, corruption, and inordinate delay in complaint but emphasized that even in those, FIR registration becomes imperative if evidence of crime emerges.[434]

The Court also mandated accountability by warning that officers who willfully delay FIRs despite disclosable offences would be liable to disciplinary action and if a preliminary enquiry is conducted and no offence is found, the police must record brief reasons for closure and send a copy of the closure report to the informant within one week. Justice Chauhan (concurring) crystallized the ratio: **"***registration of FIR is mandatory in cognizable cases, except in a limited category of cases, where a preliminary enquiry is justified*".[435] *Lalita Kumari* thus reaffirmed the mandatory FIR doctrine while introducing a narrowly tailored, judge-made safety valve within strict procedural limits.

1.3. Post-Lalita Jurisprudence

In the years following *Lalita*, the courts have clarified that even the allowed enquiries are fully discretionary. In *Priyanka Srivastava v. State of U.P.*, a three-judge Bench reaffirmed that *Lalita Kumari*'s rule is unequivocal as FIR registration is the default but "instances" may require preliminary enquiry due to "genesis and novelty of crimes" citing medical negligence as an example and it restated the five illustrative categories verbatim and the 7-day limit, stressing the enquiry's narrow purpose and procedural safeguards.[436] It also cautioned magistrates to apply mind when directing FIR registration through Section 156(3) CrPC and even suggested requiring an affidavit with such applications to curb misuse.

In *State of Telangana v. Managipet*[437], dealing with disproportionate assets investigations, the Supreme Court held that if a complaint itself clearly indicates a crime, the police need not conduct any enquiry. In other words, *Lalita* did not create a *right* to an enquiry; it remained in police hands. Likewise, in *State of Karnataka v. T.N. Sudhakar Reddy,*[438] a Constitution Bench stated plainly: "*a preliminary inquiry is not mandatory in every case*". If senior officers have a

[434] Lalita Kumari v. Gov't of U.P., (2014) 2 SCC 1 (India).
[435] Lalita Kumari v. Gov't of U.P., (2014) 2 SCC 1 (India).
[436] Priyanka Srivastava v. State of U.P., (2015) 2 SCC 657 (India).
[437] State of Telangana v. Managipet, (2019) 19 SCC 87 (India).
[438] State of Karnataka v. T.N. Sudhakar Reddy, 2025 INSC 229 (India).

source report that itself discloses an offence, they may skip a separate enquiry and directly lodge the FIR.

Thus, the post-*Lalita* trend is clear: preliminary enquiries are exceptional and fact-specific, not a routine step. At the same time, officials who disregard the FIR mandate when it clearly applies may be held accountable. In effect, the mandatory FIR doctrine has been reinforced: an enquiry can only delay (never deny) the obligation to file an FIR once a cognizable offence is shown on the face of it.

In sum, the Supreme Court in *Lalita Kumari* imposed a narrow and tightly controlled niche for pre-FIR enquiries limited by category, purpose, and time. Before the BNSS, therefore, the law was: no enquiry unless falling under those special circumstances, for example, medical negligence and even then, strictly short and recorded. This "judicial genesis" of preliminary enquiry provided some due process of reason-recording (Article 21's fairness) but it left significant scope for inconsistency, as what was considered as "commercial" or "abnormal delay" was often unclear. The core legal problem remained: the CrPC itself had no explicit rule, so these enquiries were a judicial creation in a legislative vacuum.

1.4. Statutory Recognition under the BNSS, 2023

The Bharatiya Nagarik Suraksha Sanhita (BNSS, 2023) explicitly authorizes preliminary enquiries for certain offences. Under Section 173(3), when information is received about a cognizable offence punishable by more than three years and up to seven years, the officer in-charge of the police station may, *with the prior permission of an officer not below the rank of Deputy Superintendent of Police*, considering the nature and gravity of the offence may either (a) conduct a preliminary enquiry of up to 14 days to assess whether a cognizable offence is made out, or (b) proceed immediately to register the FIR and investigate if a prima facie case emerges.[439]

Thus, the statute codifies Preliminary Enquiries as a *statutory exception* to the immediate FIR rule. The proviso expressly states that aside from this exception, FIR registration remains mandatory whenever a cognizable offence is disclosed.[440] These conditions- a senior officer's

[439] Bharatiya Nagarik Suraksha Sanhita, 2023, § 173(3) (India).
[440] Imran Pratapgarhi v. State of Gujarat, (2025) 3 SCC 145

sanction and an absolute 14-day limit were absent under the old regime. In effect, the BNSS tries to impose structure on what used to be informal: an inquiry cannot drag on indefinitely. The DSP's written approval (paralleling CrPC §156(3)'s requirement of sanction in certain cases) adds oversight.

1.5. Shift from CrPC

The enactment of Section 173(3) of the Bharatiya Nagarik Suraksha Sanhita, 2023 marks a doctrinal shift in Indian criminal procedure. For the first time, Parliament has expressly recognized a pre-FIR enquiry in statutory form, however, only for a limited class of offences. Under CrPC, preliminary enquiry existed only as a judicial exception carved out in *Lalita Kumari*; under the BNSS, it becomes a codified procedural option.

Section 173(3) partially aligns with *Lalita Kumari* by permitting limited preliminary scrutiny before FIR registration, but it departs sharply in design. Instead of relying on illustrative categories such as corruption, matrimonial disputes, or medical negligence, the BNSS adopts a punishment-based filter. Only offences punishable with imprisonment between three and seven years qualify for preliminary enquiry. Offences punishable below three years or above seven years fall outside this regime and continue to attract mandatory FIR registration under Section 173(1). This reclassification is significant: corruption offences, which *Lalita Kumari* explicitly treated as suitable for preliminary enquiry, are often punishable with seven years or more and are therefore excluded from Section 173(3)'s scope.[441]

The BNSS also introduces procedural safeguards absent from *Lalita Kumari*. Most notably, it imposes a statutory 14-day time limit for completing the enquiry and requires approval from a senior police officer (of DSP rank or above).[442] Commentators have welcomed this as an improvement in clarity, replacing *Lalita Kumari*'s flexible seven-day guideline with a firm legislative deadline.[443] In theory, these features enhance accountability and reduce the risk of indefinite delay.

[441] Lalita Kumari v. Government of U.P., (2014) 2 SCC 1

[442] Bharatiya Nagarik Suraksha Sanhita, 2023, §173(3).

[443] Lexology (n.d.) *Conceptual Challenges in BNSS §173(3)*, Lexology, available at: https://www.lexology.com/library/detail.aspx?g=f9da2de7-d32a-4d5b-8a82-ba219c331c89

However, Section 173(3) also introduces new ambiguities. The provision allows enquiry where, "considering the nature and gravity of the offence," no prima facie case appears to be made out. Neither "prima facie" nor "nature and gravity" is defined. In *Imran Pratapgadhi v. State of Gujarat* (2025), the Supreme Court confirmed that police may invoke Section 173(3) to make this initial assessment, but it did not clarify the evidentiary threshold required to conclude that no prima facie offence exists.[444] This silence potentially enlarges police discretion beyond what *Lalita Kumari* permitted, allowing FIR refusal on grounds not previously recognised.

Critics argue that Section 173(3) risks becoming a "legal cloak" for delay. While Lalita Kumari mandates immediate FIR registration for cognizable offences, allowing only narrow, time-bound exceptions, §173(3) permits a 14-day enquiry for offences punishable between three and seven years. This shift risks normalizing delay, enabling misuse of police discretion, and undermining complainants' rights to timely justice. Before BNSS, postponing FIR registration outside *Lalita Kumari*'s narrow categories was arguably illegal; now, police may justify postponement as a statutory prima facie enquiry even where the offence is clearly cognizable and others defend the provision as a pragmatic compromise, noting that codification brings transparency, uniformity, and enforceable limits where earlier practice operated in a grey zone.[445]

In *Imran Pratapgarhi v. State of Gujarat* (2025), the Court emphasized that Section 173(3) is a narrow exception: if an offence outside the 3–7 year limit is disclosed, Section 173(1) (a requires FIR registration and it made clear that §173(3) is "without prejudice" to the general FIR rule, that police *may* hold a preliminary enquiry only where the statute allows it.[446] The Court further insisted that the DSP sanction and timeline must be strictly followed, aligning with *Lalita*'s insistence on seniority and promptness.

Similarly, *State of Karnataka v. T.N. Sudhakar Reddy* (2025) held that "a preliminary inquiry is not mandatory in every case" and If a senior officer has a detailed source report clearly disclosing an offence, he may bypass any enquiry and register an FIR immediately.[447] The

[444] Imran Pratapgarhi v. State of Gujarat, (2025) 3 SCC 145
[445] *supra* note 27, at 8.
[446] Imran Pratapgarhi v. State of Gujarat, (2025) 3 SCC 145
[447] State of Karnataka v. T.N. Sudhakar Reddy, 2025 INSC 229

Bench essentially said that *Lalita* did not create a right to PE; if a cognizable offence is already plain, delay is unjustified. These rulings reinforce that BNSS PEs are discretionary and exceptional: they do not allow police to *avoid* FIRs when the law clearly mandates one.

In sum, Section 173(3) brings preliminary enquiry out of the shadows and into the statute book. It replaces a judge-made exception with a legislatively sanctioned procedure, adding structure and oversight. Yet its open-ended language also creates fresh tensions with the mandatory FIR rule under Section 173(1). Whether the provision strengthens procedural fairness or normalizes delay will ultimately depend on how rigorously its safeguards are enforced and how courts interpret "prima facie" scrutiny in future cases.

2. CONSTITUTIONAL IMPLICATIONS AND LEGAL SAFEGUARDS

Pre-arrest or pre-FIR enquiries, by blurring the line between information and formal investigation, raise fundamental constitutional questions. Key among these are the guarantees of personal liberty (Article 21), equality (Article 14), and protection against self-incrimination (Article 20(3)). The increasing reliance on pre-arrest and pre-FIR enquiries raises serious constitutional questions concerning personal liberty, procedural fairness, and protection against self-incrimination. While such enquiries are often justified as tools for filtering frivolous complaints and preventing unnecessary arrests, their informal and extra-statutory character exposes individuals to coercive state power without the procedural safeguards that accompany formal investigation or arrest. This section examines the constitutional implications of pre-arrest enquiries under Articles 21, 20(3), and 22 of the Constitution of India, and evaluates the adequacy of existing legal safeguards in preventing their misuse.

2.1 Article 21 – Personal Liberty

Article 21 guarantees that no person shall be deprived of their life or personal liberty except according to procedure established by law.[448] Judicial interpretation has consistently expanded the scope of this protection to include not merely physical restraint but also freedom from arbitrary and coercive state action. In *Maneka Gandhi v. Union of India*, the Supreme Court held that any procedure depriving personal liberty must be "just, fair and reasonable," thereby importing substantive due process into Indian constitutional law.[449]

[448] India Const. art. 21.

[449] Maneka Gandhi v. Union of India, (1978) 1 SCC 248.

Pre-arrest enquiries, though not formally recognised as "investigation" or "arrest", often involve repeated summons, informal questioning, and implicit threats of coercive action. Such practices can significantly restrict an individual's liberty, compelling compliance without the procedural guarantees attached to arrest under Sections 41 and 41A of the CrPC or their equivalents under the BNSS. The absence of formal custody does not negate the reality of coercion, particularly where individuals are subjected to prolonged questioning or reputational pressure.[450]

In *D.K. Basu v. State of West Bengal*, the Court acknowledged the vulnerability of individuals to police abuse even prior to formal arrest and laid down detailed safeguards governing detention and interrogation.[451] Although these guidelines were framed in the context of custodial arrest, their underlying rationale preventing abuse of police power and protecting human dignity applies equally to pre-arrest enquiries that function as de facto restraints on liberty.

The BNSS, 2023, by statutorily recognising preliminary enquiries under Section 173(3), attempts to regulate this stage through requirements such as senior officer approval and a 14-day time limit. However, mere temporal limits do not address qualitative aspects of liberty infringement, such as psychological pressure, social stigma, and compelled participation. If preliminary enquiries become a routine mechanism for delaying FIR registration, they risk violating Article 21 by transforming procedural delay into a form of punishment without judicial oversight.[452]

2.2. Article 20(3) – Protection Against Self-Incrimination

Article 20(3) provides that no person accused of an offence shall be compelled to be a witness against themselves. This protection extends to police questioning and applies from the moment a person becomes an "accused," irrespective of whether formal charges have been filed.

In *Nandini Satpathy v. P.L. Dani*, the Supreme Court held that the right against self-incrimination includes the right to silence during police interrogation and applies even at the

[450] Kelkar, R.V. (2018) *Lectures on Criminal Procedure*, 6th ed., Eastern Book Company, pp. 146–148.
[451] D.K. Basu v. State of West Bengal, (1997) 1 SCC 416.
[452] Law Commission of India (2001) *177th Report on Law of Arrest*, paras 3.2–3.6, Government of India.

pre-trial stage and emphasised that coercive questioning either physical or psychological undermines constitutional guarantees.[453]

Pre-arrest enquiries often blur the line between "informal interaction" and custodial interrogation. Individuals summoned during such enquiries may not be informed of their right to silence or their right to consult a lawyer. Statements obtained at this stage, while not formally recorded under Section 161 CrPC (or Section 180 BNSS), may still influence investigative decisions or be used indirectly to build a case.

In *Charansingh v. State of Maharashtra*, the Court observed that statements made during preliminary enquiries do not carry the same evidentiary status as statements recorded during formal investigation.[454] However, this distinction does not eliminate the constitutional concern, as the coercive environment itself can violate Article 20(3), even if the statements are not admissible in evidence.

The lack of explicit statutory safeguards—such as mandatory intimation of the right to silence and access to legal counsel creates a real risk that individuals may be compelled to provide incriminating information during pre-arrest enquiries.[455]

2.3. Arrest Safeguards as Indirect Limits on Pre-Arrest Enquiries

While the Constitution does not expressly regulate pre-arrest enquiries, judicially developed arrest safeguards indirectly constrain their scope. In *Joginder Kumar v. State of U.P.*, the Supreme Court held that arrest must be justified by necessity and not used mechanically.[456]

This principle was strengthened in *Arnesh Kumar v. State of Bihar*, where the Court mandated compliance with Section 41A CrPC and discouraged unnecessary arrests in offences punishable with imprisonment up to seven years.[457] Similarly, in *Satender Kumar Antil v. CBI*, the Court emphasised that personal liberty must not be sacrificed for procedural

[453] Nandini Satpathy v. P.L. Dani, (1978) 2 SCC 424.
[454] Charansingh v. State of Maharashtra, (2021) 5 SCC 469.
[455] Pillai, K.N. Chandrasekharan (2022) *R.V. Kelkar's Criminal Procedure*, 7th ed., Eastern Book Company, pp. 221–223.
[456] Joginder Kumar v. State of U.P., (1994) 4 SCC 260.
[457] Arnesh Kumar v. State of Bihar, (2014) 8 SCC 273.

convenience.[458] In *Siddharth v. State of Uttar Pradesh*, the Court clarified that arrest is not mandatory merely because a charge sheet has been filed.[459]

These decisions reflect a constitutional ethos that prioritises liberty over mechanical enforcement. However, they also create an unintended incentive for the police to rely on pre-arrest enquiries as an alternative means of exerting control without triggering formal arrest safeguards. When arrest becomes procedurally burdensome, informal enquiries may become the preferred tool for extracting information or exerting pressure.

Thus, while arrest jurisprudence protects individuals from arbitrary custody, it does not adequately regulate the grey zone of pre-arrest interaction. Without parallel safeguards governing preliminary enquiries, the constitutional promise of liberty risks being undermined through informal policing practices.[460]

2.4 Article 22 and the Right to Information

Article 22(1) guarantees that a person who is arrested shall be informed of the grounds of arrest and shall have the right to consult and be defended by a legal practitioner. Although these rights formally attach only upon arrest, their underlying purpose is to ensure transparency and accountability in the exercise of police power.

In the context of pre-arrest enquiries, individuals are often summoned without clear disclosure of the allegations against them. This lack of transparency creates informational asymmetry and heightens the risk of coercion.

In *Mihir Rajesh Shah v. State of Maharashtra* (2025), the Supreme Court held that when an arrest follows a preliminary enquiry, the findings of such enquiry must be communicated to the accused.[461] This requirement strengthens procedural fairness by enabling meaningful exercise of rights under Articles 21 and 22.

[458] Satender Kumar Antil v. CBI, (2022) 10 SCC 51.
[459] Siddharth v. State of Uttar Pradesh, (2021) 1 SCC 676.
[460] Baxi, Upendra (1982) *The Crisis of the Indian Legal System*, p. 23-25.

[461] Mihir Rajesh Shah v. State of Maharashtra, (2025) INSC 1288

However, this safeguard operates only at the terminal stage of arrest and does not regulate the conduct of the enquiry itself. Without statutory obligations to disclose the basis of the enquiry, pre-arrest processes remain opaque and susceptible to abuse.

2.5. Adequacy of Existing Safeguards

The constitutional safeguards applicable to arrest and investigation were developed in response to the coercive nature of formal custody. Pre-arrest enquiries, by contrast, occupy an informal space that often escapes rigorous legal scrutiny. While judicial decisions have emphasized restraint, proportionality, and transparency, these principles have not been translated into enforceable procedural rights at the preliminary enquiry stage.

Section 173(3) of the BNSS introduces time limits and hierarchical approval for preliminary enquiries. However, it does not mandate the presence of counsel, inform individuals of their right to silence, or require disclosure of allegations. Nor does it provide remedies for abuse, such as exclusion of improperly obtained statements or departmental accountability.

From a constitutional perspective, the current framework falls short of ensuring that pre-arrest enquiries conform to the standards of fairness, reasonableness, and non-arbitrariness demanded by Articles 14 and 21.[462]

Pre-arrest enquiries represent a legally ambiguous but practically powerful phase of the criminal process. While intended to prevent unnecessary FIRs and arrests, they often operate without the constitutional safeguards that protect individuals from arbitrary state action. Judicial jurisprudence under Articles 21, 20(3), and 22 highlights the importance of liberty, transparency, and protection against coercion, but these principles have not been fully operationalized in the context of preliminary enquiries.

The statutory recognition of such enquiries under the BNSS, 2023, offers an opportunity for regulatory clarity. However, unless accompanied by robust procedural safeguards—such as the right to counsel, clear disclosure of allegations, and protection against self-incrimination—pre-arrest enquiries risk becoming constitutionally suspect. Judicial vigilance will therefore remain

[462] Bhatia, Gautam (2019) *The Transformative Constitution: A Radical Biography in Nine Acts*, HarperCollins India, pp. 312–315.

essential to ensure that the balance between effective policing and personal liberty is not tilted irreversibly in favour of unchecked state discretion.

3. COMPARATIVE INSIGHTS

Comparing pre-arrest enquiry frameworks in other common law jurisdictions like the UK and US offers valuable perspectives for assessing India's evolving system, particularly with the advent of the Bharatiya Nyaya Sanhita (BNSS) as both the UK and US criminal justice systems, having historical ties to India's legal framework, provide contrasting approaches to police powers and citizen safeguards before formal arrest or charges are laid.[463]

3.1. United Kingdom: Police and Criminal Evidence Act (PACE)

In the United Kingdom, the Police and Criminal Evidence Act (PACE) 1984, along with its Codes of Practice, establishes a comprehensive statutory framework governing police powers, including stop and search, detention, and interrogation.[464] PACE is considered the most significant piece of legislation related to policing in England and Wales, outlining police powers concerning individual citizens and it provides a structured approach to pre-arrest interactions, emphasizing transparency and accountability, often requiring detailed records and clear justifications for police actions.[465] The legislation dictates specific procedures for questioning, searches, and the rights of individuals in police custody, aiming to balance effective policing with individual liberties.[466] While police discretion is an inherent and inevitable characteristic of policing, PACE sets clear boundaries to ensure its exercise upholds principles of procedural justice.

3.2. United States: Probable Cause and Miranda Warnings

The United States criminal procedure is deeply rooted in the Fourth, Fifth, and Sixth Amendments of its Constitution, particularly emphasizing "probable cause" for searches, seizures, and arrests.[467] The requirement of probable cause means that police must have a

[463] Halder, D. (2020) *Stop, Search, Frisk and Detain: A Comparative Analysis of Police Power Between India, UK and US*, Social Science Research Network (SSRN).

[464] Police and Criminal Evidence Act 1984, c. 60 (UK),

[465] Corteen, K. & Turner, J. (2023) *Police and Criminal Evidence Act 1984*, Policy Press eBooks

[466] Radburn, M., Tallent, D., Kyprianides, A., Stott, C. & Savigar-Shaw, L. (2021) *Procedural Justice as a Reward to the Compliant: An Ethnography of Police–Citizen Interaction in Police Custody*, Policing & Society.

[467] Harris, A. (2020) *CRM 322: Law of Criminal Procedure*, LibGuides, Saint Leo University.

reasonable belief, based on facts, that a crime has been committed or is being committed, before they can effect an arrest or conduct a search. This standard is a critical safeguard against arbitrary police action. Furthermore, the landmark Supreme Court decision in Miranda v. Arizona[468] established the requirement for "Miranda warnings," informing individuals of their right to remain silent and their right to an attorney during custodial interrogation. This ensures that any statements made by suspects are voluntary and not coerced, directly addressing self-incrimination concerns.[469] While the US system allows for some pre-arrest investigation, any questioning that becomes custodial triggers these significant constitutional safeguards, defining the limits of informal enquiries.[470] The vast body of US criminal procedure law, focusing on Supreme Court cases and statutory rules, provides a robust framework for its criminal justice system.

3.3. Lessons for BNSS Implementation

The comparative analysis highlights that both the UK and US systems provide clearer legal parameters and stronger safeguards for pre-arrest interactions compared to the historical ambiguity in India, which the BNSS now seeks to address. The statutory clarity of PACE in the UK and the constitutional probable cause and Miranda requirements in the US offer models for defining the scope, duration, and procedural obligations of preliminary enquiries. As India implements Section 173(3) of the BNSS, integrating more explicit procedural safeguards, such as clear rules for summons, strict adherence to time limits, and explicit advisories regarding the right to silence during preliminary enquiries, could further strengthen constitutional protections under Articles 20(3) and 21. This could help mitigate the risk of legitimizing delays and preventing the "process as punishment" scenario that informal pre-arrest enquiries can create.

4. CRITICAL CHALLENGES AND REFORM IMPERATIVES

Despite the judicial safeguards articulated in *Lalita Kumari v. Government of Uttar Pradesh* and the statutory codification of preliminary enquiries (PEs) under Section 173(3) of the Bharatiya Nagarik Suraksha Sanhita, 2023 (BNSS), significant practical and constitutional concerns persist. A central problem is the lack of transparency in how PEs are conducted. Many

[468] Miranda v. Arizona, 384 U.S. 436 (1966).
[469] Miranda v. Arizona, 384 U.S. 436 (1966).
[470] Slobogin, C. (2020) *Advanced Introduction to U.S. Criminal Procedure*,Edward Elgar Publishing.

police stations fail to formally record informal enquiries or communicate outcomes to complainants, despite the Supreme Court's direction that all information and decisions must be entered in the General Diary.[471] This opacity allows enquiries to be conducted "off the books," leaving no documentary trail for judicial or public scrutiny. Closely linked is the potential for abuse of discretion. The vague "prima facie" standard permits subjective rejection of complaints, disproportionately affecting marginalized groups such as women, minorities, and the poor.[472] Politically sensitive or inconvenient cases may be deliberately stalled, and the absence of meaningful penalties for non-compliance weakens the deterrent effect of the 14-day limit prescribed by BNSS.[473]

Another major concern is the deterioration of evidence caused by delayed FIR registration. Forensic traces, digital data, and witness recollections can fade quickly, compromising the integrity of investigations. Prolonged informal enquiries may distort the chain of evidence and prejudice both prosecution and defence.[474] Repeated summonses during PEs can amount to "process as punishment," subjecting individuals to reputational harm and psychological pressure without the procedural safeguards of arrest.

Implementation of Section 173(3) also suffers from uneven enforcement across States. While some police forces comply with senior officer approval and timelines, others manipulate offence classifications to justify PEs. The absence of a mandatory national reporting mechanism makes oversight difficult. Victims, too, are adversely affected as delays in FIR registration undermine their access to justice, erode public confidence in law enforcement, and leave them uninformed about the progress of their complaints.[475] Compounding these issues is widespread lack of awareness among citizens about their rights during PEs. Unlike arrestees, persons summoned for enquiries are not formally informed of their right to silence or legal counsel, creating an informational asymmetry that facilitates coercion.[476]

[471] Lalita Kumari v. Gov't of Uttar Pradesh, (2014) 2 SCC 1.
[472] Law Commission of India (1996) *154th Report on the Code of Criminal Procedure*.
[473] Bharatiya Nagarik Suraksha Sanhita, 2023, § 173(3) (India).
[474] Ashworth, Andrew & Redmayne, Mike (2019) *The Criminal Process*, 5th ed., Oxford: Oxford University Press.
[475] Ramesh Kumari v. State (NCT of Delhi), (2006) 2 SCC 677.
[476] Nandini Satpathy v. P.L. Dani, (1978) 2 SCC 424.

To address these systemic flaws, a multi-pronged reform strategy is essential. First, mandatory record-keeping should be enforced through electronic enquiry logs documenting timelines, officer identities, and investigative steps. This would promote accountability and enable judicial review of PE legality.[477] Second, audio-visual recording of all formal questioning during PEs should be introduced to prevent coercion and fabrication, aligning Indian practice with international standards on custodial safeguards.[478]

Third, access to legal counsel must be guaranteed at the PE stage. While Section 41D CrPC allows consultation with a lawyer after arrest, a similar statutory right should extend to individuals summoned during PEs.[479] Informing suspects that participation is voluntary would strengthen compliance with Articles 20(3) and 21 of the Constitution. Fourth, the 14-day time limit should be treated as mandatory, not directory. Courts should exclude evidence obtained through unjustified delays, and departmental action should follow violations, as envisioned in *Lalita Kumari*.[480]

Fifth, judicial oversight should be strengthened. Requiring police to notify magistrates when invoking Section 173(3), or when enquiries exceed a specified duration, would introduce external supervision and curb arbitrary discretion.[481] Sixth, transparency toward complainants must be ensured. Closure reports with reasons should be communicated to informants if FIRs are not registered, reinforcing accountability and public trust.[482]

Finally, training and institutional guidelines are necessary. Police manuals should incorporate BNSS safeguards, and legal literacy programs should educate citizens about their rights during PEs.[483] Without such reforms, the formalization of preliminary enquiries risks normalizing procedural delay and informal coercion, undermining the constitutional promise of liberty. The guiding principle must remain that PEs are exceptional tools for screening frivolous complaints not substitutes for prompt FIR registration and judicial oversight.

[477] National Crime Records Bureau, *Crime in India Report 2023*.
[478] United Nations Office on Drugs and Crime (2011) *Handbook on Police Accountability, Oversight and Integrity*.
[479] Code of Criminal Procedure, 1973, § 41D (India).
[480] Lalita Kumari v. Gov't of Uttar Pradesh, (2014) 2 SCC 1.
[481] Bhajan Lal v. State of Haryana, 1992 Supp (1) SCC 335.
[482] Mihir Rajesh Shah v. State of Maharashtra, 2025 INSC 1288
[483] Bureau of Police Research and Development (2023) *Model Police Manual*.

5. CONCLUSION

Preliminary enquiries in Indian criminal procedure have evolved from a narrow, judge-made exception into a statutorily recognised mechanism under Section 173(3) of the Bharatiya Nagarik Suraksha Sanhita, 2023. While this shift seeks to bring clarity and structure to an otherwise ambiguous practice, it simultaneously raises serious constitutional and procedural concerns. Historically, the Supreme Court in *Lalita Kumari v. Government of Uttar Pradesh* reaffirmed the mandatory nature of FIR registration, permitting preliminary enquiries only in limited and exceptional circumstances, subject to strict timelines and accountability safeguards.[484] Subsequent jurisprudence consistently emphasized that such enquiries must never become a routine substitute for FIR registration.[485]

The BNSS departs from this judicial framework by introducing a punishment-based threshold for preliminary enquiries, thereby altering the doctrinal foundation laid down in *Lalita Kumari*. Although the statutory 14-day time limit and senior officer approval offer a degree of procedural discipline, the provision's vague standards such as "*prima facie*" assessment and "*nature and gravity*" of the offence risk expanding police discretion without corresponding safeguards.[486] This creates a real danger of institutionalising delay, allowing informal enquiries to function as a form of "process as punishment," particularly in politically sensitive or socially contentious cases.

From a constitutional perspective, pre-arrest enquiries implicate Articles 21, 20(3), and 22 by exposing individuals to coercive state power without the procedural protections attached to arrest or formal investigation. Judicial safeguards developed in cases such as *D.K. Basu*, *Joginder Kumar*, and *Arnesh Kumar* underscore that liberty cannot be compromised for administrative convenience. Yet, these protections remain largely inapplicable at the preliminary enquiry stage, creating a regulatory vacuum where informal coercion can thrive.
Comparative experiences from the United Kingdom and the United States demonstrate that effective policing can coexist with robust safeguards through clear statutory limits,

[484] Lalita Kumari v. Gov't of U.P., (2014) 2 SCC 1.
[485] Priyanka Srivastava v. State of U.P., (2015) 6 SCC 287; State of Telangana v. Managipet, (2019) 19 SCC 87.
[486] Bharatiya Nagarik Suraksha Sanhita, 2023, § 173(3).

transparency requirements, and rights advisories. India's current framework, however, lacks equivalent procedural clarity for pre-arrest interactions.

Ultimately, while Section 173(3) of the BNSS represents an attempt to regulate preliminary enquiries, its success will depend on rigorous judicial enforcement, mandatory transparency, and the incorporation of constitutional safeguards such as the right to counsel and protection against self-incrimination. Without such reforms, the codification of preliminary enquiries risks diluting the mandatory FIR regime and eroding the constitutional promise of personal liberty.

Cyber-Kinetic Hijacking and International Aviation Law: Bridging the Legal Gaps in the Digital Age

Asfiya Bathul[487]

ABSTRACT

The rapid digitalization of civil aviation has exposed aircraft operations, navigation, airport infrastructure as well as air traffic management to complex cyber threats that are capable of causing physical harm. This phenomenon, described as the cyber-kinetic hijacking, challenges the adequacy of existing international aviation security conventions, which were largely developed in response to the traditional, physically executed acts of unlawful interference. This paper examines whether the current international aviation security conventions, particularly the Tokyo Convention, Hague Convention, Montreal Convention, and the Beijing Convention efficiently address cyber-kinetic hijacking. Using a doctrinal and analytical methodology, the paper analyses treaty provisions, ICAO standards, and relevant institutional practices to assess the extent to which cyber-enabled acts may be accommodated through interpretation. It argues that while certain provisions can be expansively constructed to include cyber-kinetic conduct, substantial legal gaps persist with respect to definitional clarity, jurisdiction, attribution, state responsibility, and enforcement. Addressing these issues requires a targeted four-pillar reform which is redefining unlawful seizure to encompass cyber-kinetic control, expanding universal jurisdiction over cyber-kinetic attacks on aviation, integrating cybersecurity obligations into the core aviation treaties, and establishing harmonised global standards for cyber resilience in civil aviation. Only through such a comprehensive normative recalibration can international aviation law effectively deter and respond to cyber-kinetic hijacking in the digital age.

Keywords: Cyber-kinetic hijacking, International Aviation law, Aviation cybersecurity, International Aviation Security Conventions, Unlawful interference, State responsibility.

INTRODUCTION

Civil aviation has long been considered as one of the most extensively regulated sectors of international activity, owing to its inherent transboundary nature and the potentially catastrophic consequences of security failures. Traditionally, threats to aviation security

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manifested through physically executed acts such as the aircraft hijacking, sabotage, and violence on board aircraft. In response, the global community enacted a comprehensive legal framework under the supervision of the International Civil Aviation Organization (ICAO), thereby criminalizing the unlawful acts against civil aviation and establishing jurisdictional and enforcement mechanisms through conventions such as the Tokyo Convention, the Hague Convention, the Montreal Convention and the Beijing Convention.

In the last few decades, however, civil aviation has undergone a drastic digital transformation. Contemporary aircraft are no longer isolated mechanical systems but highly integrated cyber-physical platforms dependent on software-driven avionics, satellite navigation, data transfer, and automated flight control systems.[488] Air traffic management and airport infrastructure have now become increasingly dependent on the digital communication networks and information-intensive technologies. Within this constantly changing technological word, the problem of cyber-kinetic hijacking has come up as one of the major security risks. Unlike that of the traditional hijacking, which involves physical seizure of an aircraft, cyber-kinetic hijacking involves the unlawful interference through cyber means that results in tangible kinetic consequences, such as physical intrusion or conventional weapons.

This development raises a loss of aircraft control, navigation disruption, collision, or forced crashes. Even the Beijing Convention of 2010, although its broader approach to unlawful acts against civil aviation, does not expressly address cyber-enabled attacks that lack pressing legal question as to whether the current international aviation security regime is capable of effectively regulating and responding to cyber-kinetic hijacking. The prevailing conventions are still based on a twentieth-century perspective of kinetic violence, which leads to significant doctrinal ambiguities in relation to the actus reus and mens rea of cyber-enabled crimes, a fragmentation of jurisdictional and enforcement processes, and a lack of common preventive cybersecurity obligations. Although ICAO has started to address the issue of aviation cybersecurity by means of standards, guidance material, and policy initiatives, these measures have been largely viewed as soft law and hence, lacking any binding normative force.[489]

[488] Ruwantissa Abeyratne, Strategic Issues in Air Transport 45 (Springer 2011).
[489] Id.

This paper examines the adequacy of international aviation law in addressing cyber-kinetic hijacking. The research is methodologically doctrinal and analytical based on the interpretation of treaties, institutional practice, and scholarly commentary. The paper identifies continuing legal and structural gaps in the existing aviation security framework and evaluates the extent to which the current international conventions can be interpreted in order to address cyber-based risks. It argues that while these instruments provide a solid foundation to deal with unlawful interference, they fall short of adequately addressing the unique challenges posed by cyber-kinetic hijacking. The paper ends by proposing a reform agenda in order to recognize cyber-physical threats within the definition of unlawful seizure, strengthen jurisdictional mechanisms, and develop a mandatory, ICAO-led cybersecurity regime capable of effectively responding to aviation security threats in the digital age.

CONCEPTUALISING CYBER-KINETIC HIJACKING IN CIVIL AVIATION

Cyber-kinetic hijacking refers to the unlawful seizure, manipulation, or interference with an aircraft or its safety-critical systems through cyber means that result in the tangible physical or kinetic effects.[490] The term "cyber-kinetic" depicts the dual nature of the threat: the attack originates in cyberspace but manifests in the physical domain, producing consequences functionally equivalent to that of the traditional aircraft hijacking.

In the aviation context, cyber-kinetic hijacking involves the deliberate cyber operations that remotely compromise aircraft systems or their supporting infrastructure such as air traffic control, satellite navigation, or ground operations in a manner that enables an attacker to seize control, divert, disable, or endanger an aircraft that is in service. The methods available for such attacks are varied and include, among others, hacking into flight management systems or avionics software, GPS spoofing that alters navigational data, data links manipulation, and air traffic management networks interference through the injection of false or misleading information. Moreover, cyberattacks might target terrestrial systems that are associated with the maintenance of the aircraft, the schedules of the flights, or the security of the airport, thereby extending the range and impact of the threats.

[490] Jan Klenka, Aviation Cyber Security: Legal Aspects of Cyber Threats, 14 J. TRANSP. SEC. 89, 92 (2021).

In layman's terms, cyber-kinetic hijacking is an attack on a cyber-physical system, which leads to physical changes, for instance, the aircraft deviating from its intended course, changing altitude, shutting down the engine, and even losing complete control by the pilot through the use of attacks on information systems like avionics software or satellite navigation signals. The functional result is similar to that of a cockpit takeover but without the physical presence of an intruder.

Civil aviation has become exposed to such acts of terrorism because of its increasing dependence on networked technologies and data-driven systems. Contemporary aircrafts, air traffic control systems, and airport operations are all so tightly interconnected that besides the added benefit of efficiency, there is also a large area opened up for cyber exploitation. A successful hijacking involving cyber-kinetic capabilities could result in a whole spectrum of different negative consequences, including but not limited to the interruptions of flight operations, large-scale financial loses, people's lives, and real estate being damaged hugely. Among the things that could cause such attacks are the goals of terrorists, cyber wars that are meant to destroy a nation's aviation infrastructure, or even ordinary crime like extortion and stealing cargo.

The technological intricacy of the cyber-kinetic hijacking is only one of its aspects; another is the legal uncertainty that it raises. The primary response of the international aviation security conventions were acts of violence, seizure, and sabotage through physical means, almost always through the presence of a hijacker on board an aircraft or the use of conventional weapons. Decoupling the physical presence of control, Cyber-kinetic hijacking challenges these basic assumptions. The disconnect between the two physical controls creates a new area of marshalling and legal ambiguity and also puts forth the very basic questions if the concepts of “hijacking” and “unlawful seizure” can be given such interpretation in the case of digital activities that yield similar physical results. Cyber-kinetic hijacking, therefore, becomes a new area of law and of security where the old traditional aviation law conflicts with the new need of digital world.

HISTORICAL FOUNDATIONS OF INTERNATIONAL AVIATION SECURITY CONVENTIONS

The global legal framework for aviation security describes "Chicago architecture" and is mainly built on the Convention on International Civil Aviation (1944) (Chicago Convention) and a group of various treaties recognized by the International Civil Aviation Organization (ICAO) with the help of multilateral agreements. The Chicago Convention, which regulates international civil aviation, sets out key principles such as State sovereignty over the airspace above their territory (Article 1).[491] Furthermore, it requires ICAO to create Standards and Recommended Practices (SARPs) for the safe, secure, and orderly growth of international civil aviation. The Chicago Convention is not primarily a security treaty; however, it still provides the institutional and normative frameworks within which aviation security law has been developing.

The substantive international regime addressing unlawful acts against civil aviation is primarily contained in the so-called quadrilateral aviation security conventions: the Tokyo Convention (1963), the Hague Convention (1970), the Montreal Convention (1971), and the Beijing Convention and Protocol (2010). Each instrument reflects the dominant security threats of its time and collectively illustrates the gradual expansion of international concern from in-flight misconduct to sophisticated forms of unlawful interference.

The Tokyo Convention (1963) was the first international instrument to address offences committed on board aircraft.[492] It gives priority to the actions that put people's or property's safety at risk during the flight and it confirms the power of the aircraft commander to restrain the troublemakers. The jurisdiction under the Convention is mainly given to the State of registration, with only minor duties imposed on the State of landing and the State of the offender's nationality. The scope of the Convention, however, is basically on the behavior of the people on board and does not directly imply any of the matters related to the hijacking of the aircraft or the use of aircrafts as weapons.

This limitation underwent a change with the Hague Convention (1970), which, in its very first Article, categorically pronounced the unlawful takeover of an aircraft in flight as a separate international crime. Article 1 comes with a definition of hijacking as the illegal taking over or control of an aircraft by using force, threat, or any other means of intimidation by someone

[491] Convention on International Civil Aviation art. 1, Dec. 7, 1944, 61 Stat. 1180, 15 U.N.T.S. 295.
[492] Convention on Offences and Certain Other Acts Committed on Board Aircraft, Sept. 14, 1963, 20 U.S.T. 2941, 704 U.N.T.S. 219.

aboard the aircraft.[493] The Convention is clearly written in such a way as to consider the case of an actual hijacker being physically present who takes over the plane by using force against the flight crew. In terms of jurisdiction, it follows the aut dedere aut judicare principle requiring States to either prosecute or deport the alleged offenders to their home country if they have committed an offense in the territory of that State.[494] Although it was a landmark change in the area of aviation security law, the definition of hijacking still very much depends on physical presence and coercion.

The Montreal Convention (1971) continued to broaden the definition of acts which, though not directly related to aviation, might still endanger the safety of international civil aviation.[495] These include the destruction of an aircraft in flight, damage making an aircraft incapable of flight, and blocking the air navigation facilities. Among other things, the Convention also prohibits the use of the aircraft in order to commit murder, seriously injure or cause the loss of property or damage to the environment, even if the crime is not happening on board the plane. Although not drafted with cyber threats in mind, the Montreal Convention offers limited scope for analogical extension to cyber-enabled interference with aviation infrastructure.

The Beijing Convention and Protocol of 2010 represent the most comprehensive attempt to modernise the international aviation security regime.[496] The new regulations combat the dangers by making the use of planes as weapons, dropping poisonous or radioactive materials from airplanes, and telling lies about the safety of an airplane in the air, all their respective crimes. Among this, the inclusion of false information offenses is particularly significant as it recognizes that the modification of data and information systems can indeed compromise aviation safety.[497] The Beijing instruments do not directly cover cyber-attacks but they do create a conceptual basis for the interpretation of certain cyber-enabled acts, like the sending of false navigational data or the manipulation of air traffic control systems, as falling under the existing treaty framework.

[493] Convention for the Suppression of Unlawful Seizure of Aircraft art. 1, Dec. 16, 1970, 22 U.S.T. 1641, 860 U.N.T.S. 105.

[494] Cheryl Esquerra-Abella, The Extradition Of Aircraft Hijackers 12-15 (2010).

[495] Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sept. 23, 1971, 24 U.S.T. 565, 974 U.N.T.S. 177.

[496] Ruwantissa Abeyratne, The Beijing Convention of 2010 on the Suppression of Unlawful Acts Relating to International Civil Aviation, 4 J. TRANSP. SEC. 131, 133 (2011).

[497] Jiefang Huang, Aviation Safety through the Rule of Law: ICAO's Mechanisms and Practices, 22 KLUWER LAW INT'L 101 (2009).

Despite this gradual expansion, none of the core aviation security conventions expressly define or address cyber-attacks against aircraft or aviation infrastructure. Any attempt to bring cyber-kinetic hijacking within their scope relies on interpretive extensions that remain uncertain and uneven across States. In parallel, ICAO has sought to address aviation cybersecurity through Annex 17 to the Chicago Convention and policy instruments such as the ICAO Cybersecurity Strategy.[498] Consequently, while the historical framework of international aviation law provides a foundational response to unlawful interference, it remains ill-equipped to comprehensively address cyber-kinetic threats in an increasingly digitalised aviation enironment.

DOCTRINAL AND STRUCTURAL GAPS IN INTERNATIONAL AVIATION LAW

Cyber-kinetic hijacking brings to light some very basic doctrinal and structural weaknesses in the present international aviation security system. The aviation security treaties have changed to some extent according to the new threats but their relevance to the cyber-enabled disruption of aircraft and aviation facilities is still unclear and uneven. The above-mentioned weaknesses result from the non-existence of cyber-related definitions, unclear interpretation of treaties, problems regarding the allocation of judicial power and identification of the offenders, and the current system's limited ability to prevent and enforce.

Absence of Cyber-Specific Definitions and Conceptual Ambiguity

One of the main drawbacks of the current structure is the lack of a universally accepted definition of cyber-hijacking or cyber-enabled unlawful interference with civil aviation. Cyber intrusion, digital seizure, and remote manipulation of aircraft systems are not mentioned in any of the key aviation security conventions. This vagueness in the law has led to different interpretations in different States regarding the classification of cyber-kinetic hijacking under existing treaty provisions, thereby sowing confusion and hindering consistent application.

According to the Hague Convention (1970), “unlawful seizure” refers to the force, threat, or intimidation that a person on board the aircraft uses to take control of an aircraft in flight or to seize the aircraft. A cyber-kinetic attacker who operates remotely and does not physically

[498] ICAO, Annex 17 to the Convention on International Civil Aviation: Security (12th ed. 2022).

present on board does not match this definition very well.[499] A teleologic interpretation could possibly view the term "control" to encompass the digital domination that is effective over aircraft systems, but the clear stipulation of the offender being "on board" reveals a physical paradigm that makes the application of the Hague Convention to such a case of cyber-kinetic hijacking legally precarious.

The Montreal Convention (1971) lends a somewhat broader interpretation that is more easily applied to the aspect of illegal aircraft seizure involving computer methods. Article 1 criminalises the destruction of an aircraft in service, damage rendering it incapable of flight, and interference with air navigation facilities that endanger aircraft safety. Importantly, Article 1(2) criminalises the use of an aircraft in service to cause death, serious injury, or significant damage, whether the act is committed "on board" or "otherwise". In this way, remote attacks can be included and it is also possible to consider the cyber-kinetic hijacking as such, which would cause devastating physical destruction. Likewise, the deliberate cyber disruption of satellite positioning systems or air traffic control networks might not be regarded as interference with the means of air navigation. Nevertheless, the Montreal Convention's applicability is still dependent on the presence of manifest damage or injury.[500]

The Beijing Convention and Protocol (2010) take the modernization of the legal framework a step further by including among the criminalized acts the use of an aircraft as a weapon, the releasing of dangerous materials, and the informing about aircraft safety that constitutes further risk, thereby causing an airline to be misled. The including of wrong information-related offenses is very significant with regard to the online world, as it to a certain extent, admits the dangers due to the manipulation of information. Yet, even the Beijing instruments do not go so far as to include the act of computer hacking into avionics and air traffic systems or the like as an independent offense, thus there are major gaps in the case of cyber-seizure that does not result in immediate physical injury.

Regulatory Blind Spots for High-Risk Non-Kinetic Cyber Intrusions

One of the main drawbacks of the current treaty system is that it only deals with crimes that have resulted in death, injury, or major damages. But, in the case of cyber-kinetic hijacking, it

[499] Brian F. Havel & John Q. Mulligan, The Future of International Civil Aviation Law, 24 WM. & MARY BILL RTS. J. 75, 78 (2015).

[500] Paul Stephen Dempsey, Public International Air Law 612 (McGill-Queen's Univ. Press 2008).

could be the scenario that there are high-risk cyber intrusions where the offender is able to take full or partial control of the airplane through digital means with no physical consequences. For instance, breaking into a flight management system or feeding incorrect navigational data that is later corrected by pilots or automated systems may not cause the levels of destruction, damage, or injury necessary for the conventions' application. So, even though the situation is very dangerous, such acts might not be punished under the law which indicates a significant gap in aviation security law.

Mens Rea Limitations and Misalignment with Cyber Threat Motivations

Aircraft security related international treaties have generally adapted the mens rea prerequisites to consist of and be limited to the traditional unlawful acts of hijacking, sabotage or terrorism, often inferring the intention to take control, destroy the plane or cause a large number of casualties. On the other hand, cyber-kinetic assaults could be motivated by several purposes like spying, interfering, forceful measures, ransomware, or destabilization of the opponent's strategy and among others. Oftentimes, such intentions are not in absolute alignment with the mental state conditions of the existing treaty offences which leads to complex cases and less prevention.

Jurisdiction, Attribution, and Enforcement Gaps in a Borderless Domain

The cyber-kinetic hijacking has revealed the enormous inadequacies of jurisdiction and enforcement in the international aviation security system that is in place today. The problem comes from the borderless, decentralized nature of cyberspace that is not compatible with the aviations law model based on territorial jurisdictions. The main air security treaties, the Tokyo, Hague, Montreal, and Beijing instruments give the right to judge mainly to the country where the aircraft is registered, the country of landing, the country of the offender's nationality, and the territory where the crime took place. This arrangement works well for the physically carried out unlawful interferences but its use in cyber-attacks is very questionably effective.

In the case of a cyber-kinetic hijacking, the attacker can be in one country, the airplane that is the target can be registered in a different country, the flight might be in the airspace of several countries, and the cyber intrusion might be going through different servers and networks in various jurisdictions. The harmful effects of the attack as a loss of control, navigational disruption, or forced diversion may occur in the airspace of the country that has not either hosted the attacker or provided the technological infrastructure used for the attack. Thus, it is

a legal question that has to be solved when it comes to where a cyber-kinetic offence is "committed" for jurisdictional purposes.

Jurisdiction might be asserted by both the registration State and the State where the aircraft lands according to the Hague and Montreal Conventions. However, On the other hand, the state where the cyber-attack originates or the intermediate states involved in the technical routing of the attack may not have a clear jurisdictional tie-up under the existing treaty provisions. This fragmentation results in a scenario where the law is not applied and practically speaking it may be possible for cyber-kinetic hijackers to be operating from jurisdictions that are not willing or able to exercise their criminal jurisdiction effectively giving rise to safe havens for cyber-enabled unlawful interference with civil aviation.

The State of registration plus the State where the aircraft lands could claim their jurisdiction rights under the Hague and Montreal Conventions however, the State where the cyber-attack comes from together with the intermediate States where the attack is technically routed might not have any jurisdictional connection at all according to the existing treaties. This fragmentation is the cause of enforcement gaps and may even in reality let those who are behind cyber-kinetic hijacking acts to operate from the jurisdictions that are not willing or able to exercise criminal jurisdiction thus effectively giving rise to cyber-enabled unlawful interference with civil aviation being conducted in safe havens.

Attribution difficulties are among the reasons why these jurisdictional challenges arise. Cyber-attacks are frequently anonymous, executed remotely, and hidden behind several layers of digital infrastructure, thus making it hard to point out individual wrongdoers or draw a sufficient connection between the action and a State.[501] Attribution, while being a requirement for both criminal prosecution and the claiming of state responsibility under general international law, is not addressed by the aviation security conventions which therefore do not provide any standards for attribution or any thresholds for evidence in case of cyber scenarios.[502] This lack of guidance contributes to the weakening of both accountability and enforcement.

[501] David E. Graham, Cyber Threats and the Law of War, 4 J. NAT'L SEC. L. & POL'Y 87, 91 (2010).
[502] Eric Talbot Jensen, Cyberattack Attribution Matters Under Article 51 of the U.N. Charter, 36 BROOK. J. INT'L L. 1, 5 (2010).

The enforcement mechanisms under the aviation security conventions are also limited in the same way. The Hague Convention's aut dedere aut judicare requirement obliges States to either carry out a trial or surrender to another jurisdiction the suspected criminals found in their territory. Nevertheless, this principle's potency is solely contingent upon the concurrence of the State where the culprit is present. If the cyber-kinetic hijacking case is associated with or has taken refuge in the territory of a State that is lacking in domestic cybercrime legislation, technical capacity, or political willingness to cooperate, then effectively, neither trial nor extradition can happen.[503] No forceful means of enforcement through conventions exist to deal with such situations of non-cooperation.

The jurisdictional and enforcement situation of international civil aviation law, therefore, is based on a thinking of the twentieth century that wrongly assumed that civil aviation unlawful acts would be bound by territory and would be physically observable. Cyber-kinetic hijacking totally contradicts this assumption as it cuts off the traditional connection between the physical location of the crime, its commission and control of the aircraft. The legal fragmentation that arises as a result significantly reduces the deterrence of transnational cyber-kinetic threats.

One potential response to this enforcement deficit lies in the clarification or expansion of universal jurisdiction for core cyber-kinetic acts against civil aviation. In both customary international law and existing aviation security treaties, offences such as aircraft hijacking and the destruction of aircraft in service are treated as crimes of international concern, permitting prosecution by any State regardless of where the offence occurred. Explicitly recognising cyber-kinetic hijacking that results in the unlawful seizure or use of an aircraft in service as a basis for universal jurisdiction would close jurisdictional loopholes, eliminate safe havens, and strengthen deterrence.[504] However, such an approach would require clear treaty-based recognition, which is currently absent from the international aviation security regime.

Reliance on Soft Law and the Absence of Preventive Cyber Obligations

Finally, the existing aviation security regime remains overwhelmingly reactive, prioritising offence and punishment over prevention, resilience, and shared responsibility. None of the aviation security conventions impose explicit obligations on States to maintain cyber-security

[503] Stephan Hobe, Air Law 145 (Columbia Univ. Press 2019).

[504] Eugene Kontorovich, The Piracy Analogy: Modern Universal Jurisdiction's Hollow Foundation, 45 HARV. INT'L L.J. 183, 186 (2004).

standards for aircraft systems, air traffic management networks, or aviation infrastructure. They also do not set up any compulsory information sharing, technical co-operation, or joint reaction to cyber-kinetic incidents mechanisms.

Although ICAO has tried to tackle the issue of cybersecurity in aviation through the interpretation of the Convention and policy measures like the ICAO Cybersecurity Strategy, these actions mainly function as soft law. The lack of bindingness naturally affects the manner in which they are enforced and leads to varying levels of implementation among States that, in turn, contributes to the problem of regulatory fragmentation that the aviation industry is already facing.

Interim Assessment

The combination of these factors reveals that the present-day international aviation security framework, while being fundamental, was not intended to cater to the realities of cyber-kinetic hijacking. The lack of cyber-specific terms, the confusion over interpretation of treaties, jurisdiction and attribution problems, and no compulsory preventive measures taken together weaken the international aviation law's ability to counteract the cyber-enabled threat effectively. This structural inadequacy emphasizes the necessity of bringing about legal reforms that are specially aimed at when the aviation security laws would be considered unfit due to the digital age.

ICAO SOFT-LAW GOVERNANCE AND THE LIMITS OF CYBER-CRIME FRAMEWORKS

The International Civil Aviation Organization (ICAO) has increasingly viewed the troubled civil aviation industry suffering from cybersecurity weaknesses as a challenge. Consequently, ICAO has enacted a variety of policies, adopted standards, and provided guidance materials to enhance the security of aviation against cyberattacks, especially by the introduction of these measures under Annex 17 to the Chicago Convention and the ICAO Cybersecurity Strategy.[505] The mentioned initiatives highlight a considerable change in institutional awareness of cyber-enabled threats to aviation safety as they go through risk management, information sharing, capacity building, and protection of critical aviation systems.

[505] ICAO, Annex 17 to the Convention on International Civil Aviation: Security (12th ed. 2022).

Nonetheless, the cybersecurity measures of the organization remain to be soft-law-regulated predominantly. While Annex 17 gives States binding obligations concerning aviation security, their implementation is mainly left to the States because the provisions concerning cybersecurity are of vague and adaptable nature. The ICAO Cybersecurity Strategy and related guidance documents are made explicit as being non-binding and they depend on voluntary compliance.[506] Therefore, these instruments have no enforcement mechanisms and do not impose a uniform legally binding obligation on the parties to prevent, detect, and respond to Cyber-kinetic hijacking. Hence, this makes the effectiveness of the ICAO, Cybersecurity approach heavily reliant on the technical capacity, political will, and regulatory maturity of the individual countries, thus resulting in uneven and fragmented regulation.

In parallel, international cyber-crime conventions provide a complementary legal framework for addressing the cyber means employed in cyber-kinetic hijacking. Instruments such as the Council of Europe Convention on Cybercrime (2001) and the forthcoming United Nations Convention against Cybercrime (2024) criminalise core cyber offences, including illegal access, illegal interception, data interference, and system interference.[507] These provisions may be invoked to prosecute the technical components of cyber-kinetic attacks against aircraft avionics, flight management systems, or air traffic management networks. For instance, a hacker who gains unauthorised access to an aircraft's Flight Management System or interferes with air traffic control data in a manner that endangers flight safety may fall within the scope of "system interference" or "serious damage" under cyber-crime law.

Besides, the aforementioned essential international cooperation methods of mutual legal assistance, extradition, and evidence sharing, the cyber-crime conventions provide important procedural tools to the law enforcement agencies. They are very much needed when it comes to investigating the transnational cyber-kinetic incidents. In this connection, the treaties against cyber-crime provide the means to overcome some of the difficulties associated with the enforcement and collection of evidence that are caused by the borderless nature of cyberspace. However, it would be a mistake to think that the international agreements regarding cyber-crime would be the only or the best solution to the problem of cyber-kinetic hijacking.

[506] ICAO, Aviation Cybersecurity Strategy (Doc 10118) (2019).
[507] Convention on Cybercrime, Nov. 23, 2001, E.T.S. No. 185 [Budapest Convention].

First, traditional cyber-crime law is primarily concerned with protecting the confidentiality, integrity, and availability of information systems, rather than with the kinetic consequences of cyber operations.[508]

Second, cyber-crime conventions lack aviation-specific norms tailored to the unique risks of cyber-kinetic hijacking. They do not define or prioritise the protection of critical aviation systems, allocate responsibilities among States for safeguarding such systems, or impose obligations to prevent and respond to cyber-attacks that threaten the safety of international civil aviation.

There is a risk that cyber-kinetic hijacking could be treated merely as a case of cybercrime by the States, thus failing to consider its significant effects on aviation safety, international transport security, and international peace and security, if the aviation security law and cyber-crime law were not integrated.

On the other hand, the global reach of cyber-crime conventions is still not fully uniform worldwide. The Council of Europe Convention on Cybercrime, for example, is considered to be a regional treaty since it was not universally ratified, while the UN Convention against Cybercrime, which was supposed to provide a global comprehensive framework, is still far from being widely adopted and effectively implemented.[509] The situation is not only fragmented but also prolongs the inconsistency and unpredictability of legal responses to cyber-kinetic hijacking.

The trend towards reliance on ICAO soft-law mechanisms and general cyber-crime conventions taken together reflects a regulatory gap at the junction of aviation security and cybersecurity. Although these instruments support the process and are very important in their own right, they cannot replace the need for a dedicated and binding international legal framework that is capable of addressing the peculiar cyber-physical character of cyber-kinetic hijacking. Thus, the gap intensifies the need for normative reform that marries aviation-specific security obligations with strong cyber-law principles.

[508] Orin S. Kerr, Cybercrime's Scope: Interpreting 'Access' and 'Authorization', 78 N.Y.U. L. REV. 1596, 1602 (2003).
[509] Jonathan Clough, Principles of Cybercrime 31 (Cambridge Univ. Press 2015).

TOWARDS A REFORMED INTERNATIONAL FRAMEWORK FOR AVIATION CYBERSECURITY

The previous analysis has clearly shown that the current international aviation security system, although it is the basis, is not able to cope with the new and different difficulties that cyber-kinetic hijacking presents. The cyber-physical character of such attacks reveals gaps between the doctrines, jurisdictions, and enforcement which cannot be solved by merely increasing the existing interpretations. A mix of interpretative changes, institutional support, and reforms in the law will be necessary to overcome these shortcomings.[510]

To begin with, until a comprehensive reform is accomplished, the interpretations of the existing aviation security conventions should be such that they would include cyber-physical interference that leads to either the effective possession of an airplane or its safety risk. Words like "unlawful seizure," "exercise of control," and "interference with air navigation facilities" should be defined in a functional manner rather than in just physical terms, so that cyber-kinetic actions that have kinetic effects can be covered by the existing treaties. Though this interpretation will not clear all the uncertainties, it still provides a temporary way of improving the legal system's responsiveness.

Second, the ICAO's institutional mandate concerning aviation cybersecurity should be made more powerful. The danger created by cyber-kinetic hijacking is systemic and global, which is why the International Civil Aviation Organization (ICAO) should be allowed to issue laws regarding the protection of critically important aviation systems, incident reporting, information sharing, and coordinated response mechanisms, which would be considered as binding standards and practices (SARPs) for cyber security specifically for these areas. Binding standards would promote harmonisation, reduce regulatory fragmentation, and enhance collective resilience.

Third, and most importantly, the international community should consider the adoption of a dedicated protocol or convention on aviation cybersecurity. The definition of cyber-kinetic hijacking, along with the description of other cyber-enabled unlawful acts, should be included in such an instrument together with jurisdictional bases in cyber contexts, standards for

[510] Ruwantissa Abeyratne, The Digitalized Aircraft: Safety and Security Issues, 12 J. TRANSP. SEC. 55, 59 (2019).

attribution and state responsibility, and the extension of universal jurisdiction to the most serious cyber-kinetic offences against civil aviation. A new treaty would link the two different domains of law, that is, aviation security law and cyber law, and this would mean that the cyber-physical threats would be tackled in a coherent and comprehensive way.

INDIA'S AVIATION CYBERSECURITY FRAMEWORK: A DOMESTIC PERSPECTIVE

From a domestic perspective, security measures for aviation in India are still mostly focused on traditional and physically executed threats. The Aircraft Act of 1934 along with DGCA's directions and rules basically cover the topics of airworthiness, safety, and physical security.[511] Although the mentioned acts create a very strong rule-making environment for the usual aviation activities they do not include cybersecurity concerns very well and that's besides the fact that these concerns can be aircraft systems, air traffic management, or aviation infrastructure.

India has been successful in the creation of a national cybersecurity framework through the establishment of policies and institutions dedicated to the protection of critical information infrastructures.[512] Nevertheless, aviation-related cybersecurity regulation remains scattered and lacking development, with only a little integration made between general cyber law and aviation regulation specific to the sector.[513] This results in regulatory blind spots in the handling of cyber-kinetic threats whose nature is closely linked to flight safety and international obligations of aviation.

The Indian experience highlights the need for wider synchronization between domestic aviation law and international cybersecurity standards which are starting to emerge. India, being one of the fastest-growing aviation markets in the world, is in a strategic position to both support the development of universal norms and at the same time, keep its domestic law up to date with the threats posed by cyber-physical attacks.[514] Finally, the action of synchronizing national laws with the changing international aviation security standards would not only make

[511] Aircraft Act, 1934, No. 22, Acts of Parliament, 1934 (India).
[512] National Cyber Security Policy, 2013 (India).
[513] K.V.K. Santhy, Cyber Security Challenges in the Aviation Sector, 3 INT'L J. PUB. L. & POL'Y 1, 4 (2020).
[514] DGCA, Annual Report 2024-25, 12-15 (2025).

India's aviation more resilient but also help in a global way through coordinated and legally strong measures against the cyber-kinetic hijacking issue.

CONCLUSION

Cyber-kinetic hijacking is a new and major hazard to civil aviation, as it has the potential to take control of safety-critical aviation systems through a digitally enabled and remote act instead of a physically executed one.[515] Thus, it unveils the weaknesses of international aviation security law that was developed based on physical presence, kinetic violence, and territorial enforcement methods.

According to the existing framework of the Tokyo, Hague, and Montreal Conventions, even if one takes into account the Beijing Protocol and the Chicago Convention regime, one can only find fragmented and incidental coverage of cyber-enabled attacks. While some cyber-kinetic incidents might be treated as cyber-enabled attacks, the existing legal instruments lack the capability to address key characteristics of such attacks like the absence of offenders on board, the potential of harm without physical destruction, and the existence of cyber-specific intent. Jurisdictional rules further compound these deficiencies, as territorially anchored enforcement mechanisms struggle to respond to borderless and anonymised cyber operations. If the cyber-kinetic hijacking is treated only within the scope of general cyber-crime frameworks, it would be a case of underestimating the gravity of the threat to the safety of international aviation.

Dealing with these issues means an international aviation law that all countries will use to gradually evolve together. The unlawful seizure situation must be clearly stated and there is to be no doubt that it includes the remote digital control over the planes and the aviation infrastructure. Serious cyber-kinetic attacks should be subjected to universal jurisdiction so that the courts where the perpetrators can escape prosecution will not exist, and ICAO has to go further than simply promoting the idea of developing binding, harmonised cybersecurity standards that will be applicable not just to the aircraft but also to air traffic management and ground-based systems, across the world.[516]

[515] Supra *note* 3.

[516] ICAO, Res. A41-19: Consolidated Statement of Continuing ICAO Policies Related to Aviation Security (2022).

In the end, protecting civil aviation during the digital era is going to be a hard task that cannot be accomplished by merely a legal interpretation of the old treaties.[517] It is of necessity the explicit acknowledgment of cyber-kinetic hijacking as a separate security threat that would be accompanied by legal reform, institutional enforcement, and international cooperation which lasts. If not, then the international aviation law will be in danger of being very much out of touch with the technical reality that it wants to control.

[517] Supra *note* 1.

Invisible Injustice: AI, Human Rights, and the Accountability Crisis

Abhishek Tiwari[518]

ABSTRACT

We are increasingly relying on artificial intelligence (AI) systems to do important things in our lives, whether it be in the field of law, healthcare, the job market, or education. The environment of creativity has been changed by AI, which has become a revolutionary tool in many fields. AI works by basic guidelines that computers are given and then the systems can generate results from data thanks to machine learning. AI now analyzes data, automates processes, and resolves challenging issues. We are beginning to encounter unanticipated issues resulting from these technologies. This paper examines how AI systems can violate new human rights. Such violations range from biased algorithms, and decision-making processes that align with society's stereotypes, to amorphous accountability when things take a turn for the worse.

AI systems are likely to behave erratically, with decisions that heavily shape people's lives made with no transparency or accountability. When they are trained on biased or unrepresentative data, such systems can learn structural discrimination from that data, leading to discriminatory hiring, differential access to health care, and more punitive sentences in criminal courts. Algorithmic bias, therefore, flouts the right to equality and non-discrimination recognized under international human rights law.

Moreover, the paper details the effects of AI-powered surveillance and data profiling, arguing that uncontrolled collection of personal information and processing thereof compromise people's right to privacy and threaten civil liberties. Such practices disproportionately impact vulnerable and marginalized communities and serve to reproduce social inequalities rather than combat them. One of the major problems this research is tackling is liability: who is responsible when AI harms? The uncertainty of legal liability again, whether for deployers or developers of AI or AI itself, is an all-encompassing justice gap for victims of AI-caused harm.

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Existing legal structures lack the tools to deal with the decentralised, autonomous nature of these new AI systems.

Keywords: Artificial Intelligence (AI), Algorithmic Bias, Human Rights, Privacy, Legal Liability

1. INTRODUCTION

Artificial Intelligence (AI) has transformed itself from just a mere speculative concept of algorithms within the field of computer science to a system that has a persuasive and dynamic force driving the technological transformation in the normal day-to-day world. From flying planes, to running autonomous cars, from autonomous trading through prediction to personalized health care, it has become an integral part of human day-to-day life. Governments and other major entities have been deploying AI to their work due to the increased efficiency, reduction in costs, and enhanced decision-making capability provided by the AI. However, these rapid developments and integration of AI into the normal human world may raise significant legal and ethical concerns, particularly in relation to the protection of fundamental human rights.

This growing use of AI in our day to day lives have started raising concerns regarding the impact on human rights i.e., the problems arising out of the harms which is caused by the AI systems and how these systems can be held accountable for the same as these systems are more widespread it is crucial to confront various ethical, legal, and social consequences they bring in. One of the major concerns that can be seen as the rise of AI systems is the possibility of these systems spreading or perhaps exaggerating the current societal prejudices and problems related to injustices present in society. One of the most concerning issues about AI and human rights is the potential for these systems to propagate and worsen existing biases and discrimination present in the current society.

Along with this, the issue of legal liability remains totally unsettled. Who should be held liable for the work of AI, whether it will be the AI system's parent company or the AI system itself, or if it is just not liable to anyone, is an answer that needs to be taken care of. There is often no clear legal subject to hold accountable. This blurs the line between tool and agent, challenging conventional legal notions of responsibility, negligence, and due process.

By analyzing these interconnected areas, this paper will be seeking to illuminate the latent risks in AI algorithms and machine learning and the risk of AI technologies in general and will be advocating for a more human- centered approach by setting legal frameworks that ensures the accountability while deploying AI systems and AI development which should be aligned with the constitutional values, the human rights values such as right to privacy, equality, international humanitarian rights standards, etc. the ultimate goal is not to halt the technological progress itself but give a more clear guiding parts towards a more sustainable way in a manner where all the human dignity, accountability, and justice is ensured by the dominated by intelligent machines itself.

2. IMPACTS ON MARGINALIZED COMMUNITIES (INDIA FOCUS)

AI as stated earlier depend upon the data it is fed , which generally is via the internet supervised or otherwise. AI in India often relies on data steeped in existing social hierarchies, reproducing caste, religious, gender, and class biases. For instance, Indian police records have historically labeled many Dalits (Scheduled Castes) and Adivasis (Scheduled Tribes) as "habitual offenders" a colonial legacy now digitized and embedded into predictive policing technologies. Most argue that such digitization hides caste discrimination and fosters discriminatory criminalization and surveillance of marginalized groups.[519] New Indian criminal justice statistics indicate that Muslims, Dalits, and Adivasis are disproportionately represented in arrests and jailings. When such AI models trained on data are applied to facial recognition or risk assessment, they lead to increased policing and surveillance in marginalized communities. For instance, during the 2020 Delhi riots, facial recognition software identified and arrested mostly Muslim young people suspecting AI-led religious profiling.[520]

Due to user prejudice, "safety apps" have often picked out and labeled places with significant numbers of Muslims or poor people as unsafe. Such biases make the principles in Articles 14 and 15 of the Indian Constitution equality before the law and preventing discrimination on religious, racial, caste, gender or birthplace grounds unattainable. Article 21 was interpreted by the Supreme Court to include rights such as dignity, living and privacy. AI with biases puts at

[519] Vidushi Marda & Shivangi Narayan, Data in New Delhi's Predictive Policing System, in FAT '20: PROCEEDINGS OF THE 2020 CONFERENCE ON FAIRNESS, ACCOUNTABILITY, AND TRANSPARENCY 1 (ACM 2020).
[520] Ananya Bhattacharya, Delhi Police's Use of Facial Recognition Could Hurt Muslims More, QUARTZ INDIA (Aug. 24, 2021).

risk the same constitutional protections related to get access to welfare, being watched or receiving financial support.

Internationally, Article 7 of the Universal Declaration of Human Rights (UDHR) and Article 26 of the International Covenant on Civil and Political Rights (ICCPR) also mandate equality before the law and protection against discrimination.[521]AI bias in India is also evident in public welfare. In Telangana, the state's Samagra Vedika system linked databases to remove ineligible citizens from welfare rolls. However, the algorithm erroneously flagged many legitimate claimants including elderly widow Bismillah Bee, who was denied food rations because the AI believed her deceased husband owned a car.[522] More than 1.8 million food-security cards were canceled in five years, often without notice or explanation.

These exclusions violate not only the constitutional right to life under Article 21 but also India's obligations under the UDHR, which recognizes the right to food and an adequate standard of living. In employment and fintech, algorithmic bias disadvantages women and marginalized communities. AI-powered hiring tools, if trained on skewed historical datasets, risk excluding SC/ST candidates or women. Similarly, alternative credit scoring based on mobile phone usage favors digitally literate male users from urban areas deepening financial exclusion of women and rural populations.[523]In India, where only 33% of women use mobile internet, such biases can result in systemic denial of credit, loans, or insurance. Public health and education sectors also reveal such exclusions[524]. AI systems designed to optimize urban medical interventions rarely consider rural health indicators like tuberculosis prevalence. AI tutors trained on English-language data may poorly support vernacular or low-income students exacerbating educational gaps.

These gaps are not just technical; they are fundamentally human rights concerns. Marginalized communities are being structurally excluded by automated tools with little accountability. Unless India adopts mandatory algorithmic audits, anti-discrimination safeguards, and redress mechanisms, AI will continue to replicate and amplify social injustice. Legal scholars and

[521] G.A. Res. 217A (III), Universal Declaration of Human Rights, art. 7 (Dec. 10, 1948); International Covenant on Civil and Political Rights art. 26, Dec. 16, 1966, 999 U.N.T.S. 171.
[522] Tapasya, Kumar Sambhav & Divij Joshi, How an Algorithm Denied Food to Thousands of Poor in India's Telangana, AL JAZEERA (Jan. 24, 2024).
[523] Berkeley Center for Long-Term Cybersecurity, A NEW ERA FOR CREDIT SCORING 22–25 (2020).
[524] Berkeley Center for Long-Term Cybersecurity, supra note 5.

rights advocates increasingly call for applying constitutional scrutiny and human rights standards to algorithmic decision-making, as they would to state action or public policy.

3. AI, DATA COLLECTION, AND THE RIGHT TO PRIVACY (INTERNATIONALLY FOCUSED)

Human Rights and Artificial Intelligence

The rapid growth of artificial intelligence (AI) and machine learning (ML) has given rise to now profound implications for human rights. AI technologies intersect with core rights such as privacy, equality, free expression, and due process and also both enabling and challenging ways. Below we examine how rights such as privacy, non-discrimination, freedom of speech, and fair legal process can be affected by AI systems.

3.1 Privacy and Surveillance

AI greatly amplifies the capacity for surveillance and data processing. Facial recognition systems, big-data analytics, and networked sensors can track individuals' movements and behaviors in unprecedented detail. A striking example is China's use of AI-driven surveillance: cities install public screens showing captured images of "jaywalkers" with personal data, turning privacy invasions into public shaming. As Human Rights Watch warns, "facial recognition surveillance… undermines our privacy rights" and poses a threat to freedom of expression and assembly. The embedded image below illustrates this point:

Facial recognition surveillance in China tags a jaywalker on a public screen, exemplifying AI's invasion of privacy and risk to individual dignity.[525][526]

Algorithms also process our phones, social media, and other digital footprints, often without meaningful consent. Companies and governments can infer sensitive details (health, religion, sexual orientation) from data and potentially expose or misuse them. In many countries, AI-driven profiling has raised alarm. For instance, litigation in the United States challenged Clearview AI's practice of scraping billions of photos from the internet to build a face-recognition database. In a recent Chicago court ruling, users alleged Clearview violated Illinois

[525] Nicol Turner Lee & Caitlin Chin-Rothmann, Police Surveillance and Facial Recognition: Why Data Privacy Is Imperative for Communities of Color, BROOKINGS (Apr. 12, 2022), https://www.brookings.edu/articles/police-surveillance-and-facial-recognition-why-data-privacy-is-an-imperative-for-communities-of-color/.

[526] Paul Mozur, Inside China's Dystopian Dreams: A.I., Shame and Lots of Cameras, N.Y. TIMES (July 8, 2018), https://www.nytimes.com/2018/07/08/business/china-surveillance-technology.html.

privacy law by collecting faces without consent. The judge approved a landmark settlement requiring the company to compensate victims for this privacy breach.[527]

Internationally, privacy rights enshrined in law are being tested by AI. The European Union's GDPR, for example, guarantees a "right not to be subject to a decision based solely on automated processing" that significantly affects a person, unless safeguards like human intervention are provided. Yet in practice, many AI systems (e.g., credit scoring or insurance decisions) operate opaquely. Civil society groups warn that without transparency and consent, AI erodes the privacy and autonomy that human rights protect.[528]

3.1.1 Inequality and the Discrimination

AI systems can entrench or even amplify existing social biases. Because algorithms learn from historical data, they often replicate prejudices present in that data. Studies have repeatedly found such biases. For instance, when there was a large-scale analysis conducted by National Institute of Standards and Technologies(NIST) found that many facial recognition algorithms were misidentify the African American and Asian faces at 10 to 100 times the error rate for white faces.[529] Similarly, a study in 2016 by ProPublica has documented that there was a criminal-risk algorithm (COMPAS) used in U.S. courts was almost twice as likely to be falsify the label of black defendants as high-risk as compared to white defendants with similar type of records and charges against them. In hiring and finance also, the automated screening was automatically screening out the women or racial minorities: one report noted that the AI hiring tools were trained on their past company's data where they used to often downgrade the qualified candidates just simply because of their gender or zip code.[530]

These patterns mean that AI can violate the right to equality before the law and the prohibition on discrimination. Human Rights Watch points out that facial recognition "exacerbates existing structural inequalities and hits marginalized and vulnerable folks hardest". Predictive policing tools, claiming neutrality, have also led to over-policing of racialized communities. As one

[527] *Id.*
[528] Kashish Maggo, Artificial Intelligence: Impact on Right to Privacy, JURIS CENTRE (Sept. 12, 2023), https://juriscentre.com/2023/09/12/artificial-intelligence-impact-on-right-to-privacy/.
[529] National Institute of Standards &Technology, Face Recognition Technology Evaluation (FRTE) 1:1 Verification, last updated Apr. 25, 2025, https://pages.nist.gov/frvt/html/frvt11.html.
[530] Jeff Larson, Surya Mattu, Lauren Kirchner & Julia Angwin, How We Analyzed the COMPAS Recidivism Algorithm, PROPUBLICA (May 23, 2016), https://www.propublica.org/article/how-we-analyzed-the-compas-recidivism-algorithm.

analysis notes, AI-driven surveillance and police tools often *automate prejudice*: areas with historically heavy policing (usually poorer, minority neighborhoods) are predicted as "crime hot spots," leading to even more policing there. In this way, AI can perpetuate cycles of inequality – undermining the ideal that human rights belong equally to all.

3.1.2 Freedom of Expression and Information

AI profoundly affects how information is created, filtered, and shared, with direct consequences for freedom of expression. On one hand, algorithms power social media platforms and search engines that millions use to communicate. They can help connect voices across languages (through translation AI) and curate personalized news feeds. On the other hand, the same technologies can suppress or manipulate expression. Automated content filters (often driven by AI) may wrongly censor lawful speech. Recommendation engines can create the "filter bubbles," which usually is isolating users in a homogenous information environment. There is also a growing concern about the AI-generated disinformation and such type of example can be seen as deep fake videos and synthetic text that can erode trust between masses and spread propaganda which the company might gain favor from, posing challenges to informed free discourse.

These issues have caught international attention. Human rights advocates note that algorithmic surveillance and curation can chill speech and assembly. In oppressive regimes, AI-powered social credit systems and surveillance cameras deter protests and target dissidents. In democratic societies, debates rage over how platforms should moderate hate speech and false content without overreaching. The UN's Advisory Body on AI, for example, has emphasized that AI governance must "prioritize human rights, free expression, and international law" and involve affected communities. Freedom of expression in the AI era thus means guarding against both direct censorship by smart systems and the more subtle distortion of information channels.

3.2 Due Process and Fair Trial

The use of AI in legal and administrative sphere is more or less related to decisions which raises questions about the due process of law and the right to receive a fair trial as the trail can be leveraged towards the general biasness of the AI system possess as mentioned above. Key aspects of due process include the ability to know and how the evidence against you can be challenged or charged. However, AI systems often operate as "black boxes," providing little to no explanation for their outputs and how they have reached to such a conclusion leaves room

for so much error. For instance, some courts use AI risk-assessment tools to inform the bail or actual deliver a sentence, and it is seen that the defendants frequently unable to reach or understand how to reach the same conclusion as the AI has reached through the algorithm. This creates a conflict between the legal principles like the right to confront one's accusers and to have an impartial tribunal.

Recognizing these challenges, some laws now limit automated decision-making. The EU's GDPR enshrines a form of due process for AI: it grants individuals a right to obtain human intervention, to express their viewpoint, and to contest automated decisions that significantly affect them. In practice, legal experts have debated whether fully automatic tools can violate constitutional due process. A landmark analysis by ProPublica highlighted the moral hazard of using COMPAS as de facto evidence, noting that "sentencing should not be easy" and that judges themselves hesitated to rely solely on the software. Similarly, an Amnesty/NIST study warned that biased face recognition not only violates privacy but also endangers the right to fair trial, since an innocent person could be misidentified and prosecuted.

3.3 AI and Human Rights in Practice: Violations and Promises

In the current world data is power and whoever has data can actually change the course of world that is why there are so many countries regulating data and other privacy concerns as a major threat to country and even though most of ai users might be unaware by during giving of consent in the permissions tab other than necessary data there are multiple data set that can be accessed by these companies and AI model as well. The data that is being getting collected, processed and is sold to other AI driven platforms especially to the social media and mobile applications, often operated on the vague consent mechanisms buried in lengthy term of services to trick the user for accessing there database. In current world scenarios, AI both threatens and can advance human rights.[531] On the one hand, there are stark examples of violations. Massive surveillance programs use AI to track citizens (often without accountability). In China, the expansion of facial recognition and social credit has intruded into basic liberties, drawing international criticism. Data-driven policing and immigration checks have ensnared marginalized groups around the globe. Even in free societies, data breaches and opaque profiling infringe privacy (as in the Clearview case), while social media algorithms

[531] Kashish Maggo, supra note 10.

amplify extremist content and misinformation, undermining pluralistic discourse. These harms reflect human rights concerns across privacy, equality, expression, and justice.[532]

On the other hand, AI also offers tools that *promote* human rights, often by empowering human rights defenders and governments to protect rights more effectively. For instance, AI for human rights monitoring is a burgeoning field. Non-profits and international agencies use AI-driven satellite imagery analysis to document war crimes and abuses in remote areas. As one recent review explains, organizations like Amnesty International have deployed AI to identify damage to civilian infrastructure in conflict zones (e.g., destroyed hospitals in Syria). Data analytics and machine learning sift through social media and media reports to detect patterns of hate speech or imminent violence (aiding early warnings in Myanmar and elsewhere). Even smartphones equipped with AI can translate emergency information across languages, assisting journalists and activists. In healthcare, AI diagnosis tools can help realize the right to health by extending medical expertise to underserved regions. These "AI for good" applications illustrate how technology can be harnessed to secure rights – if deployed ethically.

Civil society and governments are responding to AI's dual nature. International bodies have begun to set standards: UNESCO's 2021 Recommendation on the Ethics of AI explicitly ties AI development to human rights norms. The UN's High-Level Advisory Body on AI recommended transparent, rights-respecting governance. Some countries are enacting laws with AI such as the EU's proposed AI Act, for example, bans the most harmful uses of AI (such as facial surveillance in public spaces) and classifies other high-risk AI used for strict such oversight. In March 2025, UN member states adopted their first resolution on AI, addressing that "AI applications should be respecting individual rights, such as privacy, freedom of expression and the right to non-discrimination." These efforts signal a growing consensus that AI must be aligned with human rights principles.[533]

4. THE ACCOUNTABILITY GAP

One of the grave and urgent issues concerning artificial intelligence (AI) involves the legal and ethical responsibility spheres. With AI technologies increasingly being incorporated into

[532] *Id.*
[533] Kashish Maggo, supra note 10.

central areas of transportation, healthcare, law enforcement, and finance, this raises a fundamental question: who is at fault in the case of harm?

At the core of this crisis is what researchers call the "**accountability gap**": a profound disconnect between the decision-making of artificial intelligence systems and prevailing paradigms of human accountability. Unlike previous technologies, AI systems, especially those based on machine learning methods, are autonomous, modifying their outputs to data patterns rather than explicit programming. This autonomy creates a big challenge of attribution when things go wrong: do we hold the creator, the organization that deployed the system, or the provider of the data, or the AI system itself, responsible?

This is exacerbated by so-called "black box" technology. Much artificial intelligence software, particularly that employing deep learning methods, is opaque, and their own authors do not know how they make decisions. Therefore, the victims of biased AI find it extremely difficult to determine where an error or the bias originated, much less issues relevant to proving negligence or fault in court. One notable example of this impunity is the 2018 fatal crash by a self-driving Uber vehicle, which killed an Arizona pedestrian.[534] The vehicle was operating autonomously when its system failed to properly recognize the victim. Investigations revealed a breakdown in both the algorithm and monitoring by human operators, but Uber was not charged criminally, with only the human safety operator being charged with negligence. The incident generated much debate over the assignment of responsibility in hybrid human-machine systems and the difficulties presented by existing tort law in assigning liability in such situations.[535]

Likewise, the application of the COMPAS algorithm within the criminal justice system in the United States is an example of how opaque AI technology can come to perpetuate systematic discrimination with impunity. Investigative reporting uncovered that the algorithm systematically marked Black defendants as high-risk relative to white defendants, even though the actual rates of recidivism did not justify such discrepancies. The proprietary software company, however, exercised proprietary privilege regarding its algorithm and refused accountability for judicial wrongdoing.[536]

[534] Daisuke Wakabayashi, *Self-Driving Uber Car Kills Pedestrian in Arizona, Where Robots Roam*, N.Y. Times (Mar. 19, 2018)
[535] Daisuke Wakabayashi, supra note 16.
[536] Julia Angwin et al., Machine Bias, PROPUBLICA (May 23, 2016).

Against this backdrop, the legal frameworks across the EU and the world are beginning to address the issue of accountability in AI. Last year, the European Commission added the AI Liability Directive to go along with the proposed AI Act. The main goal of these frameworks is to develop one simple system for understanding AI liability. Artificial intelligence developers and users are required to tell users about the risks, clearly classify how risky their products are, allow people to monitor their decisions and comply with the law, under the AI Act.

In addition, the United States still relies on statutes and legal guidelines made for each industry such as common law rules. like general principles of common law. The regulatory bodies, e.g., the Federal Trade Commission (FTC),[537] have begun to define discriminatory or biased artificial intelligence systems as crimes under consumer protection laws, and they ask corporations to refrain from unfair or discriminatory algorithmic practices. However, because of the absence of general federal legislation on AI, the victims of such practices typically face extreme difficulties in the legal system.

In India, the regulatory infrastructure is mostly absent. The Digital Personal Data Protection Bill, 2022, addresses some of the aspects of automated decision-making but is short on dealing with more comprehensive issues regarding accountability for harm inflicted by artificial intelligence. The judiciary and legislators have not yet seriously explored the tangled issues regarding the autonomy of AI and its legal consequences.[538]

Legal experts and policy analysts have advocated a range of options for bridging the accountability gap. These involve: Demanding algorithmic impact assessments, which analyze the risk of AI systems prior to deployment; Developing audit trails to improve traceability and transparency of algorithmic choices; Inferring strict liability on organizations that employ high-risk AI, akin to the ultra-hazardous activities tort law doctrine; Creating autonomous AI regulatory bodies or courts that are charged with examining harms and offering redress.

Global standards facilitate such changes. The OECD AI Principles and the UNESCO Recommendation on the Ethics of Artificial Intelligence both emphasize that accountability

[537] Fed. Trade Comm'n, *Aiming for Truth, Fairness, and Equity in Your Company's Use of AI* (Apr. 2021), https://eaccny.com/news/chapternews/ftc-aiming-for-truth-fairness-and-equity-in-your-companys-use-of-ai/
[538] Digital Personal Data Protection Bill, 2022, Bill No. 233-C of 2022 (India).

must be an inherent value in AI governance. As mandated in these guidelines, all the stakeholders within the AI life cycle, i.e., developers, deployers, and regulators, must have clear responsibility for the systems they manage. Ultimately, fixing the accountability deficit will necessitate a change in legal doctrine as well as institutional design. As AI systems increasingly become the source of everyday decisions, the law itself will have to adapt to acknowledge new types of agency and corresponding risk. Legal accountability cannot be permitted to devolve into technical vagueness. Instead, the rule should remain the same: where there is the capability to impact human lives by algorithmic means, there should be accountability.

4.2 Comparative legal Responses

There are multiple organization and states which want to combat the same the unethical use of AI they are the European Union 's AI act that introduces the risk based on the regulations and accountability towards AI including the documentation, human oversight, and penalties for non- compliance by the AI companies. In contract to this the U.S. policy still remains fragmented, with sector- specific approaches and in general limited federal oversight. And similar to EU's and US laws India also jumped into action by providing new draft for the Digital Personal Data Protection Bill signals the growing concerns that the world is facing due to the emergence of AI all the parts that has been added are mentioned below

4.2.1 Indian Constitutional Law and AI

The Indian Constitution, though it was drafted in the mid-20th century, but still provides a robust framework which can be helped to address modern technological challenges through its Fundamental Rights, particularly under Part III.

a. Right to Privacy (Article 21)

The Supreme Court in its landmark judgement of *Justice K.S. Puttaswamy (Retd.) v. Union of India (2017)*,[539]has already recognized the right to privacy as a fundamental right which is given under Article 21 of the Indian constitution. The judgment can be seen in a fashion where it has emphasized on what an informational privacy is and the autonomy in the digital age given the principles that are increasingly challenged by AI-driven surveillance, facial recognition systems, and data-mining practices. There are certain Legal Risk which can be seen as the AI

[539] Justice K.S. Puttaswamy (Retd.) v. Union of India, AIR 2017 SC 4161.

surveillance tools, such as those used in "Aadhaar-linked authentication"[540] or law enforcement facial recognition, may or may not violate the proportionality standard laid out in Puttaswamy unless there is clear legislation ensuring the necessity, proportionality, and procedural safeguards. And it can be said although the Puttaswami case has laid the foundation for protection of rights privacy, but that system can still be questioned as that data of Aadhar card screening is totally give in the hands of the government and to what extent that data can be used without being known by other judicial body.

b. Right to Equality and Non-discrimination (Articles 14 and 15)

AI systems which are getting widely used in recruitment of various jobs and stuff so there is a dire need of policy making in this aspect so the welfare distribution which is risking the violation of Article 14 (equality before the law) and Article 15 (non-discrimination) if they are replicate or exacerbate the structural inequalities will going to increase.[541][542]For example, the predictive policing algorithms may be disproportionately targeting the marginalized communities, which will be violating the equal protection guarantee given under the constitution of India. The use of opaque decision-making systems with no avenue for appeal might also undermine that procedural fairness a very crucial component of Article 14.

c. Intellectual Property Rights (IPR)

While India has a Copyright Act, 1957 which recognizes human authorship,[543] but it does not have shown or given any room to accommodate AI-generated works. This creates a major legal vacuum in determining as to who to give the ownership rights over the work that has been created by AI, raising significant questions on whether under Article 19(1)(g) (freedom to practice any profession or carry on any occupation) the creators work can be protected or not.Therefore, it can be seen that there is a Policy Gap which is there since it can be seen in the modern times that who owns a painting, or a poem generated by AI? The absence of a legal framework addressing AI authorship could hamper the innovation or could also lead to unjust enrichment.

[540] "Unique Identification Authority of India, Which Devices Can Be Used for Face Authentication?", UNIQUE IDENTIFICATION AUTHORITY OF INDIA, last visited May 25, 2025, https://uidai.gov.in/en/304-english-uk/faqs/authentication/for-aadhaar-number-holders/16557-which-devices-can-be-used-for-face-authentication.html.
[541] INDIA CONST. art. 14.
[542] INDIA CONST. art. 15.
[543] The Copyright Act, No. 14 of 1957, INDIA CODE (1957).

4.2.2 European Union: GDPR and Fundamental Rights

The EU have been constantly adopted a rights-centric approach to AI regulation, with the General Data Protection Regulation (GDPR) and the EU Charter of Fundamental Rights serving as the bedrock for digital rights protection. And different articles supporting the same are listed below

d. Data Protection and Privacy (Articles 7 & 8 of EU Charter, GDPR Articles 5–22)

The GDPR actually mandates that the data minimization which means very less data from the users shall be collected and through this the purpose of limitation is achieved, they also mandate under this that there should be explicit consent shall be mentioned and given by the users, and transparency shall be present in AI systems that process personal data. Yes there are some Legal Basis which is mentioned under Article 22 of GDPR that guarantees the right not to be subject to automated decision-making with legal or significant effects.[544] AI systems making credit, hiring, or sentencing decisions must provide meaningful human oversight.[545] A Case Law regarding the same in Schrems II (2020), where the CJEU invalidated the Privacy Shield agreement due to inadequate U.S. surveillance protections thereby highlighting how AI-powered mass data transfers must comply with EU privacy norms.

e. Equality and Bias

The AI Act (proposed in 2021) introduces the concept of high-risk AI systems, includes those that affect the fundamental rights of citizens through access to education, employment, or justice. Discriminatory outcomes in AI are subjected to scrutiny under Articles 20 and 21 of the Charter, which majorly protects against unequal treatment and discrimination.

f. IPR and AI-generated Content

EU copyright law (Directive 2019/790) presumes only the human authorship but leaves AI-generated content in a grey area. The EU Parliament has long debated as to whether AI systems can be or should be granted legal personhood or whether creators of training datasets should be given the rights.

[544] Regulation (EU) 2016/679 (General Data Protection Regulation), art. 22, 2016 O.J. (L 119) 1.
[545] *Id.*

4.2.3. United States: Bill of Rights and Common Law Protections

Just like India and EU, U.S. has also designed some legal framework, although decentralized, which protects the core liberties through the U.S. Constitution's Bill of Rights, supplemented by sectoral regulations.

g. Right to Privacy (Fourth and Fourteenth Amendments)

Although not explicitly stated in US constitution, the right to privacy has been inferred from multiple amendments. There has been a regulation which protects data from AI-driven surveillance and predictive analytics that have been raising constitutional concerns, especially when deployed by the state. There is a very relevant case law as well In Carpenter v. United States (2018), the Supreme Court of USA has ruled that the cell-site location the data collection from that without a warrant violates the Fourth Amendment of US, setting a precedent for all AI surveillance tools.[546]

h. Right to Equality (Equal Protection Clause of the Fourteenth Amendment)

The Discriminatory algorithmic practices which can trigger the equal protection claims, can be particular when used in criminal justice. Tools like COMPAS are being used for recidivism prediction but have been constantly criticized for racial biasness. Through this it can be seen that there is a Legal Vacuum whereby there is no federal law that actually mandates the fairness or transparency in AI decision-making, although states like Illinois (Biometric Information Privacy Act) and New York have started passing targeted AI regulations but there is no one concrete regulation to being with.

i. Intellectual Property Rights (U.S. Copyright Act)

The case of Thaler v. Perlmutter (2023), the U.S. Copyright Office refused to register a copyright for an AI-generated image, asserting that only human authorship is protectable.[547] So this reflects a conservative stance on AI. Also this can be said in the case that work of ai is still not recognized under one domain and can be said that there is a lack of proper bifurcation for the same as to whom can the rights be give to.

[546] Carpenter v. United States, 138 S. Ct. 2206 (2018).
[547] Thaler v. Perlmutter, 687 F. Supp. 3d 140 (D.D.C. 2023).

5. POLICY FRAMEWORK FOR ETHICAL AI IN INDIA: ELIMINATING ALGORITHMIC BIAS AND UPHOLDING RIGHTS

5.1. Data Governance Model for Fair AI

a) Representative, High-Quality Data: Mandate that all (especially high-risk) AI systems use "relevant, sufficiently representative, error-free" training/validation data. Datasets must undergo bias and quality certification before use. For example, the EU AI Act requires high-risk systems to be trained on data free from distortions. India can adopt similar rules, requiring agencies to document data sources, check for population skews, and continually monitor for new biases.

b) Algorithmic Impact Assessments: Require pre-deployment fairness and privacy impact assessments (AIAs) for public-sector AI (analogous to environmental impact statements). Such AIAs would force agencies to identify potential bias, justice, or privacy harms in advance. Evidence shows that internal self-assessments help agencies "better understand and explicate" an AI's disparate impacts before deployment.

c) Continuous Auditing & Transparency: Establish ongoing, independent audits of AI systems to detect bias in live use. Agencies should publish summaries of AI decision-making criteria and allow third-party review. Public registries (inspired by OECD and NY principles) could list deployed AI tools in welfare, policing, credit, etc., increasing transparency.

d) Human Oversight and Redress: Enshrine a right to human review and explanation for significant automated decisions. Like the UK's GDPR (DPA 2018), India should guarantee that individuals "obtain human intervention… express their point of view… and obtain an explanation of the decision and challenge it". All critical AI-driven decisions (e.g. welfare exclusion, policing) must allow appeals and correction of errors, preventing unjust outcomes.

5.2. Constitutional & Human Rights Alignment

a) Equality & Non-Discrimination (Art.14, Art.15): AI systems must uphold Article 14's promise of "equality before the law" and Article 15's ban on caste/religion/sex discrimination. Policy should prohibit algorithms from using caste, religion, or gender proxies unless explicitly required by law for positive measures. As commentators note,

unchecked AI often "replicate[s] and amplif[ies] discrimination against people who've borne the brunt of historical oppression". Under the Constitution and ICCPR/UDHR equality norms, any AI output showing unlawful bias (e.g. over-policing of a community) must trigger legal accountability.

b) Right to Life, Liberty and Privacy (Art.21): Article 21 guarantees life, liberty and (by Puttaswamy v. Union of India) informational privacy. Any AI intrusion on privacy or liberty must meet strict tests: it must be lawful, necessary, proportionate and carry procedural safeguards. For instance, mass surveillance or predictive policing infringe privacy unless explicitly authorized, narrowly targeted, and transparent. Our model integrates these principles by requiring legal mandates and oversight for AI uses affecting bodily security or reputation.

c) Economic and Social Rights (Art.21 read with Art.21A/Art.25 etc): AI policies must also respect socio-economic rights (e.g. right to food, healthcare). Automated welfare exclusion threatens the right to food under international law. Aligning with UDHR and ICESCR, regulators should ensure AI in public services does not deprive anyone of essentials. For example, welfare algorithms should default to inclusion, with the burden of proof on the system to justify exclusions.

5.3. Safeguards for Marginalized Communities

a) Inclusive Data & Design: Mandate collection of disaggregated data on caste, gender, disability, and religion to test algorithms. AI developers must involve community representatives from SC/ST, OBC, Adivasi, Muslim, Christian, and other groups in design reviews. This helps detect "proxy" biases (e.g. locality = religion) that entrench marginalization. Metrics should be tracked separately for each group to ensure equitable outcomes.

b) Affirmative Audit Focus: Require that high-risk AI (policing, credit scoring, hiring, benefits distribution) pass stringent fairness audits. For example, algorithms that allocate social benefits must show error rates are uniform across castes and gender. Any significant disparity triggers a halt and redesign.

c) Accessibility and Alternatives: Ensure AI systems do not bar those with limited tech literacy or resources. For instance, if biometric verification (fingerprint/face) is used in welfare, alternatives (PIN, SMS OTP) must be offered so that the elderly, manual

laborers or people without smartphones are not excluded. This prevents the 'coerced inclusion' noted by rights groups.

d) Grievance Redressal: Create dedicated grievance cells (within Data Protection Authority or local government offices) where citizens can report AI harms. Victims should not be left "stuck in a bureaucratic maze, with little to no access to remedy". Instead, a clear appeal channel (like a consumer court for algorithms) must be established, with stipulated response times and oversight.

5.4. Case Studies: AI Bias in India & Model Remedies

a) *Fig: Government memo on Telangana food-subsidy processing.* In Telangana's Samagra Vedika welfare system, linked databases automatically flagged "ineligible" beneficiaries. From 2014–2019 the state cancelled over 1.86 million subsidized food cards, often without notice. Investigations found thousands of wrongful exclusions: e.g. 67-year-old widow Bismillah Bee was falsely tagged as a car-owner and denied rations. Under our model, every automated welfare check would require an audit trail and human review before action. Agencies would have to verify AI rejections with field officers and allow citizens to rebut algorithmic errors (with proof) before benefits are cut. This would catch data mistakes like Bee's (where algorithmic "Syed Ali" was misidentified) and protect citizens' right to food and dignity.

b) *Fig: Telangana resident displays her ration card after Samagra exclusion.* The Samagra case starkly shows how opaque AI can harm the poor. The proposed policy fixes this by insisting on transparency: affected families must be informed of the AI decision and grounds for exclusion, and given a chance to appeal. Enshrining a formal "right to explanation" (as in GDPR/DPA law) means algorithmic denials are reviewable. (It also echoes Art.21 due process: no person should lose a basic entitlement without a fair hearing.)

c) Facial Recognition Abuse: In recent Delhi riots, police used AI face-matching to arrest dozens of men at protests. Notably, those targeted were overwhelmingly Muslims in one case. Civil rights groups warn that without limits, FRT "criminalise minorities and channel[s] … bias to the rich". Our framework would prohibit unregulated use of public facial ID. Any surveillance AI must meet very high accuracy standards in the Indian context, and be operated only with warrants and strict audit logs. For instance, public

CCTV face recognition would be banned unless there is court approval and continual accuracy monitoring, protecting privacy and preventing communal profiling.

d) Predictive Policing: Delhi's CMAPS system (and pilots in Jharkhand, Telangana) aimed to forecast crime but ended up surveilling Muslim and lower-caste neighborhoods disproportionately. In effect, it digitized historical police bias against Dalits and Adivasis. The policy model intervenes by declaring such high-risk policing AI impermissible without safeguards. All law-enforcement algorithms must undergo an Algorithmic Impact Assessment for discrimination, and agencies must report arrests initiated by AI to an oversight committee. Independent panels (including judicial members) would review these reports for bias, and police would have to justify any AI-based targeting under Article 21 standards. This prevents a feedback loop of bias: if the AI starts singling out a community, it triggers review or shutdown.

e) Welfare Authentication: Even outside Samagra, biometric failures have denied aid. For example, daily-wage laborers with worn fingerprints get refused at ration shops. The new rules would ban single-factor ID checks; a lost fingerprint or face scan cannot by itself block access. Multiple authentication methods (Aadhaar PIN, head-of-household verification) must be available, ensuring poor or disabled people aren't unfairly excluded.

5.5. Governance & Oversight Structures

a) Independent AI Authority: Establish a statutory AI Oversight Commission (or empower the Data Protection Authority) to audit and regulate AI. Experts recommend setting up a dedicated "AI Safety Institute" to build technical capacity and guide policy. Such a body would develop standards, conduct market studies, and liaise with global peers. Crucially, it must be institutionalized (e.g. via Parliament) to ensure autonomy.

b) Algorithmic Audit Boards: Mandate periodic external audits of high-risk systems by accredited third parties. Similar to financial audits, auditors would check code and data for bias. OGP research suggests combining internal self-assessments with external review and public comment. In practice, the government could require any AI vendor to submit to an independent "AI conformity assessment" before sale to state agencies.

c) Cross-Agency Committees: Form an inter-ministerial AI Risk Committee (MeitY with NITI, Home, Finance, Health, etc.) to classify AI applications by risk. This mirrors the

EU's approach of listing "high-risk" uses needing extra checks. The committee should coordinate training for regulators (RBI, TRAI, insurance authority) on AI risks. For instance, RBI could then issue guidelines on bias-testing in lending algorithms. A Parliamentary Standing Committee on IT could provide legislative oversight of this process.

d) Transparency and Registers: Require that all government AI deployments be logged in a public registry (by department). This allows citizens and watchdogs to know what AI tools are in use. Regular progress reports (inspired by a US Executive Order approach) would compel agencies to report their AI systems and any harms detected. Such transparency builds trust and accountability, deterring secretive or abusive AI.

5.6. International Best Practices for India

a) EU AI Act – Risk-Based Rules: Adapt the EU's categorization of AI by risk. For "high-risk" systems (e.g. biometric ID, welfare allocation, law enforcement), enforce strict standards. Article 10 of the EU AI Act, for example, mandates high-risk AI be trained on datasets that are "free of errors" and "sufficiently representative". India can mirror this by requiring third-party certification that training data reflect India's diverse population (including caste, region, and socio-economic status).

b) Data Protection (GDPR-like) Safeguards: India's DPDP law should incorporate GDPR-style protections for automated decisions. Notably, it should bar any legal or similarly significant decision made solely by algorithm (echoing GDPR Article 22). For example, UK law (implementing GDPR) explicitly prohibits "significant decisions" without human review, and grants individuals the right to an explanation. Embedding such rights in Indian law ensures citizens can challenge faulty AI outputs.

c) Algorithmic Impact Assessments (AIA): Learn from jurisdictions (e.g. New York City's ADS Task Force) that require algorithmic impact statements. The AI Now Institute recommends that public agencies publish AIAs with each AI rollout, combining self-assessment and public input. India should mandate that before any public AI project, its AIA (covering fairness, privacy, security) be made public and subject to consultation.

d) Global Ethical Principles: Align with OECD and UNESCO AI ethics guidelines on fairness and human rights. For instance, the OECD's AI Principles emphasize transparency, accountability and non-discrimination. India should incorporate these

into its policy lexicon to attract international collaboration and ensure its laws meet global standards.

5.7. Implementation Roadmap for Regulators

a) MeitY (Technology Ministry): Empower MeitY to issue binding AI governance rules under the IT Act and forthcoming DPDP Act. Specifically, MeitY should finalize guidelines on automated decisions (in line with its draft AI framework) and mandate DPIAs/AIAs for any project using personal data. It can also set up a dedicated AI auditing arm. For example, following experts' advice, MeitY could either be strengthened to act as regulator or a new AI regulator can be created under its aegis.

b) NITI Aayog and PSA Office: Task NITI with integrating these rules into India's AI strategy. NITI should require that all publicly funded AI initiatives include bias mitigation plans (building on its Ethics Guidelines). It can also commission periodic market studies (as done for digital economy) to detect algorithmic harms. The Office of the Principal Scientific Adviser can coordinate between ministries to ensure a unified approach (similar to how it advises on emerging tech).

c) Sector Regulators & RBI/TRAI/IRDA: Issue sector-specific orders. For example, RBI could direct banks to test credit-scoring models for caste/gender bias before deployment. Election Commission and police boards should ban use of AI profiling in elections and policing without strict oversight. Consumer Protection bodies must treat AI fraud screening as a regulated activity.

By combining data-centric regulations with constitutional safeguards, this framework ensures AI in India serves all citizens fairly. Regular audits, public oversight bodies, and enforceable rights will prevent AI from perpetuating old injustices, while international best practices guide India's unique implementation.

6. CONCLUSION

The dualism in a potential set of benefits from and risks of artificial intelligence integration into core societal institutions is wedded. At the same time, these same AI technologies hold unprecedented promise to improve efficiency, increase accessibility and spur innovation in sectors ranging from health, government, law and education – yet these same technologies

present major new risks to core human rights, when deployed without appropriate ethical, legal and social safeguards. Based on this research, we critically analyzed how algorithms bias strengthens the structural discrimination, how the open data collection processes put the privacy in peril and how the lack of legal accountabilities of harms resulting from AI puts us in an extreme accountability lacuna.

In the Indian context, these problems are complicated by a combination of entrenched caste and gender, as well as economic disparities and a lacuna of strong AI specific regulatory framework. Poor or bias data in the implementation of AI in various systems, affect primarily marginalized communities, Dalits, Adivasis, Muslims, women and rural communities. Cases show predictive policing system, credit score algorithms and welfare eligibility system operating in exclusionary, surveillance or judgmental fashion lacking in due process and transparency, in examples as illustrated. This violates the constitutional guarantee under Articles 14, 15 and 21 of the Constitution, as also India's obligation of international human rights under instruments such as the UDHR and ICCPR.

Confronted by the simultaneous challenge to manage enabling AI innovation but without precedence to ensure the innovation does not occur at the cost of dignity, autonomy or equality, states around the world have attempted to strike a balance. Systemic regulation by the European Union is acting through the AI Act and GDPR which promote accountability, human oversight and data protection. India has issued a draft Digital Personal Data Protection Bill and the United States responded with a sectoral approach. However, we still lack a cohesive rights based legal framework on AI. This article contends that in the face of such new realities, the law must evolve.

The aim is not to stifle innovation but to direct it for artificial intelligence's sake and ours to advance human well being and not exacerbate social injustices. AI at its best is human centered – and rooted in the principles of dignity, equity and responsibility it must be. As we move toward a future governed by ever wiser smart machines, human rights watches should not grow dimmer. AI should be for people and the legal tools that we build today will decide whether AI is empowering or exclusionary.