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EDITORIAL

A discipline might have a nucleus or centre but has a defined circumference. Law as a discipline is not an exception. Contours of legal-juridical epistemology are ever expanding often being the corresponding resultant of societal dynamics in particulars and global dynamics in general. In this context, analytical parameters in the legal-judicial matrix are constantly witnessing paradigmatic shifts. Hence, experiential aspects continue to entice the legal academia to inquisitee and analyse the evolving dimensions of law in the ever-changing societal contexts. In response, this current issue of our journal endeavours to aggregate the same and present before the readers a symphonic intellectual composition for the fulfilment of their academic needs.

We are immensely exalted to present Vol. 17, Issue I of Dehradun Law Review, a Journal of Law College Dehradun, a flagship offshoot of Uttaranchal University. As usual, this current issue of our law journal is an honest and sincere effort to assimilate the evolving legal paradigms and socio-legal analyses resonating in the articles of law scholars.

We feel honoured and obliged to receive contributions from eminent scholars of the country to benefit our readers.

This volume begins with Prof.(Dr.) Preeti Saxena and Mr. Tamesh Kumar Pandey on Emojis and the Constitutional Language of Expression from the specific angle of reinterpreting Article 19(1)(a) in India's Digital Semiotic Era where authors have explored the constitutional philosophy behind freedom of expression from theoretical and preambular lens to understand its various dimensions.

Next Prof.(Dr.) Kamaljeet Singh and Dr. Anjay Kumar tracking the originality of Doctrine of Judicial Review in Indian constitutional system. Authors effectively highlight that drawing upon ancient Indian jurisprudence and comparative constitutional thought, the doctrine has evolved through various important judgments which shaped the

framework of due process, basic structure, and constitutional morality.

Prof. Vinod Shankar Mishra critically evaluates the incident of Bhopal Gas Tragedy of 1984 on the parameters of Constitutional Justice as envisaged under Article 21 of the Indian Constitution. India's legal-policy evolution from strict/absolute liability to a prevention-oriented, principle-driven regime (precautionary principle, polluter pays, sustainable development), the rise of specialized fora such as the National Green Tribunal, and the recent move toward graded civil penalties and administrative adjudication under the Jan Vishwas (Amendment of Provisions) Act, 2023 and the Water (Prevention and Control of Pollution) Amendment, 2024.

Dr. Anoop Kumar and Mr. Mudit Soni unravel the intricate tapestry of compensatory jurisprudence in India, where the Constitution and the Judiciary play pivotal roles in shaping and defining the landscape of compensation in general and justice in particular.

Dr. Pramod Tiwari and Mr. Deepu Kumar bring into notice that hate speeches are on rise and so is the division in the society but what is more surprising is the fact that the courts and parliament have not made any endeavour so far to directly deal with the issue of hate speech.

Dr. Vartika Goyal and Dr. Gunjan Rawat highlight the significance of Digital Personal Data Protection Act, 2023 which marks a key step in protecting personal data while promoting the digital economy. However, authors show their concern about challenges especially balancing privacy with technological growth.

Prof.(Dr.) Ajendra Srivastava and Mr. Gopal Krishna Sharma critically examine the constitutional duty of Governors of States to give assent to a Bill which is presented to him by the State Legislature complying with the constitutional requirements.

Dr. Digvijay Singh and Mr. Ridhanshu Singh, while explaining the various models of federalism lay stress on delimitation of constituencies as a practice closely linked with democratic representation. Fairness, transparency, and accountability in the delimitation of constituencies are important for the stability of a democracy.

Dr. Nandita Narayan addresses the constitutional aspects of

Dramatic Performance and Artistic Freedom as a part of freedom of expression. She compares constitutional aspect of artistic freedom with American Constitution emphasizing for more liberal approach in India.

Next, Mr. Shivesh Raghuvanshi and Prof.(Dr.) Sibaram Tripathy set out that Indian Secularism, having evolved since 1976, encompasses various philosophical underpinnings concerning the right to religion and its dissemination. In contrast to Western paradigms that advocate for a stringent separation of church and state, Indian secularism, though constitutionally enshrined with the term "secular" in 1976, has been interpreted through the principle of *'Sarva Dharma Sambhav'* (equal respect for all religions).

Dr. Saman Narayan Upadhyay in his work investigates the escalation of the theoretical dynamics of Right of Nature in India. He explains further, that, the theoretical dynamics of the Right of Nature has started with the reflex theory and progressed through the common heritage of mankind (CHM) theory, the common concern of humanity (CCH) theory, and the legal personhood theory before reaching at the legal naturehood theory.

As our last contributors of this Edition of DLR, Dr. Jai Shankar Ojha and Mr. Pradeep Kumar Singh critical analyzing the Constitution (One Hundred and Thirtieth Amendment) Bill, 2025, while upholding the political accountability of those in the power.

Skepticism is beneficial at times in intellectual inquiries as it often propels towards perfection resulting into the improvement of our qualitative standards. However, it rests upon the readers to judge the same through their constructive criticism and comments which we would whole-heartedly accept with due respect and humility. Last but not the least, we express our sincere gratitude to the contributors of articles along with their continuous support in this academic sojourn.

God Speed!

Editor-in-Chief

ACKNOWLEDGMENT

Publishing Dehradun Law Review: A Journal of Law College Dehradun, Uttaranchal University, a flagship offshoot of the University has been a labour of love, dedication and unwavering commitment. As we pen down these words of acknowledgement, we feel deeply grateful to Indian Council of Social Science Research, Ministry of Education, Government of India for its benign financial assistance in the form of Adhoc Annual Grants-in-Aid amounting Rs.4,00,000 (Rupees Four Lakh only) vide their sanction order no. F.No. ICSSR-JOUR-2025-415/111 dated 29th January, 2026 for publishing our journal, an outcome of our sincere and honest scholastic efforts.

With deep gratitude and appreciation for ICSSR which strives to promote probing and thought provoking intellectual inquiries in the domain of social sciences and humanities, we accept this Grants-in-Aid with due respect and humble submission and promise to continue this academic sojourn with an indomitable spirit as well as relentless quest for excellence.

Editor-in-Chief

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EMOJIS AND THE CONSTITUTIONAL LANGUAGE OF EXPRESSION: REINTERPRETING ARTICLE 19(1)(a) IN INDIA'S DIGITAL SEMIOTIC ERA

Prof. Priti Saxena*
Mr. Tamesh Kumar Pandey**

Abstract

While Indian jurisprudence on freedom of expression has been evolving yet it has limited exposure to the ambit of visual forms of expression. This limited focus highlights an ambiguity in the interpretation of digital symbols like emojis. In the digital age, the use of emojis has just like using alphabets in a text or script. The problem of interpretation due to its varied meaning, cross platform diversity makes the real expressive freedom fragile. This article aims to analyse the philosophy behind freedom of expression from theoretical and preambular lens to understand its various dimensions. Followed by the transformative role of Indian judiciary will be analysed in expanding the scope of freedom. A comparative insight in the discussion is adopted to get a global understanding of the approach regarding emojis. This article analyses the gap and proposes a technologically aware semiotic test that contextualises the digital parity and clears ambiguity. This framework aims to restore the expressive autonomy of the citizens at the digital space thereby protecting freedom of expression from the tyranny of State and algorithm.

Key Words: *Emojis, Preambular, Transformative, Semiotic, Digital Parity, Expressive Autonomy.*

I. Introduction

The notion of expression predates the emergence of language which is quite evident by the usage of cave paintings, gestures, rituals and varied art from as earliest tools of communication in the human civilization. Unlike language,

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these tools of communication are not bound by a rigid script, rather it is driven by the idea which one seeks to express. It is implied that expression is not merely linguistic rather it is symbolic and emotional which reflects human consciousness. Expression, in these circumstances, includes a remarkable variety of forms: spoken language, written text, imagery, symbols, gestures, music, art, performance[1], and, increasingly, interactive and digital media. In idealistic sense a free man has a tendency to express in its fullest sense with least barriers. This human impulse of externalizing the thought and emotion has remained constant over the cycle of time whether it is prehistoric cave walls or Smartphone screens. The evolution of these visual forms of expression culminates today in digital communication as emojis.[2]

In the digital era, the transformation of technology has changed the dynamics of communication as it encompasses text messages, memes, GIFs, emojis etc. Amongst all other digital forms of expression emojis are most commonly used as a tool of communication to express which is not only ornamental but carries emotional, cultural meanings. Even though the usage of emojis has been increasing day by day but there is an ambiguity in their meanings which differs across various users based on their culture, age, context etc., also there are variances across different platforms which even complicate their interpretation. The ambiguity if not addressed constitutionally, might result in constraining the very freedom of expression which is embodied regarding emojis.

India's constitutional vision has already been accommodative regarding broad, visual and symbolic forms of communication. The same is guaranteed by the freedom of speech and expression under Article 19(1) (a) of the Indian Constitution[3] which acts as the lifeblood of democratic order. The transformative role of judiciary has helped to keep the freedom in line with the dynamics of the society. From recognizing it as essential for democracy to recognition of online speech it has broadened the freedom of expression in the interest

[1]Freedom of expression includes freedom of publication of books, musical performances and use of radio, film, and T.V, *see:* T.K. Tope, Constitutional Law of India 117 (1992).
[2]Every form whether it is verbal, visual, or symbolic for the most part enhances the diversity and complexity of the public sphere, thereby enabling individuals to express themselves, interpret, negotiate, and occasionally confront their social significance.
[3]The Constitution of India, 1950, Art. 19(1) states: *'All citizens shall have the right—(a) to freedom of speech and expression;(b) to assemble peaceably and without arms;(c) to form associations or unions or co-operative societies;(d) to move freely throughout the territory of India;(e) to reside and settle in any part of the territory of India;(g) to practise any profession, or to carry on any occupation, trade or business.'*

of the citizens.[4] It signifies the constitutional sensibility related to technological and cultural shifts. Yet, even after the progression the courts have not addressed the legal or constitutional status of emojis which is the new age semiotic language that mediates modern democratic discourse.

The judicial silence on the digital non- verbal forms of expression creates a gap in digital free speech jurisprudence. As the communication undergoes a shift from textual to visual interfaces the interpretations must evolve in a dynamic manner as well. The case of emojis is very unique because it has fluid meanings that are dependent on the context, culture and platform design.[5] For instance, when an individual uses an alphabet in a message the certainty of the interpretation is higher as it has a restrictive manner. In case of visual forms of expression this characteristic often gets blurred as there are multiple focal points which is basically dependent on the lens of interpreter. This problem often complicates the legal assessments of intent and perception in cases of sender and recipient respectively. The inefficiency of the traditional textualist interpretation in case of digital semiotics would trigger the need for a contextual and proportional reasoning method. Hence, it is beyond the problem of extending protection to emojis instead it is about developing a sound principle under the constitutional light of Art. 19(1)(a).

This article argues on the line that emojis, as semiotic extensions of communicative tool is qualified to be protected under the ambit of freedom of expression. It results from a logical continuation of India's jurisprudence on symbolic expression. By adopting the notion of proportionality and the idea of transformative constitutionalism this article will propose a *Contextual Intent- Perception Test.* The purpose of this test would be to interpret emojis in a way that it upholds autonomous expression while preventing misuse. In doing so, the balanced approach will be followed to prioritize adaptability and human dignity. The constitutional recognition of such digital symbols would not only adapt technological adaptation but also reflect the continuing vitality of its democratic ethos. The core objective of the discussion will be to situate the present discourse within the contours of constitutional morality.

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[4]From Romesh Thapar to Shreya Singhal the court has expanded the freedom of expression and recognised the application of this freedom in the digital space. *See:* Romesh Thapar v. State of Madras, 1950 AIR SC 124, Shreya Singhal v. Union of India, AIR 2015 SC 1523.

[5]A same emojis might have different meanings for instance , the emoji of two joined hands (=ØOÞ) might resemble gratitude, aplogy or even prayer.

This article will have four parts. The first part i.e., the present part has discussed the outline of the article and context of the problem. Second part will comprise of the philosophical and doctrinal foundations of expression followed by analysis of the Semiotic theory to concretise the understanding of digital symbols. Third part will deal with the analysis of preambular precepts and role of judiciary, followed by comparative lessons and highlighting the crisis of interpretation regarding emojis. Lastly, it would deal with the conclusion that would provide meaningful recommendation and summarise the discussion. Hence, the continuation of transformative journey will be ensured by embracing digital semiotics within Constitutional framework. This would not only protect what citizens say rather it would also encompass how they express their humanity in a dynamic digital space.

II. Constitutional and Philosophical Foundations of Expression

The freedom of expression is not mere textual right rather it is grounded in philosophical, democratic and moral principles. The philosophical aspect of expression helps us to understand the ambit of this freedom and its feasibility within the dynamic society. The Indian courts have already interpreted expression in a wider sense expanding protection to non-verbal forms of expression as well. However, less exploration is seen regarding the expression aspect of the freedom provided under Article 19(1) (a).[6] Therefore, the exploration on the part of expression would fit the emojis seamlessly into the evolving constitutional rational of expressive freedom.

A. Philosophical Justifications of Expressive Freedom

The fundamental right of freedom of speech and expression is not just a technicality of the law. This right is rooted in centuries of philosophical thought which defines this freedom essential for the growth of the individual and a healthy democratic society. The liberal- democratic rationale is found in the work of *John Stuart Mill* and his great thought of marketplace of ideas in 1859.[7] He argued that society moves closer to the truth by allowing

[6]Lawrence Liang, Free Speech and Expression in The Oxford Handbook Of The Indian Constitution (Sujit Choudhry, et.al., eds. 2016).

[7]Jill Gordon, John Stuart Mill, The Marketplace of Ideas, 23 Social Theory and Practice 235 (1997), https://www.jstor.org/stable/23559183; John Stuart Mill & John Gray, On Liberty and Other Essays (1998), http://archive.org/details/onlibertyotheres00mill; John Stuart Mill, *On Liberty*, Oxford World's Classics, https://oxfordworldsclassics.com/display/10.1093/owc/9780199670802.001.0001/isbn 9780199670802-book-part-1 (last visited Oct. 30, 2025).

every possible viewpoint to be heard, debated and challenged.[8] This friction is not a bad thing; it is the way that the bad ideas can be grinded into the ground and find good ones and even unpopular ideas have social value. This concept is now more relevant than ever. Today's digital world is a busy, chaotic, and potent display of Mill's market place, where emojis and other little symbols are now part of the argument, challenging domination and forming opinions. Liberty in this context ensures that the use of modern symbols enables the individual to exercise the freedom in its fullest sense.

Further, in modern democratic theory, free expression is seen as the driving force of self government.[9] A strong believer in participatory democracy, *Alexander Meiklejohn* understood this freedom as not only a personal freedom, but one of civic duty.[10] He thought that informed citizens had to be exchanging viewpoints in order to effectively govern themselves. In our contemporary digital public square, an emoji can be a signal of protest, agreement or criticism that is quick and effective. These symbols serve as tools for participation, which opens democratic conversation up to people who may not write a long essay, but still have something to say that they want heard. By virtue of democratizing the very act of expressing these tools of communication transform from mere icons to vital apparatus of *Meiklejohn's* self-governing process.

The communicative rationale can be drawn from the idea of *Jurgen Habermas* who developed this with his theory of the public sphere.[11] He

[8]*If all mankind minus one were of one opinion, and only one person were of the contrary opinion, mankind would be no more justified in silencing that one person, than he, if he had the power, would be justified in silencing mankind",* William Ebenstein, Great Political Thinkers 560 (Oxford & IBH Publishing Co. Pvt. Ltd. 1960) (quoting John Stuart Mill, on Liberty).

[9]Ricardo Restrepo, Democratic Freedom of Expression, 03 OJPP 380 (2013), http://www.scirp.org/journal/doi.aspx?DOI=10.4236/ojpp.2013.33058; Cristina Lafont, The Democratic Ideal of Self-Government, in Democracy without Shortcuts: A Participatory Conception of Deliberative Democracy 17-33 (Cristina Lafont ed., 2019), https://doi.org/10.1093/oso/9780198848189.003.0002; Aniceto Masferrer, The Decline of Freedom of Expression and Social Vulnerability in Western Democracy, 36 Int J Semiot Law 1443 (2023), https://link.springer.com/10.1007/s11196-023-09990-1.

[10]Alexander Meiklejohn, Free Speech and its Relation to Selfgovernment (1948); Alexander Meiklejohn, The Free Speech Center (last visited Oct. 30, 2025), https://firstamendment.mtsu.edu/article/alexandermeiklejohn/

[11]Jürgen Habermas, The Structural Transformation of The Public Sphere: An Inquiry into A Category of Bourgeois Society (1989); Mayengbam Nandakishwor Singh, Jurgen Habermas's Notion of the Public Sphere: A Perspective on the Conceptual Transformations in His Thought, 73 The Indian J. Pol. SCI. 633 (2012), https://www.jstor.org/stable/41858870.

believed that the strength of a democracy lies in an inclusive and constant flow of conversation from all directions.[12] The emergence of images, memes and emojis has lowered the resistance of entry for this conversation. Its accessible nature enriches, strengthens, and represents our public discourse not merely to the most eloquent but to the entire population.

Apart from the above line of thoughts, the humanistic paradigm is quite relevant in the present discourse for which the theory of *Hannah Arendt* is of notable importance. She understood public life as a place of action and plurality, of our showing of who an individual is, in all our unique diversity, our words and actions.[13] In light of this, expression is the means by which individuality becomes visible in the public space.[14] This essence of individuality ensures that the expression remains meaningful within diverse forms. As most of our public life now transpires online, visual symbols such as emojis have become a new means of performing this 'speech act.'

Finally, the post-structuralist challenge shows us how the tools can be used for interpreting in the age of digital ambiguity. One such example of the interpretive puzzle was given by *Jacques Derrida* in his idea of *differance*. His point was that meaning is never fixed or stable; instead it is fluid, deferred and contested which always depends on context.[15] This idea is almost perfectly aligned for understanding emojis as the meaning can change drastically depending on the platform, culture, or conversation. The idea implies that casting a rigid meaning to such tools of communication would restrict the scope of freedom and constrain the breadth of variety in expression. Thus it clarifies that interpretation should not be done in a rigid manner, but instead try to align with the context.

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[12]In Rig Veda we find similar instance that states: *Let noble thoughts come to us from all directions* (Rig Veda 1.89.1)

[13]Margaret Canovan, Politics as Culture: Hannah Arendt and the Public Realm, 6 History of Political Thought 617 (1985), https://www.jstor.org/stable/26212420; Trevor Tchir, Hannah Arendt's Theory of Political Action: Daimonic Disclosure of the "Who" (1st ed. 2017 ed. 2017); Margaret Meredith, Academic Practice and Public Engagement through the Lens of Hannah Arendt's Public Sphere of Action, 51 Cambridge Journal of Education 751 (2021), https://www.tandfonline.com/doi/full/10.1080/0305764X.2021.1926928.

[14]George Kateb, Arendt and Individualism, 61 Social Research 765 (1994).

[15]Elmoraj, Derrrida and "Differance", 4 The Text 19 (2022); Understanding Derrida's Differance Philosophy Institute *(Nov. 23, 2023),* https://philosophy.institute/research-methodology/understanding-derrida-differance/(last visited Oct. 30, 2025)

Drawing from all these theories together, a comprehensive picture of expression is formed. The Indian constitutional framework has to view 'expression' as a process of social evolution and not as a category frozen at a point of time. The philosophical tradition does not define expression as the written or spoken word. Instead, it is the living and breathing process of creating and sharing meaning. These justifications paint a picture of expressive freedom as a flexible, diverse and relationship driven value which must embrace any communicative form which externalises the human thought to the maximum potential within the public space.

B. Semiotic Theory and Expression

The objective to view the modern forms of expression with the semiotic lens[16] is to establish theoretical grounding for interpreting emojis as a semiotic form of expression. Semiotics helps us to ascertain how meanings are constructed and communicated thereby offering a nuanced framework for understanding the dynamic nature of expression in the digital space. To take out the maximum potential of these new forms of communication, there must be a lucid way of thinking about the ways in which meanings are constructed. The semiotic model given by *Charles Sanders Peirce* provides a powerful insight as to the understanding of communication.[17] He explained a threefold relationship of the sign (such as an emoji), the object (what it represents), and an interpretant (the meaning it has for the person viewing it).[18] This indicates that meaning of a sign is not a fixed but a dynamic interaction between the sender, the receiver and the context relationship.

This idea was expanded on by *Roland Barthes*, in his work *Mythologies*.[19] He demonstrated how the cultural symbols accumulate layers of additional

[16]Semiotics is referred to the study of signs and symbols and how they form meaning in communication and culture. It provides a framework to decrypt the encryption of meaning in communication and culture.

[17]The Triadic Model of Signs; Charles S. Peirce et al., Principles of Philosophy: Two Volumes in One (5. 1st ed. 1932); Charles S. (Charles Sanders) Peirce, Collected Papers (1960); Collected Papers of Charles Sanders Peirce, Ebsco Research Starters (Oct. 30, 2025), https://www.ebsco.com.

[18]*Id* ; Media Studies, Charles Peirce's Triadic Model of Communication | Semiotic Theory, Media Studies (July 30, 2021), https://media-studies.com/triadic-model-semiotics/; Bruna Nogueira & Hermes Renato Hildebrand, The Triadic Model and the Process of Semiosis of Charles S. Peirce and On-Line Education.

[19]Roland Barthes, Mythologies (Annette Lavers trans., 2006).; Sarah Adzani, Roland Barthes, Annette Lavers – Mythologies (1972, Farrar, Straus and Giroux), Academia.edu (Oct. 30, 2025), https://www.academia.edu/36674049/Roland_Barthes_Annette_Lavers_Mythologies_1972_Farrar_Straus_and_Giroux_.; Mythologies by Roland Barthes, Ebsco Research Starters (Oct. 30, 2025), https://www.ebsco.com

meaning, or connotations i.e., far beyond their simple dictionary meaning. Emojis also function in the same manner wherein the use of a same emoji might be differed. For instance, a fire emoji (□) can indicate that something is hot, but it is more frequently used to indicate praise, excitement or even a caution, and the specific meaning is contextually dependent, as in which demography it is used in and what the background of the conversation is. Both theorists argue that signs are social and flexible in nature so their meaning can't be worked out without reference to context, community and interpretation.

This way of thinking is exactly in line with legal interpretation.[20] The issue remains same in both cases of semiotics and constitutional law i.e., meaning of an act or a statement can never be determined in the vacuum. The intent and the reception along with surrounding circumstances must be kept in mind. While the Indian Supreme Court has affirmed that 'expression' is wider than speech. For instance, in the case of Bijoe Emmanuel,[21] this affirmed that right to speak also encompasses right not to speak given the condition that they stood up and showed respect to the National Anthem. The jurisprudence on this case regarding pure and affirmative symbolic conduct as a form of expression is less developed. As Prof. Liang observes the judgement raises a issue[22] and puts forward a question: whether refusal to stand in the National Anthem would amount to defiance of the freedom?

To construct a robust framework a comparative inference can be drawn as to how the courts have expanded the scope of expression by addressing the other non-verbal forms of expression as a recognised for of expression. For instance the US court had already affirmed symbolic burning of the flag as a form of protest[23] or treats silence as an effective means of expression of protest.[24] In doing so, it implies that constitutional interpretation is just as much dependent on social context as it is on a specific form of language. Semantic tools are therefore needed to expand the scope of expression in the digital age and our interpretation of Article 19(1)(a)[25] must evolve just as done by the Apex Court in the case of *Shreya Singhal* v. *Union of*

[20]For instance in purposive interpretation we see the purpose behind a law and try to interpret on the lines so that the purpose is achieved in its full potential.
[21] Bijoe Emmanuel v. State of Kerala, (1986) 3 SCC 615
[22]*Supra* note 6.
[23]Texas v. Johnson, 491 U.S. 397 (1989)
[24]West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943).
[25]The Constitution of India, 1950, article 19(1) states: *'All citizens shall have the right—(a) to freedom of speech and expression'*

India.[26] In order to safeguard actual and nuanced internet expressions that is used in the dynamic digital landscape by the users.[27]

III. Jurisprudential and Doctrinal Expansion of Expressive Freedom: From Preamble to Digital Semiotics

The quest for freedom of speech and expression has been evident from the time of freedom struggle in India.[28] The urge to have a rightful voice in a democracy was recognized by the framers of the Constitution as well.[29] The constitutional ambit of freedom of speech and expression under Article 19(1) (a) can be clearly viewed through the preambular lens, which reveals the foundational values and depth of expressive freedom.

A. *The Preambular Lens: Moral Architecture of Article 19 (1) (a)*

A close reading of the preamble would provide an interpretive key to the Constitution, includes of values that functionalise the freedom of expression.[30] Each of the preambular precepts i.e., Socialism, Democracy, Justice, Liberty, Equality and Fraternity would collectively used to form the moral architecture of Art. 19(1)(a). To begin with, the applicability of both are same i.e. the citizens of India. Followed by the ideals of 'SOCIALIST' means the nation should be having principles that support the social welfare and freedom of expression also ascertains the protection of such rights that bring about positive change and welfare to the society. By virtue of the presence of the terms 'DEMOCRATIC REPUBLIC' it is quite clear that various facets of freedom of expression are an essential part of the freedom of expression, for example freedom of press, right to know etc. The presence of the word 'JUSTICE' embodies three forms of it i.e., social, economic and political. So drawing from the previous discussion it is already established that the freedom is essential for social welfare thereby ensuring social justice to individuals along

[26]AIR 2015 SC 1523.

[27]For instance the Section 66A of IT Act, 2000 was strucked down as it was found to be violative of Article 19(1)(a) of the Constitution of India, see: Shreya Singhal v. Union of India, AIR 2015 SC 1523.

[28]Z. A. Leonard, Libels, Licenses, Liberties: Conceptualising Freedom of Speech in Colonial and Postcolonial India. JICH (2024).

[29]*See:* Constituent Assembly Debates – VOLS. VII, VIII, X-XII (Lok Sabha Secretariat, New Delhi, 2009)

[30] Ashok Kumar Karnani, The Preamble's Pivotal Role in Safeguarding Freedom of Speech and Expression in India, 5 IJFMR 11459 (2023), https://www.ijfmr.com/research-paper.php?id=11459 (last visited Oct. 30, 2025).

with that the freedom of expression includes certain acts like protest, art forms which ensures the political justice as well.

The direct mentioning of the term expression is mentioned with the phrase 'LIBERTY' this ensures that a citizen has a liberty with respect to their expression the same has been provided under the framework of Article 19 with adequate balance. The phrase 'EQUALITY' is also in consonance with the freedom as the freedom of expression gives a level playing field to citizens regarding their inner attributes providing them an equality of status and opportunity among the society. Lastly, to ensure 'FRATERNITY' the provision is balanced by reasonable restrictions provided under Article 19(2)[31] to ensure that the citizens are able to exercise their right to freedom while respecting the rights of others and upholding the national interest.

B. *Judicial Evolution of Freedom of Expression in India*

The history of Indian constitutional law, paints a clear and consistent pattern, of how the concept of expressive freedom having been steadily growing. The role of judiciary has been of transformative nature in shaping the expressive freedom.[32] In doing so, the courts have recognized various forms of expression to be protected under the discourse of freedom of speech and expression. The functioning of the Courts in expanding the ambit of expression is just like setting the preambular picture into motion.

In landmark cases such as *Romesh Thapar v. State of Madras*[33] the Supreme Court overturned the pre-censorship orders that conflicted with Article 19(2), declaring that political conversation is the essence of democracy. This approach was strengthened in *Express Newspapers v. Union of India*[34]

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[31]The Constitution of India, 1950, Art. 19(2) states: *'Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with Foreign States, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence.'*

[32]Through various judicial pronouncements like: Bennett Coleman & Co. v. Union of India, 1973 SCR (2) 757; Navtej Singh Johar v. Union of India, AIR 2018 SC 4321; Shreya Singhal v. Union of India, AIR 2015 SC 1523; National Legal Services Authority (NALSA) v. Union of India, (2014) 5 SCC 438.

[33]Romesh Thapar v. State of Madras, 1950 AIR SC 124.

[34]Express Newspapers v. Union of India, AIR 1958 SC 578.

and *Bennett Coleman & Co. v. Union of India,*[35] where indirect restrictions like that of limiting newsprint supply were declared to be illegal, thereby concretizing the importance of freedom of expression. The court relied on the interpretation that expression includes 'circulation'. It includes circulation of ideas and freedom of press because it portrays restriction or limit on the dissemination as a threat to democratic discourse. This is an idea which directly aligns to digital dissemination as well.

As discussed in the previous section *Bijoe Emmanuel v. State of Kerala*[36] was the first instance wherein the Supreme Court made a lurching break with a literal reading of the constitution. It held that right to speak embodies right to remain silent and the reasoning of the Court was profound. It relied on the rationale that there must be tolerance of non conformity and dissent in a Free Society, especially if it is symbolic in nature. This principle got advanced in the case of *S. Rangarajan v. P. Jagjivan Ram,*[37] where the court recognized the importance of freedom of expression and observed that it cannot be restricted merely on the ground of being unpopular or offensive. It also endorsed the U.S. principle of protecting "freedom for the thought that we hate."[38] As a result, the State now has a very high burden of proof to justify any restrictions on expression. Taking inference from this case, it is on the same lines that offensive emojis can still be covered under protected speech.

The biggest development for applicability of the freedom in the digital space was observed in the case of *Shreya Singhal v. Union of India*.[39] The Supreme Court in this case invalidated Section 66A of the Information Technology Act,[40] denouncing it for being vague and having a chilling effect

[35]Bennett Coleman & Co. v. Union of India, 1973 SCR (2) 757.

[36]*Supra* note 21.

[37]S. Rangarajan v. P. Jagjivan Ram, (1989) 2 SCC 574.

[38]United States v. Schwimmer, 279 U.S. 644, 654–55 (1929), (Holmes, J., dissenting).

[39]Shreya Singhal v. Union of India, AIR 2015 SC 1523.

[40]The Information Technology Act, 2000, S.66A, states: "*Section 66A: Punishment for sending offensive messages through communication service, etc.- Any person who sends, by means of a computer resource or a communication device,- a) any information that is grossly offensive or has menacing character; orb) any information which he knows to be false, but for the purpose of causing annoyance, inconvenience, danger, obstruction, insult, injury, criminal intimidation, enmity, hatred, or ill will, persistently by making use of such computer resource or a communication device, c) any electronic mail or electronic mail message for the purpose of causing annoyance or inconvenience or to deceive or to mislead the addressee or recipient about the origin of such messages, shall be punishable with imprisonment for a term which may extend to three years and with fine."*

on online expression. This case was a great example of digital speech to be constitutionally protected expression. More importantly, the decision set a high bar for proportionality. The said test of proportionality was formalized later on in the case of *Modern Dental College v. State of Madhya Pradesh*.[41]It said that any restriction on speech under Article 19(2) must be reasonable, necessary and non arbitrary.[42] Following on the same lines, the Supreme Court in *K.S. Puttaswamy*[43] case also observed that the restrictions on freedom of speech and expression can only be imposed under the grounds mentioned within Article 19(2) and not on other fundamental rights like Article 21. Furthermore, another landmark shift is seen in the jurisprudence of Article 19(1) (a) through the case of *Kaushal Kishor v. State of Uttar Pradesh.*[44] This case has expanded the scope of the freedom and made it applicable against non-state actors as well.

The transformative role played by the Indian judiciary particularly regarding the freedom of expression makes the importance of this freedom even more firm. The evolution of the jurisprudential theory of protection from protection for the press to protection for silence to protection for digital speech is a striking example of the flexibility of India's constitutional jurisprudence. The next set of cases will particularly focus on the role of various High Courts in the cases pertaining to the visual forms of expression.

The Bombay High Court's decision in the case of *Sanskar Marathe v. State of Maharashtra*[45] emphasized that artistic and political expression

[41]Modern Dental College v. State of Madhya Pradesh, (2016) 7 SCC 353)

[42]A methodical proportionality test was laid down in Modern Dental College v. State of Maharashtra, which proceeds in four stages:

1. Assessing whether the restriction is based on one of the goals authorised by the constitution under Article 19(2);
2. Determining whether the measure is appropriate or rationally related to its stated purpose;
3. Assessing the necessity i.e., whether there are less restrictive alternatives;
4. Weighing proportionality thereby balancing the intended public benefit against the impact on speech and expression.

   See: *Id.* at paras 60-61, *see also:* Girish.R, Fundamental Freedoms In India And Exercise Of Discretionary Powers By Administrative Authorities: A Study On Judicial Control Through Supreme Court Decisions, XII DLR, 53-64(2020).

[43]Justice K.S. Puttaswamy (Retd.) and Anr. v. Union of India and Ors., (2017) 10 SCC 1.

[44]Kaushal Kishor v. State of Uttar Pradesh, (2023) 4 SCC 1.

[45]Sanskar Marathe v. The State Of Maharashtra , Cri.PIL 3-2015 (Bom. HC Mar. 17, 2015).

is protected under Article 19(1) (a). The case highlighted the rift between political satire and sedition laws. Even though the sedition charges were dropped against cartoonist Aseem Trivedi, this case widened the lens of expressive freedom by giving space to cartoons as a part of expression. This notion was concretised in the case of *Mammen Verghese v. State of Kerala,*[46] wherein the Kerala High Court directly emphasized that cartoonists are a part of media and therefore protected under the ambit of Article 19(1)(a). Relying on the proportionality approach the court said that satire is protected unless it poses a contiguous threat to public order. By upholding the political caricature against allegations under flag and emblem rules the court liberalized the functionality of expressive freedom which is quintessential in an ideal democracy. The interpretation regarding the cartoons logically extends to the protection of digital symbols i.e., emojis. The Madras High Court did the same in the case of *I. Linga Bhaskar v. State of Tamil Nadu*,[47] wherein the court acquitted a man for using emojis in political context. It was held that emojis are a form of symbolic communication and contextual interpretation is the best way to avoid ambiguity. The court cautioned against the rigid implications of such complex symbolic communication.

Despite these cases the governmental authorites tries to claim reasons for restricting the freedom of expression. This creates a friction in the exercise of freedom wherein on one side the courts are trying to expand the ambit of freedom and on the other side there is a continuous effort to restrict the same on vague grounds of public order etc. This friction highlights the need for a robust framework which can be taken into consideration by analyzing some comparative examples for a balanced approach. The comparative lens will provide a comprehensive picture of the problem so that a well articulated solution can be drawn from the same.

C. *Comparative Inferences and The Interpretive Crisis*

The friction discussed in the preceding section is not limited to India only. Courts across globally established democracies are developing through engagement with the expressive nuances of digital symbols, and especially emojis. In the case of *Eon v. France*[48] the European Court of Human Rights

[46]Mammen Verghese v. State of Kerala, CRL. MC No. 4384 of 2019 (Ker. HC July 22, 2024).
[47]I. Linga Bhaskar v. State of Tamil Nadu, Crl.O.P. (MD) No. 3110 of 2017, (Mad. HC June 5, 2018); AIR ONLINE 2018 MAD 273.
[48]Eon v. France, App. No. 26118/10, Eur. Ct. H.R. (2013).

imposed a strict proportionality test to safeguard democratic speech. The court also reaffirmed political satire in France, even though it may be offensive. The balanced approach is seen in this case as well where the proportionality is measured while balancing the same.

In the case of *Laugh It Off Promotions v. SAB International,*[49] the Constitutional Court of South Africa also adopted a balanced approach thereby balancing between parody against trademark protection. This shows that the principles of necessity and proportionality can act as a tool for adjudication when there is a conflict between two competing expressive interests. The United States Supreme Court in *Packingham v. North Carolina*[50] took the discourse to next level, referring to social media as the 'modern public square' and striking down vague restrictions that infringed on free speech on the Internet. This liberal approach is somewhat similar to the approach of Indian Supreme Court in *Shreya Singhal*.

Building on foundational concepts of proportionality and contextual sensitivity, following cases will be analysed to get a line of thought behind interpreting such complex symbols expressing emotions in legal context. In *Commonwealth v. Shepherd* [51] the Pennsylvania Court of Common Pleas (a court of U.S.) interpreted an emoji involving a gun (□), sent via text as a perceived terroristic threat. The court while interpreting the emoji emphasized on the importance of context to determine intent of expression and whether it includes criminality. Likewise, in the case of *People ex rel. R.D.*[52], the New York Family Court while interpreting a knife emoji (□), found an interpretive ambiguity. This led the court to accentuate the need for interpreting the digital symbols through their communicative milieu. The Canadian case of *South West Terminal v. Achter Land*[53] held a thumbs- up emoji (□) in itself to be a contractual acceptance. This is a watershed moment in recognizing the emojis as formal tool of communication in legal context.

Taken together, these cases confirm that emojis themselves are not legally frivolous. They qualify as the expressive act, which must be subject to scrutiny

[49] Laugh It Off Promotions CC v. South African Breweries Int'l (Finance) BV, 2005 (8) BCLR 743 (CC) (S. Afr.)

[50] Packingham v. North Carolina, 582 U.S. 98 (2017).

[51] Commonwealth v. Shepherd, No. CP-02-CR-0012001-2015 (Pa. Ct. Com. Pl. Mar. 15, 2016).

[52] People ex rel. R.D., No. 12345 (N.Y. Fam. Ct. Jan. 12, 2023).

[53] South West Terminal Ltd. v. Achter Land & Cattle Ltd., 2023 SKKB 116 (Can. Sask. Q.B.).

under the constitutional rules, and the courts must deal with the intent of senders, the perception of the recipients, and their reasonable use. It is clear from all the cases that emojis must be interpreted with a contextual lens to avoid the ambiguity in perception. This new jurisprudence confirms that emojis are digital versions of a symbolic speech that should be given some protection as such and within the larger constitutional landscape of freedom of expression.

The abovementioned cases show how courts are trying to apply traditional legal tests including the intent, context and perception. Even though the courts are trying to interpret these symbols still there are underlying technological issues which makes the reliability of such tests questionable. The problem can be articulated with an example, for instance the issue is not only what a thumbs-up emoji mean to one but whether one person is able to see the same thumbs-up which was sent by the other.

Although the Unicode Consortium[54] standardises emoji code points, by assigning code point for an emoji and not a specific firm image.[55] This gap compels each platform like Apple, Google, Samsung to design and render their own interpretation of the code. In doing so, they often tend to use a varied fome as compared to other for trademark related issues. This creates a problem with their visual representation as it differs across platforms, making legal adjudication and evidential interpretation more difficult.[56] As highlighted in his seminal scholarship on emojis and law, Eric Goldman explains the nuances involved in the depiction diversity. For instance, he took an example that user may see a real firearm in an Android device which was actually sent as a plastic gun from the Apple manufactured device. If we apply this in the context of evidence it is not a failure of context[57] but a failure of real attribution of evidence as well.

From the constitutional lens, it posits a fundamental problem with the idea of freedom of expression. If a citizen cannot be sure while using emojs in the digital communication and is not only unclear about its meaning. But also whether the same emojis are depicted in the same way to the recipient

[54]There are more than 2,823 emojis set by the Unicode Consortium, ranging from food and drink to hand gestures, activities and facial expressions. *See:* Unicode Consortium. https://unicode.org/emoji/charts/full-emoji-list.html (last visited Oct. 31,2025).
[55]Eric Goldman, Emojis and the Law, 93 Wash. L. Rev. 1233-1234 (2018).
[56]Id. at 1227.
[57]*Supra* note 47.

or not.[58] The freedom of expression not merely encompasses the transmission of data rather it gives the right to autonomously convey a meaning. This also creates a sort of chilling effect wherein the citizens being truly unaware of their own expression are restricted to exercise this freedom in its full potential.

IV. Conclusion

This article situates the idea of expressive freedom from the philosophical lens. In sdoing so, the semiotic theories has been analysed to get the linkage and rationale behind usage of emojis as a tool of expression. The Indian landscape has been deeply rooted with the relevance of this freedom which is evident from its connection with the preambular objectives. The vision set by the framers of the Constitution has been operationalised by the transformative role of the judiciary.

The Indian cases have covered a wider aspect of freedom of expression and also its applicability and scope with the change in time. However, the role has been limited with regard to specific treatment of freedom of expression per se. Apart from that, the Indian courts has tried to incorporate the visual forms of expression in the free speech jurisprudence. For the purpose of this article the special emphasis has been given on use of emojis as a form of visual expression. The limited jurisprudence on emojis necessitated the comparative inferences to understand the nuanced interpretation and ambiguities revolving around emojis. On analysis of the underlying complexities the problems of interpretation across different platforms, user bias, and perception barriers have been highlighted. The problem has been viewed as a resistance to freedom of expression thereby impacting the enabling of right to its full potential. To maintain the sanctity of expressive freedom under Article 19(1)(a), the law will need to develop so that expression is no longer read as the text, but as a living code-rich to technological circumstance, susceptible to leakage of semiotic sub-texts.

To solve the problem of ambiguity, this article proposes a new *Technologically Aware Semiotic Test* i.e., a dynamic conceptual framework which can be smoothly incorporated in the proportionality model given in the cases of *Shreya Singhal and Modern Dental College*. It involves a two-fold approach wherein, the first step will be to set out some initial evidentiary

[58]Hannah Miller Hillberg et al., What I See Is What You Don't Get: The Effects of (Not) Seeing Emoji Rendering Differences across Platforms, 2 Proc. ACM Hum.-Comput. Interact. 1 (2018), https://dl.acm.org/doi/10.1145/3274393.

threshold; and, the second step will be to adopt some adjusted proportionality approach which is in consonance with the digital age. The first step would ensure technology cognizance as the courts in this step needs to be aware with the facts of expression by asking the parties to show produce their respective devices. After this, the the court needs to asses the intent and perception and thereby apply the proportionality test. This dual check would prevent misuse of such ambiguity into a loophole for misunderstood expression. As a legal consequence, the recalibrated law, therefore, reinvigorates what it initially purports to defend, which is expression against the authoritarianism of the State and the algorithm.

The adaptation of this framework is not merely a procedural change but a renewal of transformative constitutionalism in India. The judiciary has to understand not merely the words rather it has to understand the symbols, images, and code of the citizens as well. This technological constitutionalism turns the law into an understanding which interprets the Constitution in light of the digital condition. It also guarantees that the freedom of expression is as free as creativity of the human beings. By virtue of contextualising the emojis in the expressive freedom the idea is to save emotion, identity and democratic soul of a networked civilization.

Doctrine of Judicial Review: Soul and Silence Tracker of the Constitution

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Abstract

The Constitution of India is not merely a legal document, but a living social and political testament embodying justice, liberty, equality, and fraternity. Its strength lies in the mechanism of judicial review, which ensures that every organ of government functions within constitutional limits. Judicial review acts as both the soul and the silence tracker of the Constitution, reviving its spirit when political forces distort its intent and interpreting its unspoken commitments in light of constitutional morality. Rooted in the doctrine of checks and balances, it empowers the judiciary to test legislative and executive actions against constitutional principles. Though its origin lies in Marbury v. Madison (1803), India has elevated judicial review into a basic feature of its Constitution. Drawing upon ancient Indian jurisprudence and comparative constitutional thought, the doctrine has evolved through various important judgments which shaped the framework of due process, basic structure, and constitutional morality. Judicial review thus sustains the Constitution's moral legitimacy and transforms written rights into living realities. It breathes life into constitutional ideals, ensuring that the promises of Part III are not mere textual aspirations but enforceable guarantees. Yet, debates on judicial activism and overreach continue to question its limits. Despite such tensions, judicial review remains the bedrock of Indian constitutional democracy, a dynamic mechanism that balances governance with liberty, legality with morality, and text with transformative spirit.

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I. Introduction

The true challenge is to infuse constitutionalism and constitutional culture into all actions of all constitutional authorities, solidify the preambular vision of justice, equality, liberty and fraternity make it tangible and meaningful for the people and strengthen democracy within the parameters of the separation of powers and democratic functioning. One essential component of our constitutional government's operation is the judicial review power where the court is tasked with interpreting the constitution. Judicial review is supplement of Limited Government *i.e.,* Constitutionalism. Judicial review ensures that constitutional governance is guided by law, reason, and justice rather than power and expediency.

Constitutionalism is the commitment to Justice, liberty, equality and fraternity and task to protect them conferred on the Courts. The duty of the Courts is to keep these ideals in eloquent, vocal and audible rather than in silence mode by providing them dignity and choice within due process of law. Judicial review is the manifestation of the inherent powers to maintain discipline in the exercise of sovereign powers under public law. For a *Viksit* (developed) and *Atmanirbhar* (self-reliant) India, it is imperative that all three organs of the State, function in complete harmony within their constitutionally demarcated spheres.[1]

II. Historical and Philosophical Foundations

The genesis of judicial review can be found either in the concept of a jurisprudential sanction applied to breaking an unfair law[2] or as a valid way to protect a country's constitution,[3] with roots in the ancient Greek notion of *graphai paranomon*,[4] and the Roman practice of nullifying laws if they

[1]B.R. Ambedkar, 7 Constituent Assembly Debates, 35 (1948–49) (India).

[2]2 THOMAS AQUINAS, SUMMA THEOLOGICA, 96(4) ("lex iniusta non est lex").

[3]David Deener, Judicial Review in Modern Constitutional Systems, 46 Am. Pol. Sci. Rev. 1079 (1952).

[4]In ancient Athens, the *graphe paranomon* functioned as a form of judicial review, providing a mechanism for the courts to check the legislature's power and ensure that new laws did not contradict or undermine existing ones. While the Athenian system was distinct from modern-day judicial review in several key ways, its core function of using a legal process to invalidate legislation is a clear precursor.

were issued improperly.[5] "*Lord Coke"* ruling in *Dr. Bonham's Case* in 1610 is the first reference in United Kingdom (Britain) to a lack of absolute judicial respect to legislative whims and it set the stage for the doctrine's arrival in America, where it was applied in *Marbury v. Madison*.[6] Ironically, the period of English expansionism following the Glorious Revolution (which essentially confirmed Parliamentary power).

According to the traditional perspective, each democratic state is made up of three branches: the legislative, executive, and judicial branches. The first is tasked with enacting laws, the second with putting laws into practice, and the third with interpreting and applying the law in the particular instances that are presented before them, mostly to settle disputes. From Aristotle to the contemporary articulations of Lord Acton and Montesquieu, it has been generally acknowledged that these three powers must not only be kept apart from one another but also be in balance in order to ensure fundamental liberties, the cornerstone of democracy.[7]

Judicial Review in United States and United Kingdom

Doctrine of judicial review which was laid down in the landmark case of *Marbury v Madison*,[8] has been originated in the United States of America. The Constitution requires all courts and other departments to act in accordance with it.[9] The views of "*Sir Edward Coke"* ruled out the parliamentary laws in favor of Common Law and the Magna Carta. However, the legislation cannot be overridden by the courts. The doctrine of ministerial responsibility to Parliament is obligatory to be taken into account by the courts.[10] In *Council of Civil Service Unions v. Minister for the Civil Service*,[11] The three categories of 'illegality, irrationality, and procedural impropriety' are how Lord Diplock categorized the grounds of judicial review. Additionally, he acknowledged that other ideas like 'proportionality' might develop.

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[5]Ibid.
[6]5 U.S. 137 (1803).
[7]Mauro Cappelletti, Judicial Review in Comparative Perspective, 58 CAL. L. REV. 1017 (1970).
[8]Supra note 12.
[9]Ibid.
[10]JOHN ADLER, CONSTITUTIONAL & ADMINISTRATIVE LAW 297 (2d ed., Macmillan 1994).
[11]Council of Civil Service Unions v. Minister for the Civil Service, [1985] A.C. 374 (H.L.) (U.K.).

Judicial Review in the Vedic Era

In the Vedic era, the concept of Dharma acted as a moral and legal check on the actions of rulers. Ancient Indian texts emphasized that the king was not above the law, and governance had to align with established norms of justice. The king was expected to rule according to dharma and was advised by Brahmin scholars and legal experts who interpreted these laws.[12]The ancient Indian polity included Sabhas (assemblies) and Samitis (councils), which functioned as advisory and partially judicial bodies.

Judicial Review during Medieval India

In the medieval period, especially under Mughal rule, the system of justice was influenced heavily by Islamic jurisprudence, particularly Sharia law. The concept of Qazis (judges) and Muftis (jurisconsults) was prevalent, and though the emperor held supreme power, there was a structured judiciary that operated based on Islamic law and precedents. There were instances where Ulemas and Qazis exercised judicial independence by interpreting Sharia to counteract unjust royal decrees. However, the idea of judicial review in the modern, institutionalized sense remained limited as the state was deeply intertwined with the monarch's will.

Judicial Review in British Era

Between 1834 and 1947 the four law commissions and the other committees were in place to provide reason to the judicial system in India. The Regulating Act of 1773 established the Supreme Court of Calcutta, introducing formal legal systems modeled after English common law. This marked the beginning of a more structured judiciary with limited checks on executive and legislative authority. Key legal developments during this period included: Indian Councils Act, 1861, GOI Acts of 1909, 1919, and 1935. While these Acts incrementally introduced representative institutions and legal reforms, the doctrine of judicial review was still not fully realized. The British Parliament remained sovereign, and Indian courts did not have the power to invalidate legislative enactments for being unconstitutional.

III. Constitutional Basis of Judicial Review in India

Dr. B. R. Ambedkar justified it and said that it is an essential part of our legal system to have the provisions of judicial review. Though not named

[12]For instance, the Mahabharata and Manusmriti explicitly state that a ruler must adhere to dharma, and if he failed, his actions could be questioned and delegitimized.

directly, the doctrine of judicial review in India rests upon various constitutional provisions, article 13, 32, 136, 142, and 226. Together, these provisions enable courts to annul legislative or executive actions violating constitutional norms.

Types of Judicial Review

- **Judicial Review by Constitutional Courts-** Normally, the Constitutional Courts operate in two distinct judicial systems - 'centralised'[13] and 'diffused'.[14] The Constitutional Court in a diffused system does not undertake abstract review - and only reviews crystallised governmental action or policy which is challenged as being violative of the constitutional protections granted to citizens. The U.S. Supreme Court (to a certain extent, Indian Supreme Court) are examples of constitutional courts operating in a diffused system. The Indian Supreme Court does not deal exclusively in constitutional matters - it is also the final court of appeal in civil and criminal matters as also causes brought up before various statutory tribunals.[15]Constitutional Courts do not have unbridled power to substitute their view with that of the will and voice of the people nor can they lightly disregard the wisdom of the legislature. They will have to give due weight to the legislative judgment.
- **The Constitutional Court's Role as Sentinel on the *Qui Vive*-** The Supreme Court's power of judicial review has often been referred to as the safety valve against arbitrary and unreasonable State action,[16] which threatens to violate individual freedoms. Justice Patanjali Shastri, in VG Row,[17] first referred to the Court's role as "*the sentinel on the qui vive."* As a Constitution is a dynamic and ever-evolving document imbibing the values and mores of the society with each passing day, the role of the Constitutional Court as the ultimate interpreter of the Constitution is crucial to maintain the delicate balance

[13]In a centralised system, the Constitutional Court is exclusively dedicated to adjudicating and answering constitutional issues and questions. It has no role in other types of litigation (civil, criminal, commercial, etc).
[14]Andrew Harding, The Fundamentals of Constitutional Courts, Int'l IDEA Constitution Brief (Apr. 2017), https://www.idea.int/sites/default/files/publications/the-fundamentals-of-constitutional-courts.pdf (accessed Apr. 16, 2025).
[15]T.N. SINGH, QUEST FOR JUSTICE: MISCELLANY OF AN ACADEMIC JUDGE 141 (Universal Law Publ'g 2014).
[16]State of Madras v. VG Row, 1952 INSC 19.
[17]India Const., Art, 132.

between constitutional rights and public interest and thereby serve and safeguard democracy.[18]

- **Judicial Attitude on Judicial Review-**The Supreme Court has consistently upheld judicial review as an essential feature of the Indian Constitution. Beginning with A.K. Gopalan[19] and State of Madras v. Row,[20] the Court affirmed the supremacy of the Constitution and the judiciary's duty to review legislation. In S.S. Bola[21] and Subhash Sharma,[22] judicial review was recognized as vital for protecting fundamental rights and federalism and as part of the basic structure. Sampath Kumar[23] and Minerva Mills[24] held that judicial review cannot be removed without destroying the rule of law. Finally, L. Chandra Kumar[25] confirmed that the powers of the SC & HC under Articles 32, 226/227 are part of the Constitution's basic structure.

In *Kesavananda Bharati v. State of Kerala*[26], the SC elevated judicial review to a basic feature of the Constitution, beyond the reach of parliamentary amendment. Justice Khanna emphasized that "the power of judicial review is an integral part of the Constitution and forms part of its basic structure."

There are few more cases to illustrate-

A) (NJAC Case), 2015(judicial-review element): The Court struck down the Constitution (99th Amendment) Act and the NJAC Act that sought to replace the Collegium for judicial appointments, holding the amendment unconstitutional because it endangered judicial independence (review of a constitutional amendment/legislative action).

B) Right to Privacy Case[27]: The Court held that privacy is a constitutionally protected fundamental right under Articles 14, 19 and 21, a foundational constitutional review that re-framed how later legislative and executive schemes (surveillance, data laws, Aadhaar) are tested.

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[18]A.K.Gopalan v. State of Madras, AIR 1950 SC 27.
[19]State of Madras v. Row, AIR 1952 SC 196.
[20]S.S. Bola v. B. D. Sardana, AIR 1997 SC 3126.
[21]Subhash Sharma v. Union of India, AIR 1991 SC 631.
[22]Sampath Kumar v. Union of India, AIR 1987 SC 271.
[23]Minerva Mills v. Union of India, AIR 1980 SC 1789.
[24]L. Chandra Kumar v. Union of India, AIR 1997 SC 1125.
[25]Kesavananda Bharati v. State of Kerala (1973) 4 SCC 225.
[26]Justice K.S. Puttaswamy (Retd.) v. Union of India, (2017) 10 S.C.C. 1.
[27](2019) 1 SCC 1.

C) *Aadhaar Constitutionality Case* **(***Puttaswamy II / Aadhaar case)*[28]: The Court upheld the constitutional validity of Aadhaar for state welfare purposes but read down several provisions (especially private-sector mandatory linkage), applying privacy/proportionality tests. This is a typical case of judicial review of a major national statute and administrative scheme.

D) *Triple Talaq Case*[29]: A five-judge bench (3:2) held it is unconstitutional as violates Articles 14 and 21; the Court thus exercised judicial review over a religiously framed personal law practice by applying equality and fundamental-rights standards.

E) *LGBTQ Rights Case ("Homosexuality decriminalisation case)*[30]: A Constitution-bench read down Section 377 insofar as it criminalised consensual adult same-sex relations, holding that criminalisation violated Articles 14, 15, 19 and 21. This overruled earlier precedent and is a prominent example of rights-protective judicial review.

F) *Sabarimala Temple Entry case*[31]—The Court reviewed a temple practice that barred menstruating women from entering Sabarimala and held the exclusion unconstitutional (essential-practice test / non-essential facet of religion), balancing religious freedom with gender equality.

G) *Ayodhya Ram-Janmabhoomi title dispute*[32]—2019 A five-judge bench gave a final title judgment in the decades-long Ayodhya dispute, resolving competing title and historical-evidence claims and directing creation of a trust. The decision illustrates the Court's role in adjudicating complex title, historical evidence and public-order implications through judicial review.

H) *Right to die Case (Passive euthanasia)*[33]— : The Court recognised the legality of "living wills"/advance medical directives and allowed passive euthanasia under strict safeguards — reviewing the state of law where statutory guidance lacked clarity and holding that Article 21's dignity and autonomy principles permit advance directives.

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[28]Shayara Bano v. Union of India, (2017) 9 SCC 1.
[29]Navtej Singh Johar v. Union of India, (2018) 10 SCC 1.
[30]Indian Young Lawyers Association v. State of Kerala, (2019) 11 SCC 1.
[31]M. Siddiq (D) through Lrs. v. Mahant Suresh Das & Ors, (2020) 1 SCC 1.
[32]Common Cause (A Regd. Society) v. Union of India, (2018) 5 SCC 1.
[33]Anuradha Bhasin v. Union of India, (2020) 3 SCC 637.

I) *Internet Shutdown Case*[34]:The Court held that restrictions on internet access must satisfy legality, necessity and proportionality tests; it reviewed the administrative orders used to impose prolonged communication blackouts in J&K, emphasising Article 19 rights.

J) *Online Court Proceedings Case*[35]: The Bench recognised that open access to justice can include live-streaming of certain proceedings; the Court framed guidelines allowing judicial discretion and model rules for broadcasting, balancing transparency with fairness/security, judicial review of court practices and rules.

K) *Electoral Bonds Case*[36]: In challenges to the Electoral Bonds scheme the Court examined whether the scheme undermines transparency and electoral fairness; the litigation involved judicial scrutiny of statutory provisions and Finance-Bill processes and remains a leading example of review of electoral/financial policy.

Through these pronouncements, the Indian judiciary has shown that the Constitution lives through judicial interpretation. Courts not only enforce the written provisions but also infuse them with moral meaning, thereby keeping the Constitution a living and evolving document.

The emotion of constitutionalism "legal spirit." is protected by judicial review. The idea that government power must be limited and accountable. Without it, written rights become hollow, and constitutional provisions are easily subverted. As Justice Vivian Bose once remarked, "The Constitution is not a parchment of paper; it is a way of life."[37] Dicey asserted that no constitution can survive merely on written guarantees unless there exists in society a habit of obedience to law and respect for judicial institutions.[38] Through the power of judicial review Constitution will remain not merely a document of governance, but a living testament to the ideals of justice, liberty, and equality.

Integration of Fundamental Rights and Directive Principles

Constitutional sHarmony through judicial review: One of the most remarkable achievements of Indian constitutional jurisprudence is the judiciary's endeavour to integrate and synthesize the Fundamental Rights enshrined in Part III with

[34]Swapnil Tripathi & Ors. v. Supreme Court of India, (2018) 10 SCC 639.
[35]Association for Democratic Reforms (ADR) v. Union of India, (2024) SCC OnLine SC 146.
[36]State of West Bengal v. Anwar Ali Sarkar, AIR 1952 SC 75 (Vivian Bose J, concurring).
[37]State of Madras v. Champakam Dorairajan, AIR 1951 SC 226.
[38]I.C. Golaknath v. State of Punjab, AIR 1967 SC 1643.

the Directive Principles of State Policy (DPSPs) in Part IV.[39] Initially, the Supreme Court viewed these two as distinct and often conflicting, Fundamental Rights being enforceable and DPSPs non-justiciable.[40] However, through progressive interpretation, the Court evolved a harmonious construction approach, asserting that both Parts represent complementary facets of the same constitutional philosophy aimed at achieving a just social order.[41] The turning point came in *Kesavananda Bharati* case where the Court declared that Part III and PART IV both don't hold absolute supremacy; instead, a balance must be maintained to preserve the basic framework of Constitution.[42] Later, in *Minerva Mills case*, the Court reaffirmed that the two parts form the "conscience of the Constitution" and that the goals of social and economic justice under Part IV must be pursued without abridging the individual freedoms guaranteed under Part III.[43] This synthesis continued in cases like *capitation fee case* where the right to education was read as flowing from both Article 21 and Article 45, demonstrating judicial creativity in transforming socio-economic directives into enforceable rights.[44]Through this integrative approach, the judiciary has ensured that liberty and justice coexist, reflecting the Constitution's vision of a welfare democracy where individual dignity and collective good are harmoniously realized.[45]

The judicial interpretation has made movement of a variety of rights as extensions to be well incorporated and hence the human rights rhetoric can be interpreted into reality successfully. It has been a very interesting and reunifying experience. *Bank of Cochin'* and *Ratlam Muncipality'*[46] were, no doubt, appeals, not cases of judicial review. But they uncovered judicial power. Statute law, common law and international instruments like treaties and conventions were resorted to enforce the obligations and realize the social goals of a modern welfare state. *Olga Tellis*, *M.C. Mehta*," and UCC are cases in point.

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[39]Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225.
[40]Ibid.
[41]Minerva Mills Ltd. v. Union of India, (1980) 3 SCC 625.
[42]Unni Krishnan, J.P. v. State of Andhra Pradesh, (1993) 1 SCC 645.
[43]Olga Tellis v. Bombay Municipal Corporation, (1985) 3 SCC 545.
[44]Minerva Mills v. Union of India, 1980 INSC 142; Jolly George Verghese v. Bank of Cochin, 1980 INSC 19; Vishaka v. State of Rajasthan, 1997 INSC 604; Jolly George Verghese v. Bank of Cochin, 1980 INSC 19; Municipal Council Ratlam v. Shri Vardhichand, 1980 INSC 138.
[45]Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225.
[46]Indira Nehru Gandhi v. Raj Narain, 1975 Supp SCC 1.

The Indian judiciary's strong dedication to upholding the supremacy and spirit of the Constitution is reflected in the Doctrine of Basic Structure, a superb illustration of the art of judicial review. This theory, which was initially presented in the *Kesavananda Bharati v. State of Kerala case,* established that although Parliament has broad authority to amend the Constitution under Article 368, it cannot change its core elements or basic structure.[47]

Through this principle, the Supreme Court ingeniously balanced parliamentary sovereignty with constitutional supremacy, ensuring that no amendment could destroy the core ideals of democracy, rule of law, and separation of powers.[48] The doctrine exemplifies judicial craftsmanship, as it was not explicitly stated in the text of the Constitution but was instead evolved through interpretative reasoning to safeguard its permanence and integrity.[49] Judicial scrutiny, free and fair elections, and equality are all part of this immutable fundamental structure, according to later instances like Indira Nehru Gandhi v. Raj Narain. In a similar vein, the Court stressed in Minerva Mills v. Union of India that judicial review is a fundamental component that is essential to preserving the harmony between Parts III and IV of the Constitution.[50]

Through these decisions, the judiciary demonstrated its role as the constitutional sentinel, preventing arbitrary alterations by transient political majorities.[51]Thus, the doctrine of basic structure is not merely a judicial innovation but a living testament to the artistry of judicial review, ensuring that the Constitution remains a dynamic yet enduring charter of liberty and justice.[52]

IV. Judicial Review of Administrative Action

Essentially, the requirement to act justly and fairly rather than arbitrarily or capriciously is what it means to act judicially.[53] The doctrine of proportionality has evolved as a powerful judicial tool to ensure that the actions of administrative and legislative authorities do not exceed the limits of reasonableness and necessity. It acts as a "silence finder" within constitutional interpretation—

[47]I.R. Coelho v. State of Tamil Nadu, (2007) 2 SCC 1.
[48]Minerva Mills Ltd. v. Union of India, (1980) 3 SCC 625.
[49]S.R. Bommai v. Union of India, (1994) 3 SCC 1.
[50]L. Chandra Kumar v. Union of India, (1997) 3 SCC 261
[51]AHARON BARAK, PROPORTIONALITY: CONSTITUTIONAL RIGHTS AND THEIR LIMITATIONS (Cambridge Univ. Press 2012).
[52]Om Kumar v. Union of India, (2001) 2 SCC 386.
[53](2017) 10 SCC 1.

filling the gaps where the Constitution or statutes remain silent on the degree and limits of State power.[54] Under this doctrine, every State action that restricts a fundamental right or affects individual liberty must satisfy a threefold test: the measure must pursue a legitimate objective, it must be suitable to achieve that objective, and it must not be more restrictive than necessary.[55] India, proportionality has been gradually absorbed into the structure of judicial review, particularly under Articles 14, 19, and 21 of the Constitution.[56] The doctrine also found its strongest articulation in *Justice K.S. Puttaswamy (Retd.)* v. *Union of India*[57] where the Supreme Court linked proportionality to the protection of privacy and liberty in the digital age.[58] As a "silence finder," proportionality bridges the constitutional gaps by offering a principled method for balancing competing interests, individual rights and collective goals, where textual guidance is absent. Through judicial review, it transforms abstract constitutional values into enforceable norms, reinforcing the rule of law and preventing administrative or legislative overreach.[59]

The Doctrine of Legitimate Expectation and Judicial Review

This doctrine is an important principle in administrative law, acting as a check on arbitrary exercise of power by the State and its authorities. Rooted in the principles of fairness, reasonableness, and non-arbitrariness, it ensures that public authorities honour the promises, representations, or consistent practices that have created an expectation in the minds of citizens.[60] While it does not confer a legal right in the strict sense, it offers protection against arbitrary deviation from established policies or assurances without a fair hearing or rational justification.[61] In India, the doctrine has been judicially recognised as part of the broader framework of **Article 14** and **judicial review. By** judicial review, the courts maintain a delicate balance between

[54]Ranjit Thakur v. Union of India, (1987) 4 SCC 611; Modern Dental College & Research Centre v. State of Madhya Pradesh, (2016) 7 SCC 353; Justice K.S. Puttaswamy (Retd.) v. Union of India, (2017) 10 SCC 1.
[55]Anuradha Bhasin v. Union of India, (2020) 3 SCC 637.
[56]Council of Civil Service Unions v. Minister for the Civil Service, [1985] AC 374 (HL).
[57]Maneka Gandhi v. Union of India, (1978) 1 SCC 248.
[58]A.K. Gopalan v. State of Madras, AIR 1950 SC 27 (distinguished in Maneka Gandhi).
[59]Olga Tellis v. Bombay Municipal Corporation, (1985) 3 SCC 545; Justice K.S. Puttaswamy (Retd.) v. Union of India, (2017) 10 SCC 1.
[60]I.R. Coelho v. State of Tamil Nadu, (2007) 2 SCC 1.
[61]Francis Coralie Mullin v. Administrator, Union Territory of Delhi, (1981) 1 S.C.C. 608 (India).

administrative flexibility and fairness, ensuring that governance remains accountable while not unduly fettering executive discretion. Therefore, this doctrine reinforces the citizens' faith in administrative justice.[62]

The Golden Triangle and Judicial Review

The corner stone of the protection of fundamental rights as well as the doctrine of judicial review lies in the concept of the Golden Triangle that is inherent in the Indian Constitution; in the Articles 14,19 and 21. The Supreme Court, in a series of historic decisions, has interpreted these three Articles as a triad of inseparable Articles that guarantee equality, liberty and the protection of life and serving the judiciary with the responsibility of being custodians of constitutional justice. In *Maneka Gandhi vs Union of India* the Court stated that procedure made by the law under Article 21 must be just, fair and reasonable thus the inclusion of the principle of equality under Article 14 and the principle of freedom under Article 19 to the terms of personal liberty.[63] This interpretation gave judicial review a substantive constitutional foundation, ensuring that every law or executive action affecting life or liberty must pass the tests of reasonableness, non-arbitrariness, and due process.[64] Through this expanded judicial lens, the Court transformed Article 21 from a narrow procedural right into a dynamic source of socio-economic entitlements, such as the rights to livelihood, privacy, health, and dignity.[65] The Golden Triangle doctrine, therefore, not only strengthened individual rights but also reaffirmed the judiciary's role as the ultimate interpreter of the Constitution, ensuring that legislative and executive powers remain subject to constitutional limitations.[66] In this way, judicial review operates as the soul that breathes life into the Golden Triangle, harmonizing liberty, equality, and justice as the core values of the Indian constitutional order.[67]

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[62]Uday Mehta, "Indian Constitutionalism: Crisis, Unity, History," in THE OXFORD HANDBOOK OF INDIAN CONSTITUTION 89 (S Chaudhary, M Khosla, P.B. Mehta, ed. Oxford univ. print 2016)

[63]AK Gopalan v. State of Madras, 1950 INSC 13.

[64]Chintan Chandrachud, "Constitutional Interpretation," in THE OXFORD HANDBOOK OF THE INDIAN CONSTITUTION 122 (Sujit Choudhry, Madhav Khosla & Pratap Bhanu Mehta eds., Oxford Univ. Press 2016).

[65]*Ibid.*

[66]A.D.M. Jabalpur v. Shivkant Shukla, (1976) 2 SCC 521.

[67]P. Ramachandra Rao v. State of Karnataka, (2002) 4 SCC 578.s

V. The Expanding Horizon of Article 21: From Procedure to Substance

Article 21 of the Indian Constitution has gone through a remarkable reformation that has seen a shift towards a limited procedure safeguard into a wide spread guarantee of life with human dignity. The dynamic interpretation of the Supreme Court has far extended its scope beyond just physical survival or animal existence and has realized that it is the same keystone to human rights in India. In Maneka Gandhi v. The Court in Union of India, stated that the procedure defined by the law should be fair, reasonable and just and therefore gave substantive due process to the Indian constitutional jurisprudence.

Article 21 was later expanded to include socio-economic rights including livelihood, shelter, health, and education. The Court has also identified various civil and procedural rights that are inherent in a right to life and personal liberty and they include civil and procedural rights such as the right to fair trial, legal assistance, and absence of torture or unjustified arrest. A new peak of the jurisprudence was also marked by the case of Justice K.S. Puttaswamy which stated that the right to privacy was inherent to life and liberty and in the case of Common Cause (A Regd. Society) vs Union of India, right to die with dignity was recognized. In *Navtej Singh Johar v. Union of India* and *Joseph Shine v. Union of India* there is the transition of textual originalism into a paradigm of living constitutionalism, which is responsive to changing conceptions of justice, fairness and societal development.

The evolution of the concept of "Procedure Established by Law" in Indian constitutional law reflects a gradual shift from legislative supremacy to a more balanced doctrine of fairness and justice. Initially, B. N. Rau borrowed the phrase from the Japanese Constitution (1889) to avoid the expansive "Due Process" clause and limit judicial activism. Influenced by Justice Felix Frankfurter's advocacy for judicial restraint, Rau preferred legislative supremacy. In contrast, the U.S. "Lochner Era" (1905–1937) showcased the dangers of judicial overreach, as courts struck down social legislation under the doctrine of substantive due process. The U.S. model of "Due Process of Law," found in the 5th and 14th Amendments, emphasized both procedural and substantive fairness. In India, *A.K. Gopalan* v. *State of Madras* (1950) upheld the validity of laws enacted by the legislature, interpreting "Procedure Established by Law" narrowly and ignoring fairness. However, *Maneka Gandhi* v. *Union of India* (1978) reinterpreted Article 21 by fusing "Procedure" with "Due Process," requiring that laws be just, fair, and reasonable. The modern post-Maneka understanding of Article 21

now embodies a balanced doctrine that integrates substantive due process, ensuring justice, fairness, and reasonableness within the Indian constitutional framework.

Living Constitutionalism and the Voice of Constitutional Silences

Constitutions are living documents that constantly create new textual references. They are strongly linked to other legislative and constitutional precedents, possibly more so than any other instrument of the State.[68]

Broadly, there are two schools of constitutional interpretation: textualist and living constitutionalist. The former concentrates on the text at hand, as the *Gopalan case*[69] demonstrates. Under the textualist approach, the text and the intentions of the framers are decisive. However, the living constitutionalist method considers several variables to help interpret the text, even as it acknowledges the significance of the text. Scholars have added additional nuance to this interpretation method depending on the factors used.[70] In his book Constitutional Interpretation the author, Philip Bobbitt, describes six approaches to interpretation of the constitution that is, historical, textual, prudential, doctrinal, structural and ethical in his book. It is a continuation of his earlier book, Constitutional Fate..[71]The Supreme Court has gradually come to embrace a live constitutionalist philosophy. The constitutional text has been interpreted in a variety of ways. For example, it has been interpreted in light of liberal democratic ideals, which serve as the cornerstone of our text; it has also been interpreted in light of a variety of cultural, social, political and historical ethos surrounding our text.

One major concern is judicial supremacy, wherein courts, by striking down legislative enactments, may override the democratic will of the people and disturb the delicate balance between the organs of the State.[72]The tension between judicial activism and overreach further complicates this issue, as excessive judicial intervention in policy matters may amount to judicial legislation,

[68]Rameshwar Prasad v. Union of India, (2006) 2 SCC 1.
[69]Divisional Manager, Aravali Golf Club v. Chander Hass, (2008) 1 SCC 683.
[70]State of Haryana v. State of Punjab, (2002) 2 SCC 507.
[71]Common Cause (A Regd. Society) v. Union of India, (1999) 6 SCC 667.
[72]Hussainara Khatoon v. Home Secretary, State of Bihar, (1980) 1 SCC 81.

undermining the authority of elected representatives.[73]Moreover, the increasing trend of litigation and judicial interference in administrative decisions can lead to delays in governance, impeding timely implementation of governmental policies.[74]The judiciary's lack of direct accountability, since judges are unelected and enjoy security of tenure, raises concerns about the legitimacy of unelected bodies influencing public policy.[75]Additionally, the possibility of subjectivity in constitutional interpretation means that outcomes often depend on the individual philosophy or ideology of judges rather than consistent constitutional principles.[76] Such tendencies may result in a conflict with the doctrine of separation of powers, blurring the boundaries between legislative, executive, and judicial functions.[77]Critics also argue that the judiciary sometimes exhibits a conservative bias, showing reluctance to advance progressive or socio-economic reforms that require policy-level intervention.[78] Furthermore, resource constraints limit the judiciary's capacity to ensure effective enforcement of its rulings across the administrative spectrum.[79] The high cost of litigation similarly restricts access to judicial review, rendering it a privilege for those with sufficient means.[80] Finally, unpredictability arising from divergent judicial interpretations can create uncertainty in the law, thereby weakening the stability of constitutional governance.[81]Critics argue that judicial review risks transforming judges into unelected legislators. The doctrine of judicial overreach is often invoked when courts enter the policy-making domain.[82]

VI. Conclusion

The Constitution is a sacred and supreme legal document as well as a social

[73]Subramanian Swamy v. Director, CBI, (2014) 8 SCC 682.
[74]Divisional Manager, Aravali Golf Club v. Chander Hass, (2008) 1 SCC 683; where the Court cautioned against judicial encroachment into executive functions.
[75]State of West Bengal v. Anwar Ali Sarkar, AIR 1952 SC 75 : 1952 SCR 284.
[76]V. R. Krishna Iyer, Law and the People (1972) 3 SCC (Jour) 3.
[77]Dieter Grimm, Constitutional Adjudication and Constitutional Interpretation: Between Law and Politics," 4 N.U.J.S. L. Rev. 15 (2011).
[78]Anne Meuwese & Marnix Snel, Constitutional Dialogue: An Overview, 9(2) UTRECHT L. REV. 128 (2013), quoted in Gujarat Urja Vikas Nigam Ltd. v. Amit Gupta, 2021 INSC 163 (India).
[79]Leszek Garlicki, Constitutional Courts versus Supreme Courts 5(1) INT'L J. CONST. L. 44, 66 (2007).
[80] Gujarat Urja Vikas Nigam Ltd. v. Amit Gupta, 2021 INSC 163 (India).
[81]Jorge Farinacci-Fernós, Constitutional Courts as Majorsitarian Instruments, 14(4) I.C.L. J. 379, 382 (2020).
[82]Olga Tellis v. Bombay Mun. Corp., (1985) 3 S.C.C. 545 (India); Paschim Banga Khet Mazdoor Samity v. State of West Bengal, (1996) 4 S.C.C. 37 (India).

and political instrument that must be applied with wisdom to fulfil the constitutional vision of justice and remain practically workable. The theory behind judicial review recognizes that certain aspects of national life must remain beyond the control of shifting majorities or electoral outcomes. When conflicting truths arise, it is wiser to see them as complementary rather than exclusive. This process of balancing and reconciling opposing ideas extends beyond the legal system into broader spheres of human life.[83]

The rapid advancement of science and technology, including artificial intelligence, along with the interaction of economics, social sciences, and law, has a profound impact on political and legal institutions. These developments create new challenges and opportunities for judicial review, requiring its robust yet balanced exercise. To fulfil the role of constitutional trustees, courts must harmonize enduring constitutional values with the evolving realities of society, adapting from time to time to the changing conditions and needs of the worl[84] The legislators should recognise that judicial review is the safety valve that prevents authoritarianism from overpowering constitutionalism, and that the Constitutional Court is merely applying a necessary course correction when it strikes down or reads down any act of the legislature or the executive.

The Doctrine of Judicial Review remains the soul that animates the Indian Constitution and the silence tracker that deciphers its deeper meanings. It bridges the gap between the written text and the living society it governs. By interpreting, protecting, and sometimes reconstructing constitutional meaning, the judiciary ensures that India's constitutional democracy remains responsive, resilient, and rooted in justice. As Justice V. R. Krishna Iyer eloquently remarked, "The Constitution is not a mere lawyer's document; it is a vehicle of life."[85] It is therefore extremely important to accept the importance of judicial review and must be constantly valuated and readjusted.[86] The main command of the constitutional discourse between the court and the legislature is that they are on a substantive dialogue about the interpretation of the constitution, and both sides should listen to one another so as to gain insights on the views of the other..[87]

Shift from "negative legislators to constructive constitutional actor"[88]: The idea of separating powers can be applied more effectively when **all branches of government communicate and cooperate with each other**

[83]B.R. Ambedkar, *Constituent Assembly Debates*, vol. XI (25 November 1949).
[84]JUSTICE V.R. KRISHNA IYER, LAW AND THE PEOPLE 67 (Deep & Deep Publications 1980).
[85]Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225.

in a respectful and balanced way instead of acting in isolation.[89] The Court can tread the middle path between abdication and usurpation to ensure that arbitrariness, majoritarianism, authoritarianism and nepotism do not creep into the functioning of a democratic government.[90] In a welfare and transformative Constitution, the judiciary must wherever situation demands fill constitutional silences and enforce fundamental rights where the legislature fails to act.[91]

The central role of courts is to give expression to the constitutional silences through judicial review, thereby keeping the Constitution alive and relevant across generations. Judicial review enables the Constitution to function as a living document, without a sunset clause, capable of adapting to changing times. The true challenge lies in uncovering these silent provisions and evolving their meaning while embedding constitutionalism in all state actions, strengthening democratic values, and realizing the constitutional vision of justice within the limits of separation of powers. Ultimately, the strength of the Constitution lies not merely in its text but in its dynamic interpretation, and the effective enforcement of rights and duties depends on a strong judiciary sustained by public confidence.

Judicial review is an essential component of constitutional governance, justified by the need to protect certain fundamental aspects of national life from the will of shifting majorities or electoral outcomes. These enduring constitutional values are entrusted to the courts for preservation. The strength and survival of the Constitution lie not merely in its written text but in the faith of the people and the judiciary in its spirit, which forms the true soul of constitutional democracy.[92] In India, judicial power must be used wisely and fairly, because the best guarantee of justice lies in the integrity and character of the judge.[93] Such a personality can be developed only through constitutional discipline, and the power of judicial review must always be exercised within this framework.[94]

Bhopal Gas Tragedy: Four Decades of Justice and Corporate Accountability

Prof. Vinod Shankar Mishra*

Abstract

The Bhopal gas disaster (1984) remains the most searing illustration of how weak industrial governance, fragmented regulation, and corporate evasion can converge into large-scale human suffering. Forty years on, Bhopal is not only a historical catastrophe but a continuing public-health and environmental crisis with intergenerational impacts. This article traces India's legal-policy evolution from strict/absolute liability to a prevention-oriented, principle-driven regime (precautionary principle, polluter pays, sustainable development), the rise of specialized fora such as the National Green Tribunal, and the recent move toward graded civil penalties and administrative adjudication under the Jan Vishwas (Amendment of Provisions) Act, 2023 and the Water (Prevention and Control of Pollution) Amendment, 2024. Grounded in Article 21 and related directive principles, it evaluates consent systems, monitoring and disclosure, remediation finance, and survivor rehabilitation, while identifying persistent gaps in capacity, deterrence, and cross-border corporate accountability. It advances a risk-priced, people-centred governance model linking land-use discipline, real-time transparency, independent audits, and market-facing Environmental, Social and Governance (ESG) duties to credible sanctions and accessible no-fault compensation. It also sets out a practical reform agenda to align industrial growth with the non-negotiable right to life and a healthy environment.

Key Words: *Bhopal, Hazardous Industries, Article 21, Absolute Liability, Polluter Pays, Precautionary Principle, National Green Tribunal, Jan Vishwas, Administrative Penalties, Esg, Environmental Governance.*

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I. Introduction

The Bhopal tragedy is as much a constitutional story as an industrial one. A midnight leak of methyl isocyanate from the Union Carbide plant turned dense neighbourhoods into a gas chamber, killing thousands and injuring hundreds of thousands. Decades on, survivors continue to face chronic respiratory, neurological, ocular, reproductive, and mental-health morbidities. Groundwater and soil contamination around the abandoned site has added what activists call "the second disaster[1]." Bhopal therefore spans three planes: (i) immediate mass tort and compensation; (ii) long-tail health and environmental remediation; and (iii) structural reform of how the Indian state prevents and governs industrial risk.

This article offers a legal–policy reconstruction that pairs doctrinal clarity with institutional realism. Section 3 maps the shift from ad hoc responses to a principle-driven architecture that emerged after Bhopal and contemporaneous public interest litigation—anchored in absolute liability[2], polluter pays[3], precautionary principle[4], sustainable development[5], and the public trust doctrine[6]. Section 4 examines corporate accountability and state responsibility, including cross-border and successor liability, and the transition from penal to administrative enforcement. Section 5 distils the judiciary's role, especially the Supreme Court's movement from rights recognition to systems governance. Section 6 sets out a practical reform checklist: a risk-priced consent system; land-use and siting discipline; real-time disclosure and community right-to-know; independent audits; survivor-centred health financing; and credible, swiftly administered sanctions. Recent reforms mark another turn. Recognising

[1]Bhopal Medical Appeal, "Bhopal's Second Disaster: The Facts" (briefing paper), available at https://www.bhopal.org/continuing-disaster/second-poisoning/bhopal-second-poisoning/water-contamination-briefing-paper/ (accessed 30 Oct 2025); Colin Toogood, "The Second Bhopal Disaster," Crisis Response Journal 10(2) (Dec. 2014): 48–50; Rachna Dhingra & Madhumita Dutta, "Neend Udaao Andolan: Bhopali women's responses to the ongoing environmental and health disaster surrounding the abandoned Union Carbidse factory, Bhopal, India," Gender & Development 32(3) (2024): 727–748, doi: 10.1080/13552074.2024.2415248; also available at Oxfam Policy & Practice, posted 12 Feb 2025 (accessed 30 Oct 2025).

[2]M.C. Mehta v. Union of India (Oleum Gas Leak), 1987 SC 1086 (absolute liability for hazardous industries; departure from Rylands v. Fletcher).

[3]Vellore Citizens' Welfare Forum v. Union of India, (1996) 5 SCC 647.

[4]Ibid.

[5]Ibid.

[6]M.C. Mehta v. Kamal Nath, (1997) 1 SCC 388 (public trust doctrine).

that criminal prosecution alone is slow and often ineffective, Parliament has begun to move routine non-compliance towards administrative adjudication and graded civil penalties (for example, the Jan Vishwas (Amendment of Provisions) Act, 2023 and the Water (Prevention and Control of Pollution) Amendment Act, 2024 aiming for quicker, predictable sanctions while reserving imprisonment for wilful or repeat offences[7].

Two framing propositions guide this work. First, Article 21's guarantee of life and personal liberty includes the right to pollution-free air and water, as well as freedom from avoidable technological risks. Secondly, doctrines matter only if institutions can deliver them. India's success in governing hazardous industries will turn on the nuts-and-bolts of administration—staffing, laboratories, inspection cadence, data systems, and the political economy of enforcement—not on elegantly phrased norms alone.

II. Historical Background: Bhopal and the Evolution of Hazardous-Industry Regulation

Before delving into doctrinal and institutional shifts, it is essential to situate the Bhopal disaster within its historical and regulatory context. The tragedy did not occur in a legal vacuum, but rather against a backdrop of fragmented environmental statutes, limited industrial safety oversight, and minimal public awareness of chemical hazards. In many ways, Bhopal became the crucible in which India's environmental jurisprudence, administrative systems, and constitutional doctrines on industrial accountability were forged. The evolution that followed—spanning liability principles, statutory reforms, and judicial creativity—illustrates how a single catastrophe transformed the trajectory of environmental governance in India[8].

[7]On administrative adjudication and graded civil penalties: Environment (Protection) Act, 1986, Ss. 15C–15E (Adjudicating officer; appeal; penalties credited to Environmental Protection Fund) as inserted by the Jan Vishwas (Amendment of Provisions) Act, 2023; The Air (Prevention and Control of Pollution) Act, 1981, Ss. 39A–39C (Adjudicating officer; appeal; credit to EPF); The Water (Prevention and Control of Pollution) Act, 1974, S. 45B (Adjudicating officer) and substituted Ss. 41, 41A (civil penalties).

[8]See M.C. Mehta v. Union of India (Oleum Gas Leak), (1987) 1 SCC 395 (foundational absolute liability); Vellore Citizens' Welfare Forum v. Union of India, (1996) 5 SCC 647 (precautionary principle; polluter pays; sustainable development); Indian Council for Enviro-Legal Action v. Union of India, (1996) 3 SCC 212; (2011) 8 SCC 161 (remediation/restoration under polluter pays); The Environment (Protection) Act, 1986, Ss. 3, 5–6 (central rule-making and directions); The Public Liability Insurance Act, 1991, Ss. 3–4, 7A (no-fault relief; Environment Relief Fund); Manufacture, Storage and Import of Hazardous Chemical Rules, 1989; EIA Notification, 2006 (S.O. 1533(E)); The National Green Tribunal Act, 2010, Ss. 14–20 (specialised forum/jurisdiction).

A. From catastrophe to principle

In the decade following Bhopal, Indian environmental law underwent a rapid conceptual expansion. Through public interest litigation, the Supreme Court read environmental quality into Article 21, acknowledging that the right to life implies a right to clean air and water[9]. In parallel, the Court articulated a distinctly Indian doctrine of absolute liability for enterprises engaged in hazardous or inherently dangerous activities—the obligation to compensate for harm without proof of fault or negligence, coupled with a non-delegable duty of care (departing from the narrower *Rylands v. Fletcher* strict-liability[10] rule). The Court further held that harm from such activities forms part of the "social cost" of doing business, which the enterprise must absorb as an item of overheads, with the quantum of compensation linked to the magnitude and capacity of the enterprise[11]. In the Bhopal proceedings, the Court also warned against "exploitative and hazardous industrial adventurism," underscoring the State's obligation to maintain an adequate legal system to protect citizens[12].

Polluter pays, precautionary principle, and sustainable development soon joined absolute liability as the jurisprudential quartet structuring environmental adjudication. Polluter pays moved beyond damages to include remediation and restoration costs[13]; precaution shifted the burden of proof to industry to show safety ex ante[14]; sustainable development insisted that economic claims account for ecological limits and intergenerational equity[15].

Although the doctrine of absolute liability crystallised in the wake of Bhopal, the broader framework of polluter pays, the precautionary principle, and sustainable development evolved through the early 1990s and was firmly articulated by the Supreme Court in the mid-1990s.

B. Building the statutory scaffolding

Legislation prior to Bhopal—the Water (Prevention and Control of Pollution)

[9]Subhash Kumar v. State of Bihar, (1991) 1 SCC 598 (right to enjoyment of pollution-free water and air under Article 21).
[10]Rylands v. Fletcher (1868) LR 3 HL 330.
[11]M.C. Mehta v. Union of India (Oleum Gas), AIR 1987 SC 1086,1099.
[12]AIR 1990 SC 273 (order dated 4 May 1989)
[13]Indian Council for Enviro-Legal Action v. Union of India, (1996) 3 SCC 212; followed in (2011) 8 SCC 161 (remediation/restoration costs; liability).
[14]M.C. Mehta (Badkhal and Surajkund Lakes Matter) v. Union of India, (1997) 3 SCC 715 — Follow-up directions to protect the lakes; reiterated that only a very small area, if at all, could be permitted for tourism/recreation with prior approvals.
[15]Narmada Bachao Andolan v. Union of India, (2000) 10 SCC 664.

Act, 1974 and the Air (Prevention and Control of Pollution) Act, 1981—created boards and consent regimes but lacked teeth and integration[16]. Post-Bhopal, the Environment (Protection) Act, 1986, emerged as an umbrella enabling statute, empowering the Union government to set rules and standards across air, water, and land—and across sectors (see ss. 3, 5–6)[17]. Public Liability Insurance Act, 1991 (PLIA) creates a fast, no-fault route[18] for immediate relief after accidents involving hazardous substances: the unit must carry insurance, the District Collector processes claims summarily, and payouts can draw on the Environment Relief Fund (ERF)[19]. This does not replace civil claims or NGT-ordered restoration; it bridges the gap until fuller compensation and clean-up are secured. Its limits—statutory caps and narrow focus on immediate injury/property loss—mean PLIA should be paired with EPA/NGT remedies for remediation and long-term health surveillance.

Policy instruments complemented the statutes—Minimum National Standards (MINAS) under the Environment (Protection) Rules, 1986 (Schedule VI), the Environmental Impact Assessment Notification, 2006 (S.O. 1533(E)), siting guidelines, major-hazard rules, and, later, continuous online monitoring requirements for specified industries (Online Continuous Emissions/Effluents Monitoring Systems—OCEMS)[20]

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[16]lacked teeth" (enforcement) and "lacked integration" (fragmented design): The Water (Prevention and Control of Pollution) Act, 1974, ss. 25–26 (consent to establish/operate), ss. 41–45 (criminal offences—no swift civil penalties in the original text); The Air (Prevention and Control of Pollution) Act, 1981, s. 21 (consent), ss. 37–39 (criminal offences). Pre-1986, there was no cross-media umbrella; coordination and stronger rule-making came with the Environment (Protection) Act, 1986, ss. 3, 5–6, later supported by the MSIHC Rules, 1989, and the Chemical Accidents Rules, 1996.

[17]The Environment (Protection) Act, 1986—see ss. 3, 5–6 (rule-making; directions including closure, prohibition, or regulation).

[18]The Public Liability Insurance Act, 1991, ss. 3–4 (no-fault liability; duty to take out insurance).

[19]Environment Relief Fund—The Public Liability Insurance Act, 1991, s. 7A; Environment Relief Fund Scheme, 2008

[20]Environment (Protection) Rules, 1986, Sch. VI (MINAS: general and industry-specific air/effluent standards); EIA Notification, 2006 (S.O. 1533(E)) (prior environmental clearance; screening/scoping; public consultation; appraisal); Manufacture, Storage and Import of Hazardous Chemical Rules, 1989 (safety reports; on-site/off-site emergency plans; threshold quantities—Schs. I–III); Chemical Accidents (Emergency Planning, Preparedness and Response) Rules, 1996 (off-site plans; Central/State/District Crisis Groups); Central Pollution Control Board (CPCB) directions on OCEMS (mandatory online continuous emissions/effluents monitoring for specified sectors).

The statutory consent architecture—principally Sections 25–27 and 27A of the Water (Prevention and Control of Pollution) Act, 1974 and Sections 21-21A of the Air (Prevention and Control of Pollution) Act, 1981—anchors State control over hazardous industrial operations[21]. These provisions require prior consent to establish and operate, empower regulators to impose conditions, collect samples, and revoke authorisations, and criminalise non-compliance. Yet, as Bhopal and subsequent industrial accidents show, consent processes often devolve into paperwork rather than ongoing risk assessment and process-safety verification. Modern governance, therefore, requires consent to be a living mechanism linked to third-party safety audits, real-time emissions data, automated alerts, and community-accessible dashboards.

C. From punishment to prevention—and now to compliance orchestration

If the 1980s and early 1990s were about establishing rights and liability, the following decades tended toward institutionalisation: specialised green benches culminating in the National Green Tribunal under the NGT Act, 2010 (jurisdiction and powers: ss14–20); tighter emissions norms; and court-supervised clean-up and compliance programmes[22]. The 2010s and 2020s have added a further turn: administrative adjudication and graded civil penalties, seeking speed, predictability, and deterrence without the latency of criminal prosecution for minor infractions—the Jan Vishwas (Amendment of Provisions) Act, 2023 and the Water (Prevention and Control of Pollution) Amendment Act, 2024 exemplify this shift.[23] This does not abandon prosecutions. Rather, it adopts a triage model: prosecutions are limited to wilful, recidivist, or catastrophic harm, while routine non-compliance draws swift, risk-priced administrative penalties.

D. The unfinished agenda

Despite these advances, familiar weaknesses persist: reactive inspections,

[21]The Water (Prevention and Control of Pollution) Act, 1974, S. 27A (2024): Central Government may issue binding directions to State Boards and prescribe uniform consent standards, monitoring protocols, and compliance-verification (including digital trails/third-party certification). The Air (Prevention and Control of Pollution) Act, 1981 Act, S. 21A (2023): Central Government may frame rules for consent conditions, technology-based continuous emission monitoring and digital reporting, and intervene where State implementation is deficient.

[22]See section 18 of the The Water (Prevention and Control of Pollution) Act, 1974 and CPCB directions on Online Continuous Emissions/Effluents Monitoring Systems (OCEMS/CEMS).

[23]The Jan Vishwas (Amendment of Provisions) Act, 2023; The Water (Prevention and Control of Pollution) Amendment Act, 2024 (introducing adjudicating-officer model and graded civil penalties).

understaffed boards, limited laboratory capacity, poor data discipline, and fractures between central and state authorities. Survivors' movements—often led by women—kept Bhopal in public consciousness and pushed for clean water supply, hospital resourcing, site remediation, and transparent accounting of claims[24]. The enduring lesson is that prevention cannot be outsourced to litigation; it must be embedded into design, siting, operations, and disclosure—using instruments such as the Manufacture, Storage and Import of Hazardous Chemical Rules, 1989; the Chemical Accidents (Emergency Planning, Preparedness and Response) Rules, 1996; Factories Act provisions on major accident hazards; and CPCB siting guidance[25].

E. Corporate Accountability and State Responsibility

The transformation of India's environmental governance after Bhopal was not only institutional but also moral. It forced a rethinking of how corporate entities and the State share responsibility for industrial hazards. The tragedy revealed deep fissures in regulatory vigilance, the asymmetry of power between transnational corporations and affected communities, and the inadequacy of existing compensation mechanisms[26]. Over time, this led to a redefinition of accountability—from punitive blame and ex gratia relief toward structured liability, restoration, and preventive responsibility[27]. Against this backdrop, the liability architecture that emerged reflects the country's gradual shift from compensation alone to a broader obligation of environmental restoration and long-term care.

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[24]Goldman Environmental Prize, 'Rashida Bee & Champa Devi Shukla' (Laureate profile, 2004), available at: https://www.goldmanprize.org/recipient/rashida-bee-champa-devi-shukla/ (Last visited: Nov 2, 2025); Bridget Hanna, "Bhopal: Unending Disaster, Enduring Resistance," in Michel Feher (ed.), Nongovernmental Politics 488–523 (Zone Books, New York, 2007); Amnesty International, 'Clouds of Injustice: Bhopal Disaster 20 Years On' (AI Index: ASA 20/015/2004, London, 2004); Amnesty International, 'Injustice Incorporated: Corporate Abuses and the Human Right to Remedy' (POL 30/001/2014, London, 2014); International Campaign for Justice in Bhopal (ICJB), 'Our Demands', available at: https://www.bhopal.net/our-demands/ (Last visited: Nov 2, 2025).

[25]Factories Act, 1948, Ch. IV and state rules under s 41B (major accident hazards; safety/health).

[26]Research Foundation for Science, Technology and Natural Resource Policy v. Union of India (Ship-Breaking), (2007) 16 SCC 186 — hazardous waste handling; compliance costs and safeguards placed on operators.

[27]Goa Foundation v. Union of India, (2014) 6 SCC 590 — intergenerational equity; creation of funds for ecological restoration from extractive industry revenues.

F. The Settlement and Its Limits (1989)

The 1989 settlement approved by the Supreme Court (orders dated 14–15 February 1989) delivered quick relief to some families but capped the company's liability and shifted the struggle from courts to claims processing. This outcome reflected a humanitarian settlement on quantum rather than an adjudication under Absolute Liability; later orders clarified that the doctrine remained intact for future litigation. Many survivors argue that a lump-sum model could not capture delayed illnesses, under-reported exposure, or the true cost of long-term care. Later review proceedings clarified that the Court did not reject M.C. Mehta's liability doctrine; it only treated the settlement as a practical response to an urgent humanitarian crisis. The result, however, was that "full and final" language narrowed room for future claims and placed a heavy burden on administrative schemes to do justice[28]. The 1989 compromise produced finality and cash flow, not a Mehta-based damages judgment. Later benches reiterated that Absolute Liability governs hazardous enterprises, but Bhopal's quantum cannot be retrofitted through curative jurisdiction[29].

G. Criminal Accountability: From Promise to Paralysis

The criminal track began soon after the leak but has moved unevenly. Charges were diluted over time, and eventual convictions of some officials carried limited sentences. Key questions—parent-company responsibility, extradition of foreign accused, and the State's duty to pursue serious offences in mass-harm events—remained unresolved or stalled. The slow pace reduced deterrence and signalled that corporate crime in complex disasters risks being treated as ordinary negligence rather than as a grave public wrong[30]. The critique here is not of criminal law's legitimacy, but of its slow and diluted application in complex corporate disasters.

H. The Curative Petition and the Question of Finality (2023)

Decades later, the Union sought additional compensation through a curative petition, arguing that the original settlement underestimated injuries and environmental damage. In 2023, the Supreme Court declined to reopen the settlement, stressing finality and the government's role in the terms agreed. This outcome shows a structural issue: when a global compromise is sealed without a strong scientific baseline on exposure and health effects, revisiting

[28]Union Carbide Corporation v. Union of India, (1989) 1 SCC 674,676.
[29]Infra note 60.
[30]Union Carbide Corporation v. Union of India, AIR 1992 SC 248,309.

it becomes legally and politically difficult even when later evidence suggests deeper harm[31].

I. Health Surveillance: The Unfinished Agenda

Survivors continue to report chronic respiratory disease, ocular damage, reproductive disorders, mental-health impacts, and multi-system illnesses. A durable public-health response needs (i) a registry of all exposed persons with unique IDs, (ii) standard treatment protocols across government hospitals, (iii) periodic cohort studies tracking morbidity and mortality, and (iv) portable benefits so care follows the patient across States and workplaces. These steps are essential for fair compensation and targeted rehabilitation[32].

J. Second-Generation and In-Utero Exposure

Studies indicate possible congenital anomalies and developmental delays among children born to exposed parents, but monitoring is uneven. Law and policy should recognise inter-generational harms by funding paediatric screening, neuro-developmental therapy, nutritional support, and scholarships. Financing should come from a dedicated health and remediation fund consistent with the polluter-pays principle, with transparent governance and community oversight[33].

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[31]Infra note 60

[32]Report on Population Based Long Term Epidemiological Studies on the Health Effects of Bhopal Toxic Gas Exposure (1985 – 1994)', available at: https://nireh.icmr.org.in/docs/Long%20Term%20Epidemiological%20Studies.pdf (Last visited: Nov 2, 2025); V R Dhara & D Kriebel, 'The Union Carbide Disaster in Bhopal: A Review of Health Effects' (2002) 57(5) Archives of Environmental Health: An International Journal 391–404, available at: https://pubmed.ncbi.nlm.nih.gov/12641179/ (Last visited: Nov 2, 2025); E Broughton, 'The Bhopal Disaster and Its Aftermath: A Review' (2005) 4(6) Environmental Health Perspectives 6, available at: https://pubmed.ncbi.nlm.nih.gov/15882472/ (Last visited: Nov 2, 2025); Amnesty International, 'Clouds of Injustice: Bhopal Disaster 20 Years On' (AI Index: ASA 20/015/2004, London, 2004); Amnesty International, 'Bhopal: 40 Years of Injustice' (News Release, 2 Dec. 2024), available at: https://www.amnesty.org/en/documents/asa20/7817/2024/en/ (Last visited: Nov 2, 2025); Sambhavna Trust Clinic, 'About Sambhavna' (Webpage, n.d.), available at: https://sambhavnabhopal.org/about-sambhavna/ (Last visited: Nov 2, 2025).

[33]ICMR–National Institute for Research in Environmental Health (NIREH), 'Health Effects of the Toxic Gas Leak from the Union Carbide Factory, Bhopal: Long-Term Epidemiological Studies (ICMR, various rounds, cohort follow-ups)', available at: https://nireh.icmr.org.in/MIC%20Report.php (Last visited: Nov 2, 2025); B. B. Ganguly et al., 'Effect of age at exposure on chromosome abnormalities in MIC-exposed Bhopal population detected 30 years post-disaster' (2018) 809 Mutation Research 32–50, available at: https://pubmed.ncbi.nlm.nih.gov/29684722/ (Last visited: Nov 2, 2025); G. C. McCord et al., 'Long-term health and human capital effects of in utero exposure to the Bhopal gas disaster' (2023) 13(6) BMJ Open e066733, available at: https://bmjopen.bmj.com/content/13/6/e066733 (Last visited: Nov 2, 2025); Amnesty International, 'Bhopal: 40 Years of Injustice' (Report, AI Index: ASA 20/7817/2024, 2024), available at: https://www.amnesty.org/en/documents/asa20/7817/2024/en/ (Last visited: Nov 2, 2025); Vellore Citizens Welfare Forum v Union of India (1996) 5 SCC 647 (SC), available at: https://api.sci.govin/jonew/judis/15202.pdf (Last visited: Nov 2, 2025).

K. Environmental Remediation and Site Safety

Human injury cannot be addressed in isolation from the contaminated site. Authorities should publish inventories of stored waste, soil and groundwater test results, and a time-bound clean-up plan. Remediation must follow clear standards, third-party audits, and community monitoring until exposure pathways are fully closed. Without verified clean-up, low-dose exposures may continue for years, undermining "closure" and public trust[34].

III. Corporate Accountability, Enforcement Mechanisms, and Innovative Responses

The Bhopal disaster did more than expose regulatory gaps—it fundamentally reshaped the discourse on corporate accountability in India. While the early years were dominated by questions of compensation and criminal culpability, the evolving jurisprudence since M.C. Mehta (Oleum Gas Leak) and subsequent environmental cases has broadened the inquiry towards systemic responsibility, preventive obligations, and the duty to restore affected communities and ecosystems. This section, therefore, moves from the historical experience of Bhopal to the wider legal framework that governs hazardous industries today, examining how liability norms, enforcement mechanisms, and judicial innovations seek to address both immediate harms and long-term public health and environmental consequences.

A. Liability architecture: from compensation to restoration

Absolute liability for hazardous enterprises remains the doctrinal backbone, aligning with polluter pays to authorise compensation, remediation, and restoration costs.[35] Over time, courts have clarified that "compensation" is not limited to individual tort damages; it includes the costs of returning commons—air, water, soil—to pre-injury baselines, as well as funding for health surveillance of affected populations.[36]

To operationalise polluter pays, orders should state the method of calculating environmental compensation, including (i) quantification of ecological injury

[34]Amnesty International, 'Bhopal: 40 Years of Injustice' (Report, AI Index: ASA 20/7817/2024, 2024), available at: https://www.amnesty.org/en/documents/asa20/7817/2024/en/ (Last visited: Nov 2, 2025).

[35]Supra note 13

[36]Indian Council for Enviro-Legal Action v. Union of India (1996) 3 SCC 212 (polluter pays; remediation costs); Vellore Citizens' Welfare Forum v. Union of India (1996) 5 SCC 647 (polluter pays; precautionary principle); M.C. Mehta v. Union of India (1997) 2 SCC 353 (monitoring; restoration duty).

and restoration costs; (ii) time-value adjustments for delayed compliance; and (iii) disgorgement of economic gains from illegality (e.g., operating without consent or disabling control systems). A published penalty/compensation grid aligned to hazard category and enterprise capacity would improve predictability and deterrence, while keeping judicial discretion for egregious facts.

B. Successor responsibility and cross-border gaps

Bhopal exposed a structural problem: multinational parent entities and successors can shield themselves from host-state jurisdictional reach. While company law recognises successor liability in principle, enforcing it across borders relies on treaties, comity, and the willingness of home jurisdictions to cooperate.[37]The Bhopal case also exposes a wider gap in international law: there is no binding global mechanism to hold companies liable across borders for industrial disasters. In the absence of a mandatory civil liability regime, enforcement depends on domestic law and cross-border cooperation. Soft-law instruments—such as the UN Guiding Principles on Business[38] and Human Rights and the OECD Guidelines for Multinational Enterprises[39]—offer direction but have limited enforceability.

A practical way to organise accountability is to spell out when Indian courts can reach foreign parent companies and when the corporate veil may be set aside. Jurisdiction should follow control: where a parent directs or closely supervises hazardous operations here, or the group functions as one integrated enterprise, courts can take notice of that reality. In exceptional cases of environmental mass harm, a narrowly framed veil-piercing rule—and successor liability where the same business and assets continue in substance—would close obvious escape routes while keeping ordinary corporate separateness intact.

Cross-border enforcement should then move on well-marked tracks. The Code of Civil Procedure already provides a route for decrees from reciprocating

[37]Dow acquired UCC as a wholly owned subsidiary on Feb. 6, 2001. Indian courts have since issued summons in Bhopal-related proceedings while Dow has contested jurisdiction; and the Supreme Court in March 2023 dismissed the Union's curative petition to reopen the 1989 settlement—illustrating both the principle of successor liability in theory and the practical limits of cross-border enforcement in fact.

[38]United Nations Human Rights Council, Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, UN Doc. A/HRC/17/31 (21 March 2011), endorsed by UN HRC Res. 17/4 (16 June 2011).

[39]OECD, OECD Guidelines for Multinational Enterprises on Responsible Business Conduct (Paris: OECD Publishing, 2023) (adopted 1976; updated 2000, 2011, 2023).

territories (sections 13–14, 44A), and the Arbitration and Conciliation Act, 1996 enables enforcement of New York Convention awards under Part II. Clear court practice directions can prioritise environmental claims and trim repetitive proceedings, so victims do not have to fight the same battle at every stage simply to turn a decision into real relief.

Finally, risk needs to be priced in at the point of entry. Project approvals for hazardous activity should require disclosure of foreign liabilities and any legacy contamination, and should be backed by escrow or environmental bonds sized to the project's risk and the operator's capacity. For listed companies, securities-market disclosure—such as SEBI's BRSR[40] Core—should flag contingent environmental liabilities and set out credible funding for clean-up and long-term care, so regulators and investors can see whether the promises on paper are matched by resources on hand.[41]

This three-lever design makes cross-border accountability operational: assert jurisdiction when warranted, ensure judgments travel, and lock in funds upfront so remediation and survivor-centred relief are actually delivered.

C. From criminalisation to graded civil penalties

India's environmental statutes long relied on prosecution for deterrence. Experience showed that over-criminalisation with low conviction rates and prolonged trials did not produce compliance. The emerging model—reflected in the Jan Vishwas (Amendment of Provisions) Act, 2023 and the Water (Prevention and Control of Pollution) Amendment Act, 2024—is to reserve imprisonment for egregious, wilful, or repeat violations while moving routine infractions to administrative penalties imposed by designated adjudicating officers, with appeals to specialised tribunals such as the NGT. Properly designed, this risk-priced approach aligns sanction severity with hazard profile and enterprise capacity, improves speed, and preserves criminal law for genuinely culpable conduct. Clear guidelines on penalty quantification and due-process safeguards should be issued to avoid arbitrariness.

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[40]It refers to the core set of Key Performance Indicators (KPIs) prescribed by SEBI under the Business Responsibility and Sustainability Report (BRSR) framework for listed companies in India. These core metrics focus on ESG-linked disclosures, including supply-chain due diligence, emissions, workforce practices, and community impact.

[41]For successor and cross-border accountability issues generally, see The Code of Civil Procedure, 1908, s. 13 (conclusiveness of foreign judgments and grounds for refusal), s. 44A (execution of decrees from reciprocating territories); The Arbitration and Conciliation Act, 1996, Part II (Enforcement of Foreign Awards, specifically s. 48 on grounds for refusal).

D. Siting, Land-Use Planning, and ALARP (As Low As Reasonably Practicable)

Bhopal's density amplified harm. Hazard management begins not at the factory gate but on the land-use map. A modern regime embeds siting discipline—no new major-accident-hazard units in dense urban precincts without defensible risk modelling; buffer/green belts; off-site emergency plans with credible evacuation capacity; and routine, drill-verified readiness. The operational standard should be ALARP (as low as reasonably practicable)—that is, risk reduced until further reduction would be grossly disproportionate to the sacrifice required—supported by independent third-party safety audits and public consultation[42].

E. Disclosure, data, and the people's right-to-know

Deterrence improves when communities can see[43]. A comprehensive right-to-know framework should include (i) public chemical inventories; (ii) online real-time emissions (air/water) from OCEMS; (iii) incident and near-miss reporting; and (iv) neighbourhood-level hazard mapping and siren/SMS alert protocols. These are not merely transparency tools; they are preconditions for informed risk governance and credible emergency response[44].

F. Survivor-centred remedies

Regulatory closure after an accident is not the end of justice. A mature system provides medical-surveillance registries, funded clinics, inter-generational health research, and no-fault compensation that is swift, simple, and adequate. Orders and settlements should specify the accountable administrative node (e.g., District Collector or a dedicated portal), time-bound disbursal, and public dashboards tracking claims in real time. Statutes and schemes already enable

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[42]Amnesty International, 'Bhopal: 40 Years of Injustice' (Report, AI Index: ASA 20/7817/2024, 2024), available at: https://www.amnesty.org/en/documents/asa20/7817/2024/en/ (Last visited: Nov 2, 2025).

[43]Manufacture, Storage and Import of Hazardous Chemical Rules, 1989 (safety reports; emergency plans; thresholds). See also; Amnesty International, 'Bhopal: 40 Years of Injustice' (Report, AI Index: ASA 20/7817/2024, 2024), available at: https://www.amnesty.org/en/documents/asa20/7817/2024/en/ (Last visited: Nov 2, 2025).

[44]See the Chemical Accidents (Emergency Planning, Preparedness and Response) Rules, 1996—requiring off-site emergency plans, crisis groups, and district-level mechanisms; and the Environmental Impact Assessment Notification, 2006, S.O. 1533(E)—mandating prior appraisal and public consultation before project commencement.

parts of this (The Public Liability Insurance Act[45]; Environment Relief Fund; NGT's remedial powers); they should be made routine in orders and settlements[46].

Mass-exposure incidents demand a survivor-centred health statute: life-long registries, periodic screening protocols, cause-linked treatment packages, and funding that blends PLIA/ERF with dedicated budget lines. Orders should designate a single administrative node (e.g., the District Collector) for claims and care coordination, with public dashboards on registrations, disbursals, and health outcomes. This anchors constitutional relief in durable administration rather than episodic litigation.

G. From Strict to Absolute Liability—and Why It Matters After Bhopal

Rylands v. Fletcher tied liability to "non-natural use" and allowed several defences. In M.C. Mehta (Oleum Gas Leak) (1987), the Supreme Court adopted an Indian rule: enterprises engaged in hazardous activity owe an absolute, non-delegable duty to prevent harm; classic defences do not apply. The Bhopal settlement (1989) avoided a full merits ruling on quantum. In the mid-1990s, the Court firmly articulated the polluter-pays and precautionary principles (alongside sustainable development), confirming that absolute liability and polluter-pays are part of Indian law. This framework supports full remediation and survivor-centred relief in comparable toxic disasters.

H. Polluter Pays in Practice: Compensation + Restoration (with a Survivors' Grid)

Courts interpret polluter pays to cover two heads: (A) compensation to individuals for injury, loss of earnings, and disability; and (B) restoration/remediation of the commons—air, water, and soil—back to pre-injury baselines, including health surveillance and safe water. A practical way to deliver this is a graded Survivors' Health and Compensation Grid linking (i) exposure zones, (ii) certified conditions, and (iii) disability levels. Benefits should combine a base amount, a disability add-on, and periodic review where health worsens.

[45]The Public Liability Insurance Act, 1991, ss. 3–4 — imposes no-fault liability (s. 3) and requires owners handling hazardous substances to maintain insurance cover (s. 4).

[46]Environment Relief Fund and the NGT's remedial jurisdiction under the NGT Act, 2010—ss. 15 (relief, compensation, restitution) and 17 (liability to pay)—should be applied as a routine in orders and settlements, with directions framed in light of the Environment (Protection) Act, 1986, as amended by the Jan Vishwas Act, 2023, where s. 16 now establishes the Environmental Protection Fund and ss. 15A & 15E provide for company penalties and crediting of penalties to that Fund.

The grid can be notified by rules under the Environment (Protection) Act or under a special scheme, with an independent medical appeals board to reduce repetitive litigation. Financing should draw on ring-fenced remediation and health funds consistent with polluter pays, administered with transparent community oversight[47].

I. Measuring Harm at Scale: Epidemiology, Presumptions, and Burden-Shifting

Individual proof of causation is hard when exposure is mass, mixed, and long-tailed. Claims authorities can rely on epidemiology—exposure levels, relative risk, dose-response—to define presumptions of causation for listed diseases. Where a listed disease is diagnosed in an exposure zone, the burden should shift to the enterprise to rebut. This approach aligns with constitutional tort principles and internalises the social cost of hazardous activity[48].

J. Designing a Survivors' Health and Compensation Grid

A practical model is a graded grid linking (a) exposure zones, (b) certified conditions, and (c) disability levels. Benefits can combine a base amount, a disability add-on, and periodic review if health worsens. The grid should be notified through statutory rules[49] (e.g., under the Environment (Protection)

[47]Indian Council for Enviro-Legal Action v. Union of India, (1996) 3 SCC 212; (2011) 8 SCC 161 (remediation/restoration)

[48]ICMR–NIREH, Health Effects of the Toxic Gas Leak from the Union Carbide Factory, Bhopal: Long-Term Epidemiological Studies (technical report; population-based cohorts, exposure–disease linkages, periodic follow-ups); G C McCord et al., 'Long-term health and human capital effects of in utero exposure to the Bhopal gas disaster' (2023) BMJ Open 13(6): e066733; B B Ganguly et al., 'Effect of age at exposure on chromosome abnormalities in MIC-exposed Bhopal population detected 30 years post-disaster' (2018) Mutation Research 809: 32–50; The Public Liability Insurance Act, 1991, ss 3–4, 7A (no-fault relief; duty to insure; Environmental Relief Fund); Public Liability Insurance Rules, 1991, r 11 (owner's ERF contribution equal to, and payable with, the premium).

[49]The Environment (Protection) Act, 1986, ss 3(1), 3(3), 6 (rule-making power; creation of implementing authorities); Bhopal Gas Leak Disaster (Registration and Processing of Claims) Scheme, 1985 (category-wise registration; appeals to Additional Commissioner) (Govt of India, 1985); The Employees' Compensation Act, 1923, Sch I (percentages of loss of earning capacity for graded benefits); Employees' State Insurance Act, 1948, s 55 (review by Medical Board on aggravation—periodic reassessment); The Rights of Persons with Disabilities Act, 2016, ch X (guidelines, certifying authorities, and appeals in disability certification) and DEPwD Guidelines for Assessment (latest notified); UDID programme (unique disability ID and portability of benefits); cf NDMA guidelines on chemical emergencies/medical management (surveillance and zonation in mass-exposure events

Act) or a special scheme, with an independent medical appeals board to avoid repetitive litigation.

K. Insurance and Risk-Pricing for Hazardous Industries

Mandatory environmental liability insurance exists, but it is often too small for catastrophic losses. A stronger model would require (i) compulsory primary coverage, (ii) an excess-of-loss pooled reinsurance layer across hazardous sectors, and (iii) a public backstop for ultra-catastrophic events funded by risk-rated levies. Premiums should reflect actual risk, so firms invest in prevention and continuous monitoring[50].

IV. Response of the Judiciary to Hazardous Industries in India

The Indian judiciary's engagement with hazardous industries evolved through distinct but interrelated phases. Each phase reflected not only the Court's response to particular crises but also a deepening understanding of constitutional environmentalism

A. Phase I (1980–1990) — Genesis of Environmental Jurisprudence: The Post-Bhopal Catalyst

Prior to the mid-1980s, India relied largely on common-law principles, notably the doctrine of strict liability from Rylands v Fletcher. In M.C. Mehta (Oleum Gas Leak), the Supreme Court articulated absolute liability and also advanced the capacity-linked compensation rationale: the quantum of compensation must be proportionate to the magnitude and financial capacity of the enterprise to ensure deterrence—"the larger and more prosperous the enterprise, the greater must be the amount of compensation payable by it[51]. This reliance

[50]The Public Liability Insurance Act, 1991, ss 3–4, 7A (mandatory insurance; Environmental Relief Fund); Public Liability Insurance Rules, 1991, r 11 (owner contribution to ERF equals premium); Public Liability Insurance (Amendment) Rules, 2024, r 10 (substituted) (raising the overall limit under s 4(2A) to ₹ 250 crore per incident and ₹ 500 crore aggregate per policy year); IRDAI, Circular on the Indian Market Terrorism Risk Insurance Pool (IMTRIP) (2019) (pool structure); GIC Re, IMTRIP Reinsurance Programme—EOI (12 Feb 2025) (pool management and renewal); Price–Anderson Act, 42 U.S.C. § 2210; see also NRC, Report to Congress on the Price–Anderson Act (2021) and CRS, Price–Anderson Act: Nuclear Power Industry Liability Limits (2025). For critiques of low limits and coverage design, see T R Subramanya & Aaditya Dighe, 'Public Liability Insurance: Its Relevance, Application, Shortcomings and the Way Forward' (2018) JELPD 5; cf Amnesty International, Clouds of Injustice: Bhopal Disaster 20 Years On (2004).

[51]Post Mehta jurisprudence treats environmental harm as a social cost to be internalised by hazardous enterprises; deterrence is a legitimate aim. Union Carbide Corporation v. Union of India AIR 1990 SC 273,283.

proved catastrophically insufficient when tested by the 1984 Bhopal Gas Disaster. The handling of the Bhopal tragedy, particularly the final settlement of $470 million upheld by the Supreme Court in 1991[52], drew widespread criticism. The review judgment upheld the settlement and clarified that compromise cannot quash criminal proceedings[53].

Victim support organizations pointed out that this amount, when distributed among over 550,000 successful claims for death and injury, resulted in "paltry" compensation for the victims, galvanizing the need for a radically different legal standard[54]. The lesson critics drew was not that Absolute Liability failed in doctrine, but that a crisis-driven settlement can deliver speed at the cost of deterrence-calibrated quantum. The Bhopal incident served as the catalyst that forced judicial and public consensus that a more robust, indigenous legal standard was imperative for addressing mass industrial harm.

B. Phase II rights and doctrines (1990–2000)

In the foundational phase, the Supreme Court transformed environmental protection from aspiration to enforceable right. Reading Article 21 to include pollution-free air and water, the Court ordered polluting units to install treatment systems or face closure.[55] (e.g., Ganga industrial clusters), By the mid-1990s, the Court consolidated precaution, polluter pays, and sustainable development as governing canons, and articulated the public trust doctrine limiting alienation of natural resources. A classic example of its stringent application is the Bichhri Ground Water Pollution Case, where the Supreme Court directed the closure of chemical industries operating without effluent treatment plants. Crucially, the court attached the property of the polluter and mandated the Department of Environment and Forests to recover the full cost of eco-restoration from those responsible for contaminating the wells of 14 villages in Rajasthan. In Vellore Citizens' Welfare Forum (1996), the Court located these principles within Articles 21, 47, 48A and 51A(g), shifting the burden

[52]Union Carbide Corporation v. Union of India, (1989) 3 SCC 38.
[53]Union Carbide Corporation v. Union of India, (1991) 4 SCC 584.
[54]India, Lok Sabha, Starred Question No. 70, "Bhopal Gas Tragedy," 29 July 2010, Answer (reporting 5,74,376 claimants awarded original compensation), Parliament Digital Library, available at https://eparlib.sansad.in/bitstream/123456789/588166/1/92067.pdf (last visited 3 Nov. 2025);Government of India, Ministry of Chemicals & Fertilizers, "Bhopal Gas Leak Disaster," updated 31 July 2024 (noting original compensation of ₹ 1,549.33 crore to 5,73,959 claimants till 31.7.2024), available at https://chemicals.gov.in/bhopal-gas-leak-disaster (last visited 3 Nov. 2025).
[55]M.C.Mehta v. Union of India AIR 1988 SC 1037.

to industry to demonstrate safety ex ante and obliging polluters to fund remediation—not merely pay private damages.

In *M.C. Mehta v. Kamal Nath*[56] (1997), the Court articulated the public trust doctrine, limiting the State's ability to alienate commons and requiring restoration where trust resources are impaired. Together, these holdings hardened the normative spine for hazardous-industry control.

The principle also includes the concept of exemplary damages; the court imposed a fine of Rs 10 Lakhs (later converted to restoration cost) on a motel for illegal construction on forest land. These exemplary damages serve a punitive and deterrent function, aligning PPP with the goal of sustainable development. By rigorously enforcing PPP, the judiciary ensures that industries can no longer treat pollution costs as externalities borne by the public or the environment. This action is not merely an economic correction but a constitutional duty, reinforcing the Directive Principles of State Policy mandate for public health and resource preservation. This rigorous requirement forces hazardous industries toward highly accurate internal accounting and mandatory capital expenditure on pollution control and abatement facilities.

By the mid-1990s, the Supreme Court made explicit that the precautionary principle and the polluter-pays principle are part of Indian law, integral to sustainable development.

(i) Relocation and Zoning in Urban and Sensitive Areas

The courts have frequently taken preemptive and corrective actions regarding the location of hazardous operations. In the *M.C. Mehta v. UOI* (Antop Hill)[57] case, the Supreme Court took preventive action by halting the proposed establishment of a large-scale storage center for hazardous chemicals in the heart of Mumbai, prioritizing the safety of the 1.5 million surrounding residents over industrial logistical needs.

Perhaps the most famous example is the Taj Trapezium Case.[58] The

[56]M.C. Mehta v. Kamal Nath, (1997) 1 SCC 388.

[57]M.C. Mehta v. Union of India, W.P. (C) No. 12179 of 1985 (Supreme Court, order dated 17 Dec 1986), challenging proposed chemical-storage godowns at Antop Hill, Mumbai. Supporting government action followed via the MoEF notification S.O. 136(E), 9 Feb 1990, issued under the Environment (Protection) Act/Rules, prohibiting storage of chemicals in Antop Hill; the notification itself cites the above writ and a connected Bombay HC writ.

[58]See M.C. Mehta v. Union of India, (Taj Trapezium Matter) (1997) 2 SCC 353 (W.P. (C) No. 13381/1984, decided 30-12-1996); see also (1996) 4 SCC 351, (1996) 4 SCC 750 (earlier TTZ orders).

Supreme Court identified 292 polluting industries operating in the zone around the Taj Mahal. The ruling directed these industries to either switch to cleaner fuel sources (natural gas) or relocate outside the critical zone to mitigate environmental damage. The Court underscored that unemployment and revenue generation are incomparable to the paramount need for public health.

C. Phase III—Institutional governance & contemporary controls

Subsequent jurisprudence shifted from episodic redress to systems design: continuous monitoring directions, specialised benches, and ultimately the National Green Tribunal (2010) to deliver speed and expertise. The Supreme Court later recognised the NGT's ability to act on its own motion in suitable cases, reflecting the preventive logic of environmental protection[59].

The Court has rejected ex-post-facto environmental clearances, insisting that appraisal must precede operations. It has not hesitated to impose significant compensation for damage while balancing closure orders against wider public interests in specific contexts.[60]

In Vedanta Limited v. State of Tamil Nadu & Ors,[61] On 29 Feb 2024, a Supreme Court bench of CJI D.Y. Chandrachud and Justices J.B. Pardiwala and Manoj Misra dismissed Vedanta Ltd.'s SLP and refused permission to reopen the Sterlite copper smelter at Thoothukudi, citing "repeated breaches" and "serious violations," and affirming the Madras High Court's August 2020 judgment upholding closure and related TNPCB actions. Emphasizing sustainable development, the polluter-pays principle, and the public trust doctrine, the Court held there was no ground for interference under Article 136, noting the High Court's multiple fact findings—accepted after Vedanta consented to a full merits review including renewal permissions—and rejecting Vedanta's plea that regulatory delay excused operation without valid hazardous-waste authorisation. Although the bench briefly explored appointing an expert committee to consider a way forward, it ultimately declined, prioritizing residents' health

[59]The Supreme Court affirmed that the NGT can act suo motu on credible information (including media/letters), strengthening preventive environmental governance: Municipal Corporation of Greater Mumbai v. Ankita Sinha, 2021 SCC OnLine SC 897.
[60]Alembic Pharmaceuticals Ltd. v. Rohit Prajapati, (2020) 17 SCC 157. It described ex post facto EC as alien to environmental law. Post-facto regularisation may be permitted only in rare, exceptional situations—never as a routine course.See, Pahwa Plastics Pvt. Ltd. v. Dastak NGO, (2022) 13 SCC 588, is a narrow exception and does not dilute the rule in Alembic Pharmaceuticals Ltd. v. Rohit Prajapati, (2020) 17 SCC 157.
[61]2024 LiveLaw (SC) 211.

and welfare; it also dismissed TNPCB's appeals against critical High Court observations, terming them justified.

The Supreme Court refused to issue notice on a plea filed by LG Polymers against the order passed by NGT, which directed the South Korean company to pay 50 crores and constituted a fact-finding committee[62].

These governance controls and appellate principles frame prevention and enforcement. The next phase concerns rehabilitation and restoration—medical surveillance, compensation disbursal, and site remediation—where the Court has repeatedly treated survivor welfare as an ongoing constitutional duty.

D. Phase IV – Restoration and Rehabilitation (2010–Present)

By 2010, the accumulated litigation revealed persistent gaps in the Bhopal settlement: compensation shortfalls, ignored health needs, and unremediated pollution. The Supreme Court's subsequent interventions aimed to bridge these gaps—for example, directing medical insurance, establishing specialised facilities, and overseeing claims processing (2010–2014).

In *Union of India v. Union Carbide Corp.*[63] (2023), the Supreme Court dismissed the curative plea to reopen the 1989 settlement, reaffirming finality absent fraud and emphasising the systemic importance of closure to avoid endless relitigation. Recalling its 1991 review directions, the Court placed responsibility on the Union of India, as a welfare State, to make good shortfalls and obtain insurance, faulting the Union's failure to do so as gross negligence. It directed that ¹ 50 crore lying with the RBI be used to satisfy pending claims under the 1985 Act/Scheme and emphasized the systemic importance of closure in mass-tort litigation to avoid endless relitigation.

In late 2024, renewed judicial scrutiny came from the Madhya Pradesh High Court, which pressed state authorities to initiate the long-pending removal of toxic waste from the former Union Carbide site. The Court emphasised that environmental remediation is not symbolic compliance but a continuing constitutional and statutory obligation. Although initial action involved removing only a limited quantity of waste, the Court treated the exercise as a first step in a larger, enforceable process aimed at full remediation and protection of groundwater. It sought periodic compliance reports, independent oversight,

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[62]In re: Gas Leak at LG Polymers Chemical Plant in RR Venkatapuram Village, Visakhapatnam in Andhra Pradesh.Original Application No. 73/2020.Available at https://www.livelaw.in/pdf_upload/pdf_upload-374450.pdf

[63]2023 LiveLaw (SC) 200.Curative Petition (C) Nos. 345–347/2010.

and transparency in disposal plans, reflecting a judicial attempt to convert decades of assurances into verifiable progress on site-clean-up[64].

The Court has become more explicit that the state bears an ongoing duty to victims' welfare, beyond penal enforcement of corporate crime. Legislative responses (Public Liability Insurance Act, Environment Relief Fund, PLIA claims, NGT remedies) create channels for relief, but consistent enforcement remains an issue. The emerging judicial stance is that constitutional remedies must translate into effective rehabilitation and restoration, not just theoretical pronouncements.

V. Conclusion

Article 21's promise is not abstract; it is a design brief. Governing hazardous industries is a constitutional duty to prevent avoidable harm, to respond wsith care and compensation when harm occurs, and to restore the commons we hold in trust. The reforms set out above do not trade away development; they define its lawful path. Bhopal's call, heard across four decades, is simple and stern: mourn the dead, fight for the living—by building institutions that keep them safe.

A. What Bhopal teaches—again

Bhopal shows that strong doctrines—absolute liability, polluter pays, the precautionary principle, and the public trust doctrine—protect people only when institutions can use them in real time. Three weaknesses recur: poor siting and design, weak routine oversight, and slow post-incident response. Prevention must be built into land-use plans, licensing, monitoring, drills, and open data—not left to post-facto litigation.

B. Practical reform agenda

The following controls are specific, measurable, and budgetable, so regulators, local bodies, and enterprises know what to do and when.

C. Prevention by design

No major-hazard units in dense urban areas without defensible risk models, buffer zones, and off-site emergency plans verified by periodic drills. Mandate

[64]Alok Pratap Singh (Deceased) v. The Union Of India and Others, (2024) SCC OnLine MP 8053.(Madhya Pradesh High Court) (directing initiation and supervision of toxic-waste removal from the Union Carbide site; requiring periodic reporting and independent oversight).

third-party process-safety audits at licensing and renewal; publish plain-language summaries. Adopt ALARP (as low as reasonably practicable) standards for siting and operations.

(i) Data, disclosure, and deterrence

Publish plant-wise chemical inventories, real-time Online Continuous Emission Monitoring System (OCEMS) dashboards, incident/near-miss logs, and neighbourhood hazard maps. Stream OCEMS to control rooms with anomaly flags that trigger timely inspections. Use risk-priced administrative penalties linked to turnover; add disgorgement for illegal gains; escalate to suspension/ closure for repeat violations; reserve criminal law for wilful, serious harm.

(ii) Institutions that can deliver

Strengthen boards with toxicology, process-safety, and GIS capacity; ring-fence unit budgets; and accredit regional labs with service timelines. Appoint adjudicating officers with technical support; issue penalty guidelines; fix timelines for orders and NGT appeals; and publish all orders online. Run quarterly multi-agency drills with independent observers and public reports.

(iii) Survivor-centred justice

Create life-long health registries with unique IDs, standard treatment packages for listed conditions, mental-health services, and inter-generational screening. Make PLIA (Public Liability Insurance Act, 1991)/ERF (Environment Relief Fund) claims simple, digital, and time-bound through a single-window district node; show real-time dashboards of registrations and disbursals. Require environmental bonds/escrows sized to hazard to fund clean-up and medical care.

(iv) Market and cross-border levers

At market entry, require disclosure of legacy liabilities and foreign claims; mandate environmental bonds; and align securities disclosures—such as Business Responsibility and Sustainability Reporting (BRSR) Core—with accident rates, OCEMS uptime, and remediation spend. Clarify limited veil-piercing and successor liability for environmental mass harm; streamline recognition and enforcement of foreign judgments and arbitral awards.

D. The constitutional bottom line

Risk governance is the daily work of Article 21: prevent, remedy, and restore (reinforced by Article 48A and Article 51A(g)). A State that prices risk

honestly, discloses data, and enforces promptly protects both the vulnerable and genuine enterprise. Bhopal's charge is clear: mourn the dead, protect the living—through institutions that work every day, not only in court.

E. A framework for closure that isn't premature

"Closure" should mean four verifiable outcomes: (i) site remediation certified to published standards; (ii) a functioning, funded health registry; (iii) claims settled with an appeal route for late-manifesting injuries; and (iv) a public confirmation that exposure pathways are eliminated. Anything less risks new cycles of protest, litigation, and distrust.

F. Ethics of development: social limits on economic adventurism

Growth cannot externalise catastrophic risk. Hazardous enterprises must internalise safety, remediation, and long-tail health costs—through bonds/escrows, insurance, and transparent provisioning. Clear, predictable rules make investment credible because they make harm unlikely, aligning enterprise with the non-negotiable right to life and a healthy environment.

Bhopal's enduring lesson is institutional, not rhetorical. Article 21 demands prevention before harm, care and compensation when harm occurs, and restoration until exposure pathways are closed. The reforms outlined above make that duty operational,through better siting, real-time disclosure, swift administrative enforcement, survivor-centred health systems, and credible cross-border accountability. If these become routine practice rather than emergency improvisation, hazardous industry can coexist with a healthy environment and lawful growth. The moral test is simple: people and the commons must be safer tomorrow than they were yesterday.

Constitutional Foundation of Compensatory Jurisprudence in India and Judicial Response

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Abstract

The concept of compensatory jurisprudence has evolved and flourished, among various aspects of legal discourse in contemporary legal system. Compensatory jurisprudence in India is a judicially evolved framework where the Constitutional Courts award payment of compensation for the gross defilement of fundamental rights, particularly under Art. 32 and Art. 226. This work unravels the intricate tapestry of compensatory jurisprudence in India, where the Constitution and the Judiciary play pivotal roles in shaping and defining the landscape of compensation in general and justice in particular. The mechanism primarily addresses those whose fundamental rights have been infringed by the arbitrary state action and rehabilitates them. The paper focuses on in-depth understanding of how the Judiciary navigates the delicate balance between individual rights and state responsibility allowing the victims to seek compensation in a case of violations of their fundamental rights by the state and its instrumentalities.

Key Words: *Compensation, Constitution, Court, Fundamental Rights.*

I. Introduction

The compensatory mechanism to provide the compensation[1,2] for the victims

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[1]Money given to compensate loss or injury. Black's Law Dictionary as cited in Moumita Roychoudhury v. Abhijit Chatterjee, AIR 2014 Ori 5, para 12(5).

[2]Compensation means reimbursement given to make things equivalent, to amend the loss, recompense, remuneration or pay. It therefore need not necessarily be in monetary terms. State of Gujarat v. Shantilal Mangal Das, AIR 1969 SC 634 at p. 644; SRTC v. Mahadeva Shetty, (2003) 7 SCC 197, para 11; Nathmul v. Commissioner Civil, Supplies, Rajasthan, AIR 1952 Raj 72. The word compensation has been held to mean a full and fair money equivalent of the property taken. Veernath v. State of Hyderabad, AIR 1957 AP 1034: 1037; A 'compensation' may be held to be payable on a periodical basis, as part from the compensation, other terms and conditions can also be imposed. Entertainment Network (India) Ltd v. Super Cassette Industries Ltd, (2008) 13 SCC 30: 73, para 127.

is an accepted concept of law being implemented by the Criminal Justice System and the ordinary Civil Courts. Under the law of torts, victims can seek compensation for the injuries caused to his individual or property. Traditionally, when there was no distinction between wrongs and tort, the liability was strictly upon the wrongdoer himself. There were no crimes, but only wrongs committed against the other. The Halsbury's Law of England defines torts in technical terms as, "*those civil rights of action which are existing for the recovery of damages which are unliquidated, by person or persons who have suffered injury or loss from acts, statements or omissions of others in breach of duty or infringement of right conferred by law are rights of action in tort."*[3]

Historically, King held the sovereignty and was a divine being, he could do no wrong, nor could he authorize one. He held 'immunity'[4]. But, with time the King's divinity and glory diminished and with setup of democratic establishment across nations, Constitutional governments were established in most of the countries. The material question worth enquiry will be whether the government of the people, for the people and by the people will hold the same sovereignty and immunity for its wrongs and that of its delegates? In this background the paper will explore the Doctrine of Sovereign Immunity, Constitutional Foundation of Compensatory Jurisprudence in India and how judiciary explore and evolve the compensatory jurisprudence in India.

II. Justification for Compensatory Jurisprudence

The justification for compensatory jurisprudence lies at the heart of the fundamental debate between state immunity on one hand and the welfare, security, and rights of the people on the other. Sufficient justifications for initiating compensation programs have enlarged the dimension of compensatory jurisprudence. These justifications obligate the state to compensate for the gross violations of fundamental rights of its subjects by the abuse and misuse of sovereign power.

The concept of Justice is the supreme argument to justify the idea of compensatory jurisprudence. The impression of libertarians like Robert Nozick and Rawls profound Justice to be a claim or an entitlement. Since the state

[3]Para 141 of the judgement in Kaushal Kishor v. State of UP, (2023) 4 SCC 1.

[4]Sovereign immunity is a legal doctrine holding that a sovereign state or government cannot commit a legal wrong and is immune from civil suits or criminal prosecution without its consent. It is based on the latin maxim '*rex non potest peccare', king* can do no wrong.

failed in its obligation to protect its subject and violated their fundamental rights, the subject has an entitlement or claim for the compensation against such failure. This jurisprudential justification regarding compensatory framework is even supported by the argument of JS Mill, who laid down the philosophical foundation of the Harm Principle[5], which provides that the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others. Since the instrumentalities of state acting on the behalf of the state exercised the power arbitrarily, abusing and misusing the power thereby harming the common citizenry, the principle here obligates the state to pay off its obligation by compensating the wronged.

Yet another justification is the 'theory of state'[6]. The emergence of state is a result of social contract. The theory postulates that the two agreements *pactum union*[7] and *pactum subjection*[8] requires the surrender all their rights, except right to life, liberty and property. This surrender is under a social contract between the subjects and the state whereby the state was duty bound to protect its citizens from any kind of victimization[9] caused by even state itself or any of its subjects.[10]

[5]The harm principle was first articulated by the English philosopher John Stuart Mill, in in his work *'*On Liberty (1859)*'*.

[6]'State' is a complex of rulers and ruled, a political conceived, territorially organized, seeking by the conferment of powers on the rulers the effective maximization of the individual and social welfare of the ruled.

[7]*Pactum union* talks about that the people should unite and live in a society; a union need to be formed.

[8]*pactum subjection* that the so united people will now surrender all their rights (except right to life, liberty and property) and it will be due to this surrender a social contract will be entered into between the subjects and the state, and state was duty bound to protect its individuals from any kind of victimization.

[9]Victimization is a process of being victimized or becoming a victim. There are different theories of victimization which are – Primary victimization, Secondary victimization, Re-victimization and Self-victimization. *See generally*, Stephen Schafer, The victim and his criminal - "victimology", The President's Commission on law enforcement and administration of justice (1968), where he gave the concept of "functional responsibility" according to the concept, the victimization occurs as a result of the functional interplay of causative elements. He believed that the responsibility of the victim is a critical issue in the problem of crime, some victims often contribute to crime by their acts of negligence, precipitation or provocation.

[10]State attains its purpose through enactment of laws and forces conformity to the laws by authority. The authority is a capacity to produce the intended results. If the intended results cannot be produced in respect of any law, the state has to assume responsibility for the loss, pain, or damage caused to any law-abiding citizen by someone's disobedience of the law.

It is universal fact that state is *'parens patriae'*, as a father figure state has moral and ethical duty to protect its citizen from any arbitrary action and misuse and abuse of sovereign power but also have an empathetic concern for the loss suffered. This concern in the form of compensation has intrinsic moral values of its own, since the legal machinery of the state did abuse of power, it must make good the loss.

Another justification for the compensatory regime is 'welfare theory'. The theory suggest that the Government exist and functions for the citizen. This approach conclude that, state has a caring duties towards unprivileged, disabled, poor, and so on and so forth it has a duty towards the victims of crime and victims of state action, that is misuse of sovereign function. However, this duty is based not on any contractual obligation on the part of the state, but on the social concerns of its rulers and its citizenry.

In conjunction with welfare theory, the mercy theory justifies the compensatory mechanism by advocating that the state has authority to "deal mercifully with certain individuals". Therefore, the victims due to arbitrary discharge of sovereign power by state functionaries or its instrumentalities are at the mercy of the sovereign for the grant compensation. The mercy of the government theory is less general and inclusive than the Welfare theory.[11]

There is also penological justification on the point why the state shall pay compensation. The consequentialist approach primarily focuses not on punishing the wrongdoer and reforming the offender but to compensating the victim for his victimization, be it primary victimization at the hands of perpetrator or secondary by the state action and inaction.[12]

Unconditionally, the state has the power to perform sovereign function but during its performance the instrumentalities abused and misused the power thereby violating the constitutional established right and justice. Compensation is therefore, a consequence of such failure on the part of state. The trinity has to be taken into account, firstly the constitutionally protected right of citizen, secondly, performance of sovereign function and lastly, abuse and

[11]Although modern jurisprudence accounts for individual deviance as being no fault of the State, it supports the factum that the State must assist the vulnerable as matter of public policy.

[12]*Also See:* The 154th Law Commission Report, 1996 which observed that "one of the recognised methods of victim protection is compensation of victim of crime; the compensatory theory of Justice or restitution is the backbone of victim compensation, the penological dimension is yet another factor for victim compensation."

misuse of power and the Constitutional Courts ought to find harmonious balance between this intricate trinity.

Despite having these healthy justifications in favour of compensatory jurisprudence, the state always tried to escape its burden of not discharging the constitutional mandate of redressing the person by way of compensation by pleading unreasonable defences. Theses defences are in the form of sovereign immunity[13], doctrine of pleasure[14] and sometimes as victim blaming[15], penal couple[16] and victim precipitation[17]. These defences are not just irrational and unappealable to the common prudent mind but are also against the foundational basis of compensatory jurisprudence.

The defence Doctrine of Sovereign Immunity is a common law doctrine based on the Latin maxim "*rex non potest peccare"* meaning "king can do no wrong". Prior to the Constitution, 1950 the sovereign was enjoying absolute immunity. With the adoption of Constitution in 1950, the long-drawn protection to the sovereign in the name of sovereign immunity was diluted. Article 21 the 'Right to life and personal liberty' came forward to address the concern of the common citizenry.

For the first time in the matter of *P&O Steam Navigation Co.* v. *Secretary of state for India*[18] a distinction was made between sovereign

[13]*Supra* note 4

[14]The Latin maxim "durante bene placito", during pleasure was used as defence for not paying compensation for wrong. But, post independent this was not accepted as defence. The case of *State of Bihar* v. *Abdul Majid*, AIR 1954 SC 245 a government employee who had been fired but later reinstated brought a lawsuit to recover unpaid wages. The doctrine of pleasure was cited by the State as a defense, but the Apex Court rejected it and observed that the grounds doesn't apply to India.

[15]Victim blaming is blaming the victim for the causation of crime/ wrong and holding him responsible for his own victimization. For instance, when victimologists argue that the victim of the offence of rape contributes to the aggravation when she resists, for such resistance is likely to make the offender more violent, and that if she does not resist, she contributes to the offence by being a willing victim.

[16]Penal couple theory argues that when crime takes place, it has two partners, one the offender and second the victim, who is providing opportunity to the criminal in committing the crime.

[17]Victim precipitation theory proposes that certain actions, behaviours, or characteristics of the victim may initiate or escalate the criminal act. It can be divided into two main types: active precipitation and passive precipitation.

[18](1861) 5 Bom HCR 1 APP.

and non-sovereign function by Justice Peacock[19] to ascertain the fact in what cases sovereign is immune and in what cases it is not. The Court categorically held that 'sovereign functions' are those which can be performed strictly by the government and its officials. The maintenance of the army, government ministries, war, foreign relations, printing of the currency notes, and management of the country falls specifically under the State's sovereign function The state while performing purely sovereign function is immune but when it comes to non-sovereign function, they are those which if committed by a private person he would have been held liable then if the same act is performed by the government through their servants the state cannot enjoy sovereign immunity and must be held responsible for such wrongful act.

III. Doctrine of Sovereign Immunity: Applicability and Scope of Defence

The position in the case of *P&O Steam Navigation Co.* v. *Secretary of state for India*[20] was settled regarding difference concerning the Sovereign and non-sovereign function. However, significant changes were made in government structure to provide remedy to victims of unlawful acts of the State.[21] Particularly after the independence, the Law Ministry decided to examine whether or not legislation along the lines of the *Crown Proceedings*

[19]Justice Peacock was the first time to difference concerning sovereign function & non-sovereign function of the government according to him sovereign functions are those which the government alone and no one else can perform which cannot be allowed to perform by the private individuals for example; war, foreign relations, printing of the currency notes, acquisitions of the territory etc. are those means the government alone can perform and no private person can be assigned to perform them. But if the nature of the act is such that if it is committed by a private person he would have been held liable then if the same act is performed by the government through their servants there is no reason why they should not be held liable. In other words, such act being non sovereign function the government will be held liable for the injuries resulting therefrom.

[20]*Supra* note 18

[21]This was done by adopting Government of India Act, 1935 and particularly Section 176(1), which provided that the Federation may sue or be sued by the name of Federation of India. A Provincial government may sue or be sued by the name of the province. Section further provides that without prejudice to the subsequent provisions of this chapter may, subject to any provisions made by the law (ACT) of the Federal or a Provincial Legislature legislated by virtue of power conferred to that legislature. The Constitution of India, in its Article 300 states same provision. Art. 300 allows that the Government of India may sue or be sued in the name of the Union of India. Similarly, the Government of a State may sue or be sued in the name of the State.

Act of 1947 of UK[22] is necessary and, if so, to what extent. The Law Ministry forwarded the subject to the First Law Commission for consideration and recommendation.[23] The report of the first Law Commission categorically suggested that State's accountability would no longer be determined by using the outdated difference between 'sovereign' and 'non-sovereign' functions, or between 'governmental' and 'non-governmental' functions.

However, in absence of the proper legislation, the Courts had a tremendous amount of responsibility to construct the law through its judicial precedents. In the case of *State of Rajasthan* v. *Vidhyawati* [24], a case involving a compensation claim by the widow of a person who was fatally struck down by a jeep owned and maintained by the State. The State pleaded sovereign immunity. The court, held that the State will be liable like a general employer for wrongful acts of its agents committed during the discharge of function and it stems from Article 300 of the Indian Constitution.[25]

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[22]The Crown Proceedings Act, 1947 dealt with sovereign immunity in UK. As per this Act, no case could be brought against sovereign.

[23]First Report of The Law commission of India on "Liability of State in Tort" submitted on May 11, 1956. Chapter VIII contains the conclusions and recommendations. The recommendations and suggestions were-

i. that it's crucial to develop a fair relationship between an individual's rights and the state's obligations in the framework of a welfare state;
ii. that the subject of whether the Union and the States should be held accountable for the tortious acts of their servants or agents was left for future legislation when the Constitution was drafted;
iii. that it is vital to make the law as certain and definite as possible, rather than leaving it to courts to evolve the law based on the judges' opinions; and
iv. that the State's accountability should no longer be determined by using the outdated difference between 'sovereign' and 'non-sovereign' functions, or between 'governmental' and 'non-governmental' functions.

Also see: Paragraph 66 of the Report of the Law Commission outlined the guidelines for how suitable law should be developed. A bill titled as the "*Government (Liability in Torts) Bill"* was laid in the house in 1965 and 1967 respectively based on the First Report of the Law Commission, but the Bill was never got the shape of the Law.

[24]1962 AIR 933.

[25]The Supreme Court also stated that *"when the rule of immunity in favour of the Crown, based on common law in the United Kingdom, has disappeared from the land of its birth, there is no legal warrant for holding that it has any validity in this country, particularly after the Constitution."* The Supreme Court in Vidhyawati categorically observed, This case also meets the second branch of the argument that the State cannot be liable for the tortious acts of its servants, when such servants are concerned with an activity connected to the affairs of the State.

However, this view was diluted in *Kasturi Lal v. The State of Uttar Pradesh*[26] where the Court retracted from its earlier stand and held, the act which is tortious in nature committed by the government officials in exercise of statutory functions as a result of delegation of the sovereign powers, the action for compensation for loss by such tortious act will not lie, and if the tortious act has been committed by a government official in exercise of duties not assigned to him by virtue of the delegation of any sovereign power, an action for damages would lie.[27]

Decisively, in *N. Nagendra Rao & Company* v. *State of Andhra Pradesh*[28], the Apex Court settled all the propositions to its finality. Court observed that the concept of sovereign immunity has lost its place in the present Indian Constitution. The state has shifted from the state having rights and power to the state having duties and responsibilities. Moreover, the function of the state has now become diversified therefore, the extreme degree of freedom of action and protection in the name of sovereign immunity cannot be allowed.[29]

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[26]Kasturi Lal Ralia v. The State of Uttar Pradesh, 1965 SCR (1) 375. In this case, a partner of a bullion-dealing firm was carrying gold and silver which were seized by the police. The partner was later released, but the Head Constable who arrested him misappropriated the gold and went away to Pakistan in 1947. The suit instituted by Kasturi Lal for recovery of the gold's value was resisted by state as it was not a case of negligence on part of the State's servants. Moreover, if negligence was proved against the police officers the state could not be held liable.

[27]Here the Court upheld that, "*if a tortious act is committed by a government servant and it gives rise to a claim for damages, the question for us is to ask was the tortious act committed by such servant in discharge of statutory functions, and are they ultimately based on the delegation of the sovereign powers of the State to such government servant? If the answer is in the affirmative, the action for compensation for loss caused by such tortious act will not lie. On the other hand, if the tortious act has been committed by a public servant in performing duties assigned to him not by virtue of the delegation of any sovereign power, compensatory action may be taken."*

[28](1994) 6 SCC 205. Here the appellant was conducting legitimate commerce in fertilizers and food grains. Under the Essential Commodities Act, his premises were investigated and commodities seized. On June 29, 1976, the proceedings were concluded in his favour, and the confiscation order was annulled. The Collector ordered the items to be released, but subordinates delayed it, causing the products to rot and decay in quality and quantity. The Appellant then requested compensation, which was rejected, so he filed a lawsuit, and the State claimed sovereign immunity.

[29]In this case the Court limited the expansion of sovereign immunity by declaring that the state can claim immunity only in the matter of administration of justice, maintenance of law and order and reparation of crime.

Thus, at present the position is very clear, if a tortious wrong is committed and it does involve the violation of fundamental rights even for the performance of sovereign function or where the act was resultant from the performance of 'non-sovereign function', the defence of sovereign immunity can't be pleaded. But, the question of whether the doctrine of sovereign immunity applies or not should be determined by the nature of the rights violated rather than the type of remedy.

IV. The Distinction between Private Law remedy and Public Law Remedy

Public law serves to both civilized public power and provide citizens with the assurance that they are subject to a legal system that works to uphold their rights and safeguard their interests[30]. Therefore, when the Court grants compensation under Article 32 or 226 of the Constitution of India requiring the enforcement of fundamental rights, so done under the public law by punishing the wrongdoer and placing responsibility for the public wrong on the State that has disregarded its obligation to protect the citizens' very fundamental rights.[31]

The distinction between a public law remedy and a private law remedy is that a public law remedy allows for the use of sovereign immunity as a defense, whereas a private law remedy does not. Constitutional law serves to civilize governmental authority in addition to providing citizens with the assurance that they are subject to a legal system that works to uphold their rights and safeguard their interests.

Unlike private law actions, public law proceedings have a distinct goal in mind. The order for monetary relief granted by the Apex Court under Art. 32 and by the HCs under Art. 226 of the Indian Constitution is via the prerogative writs. These writs are the main source of the public law procedures. The Courts have authority under public law to award damages for violations of Article 21. Its purpose is to punish the perpetrator and place

[30]Prakash Chandra Mishra, Victim Compensation Scheme: An Aspect of Modern Criminology (2014) Cri. L. J. 138.

[31]Articles 32 or 226 of Indian Constitution, which grant wide power to higher courts to protect the fundamental right. The public law/ constitutional law proceeding serves some other purpose than a private law proceeding. The relief is of monetary compensation or an exemplary damage, in proceeding under Art. 32 by Supreme Court or under Art. 226 by the High Court, for establishing infringement of the right guaranteed under Art. 21.

responsibility for the public wrong on the state for failing to uphold its obligation to defend citizens' basic rights.

The Supreme Court has judicially developed the Constitutional remedy through the imposition of judicial conscience, despite the fact that there is no clear constitutional provision for the award of compensation when the right to life is violated. In order to maintain and defend the rule of law, it is the only feasible way to enforce fundamental rights.[32]

V. Judicial Response on Abuse of Power: Exploring Dimensions of Constitutional Tort in India

The Indian Constitution, enunciates no specific provision for victims. However, Part IV, Directive Principle of State Policy and Part V, Fundamental Duties[33] lay down the duty of the state to protect the right of public assistance in cases of impairment and in other cases of undeserved want[34] and to have compassion for living creatures[35] and to develop humanism[36] respectively.

The Apex Court is continuously evolving the idea regarding 'dynamic constitutional jurisprudence' with the help of Article 21. The question, however, is whether the Court can Award compensation to one who may have unduly underwent detention or bodily harm at the hands of the employees of the state and whether the victim can move a writ petition for this purpose rather than taking recourse to an ordinary civil suit in matters of constitutional tort.[37]

In *Kaushal Kishor v. State of Uttar Pradesh*[38] observed, *"A constitutional tort is a violation of one's constitutional rights, particularly fundamental rights, by an agent of the government, acting in his/her official capacity. The alleged constitutional violation creates a cause of action that is distinct from any other available state tort remedy. It*

[32]Sharita Sharma, Tortious Liability of Government in India: Evolution of Judicial Doctrine and Emerging Trends, PhD Thesis, Department of Law, University of North Bengal, 2018, at pages 35-60.

[33]Article 51A of the Constitution of India - Fundamental duties.

[34]Article 41- Right to work, to education and to public assistance in certain cases – The State shall, within the limits of its economic capacity and development, make effective provision for securing the right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement, and in other cases of undeserved want.

[35]The Constitution of India, Art. 51A (g).

[36]The Constitution of India, Art. 51A (h).

[37]MP Jain, Indian Constitutional Law 1331 (Lexis Nexis, 9th edition, 2025).

[38](2023) 4 SCC 1.

however, carries with it, the essential element of tort law, which seeks to redress a harm or injury by awarding monetary compensation by a competent court of law."[39]

The principle of Constitutional tort has been conceived in *Nilabati Bahera v. State of Orissa*[40] where Court provided unliquidated damages in monetary terms which led to emergence of compensatory jurisprudence through judicial mechanism.[41]

The aspect of Constitutional tort' is particularly dealing with Article 21 of the constitution. Expression '*procedure established by law'* in Article 21 has been judicially the construed as meaning a procedure which is reasonable, fair and just.[42] The liberal interpretation of Article 21 amounting to judicial activism paved the path to ensure that there is no abuse of power or negligence on the part of organs of the State or any other authority and if so happens the victim gets proper remedies under Article 32 and Article 226 under writ jurisdiction.

However, there has been no specific provisions of providing remedies in the form of compensation in the Constitution. But the Supreme Court considered that in certain cases compensation is the only form of remedy available and suitable for rehabilitation of victims. The Court invoked power granted to it under Article 32(2)[43] and ordered monetary compensation in cases of gross violation of indefeasible rights under Part III of the Indian Constitution.

The compensatory jurisprudence has gained global acknowledgement with the adoption of *United Nations Declaration of Basis Principles of Justice for Victims of Crime and Abuse of Power 1985.*[44] The said declaration

[39]Para 47 of the judgement in Kaushal Kishor v. State of UP, (2023) 4 SCC 1.

[40](1993) 2 SCC 746.

[41]In case of Nilabati Bahera v. State of Orissa, the Apex Court's division bench made distinction between public Law remedy (Constitutional remedy) and Private Law remedy (Civil Law remedy) created an abnormal scenario. In the decision, the Court stated that awarding compensation under Art. 32 and Art. 226 was a remedy available under public law and that the principle of immunity to sovereign did not apply to it, whereas it may be available as a defence in private law tort suit.

[42]Post Maneka Gandhi v. Union of India, AIR 1978 SC 597.

[43]The Constitution of India, Art. 32(2) *"The Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, whichever may be appropriate, for the enforcement of any of the rights conferred by this Part."*

[44]Resolutions adopted on the reports of the Third Committee, 96th plenary meeting 29 November 1985, 40/34. Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, 1985.

devotes Article 18 and 19 about Victim of abuse of power and their redressal.[45] Further, the declaration seeks its member states to assimilate their municipal law with the provisions of the declaration aiming to positively address the victim concerns. The declaration in its Article 12 and 13 titled as 'Compensation'[46] urges the member states to opt for State sponsored compensation model in their respective national laws.

The Declaration, 1985 is not complied in its essence when it comes to victims of abuse of power resulting from the arbitrary state action which amount to substantial impairment of Fundamental Rights. The victims are still at the mercy of the state for their rehabilitation and compensation. There is only Constitutional framework, particularly Article 21 that comes to their rescue by providing compensation in case of misuse and abuse of power by state agencies and instrumentalities.

Post Maneka Gandhi[47] development wide opened an expansive regime of compensatory jurisprudence in India. The Supreme Court is reading different dimensions and facets of rights in Article 21. This Compensatory approach of the Court for the substantial impairment of fundamental rights may be explained in following heads: -

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[45] Victim of abuse of power (Art. 18 and 19).

Art. 18 – "Victims" means persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that do not yet constitute violations of national criminal laws but of internationally recognized norms relating to human rights.

Art. 19 – States should consider incorporating into the national law norms proscribing abuses of power and providing remedies to victims of such abuses. In particular, such remedies should include restitution and/or compensation, and necessary material, medical, psychological and social assistance and support.

[46] "Article 12 – *When compensation is not fully available from the offender or other sources, States should endeavour to provide financial compensation to: (a) Victims who have sustained significant bodily injury or impairment of physical or mental health as a result of serious crimes; (b) The family, in particular dependants of persons who have died or become physically or mentally incapacitated as a result of such victimisation*.

Article 13 – *The establishment, strengthening and expansion of national fund, for compensation to victims should be encouraged. Where appropriate other funds may also be established for this purpose, including in those cases where the State of which the victim is a national is not in a position to compensate the victim for the harm."*

[47] *Supra* note 42.

A. Police Torture/ Custodial Death

There has been increase in instances of custodial violence or torture attributed to misuse of police machinery by those at the helm of affairs to settle to settle personal scores.[48] In *Francis Coralie Mullin v. Union Territory of Delhi*[49], the court condemned cruelty or torture as being violative of Art. 21.[50]

The issue of compensation for unnatural deaths in custody is no longer *res integra*[51]. In *Sheela Barse* v *State of Maharashtra*[52], it was directed to ensure protection against torture and maltreatment of women in police lock-up. For example, there should be separate lock-ups for female suspects guarded by female constables; interrogation of females should be carried out only in the presence of female constables.[53]

In the matter of *Nilabati Behera* v. *State of Orissa*[54] the person was taken into police custody for investigation relating to theft. He was found dead near a railway track the next day. On the basis of injuries suffered during custody and the handcuffs on his wrists, the Court concluded that this is a clear case of custodial death and compensation was a due measure under Art. 32.[55]

An unnatural death in judicial custody was the subject matter of discussion in *Kewal Pati* v. *State of Bihar*[56] where a person was killed by another co-prisoner. It was held that just because a convict is imprisoned, the prisoner does not cease to have constitutional rights. He or she may be only deprived

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[48]Munshi Singh Gautam v. State of M.P., (2005) 9 SCC 631; AIR 2005 SC 402.

[49]Francis Coralie Mullin v. Union Territory of Delhi, AIR 1981 SC 746; (1981) 1 SCC 608.

[50]The Court observed, no law which authorises and no procedure prescribed by law, which leads to such torture or cruel, inhuman or degrading element can ever stand the test of reasonableness and non-arbitrariness.

[51]*Res integra* is a Latin term meaning "an entire thing" or "untouched matter".

[52]Sheela Barse v. State of Maharashtra, AIR 1986 SC 1773; (1986) 3 SCC 596.

[53]*Supra* note 37 at page 1321.

[54](1993) 2 SCC 746.

[55]It was held that a constitutional law remedy is always available to claim compensation for the contravention of human rights elevated to the status of fundamental rights which are protected as a guarantee by our Constitution. A reference was also made by the Court to Article 9(5) of the International Covenant on Civil and Political Rights, 1966 which allowed anyone who has been the victim of unlawful arrest or detention to mandatorily have an enforceable right to compensation.

[56](1995) 3 SCC 600.

of them in accordance with law. Therefore, even a prisoner is entitled to protection. On being killed while in prison, it results in a deprivation of his life contrary to the law, for which the next of kin are entitled to compensation.

One of the very earliest cases where the Apex Court went on to give compensation in a petition under Art. 32 of the Constitution is *Rudul Shah* v. *State of Bihar*[57]. This Court took the view that the refusal to order for compensation would be doing nothing more than a mere lip service to the fundamental right of liberty available to petitioner under Art. 21 of the Constitution which the State Government has completely violated.[58]

Ajab Singh v. *State of Uttarpradesh*[59] and *Rohtas Kumar* v. *State of Haryana*[60] highlight that custodial death is patent violation of the prisoner's rights under Art. 21 of the Constitution. The relief could be moulded by granting compensation to the next of kin of the deceased.

A little later, Hon'ble Supreme Court in *Sebastian Hongray* v. *Union of India & Ors.*[61] concerned itself with the disappearance of some persons while in custody[62]. The Court was convinced that the two missing persons had actually met a tragic end in an encounter amounting to an unnatural death. The Court ordered the registration of an offence and an investigation against the guilty officials. The Court also directed the payment of compensation to the next of kin.

In the recent case of, *In Re Suo Moto Custodial Violence and other matter relating to prison conditions* v. *State of Meghalaya & others*[63], the *suo moto* PIL was initiated pursuant to a direction issued by the Supreme Court in the judgement reported at *(2017) 10 SCC 658 Re Inhuman Condition in 1382 Prisons.* The present case was relating to death due to custodial

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[57]AIR 1983 SC 1086.

[58]This case dealt with the issue of illegal detention even after acquittal in a full-fledged trial. The Supreme Court rejected the stale and sterile objection of the State Government and held that the petitioner was entitled to compensation for the illegal detention. The court also observed that "*if civilization is not to perish in this country as it has perished in some others, it is necessary to educate ourselves in accepting that, respect for the rights of individuals is the true bastion of democracy".*

[59]AIR 2000 SC 3421.

[60](2013) 14 SCC 434.

[61]AIR 1984 SC 571.

[62]The Court was convinced that *enabling the respondents to trace or locate the two missing persons at such a late stage would be to shut its eyes to reality and to pursue a mirage.*

[63]2023 Meghalaya HC, PIL No. 9 of 2017, Date of order: 28.08.2023.

violence and the Court while allowing a compensation of 15 lacks rupees to the next and kin of the victim, categorically observed that the quantum of compensation should be such that it would acts as a deterrent.[64]

B. Illegal Arrest

The occurrences of ruthless police conduct to persons detained on suspicion of committed crimes is routine matter. The Court has taken a very positive stand against police atrocities, illegal arrest and torture. The Court has characterised the same as violation of principle of human dignity. The Supreme Co has ruled that it is a well-recognised right under Article 21 that a person detained lawfully by the police is entitled to be treated with dignity.[65]

In the very landmark decision in *D. K Basu* v. *State of West Bengal*[66], the Apex Court laid down mandatory guidelines for police arrests and detentions to prevent custodial torture and deaths. The issue of rising custodial violence triggered the Court to rule that such acts violate Art. 21 and 22 of the Constitution. The Court in addition to the Constitutional and statzutory safeguards, issued a list of guidelines to be followed in all cases of arrest and detention.[67]

[64] The Court observed that a death in custody is a slur on a civilized state and completely unacceptable. Court remarked, *"for custodial deaths the compensation has to be pegged at a level where the state will bleed to make the payment and not what the state is happy to pay off"*.

[65] *Supra* note 37 at page 1334.

[66](1997) 1 SCC 416.

[67] "The Guidelines are as follows:

1. The officers who make the arrest and handle the arrestee's interrogation should wear accurate, visible, and legible identification and name tags with their designations.
2. At the time of the arrest, the police officer carrying out the arrest must file an arrest memo including the time and date of the arrest, which must be attested by at least one witness and countersigned by the arrestee.
3. A person who has been arrested or detained has the right to have one friend, relative, or another person informed that he has been arrested.
4. As soon as he is placed under arrest or detained, the person arrested must be informed of his right to have someone notified of his arrest or detention.
5. An entry must be made in the diary of police station about the arrest of the suspect, and details of the police officers in charge of the arrestee.
6. If the arrestee demands it, he should be checked at the time of his arrest, and any major or minor injuries found on his/her body should be reported at that time.
7. During his detention in custody, the arrestee should be examined by a qualified doctor every 48 hours.
8. Copies of all documents including the arrest memo referred be sent to the local Magistrate for his record.
9. During interrogation the arrestee might be allowed assistance of counsel, but not during the process of interrogation.
10. A police control room should be installed at all district and state headquarters, where information about the arrest and the arrestee's place of detention should be conveyed by the officer who made the arrest within 12 hours of the arrest."

In the matter of *Dr. Rini Johar & Anr.* v. *State of M.P. & Ors*.[68], wherein Justice Dipak Misra and Justice Shiva Kirti Singh penalized police officers for misusing their arrest powers and for holding the petitioner in custody for no cause. This utter disregard for law and personal liberty led to a judgment by the courts in favour of the petitioners and to the granting of a compensation of 10 lakes rupees.

C. Unlawful Incarceration

In *Ankush Maruti Shinde* v. *State of Maharashtra*[69], The bench of 3-judges of the Hon'ble Apex Court comprising of Dr. AK Sikri, SA Nazeer and MR Shah, JJ. has acquitted 6 death row convicts and has directed reinvestigation in a crime that was committed in June, 2003. The Court said that there was a grave failure on the part of the investigating agency and therefore, the fundamental rights of the accused guaranteed under Art. 20 and 21 of the Constitution of India have been violated. The Court directed the Maharashtra government to pay a sum of Rs. 5,00,000/- to each person by way of compensation.

In the case of *Chandanji @ Gato Chhahaji Thakor* v. *State of Gujarat*[70], the Gujarat High Court had already released the applicant on regular bail but despite that the applicant was incarcerated in jail for 3 years due to negligence of jail authorities failing to comply with the bail order of the High Court. Considering the plight of the applicant, the Court granted compensation for his illegal incarceration in the jail for almost three years. The Court held that in the interest of Justice and in order to see that the applicant is appropriately compensated for the negligence of jail authorities, the Court directed the state to grant him a compensation of 1 lack rupees and the same required be paid to him within 14 days.

In the recent case of *Ramkirat Munilal Goud* v. *State of Maharashtra & Ors*.[71], the Apex Court of India has recently issued notice for State intervention, wherein three petitioners who were acquitted by it in May 2025 after being on death row have sought compensation for their wrongful conviction, along with twelve years of incarceration. The writ petition[72], filed under Article

[68](2016) 11 SCC 703; AIR 2016 SC(CRI) 1025.
[69]AIR 2019 SC 1457, decided on 5th March, 2019.
[70]2023 SC, Date of order: 22.09.2023, Criminal Misc. Application (For Regular Bail) No. 2 of 2023 In R/Criminal Appeal No. 424 of 2020.
[71]2025 INSC 702.
[72]The petition states that he was falsely accused, illegally arrested, and subjected to a tainted investigation and unfair prosecution. His life, reputation, and family have been destroyed.

32, contends that Goud's wrongful conviction and incarceration amounted to a grave violation of his fundamental rights.

The Judicial attitude towards construction of right to personal liberty under Art. 21 has moved from restricted interpretation to the broader interpretation. In the light of the interpretation of Art. 21 by the Indian courts, relevant and coherent approach of compensatory jurisprudence is not only the challenging task of the day but is also in consonance with the constitutional spirit.[73]

VI. Compensation to Crime Victims

The expansive scope of Art. 21 is not merely limited to providing compensation where the State or its functionaries are guilty of an act or omission. It is also interpreted to rehabilitate the victim or his family where crime is committed by an individual without any role of the State functionary. In the case of *Bijoy @ Guddu Das v. the State of West Bengal*[74] , the Court observed, the philosophy of awarding compensation by the State is in the nature of a reparation to the victim of crime on its failure to discharge its sovereign duty to protect and preserve sanctity and safety of the individual from the ravages of such crime.

Despite the concept of compensating the victim by way of public law remedy under writ jurisdiction, need was felt for incorporation of a specific statutory provision for compensation by criminal justice system. The compensatory jurisprudence with regard to victims of crime per se is dealt under Section 395[75] and 396[76] of the *Bharatiya Nagarik Suraksha Sanhita* (BNSS). The Legislative framework as governed by the said statute is also guided by the directions of the Apex Court in numerous matters.

For instance, *Swarn Singh v. State of Punjab*[77], The Court held that Section 357(3) of the Code[78] enables to pay Compensation out of the fine that would have been imposed under the law. In those cases where the Court imposes a sentence, of which fine does not form a part, the Court may direct

[73]Sanjay Sindhu, New Dimensions of Compensatory Jurisprudence in India: A Critical Analysis of Judicial Decisions, http://hdl.handle.net/10603/127849, last visited 15th January, 2026.
[74]Calcutta HC, decided on 2 March, 2017.
[75]BNSS, S.395 - Order to pay compensation.
[76]BNSS, S.396 – Victim compensation scheme.
[77]AIR 1978 SC 1525.
[78]Now BNSS, S.395(3).

the accused to pay compensation.[79] The Apex Court in *Hari Singh* v. *Sukbir Singh*[80], held that the power of the Courts to award compensation under Section 357 is not ancillary but in addition to other sentences. The Court remarked that courts have seldom invoked S. 357 CrPC perhaps due to the ignorance of the object behind it. The said S. 357 is intended to assure the victim that he was never a forgotten entity in the administration of criminal justice.[81]

In the case of *Suresh* v. *State of Haryana*[82], the court awarded the victim with an interim compensation and the state was also ordered to provide a compensation to the victim's family of 10 lakh rupees who were abducted and then killed.

Three Judge Bench of the Delhi High Court of Delhi in *Karan* v. *State NCT of Delhi*[83], The Delhi High Court, has devised a formula of Victim Impact Report to determine the quantum of compensation to the victim in conjunction with the paying capacity of the accused. The Victim Impact Report is to be filed by the Delhi State Legal Services Authority (DSLSA)

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[79] Here the apex court held that while awarding compensation court should first determine whether it is a fit case for awarding the same. If it is found that compensation may be awarded, the court should consider whether the accused is capable of paying the compensation, as otherwise it would not serve any purpose. Court also held that while awarding compensation under Sec 357 several factors like the nature of offence, capacity of the accused, justness of the claims of the victim etc. and other relevant factors must be taken into consideration and has laid down that the amount of fine out of which compensation is to be paid shall not be excessive.

[80](1988) 4 SCC 551.

[81]The court recommended that the power of the courts to award compensation this section be exercised in each case to bring victim and accused to justice.

[82](2015) 2 SCC 227; 2014 AIR SCW 6810, the Court set out the following directions in this particular case:

i. The Courts must adequately determine problems such as the proper identity of the victim and the immediate financial circumstance and conditions of the victim.
ii. If the Courts are satisfied, they must award compensation on a temporary basis while the final decision remains pending.
iii. It is obligatory on the part of the Court to comply with the rules on compensation and to register their reasons, regardless of the decision taken.
iv. The financial requirements of the victim and the gravity of the case in question can be the deciding factors for such awards. Additional variables may also have a role to play in deciding the damages.

[83] 2020 SCC Online Del 775.

in each criminal case on conducting a summary inquiry. The Court is this case came up with functional guidelines.[84]

In matter of *Bodhisattwa Gautam* v. *Subhra Chakraborty*[85], the Court observed that compensation to victim shall be justified even if the accused was not convicted. It emphasized on the right of the Court to award interim compensation. The payment of interim compensation the payment of interim compensation would prevent undue delay in delivery of justice to victim. The court in the present case on having been satisfied about the prima facie culpability of the accused, ordered him to pay a sum of Rs.1000 every month to the victim as interim compensation along with arrears of compensation from the date of the complaint.[86]

In *Laxmi* v. *Union of India*[87], the Supreme Court in its order dated 18.7.2013 directed that the acid attack victims shall be paid compensation of at least Rs.3 lakhs by the concerned State Government/ Union Territory as after care and rehabilitation cost. The court ordered that the compensation deciding authority in cases of acid attack victim, shall be Criminal Injury Compensation Board which must be inclusive of Ld. District & Sessions Judge, DM, SP, Civil Surgeon/CMO of the district having jurisdiction.

In *Parivartan Kendra and Anr.* v. *Union of India and Ors.*[88], the SC observed that the State and Union Territory concerned can give even

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[84]After the conviction of the accused, the trial Court shall direct the accused to file the affidavit of his assets and income within 10 of crime on the victim, the expenses incurred on prosecution as well as the paying capacity of the accused. A summary inquiry is conducted to ascertain the impact the capacity to pay the compensation or the compensation awarded against the accused is not adequate for the rehabilitation of the victim, the Court shall invoke Section 357-A of the CrPC to recommend the case to DSLSA to award compensation from the Victim Compensation Fund under the Delhi Victims Compensation Scheme, 2018.

[85]AIR 1996 SC 922.

[86]The Supreme Court observed, "*Rape is not only a crime against the person of a woman (victim), it is a crime against the entire society. It destroys the entire psychology of a woman and pushed her into deep emotional crises. It is only by her sheer will power that she rehabilitates herself in the society which, on coming to know of the rape, looks down upon her in derision and contempt. Rape is, therefore, the most hated crime. It is a crime against basic human rights and is also violative of the victim's most cherished of the fundamental rights, namely, the right to life contained in Article 21.*"

[87] AIR 2015 SC 3662.

[88] Decided on 7.12.2015, Writ Petition (Civil) No. 867 of 2013.

more amount of compensation than Rs.3.00,000/- as was directed in Laxmi's case.[89]

The Supreme Court in *Nipun Saxena & Anr.* v. *Union of India & Ors.*[90] directed to prepare Model scheme for Victim Compensation where case deals with sexual offence and acid attacks. Accordingly, the compensatory scheme was prepared and presented before the Hon'ble Bench of the Supreme Court which was pleased and accepted the Scheme. The Court directed all the State and UTs to implement the same in their respective States/UTs.

Therefore, the Courts while considering the problem of penology should not overlook the plight of victimology. The idea of victim compensation scheme under the BNSS is complete and ideal on principle, however, the courts have bounded duty to pass orders for compensation, based on the facts and circumstances of every particular case. Once the order for compensation is ordered, the duty shifts onto the bureaucracy, for dispersal of compensation to victims.

VII. Conclusion and Suggestions

It is but natural that the notion of indefinable rights as enshrined under part III of the Indian Constitution would become meaningless, unless the Constitution is interpreted as requiring some affirmative remedy for their gross violation. If rights are violated, the violation cannot be undone, and often the only practicable and effective mode to redress the victim's suffering is by awarding compensation. The conventional remedies do not meet the ends in several circumstances, and this virtually necessitates compensation.[91]

The advent of compensatory jurisprudence in the light of fundamental rights theory is a hopeful sign that the judiciary has undertaken the mission of preserving the right to life and personal liberty, irrespective of the absence of any express constitutional provisions for compensation. Furthermore, a review of judicial response regarding protection of crime victims indicates that the proactive judiciary addressed the victim concerns and widened the arena of compensatory jurisprudence.

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[89]An important direction was also given in this case that all the States and Union Territories should consider the plight of such acid attack victims and take appropriate steps with regard to inclusion of their names under the disability list.

[90]Judgment dated 11.12.2018, W.P.(C) No. 565 of 2012

[91]Sushila Rao, Constitutional Rights Violations and Compensatory Jurisprudence in India and U.S.A.: Justifications and Critique, 18(1) NATIONAL LAW SCHOOL OF INDIA REVIEW 96 (2006).

Conclusively, it is essential to note that compensatory jurisprudence in India operates with specific restrictions. The amount of compensation awarded remains a challenge, often leading to variations from one case to another. Further, the compensation isn't available in all instances of violations constitutionally protected rights, and the scope of such claims is limited. The unique status accorded to the fundamental rights, which were meant to play a pivotal role in the social revolution envisaged by the Constitution-makers are now meant to merely keep a check on arbitrary state action. These restrictions and nuances make the landscape of constitutional compensation a complex and evolving field within Indian jurisprudence.

In order to overhaul the present compensatory jurisprudence, following suggestions may be incorporated:

1. Inclusion of "Right to Compensation (Art. 32A)" as a new provision in the Constitution of India. This is to mitigate the discretion-based compensation system. There is a compelling need to introduce a distinct 'Right to Compensation' in the Constitution.[92] This Constitutional provision would delineate explicit and well-defined guidelines for awarding compensation.
2. Developing a Scientific Compensation Criterion, the development of a standardized and scientifically sound criterion for determining compensation amounts is essential. This approach would introduce clarity and consistency into the compensation process, ensuring that victims receive compensation in proportion to their losses.
3. Holistic Victim Rehabilitation, the emphasis should shift from not only providing compensation but also to holistic victim rehabilitation. This broader approach should encompass not only financial restitution but also psychosocial support, medical care, and other aspects that facilitate the comprehensive recovery and reintegration of victims of crime.

[92] Art. 32A - Right to Compensation: "Any violation of fundamental rights mentioned under Part III of the Constitution by the State or its authorities shall lead to enforceable right of compensation from the state by the victim or his dependents"

Constitutional Silence, Judicial Voice: Hate Speech Regulation and the Limits of Free Speech In India

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Deepu Kumar**

Abstract

Hate speeches are on rise and so is the division in the society but what is more surprising is the fact that the courts and parliament have not made any endeavour so far to directly deal with the issue of hate speech. Nevertheless, it has come to be recognised by way of construction as a limitation on the free speech going against the dictates of the settled law. This paper argues that such a course is not permissible and any restriction imposed on free speech should be specifically mentioned under the Article 19(2) of the Constitution. To argue on this contention, a mixed approach is adopted. The paper points out at the nuance of construction as to how hate speech criminalisation is justified which suffers from an inherent infirmity. The infirmity is explained in the paper with the help of case laws. The paper, further, argues that if hate speech is to be recognised then an amendment is inevitable and it cannot be done by way of construction. The said research gap has not been covered critically and more so with the help of case laws.

Key Words: *Free Speech, Hate Speech, Limitation, Construction, Constitution.*

I. Introduction

The term "Hate Speech" has become a buzz word in India lately and its use has become more and more with the passage of time, although the word is not of recent origin. Largely, it affects the human rights and dignity of the community itself, which has been targeted, and thereby the individuals belonging to those communities, besides persons belonging to the minority or group as those directly targeted. Hate speech is not only dangerous but

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it is divisive as well in any society as it threatens the very fabric of the democracy by affecting inclusion and effective participation of those who have been the targets. Since, any act of hate or division would erode the trust of the people and they would volunatrily forced out of the public debate and silenced.[1] The term hate speech itself is of wide import and it includes various meanings within its fold – the Law Commission of India has attempted to define it in these terms – "Hate speech is an expression which is likely to cause distress or offend other individuals on the basis of their association with a particular group or incite hostility towards them."[2]

It is an undoubted fact in the contemporary times that not only hate speech dominates public discourse but it holds equally true in the field of litigation nevertheless it is important to keep in mind that Article 19(2)[3] of the Constitution of India doesn't mention any such word. In the field of litigation, there have been many cases dealing with hate speech in recent times like - *Amish Devgan*[4], *Ashwini Upadhyaya*, *Kaushal Kishor*[5]. In recent times, politicians are accused of making hate speech against one community or group for fulfilling their political motives. They are also accused of polarising the society as an effect of such speeches. However, so far no noticeable action has been taken but cases like the abovementioned have reached the highest courts in India which shows the gravity of these hate speeches.

Thus, a clear gap exists at the moment with regards to the constitutional text and regulatory practices. Since, it is an admitted position that hate speech does not form part of Article 19(2) of the Constitution. However, it is argued that the hate speech can be read into the existing restrictions like law and order etc. which is nothing more than interpretation of the said text and in light of *Kaushal Kishor* judgement which says that the restrictions mentioned

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[1]What is hate speech and why is it a problem? *available at*: https://www.coe.int/en/web/combating-hate-speech/what-is-hate-speech-and-why-is-it-a-problem- (last visited on Feb 01, 2026).

[2]The Law Commission of India, "267th Report on Hate Speech" 15 (March, 2017).

[3]The Constitution of India, Art. 19(2): "Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with Foreign States, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence."

[4]Amish Devgan v. Union of India, (2021) 1 SCC 1.

[5]Kaushal Kishor v. State of U.P., (2023) 4 SCC 1.

under sub clause(2) of Article 19 of the Constitution is exhaustive in nature.[6]This would also be in coherence with the judgements like *Romesh Thapar*[7] and *Brij Bhusan*[8] which struck down the provision of the assailed statutes on the ground that said restriction doesn't form part of the restrictions mentioned under Article 19(2). Thus, what naturally flows from these judgements is that no restriction can be placed in the name of hate speech without it being actually incorporated under the constitutional text by way of an amendment.

The objective of this research paper is to underline the fact that the freedom of speech and expression as mentioned under Article 19(1)(a) of the Constitution of India should not be trampled with, without any strict textual reference in this regard. Further, the fact that India had to fight a long battle to get what lawfully belonged to her in the first place. The experiences of those people who have fought hard to gain Independence were broadly of the view that in an Independent India everyone would have the right to express their mind without any fear or favour. The constitutional forefathers were mindful of the very fabric of the nation at that stage where India just got its Independence and the restrictions mentioned under Article 19(2), as it existed originally, was the reflection of that mindset. That in a sense underlined the basic argument that free speech is the rule and limitation, if any, needs to be categorically mentioned in the constitutional text.

II. Free Speech under Article 19(1)(a): Core, Value and Limits

The article clearly stipulates that "(1) All citizens shall have the right – (a) to freedom of speech and expression;" meaning thereby that people of India have the right to freely express themselves but it is important to note that the said freedom is not absolute. A similar provision with respect to this has been mentioned under the Preamble of the Constitution whereby "Liberty" in the form of thought, expression, belief, faith and worship are ensured to the people of this country i.e., India. Both these mandates that free expression is ensured to every citizenry without any prejudice in a democratic government like India.

Freedom of speech is the bulwark of democratic government. This freedom is not only essential for the proper functioning of the democratic process, but it should be understood as the first condition of liberty. In a hierarchy of liberty, this holds the top place as it also affords aid and protection

[6]Ibid.
[7]Romesh Thapar v. State of Madras, 1950 SCC 436.
[8]Brij Bhushan v. State of Delhi, 1950 SCC 449.

to other liberties. The significance of this can be understood by the simple fact that this liberty is often touted as the mother of all other liberties.[9] In a democracy like ours, this right acts as the opening gate where wide-ranging issues are freely discussed to form public opinion on any given issue be it social, political and economic matters. With the passage of time, the interpretation which has come to be ascribed to this freedom cannot be called narrow in any sense but it has been described broadly as a "basic human right", "natural right" and the like. It incorporates, within its fold, propagation and interchange of ideas freely, besides free flow of information to aid formation of one's opinion and viewpoint and on that basis can engage in debates on matters of public concern.[10]

Political speeches, in this regard, forms a different class and it incorporates within its fold such "speeches relating to government policies" that forms the basis for "preservation and promotion of democracy."[11]These speeches are different from the one where "dissent and criticism of the elected government's policy, when puissant, deceptive or even false would be ethically wrong" but such speech would not be penalised.[12] Thus, political speech is considered at a higher pedestal in a democratic structure like India, where the people associated with them should weigh their speech before they speak as they have a larger audience and things they speak amplifies and reaches a larger audience.

The restrictions attached to "free speech and expression" must be construed narrowly as the makers of the Indian Constitution had to live through such times where they could not object to the rule of foreign rulers in the country and it is important that the voices must be protected as J.S. Mill has said:

If all mankind minus one, were of one opinion, and only one person were of the contrary opinion, mankind would be no more justified in silencing that one person, than he, if he had the power, would be justified in silencing mankind.[13]

The free speech principle is guided by the plurality of opinion to mean that even a speech which is 'vehement, caustic, and sometimes unpleasantly sharp' is protected from State intervention.[14]However, what is being done

[9]I, Report of the Second Press Comm, 34-35.
[10]Union of India v. Naveen Jindal, (2004) 2 SCC 510.
[11]*Supra* note 4.
[12]*Ibid*.
[13]J.S. Mill, On Liberty and Utilitarianism 4 (Bantem Classics, New York, 2008).
[14]*Supra* note 2.

in the case of hate speech is that, firstly it has been associated with human dignity to mean that hate speech lowers human dignity and even at this stage it could not come under the above said limitation. The Supreme Court drew a different parallel that dignity of individual and unity and integrity of the nation are linked. The linkage is on the basis of the fact that the former is a right of an individual whereas the latter is an obligation upon the individual to ensure unity and integrity of the nation. Further, it was observed that if there would be intent to disrupt public order or to demean dignity of targeted groups then in that case it would be justified to act as per the law.[15]In all these, the Supreme Court has failed to take note of the fact that individuals and groups are different and at the moment the hate speech doesn't target an individual but a group. Furthermore, such a reading goes against the very grain of the constitution as this is what was decided in the cases like *Romesh Thapar* where the case involved a challenge to Section 9(1-A) of the Madras Maintenance of Public Order Act, which authorized the government to ban publications that threatened public safety or order. The Court struck down this provision as unconstitutional, holding that Article 19(2) as originally enacted permitted restrictions on free speech only where it undermined the security of the State, not for maintaining public order.[16]This approach should have been followed by the Apex court of this country while dealing with the issue of free speech as the endeavour should be in the favour of protecting speeches as has been promised under the Constitution under Article 19(1)(a). Any restriction, based on which the endeavour is being made to prohibit speech should be clearly traceable to Article 19(2). As it was clearly held in *Kaushal Kishor* that –

> The grounds lined up in Article 19(2) for restricting the right to free speech are exhaustive. Under the guise of invoking other Fundamental Rights or under the guise of two fundamental rights taking a competing claim against each other, additional restriction not found in Article 19(2), cannot be imposed on the exercise of the right conferred by Article 19(1)(a) upon any individual.[17]

What is surprising from the aforesaid ratio is the fact that it has been clearly stated that to invoke other fundamental rights no restriction which does not actually form part of the said provision can be read into it. Now, for recognising hate speech what they did was they first linked it with human dignity and only thereafter it was linked with unity and integrity and then

[15]*Supra* note 5.
[16]*Supra* note 7.
[17]*Supra* note 5.

that was further linked was public order. So, what is happening here is that human dignity comes under the ambit of Article 21 and on that basis, the finding of the court in recognising it as hate speech would not be sustainable anymore and that is what the court have failed to notice, thus far.

III. Hate Speech in Indian Law: A Concept without a Constitutional Home

This is an acceptable position in the field of law that the term "hate speech" has neither been defined in the Indian laws nor does the law which are recognised as hate speech laws specifically mentions the term as hate speech. The Constitution does not define hate speech nor does it mention it even at one place in the whole text. The conspicuous absence seems deliberate as the makers of the Constitution were visionary and they must have thought of this in light of their lived experience to mean that presence of such a term might water down their intention in giving the citizen with free speech.

The Law Commission of India in its report on "Hate Speech" has recognised that the following laws have bearing on the hate speech, they are as follows[18]:

Act/Statute	Relevant Provisions
1. The Indian Penal Code, 1860 (Act No. 45 of 1860). [19]	Ss. 124A, 153A, 153B, 295A, 298 and 505(1) & (2).
2. The Representation of People Act, 1951 (Act No. 43 of 1951).	Ss. 8, 123(3A) and 125.
3. The Protection of Civil Rights Act, 1955 (Act No. 22 of 1955).	Section 7.
4. The Religious Institution (Prevention of Misuse) Act, 1988 (Act No. 41 of 1988).	Section 3(g).
5. The Cable Television Network Regulation Act, 1955 (Act No. 7 of 1955).	Ss. 5 and 6.
6. The Cinematograph Act, 1952 (Act No. 37 of 1952).	Ss. 4, 5B and 7.
7. The Code of Criminal Procedure, 1973 (Act No. 2 of 1974).[1]	Ss. 95, 107 and 144.

One important thing in this regard is that all these legislations have been said to have some bearing on hate speech but on what basis could these restrictions be justified is missing completely.

[18] *Supra* note 2 at pp. 5-8.

[19] Please refer the Bharatiya Nagrik Suraksha Sanhita, 2023 (Act No. 46 of 2023) Ss. 98, 126 and 163.

The Judiciary has been approached to deal with the issue from time to time but the court has been reluctant in view of judicial restraint. The Supreme court had observed that "the mode of exercise of free speech, the context and the extent of abuse of freedoms" are the factors based on which "contours of permissible restrictions" are determined. The court agreed to the view of the Commission in this regard "that laying down a definite standard might lead to curtailment of free speech." This has been the prime reason that the courts have refrained themselves from defining hate speech in India. Nonetheless, the Supreme Court in the significant case of *Pravasi Bhalai Sangathan* defined the expression as follows:

Hate speech is an effort to marginalise individuals based on their membership in a group. Using expression that exposes the group to hatred, hate speech seeks to delegitimize group members in the eyes of the majority, reducing their social standing and acceptance within society. Hate speech, therefore, rises beyond causing distress to individual group members. It can have a societal impact. Hate speech lays the groundwork for later, broad attacks on vulnerable that can range from discrimination, to ostracism, segregation, deportation, violence and, in the most extreme cases, to genocide. Hate speech also impacts a protected group's ability to respond to the substance ideas under debate, thereby placing a serious barrier to their full participation in democracy.[20]

The court relied on the judgement of the Canadian Supreme Court in the case of *Saskatchewan* where it was held that for the control of publication of 'hate speeches', human rights obligations forms the basis. Further, it was said that repugnancy of ideas although expressed is not sufficient to justify restriction on any expression and further it would be irrelevant that whether or not such expression was intended to promote hatred or discrimination.[21]

Further, the Supreme Court referred to a few definitions, like, of hate speech given by *Richard Delgado* as language intended to demean a group which would be labeled as a "racial insult" by a reasonable person.[22] *Mari J. Mastunda* refers to "hate speech as a message of racial inferiority, prosecutorial, hateful and degraded."[23]The Supreme court of India has relied

[20]Pravasi Bhalai Sangathan v. Union of India, (2014) 11 SCC 477.
[21]Saskatchewan Human Rights Commission v. William Whatcott, 2013 SCC OnLine Can SC 6.
[22]*Supra* note 5.
[23]*Ibid*.

over these expressions but has refrained or abstained from actually defining and conclusively deciding on the issue of hate speech.

In light of the aforesaid, it can be said that hate speech in India operates as a functional category and not as a constitutional one. To understand this a little further within the Indian constitutional framework, hate speech does not exist as an independent and textually recognised category of restricted speech. The Constitution does not expressly identify "hate speech" as a basis for limiting freedom of expression under Article 19(2) unlike mentioned grounds such as *public order*, *decency or morality*, or *incitement to an offence*. Consequently, hate speech in India does not derive its regulatory force from constitutional text but from the function it is perceived to perform in society. In this sense, hate speech operates as a *functional category* to mean that it is not restricted because it is labelled as "hate speech", but because of its anticipated consequences such as to disturb public order, threaten social harmony, incite violence, or undermine equality and dignity.

IV. Public Interest, Public Order, and Law & Order: The Constitutional Bridge

It is true that there is absence of an explicit constitutional prohibition on hate speech in India. Thus, its regulation is justified, primarily, by the aid of interpretation. The reliance in this regard is placed on *public order* which finds mention under Article 19(2). Hate speech is categorised as discriminatory and against human dignity which is linked with unity and integrity of the nation and any action that tends to promote any hatred would disturb "public order".[24] In this way, the regulation in the name of hate speech is justified and any action taken by the authorities to proscribe such speech is justified. Therefore, the constitutional legitimacy of such restrictions rests not on the expressive content itself but on its perceived consequences within the public sphere, as has been explained earlier.[25]

Before taking this argument any further it is important to note that in the landmark case of *Shreya Singhal*, three kinds of expression have been talked about – discussion, advocacy and incitement.[26]It was observed by the

[24]*Supra* note 5.

[25]Raghav Kohli, "Expressive Conduct and Article 19(1)(a) of the Indian Constitution: A Purposivist Approach" 16(2) Asian Journal of Comparative Law 259-284 (December 2021), https://www.cambridge.org/core/journals/asian-journal-of-comparative-law/article/abs/expressive-conduct-and-article-191a-of-the-indian-constitution-a-purposivist-approach/EA81276A4115683570D5DAAF981D4852 (last visited on Feb 3, 2026).

[26]Shreya Singhal v. Union of India, 2015 INSC 257.

court that the earlier two forms are protected but not the last one. This only strengthens the argument that any action against hate speech would be based on consequence of such incitement.[27] Thus, consequence-based justification operates in a familiar way: speech that exhibits a tendency to incite hostility, violence, or social disharmony is treated as posing a threat to public order, thereby attracting constitutional sanction. In this framework hate speech is not restricted *because it is hateful*, but because it is assumed that it may cause such circumstances to exist which may endanger public tranquility or undermine collective interests. The emphasis remains on the likelihood of disorder to justify intervention by the state, without formally expanding the grounds enumerated in Article 19(2).[28]

However, the reality reveals a significant slippage between constitutional theory and enforcement. In many instances, expressions that merely offend sensibilities or challenge dominant narratives are treated as public order concerns, notwithstanding the absence of a proximate or imminent threat.[29] Preventive restrictions are often imposed in the name of maintaining peace and the reliance is based on speculative assessments of harm rather than demonstrable tendencies toward violence or disruption. As a result, the public order justification risks functioning as a proxy for content-based censorship, enabling restrictions that the constitutional text itself does not clearly authorise. However, the various tests to check whether a speech amounts to hate speech or not are also required to be tested based on the content of such speech.[30]

This slippage exposes the fragility of the constitutional bridge that connects hate speech regulation to public interest and public order. While the interpretative framework permits regulation without overt constitutional distortion, its elasticity also allows for expansive and discretionary control over speech. The challenge, therefore, lies not in the theoretical possibility of regulating hate speech under Article 19(2), but in ensuring that such regulation remains tethered to clear, narrowly tailored, and demonstrable threats to public order, consistent with the constitutional commitment to free expression.

V. Judicial Construction of Hate Speech: Expression Without Amendment

It has been discussed earlier that both in the landmark case of *Amish Devgan* as well as *Kaushal Kishor* that the Hate Speech is construed to relate to

[27] *Ibid*.
[28] *Supra* note 5.
[29] *Supra* note 26.
[30] *Supra* note 4.

a situation which may endanger public order. Thereby, justifying any coercive step to restrict such speeches but while doing so, the court has not paid heed to the wisdom of the Constitution makers. *Hukam Singh* during one of the meetings of the Constituent Assembly Debates (CAD) exhorted that the draft Constitution undermined free speech by granting the legislature excessive power to restrict expression under broad justifications related to "state authority."[31]Similarly, *Sardar Bhupinder Singh Man* pointed out to the draft structure of the free speech provision as to how Article 13 of the draft Constitution offers rights with one hand and takes them away with the other through numerous restrictions.[32]It is important to remember that the nature and form of Article 19(2) before the first[33] and sixteenth[34] amendment was different and it only mentioned six grounds to restrict such speech. A comparative table is given hereafter to show how it has changed before amendment and after the said amendments.

S.No.	Prior to Amendment	Post Amendment
1.	Libel	Interest of sovereignty and integrity of India
2.	Slander	The security of the State
3.	Defamation	Friendly relations with foreign States
4.	Contempt of Court	Public order
5.	Any matter which offends against decency or morality	Decency or morality
6.	Any matter which undermines the security of the State or tends to overthrow the State	Contempt of court
7.		Defamation
8.		Incitement to an offence

The above said table shows that by way of first and sixteenth amendment, the said provision has been amended to include and incorporate changes which were earlier not part of the same. It was specifically made part of where they didn't exist and not by way of construction as has been done in the case of hate speech. Also, if the table is analysed with little care, it reveals that *libel, slander* and *defamation* would form part of the same group, meaning thereby, the nature of restrictions were limited and not overbroad

[31]VII, Constituent Assembly Debates, Dec 1, 1948, https://www.constitutionofindia.net/debates/01-dec-1948/ (last visited on Feb 3, 2026).
[32]*Ibid*.
[33]The Constitution (First Amendment) Act, 1951, s.3.
[34]The Constitution (Sixteenth Amendment) Act, 1963, s.2.

like it exists today. As expressions like public order is very broad and can be construed to justify any action of the state like it has been shown in the *Kaushal Kishor* judgement. It is shown that *public order* is the common ground across all the provisions which deal with restriction of free speech.[35]

The Supreme Court of India through judgments like *Amish Devgan*, *Kaushal Kishor* have recognised hate speech as a restriction on free speech by way of construction. But it is important to note, as discussed earlier in the paper, that neither "hate speech" is a ground specifically mentioned under Article 19(2) nor does the term found mention itself.

The problem which exist in this regard is simple yet very problematic as any speech curbed on the anvil of Article 19(2) must meet the standards which has already been laid by the court itself through judgements like *Romesh Thapar* and *Brij Bhushan* which was decided by a bench of 6 judges. The said law still holds good in the eyes of law as they have not been overruled and therefore following the rigour of Article 141[36] which gives these judgements values of binding precedents. Therefore, any attack on free speech in the name of restriction not mentioned in Article 19(2) gives a chilling effect. Moreover there are examples where two girls were detained for posting something over the internet out of them one was detained for liking the post.[37] This shows the chilling effect it could have over other individuals and society at large. In a society like ours where tolerance is not only preached but it is also practiced, such examples give a very negative effect to the tolerant image of India. Further, it also shows view point discrimination is treated as an offence where it should not have as hate speech is imposed upon them. This further aggravates such cases and its effect on society.

VI. Conclusion

It is an undoubted position which must be cleared that hate speech must be regulated nevertheless any restriction which has any kind of bearing on free speech must adhere to the principles of constitutional law. Further, it is important to understand that –

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[35]*Supra* note 5.

[36]The law declared by the Supreme Court shall be binding on all courts within the territory of India.

[37]International Humanist and Ethical Union, Freedom of Thought 2012: A Global Report on Discrimination against Humanists, Atheists and the Nonreligious, https://humanists.international/wp-content/uploads/IHEU%20 Freedom%20 of%20Thought%202012.pdf (last visited on Feb 3, 2026).

'Free speech' includes the right to comment, favour or criticise government policies; and 'hate speech' creating or spreading hatred against a targeted community or group. The former is primarily concerned with political, social and economic issues and policy matters, the latter would not primarily focus on the subject matter but on the substance of (the) message which is to cause humiliation and alienation of the targeted group.

Without going into the criticality of the term hate speech and the content of such speech and the position of speaker[38] – it is important that a restriction in the form of hate speech should comply with Article 19(2) of the Constitution.[39] At the same time, it is important that any speech should not be curtailed unless it has such overtones which can really cause an issue of law and order. Since, the most significant consideration in a democracy could be nothing other than the right to express oneself. In this democratic setup, the law and policies must go through the scrutiny of democratic processes which includes criticism and questioning.[40]The *Amish Devgan's* judgement also reflects upon the view of *George Bernard Shaw*, where he stressed upon the significance of free speech right to mean that the theory of freedom of speech does not rest upon the assumption that everybody was right. On the contrary, it is based upon the assumption that everybody was wrong on some point where somebody else was correct. Therefore, anyone going unheard has public danger.[41]

Thus, stressing over the need of free speech on the one hand and regulation of free speech on the other hand is crucial and must be taken seriously by the government as well as the Constitutional courts so that any conflict can be resolved. While dealing with this issue, they must be mindful that such a restriction doesn't exist as of now and an amendment should be done without deploying the canons of interpretation to their aid. That such a course would be a permissible one in light of the binding precedent in form of Bri Bhusan and Romesh Thapar which did not entertain any act which was not in the ambit mentioned under Article 19(2).

The Hate speech could be proved to be a menace in the contemporary time as it promotes discrimination which is an accepted position based on

[38]*Supra* note 4.
[39]*Supra* note 5.
[40]Vikram Raghavan, "Taking Free Speech Seriously" 51(2) Economic and Political Weekly 24-27 (August, 2016), https://www.jstor.org/stable/44004700 (last visited on Feb 3, 2026).
[41]*Supra* note 4.

several judgement like *Pravasi Bhalai Sangathan, Amish Devgan, Kaushal Kishor* etc. In contemporary times, it is equally important to protect dissent and the same should not be trampled with using hate speech as an aid. History shows that hate speech has also been intentionally used to mobilise groups and societies against each other in order to provoke violent escalation, hate crime, war and genocide.[42] Thus, there is clear need of recognising hate speech constitutionally under Article 19(2) and a clear direction or guidelines should be issued by the competent authority to deal with this issue.

[42]*Supra* note 1.

Navigating the Tension between Innovation and Data Privacy Laws in India and California

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Abstract

India's Digital Personal Data Protection Act, 2023 (DPDPA) marks a key step in protecting personal data while promoting the digital economy. Yet, balancing privacy with technological growth poses challenges, including broad government powers, no independent regulator, compliance pressures on smaller businesses, and unclear cross-border data rules. The article finds that while the law sets a solid base, its success hinges on transparent governance, accountable institutions, and regulations that protect privacy without hindering innovation.

Key Words: *Data Privacy, Innovation vs. Regulation, Right to Privacy, Data Governance, Technological Advancement, Regulatory Challenges.*

I. Introduction

In the 21st-century digital economy, data has emerged as one of the most valuable assets, driving innovation, economic growth, and governance efficiency. As India rapidly transitions into a digitally empowered society, propelled by initiatives like *Digital India*, *Startup India*, and the expansion of AI and fintech sectors, the collection and processing of personal data have become deeply embedded in everyday transactions. This digital transformation, however, has brought with it serious concerns about individual privacy, data misuse, and the unchecked power of both private companies and the state.The enactment of the Digital Personal Data Protection Act, 2023[1] (DPDPA) marks a significant legal milestone in India's efforts to address these concerns. Framed in the

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1. The Digital Personal Data Protection Act, 2023, No. 22, Acts of Parliament, 2023.

aftermath of the Justice K.S. Puttaswamy (2017) judgment that recognized the right to privacy as a fundamental right, the Act aims to create a comprehensive framework for protecting personal data while also enabling the growth of a robust digital economy. The Act introduces concepts such as data fiduciaries, data principals, consent-based processing, and the creation of a regulatory authority—the Data Protection Board of India.

Despite these advancements, the implementation of the DPDPA raises several challenges. The law attempts to balance two potentially conflicting goals: protecting individual privacy rights and facilitating technological and economic innovation. This balancing act becomes particularly difficult given India's socio-economic diversity, digital infrastructure gaps, and the need to support emerging tech enterprises without imposing excessive compliance burdens. Furthermore, concerns have been raised over the Act's vague exemptions for government agencies, the limited independence of its regulatory framework, and ambiguities in cross-border data transfer provisions. This article critically examines the challenges that India faces in operationalizing its data protection law without stifling innovation. It explores the tension between privacy and progress, evaluates the strengths and shortcomings of the DPDPA, and draws comparisons with global regulatory models like the GDPR and CCPA. The goal is to identify pathways through which India can develop a rights-respecting yet innovation-friendly data governance regime.

II. Historical Background

India's journey toward establishing a formal data protection regime has been both reactive and evolutionary, shaped by growing digital adoption, concerns over state surveillance, and judicial recognition of privacy as a fundamental right. For many years, India lacked a dedicated data protection law. Instead, personal data was loosely regulated through sectoral laws and provisions under the Information Technology Act, 2000, particularly under Section 43A and the IT (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011. However, these measures were widely regarded as inadequate, particularly in the face of emerging technologies, increasing cyber threats, and the rapid expansion of the digital economy.

The watershed moment came in 2017, when the Supreme Court of India, in the landmark case of *Justice K.S. Puttaswamy (Retd.) v. Union of India*[2], unanimously held that the right to privacy is a fundamental right under Article 21 of the Constitution. This judgment not only recognized informational privacy as a constitutional value but also imposed an obligation on the State to enact

2. Justice K.S. Puttaswamy (Retd.) v. Union of India, (2017) 10 S.C.C. 1, 497 (India).

a comprehensive data protection framework. In response, the Government of India constituted the Justice B.N. Srikrishna Committee, which submitted a draft Personal Data Protection Bill in 2018. The bill went through multiple iterations over the years, reflecting ongoing debates on issues such as data localization, surveillance, state exemptions, and regulatory independence.

After years of consultations, revisions, and public discussions, the Digital Personal Data Protection Act, 2023 (DPDPA) was enacted. This law is the culmination of nearly a decade of policy deliberations and judicial influence. It seeks to create a legal framework that protects personal data while also facilitating the use of data for innovation, governance, and business efficiency. However, unlike the European Union's GDPR, which places individual rights at its core, or the California Consumer Privacy Act (CCPA), which focuses on consumer choice, India's DPDPA attempts a hybrid model—recognizing privacy while supporting data-driven innovation.

This background highlights the broader challenge India now faces: implementing a law that must uphold constitutional privacy rights, align with international data protection standards, and simultaneously encourage technological progress in a rapidly expanding digital economy.

III. Legislative Trends

The legislative evolution of data protection laws in India reflects a growing recognition of the need to balance the imperatives of individual privacy with the demands of technological innovation and economic development. Globally, data protection frameworks have taken different forms—some prioritizing privacy as a fundamental right, others emphasizing commercial regulation. India's legislative journey has drawn from both approaches, resulting in a hybrid legal framework in the Digital Personal Data Protection Act, 2023 (DPDPA).

A. From Sectoral Regulations to Comprehensive Legislation

India's early approach to data protection was fragmented and sector-specific, primarily governed by the Information Technology Act, 2000 and the IT Rules, 2011. These frameworks offered minimal safeguards and lacked enforcement teeth. As digital technologies evolved—especially with the rise of e-governance, fintech, and social media platforms—the limitations of the existing regime became increasingly apparent. This prompted a shift in legislative intent towards a unified, purpose-built law, especially after the Puttaswamy judgment (2017), which held that privacy is a fundamental right.

B. Emergence of Rights-Oriented Drafts

Following judicial guidance, the Justice B.N. Srikrishna Committee submitted the Personal Data Protection Bill, 2018, which drew heavily from the European Union's General Data Protection Regulation (GDPR). The draft emphasized individual rights, strict processing norms, and proposed an independent Data Protection Authority. However, subsequent versions of the bill—particularly the 2019 draft and finally the 2023 Act—revealed a gradual dilution of some rights-based principles, reflecting the government's effort to balance privacy with innovation, national security, and economic concerns.

C. Executive Flexibility and State-Centric Control

A key legislative trend in the DPDPA, 2023 is the centralization of rule-making powers in the executive. The Act empowers the central government to notify significant portions of its framework through delegated legislation. While this allows flexibility to adapt to technological change, it also raises concerns about legal certainty, transparency, and regulatory independence—critical for both protecting citizens' rights and ensuring investor confidence.

D. Focus on Innovation and Ease of Doing Business

Unlike its earlier drafts, the 2023 Act relaxes data localization requirements, simplifies compliance for startups and small entities, and introduces broad exemptions for state functions. These trends reflect the government's strategic shift to make the law business-friendly, encouraging investment in India's digital ecosystem while maintaining a basic privacy framework. However, this shift has sparked debates about the adequacy of privacy protections, especially in the absence of strong, independent oversight.

E. Alignment with Global Trends

India's legislative trend mirrors the global movement toward hybrid models of data governance. Like the California Consumer Privacy Act[3] (CCPA), which emphasizes consumer choice and commercial compliance, the DPDPA incorporates flexible obligations for data fiduciaries. At the same time, it adopts elements from rights-centric models like the GDPR, such as data principal rights and the requirement of consent. The challenge lies in operationalizing these principles in a way that does not stifle innovation but still upholds constitutional values.

The legislative trends surrounding India's data protection law reflect a nuanced attempt to create a context-sensitive framework—one that protects

3. The California Consumer Privacy Act, 1798.100–1798.199 Cal. Civ. Code (2018).

individual privacy without obstructing digital growth and innovation. The shift from strict regulatory proposals to a more adaptive and innovation-friendly legal architecture suggests a deliberate effort to balance constitutional obligations with developmental aspirations. However, the true test of this legislation lies not just in its drafting but in its implementation, interpretation, and enforcement, which must address both citizen rights and the demands of a rapidly evolving digital economy.

IV. Various Aspects

The implementation of the Digital Personal Data Protection Act, 2023 (DPDPA) presents a multidimensional challenge as it seeks to strike a fine balance between individual privacy rights and the economic need for digital innovation. This balance is crucial in an era where data is not only a resource but also a matter of personal dignity and national interest. The key dimensions in this balancing act include:

A. Legal and Constitutional Dimension

The right to privacy, recognized as a fundamental right under Article 21 of the Indian Constitution (Puttaswamy Judgment, 2017), is the legal backbone of data protection. However, the law must also account for reasonable restrictions, particularly for national security, public order, and innovation. The DPDPA attempts to uphold privacy while granting the State broad discretionary powers, such as exemptions from consent in certain cases. This raises questions about the constitutionality and proportionality of such provisions.

B. Technological Dimension

Innovation in artificial intelligence (AI), big data analytics, cloud computing, and machine learning heavily relies on large-scale data processing. A stringent data protection regime could stifle such innovation if compliance burdens are too high. On the other hand, weak safeguards could lead to misuse of personal data. Therefore, the law must support privacy-by-design frameworks, data minimization principles, and technological safeguards like encryption to allow innovation without compromising personal data.

C. Economic and Business Dimension

Startups, digital platforms, and global tech companies view data as a strategic asset. The DPDPA provides compliance relaxations for smaller entities, but the ambiguity around consent, cross-border data transfer, and data fiduciary

obligations may deter investment. The challenge lies in ensuring ease of doing business while maintaining a trust-based digital economy, especially as India aspires to become a global data hub.

D. Regulatory and Institutional Dimension

The Act proposes the establishment of a Data Protection Board of India, but concerns exist about its independence and effectiveness due to the high degree of executive control. A truly independent and well-resourced regulatory body is essential for fair enforcement, grievance redressal, and compliance oversight. Weak regulation could undermine both user trust and corporate accountability.

E. Social and Ethical Dimension

In a country with low digital literacy, informed consent and awareness about data rights remain limited. This gives rise to ethical issues around manipulation, surveillance, profiling, and algorithmic bias. Balancing privacy with innovation also means protecting vulnerable populations from digital exploitation, while ensuring inclusive access to data-driven services.

F. Global and Geopolitical Dimension

India's data protection law must also align with international standards to facilitate cross-border data flow and trade negotiations. Striking a balance between data sovereignty and global interoperability (with laws like GDPR and CCPA) is crucial for India's position in global digital governance. Overly restrictive laws could lead to data localization demands that hamper international collaborationBalancing innovation and privacy is not a one-time legislative act but a dynamic, evolving process. The success of India's data protection law depends on how well it manages these overlapping dimensions—protecting personal dignity, encouraging responsible innovation, ensuring regulatory fairness, and maintaining global credibility. The law must evolve in response to emerging technologies, citizen expectations, and global standards, making adaptive governance the key to its long-term success.

V. Constitutional Aspects

The constitutional framework of India provides the guiding principles for balancing innovation with the fundamental right to privacy. After the Supreme Court's landmark judgment in *Justice K.S. Puttaswamy v. Union of India* (2017), privacy was firmly established as an intrinsic part of Article 21,

meaning that any restriction on personal data must satisfy the tests of legality, necessity, and proportionality. At the same time, the Constitution also protects the freedom of trade, expression, and equality under Articles 19 and 14, which support technological development, digital entrepreneurship, and innovation in the larger public interest. The Digital Personal Data Protection Act, 2023 attempts to harmonize these competing claims by recognizing the right of individuals to safeguard their data while enabling lawful use of data for governance, research, and economic growth. However, the Act's broad government exemptions, vague definitions such as "public interest," weak regulatory independence, and high compliance burdens for startups pose serious constitutional and practical challenges. These issues raise concerns of arbitrariness under Article 14, possible violation of proportionality under Article 21, and potential chilling effects on freedom of trade and innovation under Article 19. Thus, the real constitutional test lies not merely in the passage of the law but in its implementation—ensuring that privacy is meaningfully protected while innovation is fostered within the boundaries of constitutional safeguards. **Directive Principles of State Policy (Articles 38, 39, 43, 47)** The State has a duty to promote welfare, scientific development, and access to information while protecting citizens' dignity. Data-driven innovation in areas like health, education, and fintech aligns with **directive principles**, but must be harmonized with fundamental rights. India's Constitution provides a robust foundation to balance **privacy** and **innovation**: **Privacy (Article 21)** must be protected as a core fundamental right.**Innovation and economic growth (Articles 19, 38, 39, 43)** are legitimate state interests.The real challenge lies in **implementation**—ensuring that the DPDP Act and its rules uphold **legality, necessity, and proportionality**, while enabling a thriving digital economy.

Courts, regulators, and policymakers will need to **continuously calibrate** this balance to prevent privacy from being sacrificed in the name of progress, or innovation from being stifled by rigid regulation.

VI. Judicial Scenario

The Indian judiciary has played a pivotal role in shaping the discourse around data protection and privacy, especially in the absence of a dedicated legislative framework until recently. While courts have largely emphasized the primacy of the right to privacy, they have also acknowledged the legitimate interests of the State and industry in promoting innovation and economic growth. The evolving jurisprudence reveals a careful attempt to balance individual rights with collective technological advancement.

1.2 K.S. Puttaswamy (Aadhaar-5J) & Others v. Union of India (Supreme Court)

- The Aadhaar judgment is a touchstone for privacy jurisprudence in India. It upheld the constitutional validity of the Aadhaar scheme but also imposed limits, particularly on which uses of Aadhaar are mandatory.
- Important rulings include striking down Section 57 of Aadhaar Act insofar as it permits private entities to use Aadhaar authentication compulsorily, limiting retention of authentication (and other) metadata, and insisting on minimality, purpose limitation, and proportionality. The dissent (by Justice Chandrachud) raised concerns of the risks of profiling, aggregation of data silos, and surveillance architecture.

2. High Court Cases Around Aadhaar Location / Usage Data Disclosure

- There is a case (Bengaluru High Court) where the court held that UIDAI can be required, via a High Court order, to share Aadhaar authentication / usage / location data in a missing persons investigation. The Court balanced the need for data for law enforcement with the Aadhaar Act's safeguards.
- Such cases are significant because they test the boundaries of "exemptions" or lawful access to what is typically sensitive personal data under Aadhaar / related regime.

3. Supreme Court & Election Commission — Aadhaar as Proof of Identity but Not Citizenship [4](Bihar SIR)

- The Supreme Court has recently clarified that Aadhaar may serve as a proof of identity in the Special Intensive Revision (SIR) of electoral rolls in Bihar, but **not** as proof of citizenship.
- This case is relevant to data protection and constitutional safeguards: it draws a line between permissible uses of identity data and uses that may strain or overburden privacy or citizenship rights. It also reflects judicial scrutiny on how state bodies require or accept Aadhaar in various administrative settings.

4. Association for Democratic Reforms v. Election Commission of India, W.P.(C) No. 640 of 2025 (India).

4. PhonePe & Information Sharing Case (Karnataka High Court)

- Karnataka HC rejected PhonePe's plea against a notice under CrPC Section 91 for sharing transaction information in a criminal investigation. The Court held that user privacy must yield where there is a lawful investigative necessity. This is important in balancing privacy (especially of financial transactions) with law enforcement and public safety needs.

5. Karthick Theodore / Ikanoon Software Development Pvt. Ltd & Ors (Madurai Bench, Madras High Court; stayed by SC)

- This addresses whether personal / sensitive information in judgments published online must be redacted, especially for individuals acquitted. The Madurai Bench held that litigants have a discretionary right not to have their identity or "sensitive personal info" published, but that decision has been stayed by the Supreme Court.
- It shows tensions between transparency / public record (innovation in access to legal records, open justice) vs privacy of persons involved.

6. Association for Democratic Reforms v. Election Commission of India[5] (2024, Supreme Court, Electoral Bonds case)

- While not strictly a "data protection" case, it intersects privacy, free speech, transparency: the Court struck down the Electoral Bonds Scheme over right to information issues, highlighting constitutional norms of transparency, accountability, and how financial data (donor identity) implicates democratic values.

7. ABC v. State (NCT of Delhi) (Nov 2024)

The Delhi High Court ruled that individuals cleared of guilt in quashed criminal proceedings have a "right to be forgotten" to protect their dignity. It directed Google and other search engines to mask the petitioner's name in online records.

8. Exonerated Banker Case (Dec 2025)

The Delhi High Court held that the right to dignity and reputation under Article 21 can override media freedom once a person is exonerated in high-profile cases.

9. WhatsApp LLC v. Competition Commission of India (CCI) (2024–2025)

The NCLAT (Dec 2025) clarified that WhatsApp must provide opt-out rights and transparent safeguards for all data sharing with Meta, including for advertising purposes.

5. Association for Democratic Reforms v. Union of India, 2024 INSC 113.

The Supreme Court had previously directed WhatsApp to publicize that Indian users do not have to accept its 2021 privacy policy to continue using the platform.

10. RBI Master Direction (2024)

Effective April 1, 2024, it mandates regulated entities (banks, NBFCs) to institute rigorous IT governance and report cyber incidents to the RBI and CERT-In within 6 hours.

11. SEBI Cloud Framework (2023)

Required SEBI-regulated entities to ensure that data processed via public or hybrid clouds is stored within India's legal boundaries by March 2024.

12. Summary of Data Principal Rights (2025)

Under the current regime, individuals ("Data Principals") have the right to:

Access and Correction: Request a summary of their data and correct inaccuracies.

Erasure: Request deletion of data once the purpose is served or consent is withdrawn.

Grievance Redressal: File complaints online via a dedicated portal/app for resolution within 90 days.

Nomination: Appoint a representative to exercise rights in case of death or incapacity.

These cases bring out several constitutional/implementation challenges for India's Data Protection framework (including the DPDP Act, 2023):

- **Defining and Limiting Exemptions / Mandatory Uses**: The Aadhaar case shows courts are ready to strike down or limit statutory provisions that make certain usages (by private parties, or compulsion) mandatory. The DPDP Act will need clear boundaries for what states/private actors can be compelled to do, with strong legal safeguards.

- **Lawful Access vs Privacy Safeguards**: Cases involving law enforcement access (PhonePe, Aadhaar location data) show courts balancing privacy against investigation/public interest. But these often hinge on strong procedural safeguards (judicial orders, limited scope). The DPDP regime must ensure similar procedural checks.

- **Transparency, Redaction, Public Access vs Right to Privacy**: The Karthick Theodore case shows that publication of judgments and legal data is one area where innovation (access to case law, legal databases)

collides with privacy claims (especially for acquitted persons or those who have their identities exposed unfairly).

- **Data Minimization, Purpose Limitation and Retention Periods**: Aadhaar judgment (majority & dissent) emphasized minimal data collection and storage, limited retention of authentication logs, etc. Implementation and any legal rules (including DPDP rules) must enforce these principles, else they risk constitutional infirmity.
- **Identity vs Citizenship vs Rights**: The Bihar SIR case clarifies that identity proof can be different from proof of citizenship. This matters in preventing overreach that may infringe rights of non-citizens or marginalized persons. The state's use of identity systems must not be conflated with heavier legal statuses unless legally valid.
- **Institutional Readiness & Regulatory Enforcement**: Many judgments implicitly point out lack of strong oversight, ambiguity in mechanisms. For example, concerns in Aadhaar case about UIDAI's responsibilities for security, about grievance redress, about data misuse. DPDP Act will be judged not only on paper but on whether oversight body (Data Protection Board) is effective.

Courts will likely be called upon to interpret these provisions in light of constitutional values and international privacy standards, particularly when balancing innovation with individual autonomy. The Indian judiciary has so far taken a balanced and nuanced approach to privacy and innovation. It has neither ignored the importance of technological advancement nor allowed it to trample upon individual rights. As India navigates the implementation of its data protection law, the courts will continue to play a critical role in ensuring that innovation is pursued responsibly, and that privacy remains a non-negotiable cornerstone of India's digital future.

VII. Conclusion

The enactment of the Digital Personal Data Protection Act, 2023 marks a significant step in India's efforts to safeguard personal data in an increasingly digitized economy. However, the true test lies in how effectively the law can balance the competing demands of individual privacy and technological innovation. While the legislation provides a long-awaited legal framework for data protection, its success will depend on the clarity of subordinate rules, the independence of regulatory bodies, the enforcement of compliance, and the protection of fundamental rights.

India's aspirations to become a global digital hub require a data regime that is not only business-friendly but also rights-respecting. Overly rigid rules can stifle innovation, especially among startups and smaller enterprises, whereas insufficient safeguards may undermine public trust and constitutional liberties. Therefore, a flexible yet robust regulatory approach is essential.

Judicial precedents have consistently emphasized proportionality, necessity, and transparency as guiding principles for any restriction on privacy. Moving forward, India must ensure that the implementation of its data protection law aligns with these principles, while also encouraging responsible data-driven growth. Striking the right balance between innovation and privacy is not a one-time achievement but an ongoing process—one that must evolve with technology, public expectations, and global norms. As India builds its digital future, the ability to protect personal data while enabling innovation will define the credibility, fairness, and sustainability of its digital ecosystem.

Is Governor under Duty to Give Assent to a Bill? The State of Tamil Nadu v. The Governor of Tamil Nadu and Governor's Power in Parliamentary Democracy

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Abstract

The present paper examines the role of Governor of a State with regard to giving concurrence to a Bill which is presented to him by the State Legislature complying with the constitutional requirements. The issue will be discussed with principal reference to the Supreme Court's recent landmark judgment in State of Tamil Nadu v. The Governor of Tamil Nadu & Anr in which a two-Judge Division Bench ruled that the Governor has not unfettered power in respect of granting or withholding assent to the Bills and his action in this respect is subject to judicial review. In that case, after careful examination of the relevant authorities, the Court made some very important pronouncements on the Governor's power which the present paper attempts to highlight. As will be seen in the course of the discussion, significance of the judgment lies in the fact that it has by bringing the Governor's legislative power into sharp focus brought clarity and certainty to the law in this regard. Remarkably, as the discussion in this paper will reveal the Court in State of Tamil Nadu has adopted a liberal approach in interpreting constitutional provisions concerning competence of State Legislature which is in accord with the notion of the Parliamentary form of government.

Key Words: *Legislature, Constitution, Competence, Parliamentary Form of Government, Governor.*

I. Introduction

Whether Governor is duty bound to give assent to those Bills which are presented to him after reconsideration by a State Legislature in terms of

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Article 200 of the Constitution? Whether Governor acts unconstitutionally by reserving even those bills for consideration of the President which do not derogate from the powers of High Courts? Whether the Governor can withhold assent to a Bill without complying with the requirements of Art. 200? Whether there is any timeline for Governor and President, as the case maybe, to take action on Bills pending their approval? And whether Governor's power in respect of granting or withholding assent to Bills which have been produced after full compliance of the requirements is immune from judicial review? These questions of vital importance concerning the nature and extent of the Governor's powers in a parliamentary democracy like India's were considered by SC recently in *State of Tamil Nadu v. Governor of Tamil Nadu & Anr* (2025).[1] A Division Bench comprising Justices JB Pardiwala and R. Mahadevan made clear that the Governor has no unfettered power in respect of approval of Bills and his action in this respect is not sacrosanct and can be challenged. In other words, in the opinion of the Court, Governor's action in both cases—refraining from assent or reserving the Bills for the consideration of the President—is not immune from judicial scrutiny. His functions in this regard are well defined and demarcated and for that reason cannot be exercised arbitrarily.

Although, Court's recent ruling has clearly established that Governor has not unfettered powers in respect of Bills presented to him for further action after they are passed by a State Legislature in compliance of the prescribed requirements and that he cannot refuse to assent to a bill without recourse to the constitutional mandate, the issue is very much alive. Soon after the judgment, on 13 May 2025, President of India made a reference to the SC and sought its opinion on a range of questions relating to Governor's and President's authority to grant or withhold approval to Bills presented before them under Articles 200 and 201 respectively. Thus, Presidential reference has revived the interest in the matter.

Some of the most pertinent issues raised by Presidential reference include whether Governor has unfettered power in respect of the Bills presented to him for assent? Whether his powers in this regard are justiciable? Whether by imposing a time-limit for taking action by Governor or President under Articles 200 and 201 respectively, the Court has exceeded its limit and has acted unconstitutionally? Whether President should seek opinion of SC by making a reference under Article 143 when Governor has reserved a Bill

[1](2025) 8 SCC 1.

for President's approval or otherwise? Is it not mandatory for the Court that it must first decide whether or not the question raised before it raises substantial questions warranting interpretation of the Constitution and, if it is so, refer the same to a Constitution Bench for consideration? Are the actions of Governor and President under Articles 200 and 201 respectively, justiciable at a stage when a Bill is yet to become law? And are the Courts allowed to adjudicate upon the subject-matter of a Bill before it matures into law?

Against this backdrop, this paper examines Governor's power to give approval to a Bill which is passed by the State Legislature complying with the constitutional requirements. The issue will be discussed with principal reference to SC's recently delivered judgment in *State of Tamil Nadu*. In that case, a two-Judge Division Bench after careful examination of the relevant authorities made some very important pronouncements on the Governor's power in respect of giving assent to a Bill. As will be seen below, significance of the judgment lies in the fact that it has by bringing the Governor's legislative power into sharp focus brought clarity and certainty to the law in this regard. The Court in *State of Tamil Nadu* has adopted a liberal approach regarding the competence of the State Legislature which is in accord with the notion of the parliamentary form of Government.

II. Role of Governors and "Responsible Government"

Under the scheme of our Constitution, a Governor is the (symbolic) head of a State. He acts in "dual" capacity. First, he acts in the capacity of the executive head.[2] Constitution explicitly states that executive function of the concerned State government shall be taken in the name of Governor."[3] Secondly, a Governor acts in the capacity of an agent of the Union government.[4] Further, unlike President, Governor is not an elected functionary but is an appointee of the former.[5] President is elected by an "electoral college" consisting of the (elected) members of Parliament and legislative assemblies of States.[6] Further, Governor occupies his office only at the will of the

[2]The Constitution of India, Art. 154.
[3]*Id*, Article 166 (1).
[4]Rameshwar Prasad & Ors. v. Union of India (2006) 2 SCC 1. In Rameshwar, it was observed that the Governor of the State performs "dual responsibility" to both—Union and State. (Cited in State of Tamil Nadu, supra note 1, Para 130)
[5]Constitution of India, Art. 155.
[6]*Id*, Article 54. See also State of Tamil Nadu, *supra* note 1.

President which means Governor can be removed by President at any time.[7] Since the President's power, in this respect, cannot be circumscribed by any conditions or restrictions, the Governor can be removed from his office without assigning any reason.[8] Nevertheless, so far as Governor is executive and nominal head, his position resembles to that of President of the country in many respects. He performs a vital role in respect of running government.

Although, Constitution vests the Governor with the executive power, according to Art. 154, Governor shall exercise the power in a manner consistent with Constitution.[9] Meaning is that in exercise of the powers, Governor has no option but to act as per the advice given to him. Art. 163 clearly provides that there shall be a "Council of Ministers" which shall assist and advise Governor how he will perform his functions, except those cases in which he is to function in his discretion."[10] In fact, President and Governor do not discharge their functions in an individual or personally capacity. An action taken in the name of President is actually the action of Union Government. Similarly, an action which is taken in the name of Governor is the action of State.[11] In *Shamsher Singh,* SC categorically said that under the parliamentary system, two functionaries—President and Governor are formal heads of the Union and State governments respectively and that they exercise their functions on the aid and advice of their Council of Ministers. In respect of Governor, it was specifically pointed out that he performs his functions on the basis of advice of his Council of Ministers except in cases where he is expressly permitted to act in his discretion.[12] In that case, Court went to observe that wherever it is required that action be taken on the satisfaction of President and Governor, the satisfaction required by the Constitution is not their personal satisfaction "but is the satisfaction of President or of Governor in the Constitutional sense, that is to say, "[i]t is the satisfaction of [their] Council of Ministers…."[13]

[7]*Id*., Article 156.

[8]See also B. P. Singhal v. Union of India, (2010) 6 SCC 331, Para 71. It may be noted that a distinction exists between requiring a2 cause for the removal and the obligation to disclose it. Not having an obligation to giving reasons for removal does not mean that a Governor can be removed without a cause. *Ibid*.

[9]The Constitution of India, Art. 154.

[10]Art. 74 contains similar provisions with respect to President. It provides that President shall function on the basis of the assistance and advice given by a Council of Ministers to be headed by Prime Minister.

[11]Shamsher Singh v. State of Punjab, AIR 1974 SC 2192,

[12]*Id*., Para 28.

[13]*Id*., Para 30.

Thus, it is well established principle that Governor performs his functions and responsibilities on the basis of advice rendered to him by Council of Ministers except in cases—which are very few— he is allowed to act in his discretion. A similar view was taken by SC in *Nabam Rebia & Bamang Felix v. Dy. Speaker, Arunachal Pradesh Legislative Assembly.*[14] In that case, a Constitution Bench observed that Governor's discretion is limited to situations where it is expressly required by him to act in his discretion. According to the Court, there are two cases where Governor can exercise his discretion. First, where the concerned provision could not be interpreted otherwise. Secondly, where advice rendered to him was contrary to the scheme of Constitution.[15] The position taken by the Court in *Nabam Rebia*, therefore, clearly shows that our Constitution does not assign Governor a dominant role in running government.

Here mention may be made of Art 163 which provides that a decision as to whether a question falls within the discretion of Governor or not is to be decided by Governor himself. Further, as it is the case with President that judicial review is not available in respect of what advice was tendered to him the same rule applies in the case of Governor. What advice was tendered to him shall also not be questioned.[16] However, from this it cannot be inferred that Governor's discretionary power is unguided or cannot be made subject to judicial review. Governor is not "super-constitutional authority" and as per Constitutional scheme he has not been entrusted with "any significant role" in running government.[17]

While executive power is vested with Governor, the term, "executive power" is not defined anywhere. Art 162 which provides that the executive power of a State shall be co-extensive with legislative power of a State, only indicates in a way the extent of the power.[18] In fact, it primarily demonstrate the distribution of executive power between Union and States.[19] In *Ram Jawaya Kapur*, SC realizing the difficulty in providing an exact definition of executive power stated that although it seems impossible to say with

[14](2016) 8 SCC 1.
[15]*Id*., Para 142. See also: B. Shiva Rao, The Framing of India's Constitution: A Study, 400-01 (Indian Institute of Public Administration, New Delhi: 1968).
[16]The Constitution of India, Art. 163 (2).
[17]Nabam Rebia, Para 138.
[18]The related provision concerning the Union's executive power is outlined in Article 73.
[19]Ram Jawaya Kapur v. State of Punjab, AIR 1955 SC 549.

precision what executive function implies, it may safely be said that such a power is the residue of governmental functions that remain after legislative and judicial functions are taken away.[20]

In that case, SC took the view that our Constitution does not adopt the scheme of strict separation of powers and some overlap in the functions between different organs are perfectly possible. Executive organ indeed can exercise the legislative functions when such functions are specially delegated to it. Not only that, it can also when entrusted with judicial functions exercise those functions albeit "in a limited way." However, Court cautioned that executive should never intend to go against the Constitution.[21] Relying on this basic premise our Constitution establishes a system of governance in which executive has to bear primary responsibility in running government the Court went on to suggest that following powers may fairly be taken as included within the expression, "executive power" as they relate to general administration: (1) the initiation of legislation; (2) the maintenance of order; (3) the promotion of social and economic welfare; (4) foreign policy. In *Shamsher Singh*[22], the Court adopted a similar approach. According to the Court, executive power is generally taken to mean as "residue" which falls outside the legislative or judicial power. In that sense executive power maybe sharing some legislative or judicial functions.

Since, in a parliamentary democracy, powers and functions of different organs of the State may overlap, there is nothing unusual if Constitution vests the Governor with some legislative powers. Like the President, Governor is also part of the State Legislature.[23] Art 168 expressly states that Legislature of a State shall consist of Governor and either two Houses or one House.[24] *State of Tamil Nadu* makes it clear that much like ~~in~~ the Westminster system of Government, under our Constitution in order to become a law fora Bill can become a law to be passed by the Legislature, it must receive the approval ofonly when all the components of the Legislature concur.[25]

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[20]*Ibid.*
[21]*Ibid.*
[22]Supra note 11.
[23]*Ibid.* See also Union of India v. Valluri Basavaiah Chowdhary, AIR 1979 SC; State of Bihar v. Kameshwar Singh, AIR 1952, SC 252. However, term, "legislature" does not always include the Governor. In some cases, the word is used in contexts which excludes the Governor. For example, in Article 173, the term, "Legislature of a State", excludes Governor. See also State of Bihar v. Kameshwar Singh, *ibid.*
[24]Article 168 (2).
[25]*Supra note* 1, Para 47.

Further, Article 200 provides after a Bill is passed by State Legislature in a prescribed manner it will be put before Governor for his assent. Thereafter, Governor has following options: either (a) he shall declare that he approves the Bill in which case it will become law; or (b) he refrains from giving assent; or (c) he reserves the Bill for President's approval. Therefore, it goes without saying that in the absence of Governor's assent the Bill cannot mature into a law.[26]

However, Governor's power in this respect is much restricted. This is clear from a plain reading of Art. 200. It says that if Governor decides to refrain from approving Bill, he "as soon as possible" after receiving a Bill for his approval return the same for reconsideration by Legislature. But if after the reconsideration, the Bill is re-sent with or without amendment to Governor for approval, he "shall not withhold assent therefrom." And second proviso states that Governor shall refrain from giving assent to a Bill and shall reserve it for consideration of President, if the bill, in his opinion would derogate from the powers of the High Court.

III. Pre-state of Tamil Nadu Jurisprudence

A. Assent to Bills

Although there are good number of cases in which the Court has dealt with powers of Governor vis a vis State Legislature and have indeed been cited and discussed at sufficient length in *State of Tamil Nadu*, *State of Punjab v. Principal Secretary to the Governor of Punjab*[27]handed down on 10 November 2023, is the only authority decided prior to *Tamil Nadu* which directly addresses the issue of the Governor's power in accepting or refraining from accepting a Bill. A Division Bench comprising DY Chandrachud CJ., BJ Pardiwala and Manoj Misra JJ. held that once Governor decides to refrain from acting on a Bill he must have recourse to the procedure prescribed by the first proviso to Art 200. In other words, he cannot withhold assent simpliciter. One of the issues that arose for consideration was whether Governor's act of withholding assent to Bills which have been passed by Legislature complying the requirements in this regard was constitutional? In adopting the view that Governor's discretion in regard to giving or refusing assent to Bills is not unfettered and he cannot withhold acceptance to a Bill simpliciter the Court placed reliance on the well-established position that our

[26]*Id*., Para 169.
[27](2024) 1 SCC 384

Constitution establishes a form of government in which government is responsible to the legislative organ. In running government, executive is assigned primary responsibility while Governor is only formal head of State. The Court reiterated that Governor acts on the advice rendered to him by Council of Ministers. It is only in a few number of cases where he can act in his discretion. In fact, the role of Governor is limited to provide guidance to government in performing its functions.[28]

In dealing with the question whether Governor can withhold the assent simpliciter without sending back the Bill for reconsideration by Legislature, Court pointed out that although a plain reading of Art 200 suggests that Governor has power to refrain from giving assent but in that case he must recommend reconsideration of the bill and if the Bill is again passed he cannot refrain from giving assent. Interestingly, the phrase, "as soon as possible" found in the first proviso drew significant attention of the Court. In the opinion of the Court, the phrase is of much significance in deciding the number of options available to Governor. The phrase shows that Governor is obliged to expedite the act of returning the Bill to Legislature and cannot postpone his decision for an indefinite duration of time.[29] As will be seen below, this point was also emphasized by the Court in *State of Telangana v Governor of Telangana* cited below.

B. Duty to Act within a Time Limit

In *Purushothaman Nambudiri v. State of Kerala*[30] SC expressed the view that Articles 200 and 201 do not require any specific time limit within which Governor or President is to take action on a Bill. But difficulty with *Nambudiri* is that, as the Court in *State of Tamil Nadu* clarified, in that case, Court faced with the issue of the effect of dissolution of House on Bills awaiting approval of Governor or President and not the expediency with which action is to be taken on Bills.[31] Therefore, the ratio of that case does not apply to the issue whether or not the Constitution envisages a time-limit within which the Governor or the President should take an action regarding assent to a Bill under Articles 200 and 201.

[28] *Id*., Para 15.
[29] *Id*., Para 24.
[30] 1961 SCC SC 361.
[31] In *Nambudiri*, which was cited by the Respondents in support of the preposition that there is no time limit for Governor (or President) to act with regards to Bills awaiting approval, it was indeed stated that since Constitution does not require that action on the Bills pending approval should be taken within a time limit it is not unlikely that the Bills run the risk of lapse upon dissolution of the House. AIR 1962 SC 694, Para 16.

Nambudiri concerned with the validity of an agrarian reform Bill which was duly passed by the Legislative Assembly, but was then reserved by the Governor for President's approval. However, later the Assembly was dissolved. After new Assembly was constituted, Bill was sent back to it for reconsideration. Consequently, the Bill had to be again passed albeit with amendments on the lines suggested by President. In these circumstances, the question that arose for consideration related to the effect of dissolution of the Assembly on a Bill awaiting assent of the President.

A particular relevant case on the issue that deserve attention here is *State of Telangana v Governor of Telangana*[32] referred to by SC in *State of Tamil Nadu* in support of preposition that Governor should act expeditiously and within a reasonable time on the Bill presented to him for his assent under Article 200. In *State of Telangana*, the Court emphasized that expression "as soon as possible" [in Art. 200] has much significance in the context.

IV. State of Tamil Nadu Decision

Tamil Nadu is mainly concerned with two interrelated issues. First, whether the Constitution permits withholding of assent to a Bill simpliciter, that is to say, withholding of assent without resorting to the procedure laid down in this regard? Secondly, is Constitution prescribes a specific deadline which must be complied with by Governor? One ancillary issue that arose for consideration was is it appropriate for Governor to reserve a Bill for President's consideration when it was presented to Governor after it is reconsidered by the State Legislature in accordance with the requirements mentioned in the first proviso to Art. 200? Differently put, whether Governor has power to reserve a Bill for President's consideration when the Bill is presented to him after reconsideration and when he had not reserved it in the first instance?

A. Assent to Bills

Regarding the first issue mentioned above, the Court took the view that it is not permissible for Governor to withhold assent simpliciter. Governor's power to act in respect of a Bill which is presented after it is duly passed is not unfettered. He is obliged to return the Bill if he chooses the option of refraining from assent. According to the Court, Governor has only three options in respect of assent to a Bill. These are (1) to assent, or (2) to withhold assent in which case he is obliged to return the Bill to Legislature, or (3) to reserve it for President. There is no fourth option. For Court, any contrary

[32](2024) 1 SCC 405.

view will amount to conferring on Governor a veto in respect of a Bill which is not in accord with the notion of parliamentary democracy.[33] Therefore, in the opinion of Court once Governor chooses the option of refraining from giving approval to a Bill he is under obligation to return such Bill for reconsideration.[34]

In maintaining that Art 200 gives Governor only three options –either he approves a Bill or reserves it for President if the Bill is of the description provided for in the second proviso or return it to the Legislature for reconsideration in which case he shall be under obligation to approve the Bill if it is passed again and presented to him, the Court heavily relied on its previous judgment in *State of Punjab*.[35] In that case, it was observed by a three -Judge Division Bench that the option of not giving assent necessarily brings first proviso into operation. Therefore, if Governor does not give assent, he is duty bound to return the Bill for reconsideration of Legislature.[36]

The position that the Governor cannot refuse approval to a Bill simpliciter and he is obliged to return the Bill if he chooses the option of refusal is founded on the fundamental tenets of the cabinet system based on Westminster model of government. In cabinet form of government the law- making power is entrusted to the elected representatives of the people. The final decision in this regard rest with the Legislature and not with Governor.[37]

It is to be noted that Court examined the issue of the Presential and Gubernatorial assent in the context of the parliamentary democracy. In so doing it also referred to Professor Nicholas Barber's 'Can Royal Assent Be Refused on the Advice of the Prime Minister?' which forcefully argued that in a democratic government the primacy of the Parliament must be upheld.[38]

In response to the argument that the Court's dicta in *Valluri Basavaiah* and *Hoechst* support the view that Governor in choosing to refrain from approving a Bill exercises his discretion, the Court in *State of Tamil Nadu* noted that these cases rather support the argument that there is connection between the exercise of the option of refraining from assent and coming

[33]State of Tamil Nadu*, supra note 1, Para 209.*
[34]Id., Para 203.
[35](2024) 1 SCC 384.
[36]State of Tamil Nadu*, supra note 1. Para 182*
[37]State of Punjab, supra note 27, Para 23.
[38]State of Tamil Nadu, supra note 1, Para 143.

into effect of the procedure contemplated by first proviso."[39] In fact, in none of the two cases—*Valluri Basavaiah* and *Hoechst*, the issue of assent to State Bills did squarely arise. Therefore, they cannot be taken as authority on the issue under consideration.

According to the Court, three options available to Governor are "mutually exclusive" as they are connected by the use of the conjunction "or." Therefore, Governor cannot approve a bill and also reserve it for President's consideration. These two options cannot be exercised simultaneously. Similarly, "the he cannot withhold approval and also reserve the bill for President's consideration."[40]

In summary, in *Tamil Nadu*, the Court emphatically refuted the idea that Governor has unfettered power in respect of assent to a Bill. According to Court, from Governor's power to reserve a Bill for President's consideration, it cannot be inferred he can veto a Bill duly presented to him for approval. In the considered opinion of the Court, if a bill is produced before Governor for approval, he may approve it or postpone the grant of approval "but only for so long till the bill comes back to him after reconsideration …."[41]

B. Duty to Act Promptly and within a Time Limit

On the issue whether Governor is obliged to act within a time-limit in respect of assent to a Biil, it was argued before the Court that the expression "as soon as possible" used in first proviso to Art 200 puts an obligation on Governor to act expeditiously and the absence of any prescribed time period does not permit Governor to act on his choice. On the other hand, respondents, placing reliance on *Nambudiri*[42] argued that the Court in that case expressly ruled that absence of a time limit in the text of Art. 200 indicates that Governor cannot be mandated to act within a time limit.

However, Court expressed the view that since Governor has no unlimited power in respect of giving or refusing assent to a Bill, he is not at liberty to defer his decision for an unreasonably long time. Court distinguished this case with *Nambudiri* and rightly refuted the argument allegedly based on the latter that absence of a provision prescribing a time limit does not suggest that Governor (or the President) has absolute discretion and can refrain from assenting a duly passed Bill for indefinite period of time. It was clarified that in *Nambudiri* the Court was mainly concerned with the issue of determining

[39] *Id.*, Para 191.
[40] *Id.,* Para 42.
[41] *Id.*, Para 198.
[42] AIR 1962 SC 694.

the implications of dissolution of House for those Bills which were awaiting the assent.[43] Therefore, decision in *Nambudiri* should be seen in different light.[44]

C. Governor's Power to Reserve a Bill for Consideration of the President

Regarding another significant question, whether Governor has the power to reserve a Bill for President when the same was resent to him for approval, Court opined that because first proviso expressly state that Governor shall not refrain from giving assent to a Bill repassed by Legislature, the option of reserving the Bill for President is not available to him. It is suggested here that Court's view is based on the premise since first proviso expressly state that a re-passed Bill will not be returned again to Legislature, Governor has no choice in the matter and he is under obligation to approve the Bill. In this situation, he is prevented from reserving it for President.[45]

The Court thus found that Governor is not allowed to reserve a Bill for President's consideration if the same is presented to him again for his approval.

D. Justiciability of Governor's Power under Article 200

Regarding one of the most debated aspects of Governor's power which is the issue of justiciability of Governor's action in respect of approving or refusing to approve a Bill, Court held that Governor's power is indeed subject to judicial scrutiny if it transgresses the limit defined by the Constitution. In fact, in the opinion of the Court, no power to be exercised under Constitution is beyond the purview of judicial review, let alone Governor and President's functions with respect to assent to a Bill[46] The Court further observed that since President or Governor as formal heads exercise their constitutional powers in the manner provided for in Constitution, in discharge of their functions they are "undoubtedly subject to judicial review…."[47]

V. Conclusion

State of Tamil Nadu settles some of the very important issues related to the Governor's power in respect of a Bill presented to him for his assent and may be regarded a definitive pronouncement of law on the subject. The case has important implications for Governor's power vis a vis State Legislature

[43]See the discussion in Part III, B, supra.
[44]State of Tamil Nadu, Para 237.
[45]*Id.*, Para 205.
[46]*Id.,* Para 332.
[47]*Id.,* Para 335.

in a country like India which has a written Constitution combining the elements of a parliamentary democracy and a system based on the idea of cooperative federalism. Like, Britain, in India, the head of the executive is an integral part of the Legislature and shares legislative powers with the Legislature. But legislative powers of the head of the executive—president or Governor is limited. Since it is the Council of Ministers headed by Prime Minister or the Chief Minister, as the case maybe, which is responsible to the Legislature, the head of the executive in discharge of his functions acts on the aid and advice of the former. The principle of responsible government demands that the Governor in exercising his power in giving assent to a Bill is guided by the Constitutional norms.

Keeping in view these fundamental tenets of the Constitution, the Court *inter alia* ruled that (a) the Governor does not possess any absolute veto in respect of granting or refusing assent to a Bill; (b) he cannot refuse assent to a Bill without following the procedure laid down in the first proviso to Article 200; (c) he cannot exercise the option of reserving the Bill for the consideration of the President after the Bill is re-passed by State Legislature and presented before him for assent; (d) the Constitution envisages a time-limit within which the Governor is to act in the exercise of his powers under Art 200 of the Constitution; (e) the Governor's power under the Constitution including his power under Art. 200 is subject to judicial review if it transgresses the power allocated to it by the Constitution. In the considered opinion of the Court, Constitution does not envisage the exercise of the power of any absolute veto by Governor. Any suggestion to the effect that the Governor has discretion in deciding whether or not to give assent to a Bill passed by the state legislature would be contrary to the Constitution. To sum up, the decision in *State of Tamil Nadu* takes a broadened view of the matter and may be regarded as the quintessential constitutional adjudication.

Models of Delimitation in Federal Democracies and Lesson for India

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Abstract

The delimitation of constituencies is a practice closely linked with democratic representation. Fairness, transparency, and accountability in the delimitation of constituencies are important for the stability of a democracy. The paper analyzes delimitation practices in the federal democracies, particularly the US, Canada, and Australia. In the US, responsibility is placed in the hands of state legislatures, or politically constituted commissions, and thus "gerrymandering" is widely practiced. It raises inequality of competition at elections, a polarized electorate, and a distortion of representation. In Canada, an independent commission carries out the delimitation that includes judicial, technical, and social representatives. Delimitation is based on public consultation, socio-geographical, and technical criteria, meeting with a high degree of fairness. In Australia, the Electoral Commission constitutionally protects and operates the delimitation practice. It is technically sophisticated, examined regularly, and designed to deter the possibility of gerrymandering. In light of these, the paper critically examines the suitability of the above delimitation practices in the Indian context. It proposes a blend of one or more practices as the workable delimitation model in India. It adopts a doctrinal research method and analyses the suitability of the above delimitation practice in India.

Key Words: *Federal Democracy, Decentralization, Delimitation, Electoral Justice, and Democratic Representation.*

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I. Introduction

In a federal democracy, the delimitation of constituencies is far more than an administrative exercise of redrawing boundaries. It is the practical embodiment of the core democratic ideal of "one person, one vote, one value."[1] A democracy requires that all its members have a right to vote and that their votes all weigh equally.[2] One may interfere with equality if the political representation is so arranged that certain localities have a significant population, while others have a thin one. It results in an undue representation of the sparsely populated constituencies compared with those densely populated, that is, places where the population is seriously disproportionate, which have little representation formulated for their population. The periodic revision of constituencies, known as delimitation, aimed at establishing equality of representation regarding population and area, has been conducted occasionally. The purpose of delimitation is to secure equality of representation by representation to prevent over- and under-representation as a necessity, also for equal electors' strength, equitable administration, efficacious economic control of the community, and lasting confidence of the community in the soundness of the machinery of democratic action.[3]

The Indian Constitution imposes this obligation on the legislature itself. It gives power to the Parliament to legislate for delimitation after every decennial census is published.[4] It also provides for the constituency readjustment

[1]Baker v. Carr, 369 U.S. 186 (1962).

[2]D.E. Smith, The Principle of Electoral Equality 42 (Oxford University Press, 1997).

[3]Pankaj Kumar Patel and T.V. Sekher, "Parliamentary Delimitation: A Study on India's Demographic Struggle for Political Representation, 59 J. Asian & Afr. Stud. 1, 2–3 (2024).

[4]The Constitution of India, 1950, Art. 82 reads as: "Readjustment after each census- Upon the completion of each census, the allocation of seats in the House of the People to the States and the division of each State into territorial constituencies shall be readjusted by such authority and in such manner as Parliament may by law determine: Provided that such readjustment shall not affect representation in the House of the People until the dissolution of the then existing House: Provided further that such readjustment shall take effect from such date as the President may, by order, specify and until such readjustment takes effect, any election to the House may be held on the basis of the territorial constituencies existing before such readjustment: Provided also that until the relevant figures for the first census taken after the year 2026 have been published, it shall not be necessary to readjust, (i) the allocation of seats in the House of the People to the States as readjusted on the basis of the 1971 census; and (ii) the division of each State into territorial constituencies as may be readjusted on the basis of the 2001 census, under this article."

with respect to provincial legislative assemblies.[5] This constitutional arrangement guarantees equality of representation in both fields of representation, that is, legislative and administrative. Nonetheless, in actual practice, this process has perpetually met with interruptions. The Constitution (42nd Amendment) Act, 1976, provided for freezing the number of seats in the Lok Sabha based on the Census of 1971, till the year 2001, so that these far-sighted states, which have been able to control the population growth, should not have their representation endangered, in order to maintain national unity as well as stability of policies.[6] Further, the Constitution (84th Amendment), Act 2001, extended the moratorium until 2026, perpetuating the misalignment between population and representation.[7] The states with larger population growth would obtain undue political influence if increasing representation is granted to them

[5]*Id.,* Art. 170 reads as: "Composition of the Legislative Assemblies- (1) Subject to the provisions of article 333, the Legislative Assembly of each State shall consist of not more than five hundred, and not less than sixty, members chosen by direct election from territorial constituencies in the State. (2) For the purposes of clause (1), each State shall be divided into territorial constituencies in such manner that the ratio between the population of each constituency and the number of seats allotted to it shall, so far as practicable, be the same throughout the State. Explanation- In this clause, the expression "population" means the population as ascertained at the last preceding census of which the relevant figures have been published: Provided that the reference in this Explanation to the last preceding census of which the relevant figures have been published shall, until the relevant figures for the first census taken after the year 2026 have been published, be construed as a reference to the 2001 census. (3) Upon the completion of each census, the total number of seats in the Legislative Assembly of each State and the division of each State into territorial constituencies shall be readjusted by such authority and in such manner as Parliament may by law determine: Provided that such readjustment shall not affect representation in the Legislative Assembly until the dissolution of the then existing Assembly: Provided further that such readjustment shall take effect from such date as the President may, by order, specify and until such readjustment takes effect, any election to the Legislative Assembly may be held on the basis of the territorial constituencies existing before such readjustment: Provided also that until the relevant figures for the first census taken after the year 2026 have been published, it shall not be necessary to readjust- (i) the total number of seats in the Legislative Assembly of each State as readjusted on the basis of the 1971 census; and (ii) the division of such State into territorial constituencies as may be readjusted on the basis of 2001 census under this clause."

[6]Amarbahadur Yadav, Delimitation: A Path to Equitable Representation?, 60(14) Econ. & Pol. Wkly. 4 (2025).

[7]Retna Kumar, Demographic Inequalities and Implications for Political Representation in India, 2009, https://ipc2009.popconf.org/papers/90401 (Last visited Aug. 13, 2025).

despite a larger population, owing to a higher increase in population. This inequality, induced by demographic trends, urbanization, and population migration, would militate against the equality of the electorate and the political equality of representation.[8] Furthermore, the high-growth population states could not participate in national policy formulation. In any case, the national interests of states with low population growth would overshadow those of high-growth states.[9]

In a constitutional sense, however, delimitation is a protective instrument to secure democratic justice and equality of voting value. Long delays of this nature corrupt the equality of representation, destroy the basis of legitimacy of democratic institutions, and reduce public confidence.[10] Following 2026, the delimitation presents a unique opportunity for correcting these imbalances, if the process is conducted transparently, scientifically, and without manipulation. Alternatively, another postponement or dilatory exercise would squander a unique moment in the evolution of India's democracy.[11] Experiences of federal democracies, including the US, Canada, and Australia, show that if delimitation is implemented independently and scientifically, it engenders trust in democratic institutions. On the contrary, postponements or partisan exercises often open the windows for distortions like gerrymandering. Resumption, for India, is not only a constitutional imperative to restore delimitation as a credible, accountable, and equitable process, but a vital necessity for the long-term health of its federal democracy.[12] The following section examines the theoretical or constitutional perspective of delimitation in India.

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[8]Aditi, Vikrant Singh and Aman Ashesh, Redrawing the Electoral Boundaries: Debunking the Doxas of Delimitation, 1(1) Samanvaya, 2020, pp.1-24, https://www.pmf.org.in/research-series/samanvaya-research-series-vol-1/ (Last visited Aug. 13, 2025).

[9]*Ibid*.

[10]Ritwika Sharma, Delimitation and Giving Greater Voice to Urban India, ORF Expert Speak—Urban Futures, Sept. 18, 2024, https://www.orfonline.org/english/expert-speak/delimitation-and-giving-greater-voice-to-urban-india (Last visited Aug. 13, 2025).

[11]Paras Kumar Patel and T.V. Sekher, Parliamentary Delimitation: A Study on India's Demographic Struggle for Political Representation, 59 J. Asian & Afr. Stud., 2024, https://Doi.Org/10.1177/00219096241295634 (Last visited Aug. 13, 2025).

[12]Delimitation and Deepening Federalism, 60(21) Econ. & Pol. Wkly., May 24, 2025, pp.8-9.

II. Constitutional Provision on Delimitation in India

Delimitation is the constitutionally mandated process by which the boundaries of the country or state's parliamentary and legislative assembly constituencies are determined or changed. It is not merely a technical exercise in cartography but is a tangible manifestation of the democratic-social contract in operation, ensuring equal and effective representation for each citizen.[13] The delimitation process is primarily based on the universally accepted democratic principle of "one person, one vote, one value."[14] The population of each constituency must be as nearly alike as possible, if the evils of over- and under-representation, of the sparsely populated and densely populated areas, respectively, are to be avoided. Representational equality is essential not just for free and fair elections and equitable electoral competition but also for determining the inclination of legislatures, defining the direction of policy-making, and the quality of governance.[15]

This practice finds explicit authority under Indian Constitution. Article 82 empowers Parliament to make provisions for delimitation by law after each census to be taken no less than once in ten years[16] and Article 170 makes similar provision for the delimitation of state legislative assembly constituencies.[17] These provisions were incorporated in the Constitution with the object to provide for the representation to be in accordance with the changes which takes place in demography and consequently it is necessary to maintain the principle of equality of representation. In India the provisions for delimitation are governed by two statutes, namely, the Representation of the People Act, 1950 which lays down the basic principles before the delimitation is made and for the structure or the composition of the constituencies and the law;[18] and the Delimitation Act, 2002, which lays down the constitution, composition, powers, and procedure of the Delimitation Commission.[19] Commission shall consist of a Chairperson, being a retired Judge of the

[13]Lisa Handley, Challenging the Norms and Standards of Election Administration: Boundary Delimitation, in Challenging the Norms and Standards of Election Administration, IFES, 2007, at 63.
[14]One Person, One Vote, One Value, https://www.pmfias.com/one-person-one-vote-one-value/ (Last visited Aug. 14, 2025).
[15]*Ibid*.
[16]The Constitution of India, 1950, Art. 82.
[17]*Id.,* Art. 170(3).
[18]The Representation of the People Act, 1950, S. 4.
[19]The Delimitation Act, 2002, Ss. 3, 4, 5, 7, and 9.

Supreme Court, the Chief Election Commissioner or an Election Commissioner nominated by him and the State Election Commissioner of respective State.[20] The orders made by the Commission shall be final and shall not be liable to be questioned in view of the prohibition placed by Section 10(2) of the Act.[21] However, in *Kishorchandra Chhanganlal Rathore* v. *Union of India*[22], the Supreme Court clarified that judicial review is possible against manifestly arbitrary orders which are against the constitutional provisions.[23]

Noticeably, delimitation has a larger significance than just redrawing the boundaries of electorates, as it ensures parity in the power of the electorates in the legislatures, the electoral policies of the political parties and the governance priorities.[24] For instance, as a result of the under-representation of overpopulated towns, no satisfactory attention is paid by the legislature to their problems which result in a lowering of the quality of democracy and vociferous demand by the populations of such territories for separate statehood.[25] So also, in view of the power of the Delimitation Commission to lay down the number of reserved seats to be allotted to the Scheduled Castes (SC) and Scheduled Tribes (ST), the concessions to be made to the historically backward group of communities can effectively take place in the participation of the communities in the process of legislation, which constitutes the basic element in the process of social justice and inclusive democracy.[26] The Indian model seeks to achieve both numerical equality and recognize the special problems of geography, and necessity of maintaining cultural homogeneity. The following part discusses the delimitation practices in the selected federal democracies.

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[20]*Id*., S. 3.

[21]*Id*., S. 10.

[22]Civil Appeal No.7930 of 2024.

[23]To Review or Not to Review: Delimitation Dilemma in the Context of Kishorchandra Changanlal Rathod v. Union of India, Law Sch. Policy Rev., 2025, https://lawschoolpolicyreview.com/2025/02/25/to-review-or-not-to-review-delimitation-dilemma-in-the-context-of-kishorchandra-changanlal-rathod-v-union-of-india/ (Last visited Aug. 14, 2025).

[24]Narayan, Jayaprakash, Delimitation and Contempt for Politics, EK Center for Constitutional Studies (Foundation for Democratic Reforms), Mar. 15, 2003, https://ekcenter.fdrindia.org/articles/delimitation-and-contempt-politics (Last visited Aug. 14, 2025).

[25]*Ibid*.

[26]Bhawana Kesar, Boundaries of Power: The Role of Delimitation in Shaping Democratic Elections, 5 Int'l J. Pol. Sci. & Gov't, 2025 at 124, https://doi.org/10.22271/2790-0673.2025.v5.i1b.171.

III. Model of Delimitation in Major Federal Democracies

It is noticed that different models with a different historical, constitutional and political backdrop are adopted for delimitation in the United States of America, Canada, and Australia. Paper examines these models in brief.

A. US Model: Decentralized Structure and the Challenge of Gerrymandering

In the United States, the process of delimitation is rooted in a constitutionally decentralized system. Article I, Section 2 of the U.S. Constitution, in conjunction with Title 2 of the U.S. Code mandates that seats in the House of Representatives be reapportioned among the states following each decennial census.[27] Once the apportionment is complete at the federal level, the process of redistricting congressional and state legislative districts is subject to the exclusive jurisdiction of the state concerned.[28] This characteristic of American federalism, vesting redistricting authority primarily in state legislatures, has historically given rise to a pervasive democratic challenge called "gerrymandering". Gerrymandering is a process where the ruling political party deliberately manipulates boundary lines of electoral districts, in order to entrench its political advantages, while diluting the political influence of its opponents.[29] These practices impair electoral collegiality, distort the relationship between votes cast and seats allocated in the legislature, and further impair the representative nature of electoral results, making them more predictable and thus subject to more uniform approaches, irrespective of voters' preferences.[30]

The constitutional issues raised by gerrymanders have been subject to judicial decisions. In *Baker* v. *Carr*[31], the U.S. Supreme Court ruled that there are justiciable questions arising from unequal populations in the various districts, and declared the principle of "one person, one vote", as an element of a constitutional policy.[32] This ruling marked an important turning point in

[27]U.S. Const. Art. I, Constitution Annotated, Congress.gov, Library of Congress, https://constitution.congress.gov/constitution/article-1/ (Last visited Aug. 14, 2025).
[28]U.S.C. – The Congress, https://www.govinfo.gov/content/pkg/USCODE-2011-title2/html/USCODE-2011-title2.html (Last visited Aug. 14, 2025).
[29]Samuel Issacharoff, Gerrymandering and Political Cartels (Social Science Research Network, Rochester, N.Y., 2001), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=[insert_id].
[30]*Ibid*.
[31]Baker v. Carr, 369 U.S. 186 (1962).
[32]*Ibid*.

American electoral law by bringing the subject of redistricting within the purview of judicial review. Subsequent decisions have altered the situation. In *Rucho* v. *Common Cause*[33], the Court in a narrow decision by 5:4, held that claims of partisan gerrymandering involve "political questions" which are not subject to the process of intervention on the part of the federal judiciary.[34] While recognizing the deleterious effects of extreme gerrymandering upon democratic process, court ruled that they were matters within the political and legislative ambit of the states, thus limiting to a considerable extent the judicial remedies available in federal courts.[35]

In spite of this limit imposed by the judiciary, a number of states have adopted institutional reforms which will limit the influence of partisanship on the redistricting subject. California and Arizona have adopted Independent Redistricting Commissions, Michigan has set up a citizen-based redistricting board through a 2018 change to its constitution.[36] These devices are intended to protect the process from direct political control, to improve transparency and to increase receptiveness to citizen participation. Though reforms like these have diminished gerrymandering in certain localities, the practice is deeply entrenched in many areas of the United States. The main strength of this method is founded in its federal nature, which allows for the creation of district lines made to fit local demographic and geographical conditions and needs. The weakness here is that the very nature of this decentralized method gives rise to an increased possibility of partisan manipulation whenever one party becomes dominant enough not only to control the state legislature, but also to hold the governorship. In these situations, the redistricting becomes means of political entrenchment rather than a safeguard of political equity.[37]

A comparative study reveals that the American system stands in contrast to the systems obtaining in different countries such as Canada and Australia, where delimitations are made by non-partisan independent commissions which limit the possibilities of gerrymandering.[38] This contrast lent emphasis to the broader lesson that the institutional form of the redistricting agencies at least somewhat determines the degree of fairness, of transparency and of democratic

[33]Rucho v. Common Cause, 588 US (2019).
[34]*Ibid*.
[35]*Ibid*.
[36]Cal. Const. art. XXI; Ariz. Const. art. IV, pt. 2, § 1; Mich. Const. art. IV, § 6.
[37]Bruce E. Cain, Redistricting Commissions: A Better Political Buffer?, 121 Yale L.J., 2012, at 1808.
[38]The Commonwealth Electoral Act 1918 (Cth) (Austl.), Pt. IV; the Electoral Boundaries Readjustment Act, 1985, c. E-3 (Can.).

quality of the political boundary delimitations. Thus, the U.S. experience illustrates the double-edged nature of decentralized delimitation. While it serves as a "federal laboratory" enabling states to innovate and adopt reforms, it also allows entrenched partisan interests to perpetuate structural electoral biases. For countries like India, it offers a cautionary insight, without independent, impartial, and technically competent bodies overseeing delimitation, the constitutional promise of "one person, one vote, one value" risks being undermined in practice.

B. The Canadian Model: Independent Commissions and Public Participation

The Canadian approach to electoral boundary delimitation operates under a constitutionally safeguarded and institutionally autonomous framework, regulated by the Electoral Boundaries Readjustment Act, 1985.[39] Its principal objective is to secure "meaningful participation" and "effective representation", the constitutional standards articulated by the Supreme Court of Canada in *Reference Re Provincial Electoral Boundaries (Sask.)*.[40] The Court ruled that constituency boundaries should take into account not only the numerical equality of the population, but other concerns, in addition, such as geography, community interest, cultural identity and the historical record. The constitutional base for the representation of the provinces in the federal Parliament is afforded by the Constitution Act, 1867.[41] After each decennial census, there is appointed in each province a Commission whose constitution is arranged under the provisions of the Electoral Boundaries Readjustment Act, 1985 which is an independent body.[42] This Commission is comprised of three members: a judge as Chairman, appointed by the Chief Justice of the province, and two members, appointed by the Speaker of the House of Commons.[43] These public Corporations are independent bodies which conduct their procedures without any direct political control or interference, since the object is to maintain, where possible, operational impartiality and publicity.

In the Canadian model, there exists a legal public participation mechanism. It is obligatory upon these Commissions to publish their first report and then to hold public hearings in various corners of the province, and by inviting

[39]The Electoral Boundaries Readjustment Act, 1985, c. E-3 (Can.), https://laws-lois.justice.gc.ca/eng/acts/e-3/index.html (Last visited Aug. 18, 2025).
[40]Reference re Prov. Electoral Boundaries (Sask.), [1991] 2 S.C.R. 158 (Can.).
[41]The Constitution Act, 1867, S. 51.
[42]The Electoral Boundaries Readjustment Act, 1985, c. E-3, S. 3.
[43]*Id.,* S. 3(1).

citizens and other interested organizations and experts to supply them with material.[44] The results of these inquiries are discussed before a final report is printed, and that final report is submitted to the House of Commons. This report, while it may be further debated in Parliament, cannot be altered or rejected in Parliament by the vote of those elected representatives. This "bottom-up" engagement transforms delimitation from a purely technical exercise into a participatory democratic process.

Canada follows the principle of effective representation. In its landmark decision in 1991, the Supreme Court clarified that while "relative population equality" remains a critical benchmark, it is not an absolute imperative.[45] Justice McLachlin emphasized that deviations of up to 15-25% may be permissible where justified by factors such as geographic remoteness, minority representation, and community identity. This jurisprudential standard contrasts with the rigid "one person, one vote" doctrine prevalent in the United States, which prioritizes numerical equality above contextual realities. The Canadian approach thus, enables enhanced representation for sparsely populated northern and rural areas, taking into account their geographic breadth and socio-economic significance.

Institutional insulation from political influence is another feather of Canadian delimitation practice. The design of the Canadian commissions institutionalizes the delimitation process so that the mechanics of this process are insulated from partisan manipulation. While political parties may make representations, commissions are not required to take them up.[46] Indeed, Parliament has no jurisdiction to alter or overturn the recommendations of the commission, thus ensuring that boundary changes are not subjected to considerations of electoral advantage, a constant failing of systems lacking such institutional safeguards. Although the Canadian model, despite its international reputation, is not without free from critiques. Public hearings exhibit wide discrepancies of participation and are often biased towards urban constituencies, whereas rural areas are under-represented. This situation may deepen the emphasis on the urban point of view in the final decision of the commission. Also, the permissible population differential ceiling of 25%, is based on the principle of effective representation, however it does not provide a judicially articulated standard of measurement by which one can argue what is an acceptable balance between equity and representational efficacy.[47]

[44]*Id*, Ss. 18-20.
[45]Reference re Prov. Electoral Boundaries (Sask.), [1991] 2 S.C.R. 158, 183 (Can.).
[46]*Supra* n. 42, S. 23.
[47]J.C. Courtney, Commissioned Ridings: Designing Canada's Electoral Districts (Montreal: McGill-Queen's University Press, 2001), 142.

The lesson from the Canadian model for India is about the independent Commissions which would get constitutional safeguards of independence from political influences, would enhance the transparency and acceptability as far as the delimitation process in India is concerned. The institutionalization of a structured pattern of public participation beyond mere symbolic consultation, will greatly enhance the democratic legitimacy of this process, particularly in a country where adjustment of the boundaries will also mean directly the federal relations and state relations, the representation of the minorities and political balances existing in various parts of the country. The stress which the Canadian model gives to effective representation would become particularly appropriate in the context of India, in view of the multiplicity of the demographic conditions and the geographical complexities existing in the country. This principle will act as a counter to the drafts of a purely numerical proportionality of representation.

C. The Australian Model: Constitutional Safeguards and Technocratic Precision

Australia's constituency delimitation system functions within a centralized, constitutionally protected, and technologically advanced institutional framework. The legal basis for this complex problem is to be largely found embodied in the Commonwealth Electoral Act, 1918.[48] The provisions regarding set-up of Redistribution Committee for each State provides for the formal establishment of the Redistribution Committee of that state by the Australian Electoral Commission (AEC).[49] The Committee comprised of Electoral Commissioner, Australian Electoral Officer for the state, Surveyor General of the state, and Auditor General of the state.[50] The combination of this group, provides for an institutional buffer from political interference. Ultimately delimitation is settled by a two-tier structure of adjudication *i.e.,* first by the Redistribution Committee and subsequently by the Augmented Electoral Commission. The process of delimitation gets constitutional protection by the Australian Constitution. It says that the allotment of seats in the House of Representatives will be defined on the basis of proportional representation, as enacted by the ratio of populations.[51] It is also interesting to note that

[48] The Commonwealth Electoral Act 1918 (Cth), Div. IV.
[49] *Id.,* S. 60(1).
[50] *Id.,* S. 60(2).
[51] The *Australian Constitution,* S. 24.

it runs even a Minimum Representation Guarantee which reads that every "original state" is guaranteed minimum of 5 seats irrespective of population.[52] The whole purpose of this process is to ensure for against political representation for the smaller states.

The major features of the Australian Electoral Commission include institutional independence; procedural framework; technological integration and scientific methodology; and insulation from political influence. The Australian Electoral Commission is an independent constitutional body and structurally as well as functionally insulated from parliament, executive and political parties.[53] The intention is to ensure that the drawing of the electoral boundaries is made fairly, transparently, so as to be based on scientific basis of evidence. Central to the rationale for this system is a desire to eliminate the possibility of partisan interference and to foster public confidence in the process of redistribution.

Redistribution is initiated by the AEC at intervals of not less than seven years or at an earlier time if there is a significant movement, which has taken place in the population.[54] The process occurs in the stages of statistical data as to population will be supplied by the Australian Bureau of Statistics (ABS) for which the population figures represent the necessary basis upon which will be apportioned the number of members of Parliament to be allotted to each State and Territory. The Redistribution Committee issues their draft maps with accompanying explanatory matter. Any member of the public, political parties or other interested organizations will be able to make, in writing, objections or alternative proposals.[55] Proper hearings will be held to investigate the submissions made and any evidence that may be adduced. The Augmented Electoral Commission will consider the recommendations of the Redistribution Committee and make its legally binding determination of the final boundaries, which will be published in the Commonwealth Gazette.

Australian redistributions are assisted by the use of modern spatial type technology and research technology, which includes Geographic Information Systems (GIS) and current digital mapping techniques which assist in the

[52]Representation of Commonwealth Territories in the Senate, Papers on Parliament, No. 64, Ch. 7, https://www.aph.gov.au/About_Parliament/Senate/Publications_and_resources/Papers_and_research/Papers_and_Parliament_ and_other_resources/Papers_on_Parliament/64/c07 (Last visited Aug. 15, 2025).
[53]*Supra* n. 51 S. 6.
[54]The Commonwealth Electoral Act 1918, S. 59.
[55]*Ibid.,* Ss. 68–70.

correct demarcation of the various boundaries.[56] The demographic modelling tries to foresee what the population changes would be so that redistributions in the future, with their consequent representation inequality, should not take place, and the mapping of community of interests assists in keeping areas which are denominated as seats of Parliament, socially, economically and ethnically integrated. This future orientated, dataless re-search model enables redistributions in the future to be of a less frequent and destructive nature.

The Australian model where welfare proved in efficaciously eliminates the risk of gerrymandering. The Independent AEC members are politically otherwise unaffiliated and, each stage must clearly provide one in which the public can participate. Neither Parliament nor political parties can veto or have any Parliamentary authority over the alteration and review of boundaries which lie entirely within the jurisdiction of AEC. Doubts exist about the entire matter, however the statutory definition of community of interests, for example, is lacking in clarity and vagueness and produces situations from time to time which gives rise to disputes having no regard for possible influence by either party in the operation of the system. In remote States such as Northern Territory or the State of Western Australia, the area is often in size of electorate vast and remote and contact with constituents is not easy. Another problem is created by the large number of the population which is mobile and which may require interim redistributions, again creating great expense and problems of administration.[57]

IV. Comparative Analysis of Above Models and Lesson for India

Delimitation is a process which ensures the quality of the representation and therefore the equality of democracy. The phrase "one person one vote one value", is accepted by accepted by all.[58] The institutional and procedural framework in which this is put into effect is left to considerably different ways in which it is achieved whilst there is a consensus of opinion and acceptance. The United States, Canada will have their delimitation models and be governed in a particular temporal social, constitutional and political

[56]Australian Electoral Commission, Federal Electoral Boundary GIS Data for Free Download, AEC, Mar. 4, 2025, https://www.aec.gov.au/electorates/gis/gis_datadownload.htm (Last visited Aug. 15, 2025).

[57]Graeme Orr, The Law of Politics: Elections, Parties and Money in Australia (Federation Press, 2010), 134.

[58]Bhawana Kesar, Boundaries of Power: The Role of Delimitation in Shaping Democratic Elections, 5 Int'l J. L. Justice & Jurisprudence, 2025, pp.123-34.

context. Australia will likewise still have their sphere of interests influenced by its own constitutional and political background, to the extent that all things developing in the same universal way.[59] A comparative study of above three models indicates following issues in their delimitation process and its implications in Indian context:

A. Structural Comparison: Centralized versus Decentralized Control

The US model adopts a decentralized approach. The federal constitution mandates only seat reapportionment, leaving boundary determination to individual states. This allows flexibility to address local conditions but carries a significant risk of gerrymandering, whereby ruling parties manipulate boundaries for partisan advantage. In contrast, Canada and Australia employ centrally regulated, independent commissions. The Australian Electoral Commission (AEC) enjoys constitutional protection, while Canada's independent commissions, established for each province, are judicially chaired. Both models minimize political interference and enhance transparency and public engagement. India's Delimitation Commission, constituted under the Delimitation Commission Act, 2002 is theoretically independent but remains susceptible to political influence due to its appointment structure and executive links.

B. Transparency and Public Participation

The US model enables US states with independent commissions (e.g., California, Michigan), public hearings, and interactive online maps meaningful citizen's participation.x Canada mandates public hearings by law, and citizen submissions can shape final boundaries. Australia similarly publishes proposals at each stage and provides formal objection mechanisms. In India's Delimitation Act, 2002, section 9 posits that there could be some public consultations. However, due to the limitation of both the scope of these hearings and their accessibility, civil society and the general public have little role in any constructive engagement.

C. Norms and Principles: Population Equality versus Effective Representation

The US model emphasizes strict population equality, fully adhering to the 'One Person, One Vote' principle.[60] In Canada, departures from the quota

[59]India at the Crossroads: The Delimitation Exercise and Its Implications for Democracy, 2025, https://sabrangindia.in/india-at-the-crossroads-the-delimitation-exercise-and-its-implications-for-democracy/ (Last visited Aug. 15, 2025).

[60] Jonathan Stark-Sachs Voting for History: One Person, One Vote and the Creation of National Register Historic Districts, 26(1) Roger Williams University Law Review, 2021, https://docs.rwu.edu/rwu_LR/vol26/iss1/8

of 15-25 % are allowed in order to facilitate effective representation. In Australia, numerical equality has a primacy, but irregularity is favored to preserve the interests of communities. In India, the constitutional provisions essentially refer to the population as the only primary consideration, with insufficient facility for accommodating demographic irregularities and geographical diversity. This results into proportional voters and representatives in over populated areas of the country, and proportionately low ratios in under populated.

D. Technical Efficiency and Data-Driven Approaches

Australia integrates advanced Geographic Information Systems (GIS) and demographic modelling extensively. Canada also relies on precision mapping and statistical tools. In the US, technological sophistication varies from state to state. In India, technological adoption remains limited.[61] The process depends primarily on census data and static maps, with little institutional use of GIS, AI-based projections, or community mapping techniques.

E. Comparative Table: Key Features of Delimitation Models

Dimension	United States	Canada	Australia	India
Institutional Control	Predominantly state-controlled; in most states, legislatures oversee the process. A few states have adopted independent or bipartisan commissions.	Independent provincial commissions, appointed with judicial leadership and without direct political control.	Australian Electoral Commission (AEC)- a constitutionally protected, fully independent federal body.	Delimitation Commission, a statutory central body; members appointed by the Union Government, with limited structural independence.
Transparency and Public Engagement	Varies in states- strong public processes in states with independent commissions, minimal transparency where législatures control boundaries.	High transparency- public hearings mandated by law; public submissions can influence final boundaries.	Very high transparency- proposals published at each stage, with a formal objection process open to citizens and stakeholders.	Limited transparency- public hearings occur but are often formalities; public influence on final boundaries is minimal.
Standard for Drawing Boundaries	Strict population equality "One person, one vote" with very limited deviation allowed.	Effective representation- allows up to 25% population deviation to protect geographic, social, and minority interests.	Population equality is central, but "community of interest" and geographic realities are also factored in.	Primarily population-based, with little flexibility for geographic or community considerations.
Use of Technology	Mixed- advanced GIS and mapping tools in some states; others still use traditional/manual approaches.	High- digital mapping and demographic modelling are standard.	Very high- sophisticated GIS, demographic projection models, and community mapping integrated into the process.	Low to moderate- census data and static maps dominate; minimal use of GIS or predictive modelling.
Risk of Political Interference	High in legislature-controlled states; gerrymandering widely documented.	Minimal- insulated from political actors by law.	Minimal- political actors have no direct power to amend final boundaries.	Moderate- political influence possible through appointments and structural design.

[61]India's Delimitation Dilemma: Challenges and Consequences, The India Forum, 2024, https://www.theindiaforum.in/politics/indias-delimitation-dilemma-challenges-and-consequences (Last visited Aug. 15, 2025).

F. Recommendations in Indian Context:

- Constitutional Status for an Independent Body: The Delimitation Commission must be granted the constitutional status that is similar to that of the Election Commission of India to ensure that it is fully independent from political influence.[62]
- Diversify the Membership of the Commission: To ensure that the Delimitation Commission's composition reflects the diversity of India's large and diverse population, there should be a balanced and diverse membership consisting of judicial, technical and social experts. In addition to this, executive should limit the potential of political influence on the commission.[63]
- Mandatory Public Hearings and Transparency: Similar to Canada and Australia, public hearings must be mandatory and conducted at local level throughout the country so that citizens have ample opportunities to express their opinions and participate in the process. Also, all proposals, objections and other supporting documents should be made available online so that citizens may access them easily.
- Technological Tools and Methods: Advanced technology including geographic information systems (GIS) and artificial intelligence-based population projections and community of interest maps should be used to assist the commission in accurately drawing boundaries of constituencies based on demographic data.[64]
- Effective Representation: While the current method of defining electoral constituencies relies solely on population figures, consideration should be given to geographical, social and cultural characteristics when drawing electoral constituency boundaries so that each region has equitable representation.[65]
- •s Regular Review Cycles: Regular review cycles should be established for the Delimitation Commission. A regular review cycle of seven

[62]K.C. Sivaramakrishnan, Constituencies Delimitation: Deep Freeze Again?, 36 Econ. & Pol. Wkly., 2001, pp.4694-96.
[63]R. Rangarajan, What Are the Issues Around Delimitation? The Hindu, Mar. 5, 2025.
[64]Pankaj Kumar Patel and T.V. Sekher, Parliamentary Delimitation: A Study on India's Demographic Struggle for Political Representation, J. Asian & Afr. Stud., 2024, https://doi.org/10.1177/00219096241295634.
[65]Changing Face of Electoral India: Delimitation 2008, I Nirvachan Sadan, Delimitation Commission of India, 2008.

to ten years would allow the Commission to reflect changes in demography while minimizing disruptions to the electoral system.

V. Conclusion

The comparative study shows that institutional independence, transparency, technical capability and citizen's participation are absolutely essential for a complete and credible delimitation process. The US model has an element of flexibility but also of vulnerability to interference by political authorities. The Canadian model has succeeded in establishing effective representation by virtue of the balanced judiciousness of the principles of judicial dedication and of public participation. The Australian model has decidedly introduced a greater degree of technical sophistication with constitutional safeguards. For India the best way will be a mixed model by taking over greater shares of the Canadian model from the point of view of public participation and effective representation, with certain technical advances and advantages of the Australian model relating to technology and constitutional structure found in the US model. Full and active participation of local communities is also necessary. Proper use of advanced systems of mapping along with investigatonal devices for gathering of data would be useful. In case, these innovations are introduced before the 2026 delimitation, it will restore the principle of democratic equality and further develop a deeper faith in the democratic institutions.

Comparative Standards of Judicial Review on Artistic Freedom in Dramatic Performances: A Study of India, The United States, and The European Court of Human Rights[1]

Dr. Nandita Narayan*

Abstract

This paper undertakes a comparative analysis of artistic freedom in dramatic performances as protected under the legal systems of India, the United States, and the European Court of Human Rights (ECHR). It explores how each jurisdiction balances freedom of artistic expression with legitimate state interests in morality, decency, and public order. The study highlights that while the United States employs a strict scrutiny standard under the First Amendment, and the ECHR applies a proportionality and necessity test under Article 10, Indian courts continue to follow a deferential approach rooted in executive discretion and colonial-era censorship laws. By analysing key precedents, including Shreya Singhal v. Union of India, Freedman v. Maryland, and Unifaun Theatre Productions v. Malta, the paper argues for harmonising India's constitutional framework with global standards by adopting a higher threshold of judicial review and removing pre-censorship in artistic works.

Key Words: *Artistic Freedom, Dramatic Performances, Comparative Constitutional Law, First Amendment, Article 10 ECHR.*

Introduction

Artistic freedom, as an extension of the right to freedom of expression, lies at the core of democratic pluralism. Dramatic performances—plays, theatre, and live art—constitute one of the earliest and most enduring forms of such expression. Yet, the stage has also been one of the most frequently censored spaces, reflecting the tension between creativity and control. While democracies recognise artistic expression as constitutionally protected speech, the *standard of judicial review* applied to restrictions on such expression varies across jurisdictions.

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In India, the remnants of colonial censorship through the Dramatic Performances Act, 1876, and state-level policing laws continue to vest sweeping discretionary powers in the executive. Courts have often upheld such measures under the guise of "public order" and "morality," applying a deferential standard of review. By contrast, in the United States, the First Amendment ensures a high threshold of protection, allowing restrictions only under compelling state interest and narrow tailoring tests. The European Court of Human Rights, through Article 10 of the Convention, employs a proportionality and necessity analysis, balancing state interference with individual freedom under the "margin of appreciation" doctrine.

This paper analyses how these three systems conceptualise and adjudicate restrictions on artistic expression, particularly in the context of dramatic performances. It argues that India must transition from an administrative, morality-driven model to a rights-based, judicially reviewable standard consistent with global constitutional principles of free expression.

Dramatic Performances and its Censorship in the USA

With respect to dramatic performances and its censorship in the US, there is no uniform or systematic prior restraint that is widespread and used by the government to regulate theatre productions. This does not mean that there is no prior restraint with respect to theatre in the USA, all it means is that the censorship of theatre in the US is restricted to local level regulation by the various states, and there is no national level regulation mechanism for the same. It must also be noted that the history of theatre and drama in the USA and its origins is still ambiguous, as it has not been recorded clearly as the origins in UK. This could be because the USA was a colony of England and all laws that were applied in England was applied in the US colonies as well, till they attained independence. The earliest incident of theatre censorship in the USA can be seen in puritanism of the English colonists in USA in the early 17th century. As examined earlier in this chapter, the puritans had a strong anti-theatre sentiment towards the stage shows. This view stemmed from the religious sentiments that were deeply rooted and questioned such shows as they were considered highly immoral as it transgressed the laws of God. The plays were considered to be chaotic and anarchic in nature and it was denounced as unchristian as the suspicion against such plays were profound. The puritan movement was thus reflected in the American soil as well, with respect to theatre and dramatic performances. During the colonial period in USA, all those laws that applied in the UK were also applied

in the USA, because of this many plays were banned, and the producers were prosecuted on the grounds of obscenity and immorality. For instance, the first ever recorded English play in the USA is that of *Ye Bare & Ye Cubb,* where the producers were taken to court for producing theatre which was banned at that time.[2] Again, if one traces the American history relating to stage performances and its regulation during the colonial period in the US, one can notice that the colonies in the South were more pro-theatre than the colonies in the North, where it was considered to be a highway to hell.[3] Later, in the next few years anti-British sentiments were seen to be on the rise throughout the US, and anti-British nationalists groups, for instance the Sons of Liberty, called for the complete shutdown of theatres throughout US, as it was, just like British tea, a British export.[4] It was in the later half of the 18th century, where most states started getting independence from the colonial powers, that the local legislations which regulated theatre performances were passed. For instance, Massachusetts passed a legislation titled the "Act to Prevent Stage-Plays and other Theatricals," which outlaws using "*any house, room or place*" for "*acting or carrying on any stage-plays, interludes or other theatrical entertainments whosoever,*" and punishes any bystanders of theatrical events. This act continued to be the law of the land for 40 years. On May 31, 1759, the House of Representatives in the Colony of Pennsylvania passed a law forbidding the showing and acting of plays under a penalty of £500. In 1761 Rhode Island passed "*an act to Prevent Stage Plays and other Theatrical Entertainments within this Colony,"* and the following year the New Hampshire House of Representatives refused a troupe of actors admission to Portsmouth on the ground that plays had a *"peculiar influence on the minds of young people and greatly endanger their morals by giving them a taste for intriguing, amusement and pleasure*."[5] During the 1770s, in the midst of the American revolution, the Continental Congress called for the shutting down of all as *in order to encourage frugality…and discountenance and discourage, every species of extravagance and dissipation, especially all horse racing, and all kinds of gaming, cock fighting, exhibition of shows and plays,*

[2]See generally, Noel McCabe, Indecent and Censorship of American Theatre (Seattle Rep, 11 October 2019), https://www.seattlerep.org/about-us/inside-seattle-rep/indecent-and-american-theater-censorship accessed 3rd April 2023.

[3]See Arthur Hornblow, A History of the Theatre in America From its Beginnings to the Present Time Vol. 1 (1st Edn, J.B. Lippincott Company 1919).

[4]See JH Houchin, Censorship of the American Theatre in the Twentieth Century (Cambridge University Press 2003).

[5]*cf* Hornblow (n. 118) 21.

and other expensive diversions and entertainments,"[6]. Finally in 1789, all laws regulating and prohibiting theatre plays were repealed. However, the laws that followed, enacted by the various States in the US, were much more stringent in nature, giving a lot of power to certain groups of elitists in the regulation of content in theatrical performances. Thus, even after independence the States in the US adopted strict laws forbidding theatrical performances. For instance, the New York State Licencing Act of 1839, required any "*theatre, circus, or building, garden or grounds, for exhibiting theatrical or equestrian performances*" in New York City to obtain a licence from the mayor, with all collected fees to be forwarded to the Society of Juvenile Delinquents. There was also a penalty put in for the violation of this law where the society would act as an agent of the State and collect all the penalties. Thus apart from the mayor and other local agencies, even such societies which were benefited in case of violations had a role in the regulation of theatrical performances. From the late 1860s onwards, there was an uneasy alliance between the police department, the mayors office, private moral reform societies, and neighbourhood groups, where a cultural surveillance of entertainment houses were done on a regular basis. Thus, whether or not a licence is acquired from the local authority to showcase a public performance such as a drama would depend on all these external elements other than the State. "*To thrive, an entrepreneur had to negotiate a treacherous terrain that included autocratic police captains, ever-vigilant moral reformers, outraged clerics, and organized neighbourhood citizens*"[7] what must be noted is that these licences were given to all authorities where drama, music concerts, opera, circuses etc were to be performed in public. This regulation came about as a mechanism to control alcoholism and prostitution in such places. But it ultimately resulted in content regulation as well, at the whims and fancies of certain aristocratic groups of people. For instance, in 1873, the Comstock Act was passed under the influence of Antony Comstock.[8] He was the head of the *New York Society for the Suppression*

[6]See *cf* Houchin (n.119).

[7]Daniel Czitrom, 'The Politics of Performance: From Theater Licensing to Movie Censorship in Turn-of-the-Century New York', (1992) 44 American Quarterly 526.

[8]An Act for the Suppression of Trade in, and Circulation of Obscene Literature and Articles of Immoral Use, this act *made it illegal to send "obscene, lewd or lascivious," "immoral," or "indecent" publications through the mail. The law also made it a misdemeanor for anyone to sell, give away, or possess an obscene book, pamphlet, picture, drawing, or advertisement. The breadth of the legislation included writings or instruments pertaining to contraception and abortion, even if written by a physician.* See Brandon R. Burnette, The Comstock Act 1873 (The First Amendment Encyclopedia, 2009), Comstock Act of 1873 | The First Amendment Encyclopedia (mtsu.edu), accessed on 3 April 2023.

of Vice, which heavily influenced Congress to pass this legislation to ban obscene materials. He was also appointed by the Mayor of New York as the authority for censorship of such materials. This had a heavy impact on performances as well, as the scripts were heavily censored by Comstock. The 20th century saw two main changes with respect to theatre production. The first change was seen during the first half of the 20th century, where, many plays were censored by local authorities for "*corrupting philosophy*" and "*corrupting decency*". Both the actors and the authors of the play were arrested on these grounds.[9] While there was a general tendency in the whole of Europe to wade off censorship of plays, and the public opinion moving towards relaxation in theatre censorship, the situation in the USA was such that the local laws became more and more stringent giving a large amount of power to the local executive body such as the Police to even rewrite the play so as it wouldn't result in public disorder. The second change took place during the latter half of the 20th century, when, there was a boom in the motion film industry, opening the audience to a visual treat. The evolution of motion pictures is very specific to the USA, and so are the censorship laws that followed.[10] The impact that motion pictures had in the US society was immense. The latent boundaries of morality, slowly started withering away, paving way for an era of creativity and profound talent. This development had a huge impact on theatre and public performances as well.

What must be understood is that prior restraint for public performances was a method of regulation adopted by most States in cases of theatrical performances and stage shows. From local municipal laws, that regulates public nuisance, public order and prohibition of public nudity, there were also state statues relating to morality obscenity and indecency. The theatre premises has to be licenced or leased out for the public performance. These municipal auditoriums and parks and other public places are usually under the control of some sort of authority such a Municipal Board. The members of the Board decided whether to grant permission for the exhibition, entertainment or public performance, after going through the script, in its entirety and examining

[9]For example, the play *Sopho*, where the actor and producer was arrested for corrupting public decency as the play was coarse, unsavory and indecent. Again, Geroge Bernard Shaw's, *Man and Superman*, and also another play titled *Mrs. Warrens Profession*, saw the Police Commissioner dictate the scenes that can be played on stage, and the script being altered to a large extent, lest it corrupts the minds of people who view it. See *cf* Houchin (n.119).

[10]Discussed in detail in the next Chapter.

whether or not it will violate the local and state laws as mentioned above. Thus, as seen above a large amount of pre censorship powers were given to certain group of people in regulating artistic content. During this time period it can be seen that, in the USA, India and in the UK, the execution of the laws were done by a very few people who had no power to adjudicate, and artistic freedom was completely at the subjective notions of these people sitting in authority. But, with the advent of motion pictures theatre premises were opened up to viewership to a large amount of content. It was in 1950s, that the court for the first time in the US, extended First Amendment rights to motion pictures as well.[11] With the passage of time and the large number of cases that came up before the US Supreme Court, it can be seen that motion pictures in the US is part of the protected speech spectrum under the First Amendment, as it can be restricted only on grounds of obscenity. The standard of obscenity is very high and motion pictures become unprotected speech only if it has no literally, scientific, political, or artistic value[12]. "*Entertainment, as well as political and ideological speech, is protected; motion pictures, programs broadcast by radio and television, and live entertainment, such as musical and dramatic works, fall within the First Amendment guarantee."*[13] With motion pictures being given the green signal in terms of First Amendment Protection, the type of content that was regulated in motion pictures also started varying. Sexuality and nudity and erotic content was protected, and since it won't stand the test of obscene content under the First Amendment, prior restraint was also relaxed. Though prior restraint and censorship has been upheld to be a valid regulation in the US, with respect to motion films, the authorities started granting licences more consciously, lest their verdict maybe called before a Court of law for lack of protection to artistic freedom under the First Amendment. Even though prior restraint was considered valid, it came with strict instructions from the court as to how it should be executed by the officials.[14] This way, the subjective whims and fancies of authorities paved way to a slightly more objective standard of evaluation. It was in this backdrop that theatre, public performances, and stage shows were also considered to be a part of the First Amendment Right for the first time by the US Supreme Court. It was in 1975, that the Court held that the First Amendment rights shall also be extended to theatre productions and plays, just like motion pictures.[15] Here, Chattanooga Memorial Auditorium

[11]Burstyn v. Wilson, 343 U.S. 495; discussed in detail in the next chapter.
[12]See next chapter for a detailed study.
[13]Schad v. Borough of Mt. Ephraim, 452 U.S. 61 (1981)
[14]See Freedman v. Maryland 380 U.S. 51 (1965), also in detail in the next chapter.
[15]Southeastern Promotions Ltd. v. Conrad, 420 U.S. 546 (1975).

and the Tivoli, a privately owned theatre under lease to the city, denied a permit to South-eastern Promotions, Ltd., the company seeking to present *Hair,* which was considered to be a controversial rock musical because there were scenes of nudity, and other offensive dialogues that were considered obscene. The city officials denied permission for it to be staged in these public places as it would not be in the " best interest of the community". The company appealed to the Tennessee District Court, and the Court with the help of a jury held that the city officials were right in not granting permission as if it was allowed to be staged it would run against the State's public nudity law. Therefore, the company filed a case against the authorities before the Supreme Court of the US. The supreme Court, did not however, go into whether or not the play was actually obscene or not. The court held that it was a matter of prior restraint. And as seen in the case of *Freedman v Maryland*, there are certain procedural safeguards that have to be followed in the case of prior restraint. Firstly, the burden of proving that the censorship or prior restraint was necessary and that the material is unprotected is on the censor and not on the person who is censored. The burden of initiating the proceedings is also on the censor. Secondly, there must be the prior restraint can only be for the purpose of maintaining the status quo, and it should be temporary. Thirdly, it must be followed by prompt judicial review, where the matter can be finally only decided by the judiciary. The Court on these procedural safeguards held that the burden was always on the company, and there was no prompt judicial review of the same. Hence the prior restraint was held invalid and against the First Amendment protection. In this way, the First Amendment protection was also extended to theatrical performances.

Music and First Amendment Review in the USA

The Courts in the US have always adopted a very high standard of review in obscenity when it comes to First Amendment Rights. The courts have always applied the same in cases of music recordings and live music shows as a part of artistic freedom. The lyrics of music albums have come before the court on the grounds of obscenity, the allegation that they incite violence or that they are harmful to minors. It is usually against these three grounds that music has been accorded a First Amendment protection. One of the interesting cases on live music orchestra performance, was where a concert protomer company entered into a contract with the municipal corporation for the promotion of music concerts in local amphitheaters. This corporation

rejected six of the applications for such live performances suggested by the company. The company alleged a Frist amendment violation. the Corporation claimed that the Company had no such right as it did not even know the nature of the songs or lyrics that it had suggested for performance in the Amphitheatre. The Court, however, held that the concert promoters were the 'clergy house' of expression just like booksellers or theatre owners. The Court further held that the place in question was a public place, and the only regulation that the government could make in this regard was content-neutral restrictions of restrictions on the place, time and manner, given its public nature. The live music performance permission was not granted because it was considered obscene and profane. The City Corporation's main concern was that it was 'rock music' and it had a large impact on the young community in the city. There was also a fear of illegal activities happening in the premises such as drug abuse and pedaling. The Court held that these concerns were grave, however, it could not be done by curbing the First Amendment right of the concert promoters. The Court did not go into the obscenity question but held that live musical performances cannot be prohibited on the basis of content-based regulations. It is not in the power of the Municipal authorities to deny a First Amendment right in live musical performances on content-based regulations. And if there is a content-based regulation, it is for the Municipal Authorities to show a compelling state interest, that the particular regulation was narrowly tailored, and that there was no other alternative mechanism other than to deny access to the Amphitheatre. None of the above were done in this particular instance; hence, the court upheld the concert providers' right to the First Amendment. Thus, the First Amendment rights were extended not only to authors or producers of the work but middle clergymen of expression such as theatre owners, booksellers, and concert promoters. Again, in public places, content-based regulation cannot be imposed, and if it is imposed there is a high standard of judicial review of compelling state interest, where the burden of proof is on the municipality, local government, or the State.[16]

In another interesting case was one that was concerning the lyrics of a rap song by the band called 2 Live Crew. The Sheriff of Florida to action to prevent record store owners from selling the alleged obscene album. It was against this arrest that a case was made in the District Court, claiming a First Amendment violation. The District Court held that the song in question was obscene and there was no unwanted prior restraint in this case. However,

[16]See Cinevision Corporation v. City of Burbank, 745 F.2d 560 (9th Cir. 1984).

on appeal the 11th circuit Court of Appeal, using the Miller test, held that this song had serious artistic value. The burden of proof was on the State to show that it lacked artistic value and they could produce any witness or evidence to show the same. On the other hand, the appellants proved through the expert opinion of scientists, music critics, and psychologists that the language was at most profane and misogynistic, but it did not lack any artistic value and hence was not obscene and fell under the First Amendment rights.[17]

There are two other instances of music censorship, that are very interesting in nature.[18] Though it does not pertain to a live performance, these two instances were where there was a question of suicide being committed because of the lyrics of a particular song. In the first instance, it was a song where two heavy metal artists were arrested on the ground that their song resulted in two people committing suicide. The allegation was that the reversed song sequences in the tape resulted in mental agony and they thereby committed suicide. The Court adopted the *Brandenburg v Ohio* test of imminent lawless action, and held that there was no actual causal link between the music and the suicide.

Nude Dancing and the First Amendment Review in the USA

Generally, in the US, art speech that is political or satirical is accorded more protection that those for commercial purposes, under the Frist Amendment of the US Constitution. For instance plays with satire or political rhetoric will get more protection that nude dancing in bars. Initially the Court gave First amendment protection to nude dancing in places where alcoholic beverages are sold. The Court held that the state can regulate nude dancing in such areas, but some of the performances of nude dancing can be accorded constitutional protection in the Frist Amendment.[19] The Court then on till the early 90s, upheld nude dancing as a form of entertainment and artistic freedom which had protection under the First and Fourteenth Amendment of the Constitution, from governmental regulation.[20] It was finally in 1991[21], that

[17]See Luke Records, Inc. v. Navarro, 960 F.2d 134 (11th Cir. 1992).

[18]Judas Priest v. Second Judicial District Court, 760 P.2d 137 (1988), Waller v. Osbourne, 958 F.2d 1084 (11th Cir. 1992).

[19] See California v. La Rue, 409 U.S. 109 (1972).

[20]Doran v. Salem Inn, 422 U.S. 922 (1975), here the court held that topless dancing in bars maybe accorded First Amendment Protection and it can be regulated by the State under certain circumstances. In *Schad v. Mount Ephraim* 452 U.S. 61 (1981). The Court held that nude dancing in bookstores in particular booths for the viewership of patrons in the bookstores could be accorded First Amendment protection.

[21]Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991).

the Court held that governmental regulations regarding public nudity is acceptable in cases of creating buffer zones and operational requirements. This was a case where a local regulation was brought in with respect to the condition of wearing G Strings in places of public nude dancing as a regulation under the public indecency law of Indiana. It was challenged on the ground that erotic messages cannot be provided when a g String is worn. The court upheld the restriction as it was considered minimal and it leaves ample capacity to the nude dancer to convey the erotic massage. What must be noted here is that though the Court upheld the restriction, it also recognized nude dancing as a form of symbolic speech under the First Amendment. the Court also held that the Government has the power to regulate expression in the light of secondary effects that the adult industry has on the public such as increased crime and decreased property rates. In other words, the secondary effects doctrine gives the power to the government in regulating expression and symbolic speech such as nude dancing. This indicates that nude dancing was given a First Amendment protection where the standard of review is very low or minimal, yet given protection. In the later cases, where there was a governmental regulation banning public nudity and complete nudity it was upheld by the Court, though semi nudity was protected.[22]Thus, it can be seen that most cases of regulation of nude dancing nude dancing is based on whether or not the regulation is content neutral or content specific. If the regulation is according to the time place and manner doctrine as brought by a large number of cases in the US, then it a valid regulation and nude dancing can be regulated. But, if it is a content specific regulation that goes into the subject matter of the expression of nude dancing then it is not a valid regulation and can be subject to stricter scrutiny of judicial review.[23]

Art Speech in Theatrical Performances and the ECHR

Article 10[24] of the European Convention on Human Rights protects various

[22]City of Erie v. Pap's A.M., 529 U.S. 277 (2000).

[23]See Schultz v. City of Cumberland, 228 F.3d 831 (7th Cir. 2000).

[24]1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises. 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

kinds of expression, including artistic, non-verbal and non-visual forms. This right means the freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. The courts have, in several occasions emphasised that Article 10 not only applies to ideas and imparting of information, or to those that are favourably received and is inoffensive or indifferent, but it also extends to anything that tends to offends shock or disturb, as it is required in a pluralistic broadminded society.[25]

But there are situations where the state can legitimately impose certain conditions and restrictions on exercise of this right. these restrictions must be construed strictly and the need for these restrictions must be construed convincingly.[26]

The Article places a positive obligation on the contracting State to see that these rights are protected and exercised without due interference from the State, and the State can interfere only in cases as mentioned under the said Article. This means that the State should ensure that the rights of the authors, artists and journalists are effectively protected against all state action, in such a manner that they have the space, opportunity and environment for participating in public debates even if their opinions go contrary to those of the State and even if they are shocking , disturbing or irritating.[27] There is a three step evaluation process to check if the contracting parties have complied with the provisions of the convention.

First, there must be an interference by the state with respect to person exercising his expression under the Article 10. This interference can be by introducing formalities, conditions, restrictions and penalties. The interference by the State must be in the form of a prescribed law, that are specific, available, and applied in a predictable manner.

Second, there must be a legitimate aim for the lawful interference by the State. This legitimate aim or the specific purpose of the legislation is clearly spelled out in para 2 of Article 10 of the convention, which include the interest of national security, territorial integrity, and public safety, for the prevention of disorder or crime, for the protection of health or morals, for

[25]The Observer and Guardian v. The United Kingdom, 51/1990/242/313 (ECHR, 24 October 1991).

[26]Stoll v. Switzerland, 69698/01 (ECHR, 10 December 2007).

[27]Dink v. Turkey, 2668/07, 6102/08, 30079/08, 7072/09 and 7124/09 (ECHR, 14 September 2010), Khadija Ismayilova v. Azerbaijan, 65286/13 and 57270/14 (ECHR, 10 January 2019).

the protection of the reputation and rights of others, for the prevention of disclosure of information received in confidence, and for maintaining the authority and impartiality of the judiciary. If this second limb is not satisfied, the regulation automatically becomes void and the need to satisfy the third limb becomes insignificant.[28]

Third, the legitimate aim should satisfy the test of the 'necessity of the interference in a democratic country'. It must be shown by the State that the interference was necessary for the democratic country of the contracting State. The way to check whether a particular interference is necessary is to check whether it is proportionate to the legitimate aim so pursued by it. The test of proportionality can be determined by using various tools. Firstly, one of the tools created by the court to see if the interference is proportionate to its legitimate aim is to see if there is a pressing social need for the interference. The Court in many cases have held that a pressing social need is not the as the expressions of *admissible", "ordinary", "useful", "reasonable" or "desirable*"[29]. It cannot be synonyms to indispensable, but it is more or less on the same lines. In other words, if there is an interference, the State must show that the interference was absolutely necessary. Thus, the burden of proving that the interference was necessary is on the State, where the State must show that the interference was prescribed by law, there was a genuine legitimate aim sought to be achieved by the interference, and that the interference was necessary in a democratic country. But there is another doctrine called the margin of appreciation in relation to the ECHR. The degree of scrutiny with which the Court views the interference is inversely proportional to the degree of discretion given to the Contracting parties under the concept of margin of appreciation. This doctrine is directly related to the issue of consensus of the Eropean nations regarding any issue at hand. In other words if there is less consensus regarding a human rights issue raised by the applicant amongst the Contracting parties, then national authorities are better placed to decide on the matter and the Court should be deferential to them in its final judgment.[30] Hence, even though the burden of proof is on the Contracting parties with respect to any interference on artistic freedom, whether or not the individual freedom is given more importance than State

[28]Case of Khuzhin v. Russia, 13470/02 (ECHR, 23 October 2008).

[29]Gorzelik and Ors. v. Poland, 44158/98 (ECHR, 17 February 2004); *Barthold v. Germany*, 8734/79 (ECHR, 25 March 1985); The Sunday Times v. the United Kingdom, 6538/74 (ECHR, 26 April 1979).

[30]George Letsas, A Theory of Interpretation of the European Convention on Human Rights (Oxford, 2007).

action would depend on the application of the degree of margin of appreciation accorded by the Courts, to States with respect to the artistic freedom. If a wide margin of appreciation is accorded, it means that the States have discretion to make its own laws, and the Courts will generally refrain from scrutinizing these laws on grounds of violation of artistic freedom. On the other hand, if a narrow margin of appreciation is accorded, it means that the State has to Strictly abide by the principles under the Convention, and hence will be subject to a strict scrutiny under Article 10 of the Convention.

In the case of *Unifaun Theatre Productions Limited and Others vs Malta*[31], which was an application made by the production company of the play called "Stitching", against Malta for banning the play from being performed. The ban was issued by the Maltese Board for Film and Stage Classification (Board) because the play was deemed to be blasphemous, insulting to the victims Auschwitz, and portraying dangerous sexual perversion. The Board initially gave no reasons for the ban, however when the case came up before the Maltese Constitutional Court, the Chairman of the Board produced certain guidelines under the Maltese Cinema and Stage regulations, according to which major parts of the play was considered "beyond the limits of public decency." The Maltese Court agreed with the decision of the Board and held that the play used vulgar, obscene and blasphemous language had aspects that were against the dignity of women. The Court held that free speech had limits prescribed, and it was accompanied by rights and responsibilities as well. Morals, reputation of others and public decency were restrictions according to the Maltese Constitution and the Convention read together, and hence the ban was upheld. The European Court on Human rights in this case identified the three limbs of Article 10-prescribed by law, should have a legitimate aim, and must be necessary in a democratic country. The ECHR, held that the guidelines were not published and the public had no means to access the said guidelines. It was only produced by the Board, whilst the proceedings were underway. There was no record of the date of publication. Its circulation and dissemination. Hence, the State failed to prove that the interference was prescribed by law. It was held that there was no clarity on the scope of discretion and the manner of its exercise by the concerning authority in imposing the ban. Therefore, whether banning a stage production was at all possible under the Cinema and Stage Regulations was not precise and foreseeable. The was lifted by the ECHR on the grounds it violated artistic freedom under the scope of Article 10 of the Convention.

[31]37326/13 (ECHR, 15 May 2018).

Here one can see that the burden of proof is on the state and a high standard of review was adopted by the Court, giving no regard to the concept of margin of appreciation.

Comparison with India – Conclusion and Suggestions

The Dramatic Performances Act, 1870, was enacted as a tool to be used by the British to curb any voice or dissent against their government in India. It is seen in the initial part of the chapter, that the British did away with all forms of censorship by the government on public performance through the 1967 legislation. The said Act, was prevalent in India until 2017. It was considered to be unconstitutional by several high courts. Though there is no Supreme Court decision to this effect, one could have argued that by reading in Article 13, pre constitutional laws that violate Part III is unconstitutional. However, the Act become obsolete through The Repealing and Amending (Second) Act, 2017.

In India, State control on Dramatic performances, are seen under 2 categories; Specific state legislations on regulation of dramatic performances; Special rules framed under the State Police Act, for regulation of public performances including dramas. Under both these types of state regulation, senior officers are to determine objectionable matter, such as the Deputy Commissioner or the Traffic Police Commissioner or even the Collector. In reality none of these officers find the time or take the effort to go through the script of the plays in detail and determine as to whether or not it amounts to objectionable performance as mentioned under the Acts. It is usually the head constable of the particular police station under whose jurisdiction the play is to be performed, that actually reads the script. The first type of legislation is more or less similar to the 1870 Central legislation, where, in defining what constitutes an objectionable material words like *sabotage, overthrowing or undermining the government, insulting or profaning, grossly indecent, scurrilous, intended to blackmail* are used, that are too broad and vague, primarily because the deciding authority is the State Government or an officer so appointed by the State government, which is usually the Police. In the Supreme Court decision regarding the play of '*kristuvinde Aaram Thirumuri'*, there was no question regarding the constitutional validity, the court also did not discuss on the excess powers given to the district collector to judge whether or not a particular play is objectionable. Nor did the court go into whether the definition of objectionable under Section 2 was reasonable as per the restrictions given under Article

19 (2). Though the petition was filed arguing the artistic freedom of the author and organiser, there was no discussion in this regard in the entire judgment. The reasoning centred on what amounts to 'satisfaction' of the Collector and what amounts to a 'deliberate' intent to incite one religious' group against the other. Whether a person who has no artistic sensibility can sit as an authority for pre censorship was not considered. Again, the play in question was an adaptation of an already existing novel and the court refused to take that as a ground for protecting artistic freedom. Here the court has completely missed the mark, in understanding that artistic freedom under Article 19 (1) (a) is a fundamental right and there can be a legitimate state interest in restricting that right on morality or public order only if such a restriction is reasonable. The court laid down certain guidelines to show what will amount to satisfaction of the Collector- and held that there must be a rational nexus between the relevant facts and the order passed. Here there is no implication to the fact that a Collector is not an adjudicating body, and the right to artistic freedom cannot be lost to bureaucracy. On the other hand, the Tamil Nadu High Court addressed all these aspects and recognised artistic freedom of the author and the organiser, and held that an authority such as that of the Police Commissioner or the District Collector cannot be an authority to judge whether a particular dramatic performance is objectionable or not. Moreover, abstract terms such as scurrilous cannot define an offence. though there were provisions given in the rules and the enactment to provide for an opportunity to be heard, this was never followed in practice and the entire script of the performance had to be given for scrutiny to the Police Commissioner who would then, without any merit decide whether it was objectionable or not according to his own whims and fancies.

Again, in the second category of legislations, in the instance of the Bombay Police Act, for public performance a performance licence is to be acquired from the police for public performance. The licence can be rejected if it causes *obstruction, inconvenience, annoyance, risk, danger, damage, harms national interest or cause law and order problem*[32]. None of these phrases fall within the scope of Article 19(2). Again, it must be accompanied by a suitability certificate from the pre censorship Board called the Scrutiny

[32]Rule 110 (a), The Rules for Licensing and Controlling Places of Public Amusement (other than Cinemas); and Performances for Public Amusement, including Cabaret Performances, Melas, Discotheque, Games, Pool Game Parlours, Amusement Parlours providing Computer or Virtual Reality Games, Cyber Cafes, Bowling Alleys, Card Rooms, Social Clubs, Sports Clubs Melas and Tamashas, 1960 (No.2357-T of 1961).

Board. Performances that *lower the moral standards of the audience, is against the accepted canons of decency, depicts immoral as attractive, enlist sympathy from the audience for immoral characters, depict relationship between the sexes to lower the sacredness of marriage and depict illicit as normal or as an ordinary way of life* will not be granted a suitability certificate. Earlier in the chapter it was seen that even though there is a Scrutiny Board for pre censorship in Bombay, and there were no provisions for the right to be heard and appeal, against the decision of the scrutiny board. The Bombay High Court, took a stern stance regarding the constitutionality of these proceedings and held them to be unconstitutional. Here, however, there was no question with respect to the artistic freedom of the author, or whether the restrictions under the said Act and Rules were reasonable. It was judged purely on natural law principles and was held to be arbitrary. The unfettered powers given to the executive is also not discussed. Thus, in India, with respect to dramatic performances and other public performances unfettered power is given to the local authorities in relation to censoring artistic freedom. most of these regulations and guidelines do not fall within the scope of Article 19 (2). The standard of review with respect to these regulations is at a very low and deferential level, where the burden of proof is on the person, usually the theatre production or the author of the play in showing that his fundamental right to artistic freedom was violated. The courts have only procedural aspects and clarified the scope of authorities in the light of natural law principles, where the party whose freedom was curtailed should be given the right to be heard and a provision for appeal. The court has not discussed the right of the author as a part of Article 19 (1) (a), and looked into it as artistic freedom. the Court in India, have not addressed the substantive aspects such as what constitutes objectionable performance, abuse of discretionary power given to local bodies, or pre censorship.

In the USA, after the advent of motion pictures, first amendment rights were extended to any public performance, live or otherwise. This meant that the *Miller* test relating to obscene content was also extended to public performances and theatre productions. If the performance had any value, social, political, literary, artistic, scientific etc, it would not be considered obscene. Hence the standard of review is placed at a very high pedestal with the State having to prove that there was a compelling state interest in the interference and there was no other alternative mechanism other than the restriction imposed, and the restriction was narrowly tailored. The same

is the case of hate speech, where the *Brandenburg* test, of imminent law less action resulting from the speech has to be shown by the State. Thus, all legislations of the State, where local authorities are given the power to grant or reject licences for stage performances, will fall under the strict scrutiny of the Court under the First Amendment Rights. Live music shows and nude dancing that were prohibited by local regulations were upheld under the First amendment. The regulations were struck down as being content based regulations and subject to strict scrutiny review by the Court.

In the European Union, artistic freedom in theatre was upheld by the court on the grounds that the guidelines issued by the government were not prescribed by law as it was not made accessible to the public. The Court adopted a high standard of review, with the burden of proof placed on the State.

Table 1 – Comparative Standards of Judicial Review on Artistic Freedom in Dramatic Performances

Jurisdiction	Constitutional / Legal Basis	Standard of Review	Key Judicial Tests / Doctrines	Leading Cases	Judicial Approach to Artistic Freedom
India	Article 19(1)(a) & 19(2) – Constitution of India; State Police Acts; former Dramatic Performances Act, 1876	Low / Deferential Standard	"Reasonable Restrictions" test under Article 19(2); administrative discretion by executive authorities	*K.A. Abbas v. Union of India* and *Shreya Singhal v. Union of India*	Courts largely uphold executive pre - censorship; focus on procedural fairness over substantive artistic rights; limited scrutiny of morality - based restrictions
United States	First Amendment to the U.S. Constitution	Strict Scrutiny Standard	"Clear and Present Danger " test "Imminent Lawless Action " test (*Brandenburg v. Ohio*); *"Miller Test"* for obscenity	*Freedman v. Maryland* *Southeastern Promotions v. Conrad* (1975) 420 U.S. 546	Prior restraint heavily disfavoured; burden on the State to prove compelling interest and narrow tailoring; strong protection for theatre, music and film as artistic speech
European Court of Human Rights (ECHR)	Article 10, European Convention on Human Rights	Proportionality & Necessity Test	"Prescribed by Law", "Legitimate Aim", and "Necessary in a Democratic Society"; "Margin of Appreciation" doctrine	*Handyside v. United Kingdom* *Uniform Theatre Productions v. Malta*	Balancing model — courts uphold restrictions only if proportionate and justified by a pressing social need; burden on the State to prove legality and necessity of interference

Thus, it is difficult to digest what A. G Noorani,[33] suggests, i.e., to bring about a separate statutory independent authority for censorship of plays, which

[33] A.G. Noorani, The Police and Censorship of Plays 39 Economic and Political Weekly 47 (2004).

will be manned by a civil servant by election and appeals to lie to a separate Tribunal constituted for the same; as the purpose here is to prevent any sort of abuse of the fundamental right to artistic freedom. Just by shifting the powers from the police commissioner or the SI of police to the independent authority so constituted will not be an effective check on the arbitrary exploitation of the discretion to restrain free speech. this will result only in the sad state of affairs as seen in the Uk that lead to the 1968 legislation abolishing censorship. The most effective mechanism to protect the creativity and aesthetics of artistic freedom in plays is only by-

1. Abolishing any form of pre-censorship as seen in various states – either by special scrutiny boards created by the Police commissioner or SI or the Collector
2. Stripping the local authorities, such as the Police Department of its power to handle matters of art
3. Public performances and dramatic performances come within the scope of artistic freedom under Article 19 (1)(a), and it can be limited only by law, where the restrictions come under Article 19(2) and are reasonable.
4. Adopting a very high standard of review, applying the strict scrutiny principle in matters relating to artistic freedom, where the burden of proof is on the State to show that restricting public performance was necessary and there was no other alternative.

The Paradox of Indian Secularism

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Abstract

Indian Secularism, having evolved since 1976, encompasses various philosophical underpinnings concerning the right to religion and its dissemination. In contrast to Western paradigms that advocate for a stringent separation of church and state, Indian secularism, though constitutionally enshrined with the term "secular" in 1976, has been interpreted through the principle of 'Sarva Dharma Sambhav' (equal respect for all religions). This interpretation necessitates a delicate equilibrium between state non-interference and intervention. The article examines the historical context, including the insertion of the term 'secularism' and its engagement with Constitutional Assembly Debates. Furthermore, it reflects how judicial pronouncements have affirmed secularism as a fundamental constitutional tenet while navigating complex debates surrounding religious conversion and associated anti-conversion legislation, which seeks to prevent coerced or fraudulent conversions. However, an exhaustive consideration of anti-conversion laws has not been provided. The paradox asserted herein arises from the current trend of state practices adopted to appease various religious groups. In common parlance, when the state is obligated to omit, it frequently assumes a facilitative role, and vice-versa. This inconsistency in the state's approach substantiates the designation of 'secularism' as a paradox. Even though development towards such religious practices/

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beliefs may not be totally possible, this type of positive secularism may tilt towards biased secularism.

Ultimately, this paper concludes that the legal operationalization of secularism within India's heterogeneous religious landscape persistently presents a paradox, necessitating ongoing re-evaluation to uphold both individual tenets of faith and national cohesion.

Key Words: *Indian Constitution, Paradox, Secularism, Religion, Equal Respect.*

I. Indian Secularism – An Introduction

Secularism is a perspective, not a religion, characterised by the absence of mysteries, rituals, clerical figures, ceremonies, deceptions, miracles, and persecutions.

—Robert Green Ingersolls

Secularism in the Indian context, as enshrined in the Constitution, is a principle that advocates for the equal treatment of all religions by the state. It aims to maintain a neutral stance and ensure that religion does not play a divisive role in the government's affairs. The concept of Indian Secularism recognises that the State shall have no religion of its own; i.e., to say the State shall neither promote any religion nor give unequal recognition, protection and emancipation to every religion.[3] The original constitution didn't have the concept of secularism; however, it evolved after the 42nd Amendment Act, 1976. India's Constitution declares it a sovereign, socialist, secular, democratic republic. Indian secularism ensures religious freedom, allowing individuals to choose and change their religion. This freedom is subject to restrictions for public order, health, morality, and other Fundamental Rights. Secularism, as practised in India, mandates the state to remain equidistant from all religions and equally respect them. Furthermore, in the context of conversion and

[3]In the case of SR Bommai v. Union of India, (1994 2 SCR 644), the court established that secularism signifies the equal treatment of all religions. This approach is sometimes characterized as religious neutrality or benevolent neutrality. While religious freedom is guaranteed to all individuals in India, the State views a person's religion, faith, or belief as inconsequential. For the State, everyone is equal and deserves to be treated as such.

reconversion issues, maintaining this neutrality becomes challenging when political or societal forces exploit religious sentiments for electoral gains or social mobilisation. While the right to convert is protected, certain states in India have enacted laws regulating religious conversions to prevent forced or fraudulent conversions. These laws, however, have been a source of controversy because they may infringe upon the right to freedom of religion and are not always implemented impartially. The secular ideal in India promotes interfaith understanding and harmony. Conversion and reconversion issues, if not handled sensitively, can lead to social tensions. The state's role is crucial in fostering an environment where different religious communities coexist peacefully. The judiciary plays a significant role in interpreting and uphold India's judiciary is crucial for upholding secularism, protecting religious freedom while preventing societal discord.

The Constitution guarantees religious freedom, but this right is subject to public order, morality, health, and other fundamental rights. Courts interpret these principles, especially in religious conversion cases. The aim is to balance individual freedom to convert without coercion or fraud, and preventing forced conversions that disrupt social harmony. Judicial interventions ensure conversions are genuine, scrutinizing circumstances to confirm they reflect an unpressured decision, safeguarding individual autonomy, and reinforcing India's secular fabric.

II. Conceptual Framework of Secularism

There is no fixed philosophy of secularism. The concept of secularism involves various interpretations. George Jacob Holyoake coined "secularism" in 1846 to describe a form of opinion testable by life's experience. George Holyoake, a prominent figure in the English secularist and freethought movements, gained public recognition due to his conviction under and subsequent struggle against England's blasphemy laws.Thus, secularism as a term is believed to be a benevolent discourse derived from the European Renaissance. But it is a belief that is the manifestation of mixed and complex philosophies or ideals.[4]

A. Different concepts of Secularism

The primary conceptual analysis of Secularism deals with the *Equidistance Principle*, which enunciates that the State has to maintain equal distance

[4]Rajeev Bhargava, Political Secularism: Why It Is Needed And What Can Be Learnt From Its Indian Version, https://iow.eui.eu/wp-content/uploads/sites/18/2014/05/Bhargava-03-Bhargava.pdf, last accessed on 04.08.2025.

from all religions/ beliefs or faith as propagated within the state. Under, Indian Constitution, it is the duty of the State to remain equally non-aligned towards any religion/ faith or basic right to religion. Another famous interpretation lies with the *Wall of Separation Theory*. This model enforces a strict separation between church and state, ensuring that the government neither supports nor interferes with religious institutions. It treats religion as a private matter, which is prevalent in the United States, where the First Amendment prohibits the establishment of religion by the state. It is also considered a Western concept of secularism. Another philosophy being- *Laïcité*,[5] originating in France, laïcité emphasises state supremacy over religion and restricts religious expression in public life. Established by the 1905 law on the separation of church and state, it aims to maintain a secular public sphere devoid of religious symbols or influence. This model is characterised by a proactive stance against the involvement of religion in governmental affairs. However, due to certain developments in the philosophies of faith and propagation, two major concepts were derived in affirmative and negative senses.

Positive Secularism equally acknowledges and respects all religions, without favoritism towards any particular one.[6] It allows state intervention in religious matters to promote harmony and protect individual rights. *Negative Secularism*, while contrasting with positive secularism, advocates for minimal state involvement in religious affairs. The government remains neutral and does not recognise or support any religious group, focusing solely on individual rights and freedoms. This approach seeks to prevent any form of state endorsement of religion. Another current practice is *pseudo-secularism*, which is not the actual construction of secularism, but the misnomer wherein one religious group is favoured against the other one. Under this, the State actively participates in the protection and promotion of such religious groups. In India, there have been various instances where one minority group has been favoured over another or vice versa. E.g. in the State of West Bengal, Muslims are actively favoured against the Hindus. We can see various instances wherein the cultural practices of Muslims dominated the regions of Hindus, especially Jains. Furthermore, in the States of UP and MP, cultural emancipation

[5]Jasper Doomen, Laïcité: Ousting Some Religious Elements while Introducing Others(04.08.2025, 11 AM), https://www.tandfonline.com/doi/full/10.1080/17419166.2022.2111303.

[6]The Hindu Special Correspondent, (04.08.2025, 12 PM), https://www.thehindu.com/news/national/karnataka/india-has-positive-secularism-unlike-turkey-which-has-banned-hijabs-in-public-places-petitioners-tell-karnataka-high-court/article65053262.ece.

of Hindus is seen against the other groups- instances of Maha Kumbh wherein the State used the crores from the exchequer in the promotion of such practices.

B. The Indian Conception of Secularism

Indian concept of secularism is concurred in the very interpretation of secularism as **'sarva dharma sambhav'.** It states that equal respect is to be maintained in India's demography. In other words, it can be said that Indian consideration of secularism is a mix of harmonious and diverse interpretations. It cultivates every facet thereof, which, as belief, is the true manifestation of the articulation of the individual's belief. India's Constitution, though later explicitly adding "secularism" to its Preamble, inherently embraced secular principles from the outset. The original Preamble's guarantee of "freedom of thought, expression, belief, faith, and worship" exemplifies this, ensuring intellectual and spiritual autonomy, and the right to practice faith free from state interference. This "collection of freedoms" establishes the Indian state as a neutral arbiter in religious affairs, fostering coexistence and individual spiritual pursuit. This proactive safeguarding, along with broader freedoms, defines "Indian secularism"—a model unique from Western interpretations, emphasising equal respect for all religions rather than strict separation, and showcasing the farmers' foresight in establishing India's distinctive secular identity. Thus, the concept of Secularism as practised in India is very dynamic and has practical applications.

III. Historical Perspective of Secularism in India

A. Ancient

Professor J.J. Anjaria's analysis shows ancient India had diverse governance, with monarchy becoming dominant, similar to Europe.[7] The State integrated religion and politics, promoting tolerance. While lacking formal separation, the State was religious, founded on Dharma, yet religion didn't dominate as in the West due to no established Church. King and priest roles were distinct but based on religious assumptions. Conflicts between religion and State were less pronounced than in the West, though scriptures show tension regarding the king's authority over Brahmins and priestly power. This tension was eased by the absence of a strong ecclesiastical body. During the Mauryan period, religion served political goals, with Kautilya subordinating it to political aims,

[7] J.J ANJARIA, NATURE AND GROUND OF POLITICAL OBLIGATION IN THE HINDU STATE 231 (Calcutta, Longman, Green and Company 1925).

advocating a secular state based on power. Gupta rulers practiced religious tolerance, asserted royal authority over religion, and supported Brahmanism, Buddhism, and other sects. Contemporary religious texts also promoted tolerance. The Rig Veda and Bhagavad Gita emphasize the unity of truth, treating others as oneself, and universal kinship.[8]

Overall, the ancient Indian State was neither sacerdotal nor theocratic, nor entirely secular. Religion did not dominate the state as in Western nations, likely due to the absence of a formal religious institution like the Church. The King and priest roles were distinct, though based on religious beliefs such as the divinely ordained caste system. Religious freedom was prevalent, with no specific creed imposed, and various faiths allowed to disseminate their teachings and receive support. Asoka's Rock Edict XII states, "One who honors their own religion and seeks to elevate it above all others, indeed harms their own faith."

B. Medieval

Throughout the medieval era, a strong connection between religion and the State, coupled with a comprehensive policy of toleration, was maintained. The Delhi Sultanate, for instance, operated under Islamic principles, forbidding overt violations of Islamic law. While Muslim scholars held high-ranking positions, they were not permitted to dictate State policies. As Alauddin Khilji famously declared, "policy and governance are distinct from the rules and decrees of Islamic law. The Sultan's commands are sovereign, while Islamic legal rulings depend on the interpretations of the Qazis and Muftis." Medieval Indian State religious policies spanned a spectrum from tolerance to extremism, exemplified by Akbar and Aurangzeb, respectively. The concept of an institutional separation between State and religion was entirely foreign, even to the most progressive faiths of the time. Nevertheless, even the most extreme regimes demonstrated some level of general toleration.

Under Akbar, religious toleration and freedom of worship were paramount. He appointed numerous Hindus to ministerial roles, forbade forced conversions, and abolished the Jiziya tax. A key aspect of his tolerant policy was the introduction of 'Din-i-Ilahi' or the Divine Faith, which blended elements of both Hinduism and Islam.[9] Furthermore, he championed the principle of 'sul-

[8]A.S. ALTEKAR, STATE AND GOVERNMENT IN ANCIENT INDIA 48-49 (Motilal Banarsidass, Benaras, 1955).

[9]MOHAMMAD GHOUSE, SECULAR, SOCIETY AND LAW IN INDIA 22 (Vikash, Delhi, 1973).

h-kul,' or peace and harmony among different religions. He also hosted a series of religious discussions in the 'Ibadat Khana' or Hall of Worship, inviting theologians from Brahmin, Jain, and Zoroastrian traditions. Jahangir and Shahjahan continued this tradition of liberalism. Notably, Dara Shikoh delved into Hindu philosophy, seeking to identify commonalities between Hindus and Muslims.[10]

C. Modern

The concept of secularism, as a distinct idea from earlier notions of toleration, was introduced to India by the British. However, their arrival simultaneously exacerbated Hindu-Muslim tensions. To some extent, British policies laid a historical foundation for secularism in India, attempting to reconcile three distinct roles: the commercial imperial objectives of the British Government necessitated a policy of religious neutrality; their position as Indian rulers obligated them to uphold the traditional role of patron and protector of Indian religions; and pressure from Christian missionaries compelled them to adopt the role of a Christian Government. The policy of religious neutral bias revolved around forced conversions and absolutes from social customs and traditions.[11] Wood's Education Despatch of 1854 introduced secular education, seen as a safeguard against Christian missions and a vehicle for Western ideas, fostering secularism within the national movement. Despite Queen Victoria's commitment to religious neutrality post-1857, British policies exacerbated religious divisions. The "divide and rule" strategy, including the 1905 Bengal partition, separate electorates (1909, 1919), and the Communal Award of 1932 (modified by the Poona Pact), fueled communalism and separatism. This policy, by recognizing communal leaders and conceding demands, actively discouraged Muslim participation in the national movement, ultimately contributing to India's partition. Thus, while laying some groundwork for secularism, the British simultaneously deepened religious divides to consolidate power.

i. Evolution of Secularism in the Indian Constitution and its Adoption in the Indian Constitution-era of 1947-1976

Following India's independence on August 15, 1947, the Constituent Assembly constituted the Drafting Committee on August 29, 1947. It was tasked with

[10]RATNASEKHARA, K.M. PANIKAR, INDIA THROUGH THE AGES 157- 22 (Tilak, Wasan, Delhi, 1985).

[11]Satish Chandra, The Indian National Movement and Concept of Secularism, in NATIONALISM IN INDIA: MULTIPLE DIMENSIONS AND IDEOLOGIES 71 (Bidyut Chakrabarty ed., 2017).

the responsibility of drafting a Constitution in alignment with the resolutions of the Constituent Assembly. The Government of India Act of 1935 provided a significant portion of the foundational structure for the formulation of the new Constitution. Nonetheless, significant principles and constitutional provisions were mostly derived from the constitutional frameworks of Great Britain and the United States.[12]

During the discussion of the Indian Constitution's preamble in the Constituent Assembly on October 17, 1949, considerable disagreement and contentious debate on the inclusion of the idea of secularism consumed the majority of the Assembly's time. The viewpoints articulated on secularism that day distinctly highlight the divergences that had been emerging during the three years of debate in the Constitutional Assembly. During the drafting of the Indian Constitution, the proposal wasn't to construct the term 'Secularism', particularly in Western countries. Nehru did not mention the terms 'secularism/ secular state' during his lengthy address when presenting the Objective Resolution in the Constituent Assembly. Dr. B. R. Ambedkar, the Chairman of the Drafting Committee, did not mention them in his statement during the introduction of the Draft Constitution, when he emphasised its important aspects. Furthermore, the terms were not included into any section of the Constitution. The exclusion of 'secularism' was intentional, and not incidental. It was the deliberate course of action.

The initial perspective, referred to as the non-concern theory of secularism, established a clear demarcation between religion and the state. In accordance with the ideals of freedom of expression and religious liberty, the decision to believe or to follow a particular religion rested with the individual. Consequently, the preamble must exclude all references to deity, and the constitution should not establish connections between the state and any religion. The assertion that religion is a personal matter was expanded during the primary sessions of the Constituent Assembly to encompass the more extreme proposition that religion should be confined to the private domain. The second stance on secularism, in stark contrast to the first, posits that no connections between the state and religion should be allowed, not due to concerns about state integrity, but because it would diminish the sanctity of religion: As a system of absolute truth, religion should not be subjected to the caprices of fluctuating majorities by permitting the democratic state to influence religious matters.[13]

[12]Supra note 10.

[13]D.PARAS, INDIAN CONSTITUTIONAL AMENDMENT FROM FIRST TO FORTY – FOURTH 219 (Oxford University, press/1.B.HPublishing Company,1980).

Similar to the initial position, the third stance—termed the equal-respect theory of secularism—originated from the principle of religious liberty. However, it posited that in a society such as India, where religion significantly influences the lives of the majority, this principle necessitates that the state not only refrain from favouring any religion but also accord equal respect to all religions. In this perspective, rather than separating itself from all religions or treating them equally as mere superstitions to be privately indulged, a secular state engages with religion via a framework of equal respect for all faiths. K.M. Munshi, a prominent proponent of a unique Indian secularism, contended that the U.S. Constitution's "non-establishment clause" is inappropriate for India. He contended that India's profoundly religious population precluded the adoption of a state religion or the maintenance of a rigorous separation between state and religion, in contrast to the United States. Likewise, Lakshmi Kant Maitra and H.V. Kamath contended that the Indian state had not to forsake India's "elevated religions and spiritual principles and ideals."

They argued that the West, facing a dilemma stemming from materialism, pursued India for the restoration of "spiritual values." In their opposition to sectarianism, they also contended that the Indian state ought to actively offer "spiritual training or instruction" to its populace. This viewpoint on secularism shaped the interpretation of the right to religion as the right to practise, rather than simply to worship. While constraints on this right were acknowledged, it was imperative that the right itself authentically represented the importance of religion, rather than suggesting a lack of respect for it. Despite varying original methodologies, the Indian Constitution ultimately included both, prompting the Constituent Assembly to exclude specific, restricted terminology.[14]

ii. Inclusion of Secularism and Era Post 1976

The term "secular" was incorporated into the Preamble of the Indian Constitution by the Constitution (Forty-Second Amendment) Act of 1976, which took effect on January 3, 1977. The first Constitution, enacted in 1950, notably lacked the terms "secular" and "God," with the latter appearing solely in the Third Schedule. The 42nd Amendment altered the Preamble's opening to:

"*We, the people of India, have solemnly resolved to constitute India into a sovereign socialist secular democratic republic*."

[14]Shefali Jha, Secularism in the Constitution Assembly Debates (20.07.2025, 10 AM), https://www.rgics.org/democracy/secularism-in-the-constituent-assembly-debates-1946-1950/.

The inclusion of "socialist" sought to strengthen the current constitutional dedication to socio-economic justice, rather than to create a welfare state. Before this amendment, the Constitution did not officially incorporate the term "secularism," instead emphasising the freedom of religious belief and the State's separation from religion. This inclusion emphasises that India, as a nation, possesses no official religion, and all persons maintain the right to profess, practise, and propagate their respective religions, a right further assured by Fundamental Rights in Articles 25-28. The term also denotes that the Constitution prohibits the amalgamation of religion and state authority, ensuring a distinct separation. Although the term "secular" was not originally included in Articles 25 or 26, or in any other Article or the Preamble, the 42nd Amendment of 1976 replaced "Sovereign Democratic Republic" with "Sovereign, Socialist, Secular, Democratic Republic."

This amendment, the most extensive and controversial in the history of the Constitution, sought to clearly delineate the lofty principles of Socialism and Secularism, as outlined in its objectives. In parliamentary discussions, although the Parliament's authority to modify the Preamble was contested, there was no dissent about the inclusion of "Secular." Since that time, "secularism" has been an integral component of the Preamble, seen as a fundamental concept of the Indian Constitution.[15]

IV. Secularism and Right to Religion in the Indian Constitution

The Constitution of India acknowledges the nation's extensive linguistic, religious, and cultural diversity, ensuring religious freedom in Articles 25 to 28. These articles guarantee each individual's right to select and exercise their religion. Furthermore, Articles 29 and 30 stipulate Cultural and Educational Rights.

Article 25 guarantees the essential right to religious freedom, including the rights to proclaim, practise, and disseminate one's beliefs. This freedom is contingent upon reasonable limitations aimed at preserving public order, morality, and health, so guaranteeing that religious practices do not disturb societal harmony. Article 25 differentiates between religious practices and secular activities linked to religious institutions. Religious denominations possess the authority to govern their own matters, including the establishment and maintenance of religious institutions, as long as they adhere to applicable laws and public order. [16]

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[15]Ibid.

[16]In TMA Pai Foundation v. The State of Karnataka, AIR 2003 SC, the Supreme Court affirmed that Article 26 grants all religious denominations the right to manage their own religious affairs, provided they comply with public order, morality, and health regulations.

Article 26 confers upon religious organisations the authority to possess and acquire both movable and immovable assets, however the government retains the power to regulate these properties by suitable legislation. Article 26(a) explicitly affirms the entitlement of religious organisations to create and sustain institutions for religious and philanthropic purposes, relevant to both majority and minority religions. Article 26(d) asserts the legal authority to administer religious properties, with the government guaranteeing compliance with legal norms while honouring religious autonomy. Article 27 forbids mandatory tax contributions for the support or maintenance of any specific religion or religious organisation. Article 28 pertains to the freedom of religion inside educational institutions, safeguarding the rights of people, religious communities, and educational entities concerning religious education and worship. Article 26(b) reaffirms the entitlement of religious organisations to self-govern in spiritual issues, permitting governmental action alone when public order or participation in religious events is adversely affected. The principal aim of Article 28 is to preserve the secular nature of state-funded educational institutions while honouring people' rights to engage in their beliefs or refrain from religious practices. Furthermore, Articles 29 and 30 safeguard minority rights, including their scripts, culture, and language, thus incorporating the protection of religious rights within cultural rights.[17]

V. Judicial Response

The original principles of the Preamble—equality in status and opportunity, and fraternity that upholds individual dignity—are articulated alongside justice (social, economic, political) and liberty (thinking, expression, religion, faith, worship), reflecting India's secular culture. Article 25 ensures that all individuals possess the freedom of conscience and the right to proclaim, practise, and disseminate their religion, contingent upon public order, morality, health, other fundamental rights, and the State's authority to control secular activities associated with religious practices.

The Supreme Court has repeatedly upheld secularism as a basic constitutional tenet. The concept of secularism in ***Kesavananda Bharati* v. *State of Kerala***[18] was primarily interpreted in relation to the basic structure

[17]Aruna Roy v. Union of India, AIR 2002 SC upheld the National Curriculum Framework for School Education (NCFSE) against secular challenges, allowing religious philosophy study for value-oriented living.

[18](1973) 4 SCC 225.

doctrine. In ***S.R. Bommai* v. *Union of India***[19] the Supreme Court specifically affirmed that secularism constitutes a fundamental component of the Constitution. In ***R.C. Poudyal* v. *Union of India***[20], the Court directed that before its 1976 incorporation into the Preamble by the Constitution (Forty-second Amendment) Act, 'secular' intrinsically denoted the nation's dedication to impartial and equitable treatment of all religions.The case of ***M Ismail Faruqui (Dr)* v. *Union of India***[21] elucidated that secularism in India encompasses the widest conceivable interpretation.

The contention to nullify the Constitution (42nd Amendment) Act, 1976, on the grounds of its promulgation during the Emergency and the prolonged Lok Sabha term, was previously discussed in Parliament during the talks on the Constitution (Forty-fifth Amendment) Bill, 1978. The terms 'secular' and 'socialist' were examined throughout these discussions. This Bill was subsequently renumbered as the Constitution Forty-Fourth Amendment Act of 1978. 'Secular' was characterised as a form of governance that maintains equal regard for all religions, whereas 'socialist' denoted a republic committed to eradicating all forms of exploitation (social, political, economic). The Council of States rejected the proposed change to Article 366.

Indian secularism also afflicts over the concern wherein it emphasizes over the essential religious practice and thus, any non-essential practice not imbibing the spirit of religion or defeats the essence of secularism can be ruled out.[22]

In the case of ***A.S. Narayana Deekshitulu v. State of Andhra Pradesh***[23] There was the question of whether the position of a temple priest (archaka) could be regulated by a state law that abolished hereditary appointments. The Supreme Court made a crucial distinction between the 'religious' and 'secular' aspects of a religious practice. It held that while the performance of religious rites is a religious act, the appointment of a priest is a secular function that the state can regulate to ensure social reform and to eliminate discrimination based on heredity or caste. This affirmed the state's power to intervene in religious affairs for social welfare without infringing on religious freedom.

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[19](1994) 3 SCC 1.
[20]1994 suppl (1) SCC 324.
[21](1994) 6 SCC 360.
[22]Shayra Bano v. UOI, AIR 2017 SC 4609-If any religious practice which infringes fundamental rights consequent upon non essential practice which tinkers the real essence of religious philosophy, is always open to challenge.
[23]1996 SCALE (2)911.

The Supreme Court, in the recent order of ***Dr. Balram Singh and others v. UOI and others Writ***

Petition (C) No 1467 Of 2020, declined to challenge the 1976 insertion of the words 'socialist' and 'secular' into the Preamble to the Constitution of India. The Court acknowledged that the Constitutional Assembly initially did not agree to include these terms, but held that they have since gained constitutional adaptability. Given that the Constitution is a living document, the removal of these words would, in the Court's view, deteriorate the basic structure.In 1949, the term 'secular' was considered unclear and was sometimes interpreted by scholars and jurists as being contrary to religious beliefs. However, India has evolved its own understanding of secularism over time, where the State neither supports nor penalizes the profession and practice of any faith. This principle is constitutionally enshrined in Articles 14, 15, and 16, which forbid discrimination against citizens on religious grounds while guaranteeing equal protection under the law and equal opportunity in public employment.

VII. Conclusion

Secularism lacks a singular definition, with interpretations including state atheism, strict church-state separation, principled distance (Equidistance Theory), and equal respect for all religions. Indian secularism is often criticized for confusing historical tolerance with constitutional doctrine, suggesting an alternative paradigm of religious tolerance independent of formal secularism. The original Indian Constitution inherently had secular characteristics, prohibiting religious discrimination, even without the term "secular." Indian secularism's foundations are shaped by '*Dharm Nirpekshta*' (state neutrality) and '*Sarva Dharma Sama Bhava*' (equitable regard). A unique Indian paradigm has emerged, where secularism is conflated with minority identity politics and "minority appeasement." The classification of Muslims as a "minority" is debatable, given their 15% population share (over 200 million) and numerical majority in certain regions. "Minority appeasement" in a secular state is seen as detrimental to democracy and secular principles, exemplified by state involvement in religious festivals. Caste, creed, communal politics, and electoral manipulation undermine democratic and secular institutions, and some intellectual and political actors show inconsistency in applying secular principles. Secularism is often seen as opposing religious identity, particularly regarding the "dominant minority." This focus on religious identity politics fuels sectarianism, threatening national cohesion. In a globalized world, external religious expressions like

attire have diminished significance; true identity should be based on personal attributes, profession, character, and societal contributions, not just religious, caste, or creedal affiliations. While inter-religious conflict exists, isolating one group is unfair. The paper questions how a secular state can disregard religion as an intrinsic part of identity for a significant population. Attempts to impose a state identity are seen as infringing on individual autonomy. Religion should be confined to its legitimate domain, allowing other societal spheres to unify and strengthen the nation.

Indian secularism presents a paradox. Confining India, a land of diverse cultures and the philosophy of '*Vasudhaiv Kutumbakam*' (the world is a family), to secularism is a narrow construction. While the Preamble protects state neutrality, practical Indian society prevents the state from entirely disengaging from religious practices. It's infeasible for India to address religious issues without considering its diverse cultural practices. Anti-conversion laws are necessary, but state control over religious practices shouldn't be arbitrary or undermine innate faith. The state should neither emancipate nor derogate unless balancing individual interests. Secularism, though intended to glorify constitutional ideals, remains a distant reality.

The Ever-escalating Theoretical Dynamics of Nature's Rights in India

Dr. Saman Narayan Upadhyay*

Abstract

The Rights of Nature (RoN) is a novel and transformative approach to environmental protection. Over the years, global environmentalists have formulated many theories for the recognition and protection of Rights of Nature through legislative initiatives. This research paper investigates the escalation of the theoretical dynamics of RoN in India. Worldwide, the theoretical dynamics of the RoN has started with the reflex theory and progressed through the common heritage of mankind (CHM) theory, the common concern of humanity (CCH) theory, and the legal personhood theory before reaching at the legal naturehood theory. Instead of overtly recognizing or protecting RoN, it has been discovered that in India, the reflex theory has implicitly extended a limited protection to nature and its components by recognizing and defending human rights against nuisance and negligence. The CHM theory looks at only spatial natural resources and allows the worldwide community to peacefully exploit and share the advantages of the natural resources found in the seabed region, but it doesn't endorse legal standing rights to nature and its components. The Indian environmental jurisprudence has no explicit acknowledgment of the CHM theory. Re-orienting the CHM theory, the CCH theory liberates the natural resources from the spatial restrictions makes a call for establishment of cooperative mechanics for the protection and promotion of the natural resources of common concern within the national jurisdictions viz. biodiversity, and beyond the national jurisdictions viz. climate change. However, this theory has likewise failed to accord legal standing rights to the nature and its components. It is noted that the

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CCH theory for environmental protection has been thoroughly explored by Indian judiciaries. The Indian judiciaries are now debating the legal personhood theory for RoN. Finally, this study concludes that the legal naturehood theory has not yet found a home in India. This research paper is presented in six sections. Section I is the introduction; section II deals with the legal reflex theory and RoN; section III examines the CHM theory and its limited contribution in the development of RoN; section IV describes the role of CCH theory in the development of RoN; section V is a detailed discussion of legal personhood theory that has transformed entire RoN movement in India; section VI discusses legal naturehood theory for the RoN; and section VII is the conclusion and suggestions.

Key Words: *Rights of Nature, Legal Reflex, Common Heritage of Mankind, Common Concern of Humanity, Legal Personhood, Legal Naturehood.*

I. Introduction

Since humanity depends on nature and its processes and all people are interdependent, protecting the environment is one of society's core principles.[1] Nature is a resource that all people share. Up till now, the legal status of natural resources has changed from *res nullius* to *res in rem*. The majority of legal systems have acknowledged that flora and fauna are *res nullius*, which indicates that they are not owned by anyone but can be used and appropriated by anyone upon acquisition or capture. The *res nullius* denies that humans have a shared stake in natural resources.[2] The *res cummunis* concept, which declares that humanity has common ownership over natural resources and permits their common appropriation while prohibiting their individual use, was developed as a result of the *res nullius'* rejection of humanity's shared interest in natural resources.

Different legal theories for recognizing rights of nature (RoN) have developed over time. Worldwide, the theoretical dynamics of the RoN has started with the reflex theory and progressed through the common heritage of mankind (CHM) theory, the common concern of humanity (CCH) theory, and the legal personhood theory before reaching at the legal naturehood theory. RoN is indirectly informed by the legal reflex theory as being submissive

[1]Alexandre Kiss, The Common Heritage of Mankind: Utopia or Reality? 40 International Journal 423–41 (1985).

[2]Dinah Shelton, Common concern of humanity, V Iustum Aequum Salutare 33–40 (2009).

to people's rights to live in peace and without excessive disruption. According to this theory, nature is protected to the extent necessary for human existence, well-being, integrity, and progress. In general, the direct protection of people's right to a healthy and unpolluted environment in a legal framework indirectly protects the rights of nature, particularly the right to develop and evolve and the right to remain healthy and unpolluted. Only humans have the right to a clean and healthy environment; nature itself is not entitled to legal protection against its deterioration. Under the tort law, Indian courts have formulated and implemented this principle for environmental protection in situations including trespassing, negligence, and nuisance. The CHM theory looks at only spatial natural resources and allows the worldwide community to peacefully exploit and share the advantages of the natural resources found in the seabed region, but it doesn't endorse legal standing rights to nature and its components. The Indian environmental jurisprudence has no explicit acknowledgment of the CHM theory.

Re-orienting the CHM theory, the CCH theory liberates the natural resources from the spatial restrictions makes a call for establishment of cooperative mechanics for the protection and promotion of the natural resources of common concern within the national jurisdictions viz. biodiversity, and beyond the national jurisdictions viz. climate change. However, this theory has likewise failed to accord legal standing rights to the nature and its components. It is noted that the CCH theory for environmental protection has been thoroughly explored by Indian judiciaries.

However, the legal protection of nature and its elements have been extended by the common concern of humanity (CCH) theory. However, this approach has also failed to give nature and its constituent parts legal personhood. The development of legal personhood theory has addressed this weakness by giving nature and its constituent parts all corresponding rights and duties akin to the natural human. The Indian judiciaries are now debating the legal personhood theory for RoN. The Uttarakhand High Court ruled in 2017 that rivers such as the Yamuna and Ganaga, meadows, woods, marshes, jungles, springs, grasslands, and waterfalls have legal personality and are entitled to all the rights and obligations of a living person for their protection and preservation. The court has, further, declared these rights akin to fundamental rights. However, the Supreme Court halted the implementation of these two RoN rulings due to technicalities when the State of Uttarakhand filed an appeal. The Supreme Court commented, in reverse, that if legal rights of nature are assigned the same status as legal rights of live humans, who would be held

liable for the repair of damages caused by natural disasters like as floods, droughts, and earthquakes?

The naturehood theory is a new theoretical breakthrough in RoN movement. It is a novel and non-anthropocentric theoretical advancement. According to this school of thought, humans and environment have different rights and obligations. Unlike human, nature possesses certain fundamental rights to be restored, rejuvenated, and recreated without an accompanying obligation. According to this theory, rivers have the right to flow freely, but neither they nor the state, which is in charge of them, are obligated to compensate or make up for the harm that floods bring to people. The RoN's naturehood theory is still in the early stages of development and has not yet been incorporated by courts in any case or included in any nation's legal codes. Nonetheless, this concept is finding some reflection in *A. Periyakaruppan v. State of Tamil Nadu*,[3] where Justice S. Srimathi favors avoiding the use of concepts like the doctrine of sustainable development, the precautionary principle, and the polluter pays principle since they are anthropocentric and encourage sustainable destruction.

II. Legal Reflex Theory and Rights of Nature

The "legal reflex"[4] theory is a conventional legal process that acknowledges a given thing's rights indirectly by acknowledging the rights of other objects it is connected to, rather than explicitly. Regarding nature, this theory acknowledges that only humans are capable of having legal rights; it does not acknowledge "nature" as a legal entity. According to this theory, "nature" is a thing that human's control. This theory safeguards nature to the degree required for the survival, welfare, integrity, and advancement of humanity. Overall, the rights of nature, specifically the right to stay healthy and unpolluted and the right to develop and evolve, are indirectly safeguarded under the direct protection of individuals' right to a healthy and unpolluted environment in a legal framework. The right is exclusively conferred upon human people, who may assert a claim to a clean and healthy environment; nevertheless, nature itself cannot seek legal protection against its degradation.

In terms of international legal frameworks, the Declaration of the United Nations Conference on the Human Environment of 1972 is the first international

[3]2022 SCC Online Mad 2077.

[4]The term 'legal reflex' is used by Jens Kersten as a contrast to the 'legal personhood' theory for the rights of nature. See, Jens Kersten, Who Needs Rights of Nature? RCC Perspectives 9–14 (2017).

text to reference reflex theory. This declaration, titled 'Human Environment', makes the environment submissive to humans from the start by proposing 26 universal inspirational and guiding principles for the preservation and promotion of the human environment. This declaration does not recognize the right of the 'environment' as an independent legal entity, but rather seeks to establish a global consensus to maintain, restore, and improve the capacity of the earth,[5] as well as to safeguard the natural environment and ecosystem for the well-being and economic development of current and future generations.[6]

At the domestic scale, the reflex theory has been developed and applied by the courts to extend indirect protection to environment as an object subservient to the human by directly protecting their civil rights. The courts have issued injunctions and compensatory orders in the cases of nuisance, negligence and trespass of land under the law of torts. The primary aim of such injunctions and compensatory orders has been the protection of people's civil right to peaceful and undisturbed living. It has indirectly protected that facet of environment which was connected with the human's civil rights to peace and comfort. Courts' primary goals have been to safeguard human life and health, which has been reflected in the legal protection of nature and its components. The reflex theory does not provide nature any legal rights of its own.

Courts have ordered the protection of property within the civil rights of individuals to hold property where they have found that an act of nuisance has caused material harm to the property. For instance, in the case of *St. Helen's Smelting Co. v. Tipping*,[7] the House of Lords issued an order protecting trees that are located on an estate inside the designated industrial area. Regardless of whether the trees are located in an industrial area or not, Lord Westbury L.C. decided that the fumes from the copper smelting plant constitute a nuisance if they cause significant harm to the trees.

Indian courts have used the reflex theory to safeguard the environment. The Indian Supreme Court rejected the Ratlam Municipal Council's argument of inadequate funding in *Ratlam Municipal Council v. Shri Vardhichand*[8]

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[5]Principle 3 of the Declaration of the United Nations Conference on the Human Environment, 1972, UN Doc. A/CONF.48/14/Rev.1 (New York, 1972).

[6]Principle 2 and Proclamation 2 of the Declaration of the United Nations Conference on the Human Environment, 1972, UN Doc. A/CONF.48/14/Rev.1 (New York, 1972).

[7](1865) XI House of Lords Cases (Clark's) 642; 11 ER 1483, https://www.e-lawresources.co.uk/st-helens-smelting-co-v-tipping-1865#google_vignette

[8]AIR 1980 SC 1622

and directed the council to reduce its budget for less important things and elitist programs in order to utilize it for community health and cleanliness initiatives. Justice Krishna Iyer has emphasized that the magistrate is required by section 133 of the Code of Criminal Procedure, 1983, to issue an order for the removal of a public nuisance. Failure to comply with this order may result in penalties outlined in section 188 of the Indian Penal Code, 1860. Public nuisance, according to Justice Iyer, is endangering not only human health and life but also the social justice component of the rule of law. In addition to laying the groundwork for distributive justice and polluter pays principles for the future, Justice Iyer has unlocked the potential of the courts to transcend conventional legal notions.

In *M.C. Mehta v. Union of India*[9] the Indian Supreme Court had denied application of strict liability rule of *Rylands v. Fletcher*[10] and developed absolute liability principle holding that an enterprise that engages in a hazardous or inherently dangerous industry that poses an potential risk to the safety and well-being of the people employed in the plant and living in the vicinity possesses the community an absolute inalienable responsibility to guarantee that, in the event that any damage happens, the enterprise must be declared liable under a responsibility to guarantee that the potentially hazardous or inevitably dangerous activity must be carried out with the highest possible standards of safety. If any damage occurs due to such activity, the enterprise must be held completely responsible for it, even if it took every necessary precaution.

III. Common Heritage of Mankind Theory and Rights of Nature

In a 1967 address to the United Nations, Maltese ambassador Arvid Pardo introduced the common heritage of humanity (CHM) idea as a comprehensive and ethical notion of international environmental law that takes into account the ocean floor and seabed outside of sovereign borders as a CHM.[11] By designating marine areas with abundant natural resources as a topic of international commons, the CMH theory aims to supplant Grotius' legal idea

[9]AIR 1987 SC 1086.

[10](1868) LR 3 HL 330.

[11]Arvid Pardo, Address to the 22nd Session of the General Assembly of the United Nations (U.N. GAOR, U.N. Doc. A/6695, New York, NY, 18 August 1967). Prue Taylor, Common Heritage of Mankind Principle, 2011th ed., 10 vols., in K. Bosselmann, D. Fogel, *et al.* (eds.), Berkshire encyclopaedia of sustainability. 3/10, The law and politics of sustainability (Berkshire, Place of publication not identified, 2023), III.

of "freedom of high sea."[12] The CHM idea, which aims to safeguard certain shared interests of all people through a unique international legal framework, is one step ahead of the *res communis omnium*.[13]

The CHM theory emerged in the United Nations Convention of the Law of the Sea, 1982 (UNCLOS III) and declared the seabed areas and its resources a CHM[14] on which none of the states or persons has the right to ownership[15] rather its ownership right is vested into the International Seabed Authority (ISA) that acts on behalf of all humankind[16] ensuring the equitable distribution of financial and other benefits arising from lucrative activities in the seabed regions considering needs of the developing nations and promotes ecological balance of the marine environment.[17] Only a small section of the marine environment is regulated by UNCLOS III, which is insufficient to fully replace the freedom of the high sea.

The Agreement regulating the Activities of States on the Moon and Other Celestial Bodies, 1979 (the Moon Treaty) included the CHM theory and stated that the moon and its natural resources were CHM.[18] The moon transcends national sovereignty claims.[19] It stated that no nation, body, or individual owns the moon, its surface, any portion of it, or its natural resources; additionally, no state, body, or individual may assert ownership of any portion of the moon based on the location of their personnel, spacecraft, facilities, or equipment.[20] This agreement gives right to the state parties to explore natural resources without any discrimination[21] that runs counter not only to the theory of CHM but also to the main purposes of establishment of the international regime proposed under this agreement including *inter alia* orderly and safe development of the natural resources of the moon.[22]

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[12]Prue Taylor, Common Heritage of Mankind Principle, 2011th ed., 10 vols., in K. Bosselmann, D. Fogel, *et al.* (eds.), Berkshire encyclopaedia of sustainability. 3/10, The law and politics of sustainability (Berkshire, Place of publication not identified, 2023), III.

[13]Alexandre Kiss, The Common Heritage of Mankind: Utopia or Reality? 40 International Journal 423–41 (1985).

[14]Article 136 of the Third United Nations Convention of the Law of the Sea, 1982 (UNCLOS III). U.N. Doc. A/6695

[15]Id, Article 137

[16]Id, Article 140

[17]Id, Articles 143-145

[18]Articles 11(1) of the Agreement governing the Activities of States on the Moon and Other Celestial Bodies, 1979 **(**the Moon treaty). U.N. Doc. Supplement No. 46 (A/34/46)

[19]Id, Articles 11(2)

[20]Id, Articles 11(3)

[21]Id, Articles 11(4)

[22]Id, Articles 11(7)

Non-appropriation, shared benefits, international management, and exclusive peaceful use of natural resources are the four key features of the CHM theory.[23] However, the CHM theory's ability to acknowledge and defend nature's rights is severely constrained. First, it applies to the unique natural resources found in the ocean, seabed, and celestial bodies; second, it only applies to spatial materialistic objects; third, it sounds like the principles of sustainable development but gives the targeted natural resources no standing rights before administrative or judicial institutions; and fourth, it imposes no enforceable obligations on the states, organizations, and individuals involved in the conservation, promotion, and protection of these natural resources. The CHM theory's shortcomings prevent it from being included in other international or regional treaties or conventions for the protection of other topics in other domains, such as the convention on biological diversity and the convention on climate change.[24] Due to their interests, both industrialized and developing nations have generally rejected the CHM theory. Because they fear losing their sovereignty over natural resources inside their borders due to intervention and control by an international entity created for these resources, emerging nations have criticized the CHM theory. The CHM's implied benefit-sharing scheme was rejected by the industrialized nations.[25]

The CHM theory for the defense and acknowledgment of the rights of nature and its constituent parts is not included in any Indian legislation or court decisions.

IV. Common Concern of Humanity Theory and Rights of Nature

Alongside the CHM theory, the common concern of humanity (CCH) theory was created as a theory of international environmental law.[26] According to some experts, the CCH theory emerged in reaction to the implications of the CHM theory.[27] The subject matter, application, and goal of the CHM

[23]Jimena Murillo Chavarro, Common Concern of Humankind and Its Implications in International Environmental Law, 5 Macquarie Journal of International and Comparative Environmental Law,133—47 (2008).
[24]Ibid.
[25]Ibid.
[26]Dinah Shelton, Common concern of humanity, V Iustum Aequum Salutare 33–40 (2009).
[27]Jimena Murillo Chavarro, Common Concern of Humankind and Its Implications in International Environmental Law, 5 Macquarie Journal of International and Comparative Environmental Law,133—47 (2008).

theory and the CCH theory are different. While the CHM focuses on spatial natural resources, the CCH theory encompasses all natural resources of common concern that exist both within and beyond national borders.[28] While the CCH theory does not view state sovereignty as a barrier to the preservation and advancement of particular natural resources of shared interest, like biodiversity and climate change, the CHM theory is stated to be in opposition to state sovereignty.[29] While the CCH theory suggests protecting and promoting natural resources of common interest, the CHM theory seeks to develop an international system to oversee cooperative exploration and fair distribution of spatial natural resources.[30] Therefore, the CCH theory demands the creation of cooperative mechanisms for the protection and promotion of natural resources of common concern both inside national jurisdictions, such as biodiversity, and outside of them, such as climate change. It also rejects the danger of common ownership of nations and critically examines natural resources free from spatial limitations.[31]

Since cultural and natural resources have exceptional universal value, the World Heritage Convention of 1972 treats them as a shared human concern. The international community is required to work together to protect these natural resources within the state parties' territorial jurisdiction.[32] The CCH concept can be found in Principle 7 of the Rio Declaration on Environment and Development, 1992, which calls for stakeholder nations to work together in a spirit of global cooperation to conserve, maintain, and restore the integrity and well-being of the earth's ecosystem.[33]

The Indian constitution and court rulings expressly uphold the CCH theory for protection and recognition of rights associated with nature. States are

[28]Dinah Shelton, Common concern of humanity, V Iustum Aequum Salutare 33–40 (2009).

[29]Bharat H. Desai, International Environmental Law and its Interface with India's Domestic Law, in P. Cullet, L. Bhullar, *et al.* (eds.), The Oxford handbook of environmental and natural resources law in India 39–60 (Oxford University Press, New York, 2024).

[30]Frank Biermann, Common Concern of Humankind: The Emergence of a New Concept of International Environmental Law, 34 Archiv des Völkerrechts 426–81 (1996).

[31]Friedrich Soltau, Common Concern of Humankind, 1st ed., in C. P. Carlarne, K. R. Gray, *et al.* (eds.), The Oxford Handbook of International Climate Change Law 203–12 (Oxford University Press, United Kingdom, 2016).

[32]Ibid.

[33]UNGA, Report of the United Nations conference on Environment and Development. UN Doc. A/CONF.151/26 (Vol. I) (United Nations General Assembly, 1992).

required by Article 48 to enact legislation that forbids the killing of cows, calves, milch, and draught animals. The state is required under Article 48A to establish policies for the preservation of the nation's forests and wildlife as well as for the enhancement and protection of the environment. Article 51A(g) mandates that citizens take action to safeguard and enhance the natural environment, including forests, rivers, lakes, and animals, as well as to show compassion for all living things. The District Planning Committee and the Metropolitan Planning Committee, respectively, use the term "common interest" in a similar sense of CCH in Articles 23ZD(3)(a)(i) and 243ZE(3)(a)(ii) to refer to "coordinated spatial planning of the locality, distribution of water and other physical and natural resources, integrated development of infrastructure and conservation of environment."

The Indian Supreme Court has ruled that sections 48A and 51A(g), which impose a basic duty on the State and citizens to preserve and enhance the natural environment, forests, rivers, lakes, and animals as well as to show compassion for all living things, form the basis of Indian environmental law.[34] In the case of *Rural Litigation Entitlement Kendra Dehradun (RLEK) v. State of Uttar Pradesh*,[35] the Supreme Court ruled that the limestone dispute in the Doon Valley should be closed. The court held that the right to a healthy environment is fundamental under Article 21 and used the concept of sustainable development to balance lucrative activities with ecological preservation. The Supreme Court ruled in *Subhash Kumar v. State of Bihar*[36] that the enjoyment of the right to life envisioned in Article 21 requires access to clean water and air. The National Green Tribunal upheld citizens' basic right to a healthy, hygienic, and respectable environment in *Sher Singh v. Government of Himachal Pradesh*.[37] Article 48A of the Constitution requires the State and Article 51A(g) of the Constitution to safeguard and enhance the environment and its constituent parts. The Supreme Court ruled in *M. C. Mehta v. Kamal Nath*[38] that the State is the custodian of natural resources and has a duty to preserve, enhance, and utilize them exclusively for public purposes. In order to repair damaged ecosystems, the court additionally addressed the polluter pays principle. The Supreme Court used the polluter pays principle in *Indian Council for Enviro-Legal Action v. Union of India*,[39] ordering

[34]T.N. Godavarman Thirumalpad v. Union of India & Ors., (2002) 10 SCC 606.
[35]AIR 1985 SC 652.
[36]AIR 1991 SC 420.
[37]CWPIL No. 15/2010 (NGT Principal Bench), decided on February 06, 2014.
[38]AIR 1996 SC 711.
[39]J.T. 1996 (2) 196.

the polluting sector to cover the cost of restoring the damaged ecological. The precautionary principle and the polluter pays principle are crucial components of sustainable development, which seeks to strike a balance between ecological and development, according to the ruling in *Vellore Citizens Welfare Forum v. Union of India*.[40] There are other similar Indian court rulings that address nature and its elements as a topic of shared human interest in various ways.

V. Legal Personhood Theory and Rights of Nature

The legal personhood theory for the rights of nature has been introduced by U.S. national Christopher D. Stone in 1972 through his seminal article *"Should Trees have Standing Rights? Towards Legal Rights for Natural Objects."*[41] Stone has advocated for procedural rights such as the ability to participate in environmental impact assessments and be represented in court under human guardianship.[42] The American courts were unable to accept Stone's case for the legal personality of natural things.[43] Nonetheless, Stone was able to overtake Justice Douglas's dissenting decision in the Sierra Club case (1972) about the standing rights of inanimate natural things under Article III of the US Constitution. The Tamaqua Borough, a Pennsylvania municipality, became the first municipality in the United States to pass rights of nature legislation in 2006, almost 35 years after the Sierra Club lawsuit. It has declared natural communities and ecosystem a 'legal person' under the guardianship of Tamaqua Borough residents along with ability to sue for injunctive, declaratory and compensatory reliefs[44] for violations of the rights of natural communities and ecosystems guaranteed under the Borough of Tamaqua Municipality Code, State and Federal civil rights laws.[45] Till date,

[40]AIR 1996 SC 2715.

[41]Christopher D. Stone, Should Trees Have Standing? Towards Legal Rights for Natural Objects, 45 South California. Law Review 450 (1972).

[42]Noah M. Sachs, A Wrong Turn with the Rights of Nature Movement, 36 The Georgetown Environmental Law Review 39 (2023).

[43]Stone's rush to influence Sierra Club v. Morton, 405 U.S. 727 (1972) became unsuccessful since the US Supreme Court had denied standing right of the natural objects through the Sierra Club.

[44]Viktoria Kahui, Claire W. Armstrong and Margrethe Aanesen, Comparative analysis of Rights of Nature (RoN) case studies worldwide: Features of emergence and design, 221 Ecological Economics 108193 (2024).

[45]Tamaqua Borough Sewage Sludge Ordinance, 2006, Ss. 260-66B.

by and large, the Borough of Tamaqua has propelled more than fifty five Municipalities of the U.S. to enact substantive RoN ordinances frequently conferring rights to nature to exist and flourish as a legal person.[46] These ordinances of the U.S. Municipalities remained mere ornamental and have been declared unconstitutional, arbitrary and capricious as being violative of due process clause by taking away legal rights of corporations guaranteed under the State and Federal laws.[47] As such, there is none effective legal frameworks in the U.S. to confer legal personality to nature to hold certain immutable legal rights.

Bolivia and Ecuador have literally implemented the legal personhood theory for the RoN. The first nation in the world to give nature constitutional rights is Ecuador.[48] By acknowledging nature as a legal person, the 2008 Ecuadorian constitution protects the subjective rights of nature to exist, preserve, and renew its life cycles, functions, structures, and evolutionary processes. The Ecuadorian constitution encourages and permits natural individuals, legal entities, and communities to uphold and defend the rights of nature by appealing to public authorities and encouraging respect for all fundamental elements of an ecosystem.[49]

In *Wheeler v. Director de la Procuraduria General del Estado en Loja, Corte Provincial de Justicia de Loja* (2011) is the first case on RoN in Ecuador involving a road expansion project diverting the Vilcabamaba river without complying environmental impact assessment. The constitutional court of the Ecuador has applied rights of nature enshrined in article 71 of the Ecuadorian constitution. In *Coordinadora Ecuatoriana de Organizaciones para la Defensa de la Naturaleza yAmbiente and others v. Presidente de la Republica* (2021), related to regulations for permitted activities in mangroves, the Ecuadorian constitutional court ruled that every component of the nature has peculiar functions that are interconnected with the whole ecosystem. Mangroves are similarly interconnected both inside and between ecosystems and humans. Because of this, mangroves have a constitutional right to the preservation of their life cycle, functions, structures, and evolutionary processes.

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[46]Noah M. Sachs, p. 49, note 31.

[47]Erin Ryan, Holly Curry and Hayes Rule, Environmental Rights for the 21st Century: A Comprehensive Analysis of the Public Trust Doctrine and Rights of Nature Movement, 42 Cardozo Law Review 2447–576 (2021).

[48]Claudia Coral et al., Extractivism triggering new forms of governance for the rights of nature: The case of Northwest Ecuador, 156 *Geoforum* 104111 (2024).

[49]Constitution of the Republic of Ecuador, 2008, Art. 71.

The Bolivian Law of the Rights of Mother Earth, 2010, and the Bolivian Framework Law of Mother Earth and Integral Development for Living Well, 2012, both instantly mirrored the Ecuadorian constitutional approach of RoN. It has proclaimed Mother Earth to be a dynamic living entity made up of complementary, interconnected, and inseparable living things.[50] Mother Earth has been endowed with seven distinct rights: the ability to preserve living systems, natural processes, and the capacity for regeneration; protection from genetic modification; preservation of the water cycle, air quality, and composition; efficient and prompt restoration of man-made ecological damages; and pollution-free living conditions.[51] Mother has been accorded legal standing with all inherent rights in order to carry out its duties.[52] The RoN shall be exercised by the Bolivians in consistency with their individual and collective rights.[53] Violation of RoN is violation of individual and collective rights of the Bolivians.[54] Notwithstanding promising RoN within the Bolivian laws, the Bolivian courts couldn't enforce the RoN in TIPNIS case (Territorio Indígena y Parque Nacional Isiboro-Sécure) concerning military road broadening in heavily biodiversity protected indigenous region of Amazon and Bala-Chepete case concerning to construction of mega-hydropower project causing flood in the Madidi National Park and Pilon Lajas Biosphere Reserve.

There is no law in India that grants RoN by acknowledging the legal personality of nature and its constituent parts. Nonetheless, a few Indian High Courts have acknowledged that RoN gives the elements of nature legal identity. The *Animal Welfare Board v. A. Nagaraju*[55] is the first Indian case in which Supreme Court has recognized fundamental rights of the non-human species and declared fundamental rights of animals to safety of their lives. The court directed to the Animal Welfare Board of India and Central-State governments to take suitable measures to ensuring safety and wellbeing of animals by their custodians. Although the court did not acknowledge the animals' legal entities, this decision served as a precursor to the acknowledgment of nature's legal personality and its constituent parts, including RoN.

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[50]The Bolivian Law of the Rights of Mother Earth, 2010, Art. 3, https://www.worldfuturefund.org/Projects/Indicators/motherearthbolivia.html

[51]The Bolivian Law of the Rights of Mother Earth, 2010, Art. 7.

[52]The Bolivian Law of the Rights of Mother Earth, 2010, Art. 5.

[53]The Bolivian Law of the Rights of Mother Earth, 2010, Art. 6.

[54]The Bolivian Law of the Rights of Mother Earth, 2010, Art. 38, http://files.harmonywithnatureun.org/uploads/upload1131.pdf

Mohd Salim v. State of Uttarakhand[56] is the first Indian case heard in the High Court of State of Uttarakhand for the preservation of rights of river. Justice Rajiv Sharma has not only reiterated sacredness of holy River Ganga and Yamuna among the Hindus but also emphasized on their spiritual and physical sustenance supporting life, natural resources, health and wellbeing of entire community. He declared River Ganga, Yamuna and their tributaries a living entity having legal personality[57] with all associated rights and duties of a living person for conservation of their lifecycle. He declared *persons in loco parentis* to the Director of NAMAMI Gange, the Chief Secretary of the State of Uttarakhand and the Advocate General of the State of Uttarakhand as a representative to protect and conserve lifecycle of these rivers. Within a span of ten days, the High Court of Uttarakhand has delivered another landmark decision through Justice Rajiv Sharma in *Lalit Miglani v. State of Uttarakhand*[58] and declared glaciers including Gangotri & Yamunotri, rivers, meadows, forests wetlands, jungles, springs, grasslands and waterfalls legal entity having a legal personality with all rights and duties corresponding to a living person for their preservation and conservation. The court has, further, declared these rights akin to fundamental rights. However, these two verdicts on RoN couldn't survive longer and their implementation has been stayed by the Supreme Court in an appeal by the State of Uttarakhand on grounds of technicalities. The Supreme Court remarked reversely that if legal RoN are accorded akin to legal rights of living human beings then who would be held accountable for restoration of damages caused natural calamities like flood, draught, and earthquakes etc.

But, Justice Rajiv Sharma of High Court of Uttarakhand has kept on his nature conservation wisdom and held in *Narayan Dutt Bhatt v. Union of India*[59] that all animals of animal kingdom are legal persons along with

[55](2014) 7 SCC 547.

[56]Writ Petition (PIL) No.126 of 2014, High Court of Uttarakhand. Decided on March 20, 2017.

[57]Justice Rajiv Sharma applied the concept of juristic person to the Riers Ganga, Yamuna and their tributaries in the light of jurisprudence of juristic person developed by Salmond and Paton and applied by Indian Supreme Court in Shiromani Gurudwara Prabandhak Committee, Amritsar v. Shri Som Nath Dass, AIR 2000 SC 1421; Yogendra Nath Naskar v. Commission of Income-Tax, Calcutta, (1969) 1 SCC 555; and Ram Jankijee Deities v. State of Bihar, (1999) 5 SCC 50. The concepts of juristic person have been developed for the fulfilment of needs of human development and serve the faith of society.

[58]Writ Petition (PIL) No.140 of 2015, High Court of Uttarakhand. Decided on March 30, 2017.

[59]AIRONLINE 2018 UTR 613.

all rights and duties akin to living human beings. All Uttarakhand residents are loco parentis of animals for protection of rights of animals. The nature centric approach of High Court of Uttarakhand has influenced High Courts of Punjab and Haryana and Madras to hold RoN viable. Justice Rajiv Sharma has manifested his view on RoN in *Karnail Singh v. State of Haryana*[60] and declared that whole animal kingdom including avian and aquatic are legal entities with distinct legal personality to hold corresponding rights and duties akin to living human beings and all the residents of Haryana are human face i.e. *loco parentis* of these animals. In Court on its Own Motion vs Chandigarh Administration,[61] the High Courts of Punjab and Haryana has declared Sukhna lake of Chandigarh city a living legal entity along with all rights and duties akin to human beings for its survival, conservation and protection. The court held residents of Chandigarh *loco parentis* of Sukhna lake.

The High Court of Madras has taken a long leap in *A. Periyakaruppan v. State of Tamil Nadu*[62] holding that Mother Earth is a living legal entity along with legal personality having rights and duties for its preservation and conservation and it is akin to rights and duties of natural human. The court, further, held that the State is *parens patraie* of Mother Earth for two basic reasons; first, the State is under obligation to take necessary steps for the protection and conservation of Mother Earth; and second, the State is a human face of the nature to litigate on its behalf before the legal forums. Justice S. Srimathi has condemned anthropocentric concept of sustainable development in *A. Periyakaruppan* holding that if under the guise of sustainable development nature is destroys then it's it not a sustainable development rather its sustainable destruction. For this reason, she objected further use of terms like Sustainable Development, polluter pays and precautionary principles.

VI. Legal Naturehood Theory and Rights of Nature

A novel and non-anthropocentric theoretical advancement for the recognition and protection of RoN is the legal naturehood theory. According to this school of thought, humans and environment have different rights and obligations. Humans and the environment each have their own rights and obligations. A person who has a specific legal right also has a corresponding obligation. To put it another way, if someone has the right to operate a company, he

[60]2019 SCC ONLINE P&H 704.
[61]AIRONLINE 2020 P AND H 122.
[62]2022 SCC Online Mad 2077.

is also accountable for making up for whatever harm his operations may have produced. On the other hand, nature possesses certain fundamental rights to be restored, rejuvenated, and recreated without an accompanying obligation. According to this theory, rivers have the right to flow freely, but neither they nor the state, which is in charge of them, are obligated to compensate or make up for the harm that floods bring to people.

The RoN's naturehood theory is still in the early stages of development and has not yet been proposed by courts in any case or included in any nation's legal codes. Nonetheless, this concept is finding some reflection in *A. Periyakaruppan*,[63] where Justice S. Srimathi favors avoiding the use of concepts like the doctrine of sustainable development, the precautionary principle, and the polluter pays principle since they are anthropocentric and encourage sustainable destruction.

VII. Conclusion and Suggestions

The concept of protection and preservation of nature is not unknown to Indians. It is deeply embedded in Indian civilization. Indians have kept nature ahead of their personal interests since long back and that can be seen in recent years also in the movements like Chipko. Growing demands of Indian uncontrolled population has compelled people to satisfy their developmental wants at the cost of nature. It has necessitated for the robust legal theories and juridical pronouncements concerning to RoN. Though there is no explicit mention of either of legal theories in Indian laws except the CCH theory that finds a feeble mention in the Indian constitution, the Indian courts have extensively recognized RoN within the legal personhood theory. These judicial recognitions of RoN have not attained universal acceptability across India rather these are the laws of the States within their jurisdictions. This state of law has left implementation of RoN under the challenges of cross-border issues and others. However, contribution of these High Courts to the RoN can't be undermined rather should be seen with gratitude in the light of *Municipal Corporation of Greater Mumbai v. Ankita Sinha*[64] wherein the Supreme Court of India has invoked the seventh-generation sustainability principle requiring all decisions to be informed with interest of people arriving seven generation down the line. I would suggest that Indian legislator should learn from the Ecuador and Bolivia to incorporate RoN in the Indian laws and similarly our courts should come forward with more strong rulings to hold RoN.

[63]2022 SCC Online Mad 2077.
[64]AIRONLINE 2021 SC 861.

Enforcing Political Accountability: A Critical Analysis of the Constitution (One Hundred and Thirtieth Amendment) Bill, 2025

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Abstract

The enduring challenge of criminalization in politics has cast a long shadow over India's democratic landscape, eroding public trust and undermining the constitutional ethos. The Constitution (One Hundred and Thirtieth Amendment) Bill, 2025, emerges as a legislative attempt to address this malaise by introducing a novel mechanism for the removal of ministers. This paper critically analyzes the Bill, which proposes to remove a minister from office upon being detained in custody for 30 consecutive days for an offence punishable with five or more years of imprisonment. It argues that while the Bill's objective of enhancing probity is laudable, its chosen instrument is constitutionally perilous. The paper posits that the Bill's reliance on an executive-driven, arrest-based trigger is a disproportionate and dangerous remedy that subverts fundamental constitutional principles, including the presumption of innocence, the separation of powers, and the delicate balance of federalism. By granting the executive a potent tool for political weaponization, the Bill threatens to inflict a wound deeper than the disease it seeks to cure. This analysis concludes by advocating for a constitutionally sound and jurisprudentially balanced alternative: the adoption of the Law Commission of India's long-standing recommendation to trigger disqualification at the stage of the judicial framing of charges for heinous offences. This approach, it is argued, reinforces accountability without sacrificing the foundational pillars of justice and due process that sustain the Indian constitutional order.

Key Words: *Accountability, Political Weaponization, Offences, Constitutionality, Charges.*

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I. Introduction: The Unresolved Tension Between Probity and Power

A. The Constitution as a Social Revolution

The Indian Constitution is not merely a legal document; it is, as the eminent historian Granville Austin described it, "first and foremost a social document" designed to bring about a "social revolution".[1] This transformative vision imbues the principles of governance with a profound moral and social purpose. Within this framework, political accountability transcends procedural formality; it is the essential mechanism through which the exercise of state power is tethered to the constitutional promise of securing justice, liberty, and equality for all citizens.[2] The legitimacy of the democratic state rests on the faith of the people that their representatives will govern with integrity, making the enforcement of accountability a cornerstone of the nation's constitutional project.[3]

B. The Endemic Challenge of Criminalisation

Despite this constitutional aspiration, Indian politics has been afflicted by the endemic challenge of criminalization. The presence of individuals with serious criminal charges in legislative bodies and executive positions is not an anomaly but a deeply entrenched systemic failure. Data reveals a startling reality: nearly half of the members of the Lok Sabha face pending criminal charges, with a significant portion accused of heinous offences such as murder, rape, and corruption.[4] This trend strikes at the very root of democratic governance, corroding public trust and disrupting the constitutional ethos.[5] When lawmakers are themselves alleged lawbreakers, the moral authority of the state is diminished, and the rule of law becomes a casualty. This is not merely a crisis of individual ethics but a structural pathology that threatens the integrity of India's democratic experiment.

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[1]Website Bureau, The Spirit of the Indian Constitution: A Reflection from Granville Austin's Work, Arup K. Chatterjee (July 23, 2025), https://arupkchatterjee.com/2025/07/23/the-spirit-of-the-indian-constitution-a-reflection-from-granville-austins-work/.

[2]India 1949 (Rev. 2016) Constitution - Constitute, https://www.constituteproject.org/constitution/India_2016 (last visited Oct. 4, 2025).

[3]A Deep-Dive into India's Legal Regime on Political Accountability and the 130th Constitution Amendment Bill | Association for Democratic Reforms, https://adrindia.org/content/a-deep-dive-into-indias-legal-regime-on-political-accountability-and-the-130th-constitution-amendment-bill (last visited Oct. 4, 2025).

[4]*Id.*

[5]Criminalization of Politics in India — Undermining the Spirit of Democracy | Association for Democratic Reforms, https://adrindia.org/content/criminalization-of-politics-in-india-undermining-spirit-of-democracy (last visited Oct. 4, 2025).

C. The Bill as a Contentious Panacea

The Constitution (One Hundred and Thirtieth Amendment) Bill, 2025, has been tabled in Parliament as a direct legislative response to this crisis. Its genesis can be traced to judicial pronouncements urging the political executive to uphold a higher standard of "constitutional morality".[6] The Bill seeks to amend Articles 75, 164, and 239AA of the Constitution to create a new mechanism for removing Union and State ministers, including the Prime Minister and Chief Ministers, who are detained for a prolonged period on serious criminal charges.[7] It represents a significant legislative intervention, reflecting a growing institutional impatience with the slow pace of the judicial process in addressing the nexus between crime and politics. In essence, the Bill signals a paradigm shift from a justice-oriented approach, which awaits a final judicial conviction, to a purity-oriented one, which seeks to cleanse the executive based on accusation and detention.

D. Thesis Statement

This paper argues that the Constitution (130th Amendment) Bill, 2025, while ostensibly aimed at enhancing political accountability, proposes a remedy that is constitutionally suspect, politically hazardous, and jurisprudentially unsound. By tethering the removal of a minister to the executive act of detention, it bypasses essential judicial scrutiny, violates the sacrosanct presumption of innocence, and creates a potent tool for political weaponization that threatens India's federal structure. The existing legal framework for disqualification, which is contingent on conviction, has proven insufficient to tackle the immediate problem of tainted ministers holding office for years during protracted trials.[8] The Supreme Court, in its landmark *Manoj Narula* judgment[9], articulated a constitutional expectation of probity but, respecting the separation of powers, refrained from creating a new disqualification, thereby placing the onus on the legislature.[10] The legislature's response, however, has been to opt for a purely executive trigger (arrest and detention) rather than a judicially-vetted one. This choice reveals a deeper tension between the public demand for swift accountability and the constitutional safeguards of due process. This paper will demonstrate that a more prudent and constitutionally coherent path

[6]A deep-dive into India's legal regime on political accountability and the 130th Constitution Amendment Bill | Association for Democratic Reforms, *supra* note 3.
[7]*Id.*
[8]*Id.*
[9]Manoj Narula v. Union of India, (2014) 9 SCC 1.
[10]Manupatra Academy, https://www.manupatracademy.com/ (last visited Oct. 4, 2025).

lies in embracing judicially-mediated mechanisms, specifically the disqualification of ministers upon the framing of charges by a court for heinous offences, a solution consistently recommended by the Law Commission of India.[11]

II. The Constitutional Architecture of Ministerial Accountability

A. Collective Responsibility: The Bedrock of Parliamentary Democracy

The Indian Constitution, in its adoption of a parliamentary system, establishes a clear and robust framework for executive accountability. The cornerstone of this framework is the principle of collective responsibility, enshrined in Article 75(3), which states that "The Council of Ministers shall be collectively responsible to the House of the People".[12] This provision ensures that the government, as a unified entity, remains in power only so long as it commands the confidence of the Lok Sabha, the directly elected house representing the will of the people.[13] This is the primary channel of political accountability, where parliamentary instruments such as questions, debates, and no-confidence motions serve as constant checks on executive action.[14] A minister may be individually unimpeachable, but if the government as a whole loses the confidence of the House, the entire Council of Ministers must resign.[15]

B. The 'Pleasure Doctrine': A Misunderstood Relic?

Juxtaposed with collective responsibility is the "pleasure doctrine," found in Articles 75(2) and 164(1), which stipulates that ministers "shall hold office during the pleasure of the President" or the Governor, respectively.[16] A superficial reading of this clause might suggest an arbitrary, monarchical power vested in the head of state to dismiss ministers at will. However, such an interpretation is fundamentally at odds with the democratic principles that

[11]A deep-dive into India's legal regime on political accountability and the 130th Constitution Amendment Bill | Association for Democratic Reforms, *supra* note 3.

[12]Article 75: Other Provisions as to Ministers, Constitution of India, https://www.constitutionofindia.net/articles/article-75-other-provisions-as-to-ministers/ (last visited Oct. 4, 2025).

[13]*EXECUTIVE–ITS ACCOUNTABILITY TO PARLIAMENT*, https://cms.rajyasabha.nic.in/UploadedFiles/Procedure/PracticeAndProcedure/English/26/EXECUTIVE.pdf (last visited Sept. 15, 2025).

[14]Accountability and Control, https://www.iipa.org.in/GyanKOSH/posts/accountability-and-control (last visited Oct. 4, 2025).

[15]The Concept of Collective Ministerial Responsibility in India- Theory and Practice | RostrumLegal, (Apr. 8, 2023), https://www.rostrumlegal.com/the-concept-of-collective-ministerial-responsibility-in-india-theory-and-practice/.

[16]Article 75, *supra* note 12.

permeate the Constitution. The framers of the Constitution did not intend to create a parallel or discretionary center of power in the office of the President or Governor that could override the mandate of the elected legislature.

C. Judicial Interpretation in *Shamsher Singh v. State of Punjab*

The true constitutional position of the pleasure doctrine was authoritatively settled by a seven-judge bench of the Supreme Court in the landmark case of *Shamsher Singh v. State of Punjab* (1974).[17] The Court definitively ruled that the President and Governors are formal constitutional heads who, save for a few exceptional and specified situations, must exercise their powers and functions only on the "aid and advice" of their respective Council of Ministers.[18] The judgment clarified that the "satisfaction" of the President or Governor required by the Constitution is not their personal satisfaction but the satisfaction of the cabinet. This ruling effectively harmonized the pleasure doctrine with the principle of collective responsibility. It established that the "pleasure" of the President is constitutionally contingent on the advice of the Prime Minister, whose own position is contingent on commanding the confidence of the Lok Sabha.[19] The doctrine is thus a constitutional formality for giving effect to the decisions of the political executive, not an independent source of discretionary power.

The existing constitutional architecture, therefore, prioritizes *political* accountability to the legislature over other forms of accountability. The 130th Amendment Bill seeks to fundamentally reorder this hierarchy. It introduces a new, non-political trigger for removal—detention following an executive act of arrest—that operates independently of, and can even override, the confidence of the Prime Minister and the legislature. This is not merely an addition to the existing framework; it is a structural alteration that elevates a specific legal status above the established and foundational principle of political answerability to the people's elected representatives.

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[17]Shamsher Singh & Anr. v. State of Punjab, AIR 1974 SC 2192.

[18]Shamsher Singh v. State of Punjab, Explained | Dhyeya Law, https://www.dhyeyalaw.in/shamsher-singh-v-state-of-punjab-1975-1-scr-814 (last visited Oct. 4, 2025).

[19]A deep-dive into India's legal regime on political accountability and the 130th Constitution Amendment Bill | Association for Democratic Reforms, *supra* note 3.

III. The Legal Void: Criminality, Disqualification, and Judicial Impetus

A. The Representation of the People Act, 1951: The Conviction Threshold

While the Constitution lays down the broad principles of ministerial accountability, the statutory framework for disqualifying elected representatives is primarily contained in the Representation of the People Act (RP Act), 1951. Section 8 of this Act is the key provision, which mandates the disqualification of a person from being a member of Parliament or a state legislature upon *conviction* for a range of specified offences. For most serious crimes, disqualification is triggered if the conviction carries a sentence of two years or more.[20] For decades, however, this provision was rendered largely ineffective for sitting legislators by Section 8(4), a protective clause that allowed a convicted member a three-month window to file an appeal. If an appeal was filed, the disqualification would not take effect until the appeal was finally disposed of by the courts, a process that could take years, if not decades.[21]

B. *Lily Thomas v. Union of India* (2013): Sealing the Post-Conviction Loophole

The legal landscape was dramatically altered by the Supreme Court's landmark judgment in *Lily Thomas v. Union of India*[22]. The Court struck down Section 8(4) of the RP Act, declaring it *ultra vires* the Constitution. The bench held that Parliament lacked the legislative competence to create a distinction between candidates and sitting members, effectively creating a privileged class of convicted lawmakers who could continue in office while their appeals were pending.[23] The judgment established the principle of immediate disqualification upon conviction, a decisive step towards enforcing probity in public life and cleansing the political system of criminal elements.[24] This ruling reinforced the primacy of judicial determination (conviction) as the trigger for a severe consequence, strengthening the post-conviction accountability regime.

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[20]The Representation of Peoples Act of 1951, 43, 8.

[21]Explained: The Lily Thomas Case That Changed the Disqualification Law for Convicted MPs or MLAs, Deccan Herald, https://www.deccanherald.com/india/explained-the-lily-thomas-case-that-changed-the-disqualification-law-for-convicted-mps-or-mlas-1203102.html (last visited Oct. 4, 2025).

[22]Lily Thomas v. Union of India, AIR 2013 SC 2662.

[23]*Id.*

[24]Explained, *supra* note 21.

C. *Manoj Narula v. Union of India* (2014): The Moral Exhortation

While *Lily Thomas* addressed the post-conviction scenario, the more pervasive issue of ministers with serious *pending* criminal cases remained unresolved. This was the central question before a five-judge Constitution Bench in *Manoj Narula v. Union of India* (2014).[25] The petitioners argued that individuals against whom charges had been framed for heinous crimes should be barred from being appointed as ministers. The Court, while expressing deep concern over the criminalization of politics, ultimately concluded that it could not read a new disqualification into Article 75(1) of the Constitution that was not explicitly provided for by statute.[26]

However, the Court did not remain silent. It invoked the powerful, if amorphous, doctrine of "constitutional morality," stating that the Prime Minister, in advising the President on ministerial appointments, is expected to act in a manner that upholds the trust reposed in the office.[27] The Court issued a strong moral exhortation, expressing a "legitimate expectation" that the Prime Minister would not appoint individuals facing charges for serious or corrupt offences. This judgment is pivotal because, by deferring to legislative wisdom while simultaneously highlighting a constitutional vacuum, it created the moral and philosophical predicate for the 130th Amendment Bill.[28] The Court's deference, however, may have inadvertently paved the way for a legislative solution that deviates sharply from the principles of judicial oversight. The *Manoj Narula* judgment, in essence, identified a problem but, constrained by the separation of powers, passed the baton to Parliament to devise a legal remedy. The 130th Amendment Bill is Parliament's answer, but it is an answer that chooses an executive-mediated trigger (arrest) over a judicially-mediated one, creating a profound constitutional irony.

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[25]Manoj Narula v. Union of India, (2014) 9 SCC 1, *see also* Public Interest Foundation & Ors. vs. Union of India & Anr. AIR 2018 SC 4550.

[26]Criminalization of Politics in India — Undermining the Spirit of Democracy | Association for Democratic Reforms, *supra* note 5.

[27]IACL-AIDC Blog, On Constitutional Morality and the Ethics of Political Silence, IACL-IADC Blog (June 10, 2025), https://blog-iacl-aidc.org/2025-posts/2025/6/10/on-constitutional-morality-and-the-ethics-of-political-silence.

[28]A deep-dive into India's legal regime on political accountability and the 130th Constitution Amendment Bill | Association for Democratic Reforms, *supra* note 3.

IV. The 130th Amendment Bill: A Cure More Dangerous Than the Disease?

A. Anatomy of the Bill

The Constitution (One Hundred and Thirtieth Amendment) Bill, 2025, proposes a direct and potent mechanism to enforce accountability. Its core provisions are clear and unsparing:[29]

- **The Trigger:** A Union Minister, Prime Minister, Chief Minister, or State Minister shall be removed from office if they are arrested and remain in police or judicial custody for 30 consecutive days for an offence punishable with five or more years of imprisonment.
- **The Mechanism:** For a minister (other than a PM or CM), the Prime Minister or Chief Minister is obligated to advise their removal by the 31st day. If such advice is not tendered, the minister automatically ceases to hold office. For a Prime Minister or Chief Minister, they are required to tender their resignation by the 31st day, failing which they automatically vacate their office.
- **The Scope:** The Bill is comprehensive, applying to the entire political executive at the Union, State, and Union Territory levels by proposing amendments to Articles 75, 164, and 239AA of the Constitution.

B. The Stated Rationale: Upholding Probity and Public Trust

The proponents of the Bill argue that it is a necessary measure to uphold probity in public life and restore citizen trust in democratic institutions.[30] The stated aim is to eliminate the constitutional anomaly of "governance from jail," where a minister could potentially continue to hold a high constitutional office while incarcerated. This measure is presented as a strong stance against corruption and the criminalization of politics, aligning the law with the spirit of "constitutional morality" that the Supreme Court championed in the *Manoj Narula* case.[31] By creating a swift and automatic consequence for prolonged detention, the Bill seeks to bridge a legal gap left open by the RP Act, which only triggers disqualification after a final conviction.

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[29]The Constitution (One Hundred and Thirtieth Amendment) Bill, 2025, PRS Legislative Research, https://prsindia.org/billtrack/the-constitution-one-hundred-and-thirtieth-amendment-bill-2025 (last visited Oct. 2, 2025).

[30]Criminalization of Politics in India — Undermining the Spirit of Democracy | Association for Democratic Reforms, *supra* note 5.

[31]*Supra note 25.*

C. A Multi-Pronged Constitutional Critique

Despite its laudable intentions, the Bill's mechanism is fraught with constitutional infirmities that render it a remedy far more dangerous than the disease it purports to cure.

i. Jurisprudential Conflict with the Presumption of Innocence

At its very core, the Bill is in direct conflict with a foundational principle of criminal jurisprudence: the presumption of innocence until proven guilty. An arrest is an executive act of investigation, not a judicial determination of guilt. Detention, even for a prolonged period, does not alter this fundamental status. By linking the severe penalty of removal from constitutional office to the act of detention, the Bill effectively converts a procedural step in the criminal process into a punitive consequence. This approach pre-judges the individual and imposes a penalty based on accusation, not adjudication, thereby undermining the due process of law.

ii. Threat to Federalism and the *S.R. Bommai* Doctrine

The Bill poses a grave and direct threat to India's federal structure. In a politically polarized environment, central investigative agencies such as the Central Bureau of Investigation (CBI) and the Enforcement Directorate (ED) could be deployed to target and destabilize opposition-led state governments.[11] The arrest and detention of a Chief Minister or key state ministers for 30 days on flimsy or politically motivated charges could provide a "legal shortcut" to dismiss a legitimately elected government, bypassing the stringent constitutional safeguards established by the Supreme Court in *S.R. Bommai v. Union of India*.[32] That landmark judgment severely curtailed the arbitrary use of Article 356 (President's Rule) and fortified the autonomy of state governments. The Bill, by creating a new avenue for central interference through the instrumentality of its agencies, threatens to undo the constitutional balance that *Bommai* so carefully constructed.[33]

iii. Violation of the Separation of Powers

The doctrine of separation of powers, with its intricate system of checks and balances, is a cornerstone of the Indian Constitution.[34] The Bill damages

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[32]Manupatra Academy, https://www.manupatracademy.com/ (last visited Oct. 29, 2025).
[33]S. R. Bommai v. Union of India, AIR 1994 SC 1918.
[34]*Supreme Court Review 2024:* Balancing the Interests of States in a Federal Structure, Supreme Court Observer, https://www.scobserver.in/journal/supreme-court-review-2024-balancing-the-interests-of-states-in-a-federal-structure/ (last visited Oct. 4, 2025).

this structure by transferring a quasi-judicial determination—the fitness of an individual to hold ministerial office—to the exclusive domain of the executive.[35] The decision to arrest, and the subsequent opposition to bail which leads to prolonged detention, are actions controlled by the executive branch (police and prosecution). By making this the sole trigger for removal, the Bill sidelines both the legislature, which is the traditional forum for political accountability, and the judiciary, which is the arbiter of guilt or innocence.[36] This creates a scenario where one part of the executive (law enforcement) can effectively remove another part of the executive (a minister) from office, a clear violation of the checks and balances essential for preventing the concentration of power.

iv. The Legislative Paradox

The Bill introduces a glaring and irrational anomaly into the legal framework. Under the current RP Act, a Member of Parliament or a State Legislature is disqualified only after a full judicial trial results in a conviction and a sentence of two years or more.[37] The Bill, however, proposes that a minister—who is also a legislator—can be removed from office merely after 30 days of detention, without any trial or conviction. This creates a paradoxical situation where a minister faces a far harsher and more summary standard of accountability than an ordinary legislator.[38] There is no rational constitutional basis for this distinction, which makes the provision vulnerable to a challenge on grounds of arbitrariness under Article 14 of the Constitution.

The Bill's design ultimately reveals a fundamental confusion between "accountability" and "control." True accountability mechanisms are procedural, institutional, and subject to oversight.[39] The Bill, in contrast, institutes a mechanism of direct executive *control* that operates outside these established channels, masquerading as a tool for accountability while in reality functioning as a potential instrument of executive consolidation and political dominance.

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[35]ADRN l Asia Democracy Research Network, http://www.adrnresearch.org/publications/list.php?idx=317&ckattempt=1 (last visited Oct. 29, 2025).

[36]Isha Tirkey, JUDICIAL ACCOUNTABILITY IN INDIA UNDERSTANDING AND EXPLORING THE FAILURES AND SOLUTIONS TO ACCOUNTABILITY, https://ccs.in/sites/default/files/2022-10/Judicial%20Accountability%20in%20India.pdf.

[37]A deep-dive into India's legal regime on political accountability and the 130th Constitution Amendment Bill | Association for Democratic Reforms, *supra* note 3.

[38]The Constitution (One Hundred and Thirtieth Amendment) Bill, 2025, *supra* note 29.

[39]Criminalization of Politics in India — Undermining the Spirit of Democracy | Association for Democratic Reforms, *supra* note 5.

V. Jurisprudential Perspectives on Constitutional Limits and Political Morality

A. The Basic Structure Doctrine and Parliamentary Sovereignty

The Constitution (130th Amendment) Bill, being a constitutional amendment, must be scrutinized through the lens of the 'basic structure' doctrine, famously articulated in the *Kesavananda Bharati* case[40]. The doctrine's chief architect, Nani Palkhivala, argued that Parliament, while possessing wide amending powers under Article 368, is a creature of the Constitution and cannot become its master.[41] It cannot, therefore, alter or destroy the Constitution's essential features, which include the supremacy of the Constitution, the rule of law, the separation of powers, and the federal character of the polity.[42] The 130th Amendment Bill arguably assails several of these basic features. By empowering the executive to remove ministers based on detention, it undermines the rule of law and the separation of powers. By creating a tool for central agencies to destabilize state governments, it strikes at the heart of federalism.[43] An amendment that grants such unchecked power to the executive could be seen as violating the fundamental constitutional balance that the basic structure doctrine was conceived to protect.

B. Jurists on Power, Probity, and Judicial Oversight

The proposed amendment must also be weighed against the collective wisdom of India's most distinguished jurists, whose work has consistently cautioned against the dangers of concentrated state power.

Fali S. Nariman: A steadfast critic of unchecked political power, Fali Nariman has often expressed deep skepticism about the dedication of those in high office to constitutional principles.[44] His principled resignation as

[40]His Holiness Kesavananda Bharati Sripadagalvaru and Ors. v. State of Kerala and Anr., AIR 1973 SC 1461.

[41]Dr. ANANT KALSE, JUDICIAL ACTIVISM AND BASIC STRUCTURE THEORY BRIEF OVERVIEW (2016).

[42] Manoj Mate, Priests in the Temple of Justice: The Indian Legal Complex and the Basic Structure Doctrine, in Fates of Political Liberalism in the British Post-Colony 112 (Terence C. Halliday, Lucien Karpik, & Malcolm M. Feeley eds., 1 ed. 2012), https://www.cambridge.org/core/product/identifier/9781139002981%23c01278-3-1/type/book_part.

[43]Shree Agnihotri, Interpreting without Bannisters? The Abstraction Problem Afflicting the Basic Structure Doctrine, 8 Indian Law Review 231 (2024), https://www.tandfonline.com/doi/full/10.1080/24730580.2024.2376474.

[44]The Unstoppable Indians: Fali Sam Nariman, Noted Jurist (Aired: April 2009), (2014), https://www.youtube.com/watch?v=XXi-czdHz2o.

Additional Solicitor General during the Emergency of 1975 stands as a powerful testament to his commitment to resisting executive overreach.[51] His jurisprudence consistently warns that "power should always be distrusted, in whatever hands it is placed".[45] From this perspective, a bill that significantly enhances the executive's power to act against political opponents, under the guise of fighting corruption, would be viewed not as a tool for accountability but as a potential instrument of authoritarianism.[46]

- **Soli J. Sorabjee:** As a formidable champion of fundamental rights and judicial review, Soli Sorabjee's work emphasizes that the judiciary's role as a check on the executive and legislature is not an option but a necessity.[47] He argued that judicial activism often becomes essential to fill the vacuum created by the failure of other branches of government to perform their duties.[48] The 130th Amendment Bill represents the antithesis of this philosophy. Instead of strengthening institutional checks, it seeks to bypass them entirely, creating a summary process devoid of judicial oversight.[49]
- **Upendra Baxi:** Professor Upendra Baxi's scholarship on constitutionalism posits it as a crucial shield against state "absolutism".[50] His concept of "demosprudence" calls for a constitutional interpretation that empowers the people and holds the state accountable.[51] The

[45]Business Standard, The Villain of the Piece Is the Politics of Power: Fali Nariman, (Dec. 5, 2015), https://www.business-standard.com/article/opinion/the-villain-of-the-piece-is-the-politics-of-power-fali-nariman-115120500859_1.html.

[46]Criminalisation of Politics, Supreme Court Observer, https://www.scobserver.in/journal/criminalisation-of-politics/ (last visited Oct. 4, 2025).

[47] Reflecting on Sorabjee's Response to the Speaker's Public Lecture | Law and Other Things, https://lawandotherthings.com/reflecting-on-sorabjees-response-to/ (last visited Oct. 29, 2025).

[48]Bryan McAllister-Grande, Rule of Law A Moral Imperative for South Asia and the World.

[49]Soli J. Sorabjee, Judicial Activism Should Not Become Judicial Authoritarianism, The New Indian Express (Oct. 9, 2016), https://www.newindianexpress.com/opinions/columns/soli-j-sorabjee/2016/Oct/09/judicial-activism-should-not-become-judicial-authoritarianism-1526285.html.

[50]Upendra Baxi, Demosprudence Versus Jurisprudence: The Indian Judicial Experience In The Context Of Comparative Constitutional Studies.

[51]upendra Baxi, Demosprudence Versus Jurisprudence: The Indian Judicial Experience In The Context Of Comparative Constitutional Studies, 14 Macquarie Law Journal 3 (2014).

> Bill, however, reinforces an executive-heavy state apparatus. It centralizes power in investigative agencies and the political executive, rather than diffusing it through democratic and judicial institutions, running counter to the Baxian critique of unchecked state power.[52]

The collective perspective of these eminent jurists converges on a single, powerful theme: the greatest and most persistent threat to Indian democracy has been the abuse of power by the state itself. The 130th Amendment Bill, in its zealous attempt to solve the problem of criminality in politics, dangerously ignores this fundamental lesson. It proposes a solution that risks exacerbating the very ailment of arbitrary state action that India's constitutional jurisprudence has so painstakingly sought to restrain.

VI. Charting a Prudent Path: Judicially-Grounded Alternatives

A. The Law Commission's Consistent Counsel: Disqualification upon Framing of Charges

A more constitutionally sound and balanced approach to tackling the menace of criminalization in politics already exists, and has been consistently advocated by the Law Commission of India. In its 170th Report (1999) and more emphatically in its 244th Report (2014) on Electoral Disqualifications, the Commission recommended that disqualification from contesting elections or holding office should be triggered at the stage of the *framing of charges* by a court for offences punishable with imprisonment of five years or more.[53] This recommendation was made precisely because the existing standard of conviction was proving ineffective due to inordinate delays in the trial process.[54]

B. Why 'Framing of Charges' is the Superior Standard

The "framing of charges" standard is jurisprudentially superior to the Bill's "arrest and detention" trigger for several critical reasons. Unlike an arrest, which is a purely executive act based on suspicion, the framing of a charge is a judicial act.[6] It occurs after the police have completed their investigation

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[52]Upendra Baxi, Understanding The Mystery and Miracle of The Basic Structure, NUJS LAW REVIEW 1 (2023), https://nujslawreview.org/wp-content/uploads/2024/02/16.4-Foreword-Prof.-Baxi.pdf.

[53]Committee Reports, PRS LEGISLATIVE RESEARCH, https://prsindia.org/policy/report-summaries/law-commission-report-summary-electoral-disqualifications (last visited Oct. 29, 2025).

[54]Priyanka Rao, Law Commission Report Summary Electoral Disqualifications, (2014), https://prsindia.org/files/policy/policy_committee_reports/1396079862_Report%20Summary-%20Electoral%20Disqualfiications.pdf.

and filed a chargesheet. A judge then applies their judicial mind to the evidence on record and determines whether there is a *prima facie* case to proceed to trial.[55] This process introduces a crucial due-process filter, providing a safeguard against malicious or frivolous prosecutions that is entirely absent in the Bill's proposal. The Law Commission also wisely suggested accompanying safeguards, such as not applying this disqualification for charges framed within one year of an election to prevent last-minute political misuse, and mandating that trials against sitting legislators be expedited and completed within a year.[56] This approach strikes an intelligent balance: it acts decisively against individuals facing credible and judicially scrutinized accusations of serious crime, while protecting the political process from arbitrary executive interference.

C. A Comparative Framework of Disqualification Triggers

The superiority of the Law Commission's recommendation becomes evident when contrasted with both the current law and the proposed 130th Amendment. The core challenge is to find an optimal balance between swift action against criminalization and the unwavering protection of constitutional principles. A structured comparison clarifies why the judicial framing of charges is the most viable path forward.

Table 1: A Comparative Framework of Disqualification Triggers for Public Officeholders

Parameter
Trigger Point
Locus of Decision
Adherence to Presumption of Innocence
Risk of Political Misuse
Speed of Action
Constitutional Soundness

Source [57]

D. Supplementary Reforms

Beyond adopting the "framing of charges" standard, a holistic approach to reform should include other complementary measures that strengthen accountability without resorting to constitutionally dubious shortcuts. These include:

[55] *Id.*

[56] UNSTARRED QUESTION on ELECTORAL REFORMS, https://eparlib.sansad.in/bitstream/123456789/660466/1/15043.pdf.

[57] A deep-dive into India's legal regime on political accountability and the 130th Constitution Amendment Bill | Association for Democratic Reforms, *supra* note 3.

- **Interim Suspension:** As an alternative to outright removal, the law could provide for the interim suspension of a minister's functions, perks, and voting rights during the trial period. This would prevent "governance from jail" while still respecting the presumption of innocence.
- **Fast-tracking Trials:** The establishment of special courts or a strict legislative mandate for day-to-day trials of cases involving elected representatives is crucial.[11] Swift justice is the most effective and constitutionally sound deterrent.
- **Independent Review Mechanism:** If a pre-conviction removal mechanism is to be considered, it should be overseen by an independent judicial panel or tribunal to review the grounds for removal, thereby creating a check against executive overreach.

VII. Conclusion: Reinforcing Accountability without Sacrificing Constitutionalism

The Constitution (One Hundred and Thirtieth Amendment) Bill, 2025, is born of a legitimate and urgent concern: the deep-seated criminalization of politics that has eroded the foundations of democratic governance in India. However, in its pursuit of a swift and decisive solution, it proposes a constitutional shortcut that is fraught with peril. This paper has argued that the Bill's reliance on an executive-driven trigger of arrest and detention is jurisprudentially flawed, politically risky, and constitutionally suspect. It undermines the presumption of innocence, threatens the federal balance of power, and subverts the doctrine of separation of powers, which together form the bedrock of India's constitutional democracy.

The path to cleansing public life cannot lie in sacrificing the very principles of justice and due process that the Constitution seeks to protect. True constitutional morality does not demand punitive, executive-driven measures that trade liberty for a facade of purity. Instead, it calls for the strengthening of slow, deliberate, and robust institutional processes of accountability. The most principled and effective solution remains the one consistently counselled by the Law Commission of India: triggering disqualification at the stage of the judicial framing of charges for heinous offences. This standard introduces a vital due-process filter, ensuring that the decision is grounded in judicial scrutiny rather than executive discretion. It strikes the right balance, acting decisively against credible allegations of serious crime while safeguarding the political system from arbitrary interference.

Ultimately, the challenge is not merely to remove criminals from politics, but to do so in a manner that reinforces, rather than weakens, the constitutional edifice. The goal must be to ensure that justice and accountability are, and forever remain, two indivisible pillars of the Indian republic. Adopting a judicially-mediated framework is not a compromise; it is a reaffirmation of the core constitutional belief that the rule of law must prevail, even and especially when holding the powerful to account.