ACCESS TO JUSTICE

A Collective Journey Through Diverse Struggles for Justice

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Access to Justice

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TABLE OF CONTENTS

TABLE OF CASE

NOTES ON CONTRIBUTORS

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CHAPTER 1: DALITS AND ACCESS TO JUSTICE

by Ananya S

INTRODUCTION AND HISTORICAL CONTEXT

Like every society in the world, there always exists a hierarchy of the superior and subordinate, whether it is rich-poor, white-black or men-women. Similarly, the Hindu Varnas and Jati system established by the Manusmriti created a strict social hierarchy of Brahmins as superiors and Dalits as subordinates.[1] The term 'Dalit' meant oppressed, broken or crushed and was used to refer to people belonging to lower caste and hence their marginalized status. Due to their lowest stratum, they were continuously subjected to social and physical segregation. They were considered too impure, too polluted, to rank as worthy beings and were therefore outcasted by the people of higher castes.[2] Further, the Criminal Tribes Act, 1871 during the colonial era, labelled certain tribes and communities as "born criminals" increasing the already existing stigmatisation of this community.[3]

Realising the marginalization of Dalits, the first attempt at giving Dalits the rights they deserve was the infamous Poona Pact of 1932. There were two kinds of movements during this time-Mahatma Gandhi wanted to raise the status of Dalits but wanted the traditional caste system to remain the same which would have made little to no difference to the stigma attached with untouchables, but Dr. BR Ambedkar believed that untouchability could only be abolished by

[1] **Manusmriti**, *EBSCO Research Starters*, https://www.ebsco.com/research-starters/religion-and-philosophy/manusmriti (last visited July 24, 2025).
[2] **India's Untouchables**, https://home.uncg.edu/~jwjones/asia/classnotes/untouchables.html (last visited July 24, 2025).
[3] Criminal Tribes Act, 1871

destroying the caste system with it. Finally, they came to an agreement which laid out the manner and quantum of representation of these 'Depressed Classes' at the central and provincial legislatures.[4]

CONSTITUTIONAL DEVELOPMENTS

Article 17 of the Indian constitution abolished the practice of untouchability.[5] Article 14 and 15 provided Dalits with the Right to Equality and protected them from any kind of discrimination. Further Articles 16(4), 38, 46, 330, 332 and 350 empowers SC's and ST's with opportunities to equalise their standing with other non-marginalised communities.[6] Article 338 also establishes the National Commission for Scheduled Castes (NCSC) to ensure the proper implementation of constitutional rights.[7]

The Protection of Civil Rights Act, 1955 also punished the practice of untouchability and any discrimination associated with it.[8] Further, The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 was enacted to prevent atrocities and hate crimes against Scheduled Castes and Scheduled Tribes. It also established special courts to try these offenses and for the relief and rehabilitation of victims.[9] It was enacted in response to the inadequacy of existing laws to address caste-based hate crimes.

Further, to uplift the economic and social background of these people, India currently has reservation in all government jobs and educational institutes which is 15% for Scheduled Castes (SCs), 7.5% for Scheduled Tribes (STs), and 27% for Other Backward Classes (OBCs). This was

[4] Poona Pact 1932 (B.R Ambedkar and M.K Gandhi), available at: https://www.constitutionofindia.net/historical-constitution/poona-pact-1932-b-r-ambedkar-and-m-k-gandhi/ (Visited on July 24, 2025).
[5] Article 17, The Constitution of India 1950
[6] The Constitution of India, 1950
[7] About the Commission, National Commission for Scheduled Castes, available at: https://ncsccmis.nic.in/about_us.aspx (Visited on July 24, 2025).
[8] Protection of Civil Rights Act, 1955, available at: https://www.indiacode.nic.in/bitstream/123456789/15434/1/protection_of_civil_rights_act,_1955.pdf (Visited on July 24, 2025)
[9] The Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989, available at: https://socialjustice.gov.in/writereaddata/UploadFile/The%20Scheduled%20Castes%20and%20Scheduled%20Tribes.pdf (Visited on July 24, 2025)

established in the *Indra Sawhney v. Union of India*[10] case (also known as the Mandal Commission).

ISSUES

Despite having so many constitutional provisions available, the condition of Dalits in India sadly had little to no improvement. In the case of *State of Karnataka v. Appa Balu Ingale*[11], the members of the Harijan community were not allowed to draw water from a public borewell. They were continuously threatened by the people from higher castes asserting their caste superiority and enabling social discrimination with the practice of untouchability. The court had convicted the high caste people for their inhumane practices and further strengthened a stricter enforcement of the SC/ST Act.

In *Safai Karamchari Andolan v. Union of India (2014)*[12], the practice of manual scavenging, which is the inhuman practice of manually removing human excreta from dry toilets, involving bare hands, brooms, or metal scrapers, and carrying it to dumping sites for disposal was termed illegal and unconstitutional as per articles 14, 17, 21, and 23 of the Indian Constitution. This was because manual scavenging was only done by people from the Dalit community and they were treated to harsh and disgusting conditions. The court had also enacted the Prohibition of Employment as Manual Scavengers and their Rehabilitation Act, 2013 to rehabilitate these workers.[13] However, despite the court having an active role in banning manual scavenging, its continued practice shows poor follow-ups by the state authorities.

Around 80% of the Dalits live in the rural areas and they do petty jobs like labourers or landless farmers. Many of them even work as bonded labourers even though this practice was abolished in 1976. In *Bandhua Mukti Morcha v. Union of India (1984)*[14], a NGO had filed a writ petition

[10] Indra Sawhney v. Union of India, AIR 1993 SC 477
[11] State of Karnataka v. Appa Balu Ingale, AIR 1993 SC 1126
[12] Safai Karamchari Andolan v. Union of India, (2014) 11 SCC 224.
[13] Safai Karamchari Andolan v. Union of India, available at: https://www.drishtijudiciary.com/constitution-of-india/safai-karamchari-andolan-v-union-of-india-2014 (Visited on July 24, 2025).
[14] Bandhua Mukti Morcha v. Union of India, AIR 1984 SC 802.

under article 32 which exposed the massive bonded labour practices in stone quarries of Faridabad involving numerous Dalits and Adivasis. The court ordered the identification, release, and rehabilitation of bonded labourers and directed state governments to enforce the Bonded Labour System (Abolition) Act, 1976 and Minimum Wages Act.[15] Therefore, we can observe that even after having plenty of laws in place, the backward thinking of dehumanising Dalits still remains the same.

A recent case of discrimination in the limelight was also when the deceased, Rohith Vemula took his life due to the caste-based harassment and discrimination by his university's authorities. There have been many more cases in recent years where people belonging to SCs or STs were taking their own lives because of the political and administrative persecution by the administration or colleagues.

VIOLENCE AGAINST DALITS

According to the data collected by the National Crime Records Bureau (NCRB), in the time span of three recent years, i.e. 2020-2022, a total of 1,58,773 cases against SCs have been registered throughout India.[16] Whereas, the conviction rate remains less than 30% and pendency in courts is over 90% in many states. One of the most prevalent case in this respect is the *Khairlanji massacre* (2006)[17] where a scheduled caste of family of 4 were raped, paraded naked and then hanged to death in front of the entire village. This incident sparked an outrage in public's hearts as the police refused to register this case under SC/ST Act and disregarded it as a personal matter. The accused were convicted of life imprisonment. The way the police failed to act fairly in this case opened our eyes on how the authorities' corruption ends up covering up for such heinous crimes committed by the so called upper caste.

[15] Bandhua Mukti Morcha v. Union of India, available at: https://lawbhoomi.com/case-brief-bandhua-mukti-morcha-v-union-of-india-uoi-and-ors/ (Visited on July 24, 2025).
[16] Government of India, Ministry of Home Affairs, Report, available at: https://www.mha.gov.in/MHA1/Par2017/pdfs/par2025-pdfs/LS18032025/2946.pdf (Visited on July 24, 2025).
[17] Central Bureau Of Investigation vs Sakru Mahagu Binjewar, AIR 2019 SC 3550

Another incident where we see the failure of justice on the judiciary's part was the *Bathani Tola Massacre*[18] where 21 Dalits (including women and children) were allegedly slaughtered by the Ranvir Sena which was an upper- caste militia. And the same group was accused of the Laxmanpur Bathe Massacre[19] a year later where 58 scheduled caste people were killed. Despite there being 23 and 46 accused respectively, all of them were acquitted of these crimes with the victims still awaiting justice for their death.

Some of the reasons behind Dalit violence are just so meagre. It can be as simple as riding a horse, wearing chappals in public streets allegedly controlled by upper castes, and keeping a moustache, etc.[20] Recently, a Dalit boy in Rajasthan was beaten up by his teacher because he touched the water pot. He dies a few days later with no serious proceeding against the teacher or the school.[21] It is important to understand the cost of a life here. One doesn't have a choice of what society he is being born in and nothing or no one gives anyone the right to take someone's life just because of somebody's caste.

INTERSECTIONALITY AND JUDICIAL BIASES

As per the NCRB data of 2014-2022, around 62,819 crimes against SC women and girls have been registered under the Prevention of Atrocities Act. Further, more than 11 Dalit women and minor girls are raped every day.[22] And these are only the registered crimes, the actual number must surpass this. The case of *Vishakha v. State of Rajasthan*[23] was a landmark case in forming a safe place for working women of India. Bhanwari devi, a Dalit woman was gang raped by a group of upper-caste men when she was working in their fields at night as revenge for stopping trying to stop the wedding of a 9-month old girl belonging to the Gujjar community. Her case

[18]Hare Ram Singh & Ors. vs. State of Bihar, Criminal Appeal (SJ) No. 543 of 2003
[19] Laxmanpur-Bathe Massacre Case
[20] **Rising Tide of Atrocities Against Dalits**, *Deccan Herald*, https://www.deccanherald.com/opinion/rising-tide-of-atrocities-against-dalits-2850523 (last visited July 24, 2025).
[21] National Human Rights Commission, Report, available at: https://nhrc.nic.in/sites/default/files/2022-8-17.pdf (Visited on July 24, 2025).
[22] Asia Dalit Rights Movement (AIDMAM), "Violence Against Women Factsheet 2024," available at: https://idsn.org/wp-content/uploads/2025/03/AIDMAM-Factsheet-2024-Violence-again-women-Factsheet.pdf (Visited on July 24, 2025).
[23] Vishakha v. State of Rajasthan, AIR 1995 SC 644.

had demonstrated deep failure of protocol as the police didn't take her complaint seriously and jeopardised her medical reports too. The believed "A member of the higher caste cannot rape a lower caste women because of reasons of purity".[24] It was because of her that the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013[25] was enacted following the Vishakha guidelines.

Similarly, in the *Delta Meghwal rape case*[26], a 17 year old Dalit student was instructed to clean the room of her upper-caste teacher and was also forced to sign a letter saying that the sexual intercourse between them was consensual. She was found dead in a water tank the next day. The college had tried their best to cover up the crime and term it as a suicide. However, they failed and the court rightfully convicted all the accused.[27]

In *Hathras rape case*[28] also the victim, a 19 year old Dalit girl was gang raped and the Uttar Pradesh Police was accused of cremating the girl's body without the family's consent in order to hide evidence. However, even in this case, 3 out of 4 accused were acquitted. The problem also lies with the media representation. If an upper-caste women is raped or murdered, the media covers it vastly with nation-wide protests for justice, for example-the Nirbhaya case[29]. However, in the case of a Dalit women, there is hardly any media outcry and therefore they become the most disadvantaged persons of our country.

Sexual abuse against Dalit women is so common because upper-caste men feel entitled to a Dalit woman's body. They also use public humiliation, mutilation and brutal violence against Dalit women to keep their families and entire Dalit communities in check. A 2001 study conducted by Amnesty International recorded that police officers dismissed 30% of rape cases as false. In a

[24] BBC News, "India's Supreme Court rules on sexual harassment at workplace," available at: https://www.bbc.com/news/world-asia-india-39265653 (Visited on July 24, 2025).
[25] Department of Education, Government of India, "Prevention of Sexual Harassment at Workplace," available at: https://doe.gov.in/files/inline-documents/DoE_Prevention_sexual_harassment.pdf (Visited on July 24, 2025).
[26] D. R. Meghwal vs. State of Rajasthan, S.B. Criminal Misc. (Petition) No. 5172/2019
[27] Times of India, "Delta Meghwal case: Raj court convicts all three accused," available at: https://timesofindia.indiatimes.com/city/jaipur/delta-meghwal-case-raj-court-convicts-all-three-accused/articleshow/86879779.cms (Visited on July 24, 2025).
[28] Satyama Dubey v. Union of India, (2020) 10 SCC 694
[29] Mukesh & Anr vs State For Nct Of Delhi & Ors, AIR 2017 SC 2161

country where the police, upper-caste panchayats and village heads, etc already make it so difficult for a person to even file a report, getting access to actual justice is even harder.[30]

IMPLEMENTATION GAPS AND MISUSE OF LEGAL SAFEGUARDS

Although the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 was a powerful legislation, its implementation still faced many gaps. Mostly it is the police officer's lack of willingness to even register a case or just ignoring its severity like in the many cases given above. During an investigation, cases at all levels are influenced by caste bias, corruption and ignorance of procedures under the Atrocities Act. Despite the National Police Commission issuing an indictment of police behaviour in 1979[31], no recommendations have been followed and police continue to detain, torture, and extort money from Dalits without much fear of punishment. The police continue to hamper evidence and manipulate witnesses for their personal interests.

In *Karuppudayar v. State rep. by Superintendent of Police, Lalgudi & Ors.*[32] The Supreme Court acquitted the accused of caste-based abuse on the ground that the insult did not occur "in public view," a requirement under the SC/ST Act at the time. This interpretation highlighted how technicalities in procedural law can obstruct justice for Dalit complainants, even when a casteist intent is evident. Therefore, the court showed a judicial tendency of undermining anti-discrimination laws.

Further, a Navsarjan NGO study of Gujarat (1990–93) found that 36% of caste atrocities were not even registered under the Atrocities Act and 84.4% of cases were issued only under minor provisions like name-calling, concealing real violence. Several interviews revealed that the majority of officers found the Act a nuisance, with 75% of DSPs charging Dalits for misusing it,

[30] Analyst News, "For Some Indian Women, Caste Is Still a Matter of Life and Death," available at: https://www.analystnews.org/posts/for-some-indian-women-caste-is-still-a-matter-of-life-and-death (Visited on July 24, 2025).
[31] National Police Commission, *Recommendations on Police Reforms in India*, available at: https://www.humanrightsinitiative.org/publications/police/npc_recommendations.pdf (Visited on July 24, 2025).
[32] Karuppudayar vs State Rep. By The Deputy Superintendent, 2025 INSC 132

and reflecting deep-seated caste bias. The study highlights systemic under-reporting and institutional resistance to enforcing the law effectively.[33]

INTERNATIONAL COMPLIANCE

India has ratified the International Convention on the Elimination of All Forms of Racial Discrimination, 1965[34]. Article 6[35] mandates that states must ensure effective legal protection and the right to seek just compensation for victims of racial (including caste-based) discrimination. The United Nations Committee on the Elimination of Racial Discrimination (CERD)[36] agreed that the situation of scheduled castes and scheduled tribes in India does fall within the purview of Article 6 of the convention and therefore emphasized that India must ensure effective protection, legal remedies, and reparation for caste-based discrimination. It recommended that India must Prevent and punish acts of discrimination and provide compensation to victims, Conduct a nationwide awareness campaign to dismantle caste-based hierarchies and Adopt legal reforms to make it easier for victims to access justice and reparation.

The UN Human Rights Committee[37] in 1997 analysed the continuing caste-based discrimination and violations such as inter-caste violence, bonded labour, and arbitrary arrests faced by Dalits and expressed concerns that it might be violative of several provisions of the International Covenant on Civil and Political Rights(ICCPR)[38]. It requested India to adopt educational reforms, maintain a central detainee register, ensure judicial oversight of preventive detention, and allow access to detention facilities for international observers like the International Committee of the Red Cross.[39] Even Article 7 of International Covenant on Economic, Social and Cultural Rights (ICESCR)[40] states that state parties shall ensure everyone

[33] Human Rights Watch, "Broken People: Caste Violence Against India's 'Untouchables'," available at: https://www.hrw.org/reports/1999/india/India994-13.htm (Visited on July 24, 2025).
[34] Convention on the Elimination of All Forms of Racial Discrimination, 1965
[35] Article 6, Convention on the Elimination of All Forms of Racial Discrimination 1965
[36] United Nations, Committee on the Elimination of Racial Discrimination (CERD), available at: https://www.ohchr.org/en/treaty-bodies/cerd (Visited on July 24, 2025).
[37] UN Human Rights Committee
[38] International Covenant on Civil and Political Rights, 1966
[39] International Committee of the Red Cross
[40] Article 7,International Covenant on Economic, Social and Cultural Rights, 1966

receives favourable conditions of work including fair wages, equal remuneration for work of equal value, and safe and healthy work conditions.

Further India signed the Convention Against Torture in 1997[41]. It defines torture as intentional infliction of severe physical or mental suffering by or with the consent of public officials, often for punishment, coercion, or discrimination. Since in India, there have been numerous incidents of severe police beatings, sexual abuse of Dalit women, and other forms of institutional violence and Dalits are frequently subjected to torture with impunity, especially during arbitrary arrests or detentions**.** Even when violence does not meet the threshold of torture, degrading treatment, like casteist slurs, coerced nudity, and sexual groping also violates the rules established by the convention. However, India's failure to ratify excludes its citizens to claim legal protection under this.

Lastly, Convention on the Rights of the Child (1989)[42] and the ILO Forced Labour Convention (1930)[43] jointly provides critical protections against bonded labour, a practice that disproportionately affects Dalit children and families**.** This was also seen in the Bandhua Mukti Morcha case[44]. These conventions protect children from economic exploitation and hazardous work that endangers their health; it also abolishes any form of bonded labour including debt and caste-based servitude. Therefore it directly challenge the structural exploitation of Dalits in fields, factories, and households, especially in areas like manual scavenging, brick kilns, and child labour system**s**.[45]

Despite having all these international treaties in place, the implementation of it on grassroot levels still lacks active enthusiasm. And unless the authorities promise to seriously abide by the existing domestic and international laws, the condition of Dalits would probably remain the same.

[41] Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, 1997
[42] Convention on the Rights of the Child, 1989
[43] ILO Forced Labour Convention, 1930 (No. 29)
[44] Bandhua Mukti Morcha v. Union of India, AIR 1984 SC 802.
[45] Human Rights Watch, "Broken People: Caste Violence Against India's 'Untouchables'," available at: https://www.hrw.org/reports/1999/india/India994-13.htm (Visited on July 24, 2025).

COMPARATIVE ANALYSIS

Despite the caste system's formal association with India, caste-based discrimination still exists in diaspora communities and in a number of South Asian nations, including Bangladesh, Pakistan, Sri Lanka, and Nepal.

NEPAL: The Caste-based Discrimination and Untouchability (Offence and Punishment) Act, 2011 made caste discrimination illegal in Nepal and made it a crime. A National Dalit Commission was established in the nation to keep an eye on human rights abuses. Dalits are still subjugated by cultural customs, and enforcement is still woefully inadequate. In the 2020 Rukum massacre, Six young Dalit men were killed because they were involved in an inter-caste relationship. Even though the offenders were ultimately given life sentences, there was a noticeable delay in justice. In another notable instance, a 12-year-old Dalit girl named Angira Pasi was raped and coerced by her community into marrying her attacker. Only after civil society organisations made a major intervention did legal action follow. [46]These instances demonstrate how legal protections are frequently superseded by traditional caste hierarchies and how state accountability mechanisms are either absent or unresponsive.[47]

BANGLADESH: Bangladesh's predicament is equally concerning. Even though their Constitution guarantees equality, Dalits who work in sanitation or are usually members of religious minorities and are structurally excluded from political representation, the workforce, and educational opportunities. Dalit students are commonly denied access to government hostels and assigned to segregated classrooms. Despite the widespread influence of their retaliation, caste remains an invisible issue in nation, and there is limited institutional capacity to address such discrimination.

PAKISTAN: The Dalit Hindu minority in Pakistan, especially in Sindh province, is the main target of caste-based discrimination. These groups experience a special combination of caste-based and religious marginalisation. Dalits are frequently excluded from government

[46] Human Rights Watch, "Nepal: Ensure Justice for Caste-Based Killings," available at: https://www.hrw.org/news/2020/06/01/nepal-ensure-justice-caste-based-killings (Visited on July 24, 2025).
[47] Human Rights Watch, "Broken People: Caste Violence Against India's 'Untouchables'," available at: https://www.hrw.org/reports/1999/india/India994-13.htm (Visited on July 24, 2025).

employment and clean water, and their women are frequently the victims of forced marriage and conversion. Since caste and religion are delicate subjects that are frequently avoided in public and legal settings, there aren't many legal remedies available. In Pakistan, caste activists are intimidated, and Dalit complaints are hardly ever documented or investigated by the government.

SRILANKA: Caste discrimination is primarily pervasive among the Tamil communities. Inter-caste marriage, temple entry, and even cremation rights are restricted for Dalit Tamils, also referred to as "Panchamas." Laws rarely address these social exclusions, and caste is still a largely disregarded axis of identity, particularly in light of the nation's ethnic conflicts. Very little jurisprudence or legal literature even recognises caste as a category for the protection of rights.

Even nations like the US, UK, and Canada have started to address caste discrimination in novel ways. In the **United States**, A Dalit engineer's significant lawsuit against Cisco Systems revealed the caste prejudice in Silicon Valley's tech industry.[48] The case exposed caste-based harassment, pay inequalities, and workplace discrimination. According to a 2016 Equality Labs survey, 67% of Dalits in the US said they had experienced unfair treatment at work, and many were even afraid to reveal their caste identity.

In **Canada**, Toronto's largest school board recently adopted anti-caste discrimination measures after lobbying by Dalit students and activists. Furthermore, there has been increasing conflict in the **United Kingdom** regarding the legal recognition of caste under anti-discrimination legislation. Even though Parliament recognised the problem, political opposition prevented caste from being formally included as a protected group in the law.

The analysis above shows that Dalit oppression is not limited to India. Social norms, and political landscapes all work against the implementation of protective laws, even in countries like India and Nepal. And in other countries caste is often overlooked or not even acknowledged.[49]

[48] Arun v. Cisco Systems, United States District Court, Northern District of California (2018–2019).
[49]UK Parliament, *Forced Labour and Modern Slavery: Briefing Paper LLN-2011-037*, available at: https://researchbriefings.files.parliament.uk/documents/LLN-2011-037/LLN-2011-037.pdf (Visited on July 24, 2025).

RECOMMENDATIONS AND CONCLUSION

The lived realities of Dalits in India continue to be extremely unequal in spite of the existence of strong constitutional provisions, legal safeguards, and international agreements. The following recommendations are put forth in an effort to close the gap between law and practice:

1. Strengthen Law Enforcement Accountability: Police officers who wilfully dilute charges or fail to report caste-based crimes must be subject to special disciplinary procedures. Human rights commissions' caste-sensitive complaint cells and other independent monitoring systems ought to have the authority to take prompt action.
2. Caste-Sensitization Training: To combat institutional caste bias, mandatory and recurring training for law enforcement, the judiciary, bureaucrats, and educators should be implemented. These need to be thoughtfully created with input from Dalit organisations and grounded in human rights frameworks.
3. Establishment of Special Courts and Fast-Track Mechanisms: According to the SC/ST (Prevention of Atrocities) Act, fast-track courts must be operational in every district, and deadlines must be closely adhered to. In order to prevent procedural exclusions, as demonstrated in Ashok Kumar v. State of Rajasthan, the judiciary should be directed by progressive interpretations of anti-discrimination laws.
4. Effective Rehabilitation and Compensation Plans: In addition to financial assistance, victims of caste atrocities, particularly women and children also need full state support in the form of housing, psycho-social counselling, financial compensation, and educational rehabilitation.
5. Media Representation and Accountability: Caste-sensitive reporting standards ought to be implemented by national media organisations. For caste violence to be visible and to challenge prevailing narratives that downplay or ignore atrocities, Dalits must be equally represented in newsrooms and editorial boards.
6. Community Legal Empowerment: To inform Dalit communities about their rights, complaint processes, and available remedies, legal literacy campaigns must be started at the local level. Working together with community paralegals, legal aid clinics, and NGOs can have a profound impact.

7. Enforce and Ratify International Human Rights Treaties: India is required to abide by the Convention Against Torture and provide periodic updates to the UN's treaty bodies. It is necessary to institutionalise procedures for keeping an eye on treaty compliance and permitting international scrutiny, such as giving the ICRC access to detention facilities.

Conclusively, despite decades of constitutional safeguards, legal protections, and international commitments, Dalits in India continue to face deep-rooted structural discrimination, violence, and exclusion from the justice system. Caste-based injustice is not just a social issue but a systemic failure where laws exist more in form than in substance. Achieving true access to justice for Dalits requires more than legislation—it demands institutional accountability, societal reform, and unwavering political will. Until the promises of equality and dignity become a lived reality for Dalits, the vision of justice enshrined in the Indian Constitution remains incomplete.

CHAPTER 2: TRIBALS AND INDIGENOUS COMMUNITIES

by Vimbainashe Masango

"We do not wish to impoverish the environment any further and yet we cannot for a moment forget the grim poverty of large numbers of people. Are not poverty and need the greatest polluters?

-Indira Gandhi, Prime Minister of India, Speech to the UN Conference on Human Environment, Stockholm, Sweden, 14 June 1972.

INTRODUCTION

India has become a home that houses more than 104 million tribal and indigenous communities, constituting over 8.6% of its entire population.[50] Despite the constitutional protections and legislative provisions provided by Indian law and statutes, these communities still remain among the most socio-economically and legally marginalized groups in the country. The deep ancestral ties tribal groups have towards forest, rivers and mountains to mention a few, have made them stewards and guardians of India's natural heritages. However, this is juxtaposed by them being the most affected group in terms of environmental degradation, land acquisition, displacement and deforestation.[51] Due to these inconveniences, access to justice remains a distant issue to be solved due to poor legal literacy surrounding this indigenous community, systematic discrimination and lack of the law to offer practical protection to such groups.

[50] Md. Kaif, "The Oldest Inhabitants of India Are Not Safe in Their Land: An Analysis on Outbreaks of Discrimination and Violence against Tribal in India" 3 Indian J. Integrated Rsch. L. 1 (2023).

[51] Srikanta Sha, "Environmental Degradation and Migration: An Analysis of Tribal Livelihoods" 6(2) Int. J. Political Sci. Governance 115-118 (2024).

This Chapter seeks to examine the following outcomes, how the Indian legal system has since historic times excluded, marginalized and criminalized tribal and indigenous groups. It unpacks promises provided by the Indian constitution, environmental statutes, landmark judgments towards these marginalized groups and institutional failures to show how the custodians of the land have been denied both voice and participatory governance in environmental justice. Secondly, although a framework of environmental and human rights law exists, its legal application has failed to translate into access to justice for these communities. Third, through this chapter, we would trace the evolution of injustice and explore pathways for reform.

HISTORICAL MARGINALISATION OF TRIBAL GROUPS FROM THE LEGAL SYSTEM

This section investigates the historical marginalization of tribal communities, tracing their criminalization from colonial-era laws such as the Criminal Tribes Act, 1871,[52] and their privation through policies such as the Indian Forest Act, 1927.[53] The origin of legal exclusion for tribal communities' dates back to the colonial Indian era. The British Raj created a legal system that criminalized tribal customs and further disrupted the governance system of tribal communities.[54] It has been discovered that the most notorious among these policies was the Criminal Tribes Act, 1871, which labelled many nomadic and tribal groups as 'criminal by birth'[55] a stigmatization that lasted until post-independence.

In addition to this stigmatization, colonial forest acts such as the Indian Forest Act of 1927, transferred the rights of forests from communities to the colonial state at that time, thus alienating tribals from their ancestral lands.[56] These oppressive acts undermined the relationship

[52] Subir Rana, "Nomadism, Ambulation and the 'Empire': Contextualising the Criminal Tribes Act XXVII of 1871" 2(2) Transcience: A Journal of Global Studies 2191-1150 (2011).
[53] ACT, INDIAN FORESTS. "The Indian Forest Act, 1927." State Forest Acts (2016).
[54] Rahul Ashok Kamble, Ritesh Kumar and Arnab Roy Chowdhury, "'Ostracized by Law': The Sociopolitical and Juridical Construction of the 'Criminal Tribe' in Colonial India" 35(4) History and Anthropology 953-973 (2024).
[55] Surbhi Dayal, "Born Criminals: The Making of Criminal Tribes during the Colonial Period in India" 14(2) Int. J. Crim. Just. Sci. 87-98 (2019).
[56] Maguni Charan Behera, "Tribe, Space and Mobilization: Colonial and Post-colonial Interface in Tribal Studies" in Maguni Charan Behera (ed.), Tribe, Space and Mobilisation: Colonial Dynamics and Post-Colonial Dilemma in Tribal Studies 1-38 (Springer, Singapore, 2022).

that tribal communities had with nature, and in turn, made them intruders on the lands they had protected.

However, post-independence, India adopted a progressive Constitution that recognized the unique status of the tribal population in India through the insertion of the Fifth and Sixth Schedules, which aimed to safeguard their land rights and cultural inheritance.[57] However, the clash between the aims of developing nationalism and tribal existence continued. According to large-scale development projects such as mines, dams and factory buildings over 50 million have been displaced since 1950, with the tribal community comprising more than 40% of the people displaced, despite being a fraction of the population.[58]

This was against the Constitution, which guaranteed equality through Article 14, protection from exploitation through Article 23, and cultural independence through Article 29. The gap between the law and the actual reality has widened over time. Thus, the right to life, enshrined in Article 21, could be interpreted to have violated the rights of tribal and indigenous communities through environmental destruction, land alienation, and exclusion from justice mechanisms.

STATUTORY PROVISIONS AND RULES

Constitutional Stance

Article 21 of the Indian Constitution guarantees the right to life and personal liberties[59]. The SC has acknowledged that dignity is respect for a person based on the principle of freedom and capacity to make choices, which also entails that the right to development is part of the right to dignity in *K.S. Puttaswamy v. Union of India,*[60] which the author advocates should be done for tribal and indigenous communities.

[57] Namita Wahi and Ankit Bhatia, "The Legal Regime and Political Economy of Land Rights of Scheduled Tribes in Scheduled Areas of India" (2018).
[58] Saroj Kumar Nayak, "Study on Development Projects, Displaced Tribals & Their Living Conditions" (2020).
[59] INDIA CONST. art. 21
[60] K.S. Puttaswamy v. Union of India, (2019) 1 SCC 1.

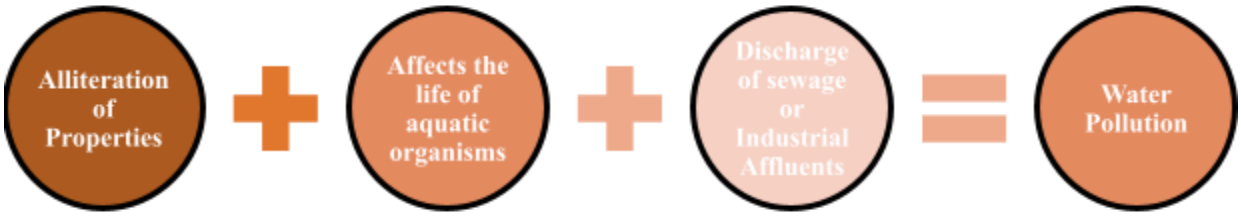
On the other hand, the apex court stated that Article 21 includes the enjoyment of the entirety of the environment in the case of *Subhash Kumar v. the State of Bihar*[61]. Furthermore, it contends that citizens must be ensured safe drinking water due to their right to life and personal liberty. [62]

The case of *M.C. Mehta v. Union of India*[63] showcases the conflict between the right to development and the right to privacy. While environmental changes are unavoidable, the court stated that this does not imply that we destroy the environment of our own free will, especially since these zones or areas are normally occupied by tribal groups. It is unacceptable to cause environmental harm. *"Every citizen has a right to fresh air and live in a pollution-free environment,"* the court stated.

Furthermore, this view is supported by the Supreme Court which declared, in the case of Municipal Council, Ratlam v. Vardhichand,[64] that article 47 mandates that public health is among a state's primary duties.

Water Prevention & Control Pollution Act, 1974

a) The possible outcome of the discharge of elements of industries may result in water pollution, as defined in the act.[65] This may affect the residential life around the river. It can also destroy the entire biodiversity present at the location.



b) The act also prohibits any person or company from knowingly disposing of polluting materials in rivers.[66] However, there are a few conditions and defenses that may or may not be applied.

[61] Subhash Kumar v. State of Bihar AIR 1991 SC 420.
[62] Bandhua Mukti Morcha v. Union of India, (1984) 3 SC
[63] M.C. Mehta v. Union of India, (1991) 2 SCC 353
[64] Municipal Council, Ratlam v. Vardichan (1980) 4 SCC 162.
[65] The Water (Prevention and Control of Pollution) Act, 1974, s 2(e), No. 36 of 1974.
[66] The Water (Prevention and Control of Pollution) Act, 1974, s 24, No. 36 of 1974.

c) The act also mandates that there must be prior permission from the state board for the discharge of effluents that a company may eject into the river[67].

d) The issue of manufacturing arises from the list of activities that require prior permission from a government board.[68] [69] Given that many companies have been found to give no prior evaluation and no authorization was obtained from the authorities, it might be considered a breach of the Gazette Notification and Protection of Environment Act.

e) The Public Trust Doctrine evolved in *M.C. Mehta v. Kamal Nath*, which stated that some common properties, including rivers, forests, seashores, and the air, were held in Trusteeship by the government for the general public's free and unrestricted use. Allowing any entity to harm it could be considered a breach of the public trust doctrine and a violation of rights.

f) The apex court, in *Vellore Citizens Welfare Forum v UOI,*[70] explained the precautionary principle. Environmental measures taken by the State Governments and statutory authorities must prevent, and fight the causes of environmental degradation. Where there are threats of serious and irreversible damage, especially in tribal populated zones, lack of scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation. The 'onus of proof is on the actor or developer to show that his action is environment-friendly'.

Accountability Mechanisms and Legal Gaps in Environmental Governance

Holding Environmental Offenders Liable: The Legal Framework and Its Failure to Protect Tribal Communities- Environmental justice cannot be pursued unless those responsible for causing ecological harm are vehemently held legally accountable for it, particularly when such harm causes unjust harm that affects the most vulnerable communities in society. Pertaining to the Indian tribal and indigenous populations, whose lives are connected to land and nature, effects such as pollution and deforestation are not just effects on the environment but are a direct violation of fundamental rights, including the Right to Life under Article 21 of the Constitution.[71] The Biodiversity Act, 2002, coupled with the regulatory policies of the National Biodiversity

[67]The Water (Prevention and Control of Pollution) Act, 1974, s 25, No. 36 of 1974.
[68]The Environment Impact Assessment (EIA) Notification, 2006, s 2 (Acts of Parliament, 2006).
[69]The Environment Impact Assessment (EIA) Notification, 2006, Schedule 3(b) (Acts of Parliament, 2006)
[70] Vellore Citizens Welfare Forum v. Union of India (1996) 5 SCC 647.
[71] The Constitution of India, art. 21.

Authority (NBA),[72] lays down specific provisions to punish those who violate such policies. However, despite the legal existence of such policies, the Act's implementation is categorized with many systematic shortcomings, thus leaving the tribal communities with little or even no access to legal remedies.[73]

First, Section 55 (1)[74] The Act states that any contravention of Section 3, 4 or 6 would be punishable with imprisonment for a period extending to five years or a fine extending to ten lakh rupees or both. These sections are crucially relevant in tribal populated zones where industries tend to frequently bypass consent protocols to exploit natural resources or conduct research.

Moreover, *Section 55 (2)*[75] The said Act states that a contravention of Section 7 would lead to an imprisonment for a duration of up to three years or a fine of up to five lakh rupees or both.

Section 57(1)[76] *and (2)*[77] separately discuss the compensation available to companies in case of offences, and the authorities could hold companies liable under the sections mentioned above to protect the right to land for tribal communities. However, while these statutes seem to offer a protective mechanism for tribal communities, the reality of actual access to justice provided to these tribal and indigenous communities is little or nothing.

Tribal Groups Recently Affected by Legal Lapses in Environmental Governance.

Recent cases across India illustrate how statutory protections have failed to translate these frameworks into practical access to justice for tribal groups.

Hasdeo Arand (Chhattisgarh)

Home to one of India's oldest and densest forest zones, and the home of Gond and Oraon Tribals, has been targeted for coal mining by many companies. Despite the gram sabha and legal

[72] K. Venkataraman, "India's Biodiversity Act 2002 and Its Role in Conservation" 50(1) Tropical Ecology 23 (2009).
[73] Gideon M. Hart, "A Crisis in Indian Country: An Analysis of the Tribal Law and Order Act of 2010" 23 Regent U.L. Rev. 139 (2010).
[74] The Biological Diversity Act, 2002, § 55(1), No. 18 of 2003.
[75] The Biological Diversity Act, 2002, § 55(2), No. 18 of 2003.
[76] The Biological Diversity Act, 2002, § 57(1), No. 18 of 2003.
[77] The Biological Diversity Act, 2002, § 57(2), No. 18 of 2003.)

safeguards under PESA and FRA, mining leases were still granted, thus violating the requirement of informed tribal consent. Although the matter is still pending judicial review, the ongoing destruction of forests continues to increase, thus showcasing the gap between legal protection and administrative action towards tribal and indigenous communities.[78]

Deocha Pachami (West Bengal)

This region, which is inhabited by the Santhal community, contains one of the largest coal blocks. While the state perpetuates that compensation is being offered, the Santhal allege miscommunication and lack of transparency,[79] which are key violations of their legal rights contained under the Forest Rights Act. The environmental impact of mining activity has not been assessed properly and tribal people have filed petitions demanding proper consultations under the EIA 2006, but their voices remain largely unheard.

Aarey Forest (Mumbai, Maharashtra)

Even though this is not a scheduled area under the Constitution, the Adivasi communities in the Aarey region (Warli tribe in particular), have historically conserved the local area. The proposed construction of a metro shed, which was done without a full environmental clearance procedure and riding community protest,[80] thus reflecting how even tribal groups are vehemently silenced through procedural loopholes.

These real-life cases highlight how existing legal provisions under biodiversity and environmental protection laws are continuously disregarded, especially in tribal-dominated areas. Even though formal mechanisms or regulations exist for tribal communities to seek legal recourse absence of tribal legal aid, fear of reprisals and bureaucratic issues discourage many tribal communities from pursuing justice.

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[78] Mukherjee, Anirban, and Binay Kumar Pattnaik. "The Evicted Tribals of Chhattisgarh: Their Saga of Impoverishment and Marginalisation." Sociological Bulletin 74.2 (2025): 132-151.

[79] Shuvam Dewanjee, "Land, Development, Indigenous People: The Coal Mine Development Project and Its Impact in Deucha" RC-07 Adivasi and Tribal Studies, 49th All India Sociological Conference (2024).

[80] Anirban Mukherjee and Binay Kumar Pattnaik, "The Evicted Tribals of Chhattisgarh: Their Saga of Impoverishment and Marginalisation" 74(2) Sociological Bulletin 132-151 (2025).

ENVIRONMENTAL CONSTITUTIONALISM AND THE RIGHTS OF TRIBAL COMMUNITIES

The pursuit of environmental justice in India was fulfilled through the 42nd Amendment to the Constitution, which was introduced in the aftermath of the Stockholm Conference of 1972,[81] which earned it the name of a ‘’mini constitution’’. This Amendment brought many changes but in the context of environmental law it introduced the responsibility of both citizens and the state to protect and improve the environment.[82] However, for tribal and indigenous communities, whose total existence is dependent on the forest, rivers, and biodiversity, this amendment not only perpetuated a legal shift but also introduced constitutional recognition and rights for these tribal and indigenous communities.[83]

The inclusion of Article 48-A in the Directive Principles of State Policy placed a constitutional obligation on the state to ’protect and improve the environment and safeguard the forest and wildlife’.[84] This provision has had a profound effect on tribal communities, many of whom reside in ecologically sensitive and resource-rich areas. It emphasizes that the forests they call home are not merely commercial assets but also constitutional priorities safeguarded by legal protection. However, the lived reality on the ground is often contradictory, as many forests have been diverted for mining, infrastructure, and plantation use without tribal consent or compensation, thus violating not only the statutory rights under FRA and PESA,[85] but also the constitutional protection embedded in Article 48-A.

[81]David R. Boyd, “Constitutions, Human Rights, and the Environment: National Approaches” in Anna Grear and Louis J. Kotzé (eds.), Research Handbook on Human Rights and the Environment 170-199 (Edward Elgar Publishing, 2015).
[82]Ved Nanda and George Rock Pring, International Environmental Law and Policy for the 21st Century Vol. 9 (Martinus Nijhoff Publishers, 2012).
[83]Jolly Garg, “Biodiversity Conservation and Forty Second (42nd) Amendment in the Constitution of India: In the Perspective of 21st Century” in National Development 26
[84] Annapurna Pattnaik, “Constitutional Provisions for the Protection and Conservation of Environment with Important Caselaws” 4(2) Int. J. Sci. Res. Sci. Tech. (2018).
[85]Sanjoy Patnaik, “PESA, the Forest Rights Act, and Tribal Rights in India” International Conference on Poverty Reduction and Forests, Bangkok (2007).

Furthermore, Article 51-A(g),[86] imposes a total of ten fundamental duties, on citizens to protect the natural environment, such as lakes, forests, lakes, and wildlife, to mention a few. While this duty is applied universally, it is particularly relevant to Industrial actors whose actions frequently result in the displacement and pollution of tribal zones. The irony is that while tribal and indigenous groups have lived in consonance with nature for centuries, their access to justice is often eroded by actions taken in the name of development and economic growth by those far removed from the importance of these zones to tribal and indigenous groups.[87]

Moreover, Article 47 of the Constitution,[88] assigns the duty to the state to protect public health and living standards of the people. Thus, for tribal communities, who often face higher risks due to air and water pollution and removal of medicinal flora, this article places a duty on the government to provide proactive protections towards these tribal communities.[89] However, these obligations remain poorly enforced in Scheduled Areas, where healthcare infrastructure is inadequate, and pollution-related illnesses go unredressed.

Judicial Interpretation: Expanding Article 21 to Include Tribal Environmental Rights.

Even though Article 21 of the Constitution simply states the right to ‘’life and personal liberty’’;[90] judicial interpretation has gradually expanded this provision to include the right to live in a clean, pollution-free environment. This transformation has been largely driven by Public Interest Litigations (PILs) and landmark cases, many of which had a direct or indirect impact on tribal rights.

[86]The Constitution of India, art. 51-A(g).
[87]Dina Gilio-Whitaker, As Long as Grass Grows: The Indigenous Fight for Environmental Justice, from Colonization to Standing Rock (Beacon Press, 2019).
[88] The Constitution of India, art. 47.
[89]Oindrilla Ghosh and Manjeri Subin Sunder Raj, “Safeguarding Tribal Rights in the Sundarbans: Navigating Health Challenges, Indigenous Wisdom, and Paths to Sustainable Development” in Community Climate Justice and Sustainable Development 417-452 (IGI Global Scientific Publishing, 2025).
[90] The Constitution of India, art. 21

LANDMARK JUDGMENTS

Rural Litigation and Entitlement Kendra v. State of U.P., 1985 AIR 652

In this case, the Supreme Court ordered the closure of limestone quarries in the Mussoorie Hills due to environmental degradation and health hazards.[91] Although not framed as a tribal case, this decision reflected the court's recognition that industrial exploitation of natural landscapes has direct human consequences and imagined what such impact would have on tribal and indigenous related areas that have no proper access to healthcare or knowledge of their rights or access to justice. Food for thought?

Indian Council for Enviro-Legal Action v. Union of India, 1996 AIR 1446

In this case, the court emphasized that it must intervene when private entities violate the right to a clean environment, especially when state authorities fail to act.[92] This precedent is critical for tribal communities which often find themselves caught between negligent corporations. This affirms that access to justice need not be state-centred but that the court itself can be a guardian of fundamental rights.

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

Similarly, in this case the court ruled that industries discharging effluents could not continue to operate at the cost of environmental harm. This judgment highlighted the polluter pays doctrine and precautionary principle, reinforcing that economic growth must not compromise environmental well-being.[93] This case remains applicable for tribal regions, where irreversible damage to the community lands and water resources are damaged.

Orissa Mining Corporation v. Mining of Environment and Forest (2013)- The Niyamiri Judgment

[91] Rural Litigation and Entitlement Kendra v. State of U.P., AIR 1985 SC 652.
[92] Indian Council for Enviro-Legal Action v. Union of India, AIR 1996 SC 1446.
[93] Vellore Citizens Welfare Forum v. Union of India (1996) 5 SCC 647.

In the Niyamgiri case, the Supreme Court upheld the rights of the Dongria Kondh tribe in Odisha to deny mining operations on their sacred hills. The court invoked Article 21 in consonance with Article 25 (freedom of religion) and the Forest Rights Act (2006), and directed that Gram Sabhas should be consulted before any clearance is granted.[94] This judgment recognized that tribal identity and cultural survival are deeply connected to the environment, thus broadening the meaning of Article 21 to include the right to cultural existence. This decision was a significant affirmation of participatory governance in environmental justice and has since become a precedent in PILs in which tribal consent is bypassed for industrial projects.[95]

Himanshu Kumar v. State Chhattisgarh (2022)

In this case, a human rights activist petitioned the Court seeking an investigation into the alleged mass killings and burning of tribal homes in Chhattisgarh by state and paramilitary forces. Even though the court dismissed the petition and imposed costs, it raised significant concerns about access to justice for tribal victims of state-led violence.[96] This outcome was vehemently criticized by tribal rights advocates for judicial activism towards tribal and indigenous communities. This case highlights the fragile terrain of tribal rights, where access to courts may be available only in theory, but justice remains far from protecting tribal and indigenous communities.

LEGAL ANALYSIS: SYSTEMATIC LOOPHOLES AND STRUCTURAL BARRIERS

Environmental laws have continued to develop since the judgement of *M C Mehta v Union of India,*[97] but various loopholes still exist.

Loopholes in the Domestic Legal Framework

[94] Orissa Mining Corporation Ltd. v. Ministry of Environment and Forest and Others, Writ Petition (Civil) No. 180 of 2011, Supreme Court of India, Judgment dated April 18, 2013.
[95]Armin Rosencranz and Manan Shishodia, "Mining Cases in India with a Special Focus on Vedanta" 4 J. Envtl. Pol'y & Dev. 11-20 (2017).
[96] Himanshu Kumar and Others v. State of Chhattisgarh and Others, 2022 SCC OnLine SC 884.
[97] M.C. Mehta v. Union of India (1986) 2 SCC 176.

1. NO ADEQUATE COMPLIANCE AND ENFORCEMENT

While the Central Pollution Control Board is the flagship authority overseeing environmental regulations, it does not have bona fide powers to enforce laws. Moreover, their powers revolve around advisory and technical assistance, which results in non-compliance with the laws, rendering them ineffective in penalizing violations that devastate tribal communities.

Ranganath Mishra, the former Chief Justice of Supreme Court went on record to discuss this issue and pointed out that: *"There are many laws but the enforcement is non-existent,"*. This observation is particularly true for tribal-dominated areas, which continue to lack institutional instruments required to monitor and report environmental crimes.

Additionally, environmental governance in India suffers from non-uniformity in regulatory structures. Water and forest regulations differ at the national, state, and municipal levels, causing confusion for both implementers and affected communities. This non-ubiquity results in selective enforcement, usually bypassing remote tribal regions.

Another issue that arises in enforcement is non-ubiquity, wherein different levels of governance have different regulations making the laws complicated to follow. Water and groundwater laws are complex in structure as they are regulated at different levels: National, State, and municipal. This non-ubiquity results in selective enforcement thus bypassing remote tribal areas.

2. LACK OF PROPER MONITORING

There is no set framework which is followed through with which ensures that the set systems are followed through with. Moreover, due to the existence of extensive bureaucracy at the levels of governance, the issue of accountability arises.

For example, although Environmental Impact Assessments are conducted, there is almost no follow-up to monitor the performance and impact on the environment once the operations of the industries begin. After the project is cleared, there is almost no accountability for terms of the actual environmental degradation caused.

Furthermore, a recent research study shows that approximately fifteen states still do not have a single operational site for disposal of hazardous waste. In Gujarat, only approximately 30 per cent of water polluting units comply with standards.

3. LOOSELY FRAMED LAWS

Most of the laws established are prescriptive and define the standards by which assessments should be made without being more practical, wherein they would be easily applied in real life. Thus, rendering the laws virtually ineffective.

In this analogy, an individual polluter does not bear any loss for generating pollution thus they do not have any incentive to actively work on reducing the amount of pollution generated. Thus only the tribal communities have to suffer the effects of such activities. However, the economy as a whole has to pay for the repercussions to follow.

COMPARITIVE ANALYSIS

One of the greatest challenges any country would have to face in implementation of environmental legislation is their failure to comply and the plight of tribal and indigenous communities across the world is one of continued failure to safeguard such marginalized groups.

In Africa, where tribal identities are rooted in national geographies, the legal system has developed a range of protective mechanisms aimed at safeguarding the rights of these communities. In the Endorois case of 2009, the African Commission ruled in favor of the

Endorois community in Kenya, which had been forcefully evicted from its ancestral lands. This decision emphasized the principles of free, and informed consent.[98]

Kenya's Constitution of 2010 recognized community land under Article 63, thus protecting tribal groups.[99] However, much like in South Africa, the practical enforcement of these rights is prevented by inadequate legal literacy. In Botswana although the High Court ruled in favor of the Basarwa in 2006, granting them a return of their ancestral lands in the Central Kalahari Game Reserve, subsequent state actions have obstructed the full implementation of the court rulings.[100]

The most suggested method to counter non-compliance with the pre-decided norms is by imposing sanctions on countries. However, for most countries the possibility that by violating their obligations in front of the nations they pose a higher risk in losing their goodwill and standing in the international world is riskier than imposing a temporary sanction.

RECOMMENDATIONS

Access to justice for tribal and indigenous communities in India must not only be provided as a protective mechanism through paper but also through practical and enforceable reality. The continuous degradation of the natural ecosystem, and the marginalization of tribal communities from the decision-making process have created a vacuum of access to justice for those who are historically connected to the lands and forests.

In a country like India, environmental degradation poses a significant challenge for both environmentalists and legislators. The author is of the opinion that to mitigate the current situation, each country must set norms that suit their domestic needs to get the maximum compliance of the rules. Since many areas of international law are underdeveloped domestically, especially in developing countries such as India, these conventions play a huge role in making these regulations applicable and must be taken inspiration from.

[98] Nqobizitha Ndlovu and Enyinna S. Nwauche, "Free, Prior and Informed Consent in Kenyan Law and Policy after Endorois and Ogiek" 66(2) J. Afr. L. 201-227 (2022)

[99] Francis Kariuki Kamau, Securing Land Rights in Community Forests: Assessment of Article 63(2)(d) of the Constitution (2013) (Unpublished LL.M. dissertation, University of Nairobi).

[100] Jonathan Woof, "Indigeneity and Development in Botswana: The Case of the San in the Central Kalahari Game Reserve" (2014).

First, there must be a constitutional right to ‘’environmental justice’’ as a tribal right which is the right to ancestral lands. Article 21 of the Constitution must thus be blended to include protection from forced displacement, pollution, and destruction of ancestral sights.

Second, India must insert global international environmental and indigenous rights treaties such as the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP),[101] ILO Convention 169[102] and the Rio Declaration on Environment and Development[103] which offer proper frameworks. The fact that India has not ratified some of these policies, their principles of informed consent, sustainable development, and participatory governance can be adapted into domestic law. Hence, I suggest that laws such as PESA and the Forest Rights Act must be strengthened to reflect these principles and made legally enforceable.

Third, India must develop the quality of legal infrastructure in tribal areas. This includes providing trained legal aid personnel, translating environmental-related statutes into tribal dialects, providing easy mechanism procedures for complaints and ensuring tribal representation in grievance redressal bodies. Moreover, environmental courts or tribunals must hold special jurisdiction in Scheduled Areas to ensure easy access to justice that is not delayed.

Fourth, Tribals must not just be consultees towards these environmental policies but co-governors of environmental decisions. Tribes must have the power to audit compliances with environmental clearances and impose penalties for violations.[104] These mechanisms will increase legal accountability while at the same time maintaining the traditional existence of tribal zones.

[101]United Nations, United Nations Declaration on the Rights of Indigenous Peoples (2007).
[102]Lee Swepston, “A New Step in the International Law on Indigenous and Tribal Peoples: ILO Convention No. 169 of 1989” 15 Okla. City U.L. Rev. 677 (1990).
[103] United Nations, Rio Declaration on Environment and Development (1992).
[104] Dean B. Suagee and Christopher T. Stearns, “Indigenous Self-Government, Environmental Protection, and the Consent of the Governed: A Tribal Environmental Review Process” 5 Colo. J. Int’l Envtl. L. & Pol’y 59 (1994).

Moreover, many areas of international laws are underdeveloped domestically, especially in developing countries such as India. These conventions play a huge role in making these regulations applicable and must be taken inspiration from.

We must attempt to make the laws varied but not different altogether since environmentally harmful activities cannot be contained within national boundaries. They often tend to harm different surrounding nations as well and the lack of consistency in such a law would lead to an issue wherein the activity would be legal in some nations and illegal in others causing irreparable damage to surrounding countries.

Additionally, it is imperative for the country to improve the quality of existing infrastructure to keep up with changes in the needs of the people. This would ensure a smooth flow of work and improve accountability.

Furthermore, it can be concluded that countries need to encourage global cooperation while dealing with environmental problems to alleviate the possibility of transboundary pollution, which mostly affects tribal populations.

CONCLUSION - JUSTICE BEYOND THE LETTER OF LAW

In conclusion, for tribal communities to access justice in its realest form, India must shift from a development-centred legal model to a people and planet protection-seeking framework, one that sees forest not as a product for economic development but as natural heritage which carry significance to tribal groups.

The struggle of tribal and indigenous communities in India to access justice is not rooted in the absence of laws, as is the case present in African countries, but rather in the failure to recognize the traditional significance of these tribal zones in perpetuating economic development. While the Constitution and statutes such as the Forest Rights Act and PESA attempt to codify protections, the experience of tribal communities is contrary.

This chapter therefore, shows that the denial of justice to tribal peoples is systematic, in that the Indian legal system has often legitimized exploitation in the name of development. Even though the law speaks in their favor, as seen in landmark cases, their implementation is weak.

Therefore, access to justice for tribal communities must go beyond courts and codified rights and there must be equal recognition of tribal people as equal stakeholders in India's democracy, which cannot be substituted for economic prowess. The author is thus of the firm belief that the law must not merely protect the environment but also protect those whose major aim is to protect the environment. If access to justice is the promise of the government, its fulfilment must start or begin with those for whom justice has been inaccessible, and in this context it's the Tribal and indigenous communities in India.

CHAPTER 3: MARGINALIZED RELIGIOUS COMMUNITIES

by Mallika Kumari

INTRODUCTION

India follows the notion of 'unity in diversity' and this aspect also aligns with the religious spirit of the nation as the country claims to be the secular nation where all the religions are treated equally and there is no official religion of the state. But the historical background of the concerned nation here somehow highlights certain aspects that determine the marginalized aspects of the certain minorities inclusive of the Muslims and other religious minorities communities.

There is no doubt that the Constitution of India, 1950, the supreme law of the land and the *Grundnorm* in the sense of Kelsen's Pure Theory of Law—on which all central and state legislation is based and with which it must be aligned—establishes the structural framework of governance and guarantees freedom of religion as a fundamental right under Article 25 in Part III.[105] The concerned topic here falls under the domain of various branches of study such as Jurisprudence, Sociology, Psychology, Political Science , Anthropology and many more. The concerned topic of this chapter highlights the notion of the religious minorities rights in all contexts as they are the vital part of the society of the Indian context and how their marginalization and discrimination impacts the overall functioning of the environment of the country's politics, economy and cultural values and virtues.

The concerned chapter holds a blend of the generic and specific blend of the matrix of the terms and aspects of the issues revolving around the concerned subset or group of the society that is specifically here, the muslims and the other religious minorities. Marginalization and

[105] Article 25, The Indian Constitution, 1950.

discrimination aspects referred in this regards, hereby means, the notions of the or the context of the unfair treatment, constant inhumane treatment or lack of access to the mainstream society's aspects or resources or being followed up as the equal grounds by the majority religious group or members of the society itself. The chapter here holds the due regards importance in all aspects.

HISTORICAL BACKGROUND

Although, legal machinery and framework has been formulated and on paper things and matrix of the concerned matter here speaks for the betterment but, the crux of the scenario is that since the colonial times, pre-independence and post-independence era, and even in modernized contemporary era, there are certain sects of the religious minorities who have not been judiciously treated in account of the equal protection of the laws and equality as given under the Article 14 of the Indian Constitution of 1950.[106] This in holistic sense somehow impacts one's overall interlinked fundamental rights under the Article 14 in the light of the quality and equal protection of the law, Article 19[107] in the light of the several distinct freedoms and Article 21 in the light of one's right to life and personal liberty.[108] It is known as the golden triangle as laid down in the Maneka Gandhi's case[109] and all these covering under the parts or ambits of the fundamental rights comes under the 'basic structure doctrine' of the Indian Constitution of 1950 which cannot be compromised at any cost as laid down in another landmark case called, Kesavananda Bharati Case,[110] and other notable cases as well.

India should learn from other successful nations in the matters of balancing the interests of the majority with that of minorities and maintain the democratic aspects in Indian Context where people's spirit is followed up so that public interest is not compromised.[111]

The vital part which needs to be highlighted or understood is that, the public interests involve the crux and elements of the interests of the both minority and majority groups for the holistic betterment of the society as a whole.

[106] Article 14, The Indian Constitution, 1950.
[107] Article 19, The Indian Constitution, 1950.
[108] Sarla Mudgal & Ors. v. Union of India, AIR 1995 SC 1531.
[109] Maneka Gandhi v. Union of India, 1978 AIR 597.
[110] Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225.
[111] Amish Devgan v. Union of India & Ors, (2021) 1 SCC 1.

CHALLENGES IN IMPLEMENTATION AND SOCIAL REALITIES

The theory-based aspects of the legal provisions are quite-distinct from actual happenings in the society. Even though the laws are enforced there may be issues in the concrete implementation aspects, with lack of resources, lack of infrastructure, lack of zeal among the players who are enforcing it, lack of trained professionals and many more associated hurdles within it.

In order to handle it all, a comprehensive and multi-dimensional approach is needed which can be based or formulated or even followed up in the light of the due scholars' and expert's opinion after conducting a thorough research and comparing it with the other countries having religious minorities. Further with the help of empirical data, actual offenders of any offence can be targeted and segregated who had been under-blanket in the name of religion and facilitating the communal violence and on the other hand, the actual innocents can be separated from such a group of members falling under any religious community. Psychologically, majority and minority groups need to interact in a wholesome manner and not in blame-game manner so as to build a healthy human civilized society and better human development so that the country's stand will be strengthened in its domestic and as well foreign affairs in this globalized world.

The interplay and intersection of marginalized religious communities in the Indian context further illuminate the layered forms of discrimination they face. Examining these dynamics helps address sub-categories of marginalization—such as discrimination against women within these communities, as well as issues related to gender equality, LGBTIQ+ rights, and other related concerns. India has better human resources but mere religious discrimination makes the basic human rights enforcement a failure which is not a good mark for a developing country like India. The concerned topic of this chapter respectively further co-relates in the comprehensive manner with other paramount and significant matters of the topics of socio-political importance, [112] that overlaps with the further topics of development and this topic ensures the due collaboration of both governmental or non-governmental actors or players in the system which can directly or indirectly impact in the handling of this situation.

[112] Ahmedabad St. Xavier's College Society & Anr. v. State of Gujarat & Anr, (1974) 1 SCC 717.

SOCIO-LEGAL REFLECTIONS ON DISCRIMINATIONS WITHIN RELIGIOUS MINORITIES

When talking about some real-life examples, incidents like delivering anti-minority speech from time-to-time is not just against the actual culprits but the whole religious minorities gets targeted.[113]The caste system within religious minority groups creates additional layers of discrimination, often resulting in unequal access to mainstream societal resources and, in some cases, unfair, dehumanizing, or derogatory treatment. These outcomes stem from entrenched notions of superiority and inferiority rooted in caste hierarchies, over which individuals have no control. Such caste-based marginalization is further intensified by a range of objective and subjective factors, including age, geographic location, financial background, socio-economic status, and race. Together, these elements contribute to a comprehensive and deeply embedded system of discrimination.

In fact there are people from the religious minorities group who are actually facing such instances of marginalization within their own community as well as from other religious community as there is the prevailing notion of 'WE GROUP' and 'THEY GROUP' and in some cases by the concerned authorities as well[114]. The notion of the 'KERNEL OF TRUTH' in this regard, often makes such religious minority communities to be on the target point inclusive of the innocent individuals, apart from the actual offenders or culprits to suffer boycott or mass hatred at a greater or wider level.

The study should be encouraged in balanced format to read and deal with such people's lack of awareness regarding their legal rights as one given under Part IV of the Indian Constitution of 1950, the DPSP (Directive Principles of the State Policy)- Article-39A[115] which talk about free legal aid to certain sections of society wherein, people of both majority and minority religious communities can avail the facility subject to the requirements laid down in the act governing it. This ensures brotherhood, peace and harmony in India's society as human beings are entitled to basic humanity under the environment of the due enforcement and maintenance of just and reasonable law and order so that justice can be accessed and available to all depending upon the

[113] Pravasi Bhalai Sangathan v. Union of India & Ors, (2014) 11 SCC 477.
[114] Shaheen Abdulla v. Union of India, W.P (Crl) No. 940/2022 (Supreme Court, 2022).
[115] Article 39-A, The Constitution of India, 1950.

facts and circumstances of each case. This shall be in respects of its uniqueness and complexity degree as required and fitted under the legal system of the country as under the sociological school of jurisprudence, where law acts as the tool for the betterment of the society, and both somehow impacts and shapes each other, aligned with realist school of jurisprudence where the judges' actual creativity and interpretation shapes the final implementation and checking of the law and other aligned schools of the jurisprudence too with other aligned branches or domains of the study , all for the due betterment of the society itself in contemporary era and in shaping the promising future outlook as well. There are various aspects or impacts of the situation concerned here, in all regards of economic, legal, political, social, anthropological and various other aspects[116].

COLONIAL LEGACY AND ORIGINS OF RELIGIOUS DIVIDE

When talking about the foundation of the contemporary scene to get build-up in light of the communal hatred or violence that too on accounts and notions of the religious diversion has been laid down right from the time of the colonial era. This was specifically at peak at partition times of India and Pakistan as this has acted as the wound which would never be forgotten, the country's division and lots of life and people's separation, the brutal murder and killings of the fraternity of brotherhood and unity. But even after such a situation, people's attitude are based on the notion of the same religious diversion at micro-individual level that gets truly reflective over the macro-societal level and rather being united , one targets and attacks the others, and the innocents out of the concerned community have been losing their livelihood and decent life too. As per the historical school of jurisprudence, the legal loopholes in the concerned matters of the aspects of the legal provisions has somehow its roots in the historical backup and setup of the field. The historical build-up of the contemporary issues or era of the concerned matrix of the issues should be interpreted in due discharge of the socio-economic issue.

[116] Tehseen S. Poonawalla v. Union of India, (2018) 9 SCC 501.

LANDMARK CASES

This section highlights the several real-life examples or cases where the situations have been highlighted in the religious minorities and discrimination aspects in the Indian case study. Although, the different levels of judiciary right from High Court to Supreme Court have been coming up with so many diverse cases inclusive of the one being involved on religious notions so as to directly or indirectly enforce the thought for the UCC-Uniform Civil Code[117], where the uniform laws would prevail ensuring diversity and its complexity in the upcoming cases would be solved in the uniform standard so as to uphold the standard norms. Cases like Shayara Bano's case[118], and various other in the light of creating a uniform rights and doing justice on the valid grounds, was all good, but the sensitive impact of it was like infringing one's personal law of religion; in that regards, government should have taken an affirmative action so as to make the people educated or literate about the steps that have been taken by the respective authorities and to drop-down the hatred and communal violence in this regards. However, no one can actually be blamed fully as all things are interlinked chain of matters but one being at the responsible side should take care and approach the matter in the well-versed aspect so that a due balance can be cultivated in the lights of one's individual freedom, religious rights and societal interest at vast value as upheld in notable S.R. Bommai case[119]. Also, people of such communities should be volunteered enough to know actually the reasons underlying it and not simply agitate like the mass protest which was witnessed after the Citizenship Amendment. Also, the government on the same hand, being a guardian should have well-balanced ways to approach all the majority and minority interests so that marginalized sections of the society could actually get integrated with the mainstream society. This will actually help in the long-term goal to curb down the issues of religious hatred, communal violence, will strengthen the notions of unity, will improve further relations with other nations as well and on the very foremost front, will give scope and time to think and act on the other major high alert topics and where even the majority and minority groups people will together contribute on India's behalf that would be like a wholesome family.

[117] Mohd. Ahmed Khan v. Shah Bano Begum, 1985 AIR 945.
[118] Shayara Bano Case, (2017) 9 SCC 1.
[119] S.R. Bommai v. Union of India, (1994) 3 SCC 1.

Further, in notable sense, the public figure, authorities as in the wider ambit of the different branches of the legislature, the executive and the guiding facet of the judiciary, should play a vital role in bringing out the peace in the society and not hatred or the establishment of divide and rule aspects as done in several times as upheld in Praveen Bhai case, [120] and in various other instances in lynching parts as upheld in Tehseen case.[121] Strict rules should be promoted in election aspects so that religion is not used for vote-bank politics as upheld in Sow Chandra's case.[122] Further, individual culprits should be targeted and no communal profiling by the authorities should be allowed or promoted as laid down in People's Union for Civil Liberties case,[123] communal riots leading to loss of several lives should be prohibited as laid down in S. R . S Enterprises case,[124] and even media trials should be discouraged in such regards as upheld in the case of Sagar Baburao Ingale Case.[125] The above cases of the different notions of the situations somehow reflects the gloomy aspects of the society that needs to be addressed in order to establish the harmony and peace in the society with the due collaboration of the individual members and the due authority players in the system.

There has been numerous cases in the same context and regards that have come up in the picture from time-to-time and situation-to-situation and each case has its own due impact and recognition aspects for shaping the scenarios of the issues concerned in the matters itself and authorities are playing their due role in aspects of the handling of the issues for the rights of the religious minorities groups in the society as the sect of the society. The case's phases and aspects are evolving from time-to-time. The case studies as discussed here and further notable ones could be a major substantive-material for the comparative and empirical study so that a thorough recommendation can be done by the experts or the scholars opinion so that the solution to the specific targeted problems could be handled and dealt in whole or holistic matters.

[120]State of Karnataka and Another v. Dr. Praveen Bhai Thogadia, ,(2004) 4 SCC 684.
[121]Tehseen S. Poonawalla v. Union of India and others ,(2018) 9 SCC 501.
[122]Sow Chandra Kante v. Sk. Habib, (1975) 1 SCC 696.
[123]People's Union for Civil Liberties v. Union of India ,(2004) 9 SCC 580.
[124]S.R.S Enterprises v. Rakesh Sharma, 2018 SCC OnLine Del 12310.
[125]Sagar Baburao Ingale v. The State of Maharashtra ,2020 SCC OnLine Bom 1111.

NEED OF THE HOUR

This section highlights the urgency of the topic, that is, why the concerned topic is important to consider in the matter of time in the contemporary era. As per the background and contentions discussed in the upper part of the concerned chapter here, it is clear, that, there is higher need and this is the high time to take affirmative steps for the protection of religious minorities concerned and for the steps the author suggests a healthy-buildup of comprehensive anti-discrimination laws, development of the independent institutions that too aligned in supervisory aspects with adequate resources allotted to them in the same regards so that things can work in an efficient and effective manner in all regards, as upheld in the case of *Pravasi Bhalai Sangathan v. Union of India.*[126]

Further, revision of the earlier or existing statutes or law or even policies is required so that the loopholes can be handled in a better and required manner for tackling the problem concerned here and for the solution formulation . Research and Development in regards to the concerned case needs to be encouraged in that matter so that there is a due solution to the concerned problem in this respective chapter. The problems in all categories of the arenas of the economic, political, social, cultural and anthropological aspects should be dealt with a due systematic approach so that the structure of the society is moulded in such a way people's mental health, social health, physical health, cultural health and other aspects are taken care of.

The surveys should be done further in this context so as to conduct the empirical study for the thorough research to solve the problems concerned for the religious minorities in the democratic setup so that even voices of the minorities could be heard in the presence of the majority aspects.

CONCLUSION

Thus, it can be said that, being alert on the concerned topic here along with the awareness of the topic plays a vital part for the youths to focus upon the solution and not just one aspect of the problem. Hence, the above stated-matter in this concerned chapter itself justifies the notion of the

[126] Pravasi Bhalai Sangathan v. Union of India, (2014) 11 SCC 477.

marginalization aspects of the concerned sects of the society, that is, the religious minority communities.

CHAPTER 4: CHILDREN AND THE LAW

by Aastha Agarwal

INTRODUCTION

Despite being legal rights-bearing individuals, children persist to be one of the most marginalized groups in the justice system in India. Their disadvantages have not been a matter of age alone but due to the overlapping other structural issues of poverty, caste, gender, disability, and displacement, that massively constrain their access to justice. As either victims, witnesses or children in conflict with the law, they are commonly confronted with a system that is procedurally unsympathetic, under-funded and unresponsive to their needs. The development of child protection in India historically emerged within the framework of colonial paternalism in which children were assumed to be passive beneficiaries and not rights-holders.[127] With the rectification of the United Nations Convention on the Rights of the Child (UNCRC) in 1992, India started to change towards a rights-based approach.[128] However, social norms and bureaucratic inertia render these legal safeguards, leaving access to justice contingent on a child's socio-economic or social identity.[129]

Key laws like Juvenile Justice (Care and Protection of Children) Act, 2015, Protection of Children from Sexual Offences Act, 2012 (POCSO), and the Right to Education Act, 2009, although are progressive, face limitations in the implementation process. These include judicial delays, lack of child friendly facilities, and punitive measures influenced by media or societal

[127] Neera Burra, Born to Work: Child Labour in India 23 (Oxford University Press, New Delhi, 1995).
[128] National Human Rights Commission, The United Nations Convention on the Rights of the Child (UNCRC) & Indian Legislations, Judgments & Schemes: A Comparative Study 9 (NHRC, New Delhi, 2019).
[129] Yousuf A. Vawda, "Access to Justice: From Legal Representation to Promotion of Equality and Social Justice – Addressing the Legal Isolation of the Poor" 26 *Obiter* 2 (2005), available at: https://hdl.handle.net/10520/EJC85124 (Visited on July 25, 2025).

pressure. Cases like Sheela Barse v. Union of India[130], Sampurna Behura v. Union of India[131], and Independent Thought v. Union of India[132] have strengthened the constitutional guarantees, but institutional insensitivity and inadequacy still exist, as reported by National Commission for Protection of Child Rights (NCPCR) and National Crime Records Bureau (NCRB).[133] This chapter critically analyzes the historical and socio-legal background of justice to the children in India. It starts with a literature review that is followed by identifying the major legal frameworks governing child rights. There will be analysis of landmark judicial rulings and their effects along with case studies and practical analyses of real world examples. The chapter goes on to critically and comparatively examine child justice systems in India and other countries, and discusses the reflections about gaps in the systems, weaknesses in the current policy, and directions of the reforms.

HISTORICAL AND LEGAL CONTEXT

Historically, this marginalization of children within the Indian legal system can be traced back to the paternalistic concept of childhood that regarded children as passive dependents as opposed to rights-bearing individuals.

In pre modern India, legal regulation of childhood was dictated mainly by family and caste structures, and had very little role of the state in determining child welfare.[134] Guardianship and succession were based on Hindu and Muslim law but rarely focused on the independence of children or their protection against abuse.[135] Colonial laws started to address childhood using a utilitarian lens. Age limits and incomplete protections: The Apprentices Act of 1850, Factories Act of 1881 and Indian Penal Code, 1860 brought age thresholds and incomplete safeguards not to ensure safeguards, but to ease a compliant workforce.[136] Parental control over the child was

[130] Sheela Barse v. Union of India, AIR 1986 SC 1773
[131] Sampurna Behura v. Union of India, (2011) 9 SCC 801
[132] Independent Thought v. Union of India, (2017) 10 SCC 800
[133] NCPCR, Annual Report 2022–23 (NCPCR 2023) 37; NCRB, Crime in India 2022 (2023), available at https://ncrb.gov.in
[134] Asha Bajpai, *Child Rights in India: Law, Policy, and Practice* (Oxford University Press, New Delhi, 3rd edn., 2018).
[135] Myron Weiner, *The Child and the State in India: Child Labor and Education Policy in Comparative Perspective* 1–227 (Princeton University Press, Princeton, 2021).
[136] Kalpana Kannabiran, *Tools of Justice: Non-discrimination and the Indian Constitution, 138* (Routledge India, New Delhi, 2013).

further deepened by laws like the Guardians and Wards Act, 1890.[137] Children not part of the family structure, such as street children, child labourers, and orphans, lacked the protection of the law, which further affirmed the invisibility of the youth in the justice system.

It was the Juvenile Justice Act of 1986, but only after India ratified the UN Convention on the Rights of the Child (UNCRC) in 1992 that a child rights framework started having a domestic law impact.[138] The Juvenile Justice (Care and Protection of Children) Act, 2000 replaced this with structured, child-oriented mechanisms. But the rights and protection of children were not binding by constitution; they were placed among the Directive Principles of State Policy in Articles 15(3), 21A, 24 and 39 (e) and (f).[139] Reforms like the amendment of Child Marriage restraint Act 1929 after independence had not fared well due to reluctance to interfere with personal laws.[140] The history of disjointed safeguards lives on weak enforcement, backdated POCSO trials, and systematic inability to affirm the dignity and legal status of children. The historical omissions continue to limit access to justice among children.

LITERATURE REVIEW

Over the last thirty years, researchers and human rights activists have explored the institutional obstacles that children face when seeking justice in India. The underlying critique by Myron Weiner focused on how the state has consistently been unable to make child welfare its priority despite having the legislative mechanisms to do so, a factor that is still relevant today due to institutional indifference towards the plight of vulnerable children.[141] Neera Burra further adds to this observation by demonstrating cases of child labour continue to exist within informal sectors, where safety laws may not apply.[142] Kalpana Kannabiran critiques the disjointed evolution of

[137]Guardians and Wards Act, 1890 (Act No. 8 of 1890). Available at: the Guardians and Wards Act, 1890

[138] Vandita Jain and Vijaylakshmi Sharma, "A Critical Study on the Juvenile Justice Act, 2015" (2022) 4(3) *Indian Journal of Law and Legal Research* 1.

[139] Constituent Assembly Debates, Vol VII, 4 November 1948, 31–33.

[140] Flavia Agnes and Madhavi Basu, et.al., *Child Marriage and the Second Social Reform Movement*, in *Love, Labour and Law: Early and Child Marriage in India* 29–62 (SAGE Publications Pvt. Ltd., New Delhi, 2021).

[141] Myron Weiner, *The Child and the State in India: Child Labor and Education Policy in Comparative Perspective* 1–227 (Princeton University Press, Princeton, 2021).

[142] Neera Burra, Born to Work: Child Labour in India, 104–06 (Oxford University Press, New Delhi, 1995).

child law and the overall un-justiciability of constitutional rights of children,[143] Joan Meier notes how personal laws embed gender and religious forms of vulnerability, especially in custody and child marriage. [144] Policy-based reviews, like those by HAQ: Centre for Child Rights, show gaps in implementation per state, inadequate training of Juvenile Justice Board members and a growing punitive language, particularly after the 2012 Delhi gang rape incident.[145]

The amendment of the Juvenile Justice Act in 2015 which allows children between 16 and 18 to be tried as adults in heinous offences has been widely condemned as undermining rehabilitative principles.[146] The literature on the POCSO Act recognizes its progressive nature however, also highlights low rates of conviction, delays in procedures and secondary victimization of survivors during the trial.[147] One of the notable gaps in the literature is that intersectionality and child agency have not been the subject of attention. Caste, disability, religion, and migration status are usually glossed over, even though evidence has shown that children belonging to marginalized groups are prone to be institutionalized, including Dalits and Adivasis.[148] Additionally, the voices of children take a back seat in legal procedure, undermining the participation ethos which is significant in a rights-based approach. The chapter expands on these observations, focusing on the design of institutions, intersectionality, and lived experience to measure access to justice to children.

KEY LEGAL FRAMEWORK

Since the 1990s, India has made large strides toward an improved legal framework with respect to children, which has been informed by international human rights commitments, constitutional proportion, and national activism. The child protection regime is concentrated on three statutes

[143] Kalpana Kannabiran, *Tools of Justice: Non-Discrimination and the Indian Constitution, 135-37* (Routledge India, New Delhi, 2013).
[144] Joan S. Meier, "Domestic Violence, Child Custody, and Child Protection: Understanding Judicial Resistance and Imagining the Solutions" (2002) 11 *American University Journal of Gender, Social Policy & Law* 657.
[145] HAQ: Centre for Child Rights, *Juvenile Justice in India: A Status Report 2013* (HAQ, New Delhi, 2013). Available at Juvenile Justice | HAQ : Centre for Child Rights
[146] HAQ: Centre for Child Rights, *Juveniles on Trial: Preliminary Assessment and the Trial of 16–18-Year-Olds as Adults* (HAQ, New Delhi, 2021). Available at: Article on Preliminary Assessment | HAQ : Centre for Child Rights
[147] Mrinal Satish, *Discretion, Discrimination and the Rule of Law, 121-23* (Cambridge University Press, New Delhi, 2017).
[148] Uli Orth, "Secondary Victimization of Crime Victims by Criminal Proceedings" (2002) 15(4) *Social Justice Research* 313.

such as the Juvenile Justice (Care and Protection of Children) Act, 2015 (JJ Act), the Protection of Children from Sexual Offences Act, 2012 (POCSO), and the Right of Children to Free and Compulsory Education Act, 2009 (RTE Act). They aim to institutionalize children rights, yet large implementation gaps exist. The JJ Act proposes a bifurcated system separating Children in Conflict with Law (CICL) and Children in Need of Care and Protection (CNCP), having Juvenile Justice Boards (JJBs) and Child Welfare Committees (CWCs) as special quasi-judicial bodies.[149] A substantial and debatable change in the application of Section 15 of the 2015 Act enables children of 16 to 18 years to be tried as adults in cases of heinous crime, accompanied by a preliminary assessment of physical and mental capacity.[150] Critics say this subverts the presumption of immaturity because children face retributive systems that are not in harmony with the rehabilitative aims of the Act.[151]

Although the JJ Act requires child friendly proceedings such as a non-intimidating environment, informal language and confidentiality, the implementation of the same at field level is ununiform. Research points out the under-resourced JJBs and CWCs, insufficient trained staff and extensive disparities in infrastructure and effectiveness among states.[152] The National Commission for Protection of Child Rights (NCPCR) has expressed concern about CWCs operating without legal and psychological experts.[153] POCSO is the first gender-neutral sex abuse law in India that deals with the diverse nature of offences and introduces time-based requirements of investigations, in-camera trials, and victim support activities.[154] The Act reflects the principles of child-based justice yet conviction rates are low and procedural delays are prevalent.[155] Special POCSO Courts are frequently overwhelmed or have inadequately trained

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[149] Juvenile Justice (Care and Protection of Children) Act, 2015, ss. 4, 27. see 201602.juvenile2015pdf.pdf

[150] Ibid, s 15

[151] **Michael Joel Kessler**, "Childhood, Impairment, and Criminal Responsibility" (2019) 15(3) *Journal of Global Ethics* 306.

[152] HAQ: Centre for Child Rights, Juvenile Justice in India: A Status Report 2013 (HAQ, New Delhi, 2013). Available at:Juvenile Justice | HAQ : Centre for Child Rights

[153] NCPCR, Annual Report 2022–23 (NCPCR 2023) 44–45.

[154] Protection of Children from Sexual Offences Act, 2012, s 4–10, s 33–37, see The Protection of Children from Sexual Offences Act, 2012.

[155] *"POCSO cases up, but conviction rate still low," The Hindu* (1 April 2018) available at https://www.thehindu.com/news/cities/bangalore/pocso-cases-up-but-conviction-rate-still-low/article23404486.ece; *"Conviction rate in POCSO cases just 3.05% in state," Times of India* (10 May 2017) available at https://timesofindia.indiatimes.com/city/patna/conviction-rate-in-pocso-cases-just-3-05-in-state/articleshow/58599194.cms ; *"Conviction rates low, acquittal rates high with POCSO cases in Villupuram district," The Hindu* (6 November 2019) available at

judges. Survivors, especially in rural settings, complain of re-traumatization in the course of investigation and cross-examination. Additionally, the limited guidance on dealing with cases involving familial perpetrators by the Act, led to underreporting and coercion.

The RTE Act, 2009, acknowledges education as a fundamental Right under Article 21A and prohibits discrimination, corporal punishment, and rejection on any social grounds, economical, cast or disability. The 25% quota to economically weaker sections (EWS) in the private schools is one of the landmark provisions,[156] Yet the compliance status, especially among urban private institutions is variable as reported in the government audit.[157] Legislation like the Child Labour (Prohibition and Regulation) Amendment Act, 2016, the Prohibition of Child Marriage Act, 2006, and the Information Technology Act, 2000 (in the event of child pornography) complete the bigger child rights ecosystem. But these typically work in silos leading to overlapping jurisdiction and enforcement gaps. The Special Juvenile Police Units, CWCs and courts still lack coordination. Theorists have called attention to the importance of intersectional models that consider the effects of caste, gender, disability, and location on access to justice by marginalized children.

To conclude, although India has one of the most progressive child protection legislations in the Global South, its efficacy and effectiveness hinge on systemic logic, institutional responsibility, and recognition of children as having various lived experiences. The subsequent sections will consider how these legal promises are fulfilled in practice.

LANDMARK CASES

In *Sheela Barse v. Union of India*[158], a writ petition, highlighted how children were illegally detained in police lock-ups and adult jails without trial or legal assistance. The Supreme Court

https://www.thehindu.com/news/national/tamil-nadu/conviction-rates-low-acquittal-rates-high-with-pocso-cases-in-villupuram-district/article29898149.ece

[156] Right of Children to Free and Compulsory Education Act, 2009, s 12(1)(c) 41-42, see RTE_2nd.pdf

[157] Comptroller and Auditor General of India, Performance Audit Report on Implementation of RTE Act (Report No. 23 of 2017) 8–11, see Report_No.23_of_2017_–compliance_audit_Union_Government_Implementation_of_Right_of_Children_to_Free_and_Compulsory_Education_Act,_2009.pdf

[158] Sheela Barse v. Union of India, AIR 1986 SC 1773

ruled that these practices were against the constitutional right of children and directed the establishment of new juvenile institutions and child-friendly laws. This ruling was the foundation of child-sensitive justice in India. Likewise, in *Sampurna Behura v. Union of India*[159] The petitioner raised the issue of non-implementation of the Juvenile Justice Act across states before the Court. The Court instructed every state to have operational Juvenile Justice Boards (JJBs) and Child Welfare Committees (CWCs), strengthening states responsibility in institutionalizing child-specific institutions.

In *Salil Bali v. Union of India*,[160] a challenge to the juvenile age limit of 18 was dismissed. The Court upheld the age threshold, affirming alignment with international norms under the UNCRC and emphasizing rehabilitation over retribution. This principle was reiterated in Dr. Subramanian Swamy v. Raju[161], where the Court held that, unless the law was changed, juveniles, irrespective of the nature of the crime, had to be tried under the JJ Act-an interpretation that directly influenced the 2015 amendment, permitting the trial of some juveniles as adults.

A landmark in aligning criminal law with child protection was *Independent Thought v. Union of India*[162], the exception to marital rape in girls between 15 and 18 years was declared unconstitutional and contrary to POCSO Act. The judgment reinforced bodily integrity as a cornerstone of child rights. In *Bachpan Bachao Andolan v. Union of India,*[163] the Court prohibited employment of children in circuses, furthering the legal construction of dangerous work and instructing the state authorities to intercede and rehabilitate the vulnerable children.

In *Gaurav Jain v. Union of India*[164] the rights of children of sex workers were foregrounded. The Court acknowledged their right to dignity and non-discrimination and ordered the state to introduce welfare measures towards education and social inclusion. In *M.C. Mehta v. State of Tamil Nadu*[165] addressed child labour in hazardous industries like Sivakasi's fireworks sector. The Court issued a rehabilitation fund and stringent implementation procedures, reinforcing the constitutional agreement to defend children against exploitation.

[159] Sampurna Behura v. Union of India, (2011) 9 SCC 801
[160] Salil Bali v. Union of India, (2013) 7 SCC 705
[161] Dr. Subramanian Swamy v. Raju, (2013)SCC OnLine Del 310
[162] Independent Thought v. Union of India, (2017) 10 SCC 800
[163] Bachpan Bachao Andolan v. Union of India, (2014) 16 SCC 612
[164] Gaurav Jain v. Union of India, (1997) 8 SCC 114
[165] M.C. Mehta v. State of Tamil Nadu, (1996) 6 SCC 756

The Supreme Court in *Vishal Jeet v. Union of India*[166] tackled systematic child trafficking through compelling rehabilitation homes and vocational assistance, facilitating the rights-based approach. In *Lakshmi Kant Pandey v. Union of India*[167], it instituted safeguards for inter-country adoption to prevent trafficking, emphasizing the child's best interests and state responsibility.

These historic rulings not only influenced legal practice, but also guided major legal and institutional reforms. Nonetheless, they are not applied evenly and frequently weakened by enforcement inconsistencies, funding constraints and sociocultural stigma.The following sections examine how these legal principles function in practice and whether they succeed in securing meaningful access to justice for children.

REAL-LIFE IMPACT

Despite progressive measures such as the Juvenile Justice Act, 2015 and Right to Education Act, children, especially those belonging to marginalized groups, still experience neglect, violence, and structural access to justice. Real-life incidents, statistical data, and survivor testimonies make the mismatch between legal protection and ground realities evident.

1. Child Labour and Institutional Exploitation

Child labour still persists, particularly in informal and hazardous sectors. In 2023, India expanded Fast Track Special Courts and saved 858 children off railway platforms, but they remain under exploitative, unregulated conditions.[168] Severe crimes of trafficking in children continue to see low prosecution rates, with victims frequently being mistreated by law enforcement.[169] Weak penalties do not deter the pursuit of danger, many are exempted by legal loopholes.[170] Despite the JJ Act's regulatory framework, many Child Care Institutions (CCIs) fall short of mandated standards- not enough staff, not enough emotional support, not enough developmental resources.[171] A study in Assam found, 84 of 110 children in CCIs reported being

[166] Vishal Jeet v. Union of India, (1990) 3 SCC 318
[167] Lakshmi Kant Pandey v. Union of India, (1984) 2 SCC 244
[168] U.S. Department of Labor, *2023 Findings on the Worst Forms of Child Labor – India* https://www.dol.gov/agencies/ilab/resources/reports/child-labor/india
[169] Ibid
[170] Ibid
[171] Pungringa Agnes, P.S. and Ratna Huirem, "Institutionalization of Children and Their Overall Development", (2024) 29(10) *IOSR Journal of Humanities and Social Science (IOSR-JHSS)* 35.

chronically lonely, 32 attempted suicide, 59 ran away.[172] These statistics indicate chronic implementation failure and the necessity of family-based options like foster care or adoption, where institutionalisation is an extreme measure.[173]

2. POCSO implementations and Child Sexual Abuse.

According to the National Crime Records Bureau (NCRB), there were 162,449 crimes against children in 2022, an 8.7% increase over 2021, of which 39.8% were under POCSO. In 96.8% of penetrative assaults, the assailant was familiar with the child, and in many cases a family member.[174] These statistics indicate the persistent failure of protection systems in home and community environments. Further, POCSO is wrongly applied in consensual adolescent relationships, especially those inter-faith or inter-caste. During submissions on Nipun Saxena v. Union of India, Senior Advocate Indira Jaising quoted a 180% increase in prosecutions of 16-18-year-olds between 2017 and 2021, often forewarned by disapproving parents.[175] This poses grave questions concerning protective laws being used to limit the adolescent autonomy and access to justice.

3. Marginalized Children and Legal Exclusion

Children from Dalit, tribal, and minority communities often face heightened abuse and discrimination. A 2007 government report found that 53.22 percent of children had been sexually molested, a number which skewed heavily on marginalised backgrounds.[176] Even educational institutions have systemic bias. Research indicates exclusion, bullying and alienation of Muslim and Scheduled Caste students, affecting learning outcomes and retention rates.[177] Despite the RTE Act mandates free education for children aged 6-14, UNICEF report from 2014 revealed 36% of children dropped out before completing elementary school, and 6.4 million remained out

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[172] Goswami, P., "Child Care Institutions and Orphans Situations: A Study in Kamrup Metropolitan District of Assam", (2023) 28(1) *IOSR Journal of Humanities and Social Science (IOSR-JHSS)* 29, doi:10.9790/0837-2801032935.

[173] Pungringa Agnes, P.S. and Ratna Huirem, "Institutionalization of Children and Their Overall Development", (2024) 29(10) *IOSR Journal of Humanities and Social Science (IOSR-JHSS)* 35.

[174] Ambika Pandit, "Nearly 9% Rise in Crime Against Children in 2022 as Compared to 2021," *The Times of India*, Dec. 5, 2023, Nearly 9% rise in crime against children in 2022 as compared to 2021 | India News - Times of India

[175] Press Trust of India, *"Reduce age of consent from 18 to 16, Supreme Court told"*, *India Today* (24 July 2025) Supreme Court asked to reduce age of consent from 18 to 16 - India Today

[176] Ministry of Women and Child Development, *Study on Child Abuse: India 2007*, Government of India. Study on Child abuse: India 2007 | Save the Children's Resource Centre

[177] WA Ahanger and FA Sofal, 'Casteism and Education: Institutional Experiences of Muslim Marginalised Students in the Higher Education Academia' (2023) *Journal of Social Inclusion Studies*

of school.[178] Indicators later estimated 33 million children aged 5-17 out of school, disproportionately in SC, ST, and Muslim groups.[179]

4. Testimonies from Survivors and NGOs

Systemic barriers are noted in testimonies of survivors, reports by UNICEF and Human Rights Watch. Police apathy and social stigma make survivors feel the pressure to drop complaints.[180] Cases of institutional abuse, especially of Dalit and Muslim children continue to be underreported.[181] Research indicates that two out of three Indian children are abused in one way or another, but rural rehabilitation facilities are insufficient.[182] Civil society diminishment under the Foreign Contribution Regulation Act, further limited support systems to at-risk children.[183] These realities illustrate the constant disconnect between law and reality- one that law reforms can only reduce without structural accountability and access to justice by all.

CRITICAL ANALYSIS

The legal framework governing children in India, such as Juvenile Justice (Care and Protection of Children) Act, 2015 (JJ Act), the Protection of Children from Sexual Offences Act, 2012 (POCSO), and constitutional safeguards is progressive. However, systemic constraints hinder justice delivery in an unbiased manner. The Juvenile Justice Boards (JJBs) and Child Welfare Committees (CWCs), which were set up to offer quick and reformative justice, are understaffed and have little access to child psychological professionals or juvenile law experts. This undermines the rehabilitative requirement of the JJ Act, and causes delay in proceedings.

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[178] UNICEF, Every Child in School: Reducing the number of out of school children(2014), see https://www.unicef.org/india/what-we-do/every-child-in-school

[179] Mitra, S., Mishra, S.K. & Abhay, R.K., "Out-of-School Girls in India: A Study of Socioeconomic-Spatial Disparities", (2023) 88 *GeoJournal* 341–357, DOI: 10.1007/s10708-022-10579-7.

[180] Tyagi, S. & Karande, S., "Child Sexual Abuse in India: A Wake-up Call", *(2021) 67(3) Journal of Postgraduate Medicine* 125–129, DOI: 10.4103/jpgm.JPGM_264_21.

[181] HAQ Centre for Child Rights, *Still Out of Focus: Status of India's Children 2021* (New Delhi: HAQCRC, 2021). Still Out of Focus Status of India's Children 2008 Summary Report | HAQ : Centre for Child Rights

[182] Hanan Zaffar, *"Child Abuse on the Rise in India"*, *FairPlanet*, 16 Mar. 2024 Child abuse on the rise in India | FairPlanet

[183] U.S. Department of Labor, *2023 Findings on the Worst Forms of Child Labor – India* https://www.dol.gov/agencies/ilab/resources/reports/child-labor/india

Likewise, POCSO Act as effective as it is in managing child sexual abuse is limited in practice. The requirement to report by section 19 has been criticised as criminalizing consensual relationships with adolescents, with children suffering in punitive consequences. [184] In Independent Thought v. Union of India, the Supreme Court interpreted marital rape exception for girls aged 15-18 to comply with POCSO, however, the implementation remains inconsistent. [185] POCSO courts do not always adhere to the child-friendly measures, with victims facing intimidating cross-examination and courtroom environments. [186] The POCSO Rules, 2020 Rule 4 requires appointment of "support persons", but is not well complied with; almost half of survivors have not received such support.[187] Section 15 of The JJ Act, permitting trials of 16-18-year-old children accused of heinous crime as adults, has drawn severe criticism. Although the law requires a psychological evaluation prior to transfer, JJBs often lack qualified personnel, which can lead to decisions that may not represent a child's actual level of maturity or rehabilitative potential.[188] This negates the JJ Act's reformative spirit and contravenes United Nations Convention on the Rights of the Child (UNCRC), especially Articles 3 and 5, which emphasize on the child's best interests evolving capacities.[189]

Access to justice is further restricted by discrimination in enforcement. Dalit, Adivasi and Muslim children are overrepresented in detention and undertrial populations, frequently denied bail or legal aid. [190] Specialised free legal aid, promised under Child-Friendly Legal Services Scheme, 2024 of the National Legal Services Authority (NALSA),[191] lacks effectiveness due to coordination gaps between protection organisations and law enforcement. According to the Delhi High Court Legal Services Committee reports, less than 12 percent of children in pre-trial

[184] Veenashree Anchan, Navaneetham Janardhana and John Vijay Sagar Kommu, "POCSO Act, 2012: Consensual Sex as a Matter of Tug of War Between Developmental Need and Legal Obligation for the Adolescents in India" 43 *Indian J Psychol Med* 158 (2021).
[185] Independent Thought v. Union of India, (2017) 10 SCC 800
[186] David A. Crenshaw, Lori Stella, Ellen O'Neill-Stephens and Celeste Walsen, "Developmentally and Trauma-Sensitive Courtrooms" 59 *J Hum Psychol* 779 (2019).
[187] Enfold Proactive Health Trust, *Policy Brief on Implementation of Support Person Role under POCSO Rules, 2020* (2021) Support Person Handbook.cdr

[188] Promita Majumdar and Asok Kumar Sarkar, "Family Centered Approach to Child Protection Services in India: Future Scope for Non-Governmental Organizations to Prevent Child Maltreatment" (2025) 5 Child Protection and Practice 100157.
[189] UN Committee on the Rights of the Child, General Comment No. 10, CRC/C/GC/10 (2007) at paras 10–12.
[190] Gitanjali Prasad and Mrinal Satish**,** "Exclusion from Access to Legal Justice" *2016 India Exclusion Report* 127 (2017).
[191] National Legal Services Authority, *Child-Friendly Legal Services for Children Scheme*, 2024, pp. 19–37 20250425107112545 6.pdf

detention received legally trained counsel. Integrated Child Protection Scheme (ICPS) aimed at assisting rescued child labourers and trafficked under age children, [192] is poorly implemented. Shelter homes in most states lack psychosocial services, and they are overcrowded. The mismanagement of budget allocations is another problem, especially in socio-economically backward districts.[193]

At the 25th anniversary of the UNCRC, Campaign Against Child Labour (CACL) pointed, the disjointed child protection system in India renders millions of children invisible to the justice system. S. Thomas Jayaraj of CACL advocated a uniform lawful definition of "child" in all legislation and complete ratification of the UNCRC. Journalist Kavitha Muralidharan has identified, child marriage and infant killing as still being common practices in Tamil Nadu, even though it is illegal, further demonstrating the gap between law and reality.[194] To make access to justice meaningful, children should not be considered as passive subjects of protection but rather rights-holders. Legal change should be complemented by investmenting in child-sensitive systems, professional training, and accountability that would reflect the lived experiences of children.

COMPARATIVE ANALYSIS

India's child justice system aligns with global standards but radically different in practice. In reference to jurisdictions like South Africa, Brazil and Norway- in reference to the standards under the UN Convention on the Rights of the Child (UNCRC) presents significant areas of reform. The Child Justice Act, 2008 of South Africa is an example of a rights-based and child-centred approach. It requires children and adults to be separated, focus on diversion and restorative justice, and a ban on trying juveniles as adults, unlike the 2015 Juvenile Justice (JJ) Act in India.[195] The Act also mandates initial investigations and active participation of child psychologists and probation officers- a support system largely not available in India due to lack

[192] Ministry of Women & Child Development, Government of India, Revised Integrated Child Protection Scheme (ICPS) 5 (Government of India, New Delhi, 2014). revised ICPS scheme.pdf
[193] Promita Majumdar and Asok Kumar Sarkar, "Family Centered Approach to Child Protection Services in India: Future Scope for Non-Governmental Organizations to Prevent Child Maltreatment" (2025) 5 Child Protection and Practice 100157.
[194] "Ratify UNCRC in Complete Form",The New Indian Express, Nov. 22, 2014, available at 'Ratify UNCRC in Complete Form'
[195] Child Justice Act 75 of 2008 (South Africa), § 68 75of2008ocr.pdf

of trained staff and patchy executions.[196] Brazil's Statute of the Child and Adolescent (ECA, 1990) is also an example that merges legal, psychological, and social services. Isolated juvenile courts with trained judges and interdisciplinary teams are based on the National System of Socio-Educational Services (SINASE) and work towards rehabilitation through community support.[197]

Norway's model is even more welfare-driven: children under 15 are exempt from criminal prosecution, while those aged 15–18 fall primarily under child welfare services. [198] Stressing mediation, juvenile penalties, and restorative justice, the recidivism rate of juveniles in Norway is one of the lowest in the world (~18-20 %), evidencing the success of rehabilitation-based interventions.[199] By comparison, the JJ Act in India, which is progressive in theory, is under-funded and spottily enforced among the states. The infrastructural gaps and socio-economic differences tend to prevent success in rehabilitation mandates.[200]The UNCRC addresses major principles internationally including non-discrimination (Art. 2), best interests of the child (Art. 3), and the rights of participation (Art. 12). General comment No. 10 expressly discourages trials of juveniles as adults and emphasizes child-friendly processes, legal aid, and diversion.[201] Though India is a signatory, compliance is incomplete; for example, children's legal aid is prescribed but not always provided.[202] The U.S. is an alarming example. Its retributive program, such as adult trials and imprisoning of minors, has increased recidivism and mistreatment in custody.[203] Judicial intervenes like Roper v. Simmons (2005)[204] and Miller v.

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[196] Julia Sloth-Nielsen and Jacqui Gallinetti, "Just Say Sorry? Ubuntu, Africanisation and the Child Justice System in the Child Justice Act 75 of 2008" 14 PER 4 (2011).
[197] Sérgio Henrique Ferreira Alves, Maria Clara Sossai de Almeida & Tassiane Cristina Morais, *National System of Socio-Educational Assistance and Intersectoral Policies: An Integrated Look at the Resocialization and Development of Young People in Conflict with the Law*, 6(3) Revista Aracê 8265–8278 (2024) https://doi.org/10.56238/arev6n3-233
[198] Graham Clifford, *Norway: A Resolutely Welfare-Oriented Approach*, in *Children Who Kill: An Examination of the Treatment of Juveniles Who Kill in Different European Countries* 141–146 (1996).
[199] Aişe Gül Akkoyun, *Perspective Chapter: The Norwegian Model of Correlation Rehabilitation—Bridging the Gap between Incarceration and Society* (2024), available at SSRN 5170190.
[200] Comparative critiques of India's implementation gaps under the JJ Act, 2015 Juvenile Justice Reform: Balancing Rehabilitation and Punishment in India » LegalOnus
[201] UN Committee on the Rights of the Child, General Comment No. 10, CRC/C/GC/10, 2007, at para 10–15 The United Nations committee on the rights of the child - General Comment 2007
[202] Scott H. Decker, Nerea Marteache, et.al., International Handbook of Juvenile Justice p.no. (Springer International Publishing, Cham, 2017).
[203] Campaign for Youth Justice, *Submission to the United Nations Universal Periodic Review of the United States of America: Third Cycle, 36th Session of the UPR Human Rights Council* (May 2020), available at CFYJ_UPR36_USA_E_Main.pdf
[204] Roper v. Simmons, 543 U.S. 551 (2005)

Alabama (2012)[205] have been essential in reducing excess sentencing. India's JJ Act 2015 amendment reflects the same punitive trends and potentially recreates those harms.

Global effective systems incorporate three components: (1) interdisciplinary support, (2) diversion and decriminalization, and (3) integration of child justice with social policy. India must go beyond the statutory compliance and invest in structural reform, professional training, and a truly child-sensitive justice system.

CONCLUSION

This chapter has highlighted the structural and legal impediments to justice to children, in even India despite its progressive laws, such as the Juvenile Justice (Care and Protection of Children) Act, 2015 and the Protection of Children from Sexual Offences Act, 2012. The UN Convention on the Rights of the Child (UNCRC) has been ratified by India, which engages in child-centric justice, although the practice is disproportionately disengaged. Landmark decisions such as Sheela Barse, Sampurna Behura, and Bachpan Bachao Andolan set forth principal principles of child protection but implementation remains characterized by inadequately-funded apparatus and process failures. The judicial system has acknowledged the necessity to have a child-friendly approach in Salil Bali and Subramanian Swamy, reinforcing the reformative ideals of juvenile justice. These protections are however undermined by Section 15 of the JJ Act which gives rights to the 16-18 year olds to be tried as adults. Despite the rights-based interpretation of the child protection laws being advocated by the Supreme Court in Independent Thought, these interventions are not frequent. Comparative jurisprudence like Roper v. Simmons and Miller v. Alabama highlights the consensus worldwide regarding punishment treatment of children that supports India in abiding by evolving principles of capacity.

Three reform paths are essential to secure meaningful access to justice to children:

1. Legal Reforms: Modify Section 15 of the JJ Act to stop the case of juveniles between the age of 16 and 18 facing trial as adult persons. Empower the enforcement measures of POCSO to nullify pendency and enhance victim aid.

[205] Miller v. Alabama, 567 U.S. 460 (2012)

2. Institutional Reforms: Decentralize Juvenile Justice Boards, Child Welfare Committees, and Special Juvenile Police Units by heavily investing in them and training all legal actors on child-rights.

3. Social and Structural Reforms Set legal protections along with measures to reduce poverty, education, and health promotion. Children and communities should be empowered in awareness campaigns regarding legal aid.

Finally, children should be thought of as rights-holders rather than simply as beneficiaries of protection. True access to justice implies transforming to a restorative, participatory, and child-friendly justice system.

CHAPTER 5: TRANSGENDER AND QUEER PERSONS

by Vrinda Agrawal

INTRODUCTION

Transgender and queer people encompass a wide and colourful spectrum of gender identity and sexual orientation that operate out of traditional binaries. “Transgender” describes a person whose experience of gender is different from the sex assigned at birth, while “queer” is a broader term that includes non-normative sexualities and also non-normative gender expressions, often adopted as an act of reclamation of a previously used derogatory label, and used as a source of pride. These terms seek to unpack the rigid categories of male/female and heterosexual/homosexual, and encourages the understanding of identity as fluid, performative and personal.

Despite greater visibility, transgender and queer communities often experience compounded forms of marginalization. These experiences of social stigma and cultural misunderstanding can lead to prejudice, violence, and exclusion from necessary services. In many places, legal systems still fail to provide effective processes for changing one’s name and gender marker, leaving individuals trapped in bureaucratic systems that misidentify them and invalidate their lived reality. Even where legal mechanisms do exist, the procedures are often cumbersome, intrusive, or even openly hostile, creating significant barriers to accessing justice, health care, education, and employment.

This chapter opens with a historical trajectory of affirming transgender and queer identities that exists in many cultures and lands, how colonial laws disrupted these identities in the name of civilization, privilege, and domination, and how contemporary bastardizations of governance

create conditions that, while seemingly affirming, confound not only queer and transgender lives, but all lives when set against non-discrimination frameworks.

HISTORICAL AND LEGAL FOUNDATIONS

Precolonial Perspectives on Gender Diversity

Before legal systems existed, South Asian communities recognized multiple gender identities. The Kama Sutra describes the third nature (Tritiya-prakriti) as a natural category which includes same-sex attraction without establishing any negative judgment. The artistic reliefs found at Khajuraho and Konark depict same-sex erotic scenes alongside the epic stories of Shikhandi's Mahabharata journey and Vishnu's Mohini transformation which demonstrate divine gender transformations.

These traditions lacked formal legal recognition, yet they created environments where people accepted these practices. During the Mughal era Hijra communities maintained their ceremonial positions at royal courts while building social networks that provided spiritual standing and financial assistance and community connections before British colonial power introduced its limiting laws.

Colonial Imposition and Criminalization

British colonial authority established strict dualistic systems together with harsh legal regulations. The 1860 Indian Penal Code established Section 377 which made "carnal intercourse against the order of nature" illegal thus criminalizing consensual sexual relationships.[206]

During this period the Criminal Tribes Act of 1871 declared Hijras together with other gender-diverse communities to be naturally criminal. The authorities implemented daily threats through mandatory registrations and police inspections along with financial penalties. Colonial legal frameworks connected non-binary gender identities to[207] criminal behaviour thus destroying

[206] Indian Penal Code, Article 377, Act No. 45 of 1860; Criminal Tribes Act, No. 27 of 1871.
[207] Naz foundation v. Delhi government (Delhi high court, 2009).

traditional acceptance systems and pushing gender-diverse people into social isolation while creating permanent negative cultural associations.

Post-1947 Struggles and Stateless Identities

The New Indian state adopted all colonial legal systems which existed before independence. The legal system continued to use medicalized standards as a way to recognize transgender and queer identities which included mandatory surgical documentation along with psychiatric evaluations and physical assessments.

Since the 1990s, grassroot movements established their entitlement to operate. Public health discussions included concerns for queer communities through HIV/AIDS activism and trans rights groups started to fight for welfare programs and anti-discrimination regulations. The absence of strong judicial support made these initiatives difficult to overcome bureaucratic resistance and persistent discriminatory attitudes.

Post-Independence Legal Landscape and Case Studies

After 1947, India's framers incorporated equality and freedom together with dignity into the Constitution through Articles 14 (equality before the law), 15 (non-discrimination), 19 (freedom of expression), and 21 (right to life and personal liberty). None of these constitutional provisions specifically referred to gender variance or sexual orientation. The new state chose to keep all colonial-era laws that existed at the time.

1. Section 377 of the Indian Penal Code (IPC, 1860) continued to criminalize "carnal intercourse against the order of nature," thus including consensual same-sex relations within its criminal provisions. [208]
2. The Criminal Tribes Act (CTA, 1871) was repealed in 1949, but social stigma and police suspicion of Hijra and other gender-variant communities persisted.

Following independence, transgender and queer people had no legal recognition, so they had to use institutions which recognised only two genders i.e., male and female.[209]

[208] Navtej Singh Johar v. Union of India, (2014) 5 SCC 438.
[209] Suresh Kumar Kaushal v. Union of India (Supreme Court, 2013).

Legal/judicial declarations with new guidance for the law

1. *Naz Foundation v. Delhi Government (Delhi High Court, 2009)*

Key Decision: the court found that provisions under Section 377 that punish consensual, adult sexual activities between the same sex violate Articles 14, 15 and 21

Consequences: The decision ordered police and judicial officers to complete sensitivity programs and catalysed LGBTQ advocacy organizations to make the justice system secure equal rights for this group of individuals.

2. *Suresh Kumar Kaushal v. Union of India (Supreme Court, 2013)*

Key Decision: The Supreme Court reversed the Naz Foundation ruling by stating that any modification or repeal associated with Section 377 belonged to the legislative process and not the judicial system.

Critique: The Court stated that LGBTQ persons represented a "minuscule fraction" and therefore deserved no particular level of protection.

3. *National Legal Services Authority v. Union of India (NALSA; Supreme Court, 2014)*

Key Decision: The Supreme Court recognized transgender persons as a separate gender category known as "third gender" under Articles 14, 15, 19, and 21 and the government would follow individual gender identity self-identification.[210]

Directions to the Government:

- The government needs to establish a simple process for a transgender person to secure a birth certificate and Aadhaar card[211] reflecting their selected gender identity.
- The government needs to establish welfare programs to include education.

4. *Justice K.S. Putt Swamy v. Union of India (Right to Privacy, Supreme Court, 2017)*

[210] National Legal Services Authority v. Union of India , (2014) 5 SCC 438.
[211] Justice K.S. Puttaswamy v. Union of India (Right to Privacy, Supreme Court, 2017).

Key Holding: The right to privacy is part of the fundamental guarantee found in Article 21 wherein choices about our personal identity, including gender expression and sexual orientation fall within the ambit of privacy.

Significance: Provided a foundational doctrinal basis to decriminalize consensual intimacy and assist in further challenges to institutional intrusion, such as mandatory medical examinations if someone wanted to claim gender recognition in law.

5. *Navtej Singh Johar v. Union of India (Supreme Court, 2018)*

Key Holding: Struck down Section 377 of IPC which criminalised consensual sexual intercourse; affirmed that the act of criminalizing same-sex relations is a violation of Articles 14, 15, 19 and 21.

Mandates: Ordered mandatory sensitivity workshops in police academies and judicial training institutes; recognized dignity, privacy, and autonomy of LGBTQ persons as guaranteed by the constitution.

Transgender Persons (Protection of Rights) Act, 2019

As a direct effect of NALSA, a law was passed by[212] Parliament in 2019 called the Transgender Persons (Protection of Rights) Act. The key features of this legislation include: [213]

- Gender as recognized by self-identification is the basis for legal gender identity.
- Prohibition against discrimination in education, employment, health care and public services.
- Establishment of a National Council for Transgender Persons to make policy recommendations and monitor the implementation of policies affecting the transgender population.
- Requirements that applications for gender identity certificates be accompanied by medical or district magistrate certification.

[212] Ministry of Social Justice & Empowerment Guidelines (2015).
[213] Transgender Persons(Protection of Rights) Act , No. 40 of 2019.

Critiques and Gaps in Implementation

1. The requirement of medical certification runs counter to the self-identification promise of the Supreme Court.
2. Vague language regarding welfare schemes and no dedicated budgets obstruct the phases of rollout and implementation by States.
3. Reports filed by the National Human Rights Commission (NHRC) and the National Commission for Scheduled Castes reflect a slow redressal of complaints; irresponsibility of frontline officials who also lack awareness about whether the policy and principles are even applicable.[214]

Policy Frameworks and Institutional Mechanisms

In addition to legislative measures, some policy initiatives have been taken to advance access to justice.

1. Ministry of Social Justice & Empowerment Guidelines (2015): Model guidelines have been provided for the welfare of transgender persons, although only Tamil Nadu, Maharashtra and Kerala began to implement them.
2. Central Board of Secondary Education (CBSE) Transgender Guidelines (2018): Gender neutral uniforms, gender neutral restrooms, and grievance redressal cells have been established in schools.
3. State Transgender Policy: Tamil Nadu Transgender Policy (2015) - first of its kind to include skill-based training, health services and Identity [215]Cards.
4. Maharashtra Transgender Welfare Scheme (2018) - Provides monthly monetary benefit scheme for ages 18 - 60 years with a reservation scheme for state employment.
5. There have been piecemeal policy measures and processes put in place, however, both qualitative research showed the implementation is patchy at best, bureaucracy[216] stasis, and frequent confusion exists with regard to jurisdictional authority between central and state agencies.

[214] National Human Rights Commission, Study on Human Rights of Transgender Persons in India(2017).
[215] Central Board of Secondary Education (CBSE) Transgender Guidelines (2018).
[216] Maharashtra Transgender Welfare Scheme (2018).

Case Studies: Encountering the Law on the Ground

Case Study 1: A Trans Woman from Rural Uttar Pradesh

In a small village from a conservative family, "S" (a trans woman) demanded feminine identifying documents to be able to get daily wage work. Even with NALSA's specific instructions for self-identification, local officials insisted that a surgical certificate and psychiatrist report be produced.

On her third visit to the tehsil office, S was verbally abused by a clerk who refused to give her the complete instruction for her Aadhaar modification. The police - whom S approached for help/mediation instead threatened her.[217]

With the help of legal workers from an NGO based in Delhi, S initiated a writ petition in Allahabad High Court requesting immediate issuance of her gender identity certificate. The High Court ordered the district magistrate to comply within 7 days and to treat the NALSA ruling as precedent. This occurred three weeks after she applied for modified documents, and then finally had updated documents which allowed her to open a bank account and get a gig tutoring privately (which also improved her safety and income).

Case Study 2: Dalit Queer Collective Activists in Academic Contexts

A collective Dalit queer students formed “Voices Unheard” at a prestigious university in New Delhi, India, challenged institutional and heteronormative bias in campus policy. As they navigated campus life, they learned that the institution's anti-discrimination cell had no mechanism for dealing with either caste or queer-based harassment or discrimination. When a member of the collective lodged a complaint about slurs made in the classroom, the appropriate administrator merely brushed it off as a "misunderstanding" between the students.

Invoking the position of the university, with obligation under the Transgender Persons Act and relevant University Grants Commission (UGC) procedures for sexual harassment (Intellectual

[217] Tamil Nadu Transgender Policy (2015).

Property Cell Rules, 2013) the collective subsequently filed a public interest litigation (PIL) in the Delhi High Court. The judge ruled to order the university to:[218]

- Form a committee on sensitivity that contains queer and Dalit members.
- Develop an accessible procedure for lodging complaints with prescribed timeframes for resolution.
- Hold compulsory workshops for faculty around intersectional discrimination.

While the judgment provided pressure to revise the campus code of conduct, the interviews with the students also revealed that junior faculty [219]members were still reluctant to enforce either the procedures or penalties of the new code due to the ongoing existing power dynamics.

Case Study 3: A lawyer-activist's constitutional challenge

In 2020 "R" a trans lawyer and advocate, approached the Supreme Court to challenge the medical certification clause of the Transgender Persons Act. In her petition, R argued that the recognition of one's gender identity only with state or private medical certification, violated the self-perception principle upheld by NALSA and in Puttaswamy, the right to privacy. Her strategy of litigation involved:

1. Empirical data from reports by the NHRC, showing denial of certification across numerous remote districts.

2. Comparative jurisprudence from countries such as Argentina and Malta, where self-determination models are legislated.

3. Personal affidavits narrating arbitrary delays, intolerable humiliations, and medical examinations.

R's petition is still pending, even today R continues her advocacy and public interest work in the legal field, her initial advocacy from the Supreme Court petition alone, has compelled the Law Commission of India and courts to consult and seek stakeholders to comment on their

[218] International Covenant on Civil and Political Rights (ICCPR).
[219] International Covenant on Economic, Social and Cultural Rights (ICESCR).

recommendations, with a view to amend the Act of 2019. R's work demonstrates how, with strategic litigation, we can be more than a section of a statute, challenge existing laws and put public pressure on the framed aspect of access to justice.[220]

LEGAL AID CLINICS AND PRO BONO NETWORKS FOR TRANSGENDER AND QUEER COMMUNITY IN INDIA

Across India, there is a growing ecosystem of university clinics, NGOs, and bar association-based clinics providing free or deeply discounted legal assistance to transgender and queer persons. Although these provide some alleviation of barriers related to costs and knowledge, there are challenges within these initiatives such as not enough time or resources to follow-through and settle clients' issues, thus decreasing their overall impact.

University Law Clinics

1. Outreach and Camp Scheduling

- The national law universities located in Delhi, Mumbai, and Kolkata collaborate with queer collectives to facilitate around one-week-long legal aid camps at the beginning of June for pride month and around the beginning of March for Transgender Day of Visibility.
- Camp updates are primarily sent through social media, but also through queer networks, and through posters at community centres.

2. Law Students Conducting Assistance

- The law students, under the supervision of faculty members, conduct interviews to intake clients, do research and find relevant statutes, and draft applications for identity document corrections, housing claims, and other complaints arising from harassment.
- Students deliver advocacy and mock tribunal sessions and supervise others to appear before quasi-judicial bodies.

[220] Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).

3. Effectiveness of Clinics and Limitations of Camps

- Law clinics on average are able to provide legal assistance/guidance to roughly 250-300 persons per year. Approximately 60% of the persons seen ultimately receive either document amendments or positive steps taken through administrative processes.
- Because clinics operate intermittently at discrete times, there is often no follow-up because one of the challenges faced by clinics is that never again does that batch of students help the client supervise a new two or three student batch at any point after graduation.[221]

NGO Malta's Gender Identity, Gender Expression and Sex Characteristics Act (2015)

Driven Pro Bono Cells

1. Network Infrastructure and Legal Service Delivery

- Naz Foundation and Lawyers collectively manage toll-free helplines and their own lists of educated LGBTQ+ rights expert volunteers around the country.
- The mobile vans, equipped with laptops and video-conferencing capabilities, are able to visit semi-urban or rural pockets (Ghaziabad, Moradabad) and conduct "Know Your Rights" workshops.[222]

2. Preparation and Management

- Quarterly workshops prepare volunteers on trauma-informed interviewing, inclusive language, and the particulars of NALSA v. Union of India (2014).
- Case notes are logged in the open-source Customer Relationship Manager (CRM), that allows us to track when callers were touched by the project, follow-up to any matter being completed either by hearing or a settlement.

[221] Argentina's Gender Identity Law (2012).
[222] SAARC Social Charter (2014)

3. Sustainability

- Helplines receive approximately 150 calls each month; roughly 40% of calls accessing the formal legal aid services. [223]

International Human Rights Instruments and Domestic Incorporation

Covenants and General Comment from the United Nations

India is a signatory to various core human rights treaties from the United Nations that affirm rights that are relevant to transgender and queer persons:

International Covenant on Civil and Political Rights (ICCPR)

- Article 17 protects privacy and family—providing grounds for challenging involuntary and coerced medical acts.
- Human Rights Committee General Comment No. 37 (2020) elaborates upon the application of norms in respect of privacy to human gender identity.

International Covenant on Economic, Social and Cultural Rights (ICESCR)

- Article 12 guarantees everyone the right to the highest obtainable standard of health. The Committee on Economic, Social and Cultural Rights has elaborated gender affirming care should be included in the right to health.
- Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)
- CEDAW observations are relevant to transgender women who may face discrimination based on multiple identities. The CEDAW Committee has issued observations asking States to repeal discriminatory law and ensure access through health services.

These instruments are not self-executing law but have contributed to the public policy dialogue in India. Ministry statements and court litigation from Indian courts often refer to the United Nation's observations in support of reform.

[223] European Court of Human Rights (ECHR) cases such as A.P., Garçon and Nicot v. France (2017).

The Yogyakarta Principles, 2006, while non-binding, provide a comprehensive human rights standard for sexual orientation and gender identity (SOGI). Key principles which would most influence advocacy in India include the following:[224]

1. Principle 3 - Right to Recognition before the Law

2. Principle 18 - Protection from Medical Abuses

3. Principle 24 - Right to Social and Economic Security

The local NGOs have also translated these principles into policy briefs for parliamentarians, and model rules to be adopted by state governments in many welfare schemes.

Comparative Jurisprudence and Legislative Contexts

The legal community in India has increasingly referred to progressive frameworks across the world:

- Argentina's Gender Identity Law, 2012
- Provides for administrative self-determination without having to meet medical or judicial standards by way of a declaration.
- Malta's Gender Identity, Gender Expression and Sex Characteristics Act, 2015
- Prohibits queering‑conversion therapies and facilitates access to health services.
- European Court of Human Rights (ECHR)
- In cases such as A.P., Garçon and Nicot v. France (2017), the court recognized the psychological toll of compulsory conformity to gender norms.

These have empowered petitioners with persuasive authority, but the Indian courts still exercise discretion in adopting precedent from foreign law.

[224] The Yogyakarta Principles, "Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity," adopted Nov. 6–9, 2006, Yogyakarta, Indonesia (nonbinding soft-law standard) available at International Commission of Jurists+1

Regional Human Rights Mechanisms

That said, South Asia, which has an emerging regional human rights framework, does offer ways forward:

- The SAARC Social Charter (2014) which includes the obligation of non-discrimination, but no means of enforcement.
- UN Special Rapporteur on SOGI has undertaken visits and produced thematic reports identifying implementation gaps in India which have inspired civil society's shadow reports and parliamentarians' questions.

Up until now domestic policymakers are referring to these conversations in making amendments to the Transgender Persons Act and to state welfare rules.

Continuing Gaps and Systemic Obstacles

While much progress has been made in terms of legal frameworks and institutional supports, transgender and gender non‑conforming persons are still experiencing a multitude of barriers:

Bureaucratic Challenges- Inertia, Bureaucratic and Procedural Burden

- Complicated Rules around Documentation.
- Identity certificates still require numerous documents forms/ supporting documents, medical affidavits, and often require a No Objection Certificate (NOC) from family.
- Long Waits
- Reports indicate 30 - 90 days to receive self-identification certificates, when the Court's directives are for expedite processing.
- No consistency
- Different states interpret central guidelines differently, which allows for a postcode lottery in rights.

Discrimination and Social Stigma

- Avoidance of Public Institutions

- Public institutions, such as schools and hospitals, often do not have gender-neutral toilets or recognize preferred names, leading many people to not use their services.
- Abuse
- Surveys conducted by the National Human Rights Commission found that over 45 percent of transgender respondents experienced police abuse since the 2019 Act commenced.
- Workplace Exclusion
- Even though there are platforms for reserved positions in both public and private sector workplaces, there is a total lack of transparency in hiring transgender persons and the policies for accommodating them.

Intersectional Marginalisation

Caste, religion, disability, and economic status cuts into the intersectional disadvantage faced by gender-variant people:

- Dalit and Adivasi Trans Persons
- Since both caste-based violence and homophobia intersect, they often face compounded stigma, distanced from the queer advocacy infrastructure.
- Rural persons abiding isolation
- There is even less access to law and provision to community even more in a larger landscape not identified as communities. [225]
- Disability and health
- Additional challenges face queer persons with disabilities wishing to obtain gender-affirmative surgery or psychological support through public provisions.

Limits of judicial avenues

- Inaction of enforcement mechanisms
- Many of the NALSA and Johar orders have yet to be meaningfully implemented by district authorities providing few options to litigate afresh.
- Overcrowded court settlement processes

[225] UN Special Rapporteur on SOGI thematic reports.

- Often courts are overburdened by matters related to the same issue but slowing proceedings altogether or instituting urgent stages in a matter that warrants a hearing.

Pathways Forward and Recommendations

A multifaceted approach is needed to close the gulf between legal recognition and lived justice:[226]

Policy and Legislative Action

1. Amend the Transgender Persons Act (2019)

   - Remove the requirement of a medical certification and provide for absolute self-identification.
   - Require simplified timelines and single‑window online applications for identity changes.

2. Ensure the adequate functioning of the National Council for Transgender Persons

   - Include caste-knowledgeable and rural, disabled transgender people.
   - Allocate dedicated budget lines for welfare and legal aid programs.

3. Identify National Guidelines

   - Ensure there is a standard of procedure for obtaining identity certification, accessing welfare, and sensitizing police working in all states.

Institutional Capacity Building

- Police learning and accountability
- Include LGBTQ and transgender rights modules in police officers' basic training course materials and include ongoing refresher certifications.
- Gender Diversity in Judicial Academies
- Include mandatory days in Judicial Academies on gender diversity laws, in addition to their human rights and gender diversity materials.
- Gender-affirming care education for health care practitioners

[226] Anindita Mukherjee, Constitutional Morality and LGBTQ+ Rights in India, 5 Ind. J. Const. L. 102(2021).

- Incorporate guidance on gender-affirming care in the academic course outline for medical schools, and in the continued medical education for doctors, nurses and other allied health professionals.

Community Empowerment and Legal Literacy

- Sustainable paralegal networks
- Provide funded stipends and pathways for transgender paralegals to build lasting capacity.
- Digital Rights infrastructures
- Scale mobile apps to track real-time identity certificate applications and complaints lodged.
- Intersectional Advocacy coalitions:
- Provide links between queer, Dalit, Adivasi, and rights groups to advocate together for equally enforceable rights in courts and parliaments.

Strategic Litigation and Grassroots Mobilization

- Public Interest Litigation
- Urge regional groups to bring state level PILs to bear local failures to implement along with maintaining nearness to the local public, making links of jurisprudential pressure.
- Community Legal Hubs
- Develop a regular workshop of "Know Your Rights" alongside colleagues in the field and as a bar association committee, publicize updates of case law and policy issues that arise.
- Media
- Train activists in media advocacy to highlight stories of injustice and successes in reform to facilitate shifts in public perceptions and political will.

CONCLUSION

Transgender and queer persons in India are at a makeshift moment. Years of repression from colonial aggressors had to wait out onslaughts from harsh laws and brave legal fights and farfetched Praxis dialogues in pop culture and social consciousness. The same complexity of procedural and substantive barriers such as degrading institutional inertia and intersectional marginalization serves, as we know now to circumscribe the form of justice suffered from such poor classic ontology of evidentiary and religious constructs.

Real access to justice necessitates reforms that combine policy with practice—efficiencies in processes, accountable organizations, and empowered community members. It must include radical legislative reform, capacity building with police, courts and health services, and community mobilization that is representative of the most marginalized.

This chapter has shown that legal developments are not endpoints- NALSA developments and Johar are invitations to rethink a more equitable society. The work ahead will require solidarity between movements, consideration of the use of international frameworks to advance collective social justice goals, and consistent commitment to actualising the rights which exist in the constitution and living transgender and queer lives. Only then can we consider access to justice as a lived experience for all and, indeed, access to justice moves from idealistically aspirational to a lived certainty.

CHAPTER 6: PERSON WITH DISABLITIES

by Mrunmai Kubal

INTRODUCTION

"It is not possible to be in favour of justice for some people and not be in favour of justice for all people" – Martin Luther King Jr. The quote precisely encompasses the challenges faced by marginalized and vulnerable parts of society, and among these communities are People with Disability. According to the 2011 census, 2.21% of the total population concise of disabled people,[227] with a recent report showcasing India's holding of the largest number of disabled people, with over 80 million people.[228]

According to the United Nations, a "person with disability" includes anyone with long-term physical, mental, intellectual, or sensory impairments which, when interacting with attitudinal or environmental barriers, limit their full and effective participation in society. The Convention's definition is not exhaustive, nor is it intended to restrict broader definitions that may exist in national laws, such as those recognizing short-term disabilities. While this definition reflects contemporary understandings of disability, it has not always aligned with historical perspectives.[229]

Though the British colonial government provided initiatives with the colonial policies being influenced by humanitarian and utilitarian concerns, with them establishing special schools for the blind and deaf, India during that era still underwent challenges of limited infrastructure, social stigma against disabled individuals, and exclusion from the schooling facility. Though

[227] Ministry of Statistics and Programme Implementation, "Persons with Disabilities (Divyangjan) in India -A Statistical Profile:2021", (31st March 2021)

[228] National Institute of Urban Affairs, "Status of Disability in India – A Review of Policy, Schemes and Fact on Disability", (February 2020)

[229] Frequently Asked Question, United Nations Enable, India, available at: https://www.un.org/esa/socdev/enable/faqs.htm#:~:text=The%20term%20persons%20with%20disabilities,in%20his%20or%20her%20community. (last visited 20th July 2025)

some of the notable changes did take place, like Blind School in Bombay and Calcutta School for the Deaf.[230] But ill-treatment towards the intellectually disabled individuals was prevalent. In fact Britishers introduced the "Indian Lunacy Act" which provided the detention of the patients for indefinite duration and keeping them under the horrible living conditions, which did not result into any recovery or discharge for the individuals, as the act provided that any persons who is not capable of deciding for themselves where to be unfit to live in the society thus detaining them under the administration care. The Amended Act of 1912 also focused on protecting the public from individuals who were deemed to be dangerous to society and were kept under the custody of the concerned authorities, while neglecting the basic human rights of intellectually disabled individuals.[231]

The boom of the Disability Rights Movements brought forth the momentum which was required to recognise the disabled individuals and their struggles, with the promotion of equal opportunities, the accessibility, and inclusion for persons with disability, to securing legal protection and rights for persons with disabilities. This movement led to significant changes, with India being a signatory to the United Nations Convention on the Rights of Persons with Disabilities. India's enactment of the Rights of Persons with Disabilities (RPwD) Act, 2016 reflects a progressive shift by expanding the recognized categories of disability from 7 to 21, thereby strengthening the social, environmental, and inclusive understanding of disability within a socio-medical framework. The Act also enhances enforceability by establishing special courts and introducing punitive measures under Section 84 and Chapter XVI.[232]

Even the provision of the Indian Constitution provides for the inclusion of disabled people, with provisions including-

i. Article 14 (Right to Equality)
ii. Article 15(1) (Prohibition of Discrimination)
iii. Article 21(Right to Life and Personal Liberty)
iv. Article 41(Right to Work, Education and Public Assistance) of Directive Principle

[230] Dr. Lekha Rani and Ms. Divya Grace Dilip, "Inclusive Endeavours: Disability Education Initiatives in Colonial India", International Journal of Early Childhood Special Education, 1 to 5, (2021)
[231] Muhammad Mudasir Firdosi and Zulkarnain Z Ahmed, "Mental Health Law in India: Origins and Proposed Reforms", National Library of Medicine, (August 2016)
[232] Tejas Madhav Joshi, "Disability Rights Movement: India and Beyond", International Journal of Integrated Research in Law, 856 to 859, ISSN – 2583-0538

v. Article 46 (Promotion of Educational and Economic Interests)
vi. Article 32 and 226 (Right to Constitutional Remedies)

Thus, these articles provide the inclusion and representation of the disabled individuals with the Supreme Court's significant case of *National Federation of Blind v. Union Public Service Commission and Ors* where the National Federation of Blind representative body for visually handicapped individuals across India filed petition under Article 32 of the Constitution of India seeking writ of Mandamus directed towards Union of India and Union Public Service Commission to permit the blind candidates to compete for Indian Administrative Services and Allied Services and to facilitate writing and civil service examination further either be in Braille-script. Since the Union Public Service Commission (UPSC) excluded blind candidates from applying for the Indian Administrative Services and other Group A and B civil services, even though they could have been eligible for these exams, the exclusion of persons with disability led to the violation of Articles 14 and 21 of the Constitution. The argument provided that such a ban was arbitrary and discriminatory, thus violating Article 14 by excluding the blind individuals from their right to compete despite being intellectually capable, as the right to life under Article 21 included the right to livelihood and dignity, which was being denied to the blind people, as easy accessibility could be provided to the blind candidates. With the judgment stating that – "to permit the visually handicapped (blind and partially-blind) eligible candidates to compete and write the civil services examination in Braille-script or with the help of a Scribe." Thus, the court overrides the administration's reasoning on the fundamental rights.[233]

LITERATURE REVIEW

The present literature review is based on the selected, recent, and well-cited content selected to provide the struggles and challenges of the person with disability based on the information collected through secondary information.

From the Deccan Herald, it should be noted that one of the main concern of the person with disability is lack of inclusion for their needs, which is very jarringly showed with the judicial system lacking accessibility for their needs, with the data provided by them showcasing that

[233] National Federation of Blind v. Union Public Service Commission, (1993) 2 SCC 411

supposedly among 30 courts across country, only two courts had tactile marking to assist the blind and only two had interpreters to assist the hearing impairment individuals throughout the court's procedure. Another major concern arising is the judicial system's lack of reliable data on persons with disability, thus making it more difficult to enforce accountability or push forth reforms. Alongside the court, even the police station and prisons remain physically and even digitally inaccessible for the person with disability, with the hostile environment at par. As one such report, the article states that only 0.29% of the overall disabled individuals have access to legal aid. Thus, foreshadows a lack of implementation and a significant gap in the implementation of the Act in the ground reality.[234]

It is necessary to understand that the legal inclusion and dismissive behaviour might stem from the lack of social awareness and inaction taken by society at large. This is also evident from another article, which provides that 'Doctors with Disability' critical view on how the new curriculum handbook provided to them has specific outdated and derogatory terms targeted at disabled individuals. Terminology used is 'handicapped', 'retardation', 'mentally subnormal', which, according to the article, took its inspiration from the Disabilities Act 1955, despite the newly introduced act. Other concerning factor is the admission guidelines which provided that those with more than 50% of impairment of lower limbs, involving non-dominant upper limb movement, with more than 50% spinal involvement and more than 50% impairment due to dyslexia, blood disorder or chronic neurological condition will be deemed to be ineligible for the graduation process in physiotherapy, dismissing their struggles and identity for which they have struggled throughout the history.[235]

Another perspective is offered by political scientist and editor Gopal Guru on Ambedkar's ideology on exclusion of disabled individuals, with the phrase 'a part apart' providing the experience of exclusion despite being part of the society, with the marginalization taking place towards the person with disability. Another take by scholar Upendra Baxi, provided that Ambedkar regarded disability not only physical or mental construct but socially structured restriction for a person with disability being considered as part of the society.[236]

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[234] Sneha Ramesh, "Lack of Data and Failure to adhere with mandates makes access to Justice tough for Persons with Disability:Report", Deccan Herald, (4th July 2025)

[235] Rema Nagarajan, "Physiotherapy Curriculum Uses 'Outdated' and 'Derogatory' terms for disabled, say doctors", Times of India, (May 7th 2025).

[236] Ambedkar: The Mooknayak of the disability justice movement, India, available at: https://www.scobserver.in/journal/ambedkar-the-mooknayak-of-the-disability-justice-movement/ (24th July 2025)

CRITICAL PERSPECTIVE

While understanding the issues, it is of utmost importance to look into what the disabled individuals are facing in their day-to-day life, which was done through the help of one such interview given at TEDx Talk based on topic of 'Disability and India' where the guest Nipun Malhotra navigated the audience through their struggle and the social exclusion they faced in their daily life.

1. Social Exclusion

Nipun Malhotra explained to us as to how the disabled individuals are always shunned from the mainstream society because of their difference, which often lead to the prejudices being built against them to straight up discrimination taking place against them, as he pointed out the common saying that they hear is-'one must have done bad deed that's why they are born this way'. With several instances where he pointed out that he was denied entry to restaurants multiple times, while being looked down by the people when he was preparing for his exam for the economics course. Encountering other disabled individuals' experiences where some were denied entry and the menu of the restaurants to parents or family members, or outright locking the disabled children inside their homes, due to the stigma associated with disabled individuals. According to Indian Mythology, a person born with disability is often associated with their past sins or karmic retribution, which led to shaping the perspective towards the disabled individuals.[237]

The case of *Kashmiri Lal Sharma v. HPSEB*, where Aadriti Pathak, diagnosed with mild autism, was diligent in her work, yet the school failed to offer the required accommodation, leading to the discontinuation of her education. The school claimed her parents voluntarily withdrew her admission due to severe behavioural issues and non-payment of fees. Attempts to seek admission under the Children with Special Needs quota for another session were dismissed, though initially it was provided with a seat was withdrawn at the school's request, citing a lack of vacancy. Leading to ultimate judgment from the court itself, stating the reaffirmation of the right of

[237] Divya Rani, "Literary Representation of Disabilities: A Case Study of Indian Mythology", 02, 1 to 4, (July-September 2022)

children with disabilities to equal participation in mainstream education. It puts schools on notice that inclusive education is not optional, and failure to provide reasonable accommodation amounts to discrimination under the law. The Court has rightly emphasized that administrative technicalities like classroom capacity or centralised processes cannot be used to defeat fundamental rights.'[238]

Another case of *Patan Jamal Vali v. State of Andhra Pradesh* where the criminal appeal of the accused who was convicted of committing rape on woman with complete visual impairment who belonged to SC community, where the accused tried to dismiss her testimony based solely on fact that her disability prevented her from being eyewitness. Based on this, the former CJI passed the judgment that "entailed exposition on the concept of intersectionality, highlighting how the challenges and vulnerabilities faced by women were amplified when combined with those resulting from disability. He held that the victim was in a uniquely disadvantaged position, and while caste may not have been a factor, the accused took advantage of her impairment and familiarity with her family to commit the crime."[239]

In *Nipun Malhotra v. Sony Films India Private Limited*, a persistent legal dilemma was of the Bollywood film Aankh Micholi for its derogatory portrayal of persons with disabilities, with the film claiming that the comedy film ridicules the character with disability before reinforcing misconceptions and prejudices. This highlights the battle between the protection of the right to freedom of speech under Article 19(1)(a) and the right to the dignity of persons with disabilities under Article 21. With the undermining factor of assessing the fitness of a film for the public, which will carry an overall message. Though the court's decision did not specifically consider the derogatory speech in the movie, it still provided that there should be an approach of minimal interference in the decision of the CBFC. Instead, the Former CJI provided that filmmakers are supposed to be more inclusive in their language with the accurate representation of medical conditions, avoid stereotypes, and include persons with disability in the creative process.[240]

2. **Limited Resources**

In the above mentioned TEDx Talk, the speaker pointed out limited resources prevalent for disabled individuals, with incidents including at Delhi university the authorities informed him

[238] Kashmiri Lal Sharma v. H.P. SEB Ltd., 2025 SCC OnLthe ine SC 1355
[239] Patan Jamal Vali v. State of Andhra Pradesh, (2021) 16 SCC 225
[240] Nipun Malhotra v. Sony Pictures Films India (P) Ltd., 2024 SCC OnLine SC 305

that he have to compromise or come up with solution of his own to get to his class which is not accessible on ground floor, citing that campus's infrastructure won't be changed to make it accessible for one person only, which led to him hiring weightlifters to carry him to his classes like for four days, when eventually the classroom was shifted to accommodate his needs. The Delhi High Court criticised the government for not taking a single step to ensure accessible transport for disabled individuals. According to the 45th Report of the Standing Committee on Social Justice and Empowerment, only 6% of buses in India are accessible for disabled individuals. Across district courts in India, only 25.2% have the accessibility of wheelchairs, and only 5.1% have tactile paving to assist persons with visual impairment to navigate the court, according to the report of the Centre for Research and Planning of SC.[241]

Case known as *Rajive Raturi v. Union of India* provides that a PIL was filed seeking proper and adequate access for persons with disabilities in the public spaces, roads and transportation, while withholding the reasoning that right to accessibility is an integral part to right to life, dignity and freedom of movement which are ensured under the Indian Constitution, thus leading to court directing the states and union territories across India to implement an 11-point action plan to bring forth public infrastructure accessible to disabled individuals, but stating in their judgment that right of persons with disability to accessible spaces under both the Constitution and RPD Act and thus noting the principles of accessibility that must be considered by authorities.[242]

Noted in the case of *Javed Abidi v. Union of India & Ors*, where the issue was regarding accessible air transport for disabled persons and general issue regarding implementation of Persons with Disabilities Act, 1995, it was argued that orthopaedic disabled persons face significant difficulty in making air transport facilities and Indian Airlines with domestic carrier should also accommodate such passengers by providing 'ambulifts' to ensure that such passengers reach their seat. The defendant put forth the argument that such procedure would be very costly and beyond their economic capacity, but the court provided direction that Indian Airlines should provide concession is airfares to orthopaedic disabled person with 80% more disability, with court also providing notice to Central and State Government assuring the Court about this issue, with court citing that – " To create barrier free environment for persons with disability and to make special provision for integration of persons with disabilities into the social

[241] Soibam Rocky Singh, "SC report exposes severe gaps in accessibility for people with disabilities at courts across India", The Hindu, (10th January 2024)
[242] Rajive Raturi v. Union of India, 2024 SCC OnLine SC 45

mainstream apart from the protection of rights, provision of medical care, education, training, employment and rehabilitation are some of the prime objectives of the Act".[243]

3. Failure of Government in implementation

Notable figure like Sadhan Gupta showcased that no disability barrier can deter a person from their meaningful contribution being India's first blind parliamentarian, yet it has occurred as a barrier towards the development and representation of disabled individuals as the Election Commission of India does not provide specific column in either documents to capture the disability status of candidates nor the Election Commission Model Code of Conduct had addressed the unique need of candidates with disabilities, as they never considered the costs which needs to be taken into account for disabled persons equipment. As it is the act's mandate to provide the initiatives such as the establishment of Special Court or the designation of Public Prosecutors and the formulation of the rules, with SC issuing notice on PIL to their demanding stricter implementation of the Right of Persons with Disabilities Act 2016.[244] And though they do get implemented, it will also be noticed that they won't be enacted efficiently, with some areas still facing issues regarding this.[245] Especially, it could be noted that India, though a signatory to the UN Convention for Disabled Individuals, has not effectively implemented the enactments that were needed to be done. As it has been pointed out by Nipun in his further talk, that the issue of accessibility and affordability are big stagnant issues for economically marginalized disabled individuals for which the government has not made any improvement. In fact it led to the government's next step in imposing tax on assisting devices like wheelchair, hearing aid and Braille tools as the minimum starting price for it is itself Rs. 5000.[246] With Odisha's Disabled Government Employees showing concern over non-implementation of the statutory reason of 4% of reservation, which is used in promotion of employees as a benchmark, thus implementing the act ineffectively and influencing a major impact on the society's development.[247] Seen in the landmark case of *Seema Girija Lal and And v. Union of India and Ors* where the Petitioners PIL

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[243] Javed Abidi v. Union of India, 1999 (1) SCC 467
[244] "Devarnav Sharma and other, "India Needs Persons with Disabilities in Politics", idr, (February 19th 2025)
[245] Bhavya Johari, "India's Right to Persons with Disabilities Act 2016: AN unfulfilled Promise", available at: https://ohrh.law.ox.ac.uk/indias-rights-of-persons-with-disabilities-act-2016-an-unfulfilled-promise/ (last visited 20th July 2025)
[246] Interview with Nipun Malhotra, Representative of Disabled Community, TEDx Talk, (last visited 20th July 2025)
[247] The Indian Express, "Odisha: PWDs seeks implementation of 4 per cent reservation in promotion", The Indian Express, (May 19th 2025)

stated that India's basic infrastructure needs haven't been met for population of nearly 3 crore disabled individuals and seeking a plea that States should notify the relevant Rules as mandated under the Section 72 and 101(2) of Act which specifically provides that petitioner seek the formation of district -level committees to enforce the various provisions of the Act which is being argued as being indispensable for effective implementation, as the reasoning is constituted that differently abled should be given differential treatment in aspect of equity and dignity of rights. Resulted in the court issuing an order in January 2023, which exposed the glaring gaps in compliance by various states, prompting the apex court to issue successive orders urging the Department of Disabilities under the Ministry of Social Justice and Empowerment of the Central Government to coordinate with the State Government.[248]

Seen in another such case, that of the *Union of India v. Ravi Prakash Gupta*, where Ravi Gupta happened to be a 100% visually impaired candidate who appeared for 2006 civil services examination, and he was ranked 5th among the visually impaired candidates but only one vacancy was declared under this category, stating that only one visually impaired candidate will be appointed. Which was counter-argued by Gupta himself that since the former Persons with Disabilities Act 1995 mandates 3% reservation in public jobs under section 33 the backlog vacancies withheld during 1996 and 2006 is illegal, and failure to identify sufficient posts under section 32 thereby denied him of his right, which had been sided by the government themselves as well where they rejected the government's argument that reservations benefits are contingent thus any further delay can be used to defeat legislative intent. The court further clarified that reservation entitlement must be calculated based on total cadre strength vacancies and not just surface level identification of posts, while aligning with statutory purpose as well. As such, denial of rights due to administrative inertia will violate the Act's objective. Thus, the court mandated the administration to appoint Gupta to the IAS using backlog vacancies, thus dismissing the government's special leave petition, upholding the Delhi High Court's order, and thus providing compensation to the affected party.[249]

The case of *Avni Prakash v. National Testing Agency*, where Vikash Kumar, the petitioner with writer's cramp, was denied one hour of compensatory time, which was provided for persons with disabilities appearing for the NEET-UG examination. For which Former CJI Chandrachud held

[248] Seema Girija Lal & Anr. v. Union of India & Ors. (WP(C) Diary No(s). 29329/2021)
[249] Union of India v. Ravi Prakash Gupta, (2010) 7 SCC 626

that the action of the testing authorities constituted a 'tragedy of errors' which has reasonably violated individuals' right to reasonable accommodation and thus their rights to education and non-discrimination bestowed according to fundamental rights.[250]

COMPARATIVE ANALYSIS

Though the provision provided across India did make an effort to include the person with disabilities through various schemes and provisions, it could also be noted that there are other countries which took the initiative of making the legislature work efficiently, such include-

United State of America

With the most landmark act like Americans with Disabilities Act 1990, provides for prohibition of discrimination against disabled individuals, while giving protection to this vulnerable group at the same time, while also providing guarantee for the equal opportunity for disabled individuals in public accommodation, transportation and employment thus making it accessible and efficient to enact the progressive step towards betterment of disabled individual[251]. As seen in the example of over 19 million people with disabilities being employed in the U.S. workforce in 2022.[252] With several schools and buildings equipping their infrastructure with ramps and elevators and as well as various transportation providers providing easier access through the equipment of buses and shuttles, alongside providing curb cuts and underfoot surface changes on sidewalks and subways, thus making it accessible for the disabled individuals.[253]

United Kingdom

The United Kingdom's Equality Act 2010 and social model of disability provide a remarkable measure of reducing the stigma and discriminatory behaviour of society and providing inclusion of this group by addressing the social barriers. This act was influenced by the social model of disability. The social model of disability provides a framework for advocating for the challenges

[250] Avni Prakash v. National Testing Agency, 2021 SCC OnLine Bom 4607
[251] What is the American with Disabilities Act (ADA), India, *available at*- https://adata.org/learn-about-ada, (last visited 17th July 2025)
[252] National Organization on Disability, "Disability Inclusion in the Workplace", (2023 Insights Report)
[253] Empowering Ways the Americans With Disabilities Act Changed Lives, India, https://www.easyllama.com/blog/how-americans-with-disabilities-act-changed-lives, (last visited 17th July 2025)

faced by a person with disability. As it showcases what people with disabilities have to live through with the socially strained structure, which also characterizes the barriers and opportunities created by the system, resources, and resilience. It talks about the physical or environmental barriers that restrict people with disability from fully participating in society. To understand the implications of the 2010 Act, the House of Lords appointed a committee that looked into the effects of the Act on disabled individuals. This led to the government introducing the 'National Disability Strategy', which stated that it would be driven by the minister for disabled people and a committee to publish an annual report on the review progress and implementation as well.[254]

New Zealand

According to the Human Rights Act, it makes it unlawful, which led to the promotion of the go implementation of New Zealand's government implementing the 'New Zealand Disability Strategy', which provides for the obligation that the Ministry of Health takes into consideration the consultation of the disabled individuals and their families as well. As it provides the government with the framework for the government agencies thus implementing the removal of barriers for the participation of persons with disabilities. Many advertisements taking place as 'Like Minds Like Mine' provide a campaign to reduce stigma and discrimination faced by these individuals. While the provision makes sure that the administrative and other government offices uphold their duties and take the initiative to implement efficiently.[255]

Uganda

Lastly it could be seen that Ugandan Constitution provides for the unicameral legislature which is required to enact the legislative act which provides representation of law favouring marginalized groups, which in turn led to parliament adopting law which reserve five seats out of 458 seat among them is for women for person with disabilities, with national electoral college of persons with disabilities, with five representatives represented from each electoral district, thus selecting those who will occupy five reserved seats in parliament, as it further provide each

[254]House of Lords, "The Equality Act 2010: the impact on disabled people Follow-Up Report", (9th September 2021)
[255] New Zealand response to OHCHR, "Legal Measure for the Ratification and Implementation of the Convention on the Rights of Persons with Disabilities", (March 2008)

village, parish, sub-country and district council must include at least one man and woman with disability.[256]

CONCLUSION

Hence, it should be noted that progressive steps are being taken by the government and other organizations through various initiatives or through various awareness campaigns and programmes which have led to the inclusion of the person with disability and provided representation to some extent. With one report providing the major findings, such as – 0.00% persons with disability have a firm belief that public transportation is neither safe for travelling nor disabled friendly and around 43% responded that public places are not disabled friendly and that they have often been judged because of their disability. The report showcases that 43% of the respondents have also reported that they have faced discrimination and exclusion from passengers while they were travelling through public transport.[257] The discrimination and bullying are prevalent especially towards women who have to deal with sexual assault cases, and also for disabled children who face the issue of bullying and discrimination in such a tender age. Thus, it is necessary for the government to take the initiative of providing stricter implementation of provisions and thus making sure that the disabled individuals won't have to face more discrimination and violation of their fundamental rights.

[256] Yohannes Takele Zewale(Harvard International Law Journal),Bridging the Gap: African Countries Outpace the West in Descriptive Representation for Persons with Disabilities.
[257] Subuhi Aziz, "Problems and Challenges Faced by Disabled Youth in India: An Empirical Study", International Journal of Novel Research and Development(IJNRD), 74, (2024)

CHAPTER 7: PRISONERS AND UNDERTRAILS

by Prisha Verma

Justice may be impartial, but in India's prisons it is accompanied by delay, neglect, and severe overcrowding."As of December 31, 2022, according to NCRB data approximately 75.8% of India's prison population were undertrial prisoners.[258] *"Innocent until proven guilty" - A beautiful principle until you are in jail waiting for a trial, if it ever happens. This is a silent crisis, in your face, a justice system that grinds its cranks to a halt, punishes before it is ready to judge, and de-legitimizes the very people it is meant to protect.*

While the Indian legal system affirms the maxim "justice delayed is justice denied," the lived reality for lakhs of undertrials is that the prolonged process effectively becomes their punishment.

UNDERSTANDING THE CONTEXT

John Austin has defined law as a command of the sovereign and the sovereign is always biased towards the powerful. Nowhere does this truth resonate more than in the Indian criminal justice system where prisoners and undertrials (people accused but not proven guilty) are the most marginalised, isolated, and silent constituents of a marginalised community. Their plight in obtaining justice is not a simple issue of legal representation, but a more insidious and oppressive manifestation of systematic failure, institutional indifference and structural injustice that exists despite constitutional promises.

[258] National Crime Records Bureau, *Prison Statistics India 2022* (Ministry of Home Affairs, Government of India 2023)

The prisons system in India is largely governed by Prisons Act 1894[259] colonial legislation that is largely unchanged and criminal law procedures prescribed within State prison manuals, which vary widely in terms of standard and implementation. The Constitution guarantees the right to equality (Article 14)[260] and right to life and personal liberty (Article 21)[261], but as is evident from the foregoing argument, the same rights often do not transcend the barriers of the prison.

Justice is not easily served in India, especially for prisoners and undertrials, they have to face a lot to get justice. These include, but are not limited to, the excessive use of incarceration before a conviction, the endless delays in the investigation and trial processes, a poor understanding of rights in the criminal justice system, entrenched caste and gender-based discrimination, media trials, custodial violence, and a widespread ignoring of mental health issues. This is not an exaggerated list; these are the reality of the system. For those already marginalized, facing poverty and social exclusion, and an unaccountable justice system makes the obstacles even graver. Together, they create a situation whereby what little hope is offered by the justice system is too distant and elusive. Though legislative measures, such as the Legal Services Authority Act 1987, created statutory mechanisms for legal aid, the inadequacy of the current outreach is fragmented.[262] District Legal Services Authorities are obligated to provide legal services without charge. However, their services are often not accessed mainly because many people do not know they exist; they also often do not provide services because they are so busy with the limited resources they have to provide legal services, and they just cannot reach out to the people who need it most.[263] Even procedural innovations, such as video-conferencing from prison for remand hearings, simply and efficiently are created to improve efficiency, but in the absence of joint protection, would compromise the principles of a fair trial.

This chapter reviews the legal and institutional framework that regulates the rights of prisoners and undertrials within India. It will do so by examining access to justice, guaranteed by constitutional provisions, statutory rights, judicial interventions and policy frameworks, and it

[259] The Prisons Act, 1894 (Act No. IX of 1894)
[260] Constitution of India, 1950, art 14
[261] Constitution of India, 1950, art 21
[262] Legal Services Authorities Act, 1987 (Act No. 39 of 1987)
[263] Legal Services Authorities Act, 1987, ss 9, 10 (Act No. 39 of 1987), National Legal Services Authority (Free and Competent Legal Services) Regulations 2010, reg 9.

assesses the degree to which prisoners have rights, and the legal system accepts this. In doing so, this chapter will expose the vast distinctions between law in books and law in practice, and illustrate the areas of reform that are urgent and important. We are left with the question "If justice cannot reach those behind bars, can a democracy honestly claim to uphold its own principles?"

INCARCERATED PERSONS AND THE LEGAL SYSTEM

The separation of guilt and innocence is far too malleable in prisons in India. The system marks a distinction between those guilty in the eyes of a court of law (prisoners) and those who are merely accused and awaiting the conclusion of their case (undertrials). This distinction is clearly outlined in legal text and on paper, but the legal definition is rarely a source of protection to those it is meant to protect. In practice, undertrials experience no due process and are effectively treated as convicts; their bodies are incarcerated prior to guilt being proven, and their rights wither before they can ever be heard robustly in a courtroom.

It is no coincidence; data from the National Crime Records Bureau confirm that more than 76.2% of the total prison population in India is made up of undertrials, people who have never been convicted of any offence.[264] Most of those indefinite detainees come from disadvantaged castes, communities, and classes. Dalits, Adivasis, and Muslims are heavily over-represented in Indian prisons and jails. They make up, as a group, a demographic minority in the general population; but they make up more than half of undertrials. Most are poor, often illiterate or semi-literate people with no understanding of the legal process they are caught in; many are migrant workers with no fixed address, which complicates verification and thus makes them less likely to be granted bail. Instead of protecting the innocent, the system criminalises them based on identity, and identity based on caste, class, and religion; these become the invisible prison bars creating those arrested, the detained, and those that disappear.

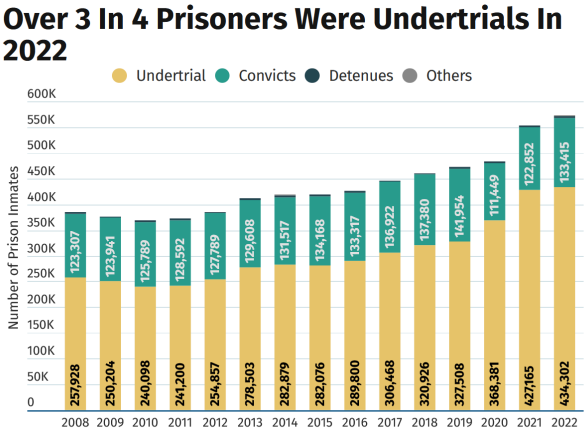
[264] NCRB, *Prison Statistics India, 2023* 76.2% undertrial prisoners. (policyedge.in)

This structural bias has not gone unrecognised, in the landmark case of *Hussainara Khatoon v State of Bihar,*[265] The plight of hundreds of undertrials languishing in Bihar's jails, of whom some had been jailed for longer than the maximum time allowed for their offence, was before the Supreme Court. The Court unequivocally found that the right to a speedy trial is a right guaranteed under Article 21 of the Constitution. But decades later, the system has not fulfilled this promise. Justice Krishna Iyer was forthright in his condemnation of the manner in which bail was being granted in India in *Moti Ram v State of Madhya Pradesh*.[266] He explicitly warned of a situation in which poor accused persons would be kept in custody because they were unable to provide surety or cash bonds, whilst the rich walked free, he remarked that bail should be conditioned by the economic status of the accused and not by the fictitious levels possessed by the affluent. In *State of Kerala v Raneef*,[267] the Court conveyed its concern that pre-trial detention was becoming common (rather than be the exception). The Court stated that "Deprivation of liberty without trial offends the principle of justice." Yet, the gears of justice continue to turn too slowly for especially those without economic means or access to lawyers. People's Union for Civil Liberties (PUCL) has continuously shown in its reports that undertrials from marginalized communities are often marginalized by the same systems that are designed to provide legal assistance for them. With magistrates across the country being burdened by overwhelming backlogs, taking bail hearings seriously appears to be a luxury that most never have the privilege to enjoy. Many undertrials spend many years languishing in jails for minor offences, sometimes longer than they do upon conviction. In most cases, the absence of legal counsel and the rather poor institutional oversight, led to these outcomes.

This is simply the case of 'justice delayed is justice denied.' What starts as a preventive measure gradually transforms into a variant of pre-trial punishment, behind every statistic is a life in limbo, a person who cannot pay a bail fee, who does not speak the language of the court, whose ultimate outcome will be tied up not in the merits of their case but as the consequences of their caste, class and conditions of life. The problem of undertrials is not simply an unfortunate outcome of a poorly functioning justice system. It is an indictment of systemic injustice that

[265] *Hussainara Khatoon v. State of Bihar* (1979) 1 SCC 115
[266] *Moti Ram v. State of Madhya Pradesh* (1978) 4 SCC 47
[267] *State of Kerala v. Raneef* (2011) 1 SCC 784

pervades access to justice in India. When liberty is shackled not to the facts or context of a case, and the identity of the accused transcends the merit of the case, the rule of law becomes tenuous.



[268]

LEGAL FRAMEWORK OF PRIONERS' RIGHTS

Constitution of India, 1950[269]

Upon first examination, the legal system of India appears to have a strong and well-established set of rights to protect those accused of a crime. The Constitution makes it clear in Article 21 that liberty is no privilege, it is a basic right. Article 21 states, "No person shall be deprived of his life or personal liberty except according to procedure established by law." This statement has become the essence of criminal justice in India. In subsequent cases, courts have read a variety of rights, such as the right to a speedy trial, the right to legal aid, protection from torture and the right to be treated with dignity while imprisoned. Article 22 provides additional strength to this assurance. Article 22 states that whenever a person is arrested, they must be informed of the reason for the arrest, must be produced in front of the magistrate within 24 hours and have the right to consult with a legal practitioner of their choice. These are not mere technicalities, they

[268] Nileena Suresh, *Despite campaign, India saw number of prisoners increase in 2022*, **Scroll.In** (Dec. 15, 2023), https://scroll.in/article/1060246/despite-campaign-india-saw-number-of-prisoners-increase-in-2022 (visited July 25, 2025). scroll.in
[269] Constitution of India, 1950

are fundamental tools to ensure that no one disappears into the system without a voice. Adding further depth is Article 20 (2) and (3), which guarantees the right against double jeopardy and right against self-incrimination.[270] One cannot be prosecuted and punished for the same offences more than once and no person who has been accused of an offence can be forced to be a witness against themselves, it ensures that confessions are not extracted under duress, and it guarantees that the prosecution bears the legal burden of proof. Further under Section 23 of Bharatiya Sakshya Adhiniyam, 2023, confessions made before the police officer cannot be proved against the accused unless such a confession is made in the presence of Magistrate. However, if a fact is deposed as discovered in consequence of information received from a person accused of any offence, who is in the custody of a police officer, and whether it amounts to a confession or not, it may be proved against the accused as long as it relates distinctly to the fact discovered.

Although not legally binding as fundamental rights, the Directive Principles of State Policy impose a distinct moral and constitutional responsibility to provide legal aid. Article 39A of the Constitution requires the State to ensure that no citizen is denied justice by reason of economic or social disabilities.[271] The provisions of Article 39A enabled the legal framework for the enactment of the Legal Services Authorities Act, 1987, which was an attempt to provide legal services to the poor and marginalized.

Bharatiya Nagarik Suraksha Sanhita, 2023[272]

These rights provided by the Constitution are not and should not be treated as isolated guarantees. They were always intended to be given shape by statutory authority in terms of making arrests, temporary detention and trials as a whole. With the introduction of the Bharatiya Nagarik Suraksha Sanhita, 2023, (earlier to as CrPC[273]), India's criminal procedure statute has been amended with the promise of a modern and improved justice delivery framework. Section 35 states that police should not automatically arrest a person accused of an offence punishable

[270] Constitution of India, 1950, art 20(3)
[271] Constitution of India, 1950, art 39A
[272] Bharatiya Nagarik Suraksha Sanhita, 2023 (Act No. 46 of 2023)
[273] Code of Criminal Procedure, 1973 (Act No. 2 of 1974)

with a term which does not exceed seven years.[274] The police must record reasons in writing justifying that an arrest was necessary, notwithstanding the right to arrest as per the law. Section 187 lays down time limits on police for finishing investigations and filing chargesheets and the aim is to reduce the unreasonably lengthy period the undertrial inmates remained languishing ignored by the court.[275] Section 479 stipulates the relaxation of detention for inmates who have completed a one-half of the maximum sentence for the alleged offence.[276] So legislatively, sound developments reduce outcomes to less injustice and faster relief. However, in practice, it often fell at the hands of police indifference, incompetence or statutory manipulation, even depriving the constitution of its guarantees to entrap suspects in a bureaucracy that reduced the right to a mere procedural requirement.

Bharatiya Sakshya Adhiniyam, 2023[277]

The Bharatiya Sakshya Adhiniyam, 2023 enshrines the principle that the prosecution has the burden of proof. The aim is to provide fairness.[278] The presumption of innocence until guilt has been proved beyond reasonable doubt is fundamental to the criminal justice system. Unfortunately, the presumptive nature may buckle under the weight of delay and social injustice. So the question to ponder upon is, if someone spends five or ten years as an undertrial, can they be presumed innocent? If a person is denied bail solely because they can't produce a financial surety, isn't justice really blind? Even worse, the burden can shift under Section 106, particularly where the accused must prove that facts are "solutions that are in their special knowledge." Without legal literacy and effective representation, it may be a trap. In a situation of systemic bias and slow procedures, the presumption of innocence is abused and becomes a misnomer.

Other Legislations

Compounding the problem, India’s prison administration still relies on the Prisons Act of 1894, a colonial statute that fails to recognize prisoners as citizens entitled to rights, treating them instead as mere entities for detention. There is no new consideration of rehabilitation, mental health,

[274] Bharatiya Nagarik Suraksha Sanhita, 2023, s 35
[275] Bharatiya Nagarik Suraksha Sanhita, 2023, s 187
[276] Bharatiya Nagarik Suraksha Sanhita, 2023, s 479
[277] Bharatiya Sakshya Adhiniyam, 2023 (Act No. 47 of 2023)
[278] Bharatiya Sakshya Adhiniyam, 2023, s 104

reform, or reintegration. The Prisons Act is long way past outliving its purpose, yet still dictates the operation of Indian prisons. Even when the gap between law and practice has been filled, the practice has failed.

The Legal Services Authorities Act of 1987 was designed to guarantee that every individual, especially impoverished, illiterate, and marginalized individuals are afforded access to free legal aid. The Act established District Legal Services Authorities (DLSA) in every district of the country. The role of the DLSA was to provide lawyers for those who cannot afford one. In practice, in Districts these are thinly staffed, underfunded and unreachable. Legal aid lawyers are overwhelmed with work, made harder by being paid poorly, or unavailability at the immediate time of need.

And thus, we encounter a troublesome contradiction, in one realm, there's a legal system with rights in principle; in the other, there are lived realities of delays, diluted rights, or outright denial of rights. The gates of prison don't only lock out liberty; often, they confine us to an idea of justice. This is not merely a road of law and life, it's a roadway that is inherently amiss. Unless this road is confronted and challenged, the promise of justice will remain such, a promise but never a practice.

THE BAIL CONUNDRUM

Bail is often hailed as one of the pillars of personal freedom, a constitutional provision designed to protect individuals from the abuses of state power. Courts have termed that “bail is the rule, jail is the exception.”[279] But those ideals break down in the day-to-day functioning of India's courts, where poverty is criminalized, discretion can become capricious, and liberty can depend on luck, literacy and liquidity rather than law. In principle, we have a legal system that recognizes bail as a right in cases not involving serious offenses. The reality is that getting bail is still exceedingly difficult. It often feels like a convoluted maze that only the wealthy, powerful, or legally literate can navigate.

[279] Justice V.R. Krishna Iyer, *State of Rajasthan v. Balchand Alias Baliya* (1977) 4 SCC 308

In *Satender Kumar Antil v CBI 2022*,[280] The Court attempted to simplify the bail jurisprudence for the benefit of the ordinary citizen by classifying offences under the CrPC and reiterating the need for arrest to be justified and not a foregone conclusion. It provided a roadmap for the bail framework, at all forms of decision-making (pre-arrest, arrest, post-arrest, bail application, post cognizance bail). The judgment was intended to compel the lower judiciary to move away from a culture of routine remand, especially for minor offences, back to a culture that reaffirmed constitutional protections and safeguards guaranteed by the law. Unfortunately, its impact is likely to be marginal at best. Earlier, in *Arnesh Kumar v State of Bihar 2014*[281], the Court in similar fashion sought to restrain an epidemic of arrest offences punishable by less than seven years imprisonment that we see in today's world. It mandated the requirement of police officers to record reasons for arrest and for magistrates to satisfy themselves that arrest was justified in accordance with Section 41 of the CrPC[282], (now Section 35 of the BNSS). The requirement of reporting reasons for arrest, in law, is rather clear; it's just that across the India courts de facto remand individuals to jail, without asking the questions that need to be asked.

The real issue with bail, much of the time, is money. Oftentimes those who are poor simply cannot satisfy conditions for a bail release imposed by the court, which may require finding dependents to act as sureties, showing property documents, or finding anyone local to vouch for them. Daily wage workers, migrant labourers and the homeless don't have these things. As a result, even when someone is able to secure bail, many are still held in jail for weeks and months, and sometimes years, not because they have committed a crime (or are perceived as dangerous) but because they are poor. In practical terms, bail has effectively become limited to individuals in a privileged position, while many others languished in jail - not only unjustly punished for not committing a crime but also for their poverty. Thus, the legal principle "innocent until proven guilty" reflects an ideal that is often far from reality and replaced by the harsh reality of one's freedom being conditioned by the amount of money they have. Second, there is a disjunction between legal and the lived social reality in good and practical terms. For example, a domestic worker from a rural area may not have "local sureties" in a place she just

[280] *Satender Kumar Antil v. Central Bureau of Investigation and Another* (2022) 10 SCC 51
[281] *Arnesh Kumar v. State of Bihar (*2014) 8 SCC 273
[282] Code of Criminal Procedure, 1973, s 41

migrated to. A Dalit man accused in a land dispute can't produce property documents when he doesn't even own land. But the system doesn't bend, it simply waits or forgets.

India's Bail System is an irony and the biggest paradox. Bail in theory is a right, while in practice it is a privilege. It punishes the poor, misunderstands liberty, and elevates risk aversion to a constitutional principle. For the sake of poor people, as well as the enormous volume of undertrials, only when bail is truly accessible, fair, and humane will undertrial detention cease to be the greatest indictment of our criminal justice system.

DELAY AS THE PUNISHMENT

For many prisoners in India, the punishment occurs long before any guilt or innocence is determined, leaving them at a disadvantage. While there is a right to a fair and expedient trial as articulated under Article 21 of the Constitution, the right to expediency in practice remains an aspiration. Delay is not merely an element of justice; it is the punishment. The *Hussainara Khatoon v State of Bihar* case series brought worldwide awareness bringing attention to the thousands of undertrials who were languishing in prisons serving sentences longer than maximum sentences for the alleged offenses. The Supreme Court's resounding affirmation of expedience in those cases seemed to be a milestone in allowing undertrials their right to a timely trial, years later, little has changed.

Pendency has developed into a type of civil death. Accused individuals remain in limbo for years bouncing in a cycle of routine remand detention, where magistrates frequently extend custody on autopilot, without scrupulously inquiring into the circumstances of the accused and without acceptable oversight; the routines for the poor and voiceless are akin to conveyor belts in the courtroom, clearly moving papers but not dispensing justice. The delay is not just procedural; it is structural, and unlike high-profile cases that attract media or political attention, the many nameless masses of undertrials, like daily wage workers, migrants' labourers and petty offenders rot in silence; the chronically over-burdened nature of the judiciary, uneven ratio of judges to population, absence of technological integration, an adroit use of procedural redundancy, causes a perfect storm of inertia. Although there have been intermittent efforts at fast-tracking courts,

these court measures have not always encompassed undertrials waiting weeks or months or years for disposition, but rather they thoughtfully, and very narrowly, defines offence; for example, the fast-track judgement deals only with sexual violence and matters involving corruption of prominent individuals etc. The judicial process appears to provide benchmarks to expedite meaningful intervention; to facilitate headlines over humanity: for a multitude of people, the right to a speedy trial is not just stalled but stopped.

BARRIERS TO EFFECTIVE LEGAL AID ACCESS

In theory, everyone accused in India is entitled to representation through the legal aid system; Article 39A of the Directive Principles of State Policy even states that free legal aid is a constitutional right. In practice, however, justice is often the prerogative of the rich. The District Legal Services Authorities (DLSAs), the legal aid system's first point of contact for assignment of legal counsel when an accused person cannot afford private representation, are hamstrung by chronic underfunding, long bureaucratic delays, and an appalling lack of accountability. Legal aid lawyers are usually overworked, poorly paid, and offered little or no training on how to manage complex criminal cases. Many lawyers regard their roles as procedural rather than constitutional. A recent report from the National Legal Services Authority (NALSA) figures illustrates the awkward gap between what legal aid on paper looks like and what it means in practice. Many millions of legal aid case records are created every year, but whether representation is functioning in people's interests is highly questionable. Legal aid lawyers aren't reliably representing clients – it's not uncommon for lawyers to not meet their client before a court appearance, forget to conduct any cross-examination, or barely file an application. For an undertrial, legal aid is usually more of a formality than a defence.

Structural failure was made plain in the landmark case of *Khatri v State of Bihar*,[283] where the Supreme Court stated in no uncertain terms that the right to free legal aid is not a privilege or a kind deed, but a right under Article 21. They stated that legal representation must be put in place even at the stage of first production before the magistrate. Yet, decades later, this was still far too often only an act of disregard.

[283] *Khatri & Ors. v. State of Bihar & Ors.*, AIR 1981 SC 1068

Challenging too are the barriers of language, illiteracy, and ignorance of rights. The majority of undertrials do not even know of their legal right to aid, or they distrust court-appointed lawyers altogether. In this milieu, one's liberty is dependent not on justice, but on the ability to navigate an unjust world.

CUSTODIAL REALITIES AND RIGHT VIOLATION

The grim reality behind the bars of Indian prisons are completely contrary to constitutional values of dignity, justice and humane treatment. The manner in which one is incarcerated in jails, particularly undertrials, where they have not even been found guilty, is often exceedingly contrary to the most basic rights guaranteed under Articles 14, 19 and 21 of the Constitution

Prison Statistics India 2023 show that Indian prisons are still at over 130% capacity. States such as Uttar Pradesh, Madhya Pradesh and Bihar are still perpetually overcrowded where a cell of 50, houses 100+.[284] Overcrowding thus contributes to inadequate sanitation, transmission of diseases, non-provision of almost all sets of facilities as well as room for internal violence.

Custodial violence, both physical and psychological, persists as a grave reality. In 2022, there were 175 custodial deaths, although this is likely a conservative estimate. The majority of cases are disguised as suicides or declared to be "natural deaths" which are often not thoroughly investigated as systemic abuse often goes unchecked with the cooperation of law enforcement officers and no independent public oversight. In the case of *DK Basu vs State of West Bengal 1997,*[285] the Supreme Court issued binding directives to prevent custodial torture and specifically noted that any instance of abuse by law enforcement or other Public Servants is against Article 21 of the Constitution. Enforcement of the rights vested under the Constitution is weak and impunity continues to be the rule.

[284] NCRB, *Prison Statistics India, 2023* (PSI-2023), all-India prison occupancy rate 120.8%, states such as UP, MP, and Bihar report acute overcrowding, contributing to inadequate sanitation, disease spread, and internal violence. ThePrint+2policyedge.in+2

[285] *D.K. Basu v. State of West Bengal & Ors.* (1997) 1 SCC 416

India’s prison administration continues to operate under antiquated laws. Many jurisdictions still comply with the Prisons Act 1894 (and there are state prison manuals that are decades if not centuries old). While they "purport to focus on rehabilitation, reformation, and welfare of inmates, hardly any of these are put into practice." Most prisons can hardly expect to have trained staff or doctors on site and grievance mechanisms are limited. The Supreme Court’s ruling in *Re: Inhuman Conditions in 1382 Prisons 2016*[286] included the simple statement about the state of India’s prisons as “shocking the conscience” and pronounced that urgent action is needed including regular monitoring of prison conditions, healthcare for those incarcerated, and the right to access Justice.

There is a mental health crisis in India's prisons. According to Prison Statistics India 2023, various national studies have indicated that over 30% of inmates suffer from mental health difficulties including depression, anxiety, and serious forms of psychosis. The stressors are varied: trauma from arrest, pre-trial detention lasting months, isolation, overcrowding of their cells, and complete lack of rehabilitative support. Hospitals and jails do have doctors, but there are no trained psychologists or psychiatric staff, and almost no diagnostic screenings for mental illness. Unfortunately, instead of delivering treatment where needed, prisoners suffering from mental health issues can experience more dehumanizing conditions by continuing to be mocked, stigmatized, or held in isolation for their own "protection." These conditions can lead to deterioration, to the point of complete breakdown and none of us having any recourse.

Female inmates have a different reality, their needs are frequently overlooked and rarely considered in the male-serving prison system. Although approximately 4% of incarcerated individuals are female, they experience disproportionately severe situations. Prison remains male-structured and systematic, resulting in flagrant incapacity to respond to women's health, hygiene, and safety needs. Notable instances would be limited and erratic access to sanitary products, lack of gynaecological care, or significant delayed gynaecological care, and especially for severe immoralities and abuses of their rights, including sexual harassment and abuse that goes underreported due to women fearing retaliations and/or not being believed.

[286] *Re: Inhuman Conditions in 1382 Prisons* (Writ Petition (Civil) No. 406 of 2013) (2016) 10 SCC 17

Before, during, and after the Supreme Court, and presently, most prison manuals have ebbed and flowed away from gender sensitivity frameworks and mental health reforms that have just begun to be understood. Furthermore, incarceration is still practiced under the colonial Prisons Act of 1894 that continues to permeate the Indian prison system until today by minimally repressing just another human being when we daily see the human cost of "keeping" inmates behind locked doors.

FROM NATIONAL COURTS TO GLOBAL STANDARDS

Indian courts have intervened from time to time, to both reactively confront and proactively eliminate the systemic injustices undertrial prisoners are facing. The following fundamental cases have provided the backbone for judicial intervention in the identity of prison reform –

Hussainara Khatoon v State of Bihar 1979 (Mother of all undertrial cases) – This PIL highlighted the disgusting situation of thousands of prisoners who were locked away in jail for longer than the maximum period of incarceration for crimes they were merely alleged to commit. The Supreme Court established clear guidelines linking the right to legal aid and a fast trial to Article 21, effectively transforming the meaning of prison justice.

Moti Ram v State of Madhya Pradesh 1978 – This judgment effectively terminated the notion of bail only being for the affluent. Justice Krishna Iyer insisted that bail must be determined according to the financial condition of the accused, rather than simply being set at a uniform unaffordable amount, effectively introducing economic equity into bail jurisprudence.

Rakesh Kumar Paul v State of Assam 2017[287] – In this significant case, the Supreme Court reaffirmed that bail is a matter of right, not a matter of judicial discretion, particularly when the maximum punishment is less than seven years. It underscored the principle that no punishment can be meted out on the basis of the imprecise fears that a court may have or because of the inordinate delay in the trial.

[287] *Rakesh Kumar Paul v. State of Assam & Anr.* 2017 AIR SC 3948

In Re Inhuman Conditions in 1382 Prisons 2016 – Taking suo motu cognizance of the situation, the Supreme Court examined the awful conditions of prisons across the states. The Court ordered a wide-ranging reform in respect of overcrowding, sanitation, medical care, dignity of prisoners, while reminding the States that constitutional rights do not vanish in prison.

Satender Kumar Antil v CBI 2022[288] – One of the most significant decisions which related to bail in recent times which established a 4-tier framework for granting bail, judging offences based on their seriousness. The Court stressed bail, not jail is the norm and buttered down the requirements of complying with the sections 41 and 41A CrPC[289] requiring a justification for arrest and remand.

The constitutional principles developed in India resonate with, and are often reinforced by international human rights jurisprudence –

Kalashnikov v Russia 2002[290] – Found that detaining people in overcrowded, inhumane conditions amounted to a violation of Article 3 of the European Convention. The Court stated that conditions alone might be degrading treatment as opposed to inhumane treatment, regardless of intent.

Castillo Petruzzi et al. v Peru 1999[291] – The Inter-American Court held excessive pre-trial detention was excessive, and made a loud declaration against excessive (unreasonable) delay for going to trial (i.e. speedy trial reasonable time) before a court, which is a non-derogable right.

Neira Alegría vPeru 1995[292] - Held, that the State is directly responsible for deaths or abuses occurring inside prisons. Condemnation here echoes India's own issues with custodial deaths and indifference of states to their culpability.

[288] *Satender Kumar Antil v. CBI & Anr.* (2022) 10 SCC 51
[289] Code of Criminal Procedure, 1973, s 41A
[290] *Kalashnikov v. Russia*, App. No. 47095/99, 36 Eur. H.R. Rep. 34
[291] *Case of Castillo Petruzzi et al. v. Peru* (Inter-Am. Ct. H.R., 30 May 1999)
[292] *Case of Neira Alegría et al. v. Peru* (Inter-Am. Ct. H.R., 19 January 1995, Merits, Series C No. 20)

General Comment No. 21, UN Human Rights Committee[293] – This document states how the right to dignity and humane treatment of detainees is applicable even in the circumstances of pre-trial custody. The comment provides for segregation, sanitation and medical treatment is also mandated.

RESTORATION OF LIBERTY AND DUE PROCESS

India's crisis of industrial imprisonment is more than just a backlog, it is nothing less than an outright collapse of constitutional promises and the basic elements of justice. This is not the result of a slowly advancing docket or simply backlogged courts; it is the imploding of due process for the poor, the marginalized, and the unarticulated.

Pre-trial detention is so overused that it has helped create a situation in which the presumption of innocence is a legal fiction. The need for reform in this area cannot be incremental or superficial, there can be no aid, such as the sporadic legal aid camps or even a few isolated fast-track courts and consider the problem resolved. Reform must be systemic, a whole-scale reconstruction of India in relation to punishment, pre-trial liberty, and the rights of the accused.

Decriminalize to Decongest

This approach is strongly reinforced by the Malimath Committee report 2003,[294] which recommended that offences be treated as minor by graded and rationalised response when and for the purpose it is a minor offence (see point 79 at page 37 of the report). They also endorsed targeted decriminalisation of minor offences and suggested enacting a national system to deal with minor offences; all helping to reduce the time and damages involved in imprisoning people for minor offences. This is supported by international models, including decriminalisation examples from the UK, Canada, and various European countries that adopted decriminalisation to reduce the number of people in prison without posing a threat to public safety.

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[293] *CCPR General Comment No. 21: Article 10 (Humane Treatment of Persons Deprived of Their Liberty)* (1992)
[294] Government of India, April 2003, Justice V.S. Malimath (Chair), *Report of the Committee on Reforms of the Criminal Justice System* (Ministry of Home Affairs)

Bail Reform

India's bail law is inconsistent, and as such, the liberty of an accused often does not depend on the law but rather the person interpreting it. There are several inconsistencies in discretion, and unmistakable class bias i.e. influence allows for freedom while the poor often stay in prison for a bailable offence.

As the Supreme Court firmly said in *Satender Kumar Antil v CBI, 2022*, it cannot be a procedural lapse, it is a constitutional lapse to have a system that leads to the over-incarceration of undertrials. Courts need to be aware of the four-tier system propounded by the Supreme Court, wherein they ought to distinguish between categories of offences and not deny the liberty of the accused simply because of a failure to grant bail. For the offences under Category A and B, the same general principles of bail would be applied. With respect to category C, , which includes special acts, the general rule regarding delays, holds good. Finally, with respect to Category D offences, the Court questioned whether economic offences should be categorised as a separate category or not.

A serious and valid proposal would be to codify bail principles into uniform, statutory, rules, which could provide expected and fairness to a largely whimsical dimension. This also includes full compliance with Section 479 of BNSS, the clear language of the statute as it relates to, specifically, the undertrial who has served half their maximum sentence for your offence must be released on bail. This provision has sat untouched on the statute-hair but is unreliably used in practice, and too many inmates await their prison release alongside their eligibility to be released and legal right under BNSS.

Fast-Track Undertrial Cases

India's criminal justice system crawls forward, too slowly for people who are in jail without a trial or have spent too long in jail without a trial. To remedy this institutional inertia, speedier, dedicated undertrial courts should be set up with a finite, exclusive mandate to dispose of cases exceeding statutory custody criteria. These dedicated courts would take precedence over cases

whereby the accused has, in theory, already served more than 50% of the maximum headings set out for the penalty of the offence.

The National Undertrial Review Committee should be in a position to do more than review cases. Courts and jails should be linked through computers with real-time electronic alerts taking place at different custody limit points, especially 50% of the sentence as set out under Section 479 BNSS. The inertia of the judiciary cannot be the excuse, when liberty is at stake. This is not merely an administrative suggestion; it is a Constitutional requirement bestowed upon us in Article 21. Delays in justice here are not merely denials of justice but tombs for justice.

Tech to the Rescue: Custody Tracking

Today, with fintech able to process transactions in milliseconds and GPS able to track a pizza in real time, there is no vindication for a society that allows a criminal justice system to "lose" track of human liberty. The criminal justice system is called upon to utilize technology as a watchdog, not just a tool. Imagine downloading and utilizing a prison management system as a watchful and seamless partner, along with a dedicated e-Courts platform and digitally integrated case tracking, to create a Custody Oversight Dashboard in real-time. A centralized system where the police, jails, trial courts, high courts, and District Legal Services Authorities (DLSAs) are linked by a Custody Oversight Dashboard.

This centralized system must be capable of tracking, the detention duration for every undertrial, the status of bail eligibility based on the nature of the offence, the length of custody prior to trial, the progress with respect to investigating and trial stages, and then be capable of automatically flagging once statutory thresholds are hit (for example, the limitations contained in Section 479 BNSS). This dashboard could help an office avoid small administrative slips from morphing into serious breaches of people's basic rights. No citizen of a world where human rights and dignity are valued should be forgotten because someone either lost their file or because one of a detective's calendars slipped.

Prison Reforms: Transparency & Oversight

We can do all the drafting we want, but without uniform enforcement of the Model Prison Manual 2016[295], we will have just that, a lot of writing. The Model Prison Manual 2016 provides standards for prisoner's rights, health, hygiene, discipline, resolution of grievances, and rehabilitation. Yet, it can amount to no more than a record of the government's commitment to prisoner rights and rehabilitation. For these principles to be realized and accepted as part of lived experiences, we need independent monitoring committees. These committees must be established by law and include sitting or retired judicial officers, representatives from civil society, a representative from a human rights organization, and medical and mental health professionals. Their responsibility must include scheduled and unannounced inspections, communication with and opportunities to interact with prisoners, and reporting recommendations for immediate remedial action. Their reports must be made available to the public on a periodic basis.

Additionally, if there are no reporting mechanisms to ensure transparency to the public, we will merely be rendering prisons invisible, subject to unchecked intricacies of abuse. The only way for the constitutional promise found in Article 21, right to life and liberty, to have value is for us to replace opacity with transparency, silence with scrutiny, and indifference (in its broadest sense) with institutional transparency.

Empowerment, Not Just Representation

Genuine access to justice for prisoners must go beyond sporadic visits from legal aid lawyers or the mere existence of a helpline. We must move from nominal representation to actual empowerment. Prisoners and undertrials must be empowered to understand, use, and be confident in their ability to enforce their legal and human rights when they want, rather than wait for the burnt-out system to save them. To that end, legal aid clinics will have to be rolled out in

[295] Government of India, *Model Prison Manual, 2016* (Ministry of Home Affairs/Bureau of Police Research & Development)

all central and district jails, and must function as permanent legal repositories of information, rather than simple consultations. Legal aid clinics must consist of legal aid lawyers, para-legals, students who are law students or supervised by a lawyer, and not merely one-off consultations. Prisoners must be able to get support on processes for bail applications, when to call trials, and appeals at a point they require help. Rights- empowerment workshops must be regularly undertaken and designed to educate inmates simply about their rights to and knowledge of, their fundamental rights, key provisions of criminal law and procedural protections. For example, to know when to apply for bail, how to appeal, or where to go to claim abuses is the first step in empowerment.

Furthermore, grievance redress systems in prisons must be made user-friendly, accessible and time-bound. Suggestions boxes, internal complaints procedures are still expressed overtly even if not used where they are simply given a face. However, the suggestion boxes and procedures must be established in such a way that they can be tracked in real-time, provided anonymity and independently scrutinised. Prisoners cannot be expected to do administrative gymnastics in order to easily submit complaints about torture, request medical care or check on status of their legal case. DLSAs must fundamentally change the way they interact with prisons - outreach must be more proactive and anticipatory in terms of complaints as possible rather than waiting for prison complaints - rather than waiting for prisoners to make a complaint, DLSAs should initiate auditing how long undertrial cases and inmates are getting legal aid lawyers to meet regularly with inmates and other complications related to discoverable digital space. To be clearer, it is important to assess quality of representation in conjunction with quantity of representation. Incarceration justice is not superfluous or a privilege, it is a constitutional right.

Public Defender System & National Undertrial Review Board

India desperately needs a statutory public defender system that replaces the ad hoc model of access to legal aid. Most legal aid lawyers in India are poorly compensated, poorly trained, and should be poorly accountable. In contrast, countries such as the United States and South Africa have public defenders with full time salaried employment and institutional support with training in criminal law plus meaningful evaluations as well as a demand for accountability and

restructuring of services, if need be. A public defender system within the context of India would provide ongoing representation and continuity of counsel, something that quality legal defence requires, as well as giving effect to the constitutional mandate of article 39A. In addition to establishing a statutory public defender system this would be complemented with a National Undertrial Review Board to address the longstanding, chronic and massive problem of prolonged undertrial detention when there is no possibility that the prisoners would be released. This Review Board should be legally mandated to regularly audit prisons, comply with section 479 of the BNSS, and use data analytics to highlight status and delay. The Review Board will report annually to Parliament and include representatives from prison departments, courts, and legal services in a way that fosters coordinated systemic reform rather than a piecemeal approach to prisons. Together there are the contours of a just plan that is a clear, enforceable path for access to justice for the most vulnerable prisoners in India.

CONCLUSION

You cannot gauge a criminal justice system in terms of law or its courtrooms, but rather in the way it treats those people with the least amount of visibility and voice, its undertrials. These undertrials are not guilty, yet they are being punished through prolonged detention due to poverty, the slow pace of the criminal procedure, and/or their inability to obtain legal representation. These undertrials, at least notionally, are presumed innocent, yet what is lost are their liberties not through guilt but stolen through neglect. A criminal justice system which is indifferent to such detention violates the very core of what it stands for. The negligence of justice violates their rights. Access to justice means no one should be punished by process or detained while trying to prove innocence. Legal reform, a public client system and system-based two-tier accountability are no longer expectations, they are requirements. Until such a system takes measures to protect the victims who remain invisible, justice remains a possibility, not a certainty. Unless attention is given the act of justice may be accomplished - but it would remain unjust.

CHAPTER 8: MARGINALISED COMMUNITIES AND THEIR INTERACTION WITH LEGAL SYSTEM IN INDIA

by Samaun Fardosy Orthi

INTRODUCTION

India's Constitution was founded on the promise of equality, justice, and inclusion for everyone. However, the reality for many people is very different, as several groups in Indian society have been pushed to the sidelines, often left out socially, economically, and by the legal system.We often refer to these groups as "marginalized communities." They include Scheduled Castes (SCs), Scheduled Tribes (STs), religious minorities, women, LGBTQ+ people, people with disabilities, and denitrified or nomadic tribes. Finding justice can be hard for these groups because they often have to wait a long time, are treated unfairly, and are discriminated against in the legal system.

The law is supposed to help people get justice. But if laws are made or enforced without considering the needs of marginalized groups, the system itself can become a place of oppression instead of freedom. There are many laws and constitutional protections in India that are meant to protect the rights of these groups, but access to justice and enforcement are still not equal.

This chapter discusses how people from the many groups ignored by society are responding to the Indian legal system. It addresses the notion of equality in the Constitution, the statutes and institutions established to protect vulnerable groups, the challenges that remain to attaining justice, and the current activities of both the courts and the legislature to ensure the inclusion of marginalized groups. It also compares India's laws to those of other countries using international

legal documents like the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), and the Convention on the Elimination of Racial Discrimination (CERD).

Through this chapter, we aim to answer a key question: *Has the Indian legal system lived up to its promise of justice for all, particularly for its most vulnerable citizens?*

UNDERSTANDING MARGINALISATION: CONCEPTUAL FRAMEWORK

Marginalization is a social process that involves individuals or groups being relegated to the fringes of the society and excluded from full engagement in political, economic, social activity. These communities typically have little power, voice, or access to resources. Within a legal context, marginalization can be thought of in terms of lack of legal literacy or awareness, discrimination by state authorities, low conviction rates, over-representation in prison populations, lack of access to legal aid, etc.

Legal scholars define marginalization as systemic exclusion combined with institutional discrimination. Upendra Baxi, a prominent legal theorist, asserts, "the Indian legal system is often blind to the lived realities of the oppressed."[296]Justice Krishna Iyer has similarly insisted that not only should justice be done, but it must also be seen to be done, for the last person in the queue (the Dalit; the tribal woman; the sex worker; the transgender person).[297]

Marginalization is not only socio, political, economic or cultural; it is deeply embedded in the structure of law and its enforcement. Therefore, it becomes essential to assess not just whether laws exist for the marginalized, but whether those laws are **accessible, effective, and inclusive**.

[296] Upendra Baxi, *The Crisis of the Indian Legal System* 108 (Vikas Publishing, New Delhi, 1982)
[297] V.R. Krishna Iyer, *Law and the People* 55 (Deep & Deep, New Delhi, 1980).

HISTORICAL CONTEXT OF LEGAL EXCLUSION IN INDIA

To understand the legal issues of present day marginalized communities, we must understand the past. The past was rooted in hierarchies, particularly caste, gender, religion, and tribal identity. In many instances, hierarchies were institutionalized in the ways that laws were drafted, interpreted, and implemented.

When the British engaged in colonial rule, they established several laws formalizing many existing hierarchies of discrimination. For instance, the British brought uniformity in laws across what is now India with the Indian Penal Code (1860) and the Criminal Tribes Act (1871)[298]. While these laws produced a level of standardization, they also formally oppressed people in a way that was previously undetermined - particularly, whole communities such as Kanjars, Pardhis and Nats being declared "criminal by birth" under the Criminal Tribes Act. These communities persisted under constant police surveillance whereas their compensation often included forced relocation and right deprival. The Criminal Tribes Act was repealed in 1952, but the cultural scars from it live on today through the descendants of these communities - now referred to as Denotified Tribes (DNTs).

In this same way, there was little or no access to formal justice for Dalits and Adivasis in pre-colonial and colonial contexts. Systems of justice were imposed by colonial officials, or dictated by upper-caste power-holders, as indigenous practices were harmonized or deformed. Justice was afforded only to its powerful; oppressed castes had no rights, but were excluded from access to justice.Women were also excluded. Patriarchal determinants were embedded within legal frameworks—seen in the colonial appropriation of Hindu and Muslim personal laws which placed restrictions on women in inheritance, education, and as autonomous persons.

Post-independence, while the Indian Constitution promised to open new possibilities that the past had confined (in terms of equality, liberty, and dignity), centuries of legal exclusion could not

[298] Sanjay Nigam, "Disciplining and Policing the 'Criminals by Birth', Part I" 27(2) *Indian Economic and Social History Review* 131 (1990)

disappear overnight. The law has to be rewired, and is still being rewired, in favour of the downtrodden.

CONSTITUTIONAL VISION AND LEGAL SAFEGUARDS FOR THE MARGINALISED COMMUNITY

The Constitution of India offers an audacious pledge to fostering an equal and just society. The Constitution of India is a product of the reality of inequality and exclusion from which so many groups in India have been oppressed for so long. Dr. B.R. Ambedkar, the primary architect of the Constitution of India and a Dalit himself, deliberately stipulated that the Constitution be a legal object but be a mechanism for social transformation[299].The Constitution promises equal treatment, prohibits discrimination, and lays the groundwork for real inclusion.

The Constitution acknowledges that some groups in India suffered from historic disadvantages and therefore cannot only require formal equality (particularly with regard to their basic human rights) but also practical assistance to achieve real justice. The Constitution recognizes this and therefore sets out protections and affirmative action provisions for marginalised persons and communities.

Equality and Non-Discrimination (Articles 14 to 18)

The notion of equality is paramount in the Indian legal system. Article 14 lays out that every person is equal before the law and the law protects every individual equally from the State[300].This means that no individual is above the law and every person is equally protected under the law. Thus the rule is that the *like should be treated alike and not that unlike should be treated alike.*[301]

Article 15 complements this notion of equality by preventing discrimination on grounds of religion, race, caste, sex, or place of birth.[302]. Article 15 allows the government to discriminate in

[299] Christophe Jaffrelot, *Dr Ambedkar and Untouchability: Fighting the Indian Caste System* 89 (C Hurst, London, 2005).
[300] Constitution of India, art. 14.
[301] Dr. V.N Shukla, Constitution of India, p.27 (5th ed).
[302] Constitution of India, art. 15.

favour of women, children, and or socially or educationally backward groups by allowing special arrangements or reservations to help them bridge the gap between them and the rest of society.Article 16 then further provides for issues of equality in public employment and therefore creates space for reservation in government College for Scheduled Castes (SCs), Scheduled Tribes (STs), and Other Backward Classes (OBCs). The idea being that without some level of positive discrimination in favour of people from disadvantaged backgrounds in Government employment, it is very difficult for these groups of people to participate on more equal terms in situations that they were historically under-represented.Articles 17 and 18 go one step further in tackling caste-based injustice. Article 17 abolishes untouchability in any way and prohibits any practice of untouchability as an offence. This is a powerful legally sanctioned step to eradicate one of the worst aspects of the caste system. Article 18 abolishes titles and honorary distinctions which reinforces the notion that birth or status should not privilege anyone.

Dignity and the Right to Life (Article 21)

The right to life and personal liberty is protected under Article 21[303]. The Supreme Court's interpretation of Article 21 has gradually expanded this right to value not only survival, but also dignity of life, which encompasses housing, education, legal aid, health, and earning a livelihood. These broad interpretations of Article 21 are particularly important for marginalized people who do not have access to the basic means of survival and opportunities available to others. Even though the courts have acknowledged that freedom to make choices in life should be viewed in context, and is enabled by rights such as security, self-respect, and dignity, freedom has historically always been denied to a high proportion of members of Indian society. In fact it was held by the Hon'ble Supreme Court in the case of Francis Coralie Mullin v. Administrator, Union Territory of Delhi that the meaning of life is not delimited to animal existence but is inclusive of the right to live with human dignity and to avail the bare necessities of life.

[303] Francis Coralie Mullin v. Administrator, Union Territory of Delhi, AIR 1981 SC 746

Directive Principles and Social Justice (Articles 38, 39, 46)

The Directive Principles of State Policy are not per se legally enforceable in courts of law but provide a broad set of principles for the government to adhere to. They embody the spirit of the Constitution and set out the moral obligations of the State.

In Article 38, the State is urged to aim at securing a social order for the promotion of the welfare of the people, and to ensure justice- social, economic, and political, to be enjoyed by all citizens. Article 39 requires the State to direct its policy towards ensuring that wealth and resources are not concentrated in the hands of a few but are distributed to the common man, especially men and women in India have the right to more equal access to a respectable and sustainable livelihood and equality also.

Article 46 directs the State to promote the educational and economic interests of SCs, STs, and other weaker sections of society and to guarantee that they are saved from social injustice and exploitation.[304]Such principles have inspired enactment of a number of laws such as the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 and welfare state schemes for backward classes.

Representation and Affirmative Action (Articles 330–342)

To guarantee political participation for marginalized communities, the Constitution sets aside seats in Parliament and the State Assemblies for Scheduled Castes and Scheduled Tribes by listing them in Articles 330 and 332[305]. This provision ensures a voice in the law making process and that their unique needs are taken into consideration.

Article 335 acknowledges the essential nature of representation in public services, and allows for special consideration in government employment for SCs and STs. Articles 340 to 342 designate the identification of socially and educationally backward classes and empowers the government

[304] Constitution of India, art. 46
[305] Constitution of India, arts. 330 and 332

to take action to ameliorate them. The Mandal Commission's report, which brought reservations for OBCs into reality, was based on these latter articles.

At a deep level, the Indian Constitution does not simply treat each citizen in a mechanistic way equally. Rather, it recognizes that genuine equality sometimes entails treating people differently according to their appropriate needs. In this backdrop, the rights afforded to historically marginalized communities are not merely legal technicalities. They are in essence lifelines, granted to those who historically experienced severe social exclusion and mend the ongoing damage of it while facilitating all citizens to partake in the life of the nation..

TYPES OF MARGINALISED COMMUNITIES AND CASE LAWS

Scheduled Castes and Scheduled Tribes – Legal Interventions and Gaps

The caste system in India continues to be one of the world's oldest expressions of social stratification. Those who were formerly known as "untouchables," and now called Dalits, were completely excluded from mainstream aspects of society and denied access to education, land ownership, entry to the temple, as well as participation in various social or economic structures they wished to be part of. The touchability/untouchability they endure is not just social, it is legal as well- in pre-independence time India; Dalits were denied the right to go to the courts, and the right to hold a public office. Similarly, scheduled tribes-- formerly, Adivasi-- who were the original inhabitants of the forests and hilly regions of India, lost their ancestral land due to colonial forest policy and post-colonial industrial projects.

Even in the post-colonial period, the reality of caste/nature of tribal marginalization is also deep. Laws could not undo centuries of oppression instantaneously[306]. Despite protective labour reforms and laws, scheduled castes and scheduled tribes still confront ongoing structural violence, landlessness, erosion of their territories, dislocation, and discrimination embedded in legal and administrative systems.

[306] Marc Galanter, *Competing Equalities: Law and the Backward Classes in India* 203 (Oxford University Press, Delhi, 1984).

The Indian Constitution seeks to undo historical injustices by utilising affirmative action and protective discrimination. Articles (15) (4) and (16) (4) introduce special provisions in relation to education and public employment for the SCs and STs. Article 17 abolishes untouchability. Article 46 requires the State to promote the educational and economic interests of SCs and STs and to protect them from social injustice and exploitation.Political representation is provided for under Article 330 and 332 with reference to Parliament and State Assemblies. Article 335 allows for representation in public services.

The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989: This historic legislation seeks to restrict the commission of caste atrocities while punishing the same. The Act not only criminalized multiple behaviors that debase, exploit, or harm SCs and STs[307], but also includes measures against perpetration of violence, including:

- Forcing SCs/STs to eat or drink dangerous or inedible substances.
- Attacks of dignity (e.g. stripping, or nude parading).
- Social boycott;
- Sexual violence against SC or ST women;
- Dispossession of land and disallowing entry into public places.

The Act requires the designation of Special Courts, special public prosecutors, and vigilance committees at the district level. Unfortunately, very little has come of this. Every year, according to the National Crime Records Bureau (NCRB), more atrocities against SCs and STs are committed. In 2021 there were over 50,000 registered crimes against SCs and 8,000 against STs[308].But the rate of conviction is still consistently below 30%, and there seems to be an absurd amount of time before a trial is ever held.The 2018 amendment to the Act included the provisions that the Supreme Court plainly weakened in the case of *Subhash Kashinath Mahajan v. State of Maharashtra* where they allowed anticipatory bail to be applied to a case of atrocity[309]. The startling outcry from the public, led by Dalit activists and aided by mass protests, compelled Parliament to restore the original strength of the Act.

[307] Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 (Act No. 33 of 1989).
[308] National Crime Records Bureau, *Crime in India 2021* (Ministry of Home Affairs, New Delhi, 2022)
[309] Subhash Kashinath Mahajan v. State of Maharashtra, (2018) 6 SCC 454

The Forest Rights Act, 2006 (FRA): Tribal communities frequently live on and rely on forest lands. The Forest Rights Act 2006 recognizes their community and individual rights over forest resources, with the aim to rectify several decades of kerfuffle over colonial and post-colonial land dispossession. Tribal gram sabhas have been delegated the power to recognize land rights. Despite this, out of over four million claims that have been submitted under the FRA, only 46% have been accepted and an extensive number of rejections occur arbitrarily.[310] Many state governments are still showing a preference for clearing forests for commercial projects and causing displacement is still occurring in waves.

Judicial Interventions

State of Karnataka v. Appa Balu Ingale (1993): The Supreme Court observed that the practice of untouchability violates Article 17 and cannot be tolerated in any form[311]. The Court reminded state authorities that passive inaction encourages social discrimination.

People's Union for Democratic Rights v. Union of India (1982): There the Supreme Court held that forced labor involving Dalits in public construction work was a form of bonded labor, which violated Articles 21 and 23[312]. It expanded the meaning of "dignity" in the Constitution to include protection from exploitation.

Justice D.Y. Chandrachud, in multiple judgments, has spoken on the need for substantive equality, not just formal equality, especially for oppressed castes[313]. Justice Krishna Iyer noted that law must not become a "tool of the dominant" and urged for pro-poor judicial activism.

Scholarly Perspectives

- Scholars like **Gail Omvedt**, **Kancha Ilaiah**, and **Anand Teltumbde** have argued that legal equality means little unless backed by material empowerment[314]. They stress that caste discrimination has modernized itself and appears in newer forms—such as

[310] The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 (Act No. 2 of 2007)
[311] State of Karnataka v. Appa Balu Ingale (1993) 2 SCC 213
[312] People's Union for Democratic Rights v. Union of India (1982) 3 SCC 235
[313] D.Y. Chandrachud J, Speaking Constitution: A Judicial Biography (2023, speeches)
[314] Gail Omvedt, Dalits and the Democratic Revolution (Sage 1994)

caste-based bullying in schools, exclusion in corporate jobs, and harassment in higher education[315].

- The **Rohith Vemula suicide case** (2016) exposed how caste still plays a deadly role in elite institutions. His death led to national outrage and discussions on institutional casteism, urging reforms in university policies and laws like the PoA Act[316].

Religious Minorities and the Legal System

Religious minorities particularly Muslims, Christians, and Sikhs have gone through cycles of inclusion and exclusion in the legal system in India. Post-Partition there was suspicion of Muslims and they were constantly monitored; Christian missionaries were thought to be foreign agents; Sikhs were subject to police repression generally and during the 1984 anti-Sikh pogroms[317].

Over time, legal institutions became spaces where minority rights have been denied or denied selective protections. Personal laws remained for religious communities, but minority voices were often stymied in reform processes. With respect to criminal law, minorities are overrepresented in undertrial prison, have also been subject to arrest and arbitrary detention, and have been subject to physical torture.

Constitutional Rights for Religious Minorities

- **Article 25** ensures the right to practice and propagate any religion
- **Article 26** guarantees the right to manage religious affairs
- **Article 29** protects the cultural identity of minorities
- **Article 30** allows minorities to run their own educational institutions

These rights form the basis of **India's secular structure**, yet their application has often been limited by political pressures, communal violence, and legal bias.

[315] Kancha Ilaiah, Why I Am Not a Hindu (Samya 1996)
[316] Human Rights Watch, India: Ensure Justice for Rohith Vemula (2016)
[317] Zoya Hasan, Politics of Inclusion (OUP 2009)

Communal Violence and Denial of Justice

1984 Anti-Sikh Riots: Delhi saw the murder of over 3,000 Sikhs after the killing of Indira Gandhi[318]. Although hundreds were eyewitnesses and video evidence existed, there were few convictions. Decades passed before the likes of Sajjan Kumar could be charged or judgment was actually rendered. These delays exposed serious problems in investigating, prosecuting and judicial spine.

Gujarat Riots (2002): Moreover 1,000 people, mainly Muslims, were killed in a state-supported pogrom[319]. The courts were initially inactive, but the Supreme Court ordered retrials, and a transfer of cases outside of Gujarat. *Zakia Jafri v. State of Gujarat* was a challenge to the complicity of so-called state organs, in particular, the then-Chief Minister (now prime minister) Narendra Modi[320]. Although the SIT report gave Modi a clean chit, the case reflects a legacy of delays and selective justice.

Discriminatory Policing and Laws: Several Numerous studies indicate that Muslims in India are over-policed and overrepresented in India's prisons. The NCRB's 2022 report indicates that Muslims make up just around 15% of the population, but over 19% of the industrial population. The Unlawful Activities Prevention Act (UAPA) and sedition laws have been disproportionately applied, primarily against minorities, journalists, and dissenters.[321]

Scholarly Reflections and International Criticism

Legal scholars like Faizan Mustafa and Rajeev Dhavan claim that, in India, secularism has become "soft on majoritarianism," and that the legal framework of India has often failed to protect its minority communities from hate speech, lynchings and mob violence. Reports by human rights organization, like Amnesty International and Human Rights Watch, have unfavorable conclusions when assessing India's collective response to communal violence, as well as the failures in protecting its minorities and other vulnerable groups[322]. The UN Special Rapporteurs have frequently called upon India to take the recommendations of the International

[318] PUCL, Who Are the Guilty? (1984)
[319] Teesta Setalvad, 'The Truth Hurts' (2003) Communalism Combat
[320] Zakia Jafri v. State of Gujarat (2022) 6 SCC 499
[321] Unlawful Activities (Prevention) Act 1967
[322] Faizan Mustafa, 'India's Shrinking Secular Space' (2021) The Hindu

Covenant on Civil and Political Rights (ICCPR), the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) to ensure that their minorities and vulnerable communities are not treated as second class citizens.

Women as a Marginalized Group – Intersectional Disadvantage

Women in India experience multiple layers of marginalization from gender, caste, religion, class, disability, and geo-spatial marginalization. The Indian Constitution guarantees equality and equal protection with Articles 14 and 15 and guarantees special provisions for women in Article 15(3). Furthermore, the Supreme Court has interpreted Article 21 to include reproductive autonomy, dignity and safety. Regardless of the protections of the Constitution, women remain underrepresented in formal and informal courts and tribunals and face structural challenges to accessing justice.

There have been a number of legislative reforms aimed at the protection of women. The Protection of Women from Domestic Violence Act, 2005 was significant and a giant leap because it recognizes abuse that is non-physical. The Sexual Harassment at Workplace Act, 2013 arose out of a judgment of the Supreme Court of India in *Vishaka v. State of Rajasthan (1997)* which ultimately enshrined survivor-centred legal protections to provide safe workspaces. Both legislative remedies are poorly implemented owing to social stigma and fear of retribution or loss of livelihood by victims or lack of funding, resources and a host of institutional support from police and courts.

Landmark cases have also deliberately shaped values around women's rights. In S*uchita Srivastava v. Chandigarh Administration (2009)*[323]The Court upheld a woman's right to exercise her reproductive choice. The case of *Joseph Shine v. Union of India (2018)*[324] and the Court's decision to declare the law of adultery unconstitutional was specifically patriarchal. In the Triple Talaq case (Shayara Bano v. Union of India, 2017)[325]The Court found instant divorce among Muslims to be discriminatory.

[323] Suchita Srivastava v. Chandigarh Administration, (2009) 9 SCC 1
[324] Joseph Shine v. Union of India, (2018) 2 SCC 189
[325] Shayara Bano v. Union of India, (2017) 9 SCC 1

Despite progressive rulings, legal matters such as marital rape remain unaddressed, and conviction rates for sexual offences are still low. Dalit and tribal women face an even greater barrier to justice, for example, in the case of the Hathras gangrape case (2020) which witnessed caste and police complicity meant that justice was denied. As argued by scholars such as Flavia Agnes and Ratna Kapur, to achieve real gender justice we need both legal reform and cultural change. International obligations such as CEDAW should compel domestic action.

LGBTQ+ Communities – From Criminalization to Recognition

The LGBTQ+ community in India has faced criminalization for many years, mainly because of Section 377 IPC that made same-sex relationships a crime until it was struck down. In *Naz Foundation v. NCT Delhi(2009)*[326]The Delhi High Court first read down Section 377 which meant that it was not legally enforceable; however , this ruling was overturned in *Suresh Kumar Koushal(2013)*. In fact, in *Navtej Singh Johar v. Union of India(2018)* the Supreme Court of India decriminalized homosexuality and held that LGBTQ+ individuals are entitled to dignity and other constitutional rights under Articles 14, 15 and 21 with a transformative approach.

In *NALSA v. Union of India (2014)*[327]The Court determined and recognized that transgender persons have rights for gender identity and self-identification under the Constitution of India. The most recent concrete legislative action, the Transgender Persons (Protection of Rights) Bill, 2019, was criticized for the bureaucratic approach it took to support gender recognition and identity. Like the Transgender Persons (Protection of Rights) Bill, 2019, same-sex marriage is not legally recognized. In *Supriyo Chakraborty v. Union of India (2023)*, the Supreme Court denied same-sex marriage to become legal, but rather left it for Parliament to take action. Arvind Narrain, Danish Sheikh and Dipika Jain argue that queer rights go beyond the decriminalization of homosexuality and provide marriage rights, adoption rights, healthcare rights, and anti-discrimination rights.

More broadly, the progress made through legal channels still does not eliminate the societal prejudice, ostracism and limited access to justice faced by LGBTQ+ individuals. The law must

[326] Naz Foundation v. Government of NCT of Delhi, (2009) 160 DLT 277 (Del HC)
[327] National Legal Services Authority v. Union of India, (2014) 5 SCC 438

now move from a position of tolerance to one of inclusion, with a clear guiding principle of constitutional morality and international human rights obligations.

Landmark Case Laws and Their Impact

Judicial interpretation has been an important tool in promoting the rights of vulnerable communities in India. Landmark cases, through interpretation of the constitution, have not only established constitutional protections, but have also filled legislative gaps and provided redress for historical injustices. Below are two prominent cases that have molded the human rights landscape in India:

1. **Navtej Singh Johar v. Union of India (2018)**

The Supreme Court decriminalized consensual same-sex relationships by reading down Section 377 IPC - affirming dignity, privacy and equality under Articles 14, 15 and 21. The Supreme Court's decision also established sexual orientation as an intrinsic aspect of identity, and that constitutional morality must prevail over societal morality.

2. **NALSA v. Union of India (2014)**

This judgement recognized sustainable legal identity for transgender persons, and recognized their right to self-definition as male, female or third gender; and recognized legal protections under articles 14, 15, 16 and 21 directed affirmative action, and inclusion, laying the basis for gender diversity in Indian law.

3. **Vishaka v. State of Rajasthan (1997)**

In light of the absence of a statutory remedy opposing sexual harassment in the workplace, the Court proceeded to formulate binding guidelines taking CEDAW and Article 21 into account. The guidelines constituted the basis for the Sexual Harassment of Women at Workplace Act, 2013.

4. **Shayara Bano v. Union of India (2017)**

The Court struck down immediate triple talaq (talaq-e-biddat) under Muslim personal law as unconstitutional, violating Article 14. The judgment took a step toward advancing gender equality in the context of religious law.

5. **State of Karnataka v. Appa Balu Ingale (1993)**

The Supreme Court condemned untouchability and social boycotts of castes and reiterated that Article 17 is enforceable and an essential aspect of dignity.

6. **Samatha v. State of Andhra Pradesh (1997)**

The Court approved that tribal land rights were protected, and ruled that a private company was leasing tribal land obtained illegally and thereby it was unconstitutional and inconsistent with the Fifth Schedule and state policy.

7. **Suchita Srivastava v. Chandigarh Administration (2009)**

The right of women to make decisions concerning reproduction was recognized as a part of personal liberty under Article 21, to reaffirm bodily autonomy.

8. **Indra Sawhney v. Union of India (1992)**

Commonly known as the Mandal judgment, the Court upheld public employment reservation for OBCs at 27% and introduced the idea of a "creamy layer" thereby influencing the landscape of affirmative action policy.

9. **Zakia Jafri v. State of Gujarat (2022)**

Although the Court upheld the SIT report which grants clean chit to political actors in this case, the case remains the subject of significant ongoing discussion and discourse around issues of state complicity and judicial accountability in relation to the cases of communal violence.

10. **People's Union for Civil Liberties v. Union of India (2004)**

The Court upheld the rights of persons who are HIV-positive and linked the right to health and the right to privacy to Article 21, thereby expanding protection for vulnerable medical minorities.

11. **Laxmi v. Union of India (2014)**

The Court ordered the regulation of acid sales and the provision of compensation to survivors of acid attacks and acknowledged the responsibility of the state in the prevention of gender-based violence.

12. **Independent Thought v. Union of India (2017)**

Exception 2 to Section 375 IPC was read down criminalising marital rape of minor wives, promoting the protection of child within marriage.

13. **Church of God in India v. KKR Majestic (2000)**

Balanced religious freedoms with public order, determining that Article 25 rights must be balanced against the rights of others in order to maintain public peace.

14. **Devidas Ramachandra Tuljapurkar v. State of Maharashtra (2015)**

Holding in favour of poetic freedom, the Court recommended the dignity of certain persons like, B.R. Ambedkar in the context of sensitivity to caste prejudice in expression under Article 19(2). 15. National Federation of the Blind v. UPSC, (2014) Court ordered reasonable accommodation for the UPSC exams, discussed the rights of disabled persons and Article 21 and the Persons with Disabilities Act.

15. **National Federation of the Blind v. UPSC (2014)**

The Court ordered reasonable accommodation in UPSC exams, reinforcing the rights of disabled persons under Article 21 and the Persons with Disabilities Act.

Together these cases illustrate the changing role of the Indian judiciary as a custodian of rights. Courts are often progressive in their interpretation, the implementation of the law relies on the executive branch of government. These judgments have made significant changes to the law on gender, caste, sexuality, tribal sovereignty and disability and have brought India closer to the realization of equality and social justice outlined in the Constitution.

INTERNATIONAL HUMAN RIGHTS INSTRUMENTS AND INDIA'S OBLIGATION

India is bound by a number of international conventions where legally-cognizable cases directly about marginalized communities are too abundant to enumerate fully. The Universal Declaration of Human Rights (UDHR) prohibits discrimination on various grounds and mandates equality and dignity for everyone[328]. The ICCPR and ICESCR acknowledge equality before the law and both civil and socio-economic rights, since everyone is entitled to sustainable development of their full individual potential while being able to reject the harms of modernity. CEDAW reaffirms the importance of gender equality, and UNCRPD commits to recognizing those from traditionally marginalized communities on the grounds of disability. ICERD explicitly commits to prohibiting discrimination motivated by caste or race.

Even though these treaties are not automatically enforceable in Indian courts, the Supreme Court of India has echoed the importance of India's global commitments in its own domestic case law (either individually or collectively), including, for instance, in Vishaka and Apparel Export Promotion Council v. A.K. Chopra, that international law can be used as an interpretive tool to apply fundamental rights if there is no disagreement with domestic law[329]. In other words, India's international commitments should not be merely symbolic, but a mechanism through which direct legal reform may be pursued and ultimately institutionalized.

[328] Universal Declaration of Human Rights (UDHR), 1948
[329] Apparel Export Promotion Council v. A.K. Chopra, (1999) 1 SCC 759

RECOMMENDATIONS AND WAY FORWARD

Several immediate reforms must take place to make the legal system inclusive and representative of the varied communities that populate India. The first step around making reasonable legal systems claims on behalf of all citizens is for India to introduce an across the board anti-discrimination law to protect persons from being excluded from the legal and human systems, based on caste, religion, gender, disability and sexual orientation. Second, the state must support legal aid structures and services, particularly in the rural and tribal areas, but this by whenever there is a person or people who can legally support their lives, through trained paralegals and or community advocates, should be possible. Third, there should be required not just sessions but regular sessions , for police and judiciary, to undergo sensitization training to understand caste, gender and minority rights. Fourth, representation, of the marginalised should be paramount with respect to judicial appointments, commissions and public service, fifth India should take more seriously her international legal obligation by developing enforcement mechanisms, and regular reviews based on these obligations through parliamentary committee and these audits be independently verified and reported on to ensure autonomous, absence of patronage are absolute.

CONCLUSION

The Indian legal system has the power to bring about change to the society by ensuring justice for its most marginalized. Through transformative judgements and progressive laws, building blocks have already existed. However, structural disparities and disadvantages, insufficient implementation, and deep seated b societal biases will continue to not afford many of their rightful place within the legal order. The promise of the Constitution will not be realized unless justice is experienced outside of statutes and courtrooms and into everyday life. Law should not only accommodate the pointers[330]; rather acknowledgment, protection and empowerment is required. Then India could be a democracy and not so only in name.

[330] Amartya Sen, The Idea of Justice 291 (Penguin, New Delhi, 2009

CHAPTER 9: FROM LAND TO LAW: ACCESS TO JUSTICE FOR FARMERS UNDER THE INDIAN CONSTITUTION

by Rhea Eleanor Rhine

INTRODUCTION

The right to access to justice lies at the heart of constitutional governance in India. Although it is often related to courtrooms during the trial and serious legal proceedings, its complete scope covers the ability of individuals and societies to enforce their rights, to reconcile and resolve any controversy in an impartial fashion, and to receive redress, without undue hardship.[331] This access is unfortunately consistently blocked by structural, legal as well as practical obstacles to many farming and agrarian communities, which are usually economically as well as socially marginalized.[332]

The role of the agrarian communities in the socioeconomic structure of India cannot be denied: more than 50% of the population of the country is engaged in agriculture; thereby providing a large amount of the jobs in rural areas and also delivering food security to the population.[333] Nevertheless, unfair land access or ownership, exploitative forms of tenancy, restricted access to institutional credit, climate risk and market uncertainty continue to challenge farmers.[334] Such difficulties, when they lead to legal confrontations, like alienation of land, non-repayment of loans, low payments on land acquisition schemes, leaves farmers without any effective redressal through legal recourse.[335]

[331] Krishna Iyer, V.R., Law and the Poor (Deep & Deep 1980) 17.
[332] Baxi, Upendra, *The Crisis of the Indian Legal System* (Vikas 1982) 105.
[333] Ministry of Agriculture and Farmers Welfare, *Annual Report 2022–23* (GoI 2023) 3.
[334] Swaminathan M.S., *Report of the National Commission on Farmers* (GoI 2006) vol 1, 11–14.
[335] Baviskar, Amita, *In the Belly of the River: Tribal Conflicts over Development in the Narmada Valley* (OUP 2004) 84.

Despite the changes initiated by the State, formal law still seems an area that is closed to the agrarian poor. This is primarily due to the barriers of language, procedure, and funds. A good example is India: this is a country who has established a huge network of subordinate courts; however, a large majority of such tribunals is located in urban centers, making them inaccessible to most rural litigants.[336] As a result, there is low legal awareness amongst the farmers and state-run legal-aid schemes, which are required by law, are either insufficient or under-utilized.[337]

The current argument is an analysis of constitutional support to the right to access to justice of agrarian populations, barriers, institutionalized responses, and recommendations. This question is based on the assumption that justice is not some sort of abstract right which should be recognized in abstract but is being a concrete need that has to be fulfilled.

CONSTITUTIONAL AND LEGAL FRAMEWORK

The Constitution of India provides a system of comprehensive justice, thus emphasizing the need to demolish socio-economic obstacles to access. Article 14 provides equality before the law, and Article 21 provides a right to life and personal liberty; the Supreme Court has interpreted this right to include the right to access justice.[338] Under this framework, the rights of land, livelihood, and legal redress by the farmer should ideally be protected.

The Directive Principles of State Policy also speak clearly on the duty of the State to establish a just social order. Article 38 and 39 guide the State to reduce the inequalities, guarantee the equity of access to material resources, and avoid the concentration of wealth.[339] These terms have been regarded as governing rules especially when dealing with agrarian distress using pro-poor legislation.[340]

[336] Galanter, Marc, 'Justice in Many Rooms' (1981) 19(1) J Legal Pluralism 1, 16–20.
[337] Legal Services Authorities Act 1987, s 12; NALSA Annual Report 2020–21 (GoI 2021) 22.
[338] *Maneka Gandhi v. Union of India,* AIR 1978 SC 597
[339] Granville Austin, *The Indian Constitution: Cornerstone of a Nation* (OUP 1966) 75.
[340] Baxi, Upendra, *Law and Poverty: Essays* (N.M. Tripathi 1988) 102.

Courts have been critical in the strengthening of these rights through interpretation. In the case of *Hussainara Khatoon v. State of Bihar*, the Supreme Court held that legal aid is an essential component of a fair trial under Article 21.[341] Similarly, in *Francis Coralie Mullin v. Administrator, Union Territory of Delhi*, the Court stated that the right to live covered the right to live with dignity which covers the provision of socio-economic rights.[342]

Rural societies benefit physically in the set of acts which have become laws to defend their rights in the sector. The dispensation of free legal assistance is a compulsory provision under Legal Services Authorities Act, 1987, and to this extent, the members of Scheduled Castes, Scheduled Tribes and other disadvantaged rural masses fall under Section 12.[343] When administered properly, such a legal framework should provide farmers with real access to remedy, but the problem is that the implementation remains consistent.

There have been some forms of reforms in land reforms, and legislations by the government like the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 (LARR Act) have attempted to address past wrongs associated with land alienation and forced displacement.[344] However, inconsistent application, bureaucratic paralysis, and gaps in compensation systems have been continuing to dull the effectiveness of such laws in most agrarian environments.[345]

The normative basis provided by the statutory legal-aid schemes is article 39A, the enactment of which, by the 42nd Amendment Act, was expressly directed at indicating that the State was required to make opportunities to secure justice not lost to any citizen on account of economic or other disabilities.[346] Nevertheless, in spite of these legal protections, access to justice on the ground is moderated by caste order, feudal relationships of power and the complexity of procedure in relation to agrarian communities. There still exists a significant disconnection between constitutional idealism and practical operation.

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[341] *Hussainara Khatoon v. State of Bihar*, AIR 1979 SC 1369.
[342] *Francis Coralie Mullin v. Administrator, Union Territory of Delhi*, AIR 1981 SC 746.
[343] Legal Services Authorities Act 1987, s 12.
[344] LARR Act 2013, s 3, 26–30.
[345] Shankar, Shylashri, *Scaling Justice: India's Supreme Court, Anti-Terror Laws and Social Rights* (OUP 2009) 118.
[346] Constitution (42nd Amendment) Act, 1976.

STRUCTURAL AND INSTITUTIONAL BARRIERS

In spite of the progressive constitutional and legislative framework in India, people in the agrarian sector, including farmers, still face both systematic and institutional barriers in their access to justice. These blockades of geographical isolation, bureaucratic complexity, economic precarity, and social stratification relate to one another in compounds and enhance the marginalization of the rural litigants.

To begin with, spatial inaccessibility is a great challenge. Most of the lower courts in India are based in the district headquarters thus forcing farmers to walk long distances hence causing monetary and opportunity costs to the farmers.[347] The Justice Indicators Report (2020) by Vidhi Centre for Legal Policy further unravels the fact that over 60 % of rural litigants face issues of logistical challenges including even filing an initial case.[348]

Second, the low level of legal literacy in farmers does not promote the ability of farmers to advocate themselves in the courts. Even though there are National Legal Services Authority (NALSA) or the State Legal Services Authorities, these are located very remotely and also unable to communicate in the local language.[349] Therefore, most of the farmers rely on middlemen or regional power brokers, increasing vulnerability to exploitation.[350]

Third, procedural and linguistic complexity constitutes one more delusion. Majority of High Court cases take place in English-a language that is foreign to most of the rural Indians.[351] Legal jargon is used to complicate forms, filing and hearings thus limiting their possible participation by large numbers. Insofar as India is concerned, as Galanter has argued, the formal legal system

[347] Basu, Durga Das, *Introduction to the Constitution of India* (23rd edn, LexisNexis 2018) 148.
[348] Vidhi Centre for Legal Policy, *India Justice Report 2020* (Tata Trusts 2020) 32.
[349] NALSA, *Annual Report 2020–21* (GoI 2021) 18–20.
[350] Krishnan, Jayanth, *Rule of Law in India: A Quest for Reason* (OUP 2012) 164.
[351] Ghai, Yash, 'Language Rights and the Legal System in India' (2008) 12(2) NUJS L Rev 41.

in the country is a system of justice in a series of rooms that are closed or accessible by cultural and economic capital.[352]

Gendered obstacles increase exclusionary effect further as women farmers make up almost 33% of agricultural workforce but they often do not have legal title to land, which further disrupts their ability to develop locus standi in court procedures.[353] The norms of the patriarchy and lesser understanding deny several women the right of property, inheritance, or even entitlements under welfare schemes.[354]

Access to quality legal representation is also very difficult. Despite the requirements in the Legal Services Authorities Act regarding provision of free legal aid, it has been seen through field studies and experiences that the quality of counsel given under this scheme is rather deplorable in nature and in many cases is on perfunctory basis.[355] Many rural beneficiaries do not have knowledge of their provisions by the Act, or trust in the state institutions, having been ignored before. These institutional barriers reduce entitlements to unattainable principles and systematically make farmers unable to claim their legal right.

CASE LAW AND JUDICIAL INTERVENTION

Over the past few decades, the Indian judiciary has recognized the failure of agrarian communities to represent themselves on different platforms and has taken the center-stage to offer justice to them. The courts have also used the Public Interest Litigation (PIL) as a medium and rights-based approach to the adjudication of issues related to land right, displacement compensation and environmental degradation as experienced by farmers in dispute.

In the case of *Samatha v. State of Andhra Pradesh*, the Supreme Court ruled in the case that the process of selling tribal land to private mining companies was an infringement in the Fifth

[352] Galanter, Marc, 'Justice in Many Rooms' (1981) 19(1) J Legal Pluralism 1, 16.
[353] Agarwal, Bina, *A Field of One's Own: Gender and Land Rights in South Asia* (CUP 1994) 214.
[354] Rao, Nitya, 'Disentangling Women's Rights to Land in Rural India' (2011) 14(2) J Peasant Stud 225.
[355] Common Cause, *Status of Legal Aid Services in India* (2016) 56–57.

Schedule of the Constitution of India.[356] The Court provided Article 21 with the scope of into amounts more than just living since it included the concept of livelihood and cultural integrity, shifting focus from mere protection of life to the safeguarding of agricultural society.

Similarly in *Narmada Bachao Andolan v. Union of India*, the Supreme Court dealt with the widespread displacement of the farmers and the tribal population during the construction of dams.[357] This case, although in the end affirmed the project, highlighted the importance of an appropriate rehabilitation and fair compensation, which became a precedent of an incident between development and social justice.

In *Banwasi Seva Ashram v. State of U.P.,* the Court explained that in the case of acquisition of land from the under-privileged, the livelihood of the latter is destroyed and it was incumbent on the State to prove the necessity and rehabilitation of the same.[358] This principle has often been used in other land acquisition controversies even though it has been used in some cases in an apparently inconsistent manner.

In a more recent case of *Land Acquisition Officer v. Karigowda*, The Court instructed that land acquisition should not be a sanctuary of exploitation and fair market compensation must be continued to be important compliances of land acquisition.[359] It also emphasized the need of following the procedural protections diligently as envisaged in Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013.

The next area touched by judicial activism is farmer suicides and debt relief. In *Centre for Environment and Food Security v. Union of India*, the Delhi High Court discussed the inability of the State to enforce rural employment guarantees and food schemes, implying that their absence was the cause of socio-economic deprivations that contribute to farmer vulnerability implicitly.[360]

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[356] *Samatha v. State of Andhra Pradesh*, AIR 1997 SC 3297.
[357] *Narmada Bachao Andolan v. Union of India*, (2000) 10 SCC 664.
[358] *Banwasi Seva Ashram v. State of U.P.*, AIR 1987 SC 374.
[359] *Land Acquisition Officer v. Karigowda*, (2010) 5 SCC 708.
[360] *Centre for Environment and Food Security v. Union of India*, WP (C) No 3012 of 2002 (Del HC).

However, the judiciary has also been accused of inconsistency. In *Rajbala v. State of Haryana*, the Supreme Court upheld a Haryana law which says that only persons with minimum educational qualifications can enter into contests at the local elections in the State of Haryana.[361] This left large numbers of rural farmers, mainly women, out of the equation and created doubt concerning substantive justice.

As a result, the justice system plays the role of hope and the reflector of inconsistencies in the system. Its interventions have enhanced the access to justice but there are some challenges in implementing and following up.

ROLE OF LEGAL AID AND CIVIL SOCIETY ORGANISATIONS

Lawyers, civil society organizations, and philosophical groups play a vital role in bridging the gap between legal rights on paper and the actual access to justice for the agrarian communities of India. Considering the socio-economic disadvantages that common people in the rural areas are generally exposed to, the Legal Services Authorities Act, 1987 recognized the provision of right to free legal aid under Article 39A of the Constitution.[362]

The National Legal Services Authority (NALSA), the State Legal Services Authorities (SLSAs), and the District Legal Services Authority provide legal counseling, hold Lok Adalats and create awareness through use of camps in rural districts.[363] However, this has not been comprehensive. A recent study by Common Cause revealed that a small number 18 percent of the rural residents knew about legal aid services in 2016.[364] Most of the legal aid lawyers are not trained in the law of land, right to tenancy and rights to cultivation and such farmers are without appropriate representation.

[361] *Rajbala v. State of Haryana*, (2016) 2 SCC 445.
[362] Legal Services Authorities Act 1987, s 12(c).
[363] NALSA, *Annual Report 2020–21* (GoI 2021) 18.
[364] Common Cause, *Status of Legal Aid Services in India* (2016) 42.

Section 19 of the 1987 Act[365] has advocated for the use of Lok Adalats, an effective way of settling minor disputes, including claims of compensation as well as debt recovery, without delays in procedures.[366] In one case the Maharashtra Lok Adalat Scheme, negotiated with the cooperative banks and settled a substantial number of farmer debt cases in thousands of cases.[367] Nevertheless, complex cases over land ownership, tenant rights and environmental claims do not always suit such forums.

The civil society organisations have strived to fill the gaps within the society. Examples are the original activities of the NGOs Mazdoor Kisan Shakti Sangathan (MKSS) and BAIF Development Research Foundation to spread legal empowerment. As a result of MKSS activities promoting the Right to Information (RTI), rural people have been given the ability to expose land usurpation and corruption in the farm projects.[368]

In parallel, paralegal training programs have also empowered the youth at a local level in rural settings to help the farmers to cope with bureaucratic processes to register land titles, to seek crop insurance and receive entitlement welfare claims. Out of recognition to the policies of the National Legal Services Authority (NALSA), a growing number of government and community volunteers have been used as the initial recourse that establishes the first line to correcting the justice balance.[369]

Despite such accomplishments, a lack of institutional support to grass root initiatives constitutes major problems. These interventions are highly funded by donors and thus limit their extension as well as sustainability. Also, the political opposition to the rights-based mobilisation has caused harassment or delegitimisation of NGOs in some states that work on behalf of farmers.[370]

In order to see the potential of these mechanisms, reforms should focus on diversifying rural legal literacy, training lawyers of legal aid on agrarian matters, and creating a more long-term

[365] Legal Services Authorities Act, 1987
[366] Singh, Parmanand, 'Lok Adalat and Access to Justice in India' (2005) 47(3) JILI 327.
[367] Deshpande, R S, *Farmers' Distress: The Way Forward* (EPW Research Foundation 2008) 14.
[368] Roy, Aruna, *The RTI Story: Power to the People* (Rupa 2018) 59.
[369] NALSA, *Scheme for Para Legal Volunteers (Revised)* (2010) https://nalsa.gov.in accessed 22 July 2025.
[370] Pai, Deeksha, 'Civil Society Crackdown and Democratic Backsliding' (2021) 9(2) Soc Change Rev 73.

collaboration between the state organs and civil society organisations. Such protections are critical towards the attainment of genuine access to justice among the poorest agricultural communities in India.

LEGISLATIVE AND POLICY FRAMEWORKS

The legal and policy environment which governs all aspects of the farming industry in India is multifaceted, consisting of and having several statutory instruments interacting with each other to determine the rights of the farmers in land, resources or avenues of proper redressal. Although these legislative measures are guaranteed under the Constitution in terms of socio-economic justice, their implementation and coherence lack consistency.

Perhaps the most sweeping reform includes the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013, or the LARR Act, which replaces the imperial-era Land Acquisition Act, 1894. The LARR act includes the elements of prior permission, strict social impact analysis and a provision of good compensation with due stress on rural and agrarian landowners.[371] However, some states including Gujarat and Maharashtra have gone ahead to modify the law to exclude a number of infrastructure development projects.[372]

In the same fashion, the Forest Rights Act, 2006 (FRA) is an attempt to right historical wrongs, as customary land rights of Scheduled Tribes and other forest dwellers are to be granted, and most of them survive off subsistence farming in these forest areas.[373] It has however run into bureaucratic challenges during implementation. The receiving of individual claims is at 46% as of 2020 with the vast majority of the rejections being tied to poorly managed documentation according to the Ministry of Tribal Affairs.[374]

[371] Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act 2013, ss 4–16.
[372] Centre for Policy Research, *State Amendments to LARR Act* (CPR 2020) https://cprindia.org accessed 22 July 2025.
[373] Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act 2006.
[374] Ministry of Tribal Affairs, *FRA Status Report* (2020) https://tribal.nic.in accessed 21 July 2025.

Although the Minimum Support Price (MSP) regime is not a legal right, it plays an essential role in making sure that farmers receive constant income. Purchasing is confined in a small number of states and crops often market under MSP in open markets.[375] The more recent farm protests (2020-2021) raised the issue of legislation of a legal guarantee of MSP, but a proposed bill was eventually withdrawn due to political pressure.[376]

In short, even though India has a strong legal structure, an unequal accessibility to justice exists due to the presence of bureaucracies, weakening or dilution of law and poor adherence to policy. There will also need to be more than better laws when a genuinely farmer-centric legal ecosystem is provided. There must also be pro-poor governance, ongoing participation of civil society, and strict, enforceable accountability machinery.

CHALLENGES AND THE WAY FORWARD

In spite of the significant improvements made in the area of law and policy change, the impediments preventing the farmers and agrarian community to access justice at an effective level remain mighty. These barriers are multidimensional in nature and this impacts in a legal, social, economic, as well as administrative sphere. They cannot be overcome by a change of law alone, but they need to be overcome through systematic implementation, reliable governance, and solid participation by the communities concerned.

The main hurdle is the lack of legal literacy in the rural community. Most of the citizens end up not knowing their rights under various acts including LARR and the Forest Rights Act which are, to a greater extent, the crucial acts to get the land in possession and receive justifiable compensation when lands are acquired or displacement takes place. There is a need to increase tailored legal learning and awareness programs. Mobile legal clinics can offer effective enforcement instruments on the community-level.[377]

[375] Commission for Agricultural Costs and Prices (CACP), *Price Policy Reports for Kharif and Rabi Crops* (2022).
[376] Khera, Reetika, 'Why Legal MSP Matters for Small Farmers' (2021) 56(2) EPW 13.
[377] NALSA, *Annual Report 2020–21* (GoI 2021) 18.

These access-to-justice issues also revolve around land administration systems. Chronic inefficiencies and corruption pose delays in land transfer, inconsistency in record bearing and it leads to lack of capacity to recover compensation under LARR Act.[378] Moreover, these issues are usually complicated by corruption at the local levels of administration, especially in rural locations where patronage is prevalent.

Another significant impediment is the enforcement of pro-farmer laws. Despite the fact that agrarian distress has been recognized even at the top levels of governance, political stasis often comes in the way of the much-needed changes. This fact can be illustrated by the recent uproar created by the Farm Laws of 2020: the branding of the legislation as pro-corporate inevitably triggered the protests of the stakeholders, highlighting the fact that it lacked the consultation with the stakeholders and their representatives were left out of the policymaking processes.[379] Lawmaking must therefore become more inclusive and in the case of such policy the farmer unions and civil society groups should take centre-stage in the decision making.

The way towards the future lies in ensuring something comprehensive in agrarian justice, which is the integration of legal reform and good institutional backing. This framework should adopt the use of special agricultural courts or tribunals to handle cases involving land as this should help speed up the process and ensure such courts are equipped with officials conversant with agrarian law.

Lastly, judicial activism must remain as a tool to hold the state accountable, but it ought to be complemented with administrative reform and policy consistency in both at the central and state level. Striving to connect the legislature to grass-root realities can help India realize the true access to justice with regards to its farmers.

[378] Pande, Shailendra, 'Land Record Digitization and Rural Development' (2019) 54(3) *EPW* 56.
[379] Bhatia, Ujjwal, *The Constitution and the Politics of the Farmer Protests* (2021) 46(34) *EPW* 16.

CONCLUSION

The right to receive justice should be feasible, reasonable, inclusive and mobile, particularly to the historically disadvantaged group of citizens such as farmers and agrarian communities according to the imagery of the Indian constitution. Even though constitutional provisions under Articles 14, 21, and 39A establish a solid background, the reality faced by farmers continues to underscore the obstacles brought about by laws and structures. The access to remedies and redress has further been undermined by alienation of lands, displacement, poor compensation, illiteracy in law and unavailability of institutions to seek redress.

Indeed, judicial interventions have determined the discourse of agrarian justice. Major cases ruling the bottom lines on livelihood, right compensation, and rehabilitation have reaffirmed the same.[380] Nevertheless, the discrepancy between court pronouncements and the implementation of the same makes justice a myth. Initiatives such as legal aid are a significant step in the right direction yet corruption problems mitigate their impact.

In the future, the idea of access to justice should be provided to the farmers not only as a constitutional promise but as a developmental need. Laws need to be changed in the light of legal literacy, technological transparency, and participatory governments. Importantly, justice should not be viewed as a one-time court decision but a systemic guarantee of dignity, as well as engagement and protection in agrarian life.

Finally, the fight to bring justice to the farmer requires concerted action on the fronts of the legislature, the judiciary, the executive and the civil society. In absence of it, ideals in the form of the constitution are in danger of being more rhetoric than factual. India is aiming to be an inclusive economy and hence provision of access to justice to the country's farmers is not merely a legal requirement but also a moral or democratic requirement.

[380] *State of Kerala v. K. S. Rajendran* (2018) 3 SCC 394; *Karnataka Industrial Areas Development Board v. C. Kenchappa* (2006) 6 SCC 371.

CHAPTER 10: RELIGIOUS MINORITIES AND COMMUNAL VIOLENCE

by Sajeda Zaman

INTRODUCTION

In India, religious minorities are defined as religious sections other than the Hindu majority, those recognised by National Commission of Minorities.[381] They are also represented by the Muslims (14.2%), the Christians (2.3%), Sikhs (1.7%), Buddhists, Jain and Parsis[382], who all have their religious identities and social cultures which demonstrate the pluralistic nature of this country.

Communal violence Foundation of communal violence in India go back to the 1946 Calcutta riots and the Partition of 1947[383], upending several million people and resulting in more than a million people being killed in sectarian massacres. Since independence, some cases such as the 1969 Ahmedabad Sectarian riots, the 1984 anti-Sikh pogrom and 2002 Gujarat riots are of communal polarization on a massive scale.[384] Lynching and hate crimes, many of them of Muslims using cow-vigilante excuses, have increased drastically in recent years.[385]

Why access to justice is a concern:

- **Discriminatory policing –** Discriminatory policing is also frequently used to harass minorities[386] in a way that FIRs are delayed, and impunity is allowed to go with communal violence.

[381] National Commission for Minorities Act, 1992, No. 19, Acts of Parliament, 1992 (India).
[382] Census of India, Population by Religious Community (2011).
[383] Bipan Chandra, India's Struggle for Independence (Penguin Books, 1989) 472.
[384] Paul R. Brass, The Production of Hindu - Muslim Violence in Contemporary India (University of Washington Press, 2003) 22.
[385] Human Rights Watch, Violent Cow Protection in India: Vigilante Groups Attack Minorities (2019).
[386] People's Union for Civil Liberties (PUCL), Report on Communal Violence and Police Bias in India (2018).

- **Delays and denials in FIR registration –** Minorities usually face refusal or procrastination in the registration of FIRs[387] caused delayed Justice and legal ways.
- **Biased investigation –** When it comes to minority communities, cases of bias in investigations appear to be an ordinary occurrence, with evidence-overlooking and covering of criminals being a common likelihood.
- **Underrepresentation in judiciary/police -** Religious minorities are also ill-represented in the courts, police, and make it hard to access the courts impartially.

Applicable Laws:

- **Indian Constitution: Article 14, 15, 25-30 –** The Indian Constitution embodies equality, non-discrimination and religious freedom of minorities[388] in Article 14, 15 and 25-30.
- **Bharatiya Nyaya Sanhita (BNS) sections on riots, hate speech –** Under Sections 194, 195 and 197 BNS penalizes communal hate,[389] religious insults, and public mischief, in place of older laws in the IPC.
- **Special laws: Communal Violence (Prevention) Bill (proposed), UAPA, NSA (misused) -** UAPA and other special laws such as NSA are known to be used against the minorities with impunity[390] and the Communal Violence Bill that is yet to be implemented.

This chapter mainly discusses the criminal law, communal crimes and prejudices in policing; constitutional law, the basic rights, equality, and religious freedom; and the human rights law, the state responsibility and violence in the system. In this multidisciplinary perspective, it examines the way these legal systems often do not support religious minorities and give justice to both during and after communal violence.

[387] National Human Rights Commission (NHRC), Annual Report 2021-22 (2022) 112.
[388] The Constitution of India, arts. 14, 15, 25-30.
[389] Bharatiya Nyaya Sanhita, 2023, ss. 194-197.
[390] Unlawful Activities (Prevention) Act, 1967; National Security Act, 1980; Draft Communal Violence (Prevention, Control and Rehabilitation of Victims) Bill, 2005.

LITERATURE REVIEW

- **"Sachar Committee Report" (2006) -** The 2006 "Sachar Committee Report"[391] showed that India's Muslim population was falling behind in crucial indicators – literacy, school enrollment, graduation rates, and regular employment[392] – and was ranked lower than India – wide averages and even below those of SC/STs in several areas.
- **PUCL and NHRC reports on communal violence –** Gravity of communal violence has always been mentioned PUCL and NHRC reports: PUCL fact-finding reports mention police collusion and targeted attacks on minorities[393] whereas NHRC has issued Suo-motu notices, conducted spot inquiry and requested compensation and reforms in most cases in order to secure vulnerable minorities and hold those guilty of such crimes accountable.
- **Usha Ramanathan, Gautam Bhatia, Flavia Agnes –** Usha Ramanathan, Gautam Bhatia and Flavia Agnes cast a critical light on the legislative loopholes that allows impunity towards the minorities:[394] Ramanathan points to the neglect of procedures and the callous nature of pragmatism in survival, Bhatia laments the existence of nebulous hate-laws and state-authoritarianism, and Agnes emphasizes the intersectional nature of discrimination with special reference to the marginalization of minority women in the legal acts, which highlights the structural inability of justice and inequality.

- **Criticisms:**

[391] Gov't of India, Social, Economic and Educational Status of the Muslim Community of India (2006) (Justice Rajindra Sachar Comm. Report).
[392] Government of India, Social, Economic and Educational Status of the Muslim Community of India: A Report (Sachar Committee Report, Cabinet Secretariat, 2006).
[393] People's Union for Civil Liberties (PUCL), Report on Communal Violence and Police Bias in India (2018); National Human Rights Commission (NHRC), Suo Motu Enquiry into Communal Violence Cases (New Delhi, 2019).
[394] Usha Ramanathan," Colonial Legality and Human Rights: The Paradox of the Indian State" (2007) 49 Economic and Political Weekly 119.
Gautam Bhatia, Offend, Shock, or Disturb: Free Speech under the Indian Constitution (Oxford University Press, 2016).
Flavia Agnes, "Protecting Women Against Violence? Review of a Decade of Legislation, 1980-89" (1992 27(19) Economic and Political Weekly WS19.

- **Absence of witness/victim protection –** In most communal violence cases, lack of proper witness and victim protection measures usually results in cowering, doctored testimonies and failure by the case to stand,[395] which all greatly sabotage the cases of marginalized and minority groups.
- **Biased use of laws like UAPA or NSA against minorities –** Such laws as UAPA and NSA are often used biasedly, to unproportionally target minorities on some blanket charges,[396] allowing an extended detention in absence of trial, and further the establishment of an atmosphere of fear and discrimination built-in the system.
- **Poor compensation/rehabilitation mechanisms –** The payment and recovery process of the victims of community violence often take late, are not sufficient or not in a consistent manner whereby the victims-mostly the minorities do not get the appropriate shelter, means of subsistence, and psychological help.

- **Gaps:**
  - **Weak legal accountability for police/politicians -** Responsibility to justice among the police and politicians considering their participation in community violence is also weak,[397] whereby not many men are prosecuted or convicted despite being documented to have incited or failed to perform their duties well. The culture of impunity is facilitated by political manipulation of criminal investigations, absence of independent checks and delayed investigations.
  - **Lack of structural reforms –** India has failed to support the communal violence by providing a structural reform that includes an independent investigative agency, the police accountability commission, or a fast-track court.[398] Existing institutions without systemic changes merely serve as an impediment to the prevention of repetition and dispensation of justice in a timely manner because they operate with internal biases.

[395] Amnesty International India, Justice Denied: The State of Victim and Witness Protection in Communal Violence Cases (2020).
[396] Human Rights Law Network (HRLN), Report on Misuse of National Security and Anti-Terror Laws Against Minorities in India (2021).
[397] Commonwealth Human Rights Initiatives (CHRI), Police Accountability and Impunity in India (New Delhi, 2018).
[398] United Nations Human Rights Council, Universal Periodic Review: India - Recommendations on Minority Protection and Justice Reform (2017).

HISTORICAL CONTEXT

Tracing the communal violence from colonial times – The communal divisions were institutionalized by the intentional British colonialist policy of implementing a divide and rule policy[399] which further polarized the Hindu-Muslim. Central legislations like the Partition of Bengal (1905), the system of separate electorates (Morley-Minto Reforms of 1909 and the Government of India Acts of 1919 and 1935)[400] had entrenched the communal identities into the political system. On other occasions British officials discriminated against unified nationalist resistance by preferring one community over another. These policies polarised religion and created a spirit of mistrust which preconditions communal violence in contemporary India.

Partition riots (1947) – The 1947 partition riots are probably the biggest known mass religious violence ever in history.[401] When British India was rudely divided into the Hindu-dominant India and Muslim-dominant Pakistan, communal massacres became rampant in Punjab and Bengal. One million to half a million people were killed in Punjab alone, and more than ten million displaced in Bhuvaneshwar, as there was engineered violence, rape and ethnic discarding of people-Hindus, Sikhs and Muslims alike. In Jammu and other areas tens of thousands were killed. These were saddening redefinitions of communities in terms of religion.

Post-independence communal incidents – After its independence, India has experienced other such ghastly communal events, such as, 1984 anti-Sikh riots in the aftermath of Indira Gandhi assassination that saw an approximate 2,700 killed throughout Delhi alone; 1992 Babri Masjid, whose demolition led to pan-Indian Hindu-Muslim riots, killing over 2,000; 2002 Gujarat riots, post Godhra train fire, that took away lives of around 1,000 people, majority.

[399] R.C. Majumdar, The History of Bengal: The Muslim Period (University of Dacca, 1943) 398.
[400] Ayesha Jalal, The Sole Spokesman: Jinnah, the Muslim League, and the Demand for Pakistan (Cambridge University Press, 1985) 45.
[401] Yasmin Khan, The Great Partition: The Making of India and Pakistan (Yale University Press, 2007) 102.

In India, the state machinery, especially the police and political leadership has been complicit in or passive in communal violence.[402] In several other cases, most notably the anti-Sikh riots of 1984 and the 2002 Gujarat riots, one has seen both press reports and special commissions noting a lack of action by police and in response to such riots, or even an active role by them in the riots themselves. Politicians have faced the accusation of stirring up violence or just protecting the attackers. Such loss of institutional impartiality even creates impunity, undermines accountability, and devalues the confidence of citizens in the ability and willingness of law enforcers and the justice system.

The justice or judicial response towards communal violence in India has frequently been characterized by delays in trial, poor conviction and the impunity of the system. During the 1984 anti-Sikh riots and 2002 Gujarat riots, several perpetrators went without being caught on paper for years; with victims. Convictions have been in some high-profile cases, but the general trend shows that there is slow investigation, hostility of witnesses and political interference. Such lapse associated with failure to serve justice not only strengthens alienation of the victims; it also blocks trust in the rule of law.

CASE LAW ANALYSIS

***Tukaram S. Dighole v. Manikrao Shivaji Kokate, (2010)*: Hate Speech and Public order –** In Tukaram S. Dighole v. Manikrao Shivaji Kokate, (2010) Supreme Court rejected allegations that Kokate had used his communal appeals to engage in corruption under Section 123(3) of the Representation of the People Act[403] (Manikrao 2010 Shivaji Kokate). That appellant depended on a VHS cassette that presumably contained hate-filled speeches of Kokate but did not prove it as a public document or established beyond a reasonable doubt its contents. With upholding the decision given by the High Court, the SC has reiterated that secondary electronic evidence should meet the strict criteria-helpless production of the cassette without any authentication and typed transcripts failing to prove communal incitement.

[402] Nanavati - Mehta Commission Report on the 1984 Anti-Sikh Riots and Gujarat 2002 Riots (Government of India, 2005 & 2014).
[403] Tukaram S. Dighole v. Manikrao Shivji Kokate, (2010) 4 SCC 329.

***Tehseen Poonawalla v. Union of India, (2018)*: Lynching and state accountability –** In Tehseen Poonawalla v. Union of India, (2018), the Supreme Court tackled the increasing cases of mob lynching, in particular, cow-vigilantes' pretences, indicating that it is constitutional order[404] from which no vigilantism can be condoned. It issued legally binding directives: appointment of district nodal offices, automatic FIRs under hate-speech and mob violence laws, fast-track courts, compensating victims of crime, providing free legal services as well as departmental disciplining of the officers who have been found to be negligent in carrying out their duties. The Court further encouraged the Parliament to invent a specific counting of lynching and continues keeping a vigilance eye on the implementation of the same by the state boosting state responsibility towards the prevention of communal violence.

***Zahira Habibullah Sheikh v. State of Gujarat, (2004)*: Best Bakery case; witness protection –** In Zahira Habibullah Sheikh v. State of Gujarat, (2004) commonly referred to as the Best Bakery case, 14 individuals were burnt to death during the 2002 riots in Gujarat.[405] A main witness by name Zahira first named those who carried out the attack but later became hostile in court under duress and all the 21 accused men were acquitted. The Supreme Court acknowledged that no fair trial and independent investigation was done with the case, instead the case was moved out of Gujarat and made it a case to be re-tired by the jurisdiction of the Bombay High Court. It stressed that witness protection, just prosecution and government check was needed, and this became an essential precedent in government prosecution of cases involving communal violence.

***Mohd. Haroon v. Union of India, (2014)*: Muzaffarnagar riots rehabilitation –** In Mohd. Haroon v. Union of India, (2014) the Supreme Court considered the consequences of the 2013 Muzaffarnagar Riots, which started due to inter-faction tribal aggression that led to the deaths of more than 200 people and relocation of thousands of others.[406] The Court took note of the state neglect and monitored the rehabilitation and relief work through the interim orders. It supported the application of a Special Investigation Cell (SIC) by the State to conduct investigations and refused to order a CBI/SIT investigation, and it ordered compensation to the victims, present safeguards to the vulnerable and punitive action against the lax officials. This ruling further

[404] Tehseen Poonawalla v. Union of India, (2018) 6 SCC 72.
[405] Zahira Habibullah Sheikh v. State of Gujarat, (2004) 4 SCC 158.
[406] Mohd, Haroon v. Union of India, (2014) 5 SCC 252.

strengthened accountability on the side of the state, judicial reviewing, and victim-centered rehabilitative models.

Bilkis Bano Case: **miscarriage of justice and delayed remedy –** An example of miscarriage of justice in the Bilkis Bano case is that delays of seventeen years and systemic failures[407] saw a man charged and convicted of rape and murder after fourteen of her relatives were murdered, and she was gang-raped during the Gujarat riots in 2002, despite an initial failure by police to investigate. In the end, the case was handed over to Maharashtra after appealing to the NHRC and Supreme Court and eleven men were arrested in 2008. In the decade and a half later, the Gujarat government in 2022 released them prematurely under remission and there was a popular uproar. Then in January 2024, the Supreme Court struck down the remission order as unlawful and scolded the state, for abuse of its discretion and its foot dragging in rights to relief.

Gujarat Riot Cases (NHRC petitions, Zakia Jafri) - In ***Zakia Ahsan Jafri v. State of Gujarat*** (commonly the Zakia Jafri petition) accused state officials and politicians of participating in the 2002 Gujarat riots, or more specifically of the Gulbarg Society massacre during which Congress MP Ehsan Jafri was killed along with more than thirty others.[408] Although this opens the doors to a possible state-sponsored conspiracy, in June 2022 the Supreme Court dismissed an appeal to invalidate the closure report of the SIT by declaring that the lapses in the Gujarat administration could not be viewed as part of a well-laid conspiracy. Zakia had been making the same plea, and yet the Court held that it was not worth consideration because it was out of merit as the Court upheld the clean chit given to the then Chief Minister Narendra Modi and 63 other accused. Critics have questioned burned up evidence, tardiness of supervision, and shortage of free investigation and this demonstrates the failures of the legal responsibility to deal with communal violence.

[407] Bilkis Yakub Rasool v. Union of India, (2024) 2 SCC 512.
[408] Zakia Ahsan Jafri v. State of Gujarat, (2022) 10 SCC 16.

CONTEMPORARY EFFECTS

- **Data analysis:**
  - **NCRB crime statistics on communal riots –** In NCRB reports registered communal-violent incidences were highest in 2020 at 857 reducing to 378 in 2021 making the total cases of riots beyond 2,900 either one way or the other demonstrating shifting trends of escalations.[409]
  - **Conviction vs. Charge-sheeting rate –** Minor riot-related cases had a poor conviction record of only 29 percent in 2020 when charge-sheets were filed in approximately 53 percent of cases indicating enormous lapses between investigation and conviction.
  - **Minority representation in police/judiciary -** Religious minorities are extremely underrepresented in the police and judiciary in India. The ~14-15 per cent Muslims make up only ~3-5 per cent of judges in the High Court and have only a single judge in the 33 benches of the Supreme Court. Such imbalance, accompanied by the failure to recruit minority officers into police agencies, confuses faith in the institution and equal access to the justice system.
- **Field reports:**
  - **Delays in lodging FIRs –** Minorities who are victims of communal violence often experience severe delays in filing FIRs, whether through reluctant local police, bureaucratic requirements or deliberate discouragement; essentially, rendering proceduralized legal remedy impossible, or at least severely delayed, and acting as a means through which impunity can be established.
  - **Biased arrest and preventive detentions –** Discriminatory arrests and preventive detention happens more frequently to minorities during communal violence, as the police tend to arrest people of marginalized groups without a trace, and neglect the members of the majority who commit the crimes, losing legitimacy before the population.

[409] National Crime Records Bureau, *Crime in India 2020* (2021); National Crime Records Bureau, *Crime in India 2021* (2022).

- **Rehabilitation failures (relief camps, compensation) -** The rehabilitation processes following a communal violence have been observed to be ineffective with the relief camps not having any basic facilities and inadequate delays in payments. Many of them have no permanent housing, means of subsistence, and psychological assistance.

- **Examples:**
  - **2020 Delhi riots: selective arrests –** In 2020, the Delhi riots were held, and it resulted in the death of more than 50 people, and majority of them were Muslims. The investigations showed discrimination in arresting the people, where the protest movement against the CAA, who were predominantly Muslims, was targeted and those that infiltrated the Hindu right-wing were barely brought to book. The Delhi Police were accused of partisan investigation and political interference in the law through the civil society and the fact-finding reports.
  - **Hate speech and vigilante groups targeting Muslims –** Vigilante violence has increased due to hate speech by political and religious leaders on Muslims, commonly in the name of cow protection or love jihad. Such groups are also working with impunity disseminating communal hatred via rallies and social media among others, yet the police often ignore or under-enforce the existing incitement law against them.
- **Media bias and social media misinformation:**

  Communal issues are seen to increase largely due to media bias and social media misinformation in India. Segments of popular media tend to broadcast state propaganda and demonize minorities by comparing even victims of victimization to attackers. Journalistic neutrality is destroyed by sensational reporting, curated reporting and communal reporting. In the meantime, social media is full of videos that cannot be verified, manipulated or parts of the media with comments that are incendiary and further the spread of hate and violence. Algorithmic choices frequently give preference to divisive material, and it is hard to fact-check. Although there are laws in place, enforcing the laws is ineffective and there is a shortage of accountability of media houses or even digital platforms. Such an unregulated environment spurs on polarisation and is followed by numerous acts of violence, in the real world, towards minority groups.

CRITICAL PERSPECTIVE

- **Failures of the justice system:**
  - **Lack of independent investigation bodies –** Lack of independent investigatory institutions into communal cases creates the problem of biased investigations that jeopardize fairness, responsibility, and the trust of victims of justice.
  - **Politicization of police –** Politicization of the police leads to selective policing where the rule of law is applied to protect political interests of co-conspirators of the ruling parties even during communal violence when dissenting voices of the minority are criminalized.
  - **Inadequate victim protection –** Poor protection of victims also subjects survivors to risk, intimidation and revenge, discouraging testifiers and weakening prosecutions in communal violence prosecutions.
- **Critique of laws:**
  - **UAPA & NSA: often used against minorities rather than to protect them –** In communal situations, the national security act (NSA), and Unlawful Activities (Prevention) Act (UAPA) which is supposed to guard national security cause a lot of trouble to minorities (and primarily Muslims). These legislations allow long-term incarcerations without charges and trials and have been frequently used without substantial facts. Unfairly used against dissenters and criminalizing minority voices, systemic bias, and violating the integrity of democratic safeguards, they are proved less to be the means of protecting vulnerable communities against hate crimes.
- **Institutional gaps:**
  - **National Human Rights Commission (NHRC's) limited powers –** The lack of power of the NHRC which includes absence of binding power, narrow jurisdiction on armed forces and reliance on state co-operation among others is an impediment to the NHRC to guarantee justice in cases of communal violence.
  - **Weak implementation of constitutional protections –** Although constitutional protection to religious freedom and equality is strongly provided, inadequate enforcement, because of bureaucratic neglect, political obstruction, and judicial

lethargy tends to provide no protection to the religious minorities in terms of discrimination and communal violence.

- **Underrepresentation of minority women victims in the justice system:**
  Due to the discriminatory nature of communal violence, victims are most commonly minority women both subject to discrimination as a member of a discriminated community and a victim as a woman in a patriarchal legal and social system. Together with fear, stigma, and absence of institutional support, their testimonies are often ignored or underreported or silenced. Gendered experiences of violence are seldom taken seriously in legal proceedings and this has made the height of their experiences invisible in the justice process since justice systems cannot investigate it adequately, convict perpetrators of these crimes and make adequate reparation to the victims.

COMPARATIVE AND INTERNATIONAL ANALYSIS

The international human rights law gives powerful guidelines to protect religious minority groups and curb communal violence. Article 18 of the International Covenant on Civil and Political Rights (ICCPR)[410] to which India is a signatory guarantees the freedom of religion and the International Covenant on Civil and Political Rights outlaws discrimination, incitement and hate crime (Articles 20 and 27). The obligation to safeguard the identities of minorities, guarantee their equal involvement and ban measures resulting in their marginalization or exclusion is further provided in the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities[411] (1992).

Some countries across the globe have put up a legal framework to deal with hate based violence. Following the history of anti-Semitism and increasing Islamophobia, anti-Semitism and hate speech as well as holocaust denial and incitement on religious grounds have been criminalized in Germany and France, where they are highly prosecuted and fined openly. These actions bring to the fore the need of effective legislature and political will in stemming communal hate.

[410] International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171.
[411] UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, G.A. Res. 47/135, U.N. Doc. A/RES/47/135 (Dec. 18, 1992).

Further, Truth and Reconciliation Commissions most prominently in South Africa, provide models of dealing with past injustices by means of victim-based procedures, recognition of harm, and a model of restorative justice, one example of a model of healing a deeply divided society. In the UK and the US, identity-based violence is better policed and monitored because data collection is centralized and the involved police are responsive as well as sensitive to community engagement.

India is a signatory to the International Convention on the Elimination of all forms of Racial Discriminations (CERD) as well as having given international commitments to the Universal Periodic Review (UPR). Such pledges require aggressive politics to stifle the communal hatred, strengthen the protection of minorities, and support equality. Nevertheless, periodic human rights reviews of India have raised the issue of mounting intolerance, accountability, and abuse of the law to discriminate against minorities time and again, which is why there is a strong demand to turn international commitments into domestic commitments.

CONCLUSION AND RECOMMENDATIONS

Communal violence in India is not a singular incident and is therefore not spontaneously caused, but is deeply based on historical, political and system structures. Divide-and-rule policies deployed by the colonialists, as well as post-colonial driven political polarization, has culminated in violence on religious minority groups through either riots, lynchings, discrimination in institutions, and incitement through speech. Although the issue of equality and non-discrimination is guaranteed in the Constitution, the legal treatment of communal violence is inefficient because of biased investigations, slow trials, low conviction rates, and the absence of provision of support to the accuser. Such access to justice gaps become a spiral of impunity and exclusion of those who are marginalized, in particular members of religious minorities.

To overcome these misfortunes, there are some fundamental changes, which are sorely requisite. First, it is necessary to reinforce the hate crime law against the thorough definitions, mandatory reporting procedures, and schemes of victim reimbursement. Laws should give a clear distinction

between communal violence and other ordinary crimes and should be supported with powerful implementation tools. Second, the independent investigation agencies that are not subjected to political pressure must have been created in order to enforce impartiality and credibility. Third, establishment of fast-track courts in order to deal with communal violence cases will help in providing fast justice and minimizes the trauma of long litigation processes.

It is also utmost important to make the police, judiciary and prosecutorial services more inclusive when it comes to the representation of minorities to instill trust and confidence in the institution. Moreover, even the work of the media should be controlled with higher accountability stipulations to reduce misinformation and hate propaganda. Pivotal is also a national system of detecting and punishing hate speech, both virtual and in real life.

Finally, to create an inclusive justice system, it is important to be more adamant on the values protected by the Constitution equality, secularism, and dignity of all communities. Legal jurisprudence is not enough and needs a political push, the social sensitivity, and intellectualization of institutions. These principles do not only constitute a constitutional mandate but also essential to the Indian republic and its democratic structure and its plurality character.

CHAPTER 11: LGBTQ + YOUTH IN EDUCATION

by Shreya Sharma

INTRODUCTION: INVISIBLE VOICES, INVINCIBLE RIGHTS

The educational rights of LGBTQ (Lesbian, Gay, Bisexual, Transgender, Queer) youth are an often overlooked dimension of social equity. Despite more recent judicial developments in India acknowledging the constitutional rights of LGBTQ individuals, such milestones have not significantly altered the frameworks of educational institutions[412]. The, queer youth continue to encounter stigma, exclusion, and systemic barriers to justice. This chapter addresses the gaps between constitutional aspirations and institutional realities, attempting to understand how LGBTQ youth navigate the education socio-legal landscape and what forms of justice are available to them.

The queer erasure in India has a historical dimension linked to colonial structures, most prominently through Section 377 of the Indian Penal Code 1860, which prohibited non-heteronormative sexual relations[413]. This provision was partially overturned by the Supreme Court in Navtej Singh Johar v. Union of India (2018) 10 SCC 1[414]. However, the decision did not impose any protective or inclusivity obligations on the State or educational institutions in favor of queer youth.

[412] Law Commission of India, *Legal Recognition of Non-Binary and Transgender Persons in India*, Report No. 276 (2018).
[413] Arvind Narrain, *Queer: Despised Sexuality, Law and Social Change* 89–95 (Yoda Press, 2004).
[414] Anjana Suhasaria, "Decriminalisation of Homosexuality in India", (2018) 60(4) *Journal of Indian Law Institute* 589.

Hence, in comparison to adjudication, a socio-legal recognition of LGBTQ rights is advancing slowly on the ground in terms of execution, which continues to be ad hoc, chaotic, and largely performative[415].

Despite the existence of an inclusive legal framework, LGBTQ youth's experiences of discrimination in educational settings, including at the primary and secondary levels, tend to be ignored or minimized by educators and school officials. Educational institutions, including colleges and universities, operate within a socially constructed framework of gender and sexuality, which is underscored by textbooks, curricula, policies, and the faculty's worldview[416]. Gender non-conforming or queer-identifying students face enormous challenges in navigating their identities in these spaces due to the dominant heteronormative framework. Even though Articles 14, 15, and 21 of the Constitution of India, which grant equality, non-discrimination, and dignity to citizens, are adhered to at a school and university level, there is an absence of supporting legal or policy infrastructure to enable the inclusion of LGBTQ individuals within education[417].

The judgment in *NALSA v. Union of India, (2014) 5 SCC 438*[418] marked an important shift in the jurisprudence of gender identity, as it affirmed the right of individuals to self-identify their gender.

Nonetheless, the educational aspects of this acknowledgment have not been fully put into practice. The later implementation of the Transgender Persons (Protection of Rights) Act, 2019, while aiming at providing legal intent to protect and aid the transgender community, did not go without criticism due to its procedural roadblocks and absence of community consultation[419]. Most conspicuously, the Act imposes obligations on educational bodies to safeguard a discrimination-free environment against transgender persons, but lacks strong enforcement and grievance mechanisms. Therefore, the absence of constructive enforcement frameworks renders the legal obligations, where they do exist, ineffective in enabling justice for institutionalized discrimination against LGBTQ students.

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[415] Danish Sheikh, "Queer Rights and the Postcolonial State", (2017) 10(1) *NUJS Law Review* 31.
[416] Ashley Tellis, "The Censoring Queer: Indian Censorship and the Regulation of Queer Representation", (2010) 45(38) *EPW* 12.
[417] Jayna Kothari, "Transgender Rights in India: Towards an Inclusive Approach", (2016) 49(51) *EPW* 121.
[418] *National Legal Services Authority v. Union of India*, (2014) 5 SCC 438.
[419] Arvind Narrain, "Critique of the Transgender Persons (Protection of Rights) Act, 2019", (2020) 55(4) *EPW* 17.

Research and fieldwork show a troubling trend of LGBTQ exclusion. In a 2018 report, Human Rights Watch reported that LGBTQ children and teenagers attending school in India face constant verbal and physical assault, and social exclusion without any formal grievance procedure to report the abuse[420]. A transgender student was suspended in Kerala for what is deemed gender affirming dress, and queer students in a Delhi university were refused hostel accommodation because of alleged gender nonconformity.

The frameworks set out have largely overlooked incorporating queer viewpoints. Neither the National Policy on Education (1986, revised 1992) nor the Right to Education Act, 2009, has developed a policy on gender and sexual identity[421]. The New Education Policy, 2020, although progressive in many aspects, conspicuously lacks as a policy aim the inclusion of LGBTQ considerations[422]. Moreover, anti-ragging rules issued by the University Grants Commission (UGC) in 2009, while considering gender and sexual orientation as grounds of harassment, lack rigorous enforcement of the anti-ragging rules. There are no comprehensive LGBTQ-inclusive curricula or teacher training modules developed and adopted by any central or state board[423]. Institutional frameworks not only fail to safeguard queer students but also perpetuate the very structures of exclusion that they aim to counter[424].

International legal instruments to which India has acceded also offer relevant normative benchmarks. The Yogyakarta Principles on the Application of International Human Rights Law about Sexual Orientation and Gender Identity states that "*The state must protect LGBTQ from discrimination in accessing education.*" Also, the United Nations Convention on the Rights of the Child (UNCRC), which India has ratified, states that every child is entitled to an education free from discrimination and violence.

The absence of a cohesive framework coordinating policies within India's education sector is a result of insufficient domestic law and policy integration. The absence of LGBTQ individuals within India's systems of justice is a phenomenon that is collectively the result of a colonial framework, a post-colonial framework, and contemporary social-legal frameworks. Gender non-conformity and non-heterosexual desire were viewed as deviant and criminal under colonial

[420] Human Rights Watch, *I Couldn't Even Sleep: Barriers to Education for LGBT Youth in India* (2016), available at https://www.hrw.org.
[421] Vikramaditya Sahai, "A Queer Reading of the NEP", (2020) 55(35) *EPW* 23.
[422] Rituparna Borah, "NEP 2020: A Missed Opportunity for Inclusive Education", (2021) 56(2) *EPW* 15.
[423] Forum for Inclusive Education, *Queer Inclusive Curriculum Toolkit* (2022).
[424] Nivedita Menon, "Rights, Queerness, and the Law", (2012) 47(2) *EPW* 40.

moral frameworks. This persisted after independence as the silence around queer identities was bolstered by regressive social values, minimal judicial participation, and the near-complete lack of legislative change. Even during crucial debates around the constitution, concepts such as personal liberty, privacy, and equality were never expanded to include non-heterosexual and non-binary identities. Indian social reform movements have historically centered on caste and gender without addressing sexual and gender identity, thereby perpetuating a legal void.

Legal and political traction for LGBTQ activism emerged only in the late 20th and early 21st centuries, motivated by groundbreaking cases like *Naz Foundation v. NCT of Delhi* [2009 SCC OnLine Del 1762][425] and advocacy from the Lawyers Collective, Naz Foundation, and Humsafar Trust. The legal framework still "continues to" undermine LGBTQ rights. The right to self-determination, for instance, recognized in NALSA, is routinely undermined by bureaucratic hurdles and institutional resistance, particularly in schools and colleges.

There is a distinct lack of literature in this domain, particularly legal literature that examines the experiences of LGBTQ youth in educational settings. There is little to no scholarship on the intersection of constitutional rights and educational governance, pedagogy, and institutional policy. There is also a lack of empirical legal scholarship specifically focused on the LGBTQ student population and their access to, or lack of, institutional mechanisms for grievance redressal. Most importantly, there is a significant lack of representation of queer youth, especially from marginalized caste, religious, or linguistic backgrounds, within mainstream legal conversations. Legal reform is a complex issue, and there is disagreement about the legal policy that needs to be adopted. While some scholars advocate for the creation of a comprehensive anti-discrimination policy that covers the issues of sexual orientation and gender identity, others push for targeted interventions, such as the creation of model institutional frameworks for schools that include strong grievance redressal systems and the compulsory teaching and training of LGBTQ issues to all educators. Other queer scholars believe that a rights-based approach needs to be combined with comprehensive risk factor frameworks, which address poverty, mental illness, and the sociological concept of exclusion, which are all faced by queer youth. This chapter seeks to add to the literature by examining the issue of access to justice for LGBTQ youth in education from a legal perspective. It will analyze the sufficiency of the constitutional protections that are provided, evaluate the legislative and policy frameworks that have been

[425] Naz Foundation v. Government of NCT of Delhi, 2009 SCC OnLine Del 1762.

enacted concerning LGBTQ inclusion in education, and discuss the function of the judiciary and civil society, as well as overarching international legal principles, in the construction of legal responsibility.

This chapter aims to highlight the experiences of queer youth and advocate for a more proactive and rights-based educational policy that respects and nurtures their dignity, identity, and societal participation.

THE JURISPRUDENTIAL JOURNEY: FOUNDATIONAL CASE TRANSFORMING THE EXPERIENCE OF LGBQ+ YOUTH

The legal framework in India about LGBTQ+ individuals has drastically changed in the last twenty years. With the advent of several landmark legal decisions, the landscape has shifted not only in terms of recognizing the fundamental rights of gender and sexual minorities but has also provided substantial legal safeguards, particularly for LGBTQ+ youth within the education system. In this section, I explore the foundational decisions that have been made in favor of LGBTQ+ inclusivity, dignity, and equality, with a specific focus on queer youth's educational and developmental experiences.

- ***Naz Foundation v. Government of NCT of Delhi, 2009 SCC Del 1762***[426]

The Naz Foundation, an NGO focused on sexual health, posed a challenge against the constitutional validity of Section 377 of the Indian Penal Code, which criminalized homosexual acts between consenting adults. This case, alongside others, served as a strong precedent in striking down Section 377 due to its violation of Articles 14, 15, and 21 of the constitution on the grounds of treating queer acts between consenting adults as private and within the bounds of constitutional freedoms.

Impact: This was the first judgment that gave voice to the LGBTQ+ community and embraced the concept of dignity, which in turn enhanced public conversations on representation and participation, particularly within the walls of academia, which embraced queer discourse.

[426] Siddharth Narrain, "Crystallising Queer Politics: The Naz Foundation Case", (2009) 2(2) *Indian Journal of Constitutional Law* 181.

- ***Indian Psychiatric Society v. Union of India, WP (C) No. 1225 of 2018***[427]

During the hearings for the Navtej case, the Indian Psychiatric Society put forth the argument that homosexuality should not be classified as a mental disorder. Their input was essential in reframing outdated medical assumptions.

Impact: This marked progress in the effort to destigmatize queer identities in educational and counseling environments, allowing for the development of proper psychological support systems in schools and universities[428].

- ***Justice K.S. Puttaswamy (Retd.) v. Union of India, (2017) 10 SCC 1***[429]

While focusing on the Aadhaar case, the Supreme Court acknowledged the right to privacy is a fundamental right under Article 21. The court's recognition of privacy as an attribute that encompasses sexual orientation is noteworthy.

Impact: This decision advanced the reasoning framework for later rulings on LGBTQ+ rights by asserting that privacy, identity, and dignity are bound together. This reasoning is crucial in safeguarding closeted LGBTQ+ students from being monitored or forced out by families or targeted within schools[430].

- ***Navtej Singh Johar v. Union of India, (2018) 10 SCC 1***

In a landmark decision, the Supreme Court recognized the right to consensual same sex relations by reading down the 377 IPC. The Court placed greater emphasis on constitutional morality, individual autonomy, and non-discrimination[431].

Impact: The judgment was a critical step in the recovery of dignity and legality for LGBTQ+ identities. This led educational institutions to have greater acknowledgment of queer identities by amending their curricula, training their staff, and enacting anti-discrimination policies.

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[427] Indian Psychiatric Society v. Union of India, Writ Petition (Civil) No. 1225 of 2018.
[428] Anubhuti Sharma, "Mental Health and Queer Students in India", (2022) 58(14) *EPW* 67.
[429] Justice K.S. Puttaswamy (Retd.) v. Union of India, (2017) 10 SCC 1.
[430] Chinmayi Arun, "Privacy and the Right to LGBTQ Expression", (2018) 60(2) *JILI* 128.
[431] Danish Sheikh, "Navtej Singh Johar: Reading Constitutional Morality into Section 377", (2018) 11(1) *NUJS L Rev* 15.

- ***Arun Kumar v. Inspector General of Registration, (2019) SCC Online Mad 8779***[432]

This case pertains to the denial of marriage registration to a transgender woman. The Madras High Court ruled that a transgender woman qualifies as a "bride" under the Hindu Marriage Act 1955.

Impact: The case provided recognition of transgender persons as part of the domain of personal laws, which advanced their identity recognition, and served as a precedent for more inclusive policies of administrative and structural admissions in schools and higher learning institutions[433].

- ***X v. State of Uttarakhand & Ors., 2020 SCC Online Utt 734***[434]

In this case, the Court was approached by a lesbian couple seeking protection from familial harassment. The Court maintained the couple's autonomy and affirmed their right to peaceful, shared habitation.

Impact: This judgment focused attention on the violence and abuse many queer youth, and particularly LGBTQ+ students, encounter from their families, a phenomenon that is often replicated in schools and colleges. The case was a strong call to institutions to address the need for protective policies for queer students from enforced confinement[435].

- ***Queer Collective v. University of Delhi, 2022 (Unreported)***[436]

The lack of a gender-neutral accommodation in hostels was contested by a collective of queer students. The Court ordered the university to make accommodations for students of all genders.

Impact: This decision had a far-reaching impact in the academic debate around inclusive design and was key to the policy change towards the provision of safe accommodation for LGBTQ+ students[437].

- ***S. Sushma v. Commissioner of Police, 2021 SCC Online Mad 13203***[438]

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[432] Arun Kumar v. Inspector General of Registration, 2019 SCC OnLine Mad 8779.
[433] Ritwik Bhattacharya, "Recognition of Transgender Persons under Personal Laws", (2021) 63(3) *JILI* 240.
[434] X v. State of Uttarakhand, 2020 SCC OnLine Utt 734.
[435] Madhu Mehra, "Queer Protection and the Role of Courts", (2021) 55(41) *EPW* 22.
[436] Queer Collective v. University of Delhi, 2022 SCC OnLine Del (Unreported).
[437] QueerCollective v. University of Delhi, 2022, Delhi HC (Unreported), Case summary available at https://www.livelaw.in.
[438] S. Sushma v. Commissioner of Police, 2021 SCC OnLine Mad 13203.

In response to a plea from a same-sex couple seeking protection, the Madras High Court issued systematic directions for police insensitivity[439], LGBTQ+ curriculum incorporation at school and university levels, and police training.

Impact: This case catalyzed the institutional change, leading universities and state boards to conduct sensitization, inclusion, and grievance redressal policy workshops for queer students.

- ***Suresh Kumar Koushal V. Naz Foundation, (2014) 1 SCC 1[440]***

The Supreme Court's reversal of the Naz Foundation ruling reinstated the penalization of same-sex relationships under Section 377 IPC. Section 377 continued to exist because, in the Court's view, the LGBTQ community was a "minuscule minority" and their rights were not infringed upon.

Impact: The LGBTQ rights movement in India was dealt a devastating blow, resulting in protests across the country, increased activism, and the emergence of queer collectives led by students in universities who countered the narratives through visibility and solidarity events[441].

- ***National Legal Services Authority (NALSA) v. Union of India, (2014) 5 SCC 438***

The Supreme Court's decision in this case encompassed the self-identification of gender and gender rights, thus extending its provisions to acknowledge the rights of a transgender person. It recognized the gender identity self-determination as intrinsic to personal sovereignty and self-determination under Articles 14, 15, 19, and 21. The Court noted the long-standing socio-political neglect of transgender individuals and ordered measures to rectify the neglect.

Impact: There was an increased recognition of admitting transgender persons and, therefore, prompted an end to discrimination in admissions, documentation, and housing in the hostels. The provision of the ruling allowed schools to adopt gender-inclusive practices[442], as well as providing gender-neutral infrastructural provisions.

[439] Rohan Deshpande, "Sushma Case and the New Paradigm of Queer Rights", (2021) 56(34) *EPW* 19.
[440] Suresh Kumar Koushal v. Naz Foundation, (2014) 1 SCC 1.
[441] Akhil Kang, "The Return of Section 377 and Its Social Impact", (2014) 49(3) *EPW* 12.
[442] Priya Kulkarni, "NALSA v Union of India: An Analytical Overview", (2015) 57(1) *JILI* 89.

WHEN LAW MEETS LIFE: REALITIES OF LGBTQ+ YOUTH IN EDUCATION

India's LGBTQ+ youth face persistent discrimination, denial of opportunities, and violence in educational settings even after receiving legal recognition. The Navtej Johar and NALSA judgments have certainly won rights on paper, but implementation in institutional transformation remains lacking.

As revealed in a 2021 survey conducted by the Naz Foundation, almost 60% of LGBTQ+ students reported a history of being bullied, harassed, and verbally abused about their sexual orientation and gender identity[443]. The mistreatment of transgender students is particularly flagrant, extending to being misgendered and deadnamed by teachers, and not being provided adequate access to hostels. Numerous public universities and other higher education institutions do not provide or actively deny housing, which forces transgender students to live in unsafe, unhealthy, or unaffordable situations.

One of the most heart-wrenching cases highlighting this crisis was reported in 2022 from Kerala, where a 19-year-old transgender student endured extensive harassment from both faculty and fellow students, ultimately leading to a tragic death by suicide[444]. The Humsafar Trust and SAATHII NGOs uncovered that the student was mocked and deprived of basic services as well as institutional mechanisms for grievance redressal.

The Queer Collective Hyderabad's 2023 field study further validates the prevailing climate of silence and pervasive fear. Their research found that LGBTQ+ students often feel the need to stay in the closet during their schooling for fear of backlash. Many undergo harmful and unscientific ‘conversion therapy’ done secretly by a counsellor[445] or school staff. These actions go against ethical medical standards and violate basic human rights.

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[443] Naz Foundation, *Survey on School Bullying and LGBTQ Youth in Delhi* (2021).
[444] The Humsafar Trust, *Kerala Transgender Student Report*, (2022).
[445] Ranjita Biswas, "Conversion Therapy in India: A Human Rights Crisis", (2021) 55(19) *EPW* 11.

Even though thorough statistical data is missing, scant research suggests that the dropout rate is almost 2 times higher among LGBTQ+ youth compared to their cisgender and heterosexual peers[446].

The Supreme Court has recognized queer identities, but there are no mechanisms in place for enforcement, leaving students to navigate heavily adversarial surroundings. Grievance cells, when they exist, are understaffed. Teachers are untrained, and there is no constructive representation of LGBTQ+ identities in the curriculum. In sum, the promise of equality remains distant from lived experiences.

LEGAL ILLUSIONS: SYSTEMIC BOUNDARIES AND DISCRIMINATORY BIASES

India's judiciary has progressively conferred certain rights upon LGBTQ+ individuals. However, the legislative and policy framework remains inconsistent and at times, self-defeating. Some regard the Transgender Persons (Protection of Rights) Act of 2019 as a landmark legislation, yet it contains deeply regressive provisions. Most notable is the requirement that transgender persons must obtain a District Magistrate-issued certificate affirming their gender[447], which allows a legal affirmation of their gender. This provision is in direct violation of the NALSA v. Union of India (2014) judgment, which granted the right to gender self-identification.

Moreover, this Act has no provisions to safeguard against discrimination in access to education. There are no provisions that place responsibility on the discriminatory institutions, their institutional accountability, grievance mechanisms, or curriculum revision. Therefore, even when breaches of policy occur, there is no normative framework that guides intervention[448].

In addition, there is no specific anti-discrimination legislation in India that covers discrimination on the grounds of sexual orientation and gender identity in education at all levels, including primary and secondary, private and public institutions.

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[446] Harish Iyer, "Dropout and Discrimination: The LGBTQ Student Story", (2022) 12(3) *Indian Journal of Gender Studies* 211.
[447] Shreya Atrey, "Gender Recognition Laws and Constitutional Validity", (2020) 61(3) *JILI* 45.
[448] Alok Gupta, "Institutional Discrimination in Indian Education", (2017) 49(12) *EPW* 33.

The University Grants Commission (UGC), in its anti-ragging policies, lists sexual orientation as one of the protected categories. Still, compliance is lackluster. Many institutions lack the Internal Complaint Cells and Gender Sensitisation Cells. Additionally, the absence of institutional frameworks means staff are untrained and often propagate the very biases they are employed to solve[449].

The same social restrictions are present in the legal frameworks. Discrimination based on sexual orientation is often ignored by police and judicial officers. Within the LGBTQ+ community, there is a fear of further abuse and victimization through legal processes. Most schools and colleges in India continue to teach within LGBTQ+ un-inclusive spaces. The history, health, rights, and advocacy of the LGBTQ+ community are often absent, and when included, it is done in a disingenuous manner. This denial of representation contributes to a lack of understanding and normalizes the assumption that queer individuals are the abnormal contingent of society[450].

FROM THE GLOBE TO THE GROUND: LEARNING FROM GLOBAL LEGAL PRACTICES

Countries and regions that have implemented more progressive policies and practices provide a meaningful framework that India can adopt to develop a more inclusive education system. In South Africa, the post-apartheid Constitution provides a profound example by granting sexual orientation equal protection to other grounds of discrimination[451].

In the country's Equality Courts, cases of discrimination, including those of a school's identity prejudice, may be brought to court. Some policies address bullying, inclusive sexual education, and comprehensive diversity in teaching materials.

Similar to Canada, Ontario's Human Rights Code also has a provision that restricts the use of discrimination based on sexual orientation, gender identity, or gender expression for accessing services, including education. Schools must also address the use of students' preferred gender

[449] Center for Law and Policy Research, *Recommendations on Institutional Training for Gender Sensitisation* (2022).
[450] Shraddha Chatterjee, "Erasure of Queer Narratives in Indian Curriculum", (2021) 58(8) *EPW* 27.
[451] Pierre de Vos, "Sexual Orientation and the South African Constitution", (2013) 129 *South African Law Journal* 2.

pronouns, provide gender-neutral facilities, and teach queer history and rights. There are also robust enforcement provisions for students and parents[452].

As the UK's Equality Act 2010, one of the protections provided includes sexual orientation and gender reassignment. It requires that all educational institutions actively stop discrimination, ensure equal access by all, and provide inclusive teaching for all learners. Institutional provision of staff training and establishment of grievance procedures are done.

Among the most progressive in the world is Argentina's Gender Identity Law of 2012[453]. It grants citizens the right to self-identify gender without the prerequisites of a medical or psychiatric evaluation.

Scholarly facilities must honor the validated identity of each student. Moreover, the student is entitled to privacy regarding education, accommodation, healthcare, etc. These services are protected by an inter-agency enforcement mechanism.

In addition, the Yogyakarta Principles[454] further expand the framework of the LGBTQ+ movement. Treaties such as the UN Convention on the Rights of the Child (UNCRC), the Convention on the Elimination of Discrimination Against Women (CEDAW), and the International Covenant on Civil and Political Rights (ICCPR) also align with the Country's inclusive education.

Nonetheless, there is no doubt that the aforementioned cases are on the extreme side of public opinion. For instance, Poland and Hungary are facing regressive legal and political LGBTQ+-inclusive changes. These examples are far more extreme than what is attainable, which highlights the plight of social advocacy.

[452] Ontario Human Rights Commission, *Policy on Preventing Discrimination Because of Gender Identity and Gender Expression* (2014).
[453] Mauro Cabral Grinspan, "Argentina's Gender Ident203*sion* Report.
[454] International Commission of Jurists, *The Yogyakarta Principles plus 10* (2017).

CONCLUSION: MOVING TOWARDS A RAINBOW- INCLUSIVE FUTURE

This chapter has analyzed the widening gap between the constitutional guarantees made for LGBTQ+ students and their actual lived realities in the context of educational institutions in India. Despite judicial progress, queer youth still face systemic discrimination due to a lack of legal protective frameworks, policy enforcement, and the prevailing culture within educational institutions.

Recognition in the legal sense must do more than just exist for the sake of existing. A comprehensive legal framework that forbids discrimination on grounds of sexual orientation and gender identity is vital. Such a law must be clear and precise, within the reach of the public, well-advertised, and must bear within it protective institutional mechanisms for grievance redressal with clear lines of accountability.

Immediate reform is also needed in educational institutions. Such reform includes:

- Active, constructive, and gender-sensitive GSCs must be established and functional.
- Formally instilled among teachers and within academic staff, anti-discrimination and diversity training must be made mandatory.
- Curricula that incorporate LGBTQ+ history, literature, and social science must be revised.
- LGBTQ+ affirmative mental health support systems should be established, alongside gender-neutral facilities and inclusive hostel policies.

Beyond the classroom, public awareness campaigns and initiatives aimed at changing parental attitudes will aid in fostering a culture of acceptance. The oversight and advocacy for compliance and reform need to be supported for civil society organizations and student collectives.

Cultural changes must accompany legal changes. Moreover, there must be a transformative focus on the legal and cultural frameworks to empower and include queer youth in India. Their

fundamental rights, alongside their lived experiences and future aspirations, must shape not only the legal and policy frameworks but also the ethical scaffold of the education system.

In contemplating a 21st-century education, we must examine whether a democracy can be just if children are raised in a reality where they are rendered invisible, feel unsafe, and deemed unworthy due to their identity. The response to this inquiry lies in doing the needful; it cannot be just a verbal or ideological commitment. The right to education is a legal right, but it is also a fundamental requirement of an inclusive society.

CHAPTER 12: POLICE BRUTALITY AND CUSTODIAL VIOLENCE

by Samta Gupta

INTRODUCTION

Custodial Violence, a gross human rights violation, perseveres to be a pressing issue in India, regardless of legal recourse and international conventions. It incorporates several forms of abuse, including torture (mental, physical or sexual), rape and extrajudicial killings, performed by law enforcement officials while in custody. In spite of protection by constitutional principles, and judicial directives, cases of custodial violence persist due to reasons such as lack of accountability, systemic flaws and prevailing beliefs towards law enforcement.

The fundamental causes of custodial violence in India are varied, comprising institutional deficiencies, political manipulation and societal biases. Police brutality often arises from a lack of proper training, excessive workload and stress to produce outcomes in an imperfect criminal justice system. Moreover, ingrained social stratification and preconceptions exacerbate the vulnerability of excluded groups, who are unfairly targeted by custodial violence.

Addressing custodial violence needs a comprehensive approach that encompasses legal reforms, institutional responsibility, and public awareness. Strengthening watchdog agencies, expanding police training on human rights and fostering community-police relations are major steps towards mitigating custodial violence. Furthermore, promoting a culture of respect for human rights and enforcing accountability across all levels of law enforcement are crucial steps in tackling this widespread problem.[455]

Meaning of Custodial Violence: Custodial Violence is dealt with by Section 120 (1) of The Bhartiya Nyaya Sanhita, 2023 which says that whoever voluntarily causes hurt for the purpose of

[455] Riya & Dr. Nitu Nawal, "Understanding Custodial Violence in India: A Critical Analysis" IJLLR Journal (2024)

extorting from the sufferer or from any person interested in the sufferer, any confession or any information which may lead to the detection of any offence or misconduct, or for the purpose of constraining the sufferer or any person interested in the sufferer to restore or to cause the restoration of any property or valuable security or to satisfy any claim or demand, or to give information which may lead to the restoration of any property or valuable security, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.[456] Usually, perpetrators of custodial violence are people in positions of power who exploit their authority to breach the rights and dignity of those they're supposed to oversee. It impairs the principles of justice, fairness, and accountability within the penal justice framework, leading to a loss of trust between citizens and police departments.

INTERSECTIONALITY OF LAW, POLICY AND SOCIETY

The execution of brutal behaviour against criminals and suspects by the law enforcement agencies was a common occurrence in ancient India. In the secondary phase of the ancient period custodial violence was at the apex level. Rapes, tortures, deaths, illegal arrests, false implications and other police excesses were common instances in historic India. Very harsh punishments were ordered in various Hindu scriptures. Precisely, the contemporary penology has its origins in ancient India. All the atrocious methods of torture such as cutting of tongue, throat cutting the limbs, pouring hot led molten in the ears, whipping, etc. are widely recognized and were part of the law of the land.

During the epic period (1400-800 B.C.), torture was specifically practiced on prisoners by police. At earlier stage, in cases of harassment of prisoners, if anyone puts obstruction to sleep, meals, sitting down, answering calls of nature or movement of putting restraints, the fine should be three panas, increased by three panas for him to do it and for him who causes it to be done sequentially.

Arrested suspects were taken into custody, in order to clear him of alleged guilt, bails were also granted. During the time, in the appearance of the complainant and the witnesses, the prosecution whether local or foreigner shall be inquired about his country, caste, name, family, occupation,

[456] The Bhartiya Nyaya Sanhita, 2023 (45 of 2023)

wealth, associates and residence. Generally, fetters and wooden handcuffs were used. Many prisoners died as the result of the torture imposed upon them.
The environment of jails and prisons during this period was disgraceful. [457]

POLICE ATROCITY IN INDIA

Detecting and preventing crime is the key motive for creating a police force in a country. In India, reports of police misconduct are appearing more frequently in newspapers and other media outlets on a daily basis. As a tactic for law enforcement, police in India commonly adopt practices that include custodial violations and torture. Torture is inflicted on the accused under the guise of examination or investigation to extract confessions. In addition to the accused, Bonafide informants, innocent individuals, and witness bystanders are subjected to torture. Their human rights violations encompass verbal abuse, assault, death or injury threats, degradation, food deprivation, among other things. On women, police officers impose torture in the form of rape, molestation and sexual harassment. It is distressing to know that police in India who are involving themselves in human rights violations follow their own code of procedure not the procedure which is mentioned in the Criminal Procedure Code, 1908 (Bhartiya Suraksha Nyaya Sanhita, 2023).[458]

In ***Rudul Sah v. State of Bihar and Another***[459] , the petitioner who was detained in prison for over 14 years after his acquittal filed a habeas corpus petition under Art. 32 of the Constitution praying for his release on the ground that his detention in the jail was unlawful. He also asked for other certain reliefs including compensation for his illegal detention. When the petition came up for hearing the court was informed by the respondent State that the petitioner had already been released from the jail. Article 32 confers power on the Supreme Court to issue directions or orders or appropriate writs for the enforcement of any of the rights conferred by Part III of the Constitution. Article 21 which guarantees the right to life and liberty will be denuded of its

[457] Dr. Asifa Parveen & Dr. Naaz Akhtar Siddique, "HISTORICAL PERSPECTIVE OF CUSTODIAL TORTURES IN INDIA" JETIR, 2, (2014), Volume 8 Issue 8, Pages 1-4
[458] Karthikeyan M. "Police Atrocity in India- A critical study". **International Journal of Law**, Volume 9, Issue 2, 2023, Pages 46-49
[459] Rudul Shah v. State of Bihar (1983) 4 SCC 141

significant content if the power of this Court were limited to passing order of release from illegal detention. Taking into consideration the great harm caused to the petitioner by the state government of Bihar, the Honourable Court states that, as an interim measure, the State must pay to the petitioner a further sum of Rs. 30,000 in addition to the sum of Rs. 5,000 already paid by it. Further, we hope that there will be no more Rudul Sahs in Bihar or elsewhere. [460]

In ***Saheli, A Women's Resources Centre, Through Ms.Nalini Bhanot v. Commissioner of Police, Delhi Police Head-quarters and Ors.***[461] ,the writ petition was filed on behalf of two women, who were severely beaten by the alleged landlord, in collusion with the local police, in their attempts to get the rooms vacated, the petitioners prayed for directions to the respondents to pay exemplary charges to one of the women for the death of her son but to injuries inflicted on him by the police. It is well settled that the State is responsible for the tortious acts of its employees. On a conspectus of decision imposed by an honourable court, it is deemed and proper to direct the Delhi Administration, respondent no. 2 to pay compensation to Kamlesh Kumari, mother of the deceased, Naresh, a sum of Rs. 75,000, within a period of four weeks from the date of this judgement. The Delhi Administration may take appropriate steps for recovery of the amounts paid as compensation or part thereof from the officers who will be found responsible, if they are so advised.[462]

In ***Smt. Nilabati Behera Alias Lalit Behera v. State of Orissa and Ors.,***[463] Petitioner's son was taken from his home in police custody at about 8 a.m. on 1.12.1987 by Assistant Sub-Inspector of Police of the Police Outpost in connection with the investigation of an offence of theft. On the next day, the petitioner came to know that the dead body of her son was found on the railway track. There were multiple injuries on the body and his death was unnatural, caused by those injuries. The petitioner alleged in her letter, which was treated as a writ petition under Article 32 of the Constitution, that it was a case of custodial death. It was prayed that compensation be made to her, for the contravention of the right to life guaranteed under Article 21 of the

[460] "Rudul Sah v. State of Bihar and Another" Supreme Court of India, August 1, 1983, https://api.sci.gov.in/jonew/judis/9759.pdf
[461] Saheli, A Women's Resources Centre, Through, Ms. Nalini Bhanot Vs. Commissioner of Police, Delhi Police Head-quarters and Ors. (1989) SCR 488
[462] "Saheli, A Women's Resources Centre, Through, Ms. Nalini Bhanot Vs. Commissioner of Police, Delhi Police Head-quarters and Ors." Supreme Court of India, December, 14, 1989, https://api.sci.gov.in/jonew/judis/7710.pdf
[463] Smt. Nilabati Behera Alias Lalit Behera VS State of Orissa and Ors.AIR 1993 SC 1960

Constitution. The respondent- State of Orissa is directed to pay Rs. 1,50,000 would be appropriate as compensation, to be awarded to the petitioner in the present case and sum of Rs. 10,000 as costs to be paid to the Supreme Court Legal Aid Committee. [464]

In ***Joginder Kumar v. State of U.P***[465]**,** a petition was filed under Article 32 of the Constitution of India. The petitioner is a young man of 28 years of age who has completed his LL.B, and has enrolled himself as an advocate. The Senior Superintendent of Police, Ghaziabad, Respondent called the Petitioner in his office in making enquiries in some cases. The petitioner along with his brother appeared before and respondent and he kept the petitioner in his custody till evening. The respondent sent a telegram to the C.M. of U.P. apprehending his brother's implication in some criminal case and also further detaining the petitioner being shot dead in a fake encounter. It's noted that the arrest law strikes a balance between individual rights/liberties and individual duties/responsibilities. There were two directives: arrests shouldn't happen as a matter of routine and the arrested person must be informed of their arrest. It is mentioned under Section 50 of the Code of Criminal Procedure, 1973 (Section 47 of the Bhartiya Nagarik Suraksha Sanhita, 2023)[466] as well. The rights are intrinsic in Article 21 and 22(1) of the Constitution and need to be recognised and protected with meticulous care. [467]

In ***Anita Kushwaha v. Pushp Sudan***[468] The Hon'ble Supreme Court held that the right to justice is a component of the rights ensured by Article 14 and 21 of the Indian Constitution. It must be available and enjoyed by prisoners as well in every condition. The court highlighted the significance of access to justice and recognizing rights as a fundamental right under Article 21 of India's Constitution. [469]

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[464] "Smt. Nilabati Behera Alias Lalit Behera VS State of Orissa and Ors.", 1993 AIR 1960, https://api.sci.gov.in/jonew/judis/12126.pdf
[465] Joginder Kumar vs. State of U. P 1994 AIR 1349
[466] The Bhartiya Nagarik Suraksha Sanhita, 2023 (46 of 2023)
[467] "Joginder Kumar vs. State of U.P", Supreme Court of India, April 25, 1994, https://jajharkhand.in/wp/wp-content/judicial_updates_files/07_Criminal_Law/04_arrest_and_custody/Joginder_Kumar_vs_State_Of_U.P_on_25_April,_1994.PDF
[468] Anita Kushwaha v. Pushp Sudan 2023 INSC 915
[469] Niyati Acharya, Anita Kushwaha Vs. Pushap Sadan, *available at* : Anita Kushwaha Vs. Pushap Sudan - Law Times Journal (Visited on August 7, 2025)

Even before the case of ***Shri Dilip K. Basu v State of West Bengal****, in* ***Sheela Barse vs State of Maharashtra***[470] The petitioner, a journalist, in her letter addressed to this court stated that five out of fifteen women prisoners interviewed by her in the Bombay Central Jail alleged that they had been assaulted by the police by the police lock up. Treating the letter as a writ petition, the court issued notices to all concerned to show cause why the writ petition should not be allowed. Further, it was directed that legal assistance to poor or indigent accused, arrested and put in jeopardy of his life or personal liberty, is a constitutional imperative mandated not only Art. 39 A but also by Article 14 and 21 of the Constitution. Considering the question as to how protection can be accorded to women prisoners in police lock ups, it was directed that four to five lock ups must be guarded by female constables. The interrogation must be carried in the presence of female constables only. The intimation of arresting someone must be informed to the Legal Aid Committee as well. Then, in the City Civil Court, preferably, a lady Judge should be appointed. These directions afford considerable protection to prisoners in lock ups.[471]

In ***Shri Dilip K. Basu vs State of West Bengal***[472], the Executive Chairman of Legal Aid Services, a non-political organisation registered under the Societies Registration Act, on 26th August, 1986, addressed a letter to The Chief Justice of India drawing his attention to certain news items published in the Telegraph regarding deaths in police lock-up and custody. The Executive Chairman after reproducing the new items submitted that it was imperative to examine the issue in depth and develop "custody jurisprudence" and formulate modalities for awarding compensation to the victim and/or family members of the victim for atrocities and death caused in police custody and to provide for accountability of the efforts are often made to hush-up the matter of lock-up deaths and thus the crime goes unpunished and "flourishes".[473] In August, 1987, the Court issued a notice to all the states to consider the applications related to this

[470] Sheela Barse vs State of Maharashtra 1983 (SC) 378
[471] "Sheela Barse vs State of Maharashtra", Supreme Court of India, February 15, 1983, https://api.sci.gov.in/jonew/judis/9835.pdf
[472] Shri Dilip K. Basu vs State of West Bengal (1997) 8 SCC 744
[473] "Shri Dilip K. Basu vs State of West Bengal", Supreme Court of India, December 18, 1996, https://api.sci.gov.in/jonew/judis/14580.pdf

concerned issue. The Apex Court should work on the matters of custodial violence, inhumane treatment and the custodial deaths which took place several times during that period. [474]

Through this case, the Court released some important **guidelines** to be considered by police authorities while arresting someone. These are -

- The police personnel carrying out the arrest and handling the interrogation of the arrestee should bear accurate, visible and clear identification and name togs with their designations and further it must be recorded in a register.
- Memo of arrest must be prepared by the arresting police officer, attested by at least 1 witness and countersigned by arrestee.
- The arrestee has a Right to Inform his friends and relatives about the incident.
- With the help of the legal service authorities, the police must issue a notification about the arrest to someone near the district where that particular person is arrested.
- An arrestee must be informed about all these guidelines.
- A Diary entry must be prepared for keeping all the minute details since the arrest of the person.
- An Inspection Memo must be prepared and its copy must be given to the arrestee as well.
- A medical examination of the arrestee must be done every 48 hours since in custody.
- Copies of all the documents including the memo of arrest, referred to above, should be sent to the Pilliga Magistrate for his record.
- The arrestee is allowed to call his own lawyer for proper assistance in the whole matter.
- A police control room should be provided at all district and state headquarters, where information regarding the arrest and place of custody of the arrestee shall be communicated by the officer, within 12 hours of effecting the arrest and the police control room should be displayed on a conspicuous notice board.

The amount of compensation will of course depend upon the peculiar facts of each case and no strait jacket formula can be evolved in that behalf.

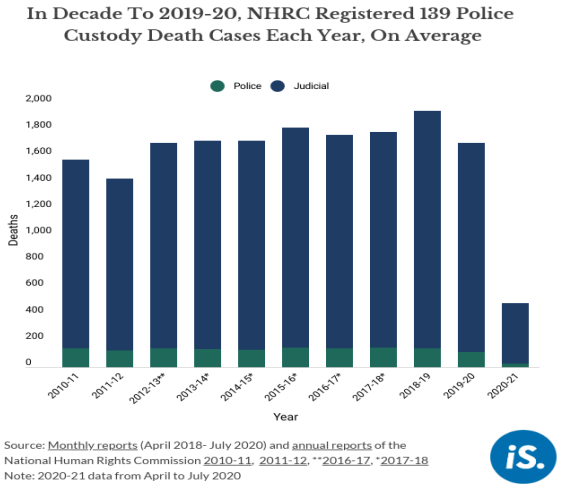
[474] Vandana Sharma, Manika Kamthan, "ENCOUNTER KILLINGS: A CRITICAL ANALYSIS WITH SPECIAL REFERENCE TO VICTIMS OF POLICE BRUTALITIES AND ENCOUNTERS", International Journal of Modern Agriculture, Volume 10, No.2, 2021, Page 4

WHY DOES CUSTODIAL VIOLENCE PERSIST DESPITE STATUTORY SAFEGUARDS AND SC GUIDELINES?

It was noted that India has signed the UN anti-torture convention but hasn't ratified it, and there's no self-contained domestic law in India criminalizing torture. This indicates a lack of political will to implement international human rights obligations. In contrast, the more vital concern lies in the embedded institutional culture that normalises and even justifies custodial violence. Police personnel often interpret such violence as an important means to achieve justice, especially when the formal legal process is seen as slow and ineffective.[475]

According to a first ever report released by **Global Torture Index Flags**[476], the India alongside Libya, Honduras, Belarus, Colombia, Turkey, the Philippines, and Tunisia considered as high-risk countries for systemic torture and retributions against victims and defenders. The said report also focused on the findings such as -

- Police brutality and institutional violence remains unchecked, with extrajudicial killings and unlawful detentions often honored through promotions.
- Unlawful Activities (Prevention) Act (UAPA)[477] is frequently misused against activists and civilians, enabling arbitrary arrests and prolonged detentions.



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[475] Katie Boyle, "Economic and Social Rights Law Incorporation, Justiciability and Principles of Adjudication", (Taylor and Francis Group, New York, 1st Edition, 2020)
[476] OMCT Global Torture Index (The News Minute, 2025)
[477] Unlawful Activities (Prevention) Act, 1967

According to a report by NHRC[478], more than 15,000 cases were recorded over a decade, where the majority of deaths were in judicial custody and approx. 1300 deaths were recorded in police custody. As per the **Section 167** of the Code of Criminal Procedure (CrPC), 1973 (Section 187 of the Bhartiya Nagarik Suraksha Sanhita, 2023)[479], it can last for 24 hours unless extended by a Magistrate for the next 15 days. Observations showed that police don't report every death in custody, and such incidents are not even revealed to the NHRC. [480]

In ***Peoples' Union for Democratic Rights vs. Police Commissioner, Delhi Police***[481]**,** a regrettable incident where police rounded up poor people and brought them to the Police Station for performing some menial work without any labour charges, a form of exploitation. They were beaten up and succumbed to injuries as well rather than paid for the work. After finding out the death of one of the members named Ram Swaroop, the Deputy Commissioner of the prone area ordered a stringent action against SHO. The Deputy Commissioner also awarded Rs.50,000 as compensation to his family, with the amount being deducted from his salary. Additionally, compensation will be given to other affected people. [482]

As per the ***Model Prison Manual 2016***, there should be at least one medical officer present for every 300 prisoners and one doctor must be available in central prisons. But, in reality it was seen that only half times the requirement of medical officers is having to be fulfilled. The prisoners face so much pathetic conditions in jails where more than 1,500 people had access to only 4-6 toilets. The issue of custodial deaths is an integration of management issues and an endowment of police administration.[483]

As per the saying of **Travis Easter -**

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[478] National Campaign Against Torture, *available at* : https://www.uncat.org/in-media/five-deaths-in-police-custody-every-day-over-10-years-but-few-convictions-business-standard/ , (Last modified on August 6, 2020)
[479] The Bhartiya Nagarik Suraksha Sanhita, 2023 (46 of 2023)
[480] Shreehari Paliath, "5 Deaths in Police/Judicial Custody Every Day Over 10 Years, But Few Convictions", August 6, 2020, 5 Deaths In Police/Judicial Custody Every Day Over 10 Years, But Few Convictions
[481] Peoples' Union for Democratic Rights vs. Police Commissioner, Delhi Police (1989) 4 SCC 730
[482] National Campaign Against Torture, *available at* : Five deaths in police custody every day over 10 years, but few convictions, Business Standard | National Campaign Against Torture , (Visited on August 8, 2025)
[483] Five Deaths in Police Custody every day over 10 years , but few convictions, *available at* : Five deaths in police custody every day over 10 years, but few convictions | Current Affairs News National - Business Standard , (Visited on August 8, 2025)

"If officers and citizens are being watched,
we are both more liable in doing the right thing". [484]

It was perceived that this incident mostly occurred with the marginalized and powerless section of society as compared to the ones who have social or political influence around the community. There's limited or no legal aid available for victims to follow through with their cases. The major reason police resort to physical force or beating is due to a lack of specific police training programs on how to gather information from suspects or how to use forensics to prove wrongdoing.

We have seen that in previous times, India has signed the UN Convention against Torture and other Cruel, Inhuman or degrading Treatment or Punishment in 1997 but not ratified it. Our country also lacks in making a standalone central or domestic law criminalising torture. A bill was subsequently presented in the Lok Sabha in 2010 known as **The Prevention of Torture Bill, 2010**[485] and then it was amended and again came into picture in 2017 but still it is not fully implemented.

RETROSPECTIVE REFORMS

Article 246 of the Constitution of India delineates the subject-matter of laws made by Parliament and by the legislatures of the states. Clause (3) specifies that the legislature of a state has exclusive power to make laws with respect to matters enumerated in List II of the Seventh Schedule (the "State List"). While the organization and administration of police forces fall under the State List, criminal law itself is placed in the Concurrent List, giving both Parliament and state legislatures the authority to legislate. Consequently, although policing is primarily a state subject in India's predominantly federal system, the central government plays a significant role in regulating aspects of criminal law, coordinating enforcement, and overseeing central armed police forces, ensuring a nationwide framework for criminal justice.

[484] Justin T Ready and Jacob T.N. Young, "The Unfulfilled Potential of Police Body Cameras in the Era of Black Lives Matter, *available at* : https://slate.com/technology/2020/10/black-lives-matter-police-body-cameras.html , (Visited on August 8, 2025)
[485] The Prevention of Torture Bill, 2010, (Bill No. 58 of 2010)

Over the years, The National Police Commission was formed under the Morarji Desai government to report on policing and give recommendations for reform. It also suggested that in case of any custodial rape, death due to police firing or excessive use of force, judicial enquiry should be mandatory. [486]

In ***Vineet Narain & Others v. Union of India & Another***[487] The Supreme Court noted the urgent need for execution of these reforms.

Then, the **Ribeiro Committee** in 1998 recommended setting up Police Performance Accountability Commissions in states and The District Complaints Authority.

In ***Prakash Singh v. Union of India***[488], considering the sweeping changes that had taken place in the country after the enactment of The Indian Police Act, 1861 and absence of any comprehensive review at any national level, the Government of India in 1977 appointed a National Police Commission. The terms and conditions of this commission were wide ranging. Also, the recommendation of this Commission shall be binding on the State Government. [489]

CROSS- COMPARISON OF LAWS

In **T*he People of the State of New York v. Yusef Salaam*[490],** also known as The Central Park Joggers Case where a female jogger was brutally assaulted in Central Park. The victim, Trisha Meili, was found harshly beaten and remained in a coma for 12 days. On that very night, 5 young men were arrested in relation to the attack, leading to conviction of them despite the absence of any forensic evidence linking them to the crime. The case amassed great media attention, which intensified public outrage and elevated racial tensions in New York city. Then, in 2002 the real or actual perpetrator, Maityas Reyes, admitted to the crime, and DNA evidence also confirmed his involvement, leading to the acquitting of five wrongfully convicted men. The case ultimately points out that the element of coercion is used by the police to extract fake confessions from

[486] Experiences of Undertrial Prisoners Released on Bail: Accessing Bail and Post-Bail Situation, *available at:* https://tiss.ac.in/uploads/files/Bail_Study_Report_-_2023.pdf , (Visited on August 8, 2025)
[487] Vineet Narain & Others v. Union of India & Another (1998) 1 SCC 226
[488] Prakash Singh v. Union of India (2006) 8 SCC 1
[489] "Prakash Singh v. Union of India", Supreme Court of India, September 22, 2006, https://api.sci.gov.in/jonew/judis/28072.pdf
[490] The People of the State of New York v. Yusef Salaam (1993) 83 N.Y. 2d 51

those men. The case had left a long-lasting impact on justice reform, unequal treatment, and media influence on public perception. Thus, this case has guided the supporters to reinterpret the existing laws and to enact harsher criminal laws.

In the case of George Floyd, a black man who died while being arrested in Minnesota. His death encouraged months of protest against police brutality and racism and motivated ongoing discussions about racial justice and the role of race in American Society. Derek Chauvin, who participated in the arrest, has been blamed for second-degree murder, and second-degree manslaughter for Floyd's death. He was declared guilty on all counts and was sentenced to 22.5 years in prison.[491]

This case has explicitly shown Custodial Violence at its peak.

After considering these two international cases, we can say that Custodial Violence is indeed considered a serious international issue.

I Pandiyan says that: -

> *"This is a land of selective outrage. If this is India's George Floyd moment, then we have to look at systematic oppression of lower castes by the police, too".*[492]

PROPOSED CHANGES OR ACTIONS

In ***Arshad Ahmad and Ors v State NCT of Delhi and Anr***[493] The instant petition discussed the power of the High Court in quashing a criminal proceeding in exercise of its inherent jurisdiction is distinct from the power given to criminal court. The state had taken stringent legal actions against the petitioner, brazenly threatening, intimidating and subjecting him to inhuman and degrading treatment that too in the presence of SHO. While collecting the recordings, it was found that the audio footage of the police station was not available marking a strict violation of

[491] Minnesota v. Chauvin and the Death of George Floyd, available at, Trial Information - Minnesota v. Chauvin and the Death of George Floyd - Guides at University of San Diego Legal Research Center, (Visited on August 8, 2025)
[492] Indian Police use violence as a shortcut to justice. It's the poorest who bear the scars, *available at* : Indian police use violence as a shortcut to justice. It's the poorest who bear the scars | CNN , (Visited on August 8, 2025)
[493] Arshad Ahmad and Ors vs State NCT of Delhi and Anr W.P.(CRL) 1185/2022

Section 65 (B) of The Indian Evidence Act, 1872. It was claimed that the police protection was not provided to him.[494]

In ***Paramvir Singh Saini v. Baljit Singh***[495] SC directed all states and Union Territories to install CCTV Cameras in all police stations. The 3-judge bench of RF Nariman, KM Joseph and Aniruddha Bose, JJ has instructed all the states and UTs to install CCTV cameras in all Police Stations and file compliance affidavits within 6 weeks. Further, the Court said that the directions are in furtherance of the fundamental rights of each citizen of India guaranteed under Article 21 of the Constitution of India, and hence, the Executive/ Administrative/ police authorities are to implement this order in both letter and spirit as soon as possible. It was directed that no area of police stations should not be left to be unmonitored and provide precise location for cameras to be installed for surveillance. Any approaches linked to its functioning such as data backup of CCTVs must be ensured by the respective governments who are mandated to establish oversight committees for the same at both the state and district level.[496]

In ***Shafhi Mohammad v. State of Himachal Pradesh***[497] The court directed that a Central Oversight Body needs to be set up by the Ministry of Home Affairs to implement the plan of action for monitoring the CCTV footage during the crime investigation. The directions circulated by the Court included the purchase, distribution and installation of CCTVs and its equipment. It was mandated in this case that all Police Stations should have installed CCTV systems at all entry and exit points; main gate of the police station; all lock-ups; all corridors; lobby/inspection area; all rooms of inspectors; station hall; in front of the police station compound; back part of the police station, etc.

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[494] "Arshad Ahmad And Ors vs State NCT of Delhi And Anr", In The High Court Of Delhi At New Delhi, June 2, 2022, https://delhihighcourt.nic.in/app/showFileJudgment/SKS02062022CRLW11852022_174217.txt

[495] Paramvir Singh Saini v. Baljit Singh (2020) 1 SCC 184

[496] Nishant Nagori, CCTVs Camera in Police Stations: A comprehensive step to deter Custodial Violence? , *available at* : CCTVs Cameras in Police Stations: A Comprehensive Step to deter Custodial Violence?￼ – The Criminal Law Blog , (Visited on August 8, 2025)

[497] Shafhi Mohammad v. State of Himachal Pradesh (2018) 5 SCC 311

CONCLUSION

To conclude, custodial violence is still a significant problem in India, endangering human rights, dignity, and lawfulness. Regardless of existing legal frameworks and accountability mechanisms, cases of abuse and torture continue to occur within law enforcement and correctional facilities. [498]A further concern is the routine admission torture-based evidence in the legal process. Section 27 of The Indian Evidence Act, 1872 (Section 23 (2) of The Bhartiya Sakshya Adhiniyam, 2023),[499] is specifically problematic in nature. On the other hand, the law excludes confessions made to the police from admissibility, and permits the use of material recovered as a result of such revelations. This loophole enabled the continued use of custodial torture, as coerced confessions can still produce evidence that is admissible in court. Involvement of community policing and help to curb such practices. Awareness campaigns led by the media, educational institutions and civil society organisations can play a critical role in informing people about the constitutional rights and mechanisms available for reparation. Increased public scrutiny of custodial practices can also exert pressure for systemic reforms. Meanwhile, for community policing to be effective, it is essential to clearly define the role of community representatives and ensure they are properly trained to engage with law enforcement constructively. [500]

[498] 2014 ANNI Report on the Performance and the Establishment of national Human Rights Institutions in Asia, (The Asian NGO Network on National Human Rights Institutions (ANNI)
[499] The Bhartiya Sakshya Adhiniyam, 2023, (47 of 2023)
[500] Editorial, "Are existing mechanisms effective in preventing custodial violence?", THE HINDU, July 11, 2025.

CHAPTER 13: ELDERLY AND ABANDONED PARENTS

by Mudit Vats

INTRODUCTION

"Care for your parents with love and respect, for you will only understand their full value when you see their empty chair"

In cities and towns across India, elderly citizens, many of whom once provided for their families are increasingly experiencing abandonment, neglect, and even violence by those they raised. A harrowing incident in Kerala involved an 80-year-old man who was forced into an old-age home after credible abuse by his son and daughter-in-law. Upon his death, the family allegedly locked the house and vanished, leaving the community to conduct his funeral rites alone[501]. In Delhi's Nangloi, a former nurse with decades of service to her family found herself reduced to a few worn suitcases in an overcrowded old-age home. Her son and daughter-in-law withheld food and insulted her daily, sending just ₹500 a month for essentials, and abandoned her entirely.

Even legal avenues offer limited solace. Though the Maintenance and Welfare of Parents and Senior Citizens Act, 2007 guarantees maintenance and even allows reversal of property gifts made under coercion, awareness remains painfully low, only about 12 % of seniors know of the Act and the maximum support one can claim is capped at ₹10,000/month, inadequate for those in need[502]. In fact, even before this Act, Section 125 of CrPC provided for order for maintenance of wives, children and parents.Recent court rulings affirm that elderly parents cannot be compelled

[501] Rohini Chatterji, "India's Seniors Are Facing Abuse in Families. Children Are No Longer Shravan Kumar" *ThePrint*, July 1, 2024.
[502] Thomas Gregor Issac, Abhishek Ramesh, Shiv Shanker Reddy, et.al., "Maintenance and Welfare of Parents and Senior Citizens Act 2007: A Critical Appraisal" 14(4) *Journal of Geriatric Mental Health* 294–301 (2021).

to live with abusive children in order to access maintenance, and that adopted children are legally bound just as biological ones are.

In India's bustling cities and quieter towns, many elderly men and women navigate their twilight years with profound uncertainty, without steady income, adequate medical care, or the legal awareness that might bring real relief. HelpAge India's survey of over 5,100 seniors across 20 Tier I and Tier II cities, along with 1,333 caregivers, reveals that **one in every three elderly people reported no income in the past year**, a hardship felt more deeply by women (38%) than men (27%)[503]. Only **29% had access to any form of social security**—be it pensions or provident funds—while a staggering 65% voiced financial insecurity, worrying about how they might manage future needs.[504] For 7% of respondents, abuse was a painful reality often at the hands of sons (42%) or daughters-in-law (28%) with low-income and illiterate seniors disproportionately affected.

Health burdens loom large. More than half, 52% struggle with everyday activities, and 54% live with two or more chronic diseases like hypertension, diabetes, arthritis or osteoporosis[505]. Around 79% sought care at government facilities, and almost half of those aged 80+ who visited such centers had no personal income, hinting at the unaffordability of private care.

Worse still, only 9–10% were aware of the Maintenance and Welfare of Parents and Senior Citizens Act, 2007, a legal instrument designed to secure maintenance and protection. This legislative lifeline remains largely invisible to those who need it most, especially those in the so-called "missing middle," who fall outside poverty thresholds but lack sufficient savings.

The Constitution of India lays down certain rights for the elderly people under Article 21 (protection of life and personal liberty), Article 41 (right to public assistance), and Article 47 (responsibility of the state to increase the quality of nutrition and standard of living). However, because they are still Directive Principles of State Policy, they are mostly unassailable and rely on legislative enforcement which is mainly done by the Parliament of India.

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[503] HelpAge India, "WEAAD 2024 Press Release" *HelpAge India* https://www.helpageindia.org/news/weaad-2024-press-release.
[504]HelpAge India, *Ageing in India: Exploring Preparedness & Response to Care Challenges* (2024) helpageindia.org
[505] Tribune News Service, "One in Every Three Elderly Persons Has No Income: HelpAge India Report" *The Tribune* (Chandigarh, June 15, 2024).

The rights of the elderly have been upheld by the judiciary. In ***Ravi Shankar v. State of Bihar (Patna HC*, 2023)**, the court confirmed the right of elderly parents to live quietly under the MWPSC Act, 2007 by upholding a Maintenance Tribunal's order to remove a son and daughter-in-law from a senior citizen's property. A Division Bench later curtailed this authority, ruling that eviction had to be connected to a maintenance claim. Even if they are noteworthy, these decisions are nonetheless disjointed and emphasize the need for more transparent enforcement and more legal interpretation.

Systemic constraints, such as delayed adjudication, lack of knowledge about rights, the emotional toll of suing one's children, physical difficulties accessing judicial forums, and administrative indifference, impede abandoned parent's access to justice. These connected problems bring up the main question of this chapter, which is whether the Indian legal system actually offers older individuals justice or simply token safeguards.

This chapter will analyse the socio-legal evolution of elderly rights, along with historical neglect and exclusion, a critical assessment of the MWPSC Act and court interventions, and an examination of the practical implication using case studies and current statistics. It will also compare and contrast international frameworks and suggest legislative and policy changes.

LITERATURE REVIEW

The growing scholarly and legal conversation around protection and well-being of elderly citizens in India reflects a pressing concern: breakdown in formal mechanisms to guarantee legal recourse for one of the country's most vulnerable groups. In order to assess current knowledge, pinpoint specific gaps, and put the socio-legal issues that older people experience in perspective, this literature review examines academic journals, official documents, field research, and non-governmental organization publications.

One important national resource on the socioeconomic and health situations of India's senior population is the Ministry of Health and Family Welfare's Longitudinal Ageing Study in India (LASI). The results of LASI (2017-18 and revised in 2022) showed that 54% of people aged 60+ had two or more non-communicable diseases (NCDs), roughly 5.7% lived alone, and 24.2% of

people assessed their health as bad. The fact that 1.5% of older people were still looking for work highlights the financial hardship that comes with aging.

According to a 2024 HelpAge India research, ageing in India: Exploring Preparedness and Response to Care Challenges, which polled over 5,000 seniors, just 9% of them knew about the MWPSC Act, 2007 and 65% of them felt financially insecure.[506] A third said they had not received any money in the previous year, and just 29% had access to social security programs.[507] These numbers show a significant lack of understanding and implementation of welfare, which hinders access to support networks and legal remedies.

HelpAge India's 2025 study, Understanding Intergenerational Dynamics & Perceptions on Ageing, added a generational perspective by polling 5,700 people in 10 cities. Even though 88% of young people still anticipate living with their families, traditional family caring standards are still in place, although attitudes toward assisted living and paid caregiving models are growing. Access to justice and digital governance were made more complicated by financial reliance (38% moderately reliant, 15% entirely dependent) and digital illiteracy (only13% of seniors utilized the internet).

From a legal standpoint, a Maintenance Tribunal's order evicting a son and daughter-in-law from an old parent's property was upheld by the 2023 Patna High Court ruling in Ravi Shankar v. State of Bihar. While the ruling reinforced the right to peaceful residence, a Division Bench later limited the Tribunal's power, stating eviction must be in consonance with the maintenance claim. This contradiction exposes the judicial inconsistency in interpreting the MWPSC Act, a concern raised by legal scholars, who emphasize the Act's vague procedural safeguards and weak enforcement.

In a compelling field investigation titled *"Ageing Alone: India's Elderly Face a Crisis of Neglect"* (Deccan Herald, April 5, 2025), journalists documented poignant scenes: elderly men and women some bearing the weight of dementia, others frail from age sitting at metro stations, quietly begging after being abandoned by children or entangled in protracted property disputes. With trembling hands and hollow eyes, they offer charity not merely as survivors but as

[506] Drishti IAS, "HelpAge India Report: Financial Insecurity & Illiteracy Among Seniors" *Drishti IAS*, June 16, 2024. https://www.drishtiias.com/daily-updates/daily-news-analysis/helpage-india-report

[507] **HelpAge India,** "HelpAge India Highlights Rising Elder Abuse: 65% of Seniors Feel Financially Insecure, 9% Aware of MWPSC Act" *HelpAge India*, June 15, 2024.

once-treasured family members now pushed to the margins—living testimonies to the chasm between legal promise and lived indignity[508].

Government schemes such as the Rashtriya Vayoshri Yojana, Atal VayoAbhyuday Yojana, and the SACRED job portal, alongside the long-standing National Policy on Older Persons (1999), indicate structured support for the elderly. Yet, field-level realities reveal stark bottlenecks, poor interdepartmental coordination, limited scheme awareness, and deep-seated digital exclusion leave these programs ineffective for the most vulnerable seniors, especially women and socioeconomically disadvantaged groups.

India's Constitution enshrines ideals of dignity and welfare through Articles 21, 41, and 47. Still, without concrete statutory mechanisms or meaningful implementation, these remain aspirational pillars rather than enforceable protections. As revealed in HelpAge India's study *"Ageing in India: Exploring Preparedness & Response to Care Challenges"*, only around **9% of seniors were aware of the Maintenance and Welfare of Parents and Senior Citizens Act (2007)** a vital legal entitlement for maintenance and care especially problematic for those above 80 years of age.

The digital divide further excludes many elders from accessing justice, care, or social participation. There's a noticeable absence of comparative research on how India's maintenance tribunals perform across states and how they compare to global elder justice practices.

TRACING THE ROOTS: HISTORICAL POSITION OF THE ELDERLY IN INDIAN SOCIETY

To deduce the ongoing legal difficulties, faced by older and abandoned parents in India, it's essential to look at their historical and socio-cultural positioning. Traditionally, Indian society emplaced immense value on its elderly population. The common family system, deeply enrooted in Hindu philosophy and other cultural norms, treated elders not just as dependents but as deified figures – custodians of family values, knowledge, and spiritual guidance.

[508] *"HelpAge India Report Reveals Majority of India's Elders Are Not Prepared for Their Later Years"* Deccan Express, June 18, 2024.

Ancient textbooks like the Manusmriti and the Mahabharata outlined the duties of children towards their growing parents, with generalities like pitru rin (debt to parents) emphasizing moral and social responsibility[509]. Caring for one's parents was considered a sacred duty (dharma), especially for sons, who were anticipated to give emotional and fiscal support.

During the colonial era, however, these traditional binding structures began to erode. British legal interventions codified diverse aspects of family law but majorly treated elder care as a private matter, governed by customs and different personal laws. This created a legal vacuum at that time which persisted for many years as formal legislation specifically addressing elderly welfare remained absent and the legislature did not focus on drafting one because of its other important priorities. The ignorance and the lackadaisical attitude affected a lot of elderly people who were in a genuine need of financial assistance and medical care.

Post-independence, the Indian Constitution recognized the need for public assistance for senior citizens. It discusses these arrangements in accordance with the mandated principles of state strategy. Article 21 states that the life and personal liberty of an individual are protected under the Indian Constitution. In order to promote public welfare, the state must take efforts to establish and stabilize a social-order that upholds – social-economic justice, as well as political equity. The State has a specific obligation to work towards reducing income disparities and eradicating inequalities in status, opportunities, and facilities. Article 41 urges the state to provide aid in cases of old age, while Article 47 places a duty on the state to improve nutrition and living standards. But these provisions relied heavily on legislative will for actual enforcement[510].

As India's traditional joint-family support networks have fragmented under the pressures of urbanisation and migration, legislative measures have attempted to fill the gap—though often falling short of grassroots realities. Early statutes such as the Pensions Act of 1871, along with the Employees' State Insurance Act (1948) and Payment of Gratuity Act (1972), recognized retirees' financial rights and workplace welfare; similarly, Section 20(3) of the Hindu Adoptions

[509] **Adikka**, "Manusmriti's Legacy: Charting the Course of Righteous Living in Hindu Tradition" *AdikkaChannels* (Adikka, 25 November 2023) https://adikkachannels.com/manusmritis-legacy-charting-the-course-of-righteous-living-in-hindu-tradition/.

[510] Priti Chaudhari and Sanskriti Mishra, "An Outline of Laws and Policies for Elderly Peoples in India" (2023) *ResearchGate* https://www.researchgate.net/publication/375422538_An_Outline_of_Laws_and_Policies_for_Elderly_peoples_in_India.

and Maintenance Act (1956) legally encoded the longstanding moral duty to care for infirm or elderly relatives if they lack independent means. Yet it was only with the Maintenance and Welfare of Parents and Senior Citizens Act, 2007 that India introduced a cohesive legal regime—empowering seniors through time-bound maintenance tribunals, enforceable support orders, and the ability to reverse coercive property transfers, while obliging states to establish old-age homes and medical facilities. In Pune, dozens of elderly individuals who transferred property in exchange for care found themselves evicted yet 20 tribunal appeals restored homes or ensured maintenance, signalling both the demand and the gaps in the system[511]. Courts have even ruled that seniors cannot be forced to live with abusive children to claim maintenance, and that adopted children carry the same obligations as biological ones affirming legal personhood and dignity for elders. But for many seniors—especially those unaware of their legal rights, these protections remain inaccessible, underscoring the urgent need for outreach, fully functional tribunals, and empathetic enforcement that bridges India's cultural reverence for elders with tangible legal safeguards.

JUDICIAL APPROACHES TO ELDERLY PROTECTION AND MAINTENANCE

The Indian judiciary has played an important role in interpreting and enforcing the Maintenance and Welfare of Parents and Senior Citizens Act, 2007, thereby defining the kind of legal protection provided to senior citizens. While the law prescribes methods for maintenance, eviction of non-supportive descendants, and preservation of righteousness, judicial deliverance spanning High Courts and the Supreme Court have both implemented and, at times, regulated these protections.

In the following case analyses, we examine landmark decisions that have substantially influenced the jurisprudence of elder rights in India, illustrating the judiciary's efforts to harmo*nize legislative intent, procedural equity, and the inviolable right to live with dignity.*

[511] Anurag Bende, "Pune seniors knock on collector's door after families abandon them" *The Times of India*, July 11, 2024.

1. ***Sunny Paul & Anr. v. State NCT of Delhi & Ors. (Delhi High Court – March 15, 2017), W.P. (C) 7145/2016, Order dated 15 March 2017***[512]

Facts - The appellant, Sunny Paul, along with his brother Victor Dass, contested an eviction order mandating them to vacate a property in Delhi. The eviction was sought by their parents under the Act of 2007 following allegations of severe physical assault, harassment, and mental trauma. The parents, both suffering from serious health issues, argued that their children had taken control of the premises by force and created a hostile living environment. The Tribunal ordered the eviction and assigned police assistance to enforce the order.

Issues – Does the MWPSC Act, 2007 permit eviction of abusive adult children, or is the remedy limited to monetary maintenance? Can the Maintenance Tribunal issue eviction orders and involve police, even if the occupants don't hold a proprietary title in the premises?

Judgment & Reasoning – The Delhi High Court upheld the Tribunal's eviction order, emphasizing the Act's overarching aim of ensuring elderly dignity, personal liberty, and safe living conditions. The court held that "property" as defined in Section 2(f) is broad and includes tenancies or licenses. Thus, abusive behaviour and forced occupation, even absent formal ownership, legitimized eviction. The Court also affirmed the Tribunal's authority to coordinate with police for effective enforcement.

Impact on Legal Interpretation – This landmark judgment expanded the MWPSC Act's judicial interpretation, confirming:

- Eviction authority: Tribunals can evict abusive grown children, irrespective of property title.
- Broad meaning of "property": Includes any form of occupation or license under Section 2(f).
- Enforcement mechanisms: Affirmed judicial empowerment to include police support where necessary.

[512] Sunny Paul & Anr. v. State NCT of Delhi & Ors., W.P. (C) 7145/2016, decided on Mar. 15, 2017 (Del. HC).

2. ***Urmila Dixit v. Sunil Sharan Dixit (Supreme Court, 2 Jan 2025; 2025 SCC Online SC2)***[513]

   Facts - A mother gifted her home to her son under a deed and promissory note promising lifelong support; clause-trigger entitlement to revoke. Upon neglect, she sought to annul the gift under Section 23.

   Issue – Can a Maintenance Tribunal cancel a gift deed lacking explicit terms for care?

   Judgment & Reasoning – The SC Quashed the gift deed, embracing a purposive and liberal interpretation of Section 23 consistent with the Act's welfare purpose. It recognized Tribunal authority to enforce eviction as part of protective measures.

   Impact – Set a national precedent empowering Tribunals to annul transfers tied to caregiving obligations and strengthened legal recourse against elder neglect.

3. ***Ravi Shankar v. State of Bihar (Patna HC, Div. Bench, 3 Jan 2024)***[514]

   Facts - Senior citizens sought eviction of their son from a guesthouse owned by them, alleging denial of maintenance and forced occupation.

   Issue - Whether eviction under Section 23 can proceed without a maintenance claim and beyond property transfer contexts, and who may issue eviction orders.

   Judgment & Reasoning – The Bench clarified that eviction is only permissible as a consequence of property transfers that violate Section 23. It affirmed Tribunal jurisdiction not executive authorities like DMs to enforce such orders under Section 23.

   Impact – Provided key guidance limiting eviction powers to Tribunal proceedings under Section 23, reinforcing separation of powers and rule of law in senior citizen protections.

4. ***Chandiram Anandram Hemnani & Anr. v. Senior Citizens Appellate Tribunal & Ors., Writ Petition 7794 of 2020 Bombay High Court (Nagpur Bench) – Senior Citizens Cannot Be Forced to Cohabit with Abusive Children***[515]

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[513] Urmila Dixit v. Sunil Sharan Dixit, 2025 SCC OnLine SC 2.

[514] Ravi Shankar v. State of Bihar, LPA No. 907 of 2023 in CWJC No. 7851 of 2022, Patna HC, decided on Jan. 3, 2024.

[515] Chandiram Anandram Hemnani & Anr. v. Senior Citizens Appellate Tribunal & Ors., Writ Petition 7794 of 2020, Aurangabad Bench, Bombay High Court.

Facts - A 77-year-old adoptive mother, Kesarabai, was abandoned by her adoptive son, Vijay Ugale, and lived separately. The SDM and Collector ordered ₹10,000 monthly towards her maintenance. Ugale petitioned, arguing that he and his mother never lived together and that she had her own income.

Issues - Is cohabitation a mandatory requirement for claiming maintenance under the MWPSC Act? Does an adopted child bear the same duties as a biological one?

Judgment & Reasoning - Justice R.M. Joshi held that forcing a senior to live with abusive children is repugnant to the Act. He affirmed maintenance claims without requiring cohabitation and affirmed that adopted children carry equal obligations.

Impact - This ruling strengthened elder autonomy and communal living cannot be imposed and legally recognized that adoption creates equivalent maintenance duties. It expanded Section 4's remedial interpretation, reinforcing the emotional dignity of seniors.

5. ***Senior Citizen Welfare Organization & Anr. v. State of Uttarakhand & Anr. Writ Petition (PIL) No. 52 of 2013 – Uttarakhand High Court (Decided: 12 June 2018)***[516]

Facts – An NGO filed a PIL alleging the State's failure to implement key provisions of the Maintenance and Welfare of Parents and Senior Citizens Act, 2007, including the absence of old-age homes in every district (as mandated under Section 19) and lack of accessible medical facilities for the elderly.

Issues - Whether the State had complied with Section 19 regarding establishment and management of old-age homes? Whether emergency medical care and transport for senior citizens were adequately provided?

Judgment – The Uttarakhand High Court held the State accountable for violating statutory and constitutional obligations. It directed: Establishment of old-age homes in every district within 6 months, Formulation of a proper management scheme and provision of free emergency medical care and ambulance services. The Court emphasized the elderly's constitutional right to live with dignity and stated that senior care is a state duty.

[516] Senior Citizen Welfare Organization & Anr. v. State of Uttarakhand & Anr., Writ Petition (PIL) No. 52 of 2013, Uttarakhand High Court.

Impact –This case reinforced that the MWPSC Act creates enforceable obligations for the State. It widened the scope of senior citizen rights beyond monetary maintenance, affirming the judiciary's proactive stance in securing dignified living for the elderly.

6. ***Simrat Randhawa v. State of Punjab & Others, CWP No. 4744 of 2018***[517]

Facts – The petitioner challenged the illegal eviction of her elderly mother from her property and sought protection under the Maintenance and Welfare of Parents and Senior Citizens Act, 2007.

Issue – Whether the State had failed in its obligation to protect the life and property of a senior citizen under the 2007 Act.

Judgment – The High Court directed the State to ensure enforcement of the Act in letter and spirit, including safeguarding property rights and personal liberty of senior citizens.

Significance – The case reinforced the State's duty to proactively secure elderly citizens' rights and property.

7. ***G.S. Manju v. K.N. Gopi, 2019 SCC Online Ker 5363 (Kerala High Court)***[518]

Facts – The petitioner, a senior citizen, had gifted a property to her son but later faced ill-treatment and neglect. She sought to revoke the gift deed under Section 23 of the Maintenance and Welfare of Parents and Senior Citizens Act, 2007.

Issue – Whether a gift deed executed by a senior citizen can be revoked due to failure by the recipient to provide basic amenities and physical care.

Judgment – The Kerala High Court upheld the revocation, holding that the son's neglect violated the conditions implied under the Act.

Significance – This case reaffirmed the enforceability of Section 23, recognizing the right of senior citizens to reclaim property when gift conditions are breached.

[517] Simrat Randhawa v. State of Punjab & Ors., CWP No. 4744 of 2018 (Punjab & Haryana High Court).
[518] G.S. Manju v. K.N. Gopi, 2019 SCC OnLine Ker 5363 (Kerala High Court).

8. ***Onkar Nath Gaur & Anr. v. District Magistrate 2025: AHC-LKO:31522-FB***[519]

Facts – A reference questioned whether Tribunals, Appellate Tribunals, or District Magistrates could issue eviction orders under the MWPSC Act, 2007.

Judgment – The Allahabad High Court (Lucknow Bench) ruled that neither Tribunals nor DMs have explicit eviction powers except when seniors transfer property under gift deeds with unfulfilled care obligations.

Impact –Clarified jurisdictional limits and standardized the law across North India, restricting eviction authority and emphasizing legal process for conditional property transfers.

CRITICAL PERSPECTIVE

Despite its promise, the Maintenance and Welfare of Parents and Senior Citizens Act, 2007 often feels hollow in practice. Across states, Tribunals remain under – resourced, often staffed by untrained officials, while many victims are unaware of their rights or too afraid to seek relief. Even though the law allows tribunals to mandate maintenance, order eviction of abusive children, or reverse care-linked property transfers, implementation is inconsistent and enforcement often stalls without follow-up mechanisms or accountability.

The Act's reliance on family-based caregiving fails to reflect India's evolving social landscape; its narrow framing renders women, LGBTQ+ seniors, and those without immediate kin largely invisible. Property transfers given in exchange for expected care rarely include enforceable clauses, and many elders end up displaced without recourse.

The HHRC recently intervened in the case of an elderly couple subjected to psychological coercion and forced property transfer despite filing eviction and maintenance petitions in January 2025, the seniors received no relief until ordered protected under Article 21 by the Commission, which directed local police to act and expedite tribunal proceedings[520]. Such interventions highlight the reactive not proactive nature of current mechanisms. Caps on maintenance (₹10,000/month), ambiguous definitions of "children," limited inclusion of caregivers, and no

[519] Onkar Nath Gaur & Anr. v. District Magistrate/President Appellate Tribunal, Lucknow & Ors., 2025 AHC-LKO 31522 (Allahabad High Court, Lucknow Bench).

[520] **Abhimanyu Hazarika**, "'Alarming, tragic situation': Haryana human rights panel flags trauma faced by neglected elderly couple" *The Indian Express* (Chandigarh, June 1, 2025).

obligation on states to ensure old-age homes remain serious limitations. Awareness remains remarkably low; only about 12% of elders know of its existence even in literate regions like Kerala where awareness still hovers at 30%.

COMPARATIVE ANALYSIS

The aging population worldwide has led to a fundamental evolution from goodwill to structured systems of compassion which strive to honour elders with dignity, autonomy, and proactive care. The intersection between caregiving and public policy exemplified by Japan's Long-Term Care Insurance (LTCI) initiated in 2000[521]. It reframed caregiving from a moral obligation to a social insurance contract. Everyone over 40 pays premiums, and eligible seniors (65, or earlier if disabled) are entitled to tailored care. Empirical studies confirm LTCI enhances emotional and financial well-being for families, and sustains older adults in familiar communities, preserving autonomy instead of uprooting lives.

The UK Care Act 2014 further remakes elder protection into a statutory duty: local authorities are legally obliged to promote the elderly's well-being, performing eligibility assessments[522], advocacy, and multi-agency safeguarding coordination. Community initiatives in Canada, such as Quebec's RECAA (Respecting Elders: Communities Against Abuse), are walking the human-centred path: multilingual forum theatre performances, personal outreach, and cultural sensitivity, to allow elders to break silence around abuse, speak, and reclaim agency. Rather than calling police first, RECAA listens first, restoring dignity before enforcement. On the other hand, India's Maintenance and Welfare of Parents and Senior Citizens Act, 2007, while revolutionary, remains stuck in bureaucracy, and aspiration rather than placed care as a lived experience. India can genuinely reimagine elder justice by rethinking how its blueprints the world such as by creating independent grievance redressal bodies, establishing standards-based needs-based care,

[521] **Naoki Ikegami**, "The Future of Japan's Long-Term Care Insurance Program" **VoxEU, CEPR**, June 29, 2023.
[522] **Social Care Institute for Excellence**, "The Care Act 2014: Promoting Wellbeing, Preventing Needs, Safeguarding Adults" *SCIE*, accessed in July 2025. https://www.scie.org.uk/assessment-and-eligibility/key-duties/

requiring local obligations to prevent elder neglect, and centering policy in global norms, as is envisioned in the proposed UN Convention on the Rights of Older Persons[523].

India, despite having the Maintenance and Welfare of Parents and Senior Citizens Act of 2007, lacks cohesive enforcement and coordination among states. By learning from these global models, India can improve its framework through the establishment of independent grievance redressal, the standardization of elder care protocols, and the ratification of instruments such as the proposed UN Convention on the Rights of Older Persons, thus aligning national protections with changing international standards.

CONCLUSION

In a country where elders were once the custodians of wisdom and care, the growing indifference to their struggles is both tragic and telling. While legal frameworks like the MWPSC Act exist, true justice lies in their effective implementation, societal compassion, and unwavering institutional support. Ageing should not translate to abandonment. It must be met with dignity, empathy, and empowerment. India must rise to protect its elderly not just through laws, but through collective moral will. Only then will justice be truly delivered, not just promised.

[523] **AGE Platform Europe**, "UN Convention: Historic Milestone for the Rights of Older Persons" *Age Platform Europe*, May 2024. https://www.age-platform.eu/un-convention-historic-milestone-for-the-rights-of-older-persons/

INDEX