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Vikram Nath, J. in
Harshit Harish Jain v. State of Maharashtra,
(2025) 3 SCC 365, para 20

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HARMONIZING TRADE, ENVIRONMENTAL GOALS, AND CARBON TAXATION: A PERSPECTIVE ON THE EU'S CBAM POLICY

- Dr. Ankit Awasthi* & Ms. Sriradha Rai Choudhuri**

Abstract

The EU-CBAM Policy adopted on 17 May 2023 entered its transitional phase from 1st October 2023, with importing countries having to report compliance with such policy by 31st January 2024. The coming of this policy has changed the global landscape for environmental, social, and economic concerns. The use of carbon tax barriers in this policy with the goal of reducing the carbon intensiveness in the EU domestic markets has led to a global social and economic disadvantage in terms of international trade participation for the developing and least developed countries. Tackling upcoming environmental issues through taxation strategies will help the EU but will create an imbalance for other developing nations that make up a large percentage of the world economies. The Indian perspective on this policy is of significance, as India is considered a representative of all the developing and least developed countries throughout the globe. If the policy has a negative impact on India, the same will be reflected in other countries. India, being a fast-growing economy but currently at its developing stage, could suffer a lot from the introduction of EU-CBAM in its full swing. With most of India's export sectors, primarily those with the EU being carbon-intensive and no fixed carbon reduction strategy in place, sudden compliance with such a policy can create a huge backlash on the Indian trading economy. Moreover, the indirect blockade created for India from participating in trade relations with the EU, keeping in mind the practical economic profits, further promotes a global social disruption for the Indian market and its international relations. Although talks regarding such sudden and heavy carbon taxation is on the way between India and EU, it remains to be seen in the month of February during the 13th Ministerial Conference as to how trading relations between the two nations are reconciled and whether India would have to suffer a compromise.

This paper seeks to analyze the environmental, economic, and social outcomes that the EU-

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CBAM Policy will usher in with its carbon tax barriers in relation to international trading relations between the EU government and the governments of developing and least developed nations, with a special focus on India. This would, in turn, help to understand how governance strategies in relation to carbon reduction policies and global trading strategies can be applied as a reconciliation measure between India and the EU, thereby balancing out the environmental goal of the EU-CBAM Policy with that of economic and social development of the developing and LDC nations in the global world.

Keywords: Environment, SDGs, Carbon Tax, CBAM and International Trade.

INTRODUCTION

The EU-CBAM Policy, which is a Carbon Border Adjustment Mechanism Policy by the EU, is a recent breakthrough policy introduced in May 2023 in the field of environment-related international trade measures. This policy is one of a kind if one looks at the positive environmental outcomes it wants to achieve in the future once the policy gets actively implemented in 2026. However, this policy has also come as a shock for many developing nations, including India, acting as a protectionist trade barrier for them.

This policy would see a debate this year at the 13th Ministerial Conference from 26th to 29th February 2024 in Abu Dhabi, with India already pulling out all its guns to tackle the EU-CBAM Policy.

CARBON MARKETS AND CARBON TRADING TO REDUCE GLOBAL ENVIRONMENTAL EMISSIONS

Just like in a market, one buys and sells products, in carbon markets, the products are in the form of “carbon credits”. Carbon Trading involves the sale and purchase of such carbon credits at a global level. Let’s suppose we have a country A and a country B. Country A has very high carbon emissions, whereas Country B has low emissions. Certain levels of emissions would be allowed to balance development activities. However, when the emissions go beyond the permissible limit, Country A would have to balance it out by purchasing carbon credits from Country B. It is a type of monetary compensation paid by Country A to the global community and a monetary incentive received by Country B from the global community. In this way, although individually, Country A and Country B will give out the same level of emissions, a balance is maintained for the global environment.

Such carbon markets can be both compliance-based and voluntary in nature. In compliance with the carbon market type, carbon markets have to be compulsorily created as per regional, national or international requirements.¹

1. The working of the EU ETS Mechanism (Emissions Trading System)

Even before the EU-CBAM Policy came into being, the EU already had the EU ETS Mechanism in place. *The EU ETS Mechanism is a compliance carbon market.* In the ETS

¹ *What are carbon markets and why are they important?*, UNDP (May 18, 2022), <https://climatepromise.undp.org/news-and-stories/what-are-carbon-markets-and-why-are-they-important>.

trading market, there are certain carbon allowances that work, such as carbon credits. Where any industry functioning in the EU exceeds its permissible limits, it is required to buy such carbon allowances to balance those carbon emissions. This is based on strict carbon pricing rules; that is, every carbon unit is priced at a “carbon price based on these rules”. The carbon price can vary depending on the cost that the EU has to bear to reduce carbon emissions. It is a mechanism of sustainable development- allowing a balance between development and the environment by allowing industries to work by emitting a certain permissible level of CO₂.²

2. If the ETS system is already in place, why was there a need to bring CBAM Policy- the problem of Allowance Banking under ETS

The pertinent question is whether ETS works efficiently as a compliance carbon market regulating carbon emissions; what more is to be done by the recent EU-CBAM Policy? The answer to this question lies in the drawbacks of the ETS System.

The ETS system can manage “carbon leakage”, that is, bypassing the payment of carbon prices through import mechanisms (*as would be discussed under EU-CBAM Policy*), but fails to create a global incentive or an incentive on the part of such emitting industries to emit less in the future. This is because the ETS System also provides certain ‘free allowances’ to certain competitive industries that are earning huge profits in the EU, thereby allowing them to develop further. These free allowances or even other purchased carbon allowances from the EU Trading Market encourage a system of “Allowance Banking”.³

In “Allowance Banking”, the industries tend to easily purchase several carbon units in the form of carbon certificates, even if they are not emitting that much. This is easy for them as they are already earning huge profits, and trading off emission requirements for their profits is always the better option for them. These carbon certificates are then banked with them for future purposes, such that now they can emit as much as they wish without the fear of paying

² EU ETS – Emissions Trading System, DNV (Oct. 2, 2023, 5:57 PM), [https://www.dnv.com/maritime/insights/topics/eu-emissions-trading-system/eu-allowances.html#:~:text=EU%20Allowances%20\(EUAs\)%20are%20a,the%20cost%20of%20reducing%20emissions.](https://www.dnv.com/maritime/insights/topics/eu-emissions-trading-system/eu-allowances.html#:~:text=EU%20Allowances%20(EUAs)%20are%20a,the%20cost%20of%20reducing%20emissions.)

³ Emily Benson et al., *Analyzing the European Union’s Carbon Border Adjustment Mechanism*, CENTER FOR STRATEGIC AND INTERNATIONAL STUDIES (Feb. 17, 2023), <https://www.csis.org/analysis/analyzing-european-unions-carbon-border-adjustment-mechanism>.

again from their pocket.⁴ This, in effect, totally destroys their incentive to reduce emissions, thus failing in the primary goal of ‘sustainable development’ as the future incentive gets lost.

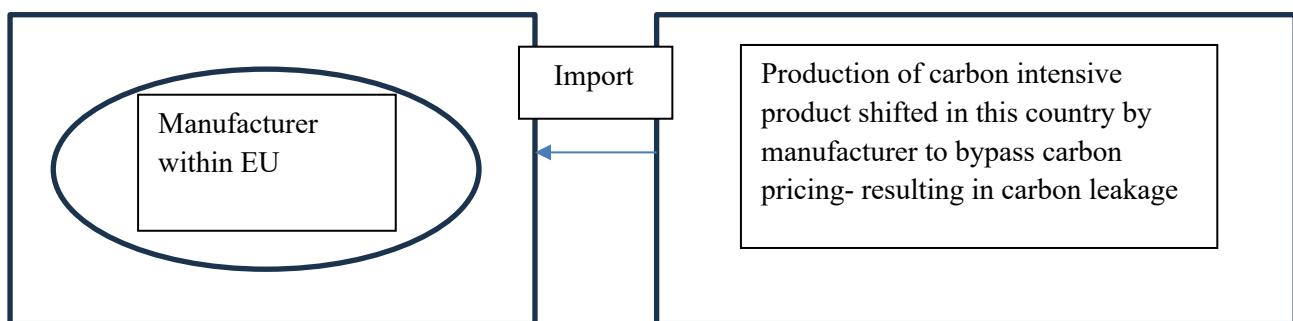
3. The coming of the EU CBAM Policy: Its Objectives and Working

To tackle this problem of ‘zero incentive of reduction of emissions’, the EU CBAM Policy came into being. Its *primary objective is 2-fold environmental*, that is-

1. To avoid carbon leakage and thereby protect its domestic market from carbon-intensive products- bringing in a ‘protectionist’ agenda, which is, therefore, also resulting in trade barriers.
2. To encourage non-EU countries to focus more on ‘greener technology’ to reduce its carbon intensiveness.

Let us understand the workings of this policy through a diagrammatic explanation-

EU- having strict carbon pricing rules ***Non-EU country- less stringent carbon policy***



When the above happens, carbon leakage is caused for the EU as the manufacturer does not need to pay the carbon tax any more through its bypassing strategies of producing the carbon-intensive product in a non-EU country with less stringent climate policies and, thereafter, importing that carbon-intensive product into the EU. So, the EU loses out on restricting carbon intensiveness in its market, and the same is not balanced out with the carbon tax.

With the coming of the EU-CBAM Policy, now even the importers have to buy a carbon certificate on import of any carbon-intensive product from outside, the price of which would be equivalent to the carbon price under the EU-Carbon Pricing Rules. This could also be

⁴ Sotirios Dimos et al., *On the impacts of allowance banking and the financial sector on the EU Emissions Trading System*, SPRINGER (July 2, 2020), <https://link.springer.com/article/10.1007/s41207-020-00167-x>.

looked into from another side, that is, from the exporting country's side. The exporting country will have to pay a carbon tax if it wants to cross the EU border for all its carbon-intensive products. This tax paid by the exporting country would be deducted from the price that the importers had to pay. Hence, this policy is based on an import-based tariff.⁵

It is this import-based tariff that not only acts as an environmental protection measure but also leads to the formation of certain trade barriers, leading to protectionism for the EU domestic markets. Moreover, once the exporting countries have to pay such high tariffs based on the carbon intensiveness of their products, it will force them to adopt greener technology to get rid of such tariffs, which will now act as a sanction upon them.

4. Protectionism and How Does EU-CBAM Policy Fit into it

Protectionism is a policy adopted by the national governments to protect and promote only their own domestic markets by restricting imported products and their competitiveness in the domestic market by application of various trade barriers such as tariffs, import quotas, voluntary export restraints, local content requirements, subsidies, and other administrative measures.

Environmental measures can sometimes take the form of disguised trade limitations that can further degrade trade facilitation. The United Nations in its Press Release⁶ has stated that “Trade protectionism disguised as environmental and labour laws should be eliminated by industrialised countries”. According to the United Nations, such environment-based trade policies affect the products of LDC countries by restricting access to such large industrialised markets.

The EU has time and again brought in environmental policies that seem to encourage its own protectionist agendas, thereby affecting developing countries, especially the least developed countries. One good example of this would be the REACH Regulation for the management of

⁵ Saptaporno Ghosh, *Explained | What is the EU's carbon border adjustment mechanism?*, THE HINDU (May 24, 2023, 8:30 AM), <https://www.thehindu.com/news/international/explained-what-is-the-eus-carbon-border-adjustment-mechanism/article66886488.ece#:~:text=CBAM's%20primary%20objective%20is%20to,with%20more%20carbon%2Dintensive%20imports>.

⁶ *Trade Protectionism Disguised as Environmental and Labour Law Should Be Eliminated, Second Committee Told*, UNITED NATIONS Press Release GA/EF/2841 (Oct. 30, 1998), <https://press.un.org/en/1998/19981030.gaef2841.html>.

global chemicals that had the ability to substantially restrict the trade and economic stability of such countries. In fact, in the Doha Declaration itself, it was clearly stated,

*“The majority of WTO Members are developing countries. We seek to place their needs and interests at the heart of the Work Programme adopted in this Declaration...[W]e shall continue to make positive efforts designed to ensure that developing countries, and especially the least developed among them, secure a share in the growth of world trade commensurate with the needs of their economic development”*⁷

But if developed countries like the EU focus only on their ability to reach a zero-carbon level within the shortest possible period and do not consider the trade barriers created for the other WTO members, the entire global trade can be at risk of “environmentalism as a disguised protectionism”.

HOW WILL THE DEVELOPING COUNTRIES SUFFER FROM THE IMPLEMENTATION OF SUCH POLICY?

Carbon-intensive industries are a major factor that contributes to the development. Unlike developed economies, it is a great burden for developing and least developed countries to cut down their emissions totally without considering their need for development at par with the ever-demanding global economy.

A developing country, Kenya, has pointed out quite sadly in a statement, “*Why do developed countries impose their environmental ethics on poor countries that are simply trying to pass through a stage they themselves went through? After taking numerous risks to reach their current economic and technological status, why do they tell poor countries to use no energy, agricultural or pest control technologies that might pose some conceivable risk of environmental harm? Why do they tell poor countries to follow sustainable development doctrines that really mean little or no energy or economic development?*

⁸

⁷ ‘Enlightened’ Environmentalism or Disguised Protectionism?- Assessing the Impact of EU Precaution-Based Standards on Developing Countries, NATIONAL FOREIGN TRADE COUNCIL (April 2004), https://www.wto.org/english/forums_e/ngo_e/posp47_nftc_enlightened_exsum_e.pdf.

⁸ ibid.

What is more concerning is the expansive scope that EU-CBAM Policy can take in the future with covering more and more emission-based sectors- all of those that are currently now included in its ETS Trading System.⁹

1. Carbon Tax barrier of EU CBAM Policy- creating a global economic and social restriction

Carbon taxes are a way to “internalise the environmental costs”, thereby helping to balance out the environmental issues with that of social and economic incentives. However, the picture of the industrialised countries does not fit well with that of the developing countries. This is because most developing countries have energy-intensive sectors producing large emissions that are highly exposed to international trade, to which a sudden alternative is hard to develop. Due to this, carbon taxes can act as economic and social restrictions rather than promoters. One might say that carbon taxes can help foster the revenue base as well as help developing countries transform their informal sector into a formal one, as many small firms would realise that they need to pay the same tax if they remain in either.¹⁰ This although, cannot be compared to a case where the tax is not limited by domestic barriers and where such tax majorly targets carbon intensive sectors.

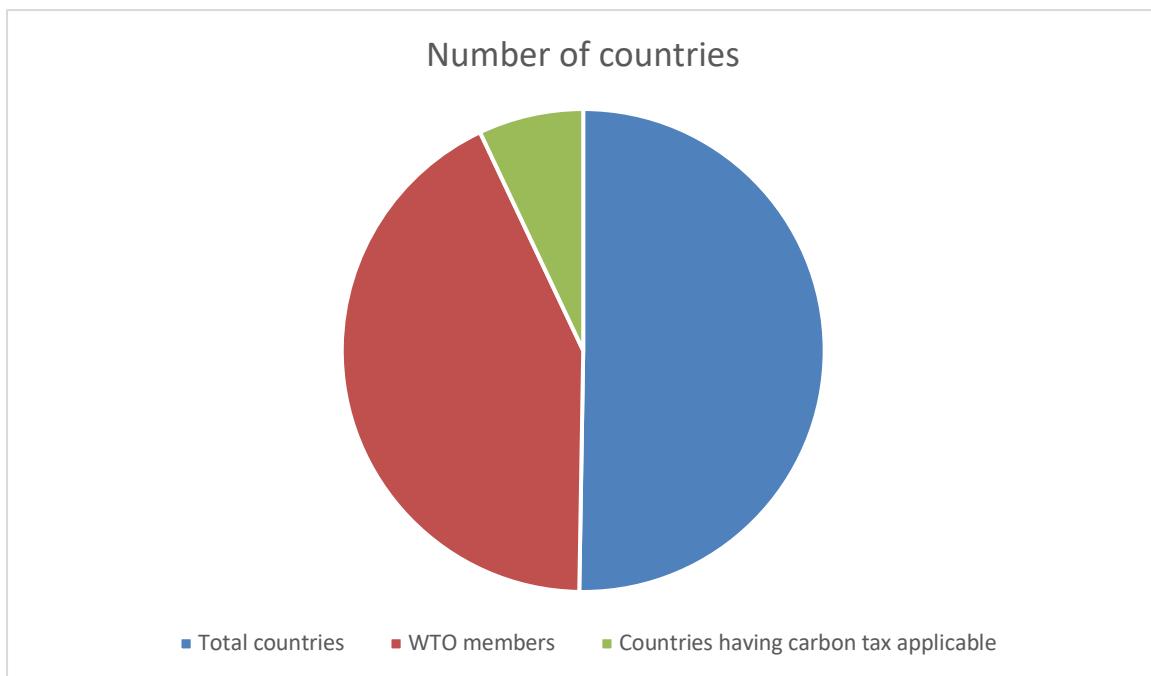
A proper carbon tax barrier by the EU should not try to fit in its structure with all the “developing countries” in the realm of global trade. Such carbon tax should take into account social and economic structure and circumstances prevailing in the domestic environment of such developing countries. The reality is quite visible when facts and figures clearly show how the exports of such carbon-intensive products could affect a large percentage of the economic costs of such countries, with India setting an example of a 20-35% rise in export economic cost.¹¹ The problem that is not being realised is that developing countries do not have a well-formed carbon policy setup from which evidence can be taken and compared to create a better carbon taxation system. Without comparative evidence, a structure that runs counter to the existing social and economic framework of the developing countries is gradually proliferating. Massive international coordination and an available setup of domestic

⁹ ibid, Footnote 5.

¹⁰ Anna Pegels, *Taxing Carbon in Developing Countries*, DIE (Jan 25, 2024, 6:56 PM), <https://dnb.info/1259851591/34>.

¹¹ Editorial: India must strategise against EU carbon tax, THE HINDU BUSINESS LINE (Oct. 22, 2023, 8:44 PM), <https://www.thehindubusinessline.com/opinion/editorial/india-must-strategise-against-eu-carbon-tax/article67449523.ece>.

policies already implementing carbon taxation strategies in developing countries are prerequisites to any global carbon tax barrier that the EU is currently trying to impose. UNCTAD has clearly identified that, as of now, such a structure is prominently missing, which makes a theoretically helpful carbon tax a potential risk aggregator for the global social and economic scenario.¹² To look at a proper figure-based structure, if we have a total of 193 countries in the world, then 164 countries are members of WTO, which shows the massive involvement of both “developed and developing countries” in international trade that impacts both the domestic and global economy. However, when this is compared to the number of countries having a carbon tax policy already applicable, the number is just a meagre 27, which includes the EU and excludes India.¹³



A simple analysis of the above pie chart shows the requirement of first increasing the grey area. This sudden EU carbon tax, with most countries having a lack of even a domestic carbon taxation structure, can really destabilise the ongoing development areas in these countries. Developed countries may also not have a carbon taxation structure in place. However, they have certain advantages over and above the developing countries that can be categorised into three-fold-

¹² *Carbon Pricing: A Development and Trade Reality Check*, UNCTAD (Jan. 25, 2024, 7:08 PM), https://unctad.org/system/files/official-document/ditctab2022d6_en.pdf.

¹³ Olivia Lai, *What Countries Have A Carbon Tax?*, EARTH.ORG (Sep. 10, 2021), <https://earth.org/what-countries-have-a-carbon-tax/>.

1. They can swiftly implement carbon tax infrastructure in their setup if they want, thereby easily adjusting to the EU CBAM structure.
2. They do not need to focus on carbon-intensive sectors as of now and, hence, would not have to bear the brunt of the economic and social impact that the EU CBAM Policy will bring along with it.
3. In the case of many developed countries, if not all, the EU does not have a higher stand, which is the case with many developing countries. India is the forerunner of developing countries and hence also has the capacity to conduct talks with the EU that most developing and least developed countries cannot. Developed countries, on the other hand, may just reduce their exports to the EU if they also start facing negative consequences that will harm the EU more than such developed countries.

Carbon tax barriers have also involved discussions on a global carbon taxation structure with global carbon pricing fixed by regulators throughout the globe. This can actually be environmentally more beneficial as a more coordinated approach can help reduce carbon emissions globally. Presently, the EU CBAM Policy directly focuses on the reduction of carbon emissions for its own domestic markets, which indirectly or coincidentally also impacts global carbon emissions. The *World Trade Report of 2022 on “Climate Change and International Trade”* has pointed out how a global carbon pricing strategy would first require inter-coordination. With countries independently imposing carbon pricing norms like the EU, free rider problems may arise where the countries may not be inclined to implement such policies and wait and watch other countries take action only to take benefit out of it. Moreover, without a coordinated global approach, the ratio of burden sharing among the developing countries may be highly disproportionate and, hence, irrational in theory as well as practice. Moreover, a highly effective global pricing scheme would require major updated details of carbon-intensive products, market prices, etc., which demands credible and functioning domestic institutions and regulators in all such countries, which is far from the reality at present. Trying to implement global carbon taxation regimes or independent taxation structures like the EU without this well-formed base can even result in a negative impact on the environment with countries (mostly the “developing and least developed

countries") trying to look at carbon tax evading techniques that may result in high carbon leakages, thereby frustrating the very foundation of such systems.¹⁴

2. Specific problems to be faced by India- Why India wants to challenge CBAM at the 13th Ministerial Conference

Being not only a developing economy but also a fast-growing one, India specifically has several issues if the EU CBAM Policy comes into effect. Some of them are-

1. EU is the third largest trading partner in India, which makes the policy a huge cause of concern as its major trade exports will be affected.
2. India, being a fast-growing and developing economy at the same time, will only grow its exports in the future rather than curtail them. The Policy seeks to achieve a totally opposite and counter-productive goal for India's development.
3. The scope of CBAM is also expansive, in the sense that it would also cover other sectors in the emissions market gradually, which would cover more than 50% of India's global exports to the EU.¹⁵
4. India has a large number of carbon intensive sectors, most of whose products are meant for export purposes.
5. India at the moment does not have a "carbon pricing scheme" in place, which affects India's export competitiveness over other countries as India may have to pay more carbon tax under this policy due to this, which other countries having schemes may reduce or avoid.¹⁶
6. Significant harm would be caused to the Balance of Payments for India- as India would not receive any greater value on imports, but excessive value drain would occur in the export sector due to this policy.

3. Future conflicts with WTO Principles that may arise for the EU-CBAM Policy-

1. The *Most Favoured Nation rule (GATT Article I)*, which is a bedrock of the Principle of Non-Discrimination, could be affected in case the EU, under this Policy, starts to discriminate against the exporting countries based on "their carbon content", which could most likely be the case. Many developing nations, including India, may not

¹⁴ *World Trade Report: Climate Change and International Trade*, WTO (Jan 31, 2024, 9:07 PM), https://www.wto.org/english/res_e/booksp_e/wtr22_e/wtr22_e.pdf.

¹⁵ ibid, Footnote 5.

¹⁶ *Carbon Border Adjustment Mechanism*, DRISHTI IAS (May 11, 2023), <https://www.drishtiias.com/daily-updates/daily-news-analysis/carbon-border-adjustment-mechanism>.

have sufficient resources or tools available to reduce carbon emissions immediately and such discriminatory practices may act as trade barriers in violation of WTO norms.¹⁷ At the same time, however, the ‘likeness of the products’ must also be seen in the application of the principle.

2. In case the carbon adjustment policy is not only limited to import-based tariffs as a border measure but also applies certain internal taxes and regulations on such carbon-intensive imported products over and above its domestic products, there may be a chance of violation of the ***National Treatment Principle under GATT Article III***, also under “Principle of Non-Discrimination”. Hence, if the EU is to bring about this policy also in the ambit of ‘internal measures’, parity must be maintained.
3. This could also pose an attack on the ***Special and Differential Treatment principle (GATT Article 36 Para 8)*** by not allowing trade liberalisation of the developing and least developed economies.
4. The import tariffs could act against the ‘bound duties’ undertaken by the EU under the ***Schedule of Concessions (GATT Article II)*** if such import-based tariffs exceed the EU’s tariff bindings.
5. Quantitative import prohibitions like the one ushered in by this policy could be considered as a ***protectionist measure in violation of Article XI of GATT***.¹⁸

At the same time, however, the EU can counter all the above Multilateral Trading System principles by invoking “*Article XX of GATT (General Exceptions)- health and environment exception under XX(b)*”- but the same must be commensurate with the Chapeau of Article XX, that is the exception must not act as a disguised restriction and should not be arbitrary and unreasonable.

CAN INDIA COME UP WITH CERTAIN RETALIATORY TACTICS, OR WILL THIS FOSTER GREATER TRADE BARRIERS?

First of all, India challenged the policy at the “13th WTO Ministerial Conference” held in February 2024 on the grounds of the negative impact it will create on developing and least-

¹⁷ Bart Le Blanc, *Potential conflicts between the European CBAM and the WTO rules*, NORTON ROSE FULBRIGHT (Feb. 2023), <https://www.nortonrosefulbright.com/en/knowledge/publications/9c5d9ec6/potential-conflicts-between-the-european-cbam-and-the-wto-rules>.

¹⁸ *Trade Related Aspects of a Carbon Border Adjustment Mechanism: A Legal Assessment*, EUROPEAN PARLIAMENT (DIRECTORATE-GENERAL FOR EXTERNAL POLICIES) (Oct. 3, 2023, 6:26 PM), [https://www.europarl.europa.eu/cmsdata/210514/EXPO_BRI\(2020\)603502_EN.pdf](https://www.europarl.europa.eu/cmsdata/210514/EXPO_BRI(2020)603502_EN.pdf).

developed economies in global trade. Hence, using the Multilateral Trading System under WTO and a consensus-driven approach to prevent the policy from coming into effect would be the primary retaliatory technique.¹⁹

Secondly, India could also seek certain waivers (Article IX:3 of Marrakesh Agreement) if, in any case, the policy comes into force looking at environmental concerns so that by that time, India could also create a carbon pricing scheme in place to reduce the carbon tax burden on it to a certain extent.

Thirdly, India could take certain Safeguard Measures under the WTO Agreement on Safeguards- as temporary import restrictions on carbon-intensive products produced by India so that India may at least be able to increase demand for such products within its domestic markets while its export competitiveness is down. Moreover, India can also enter into an agreement with the EU by showcasing to the EU that rather than enforcing such a blanket measure at the initial level, it can first trigger its safeguard measures temporarily on specific imports that affect its environment and carbon leakage.²⁰

Fourthly, although this should be a last resort and also not unilateral through the approved system, *India could apply a “Calibrated Retaliation Mechanism”* wherein it imposes in a phased manner certain customs duties on EU products “mirroring the effect EU is causing through its policy”.²¹

On the positive side of enforcing this policy in a better way, India and the EU have started talks with respect to the EU CBAM Policy and have agreed to “*a constant engagement to achieve the right solutions*”.²² Moreover, the Indian government is also looking forward to *entering into clean technology partnerships with the EU* so that they can upgrade their

¹⁹ Manoj Kumar & Neha Arora, *India plans to challenge EU carbon tax at WTO*, REUTERS (May 17, 2023, 2:57 AM), <https://www.reuters.com/world/india/india-plans-challenge-eu-carbon-tax-wto-sources-2023-05-16/>.

²⁰ POLICY BRIEF | *The EU’s Carbon Border Adjustment Mechanism: how to make it work for developing countries*, GSP HUB (Oct. 6, 2023, 7:03 PM), <https://gsphub.eu/news/brief-cbam#:~:text=Safeguards,CBAM%20levy%20to%20specific%20imports>.

²¹ *India should use calibrated retaliation mechanism to deal with EU’s carbon tax: GTRI*, THE TIMES OF INDIA (Sep. 20, 2023, 10:50 AM), <https://timesofindia.indiatimes.com/business/india-business/india-should-use-calibrated-retaliation-mechanism-to-deal-with-eus-carbon-tax-gtri/articleshow/103799479.cms?from=mdr>.

²² Mukesh Jagota, *India-EU agree to engage on carbon tax*, FINANCIAL EXPRESS (May 18, 2023, 2:15 AM), <https://www.financialexpress.com/economy/india-eu-agree-to-engage-on-carbon-tax/3091704/>.

competitiveness in the ever-growing environment-friendly international market²³, with other countries like the USA, the UK, China, etc., also trying to enforce similar policies like CBAM.

INDIA'S STANCE UP TO NOW ON REDUCING CARBON INTENSIVENESS-PROGRAMS, SCHEMES AND COMMITMENTS

India, being a developing country with significant energy needs for its development and which has not as of yet contributed much to the global warming scenario as compared to other developed countries, cannot focus on an immediate carbon reduction strategy and instead focuses on a long-term plan to reduce carbon intensiveness. India works in cooperation with the UNFCCC, reporting and coordinating with it on carbon reduction policies and initiatives. In fact, in 2008, India launched its "*National Action Plan on Climate Change (NAPCC)*" to bring about a balance between development and climate goals. This "*Long term Low Carbon Development Strategy*" relies on a 7-prong strategy²⁴:

1. *Incorporating renewable resources and low carbon technology options to generate energy and electricity-* Initiatives include setting up of Green Energy corridors, a Policy on Energy Storage Obligations, Hydro Purchase Obligation Policy to mandate hydropower use, targeted rise in nuclear energy resources by 2032.
2. *Incorporating low-polluting and fuel-efficient transport system-* Initiatives include achieving a 2025 target of having a 20% ethanol blend in petrol, PM Gati Shakti, and achieving Bharat Stage VI emissions.
3. *Promoting such urban planning structures that lead to low carbon and climate change resilient infrastructure-* Initiatives include introducing codes like the "National Building Code" and "Energy Conservation Building Code" and coming up with plans like the National Solar Mission and National Cooling Action Plan.
4. *Usage of green hydrogen technology and bio-based materials in the MSME sectors-* Initiatives include moving to bio-based fuels, decarbonisation of much required sectors of steel and cement through the use of research and development.

²³ If EU Goes Ahead With Carbon Tax, India Will Respond With Retaliatory Tariffs: Reports, SWARAJYA (Mar. 21, 2023, 12:18 PM), <https://swarajyamag.com/economy/if-eu-goes-ahead-with-carbon-tax-india-will-respond-with-retaliatory-tariffs-reports>.

²⁴ India's Long Term Low Carbon Development Strategy, MOEFCC (GoI) (Feb. 11, 2024, 11:34 AM), https://unfccc.int/sites/default/files/resource/India_LTLEDS.pdf.

5. *Engaging in public-private partnership models to create capacity-building techniques and technology for specific CO₂ removal-* In this arena, a good amount of capital financing is required as India requires the model of “Carbon Capture Utilisation and Storage”, which is quite expensive to implement.
6. *Improving forest vegetation cover and upgrading the functioning of State Forest Departments-* Initiatives include policies like National Mission for a Green India, Nagar Van Yojana, National REDD+, and actions like moving towards greener national highway areas.
7. *Focusing on bettering international trade and other mobilisation areas to provide for increased climate-specific and carbon reduction financing-* High costs are required for this transition to a low carbon economy, as has already been noticed for the implementation of the CCUS system for CO₂ removal. In such a scenario, *international trade* objectives should not clash with Indian policy structures that seek to empower domestic producers to create environment-friendly goods and services. At the same time, *carbon adjustment strategies like that of EU-CBAM can directly impact Indian international trade, which in turn will create further hurdles in the long-term Indian initiatives to tackle climate change through carbon reduction measures.*

Moreover, the *interim budget released by Finance Minister Smt. Nirmala Sitharaman for the year 2024-25* also shows increased expenditure as compared to the earlier 2023-24 budget towards tackling climate change and incorporating carbon reduction strategies. These include setting up *solarised rooftops* for a huge number of 1 crore households for starting the rapid shift towards renewable energy demands and enabling 300 units of free electricity to reach such households; *harnessing wind energy* with an initial potential of 1 GW; and incorporating a phase-wise *blending process of natural fuels like biogas in CNG in the transport sector*.²⁵ Hence, what is prominently evident in India is not totally at a loss when it comes to carbon reduction initiatives, but all of this is based on a gradual, long-term process that could also sustain India’s development curve. Hence, sudden international measures like carbon taxation at its border by the EU not only has the outcome of disrupting global trade but also hampers

²⁵ *Net-zero goal: India’s interim budget focuses on green economy, climate investments*, THE ECONOMIC TIMES (Feb. 1, 2024, 6:05 PM), <https://economictimes.indiatimes.com/industry/renewables/net-zero-goal-indias-interim-budget-focuses-on-green-economy-climate-investments/articleshow/107328700.cms?from=mdr>.

such carbon reduction initiatives undertaken by developing countries as loss of international trade with such prominent players like the EU will derail the entire capital financing required for such projects.

It must be noted that *India does not have an express carbon taxing scheme but has implied carbon pricing mechanisms*, some of which are:

1. Coal Cess
2. Perform Achieve Trade Schemes
3. Grant of Renewable Energy Certificates

Coal Cess, introduced in 2010, worked like a carbon tax, which then went to the “National Clean Environment and Energy Fund” for its specific use in carbon reduction initiatives. Similarly, the *Perform Achieve and Trade Scheme*, along with a grant of *Renewable Energy Certificates*, worked in a similar fashion to the carbon markets (a parallel analogy can be drawn to the Emissions Trading System of the EU). It encouraged energy-intensive sectors to comply with techniques that could save energy consumption, which, when saved, could be used to trade the excess energy with other industries that may not have achieved a good result. This could be traded and purchased in the form of Renewable Energy Certificates. All this was part and parcel of the “National Action Plan on Climate Change”, as discussed before.²⁶

The major problem with the actual success of these implicit carbon tax and carbon pricing mechanisms was in their implementation. The coal cess collected was being used not for its specific purpose of carbon reduction but for any general purpose, and the introduction of the GST, which subsumed this coal cess as a compensation cess, resulted in a total loss of its specific goal. For the “Perform Achieve and Trade Scheme” and Renewable Energy Certificates, leniency in target achievement resulting in renewable energy certificates being traded off at very negligible prices failed to create a motivation for the ones wanting to comply with it and a sanction for the ones failing to comply with the same. At the same time, with long-term carbon reduction policies and strategies in place for India, as shown above, the introduction of an express carbon tax at present could lead to later confusion in revenue

²⁶ *Perform, Achieve, Trade*, BUREAU OF ENERGY EFFICIENCY (Feb. 11, 2024, 12:01 PM), [https://beeindia.gov.in/en/programmes/perform-achieve-and-trade-path#:~:text=Perform%2CAchieve%20and%20Trade%20\(PAT\)%20is%20a%20regulatory%20instrument,saving%20which%20can%20be%20traded..](https://beeindia.gov.in/en/programmes/perform-achieve-and-trade-path#:~:text=Perform%2CAchieve%20and%20Trade%20(PAT)%20is%20a%20regulatory%20instrument,saving%20which%20can%20be%20traded..)

generation streams and a deviated focus from the long-term plans and initiatives.²⁷ Even if an express carbon taxing measure is not available in India, a *Net Effective Carbon Rate (Net ECR)* is levied on almost 54.7% of the GHG emissions, and this is in the form of *fuel excise taxes and fossil fuel subsidies*, which are yet again another form of implicit carbon pricing strategy. To compare the Indian GHG emissions sector-wise, the most is released from the road transportation sector, while sectors such as fisheries and agriculture have almost zero or even negative GHG emissions.²⁸ With India's political landscape favouring climate change measures, researchers point out the importance of introducing a carbon tax for India, which can help reduce emissions to a large extent (as WHO reports that \$40 per tonne of such emissions will reduce 1.7 billion tonnes for India accounting for almost 30% of its overall emissions by the year 2030) and could also influence other G20 countries to follow in India's footsteps. India, being on a high development gradient, fears the imposition of carbon tax due to the effect it will have on the economy with increasing costs for production and manufacturing. India's present dependence on coal-based energy generation could only be tackled by long-term measures that would again bring about extra costs from the carbon tax and a highly fragmented economy filled with small sectors and MSMEs, leading to highly inaccurate data on actual carbon emissions. The multiple tax structure had also inhibited the imposition of such tax. However, if introduced, the same could be successfully incorporated into the GST regime.²⁹ However, while all this debate persists whether India should bring about an express carbon tax or not, especially in the face of this new EU-CBAM Policy that has caused a huge hurdle due to the prevailing carbon intensiveness in India, one cannot deny that from very long before- starting from 2010-2015 period, 'carbon tax-like measures' like cutting of carbon subsidies, increasing fossil fuel taxes or increasing the coal cess have been taken, which has actually helped India in reduction of its emissions to a good level from what it was before.³⁰ It may so happen that the Indian economy, at least at present, is more suited

²⁷ Subrata Sekhar Rath & Jyotsna Goel, *Carbon Taxes could be India's Inclusive Climate Mitigation Strategy*, CBGA INDIA (June 7, 2023), <https://www.cbgaindia.org/blog/carbon-taxes-could-be-indias-inclusive-climate-mitigation-strategy/#:~:text=India%20does%20not%20have%20an,schemes%20and%20Renewable%20energy%20certifies>.

²⁸ *Pricing Greenhouse Gas Emissions: Key findings for carbon pricing in India*, OECD (Feb. 11, 2024, 12:20 PM), <https://www.oecd.org/tax/tax-policy/carbon-pricing-india.pdf>.

²⁹ Prof. Mohammed Khaja Qutubuddin, *How India's Carbon Tax Implementation Could Set a Precedent for G20 Countries*, EARTH.ORG (Apr. 12, 2023), <https://earth.org/india-carbon-tax/>.

³⁰ *From Carbon Subsidy to Carbon Tax: India's Green Actions*, PRESS INFORMATION BUREAU (Feb. 27, 2015, 12:30 PM), <https://pib.gov.in/newsite/PrintRelease.aspx?relid=116058>.

to such measures rather than a direct and sudden imposition of a carbon tax to drastically reduce its carbon intensiveness just to be in consonance with the EU-CBAM Policy. Doing so may affect India in the long run by completely frustrating its other carbon-related measures and future-based outlooks.

INDIA AND EU TRADING AND OTHER INTERNATIONAL RELATIONS- HOW HAS IT BEEN IN THE PAST AND IS THERE SCOPE FOR RECONCILIATION?

In terms of trading relations, EU-India cooperation has been at quite a stronghold. According to statistics, the EU is 3rd largest trading partner of India, and India is the 10th largest of the EU. Hence, strained trading relations can negatively impact both countries. In the year 2000 the very first India-EU summit had taken place to signify the initiation of robust international relations. Thereafter, the 12th such annual summit that first happened in India went on to discuss several bilateral trade negotiations and the issuance of "*Joint Declarations on Research and Innovation Cooperation and Enhanced Cooperation in Energy*", which also promoted relations in the energy sector. The year 2005 marked a landmark event with India and the EU constituting an Energy Panel taking relations on energy security forward. Under this energy panel, several sub-groups were formed, especially the ones dealing specifically with clean technology and energy-efficient models.³¹ These events marked stepping stones in India-EU international relations, and it must be noted that today, the persisting conflict between India and the EU remains on this link between trading and energy cooperation. Recently, in 2021, the "*EU-India High-Level Dialogue on Trade and Investment*", also including within its ambit the "*EU-India Trade Sub-Commission*", was established following the 2020 India-EU summit. This improved strategic trading relations between India and the EU, with both nations agreeing to formulate a mutually beneficial trading agreement and such trading negotiations that would better the market access.³² Today, the EU-CBAM Policy, with its carbon taxation regime at EU borders, has disrupted such market access for India, and it is high time that the EU is reminded once again of the "*mutually beneficial*" trading arrangements that it had negotiated with India.

³¹ *India-EU relations*, MEA (July 2013), https://www.mea.gov.in/Portal/ForeignRelation/India-EU_Relations.pdf.

³² *EU trade relations with India. Facts, figures and latest developments*, EUROPEAN COMMISSION (Feb. 13, 2024, 6:14 PM), https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/india_en.

As per the measures that India could take against the EU-CBAM Policy, one of such measures is the *Calibrated Retaliation Mechanism*, which seeks to mirror the same effect for the EU as the CBAM Policy is creating for India. This could be harmful even for the EU, as India's imports to the EU are on an increasing scale, although low as compared to China, and India's imports can offer the required diversification of products that the EU lacks. Also, with such counter acts, India-EU relations can turn sour, which India cannot afford at the present moment due to the high Foreign Direct Investment share that the EU occupies in the Indian FDI market. Also, the EU has a good market for intermediate products in India that is later used to complete the manufacturing cycle. Moreover, the persisting clash between India and the EU over the sustainability model that the EU follows (the one that also led to the EU CBAM Policy), which India looks at with suspicion of protectionist agendas, is something that inhibits improved trade and investment between India and EU thus falling foul of economic and social factors. The concern is not whether India can adopt sustainable frameworks. India is inclined towards the same. The concern is India's sensitivity towards the immediate adoption of such sustainable frameworks before it has a proper transition plan to shift to carbon neutrality that inadvertently results in decreasing trade in CBAM-affected sectors when actually there should be increased collaboration between India and EU to tackle the same.³³ Before the CBAM was introduced in May 2023, high-level talks between the Indian Prime Minister and European Commission President in 2022 had ended in the formation of the “*India – EU Trade and Technology Council*” to increase the cooperation in trade and technology areas between India and EU, thus pointing out the improving trading relations between the two countries.³⁴

Talks regarding the India-EU Free Trade Agreement have also not been concluded. What started in 2013 was again re-launched only 9 years later, in 2022, with the hope that the same would be agreed upon before the general Lok Sabha elections of India to be held in 2024. This FTA would have been very beneficial if the EU had accepted the lower tariffs for Indian imports into its territory, thereby giving a boost to the Indian export sector. Along with this, India is also in talks under this agreement itself to make the visa process for the EU easier for

³³ *India and the European Union in 2030: Building a Closer Economic Relationship*, OBSERVER RESEARCH FOUNDATION (July 12, 2023), <https://www.orfonline.org/research/india-and-the-european-union-in-2030>.

³⁴ *India-European Union Bilateral Relations*, MEA (Sep. 30, 2023), <https://indianembassybrussels.gov.in/pdf/230930%20Unclassified%20India-EU%20Bilateral%20Brief.pdf>.

Indian professionals seeking to work there.³⁵ This would have improved the economic and social status of India in the international sphere manifold, as the EU is a huge economy with which to come into partnership. But all this is now tougher with newer obstructions in the process of getting reduced tariffs. One such is the EU-CBAM Policy, which runs almost counter to the objectives sought to be achieved by the *India-EU FTA Agreement* because it now imposes increased tariffs through carbon taxation for carbon-intensive products, thus hampering rather than upgrading the Indian export sector. This FTA is also deemed to be one of a kind as the EU will enter into an FTA with an ‘emerging economy’ like India for the very first time. The requirement for an increased pace to conclude this FTA stems from the fact that parallel negotiations on agreements that are considered significant in the trading perspective, like the “*Transatlantic Trade and Investment Partnership (TTIP)*” or the “*Regional Comprehensive Economic Partnership (RCEP)*” are also continuing and could be approved soon. The hurdle in the completion of the FTA also comes from India’s side, which has several disagreements on the reduction of tariffs on wine and alcohol, which is a huge revenue source for India. At the same time, conflicts in relation to the liberalisation of the EU professional services sector are also coming in the pathway of a successful negotiation.³⁶ What must be realised from the Indian side now is that it is negotiating with a bigger economy that has more options on its plate apart from India. Losing out on this FTA agreement could be highly disadvantageous for India, and the same has become a cause of greater concern after the EU-CBAM Policy and the restrictions it has indirectly imposed. This is not to say that by entering into this FTA agreement, India should totally lose out on its revenue generation from the wine and alcohol market, but India should at present compare the consequences of losing out on this revenue and not having this agreement in place that could be the much-needed counter to the ongoing CBAM Policy. Reconciliation in this regard is the best thing as of now as it would help India in increasing its exports in certain sectors to tackle the heavy decrease in export of carbon-intensive products for the time being till a plan for carbon neutrality is achieved or the EU reduces or puts on hold through a waiver such immediate carbon taxations at least for the developing and least developed economies.

³⁵ Sushma Ramachandran, *India-EU FTA is a win-win for both economies*, DECCAN HERALD (Dec. 14, 2023, 11:56 AM), <https://www.deccanherald.com/opinion/india-eu-fta-is-a-win-win-for-both-economies-2810694>.

³⁶ Sangeeta Khorana, *The FTA: a strategic call for the EU and India?*, EUROPEAN COUNCIL ON FOREIGN RELATIONS (Oct. 2020), https://ecfr.eu/special/what_does_india_think/analysis/the_fta_a_strategic_call_for_the_eu_and_india.

Taking such things into consideration, in a historic move, India and the four EFTA (European Free Trade Association) nations signed an FTA pact recently on March 10, 2024, after almost a long wait of 16 years. This is considered a very significant step towards reconciliation between European countries and India towards a more equitable trade just after the backlash was received from the EU-CBAM Policy. As a sort of collaborative arrangement, this FTA will bring in mutual gains for both parties, with India providing tariff concessions and duty-free market access into India for certain products and EFTA nations investing in greater FDI in India and providing employment and research effectiveness to the Indian youth.³⁷ India had earlier signed another FTA agreement with UAE, and this is the second such initiative, but this time with EFTA countries, known as the “Trade and Economic Partnership Agreement” or the TEPA. It must be noted that the EFTA nations that have signed this agreement do not form part of the EU- Norway, Iceland, Switzerland and Liechtenstein.³⁸ However, this is an important step forward in collaboration with European countries with whom India is majorly involved in international trade, even if the EU takes the largest trade share. The gains in international trade and investments that would occur through this FTA could at least balance out the loss that is being caused to India due to the EU-CBAM Policy until a full-fledged carbon reduction strategy can be brought into place and India is able to tackle the CBAM Policy in the sphere of international trade without any compromise on its part.

G20 CHAIRMANSHIP OF INDIA- CAN THIS HELP BRING IN BETTER GLOBAL STANDARDS FOR CARBON REDUCTION WITHOUT AFFECTING INTERNATIONAL TRADE?

India is also currently chairing the G20. Under its *G20 chairmanship*, it has introduced the virtual summit titled “Voices of the Global South”. The G20 and this summit seek to show the ‘North’ that includes the EU and the dire conflicting situations of the Global South, with most countries struggling to balance out both debt and climate issues at the same time. The Global South, which also involves India, has a strong desire that the ‘North’ recognise the ‘South’ and restrain itself from taking undue advantage of such global disparities between the

³⁷ Asit Ranjan Mishra, *16 years, 21 rounds of talks: India-EFTA free trade agreement a reality*, BUSINESS STANDARD (Mar. 12, 2024, 9:15 AM), https://www.business-standard.com/economy/news/16-years-21-rounds-of-talks-india-efta-free-trade-agreement-a-reality-124031000641_1.html.

³⁸ Suhasini Haidar, *India signs free trade pact with 4 European countries*, THE HINDU (Mar. 10, 2024, 12:42 PM), <https://www.thehindu.com/news/national/india-european-free-trade-association-ink-free-trade-agreement/article67935003.ece>.

two regions, like in the name of EU-CBAM Policy, for the ‘South’ is a symbol of total autocratic behaviour bringing about “green protectionism” and “regulatory imperialism”.³⁹

G20 can play a very significant role in promoting global-based uniform measures for carbon emission reduction and reducing such unilateral measures as is being taken by the EU. It has been noticed that among the G20 countries, very few numbers that is mostly inclusive of the EU, the UK, and Japan, will have increased export and positive welfare impacts if the CBAM Policy is implemented. It is also seen that although China receives a huge blow in terms of exports in CBAM-affected sectors, its welfare remains on the positive side because of its ability to productively reallocate its exports to non-tax-based sectors. However, expecting such sort of product reallocation for developing or least developed countries at this point in time is extremely foolish. In terms of the *role that can be played by G20*, it could be:

1. Bringing in a multilateral solution (maybe through the Paris Agreement) to replace such unilateral measures.
2. Introducing uniform global reporting standards for CO₂ determination.
3. Incorporating Special and Differential Treatment and waivers on a global scale.
4. Building a climate-carbon reduction financing strategy wherein the developed countries who generate increased revenue due to initiatives like CBAM could redistribute such revenue as financial assistance to developing and least developed countries who face a negative welfare impact and export downfall.
5. Allowing industries in the “developing and least developed countries” to choose the type of climate reduction strategy that would be suitable for their institutional, political and economic structures.
6. Developing trade in environmental goods so that clean technology is made more accessible for all countries, thereby facilitating increased conversion to carbon-reducing mechanisms.⁴⁰

CHALLENGES PUT FORWARD BY INDIA AT THE 13TH MINISTERIAL CONFERENCE- A LOOK AT THE SAME:

³⁹ Josep Borrell, *Three messages from New Delhi*, EUROPEAN UNION EXTERNAL ACTION (Mar. 11, 2023), https://www.eeas.europa.eu/eeas/three-messages-new-delhi_en#:~:text=Regarding%20the%20Carbon%20Border%20Adjustment,representatives%20present%20in%20New%20Delhi..

⁴⁰ Paul Baker et al., *Devising a Response to Carbon Border Adjustment Mechanisms for G20 Countries*, G20 INDIA 2023 (Mar. 11, 2023, 9:19 PM), <https://t20ind.org/research/devising-a-response-to-carbon-border-adjustment-mechanisms-for-g20-countries/>.

For the first time, a ministerial conference was held revolving around trade and environment as a major theme. The concept of sustainability, “environmental unilateralism”, and how the present WTO trading rules are not comprehensive enough to tackle such policy concerns in the field of trade and environment was discussed as an important issue in the 13th Ministerial Conference held during late February.⁴¹ India, however, had stated that in WTO meetings, it would not generally debate on sustainability or climate vis-à-vis that of international trade and keep its demands more restricted or narrowed down on direct trade issues. This is to further safeguard its trade interests with major trading blocs while keeping bilateral negotiations ongoing. India also stated that such issues that are more related to climate and environment and the ways in which it creates disguised trade restrictions could be better discussed and debated in multilateral forums like the United Nations rather than WTO.⁴² Piyush Goyal, a Commerce and Industry Minister of India, speaking at the 13th WTO Ministerial Conference, highlighted the fact that such unilateralist measures in the name of “environmental protection” not only impact international trade but also affect the rights of parties to multilateral environmental agreements. This is because the multilateral environmental agreements also provide for greater flexibility in terms of responsibilities towards the environment dependent upon the state of development of the nation.⁴³ Moreover, India, at this 13th MC, has also blocked another major obstacle being put forth before it by the EU in the form of a proposal seeking to link the subject of industrial economic policy with that of international trade policy for exercising scrutiny even over the industrial economic policy of developing nations. India contended that “industrial policy” is a concurrent list matter where states also make policy or provide industrial subsidies that do not majorly affect exports and, hence, may not come directly within the scope of international trade. It was also argued by India that these tactics by the EU are to curb and scrutinise the industrial subsidies that have to be provided by the Indian states and the national government to counter the EU-

⁴¹ DDG Jean-Marie Paugam, *Trade, sustainability and climate: What is at stake 30 years after WTO's creation?*, WTO BLOG (Mar. 5, 2024), https://www.wto.org/english/blogs_e/ddg_jean_marie_paugam_e/blog_jp_28feb24_e.htm.

⁴² Dhirendra Kumar, *India to exclude non-trade issues at WTO talks, to engage with EU on CBAM*, LIVE MINT (Feb. 7, 2024, 6:33 PM), <https://www.livemint.com/economy/india-to-exclude-non-trade-issues-at-wto-talks-to-engage-with-eu-on-cbam-11707305229178.html>.

⁴³ *India expresses serious concerns in WTO meet over unilateral protectionist measures*, THE HINDU (Feb. 26, 2024, 10:37 PM), <https://www.thehindu.com/news/international/india-expresses-serious-concerns-in-wto-meet-over-unilateral-protectionist-measures/article67889564.ece#:~:text=The%20CBAM%20will%20translate%20into,EU%20starting%20January%202026.&text=WTO%20MC13%20%7C%20What's%20on%20the,will%20be%20hit%20by%20CBAM..>

CBAM Policy, which is a sort of direct interference in internal matters of India of tackling CBAM.⁴⁴

CONCLUSION

What is the EU CBAM Policy- an environmental boon or a disguised trade restriction?

It is difficult to conclude such a statement in white or black. More so, when the EU CBAM Policy is not yet in force, although it cannot be negated that the Policy would bring about great environmental friendliness and incentives for countries worldwide, the question is whether the time and stringency of the policy are correct at the specific moment with several developing and least developed countries struggling to achieve their development goals along with tackling other environmental hardships.

It is also true, at the other end of the spectrum, that this policy has every chance of becoming a huge trade restriction, especially for the growing economies that can affect the major base of trade facilitation under the Multilateral Trading System. It needs to be seen whether India could act as a forerunner and representative for the developing economies against the EU CBAM Policy while also trying to balance out its relations with the EU. The 13th Ministerial Conference has also been utilised by India to put forward its challenges and grievances against the EU-CBAM Policy and other proposals being placed by the EU in furtherance of the same to safeguard its own trade advantages and international trading relations.

SUGGESTIONS

In brief, ways to tackle EU-CBAM by developing and least developed nations- specific focus on India:

To state in brief, the following measures can be identified to tackle the EU-CBAM Policy as a balancing act between climate and environment sustainability and economic sanctions by way of carbon taxation and reduced exports in international trade-

1. WTO Multilateral Trading measures like-
 - Putting up challenges resulting in debates and discussions at Ministerial Conferences

⁴⁴ Asit Ranjan Mishra, *WTO MC13: India blocks EU proposal to link trade with industrial policy*, BUSINESS STANDARD (Mar. 4, 2024, 10:50 PM), https://www.business-standard.com/economy/news/india-blocks-eu-proposal-to-link-trade-with-industrial-policy-at-wto-mc13-124030400933_1.html.

- Seeking waivers under “Article IX:3 of WTO Agreement.”
 - Applying Safeguard measures under “WTO Agreement on Safeguards” to temporarily restrict carbon-intensive product import increases the internal demand to tackle the loss in exports
 - Challenge with regard to violation of basic international trading principles like Special and Differential Responsibility and violation of “Article XI GATT” (imposition of protectionist measures in the form of quantitative restrictions)
2. Calibrated Retaliation Mechanism- sanction-based approach towards EU- phased-wise imposition of greater tariffs or customs duties.
 3. Improving its own carbon reduction strategies, policies, schemes, carbon reduction, and climate change financing avenues and further developing its own carbon pricing mechanisms, most of which seem to be at a dormant stage. Alongside this, ways to shift towards non-fossil fuel-based energy sources like solar power should be built to come in more consonance with the CBAM Policy if it is to be ultimately followed.
 4. Improving India-EU international relations further through dialogues, India-EU trade summits, joint declarations, formation of sub-commissions on trade and energy, cooperative mechanisms and entering into more Free Trade Agreements, specifically with the EU, if possible, as has already been done with UAE and certain EFTA nations.
 5. Applying G20 multilateral solutions that can restrict unilateral protectionist measures and bring in uniform global standards for CO₂ reporting, carbon reduction, and carbon reduction financing through assistance from developed countries to developing and LDC countries.

Contending at the level of violation of not only WTO principles but also Multilateral Environmental Agreements due to such unilateral measures.

LEGAL REGIME ON MOB LYNCHING: A COMPARATIVE ANALYSIS OF INDIAN AND AMERICAN SCENARIO

- Anoop Kumar* & Harinath Prasad**

"The majesty of law cannot be sullied simply because an individual or a group generate the attitude that they have been empowered by the principles set out in law to take its enforcement into their own hands and gradually become law unto themselves and punish the violator on their own assumption and in the manner in which they deem fit".

- Dipak Misra, C.J. in *Tehseen S. Poonawalla v. Union of India*¹

"The strong arm of the law must be brought to bear upon lynchers in severe punishment, but this cannot and will not be done unless a healthy public sentiment demands and sustains such action".

- Ida B. Wells²

INTRODUCTION

Society in every part of the world has witnessed the ugliest face of discrimination in the form of brutal killing by masses, be it on the basis of race or on the basis of religious sentiments³⁴. Even in the advanced societies of countries like the USA, it has been observed that from the late nineteenth century to the mid-twentieth century, thousands of Americans were lynched. Among the victims, about two-thirds of the victims were Black⁵.

Further, the widespread impact of social media messages has added fuel to the fire in the name of incidents like mob lynching in the name of cow vigilantism in democracy like

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¹ (2018) 9 SCC 501

² Ida B. Wells, "Southern Horrors: Lynch Law in All its Phases (1892)", available at: https://www.digitalhistory.uh.edu/disp_textbook.cfm?smtid=3&psid=3614

³ The Economist, Cowboys and Indians, *The Economist* (Aug. 20, 2016), available at: <https://www.economist.com/asia/2016/08/20/cowboys-and-indians>

⁴ Manfred Berg & Simon Wendt, eds., *Globalizing Lynching History: Vigilantism and Extralegal Punishment from an International Perspective* (Palgrave Macmillan 2011), available at: <https://link.springer.com/book/10.1057/9781137001245>

⁵ Karlos K. Hill, *21st Century Lynchings?*, Cambridge Blog (Feb. 21, 2016), available at: <https://cambridgeblog.org/2016/02/21st-century-lynchings/>

India⁶.

Conceptually, lynching is associated with denial of due process of law. The process involves extra-legal public executions, which were illegally organized by members of a local community and not by a law enforcement agency⁷. As far as the purpose is concerned, historically, such executions had been organized to violently punish them on the allegation that they have committed a crime or breached a social norm.

The past couple of years have been crucial in the legislative history of both India and USA, as they witnessed enactment of legislative provisions to combat such extra-judicial killings⁸.

DEFINITION

The origin of the term “lynch” is uncertain, but it likely emerged during the American Revolution. The term originates from “Lynch Law,” which referred to a method of punishment carried out without a trial. It is usually linked to Charles Lynch and William Lynch from Virginia during the 1780s⁹. Historically, the definition of the word “lynching” suffered from lack of consensus amongst the anti-lynching reformers.

Therefore, the role of anti-lynching organizations such as Tuskegee Institute, the National Association for the Advancement of Colored People (NAACP), the International Labor Defense (ILD) and the Association of Southern Women for the Prevention of Lynching (ASWPL) had been crucial to derive a suitable definition¹⁰.

NAACP has defined lynching as the public execution of an individual without trial or legal process. While these acts were typically carried out by violent mobs, law enforcement officers occasionally took part, often justifying their involvement as a form of justice¹¹.

It has been considered as violation of the human rights and fundamental rights as guaranteed under article 21 of Indian constitution.

⁶ DNA India, *Mob lynching: 7 instances which shook India*, DNA INDIA (Jan. 23, 2019), available at: <https://www.dnaindia.com/india/report-mob-lynching-7-instances-which-shook-india-2639925>

⁷ *Supra* note 5

⁸ Provisions under the newly enacted Bhartiya Nyay Samhita, 2023 and the Emmett Till Antilynching Act of USA enacted in 2022

⁹ *Lynch*, Online Etymology Dictionary, available at: <https://www.etymonline.com/search?q=lynch>.

¹⁰ Christopher Waldrep, *War of Words: The Controversy over the Definition of Lynching, 1899-1940*, 66 *J. of Southern History* 75 (2000), available at: <https://www.jstor.org/stable/2587438?seq=1>

¹¹ NAACP, *History of Lynching in America*, available at: <https://naacp.org/find-resources/history-explained/history-lynching-america>

LAGEL PROVISIONS

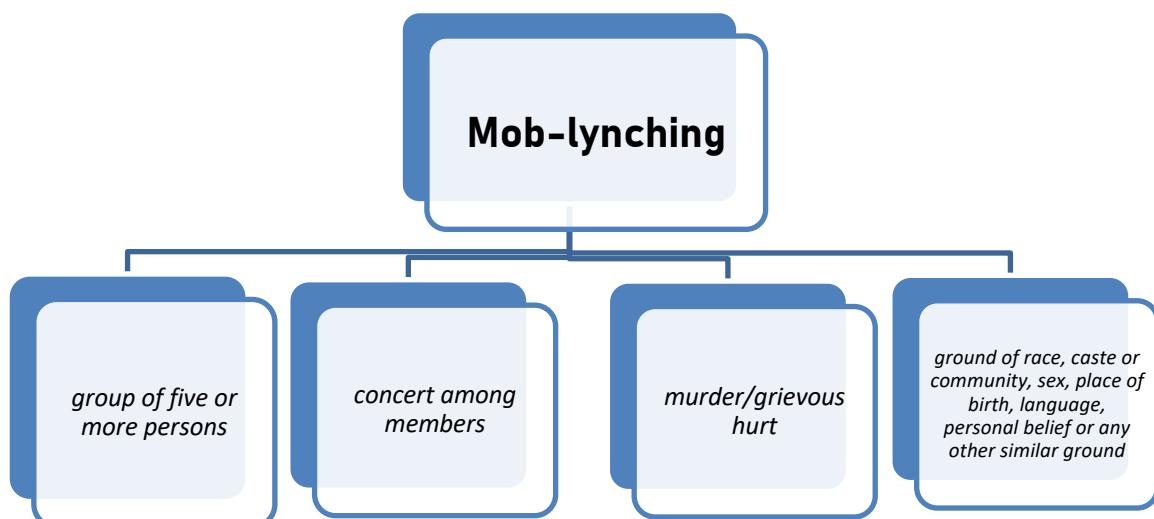
Prior to the enactment of the Bharatiya Nyaya Sanhita (BNS), 2023, the Indian Penal Code had no specific provision for providing definition and punishment for the offence of mob-lynching. It was made punishable as the offence of murder punishable under section 302. For the first time, it was recognized as an offence and made punishable in sections 103(2) and 117(4) of the Bharatiya Nyaya Sanhita (BNS), 2023.

Section 103(2) lays down that:

“When a group of five or more persons acting in concert commits murder on the ground of race, caste or community, sex, place of birth, language, personal belief or any other similar ground each member of such group shall be punished with death or with imprisonment for life, and shall also be liable to fine”.

Similarly, section 117(4) lays down that:

“When a group of five or more persons acting in concert, causes grievous hurt to a person on the ground of his race, caste or community, sex, place of birth, language, personal belief or any other similar ground, each member of such group shall be guilty of the offence of causing grievous hurt, and shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine”



Thus, following are the essential ingredients of offence of mob-lynching

1. There must be a group of five or more persons.
2. There must be concert amongst members.
3. Such concert must be in order to commit murder or grievous hurt.
4. Grounds for such act must be either race, caste or community, sex, place of birth, language, personal belief or any other similar ground.

When the murder is caused as a result of such a concert, each member of such group is liable for punishment of death or imprisonment for life and is also liable to fine. But when grievous hurt is caused as a result of it, such members are liable to imprisonment extending up to seven years and they are also liable to fine.

Further, it is notable that the ground of religion has not been included in the definition.

SUPREME COURT GUIDELINES

Even before the enactment of the BNS, the hon'ble Supreme Court has time and again lamented over the practice of extra-judicial killings by the assembly of persons forming 'Khap panchayats', who take law into their hands¹².

Following a series of lynchings in Dadri, Jharkhand, and other incidents linked to cow protection groups, social activists filed writ petitions under Article 32 of the Constitution against the relevant states. In response, the Supreme Court, in 2018, issued a comprehensive set of guidelines outlining preventive, remedial, and punitive measures to tackle the issue of mob lynching in the case of *Tehseen S. Poonawalla v. Union of India*¹³.

To address the need for prompt and decisive action by both the state and Central governments against mob attackers committing violence in public, the bench, consisting of Justices Dipak Misra, D.Y. Chandrachud, and Ajay Manikrao Khanwilkar, reviewed the observations made in earlier Supreme Court rulings, including *Shakti Vahini v. Union of India*¹⁴ and the US case *Ex parte Riggins*¹⁵. In the landmark *Shakti Vahini* case, the Hon'ble Court ruled that 'Khap Panchayats' or similar assemblies cannot assume the role of law enforcers. The Court

¹² *Shakti Vahini v. Union of India*, AIR 2018 SC 1601

¹³ *Supra* note 1

¹⁴ AIR 2018 SC 1601

¹⁵ 18 (C.C.N.D. Ala., 1904) 134 Fed. 404

emphasized that such groups have no legal authority to act as law enforcement bodies, as no law grants them this power.

The Hon'ble Court recognized the urgent need to tackle the rising issue of mob lynching, a problem that has also emerged in countries like the USA. Consequently, it found it necessary to reference the US case *Ex parte Riggins*¹⁶, which involved the lynching of a Negro citizen who had been incarcerated on a murder charge.

Regarding the liabilities of the police and administrative authorities, the Court took into consideration the decision of the apex Court in *Arumugam Servai v. State of Tamil Nadu*¹⁷.

The Hon'ble court came up with a slew of following guidelines, which may be classified into preventive, remedial and punitive measures:

- a) **Preventive Measures.** The major preventive measures, which involve actions on the part of the state and Central governments, police authorities etc., laid down were as follows:
 - i. **Appointment of Nodal Officer:** The State Government was directed to appoint a Nodal Officer in each district, who should be no lower than the rank of Superintendent of Police. This officer was to be assisted by personnel holding the rank of Deputy Superintendent of Police (DSP). The function of such Officer will be to take measures for prevention of incidents of mob violence and lynching.
 - ii. **Constitution of a special task force:** The Nodal Officers have been empowered to constitute a special task force. The purpose of such force will be gathering intelligence on individuals who are prone to committing such offenses or engaging in the spread of hate speech, inflammatory remarks, and false information.
 - iii. **Identification of affected regions.** State Governments have been entrusted with the duty to identify regions, where cases of lynching and mob violence have been documented in the past five years.

¹⁶ *Ibid*

¹⁷ (2011) 6 SCC 405

iv. **Holding regular meetings with the local intelligence units.** The Nodal Officer has been tasked with holding regular meetings, along with all Station House Officers of the district, at least once a month, with the local intelligence units in the district. The goal is to detect any signs of vigilantism, mob violence, or lynching and take proactive steps to eliminate any hostile environment targeting specific communities or castes involved in such incidents.

v. **Other measures:**

- The Director General of Police is bound to instruct the Superintendents of Police to enhance police patrols in sensitive areas, considering previous incidents and gathered intelligence.
- The Central and State Governments shall be responsible for preventing the spread of reckless and inflammatory messages on social media platforms.
- FIRs shall be filed under Section 153A of the IPC and/or other applicable legal provisions against individuals who circulate such messages.
- The Central Government shall provide the necessary directions and advisories to the State Governments.
- The Secretary of the Home Department in the relevant States shall issue instructions to Nodal Officers in each district, ensuring that Police Station In-charges in sensitive areas remain vigilant if any instance of mob violence occurs within their jurisdiction.
- Every police officer shall have the duty to disperse any mob that, in their judgment, may lead to violence or lynching, whether under the guise of vigilantism or otherwise, using their authority under Section 129 of the CrPC.
- The Director General of Police or the Secretary of the Home Department in the relevant states will conduct regular review meetings (at least quarterly) with all Nodal Officers and heads of State Police Intelligence. Nodal Officers should report any coordination issues between districts to the DGP to formulate strategies to address mob violence and lynching at the State level.

b) **Remedial Measures.** Remedial measures come into play when the preventive measures fail. In other words, when the act of mob lynching has taken place, the authorities take recourse to remedial measures. The major remedial measures are:

- i. **FIR without any undue delay:** It shall be the duty of the jurisdictional police station to lodge an FIR under the relevant provisions of IPC and/or other provisions of law, when the local police come to know about the occurrence of the acts of mob-lynching.
- ii. **Duty to intimate to the Nodal Officer:** The Station House Officer was made duty-bound to intimate the Nodal Officer in order to prevent further harassment of the family members of the victim.
- iii. **Monitoring of the Investigation:** The Nodal Officer has been made duty-bound to personally monitor investigation for an effective investigation.
- iv. **Compensation Scheme for Victims:** The state governments were made duty-bound to create a compensation scheme for lynching/mob violence victims covered under section 357A of CrPC within one month from the date of the judgment. Consideration for the compensation shall include the extent of physical injury, emotional harm, loss of income including missed employment and educational opportunities, and costs related to legal and medical expenses.
- v. **Interim relief:** The Court also ordered that interim relief be provided to the victim or the next of kin of the deceased within thirty days of the mob violence or lynching incident.
- vi. **Trial:** Regarding the trial of mob violence/lynching, the Court laid down following guidelines:
 - Cases of lynching and mob violence shall be exclusively handled by designated courts or Fast Track Courts.
 - Trial shall be conducted on a day-to-day basis.
 - The trial must be completed within six months from the date of taking notice of the case.
 - Trial courts are bound to take measures necessary for protection and for concealing the identity and address of the witness.

- The victim or the deceased's next of kin shall be given an opportunity to be heard during the trial regarding applications like bail, discharge, release, and parole filed by the accused.
 - Free legal aid shall be ensured for the victim or the next of kin of the deceased in cases of mob violence and lynching.
 - The victim has the right to hire any lawyer of their choice from those listed in the legal aid panel under the Legal Services Authorities Act, 1987.
- c) **Punitive Measures.** These measures have the objective of punishing the police and district administration, in case of their failure to prevent the acts of mob violence and lynching. These measures are:
- i. ***Failure to be treated as act of deliberate negligence or misconduct:*** The Court held that failure on part of the Police officer or officer district administration to comply with the aforesaid directions in order to prevent or investigate or facilitate expeditious trial of any crime of mob violence and lynching will be considered as an act of deliberate negligence or misconduct.
 - ii. ***Disciplinary action:*** The Court recommended that disciplinary action be taken against the officials who, despite having prior knowledge of the incident, failed to prevent it, or those who, after the incident occurred, did not take immediate action to arrest the perpetrators and initiate criminal proceedings. The Court relied upon the judgment of *Arumugam Servai v. State of Tamil Nadu*¹⁸.

LEGAL REGIME IN USA

Regarding history of lynching in USA, it has been observed by Walter Howard that lynchings were “a routine, everyday sort of villainy”, largely confined to the South and predominantly directed at Black individuals rather than White ones in 1930s¹⁹. Further, it has been observed that between 1882 and 1968, roughly 4,742 people were lynched, of which 73%, of the

¹⁸ (2011) 6 SCC 405

¹⁹ Walter Howard, *Lynchings: Extralegal Violence in Florida During the 1930s* (University Press of Florida 2001), available at: <https://www.google.co.in/books/edition/Lynchings/YirwhyDdoNYC?hl=en>.

victims were Black²⁰.

The ugly phase of lynching was witnessed during the Reconstruction, phase of the 12 years following the Civil War, failed to offer freedom and opportunities to formerly enslaved Black people. Instead, white resentment toward Black social, political, and economic progress sparked violent racial terror, including mass lynchings, which continued into the 20th century²¹. The white press often deliberately referred to these deadly attacks as “riots,” while those responsible faced no repercussions. The widespread violence created an atmosphere of fear and intimidation in Black communities²².

During Reconstruction, at least 34 mass lynchings took place, with 12 major massacres occurring in the South between 1872 and 1876, many aimed at politically active African Americans²³.

The US Supreme Court in *Ex Parte Riggins*²⁴ lamented over the menace of mob lynching prevalent in the USA. The facts involved the lynching of a Negro citizen who had been incarcerated on a murder charge. The Court referred to the following relevant observations made by Thomas Goode Jones, J. in the same²⁵:

“When a private individual takes a person charged with crime from the custody of the state authorities to prevent the state from affording him due process of law, and puts him to death to punish the crime and to prevent the enjoyment of such right, it is violent usurpation and exercise, in the particular case, of the very function which the Constitution of the United States itself, under this clause [the 14th Amendment] directs the state to perform in the interest of the citizen. Such lawlessness differs from ordinary kidnapping and murder, in that dominant intent and actual result is usurpation and exercise by private individuals of the sovereign functions of administering justice and punishing crime, in order to defeat the performance of duties required of the state by the supreme law of the land...”

²⁰ Robert L. Zangrando, *The NAACP Crusade Against Lynching, 1909-1950* (Temple Univ. Press 1980), https://www.google.co.in/books/edition/The_NAACP_Crusade_Against_Lynching_1909/XQ80AAAAIAAJ?hl=en.

²¹ Equal Justice Initiative, “History of Racial Injustice: Mass Lynchings”, 2023, available at: <https://eji.org/news/history-racial-injustice-mass-lynchings/>.

²² *Ibid*

²³ *Ibid*

²⁴ *Supra* note 15

²⁵ *Supra* note 15

The 1909 decision of *United States v. Shipp*²⁶ was one in which the U.S. Supreme Court addressed the issue of the legality of a mob's actions in lynching a Black man named Ed Johnson in Chattanooga, Tennessee, in 1906. However, the trial was under murder statute.

The fight to curb this menace in USA is not of recent origin. There have been many efforts in that direction for over a century. Some of the noteworthy efforts were as follows:

1. ***The Dyer Anti-Lynching Bill (1918)***. The Bill was introduced to combat the widespread racial violence and lack of accountability for lynchings, particularly in the South. Though, the House of Representatives passed the Bill, it was ultimately blocked in the Senate, primarily due to strong opposition from Southern lawmakers who supported lynching as a method of racial control²⁷.
2. ***The Costigan-Wagner Bill (1934)***. The proposed legislation sought to enable federal prosecution of individuals involved in lynch mobs, including public officials and law enforcement officers who neglected to protect victims under their custody. The bill was designed to dismantle mob rule and end the vigilante violence that specifically targeted Black Americans²⁸.
3. ***The Justice for Victims of Lynching Act (2018)***. The bill defines lynching as any act intended to “willfully cause bodily injury to another person” based on their actual or perceived race, color, religion, national origin, gender, sexual orientation, gender identity, or disability. This legislation aims to address lynching as a targeted act of violence driven by hate and to ensure stronger legal consequences²⁹.

After failure of these efforts, in 2022, Emmett Till Antilynching Act was enacted³⁰. The act revises section 249(a) of title 18 of the United States Code to include punishments for “lynching” and “other conspiracies”. The provisions are as follows:

²⁶ 214 U.S. 386 (1909).

²⁷ NAACP, “Dyer Anti-Lynching Bill”, available at: <https://naacp.org/find-resources/history-explained/legislative-milestones/dyer-anti-lynching-bill>.

²⁸ *Ibid*

²⁹ S.3178 - Justice for Victims of Lynching Act of 2018, 115th Congress (2018) available at: <https://www.congress.gov/115/bills/s3178/BILLS-115s3178es.pdf>

³⁰ Public Law 117-107 - Justice for Victims of Lynching Act of 2022, 117th Congress (2022) available at: <https://www.govinfo.gov/content/pkg/PLAW-117publ107/html/PLAW-117publ107.htm>.

“(5) Lynching- Whoever conspires to commit any offense under paragraph (1), (2), or (3) shall, if death or serious bodily injury (as defined in section 2246 of this title) results from the offense, be imprisoned for not more than 30 years, fined in accordance with this title, or both”.

“(6) Other conspiracies- Whoever conspires to commit any offense under paragraph (1), (2), or (3) shall, if death or serious bodily injury (as defined in section 2246 of this title) results from the offense, or if the offense includes kidnapping or an attempt to kidnap, aggravated sexual abuse or an attempt to commit aggravated sexual abuse, or an attempt to kill, be imprisoned for not more than 30 years, fined in accordance with this title, or both”.

CONCLUSION

To a great extent, the fight against mob-lynching has been given great emphasis by the judicial pronouncements in both countries. However, despite the well-formulated guidelines laid down by the Hon'ble apex court, the central and state governments have to show their will-power to designate a special court for the trial of mob-lynching.

PUBLIC POLICY EXCEPTIONS IN JUDICIAL REVIEW OF INTERSTATE ARBITRATION AWARDS: “THEIR ROLE AND IMPACT”

- Kumari Neha* & Dr. Suneel Kumar**

Abstract

The public policy exception as a ground for judicial intervention in interstate arbitration awards. While the Federal Arbitration Act (FAA) establishes a strong presumption in favour of arbitral finality, courts retain limited review powers when awards potentially violate fundamental public policy principles. This creates a delicate balance between respecting arbitration's autonomy and protecting essential societal values. The article analyzes the legal foundations of the exception, its particularly complex application in interstate commercial disputes, the categories of public policy that may justify vacatur, circuit splits on its interpretation, and recent judicial trends. It concludes that courts have increasingly narrowed the exception's scope, reflecting the federal policy favouring arbitration in interstate commerce, while preserving it as a crucial safeguard against awards that would undermine core legal principles or require illegal conduct.

Keywords: Public Policy, Judicial Review, Arbitration, ADR, ODR.

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INTRODUCTION

Interstate commerce forms the backbone of economic activity in federal systems worldwide, with the United States serving as a prominent example where trade across state lines constitutes a substantial portion of national economic output.¹ When disputes arise in these interstate commercial relationships, arbitration has emerged as a preferred mechanism for resolution, offering parties greater flexibility, efficiency, and control compared to traditional litigation.² However, the intersection of state laws, federal regulations, and judicial interpretations creates a complex legal landscape that continues to evolve through judicial pronouncements.³

The constitutional dimensions of interstate trade arbitration present unique challenges, as courts must balance state sovereignty with federal interests in maintaining a unified commercial system.⁴ The Commerce Clause, coupled with federal legislation like the Federal Arbitration Act (FAA), establishes a framework that has been continuously refined through judicial interpretation.⁵ This ongoing process reflects broader tensions in federalism and raises fundamental questions about the appropriate allocation of authority between state and federal judiciaries in commercial dispute resolution.⁶

This article critically examines how courts have navigated these complexities, highlighting landmark decisions that have shaped the contemporary understanding of arbitration in interstate trade disputes.⁷ It analyses the reasoning behind pivotal judicial pronouncements,⁸ their practical implications for businesses engaged in interstate commerce,⁹ and the theoretical underpinnings that inform judicial approaches to arbitration enforcement and

¹ U.S. Const. art. I, sec. 8, cl. 3; *See also, Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 189-190 (1824).

² Federal Arbitration Act, 9 U.S.C. sec. 1-16 (2012).

³ *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984) (recognizing federal pre-emption of state laws that conflict with the FAA).

⁴ *Alden v. Maine*, 527 U.S. 706, 713 (1999) (discussing state sovereignty within the federal system).

⁵ *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011) (reinforcing the FAA's role in pre-empting conflicting state laws).

⁶ *Perry v. Thomas*, 482 U.S. 483, 489 (1987) (emphasizing the federal interest in maintaining a consistent arbitration framework).

⁷ *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 476 (1989) (discussing the balance between state autonomy and federal arbitration policy).

⁸ *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985) (establishing the enforceability of arbitration clauses in international commercial contracts).

⁹ *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1624 (2018) (upholding arbitration agreements under the FAA despite conflicting state laws).

interpretation.¹⁰

HISTORICAL DEVELOPMENT OF ARBITRATION IN INTERSTATE TRADE

Early Scepticism and Judicial Hostility

The history of arbitration in interstate trade disputes reveals a remarkable transformation in judicial attitudes. During the early nineteenth century, courts in most jurisdictions exhibited significant hostility toward arbitration agreements, viewing them as improper attempts to “oust the courts of jurisdiction.”¹¹ This scepticism was rooted in traditional common law principles that prioritized judicial authority and viewed private dispute resolution mechanisms with suspicion.¹² In the 1874 case of *Insurance Co. v. Morse*, the Supreme Court reinforced this position, declaring that agreements to arbitrate future disputes were unenforceable as contrary to public policy.¹³

This judicial hostility created substantial barriers to the development of arbitration as a viable mechanism for resolving interstate trade disputes. Businesses operating across state lines faced uncertainty regarding the enforceability of arbitration provisions, with courts frequently refusing to compel arbitration even when parties had expressly agreed to such procedures in their contracts.¹⁴ The resulting inconsistency in enforcement significantly undermined the utility of arbitration as a predictable dispute resolution tool in interstate commerce.¹⁵

The Federal Arbitration Act: A Paradigm Shift

The passage of the Federal Arbitration Act (FAA) in 1925 marked a watershed moment in the evolution of arbitration law in the United States.¹⁶ Enacted primarily to overcome judicial

¹⁰ *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 (1967) (introducing the separability doctrine in arbitration agreements).

¹¹ *Home Ins. Co. v. Morse*, 87 U.S. (20 Wall.) 445, 451 (1874) (expressing judicial disapproval of arbitration agreements that attempted to exclude court jurisdiction).

¹² David S. Schwartz, Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration, 1997 WIS. L. REV. 33, 39 (1997) (discussing common law hostility toward arbitration).

¹³ *Red Cross Line v. Atlantic Fruit Co.*, 264 U.S. 109, 120–121 (1924) (acknowledging the general reluctance to enforce arbitration agreements).

¹⁴ Katherine Van Wezel Stone, Rustic Justice: Community and Coercion under the Federal Arbitration Act, 77 N.C. L. REV. 931, 934 (1999) (analysing the limitations on arbitration enforcement before the FAA).

¹⁵ *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 219 (1985) (stating that the FAA’s purpose was to place arbitration agreements on equal footing with other contracts).

¹⁶ *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983) (recognizing a strong federal policy favouring arbitration).

hostility and place arbitration agreements “upon the same footing as other contracts,”¹⁷ the FAA established a federal policy favouring arbitration.¹⁸ Section 2 of the Act provided that written provisions for arbitration in “any maritime transaction or a contract evidencing a transaction involving commerce” would be “valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”¹⁹

While the immediate impact of the FAA was limited, its significance grew exponentially in subsequent decades as courts gradually embraced its pro-arbitration mandate.²⁰ The Act’s application to interstate trade disputes became increasingly pronounced, establishing a foundation for the expansion of arbitration as a primary method for resolving commercial conflicts across state lines.²¹ This legislative intervention initiated a fundamental reconceptualization of arbitration’s role in the American legal system, particularly for disputes falling within the purview of interstate commerce.²²

Modern Expansion Under the Supreme Court

The transformative potential of the FAA was not fully realized until the latter half of the twentieth century, when the Supreme Court began to interpret the Act more expansively.²³ In a series of landmark decisions beginning in the 1980s, the Court established the FAA’s pre-emptive effect over state laws that restricted arbitration, significantly broadening the statute’s reach and impact on interstate trade disputes.²⁴

The 1984 decision in *Southland Corp. v. Keating* represented a pivotal moment in this jurisprudential evolution.²⁵ The Court held that the FAA created substantive federal law applicable in both state and federal courts, effectively pre-empting state laws that disfavoured

¹⁷ *Supra* note 3 (expanding the application of the FAA to state courts).

¹⁸ *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 272 (1995) (holding that the FAA applies to contracts involving interstate commerce).

¹⁹ David Horton, Federal Arbitration Act Pre-emption, Purposivism, and State Public Policy, 101 GEO. L.J. 1217, 1220 (2013) (discussing the evolution of arbitration’s role post-FAA).

²⁰ Ian R. Macneil, American Arbitration Law: Reformation, Nationalization, Internationalization 123–125 (1992) (discussing the gradual expansion of the FAA’s scope through Supreme Court interpretation).

²¹ *Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996) (holding that state rules singling out arbitration agreements for special scrutiny are pre-empted by the FAA).

²² *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992) (discussing express pre-emption).

²³ *Arizona v. United States*, 567 U.S. 387, 399 (2012) (explaining field pre-emption).

²⁴ *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142–143 (1963) (explaining conflict pre-emption).

²⁵ *Preston v. Ferrer*, 552 U.S. 346, 353 (2008) (noting that the FAA pre-empts state laws that interfere with arbitration agreements).

arbitration.²⁶ This pronouncement fundamentally altered the legal landscape for interstate arbitration by establishing federal supremacy in this domain and limiting states' ability to regulate arbitration agreements within their borders.²⁷

Subsequent decisions further expanded the FAA's scope and reinforced its pre-emptive effect. In *Perry v. Thomas*, the Court invalidated a California statute that exempted wage collection actions from arbitration.²⁸ Later, in *Allied-Bruce Terminix Cos. v. Dobson*, the Court adopted an expansive interpretation of the FAA's "involving commerce" language, holding that it extended federal arbitration law to the full reach of Congress's Commerce Clause authority.²⁹ These pronouncements collectively established a robust federal framework that significantly favoured arbitration in interstate trade disputes, often at the expense of state regulatory authority.³⁰

THE FEDERAL PRE-EMPTION DOCTRINE IN ARBITRATION

Theoretical Foundations of Pre-Emption

The doctrine of federal pre-emption serves as the cornerstone of modern arbitration jurisprudence in interstate trade disputes.³¹ Derived from the Supremacy Clause of the U.S. Constitution,³² pre-emption occurs when federal law displaces state law that would otherwise apply to a particular issue or dispute. In the context of arbitration, pre-emption analysis typically focuses on whether and to what extent the FAA supplants state laws that regulate arbitration agreements.³³

Courts have recognized three primary forms of pre-emption: express pre-emption, where federal law explicitly states its intent to displace state law;³⁴ field pre-emption, where federal

²⁶ Erwin Chemerinsky, Empowering States or Undermining Federalism? The Case for Limiting Federal Pre-emption, 92 B.U. L. REV. 1, 5 (2012) (discussing the federalism implications of pre-emption doctrine).

²⁷ David S. Schwartz, The Federal Arbitration Act and the Power of Congress over State Courts, 83 OR. L. REV. 541, 552 (2004) (arguing that uniformity in arbitration law promotes commercial stability).

²⁸ *Supra* note 6

²⁹ *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 68 (2010) (acknowledging the preservation of general contract defense under the savings clause).

³⁰ *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 529 (2019).

³¹ *Stolt-Nielsen S.A. v. Animal Feeds Int'l Corp.*, 559 U.S. 662, 684 (2010).

³² Brian T. Fitzpatrick, The End of Class Actions? 57 ARIZ. L. REV. 161, 169 (2015).

³³ Christopher R. Drahoszal & Peter B. Rutledge, Contract and Procedure, 94 MARQ. L. REV. 1103, 1121 (2011).

³⁴ *GE Energy Power Conversion France SAS v. Outokumpu Stainless USA, LLC*, 140 S. Ct. 1637, 1644 (2020) (discussing equitable estoppel and non-signatory enforcement).

regulation is so pervasive that it leaves no room for state supplementation;³⁵ and conflict pre-emption, where compliance with both federal and state law is impossible or where state law stands as an obstacle to accomplishing congressional objectives.³⁶ In arbitration cases, conflict pre-emption has emerged as the dominant analytical framework, with courts frequently finding that state laws restricting arbitration frustrate the FAA's purpose of placing arbitration agreements on equal footing with other contracts.³⁷

The theoretical underpinnings of pre-emption in arbitration reflect broader tensions in federalism.³⁸ Proponents of expansive pre-emption emphasize the need for uniformity in interstate commerce and argue that allowing states to regulate arbitration differently would create inefficiencies and uncertainty for businesses operating across state lines.³⁹ Critics counter that aggressive pre-emption undermines state sovereignty and displaces important consumer protection and employment laws without clear congressional authorization.⁴⁰

Landmark pre-emption Cases and their Impact

The Supreme Court's pre-emption jurisprudence in arbitration has evolved significantly over time, generally trending toward broader federal authority and correspondingly narrower state regulatory power.⁴¹ The 1984 decision in *Southland Corp. v. Keating* established the foundation for FAA pre-emption by holding that the statute applied in state courts and pre-empted conflicting state law.⁴² Justice O'Connor's influential dissent, which argued that Congress intended the FAA to be a procedural statute applicable only in federal courts, highlighted the contentious nature of this interpretive move but failed to persuade the majority.⁴³

In *Doctor's Associates, Inc. v. Casarotto*, the Court further expanded pre-emption by striking down a Montana law requiring arbitration clauses to be typed in capital letters on the first

³⁵ *New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 543 (2019).

³⁶ *Morgan v. Sundance, Inc.*, 142 S. Ct. 1708, 1712 (2022).

³⁷ Ethan Katsh & Colin Rule, What We Know and Need to Know about Online Dispute Resolution, 67 S.C. L. REV. 329, 335 (2016).

³⁸ Richard C. Reuben, Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice, 47 UCLA L. REV. 949, 961 (2000).

³⁹ *Supra* note 27 at 552.

⁴⁰ Katherine Van Wezel Stone, "Rustic Justice: Community and Coercion under the Federal Arbitration Act" (1999) 77 NC L Rev 931, 945.

⁴¹ *Supra* note 16

⁴² *Supra* note 3

⁴³ *Ibid* at 21 (O'Connor, J., dissenting).

page of a contract.⁴⁴ The Court reasoned that by singling out arbitration provisions for special treatment, the state law contravened the FAA's equal-footing principle.⁴⁵ This decision significantly limited states' ability to regulate even the form and notice requirements of arbitration agreements in interstate transactions.

More recently, in *AT&T Mobility LLC v. Concepcion* the Court invalidated a California judicial rule that deemed class action waivers in consumer arbitration agreements unconscionable.⁴⁶ Justice Scalia's majority opinion concluded that requiring the availability of class wide arbitration interfered with the fundamental attributes of arbitration and therefore conflicted with the FAA's objectives.⁴⁷ This controversial 5-4 decision substantially expanded pre-emption by suggesting that even generally applicable state law doctrines like unconscionability could be pre-empted if applied in ways that disproportionately affect arbitration agreements.⁴⁸

The practical impact of these pre-emption cases has been profound. Businesses engaged in interstate commerce increasingly rely on arbitration provisions to manage risk and standardize dispute resolution across multiple jurisdictions.⁴⁹ States, meanwhile, face significant constraints in their ability to regulate arbitration even when motivated by legitimate consumer protection or public policy concerns.⁵⁰ This shift in power has transformed the landscape of interstate trade disputes, with arbitration increasingly becoming the default forum for resolution.⁵¹

The Savings Clause and Its Limitations

Section 2 of the FAA contains a critical qualification known as the "savings clause," which provides that arbitration agreements are enforceable "save upon such grounds as exist at law or in equity for the revocation of any contract."⁵² This provision theoretically preserves state law defense that apply to contracts generally, such as fraud, duress, or unconscionability,

⁴⁴ *Doctor's Associates Inc v. Casarotto*, 517 US 681, 687 (1996).

⁴⁵ *Ibid* at 688

⁴⁶ *Supra* note 5

⁴⁷ *Supra* note 5 at 348

⁴⁸ *Supra* note 5 at 352

⁴⁹ Richard Frankel, "The Arbitration Clause as Super Contract" (2014) 91 Wash U L Rev 531, 534.

⁵⁰ Jean R. Stern light, "Panacea or Corporate Tool? Debunking the Supreme Court's Preference for Binding Arbitration" (1996) 74 Wash U LQ 637, 644.

⁵¹ *Supra* note 19 at 1225

⁵² Federal Arbitration Act, 9 USC, sec. 2 (2012)

suggesting a boundary to federal pre-emption in arbitration.⁵³

However, judicial interpretations have progressively narrowed the practical significance of the savings clause. In *Concepcion*, the Court held that even facially neutral state law doctrines are pre-empted if they disproportionately impact arbitration agreements or interfere with fundamental attributes of arbitration.⁵⁴ This approach was further extended in *Epic Systems Corp. v. Lewis*, where the Court rejected the argument that the National Labor Relations Act created a statutory exception to the FAA for collective action waivers in employment agreements.⁵⁵

The progressive constriction of the savings clause illustrates a significant trend in judicial pronouncements on arbitration: the prioritization of a national, uniform policy favouring arbitration over potentially competing state interests.⁵⁶ While the savings clause continues to provide some protection for traditional contract defense, its application has been increasingly circumscribed by federal courts reluctant to allow state law to impede the enforcement of arbitration agreements in interstate trade.⁵⁷

JUDICIAL TREATMENT OF SPECIFIC ARBITRATION ISSUES

Scope and Interpretation of Arbitration Agreements

Courts have developed specialized interpretive approaches for determining the scope of arbitration agreements in interstate trade disputes.⁵⁸ A central principle, reiterated in numerous judicial pronouncements, is that “any doubts concerning the scope of arbitrable issues should be resolved in favour of arbitration.”⁵⁹ This presumption, articulated in *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, reflects the federal policy favouring arbitration and has profound implications for how courts analyze arbitration

⁵³ *Supra* note 29

⁵⁴ *Supra* note 5

⁵⁵ *Supra* note 9

⁵⁶ Myriam Gilles, “The Day Doctrine Died: Private Arbitration and the End of Law” (2016) U Ill L Rev 371, 380.

⁵⁷ Peter B. Rutledge, “The FAA, Arbitration, and State Pre-emption: A Call for Federal Judicial Restraint” (2002) 23 Berkeley J Emp & Lab L 245, 249.

⁵⁸ Thomas E. Carbonneau, “Arbitration and the U.S. Supreme Court: A Plea for Statutory Reform” (1990) 5 Ohio St J Dips Resol 231, 237.

⁵⁹ *Supra* note 16

clauses in commercial contracts.⁶⁰

The judicial approach to interpretation has typically focused on the text of the agreement, with particular attention to whether the parties used broad or narrow language to define arbitrable disputes.⁶¹ Courts generally treat phrases like “arising out of or relating to” as indicative of a broad arbitration provision that encompasses not only direct contractual claims but also related statutory and tort claims.⁶² Conversely, more restricted language such as “arising under” may be interpreted to limit arbitration to disputes directly involving the contract’s terms.⁶³

This textual focus is complemented by the separability doctrine, established in *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*, which treats arbitration clauses as separable from the underlying contract.⁶⁴ Under this approach, challenges to the validity of the contract as a whole are determined by the arbitrator, while challenges specifically directed at the arbitration provision itself remain within the court’s jurisdiction.⁶⁵ This distinction significantly influences how courts allocate decision-making authority between themselves and arbitrators in interstate trade disputes.⁶⁶

Arbitrability: Who Decides?

A recurring question in arbitration jurisprudence concerns who should determine whether a particular dispute is subject to arbitration—courts or arbitrators.⁶⁷ The traditional approach, reflected in *AT&T Technologies, Inc. v. Communications Workers of America*, established that arbitrability is “undeniably an issue for judicial determination” unless the parties clearly and unmistakably provide otherwise.⁶⁸ This position respected the fundamental principle that parties cannot be forced to arbitrate issues they have not agreed to arbitrate.⁶⁹

However, subsequent judicial pronouncements have progressively expanded the

⁶⁰ *Ibid* at 24.

⁶¹ David Horton, “The Federal Arbitration Act and Testamentary Instruments” (2012) 90 NC L Rev 1027, 1036.

⁶² *PaciCare Health Systems Inc v. Book*, 538 US 401, 406-07 (2003).

⁶³ *Cape Flattery Ltd v. Titan Maritime LLC*, 647 F3d 914, 922 (9th Cir 2011).

⁶⁴ Supra note 10

⁶⁵ *Ibid* at 404.

⁶⁶ *Buckeye Check Cashing Inc v. Cardegnia*, 546 US 440, 445-46 (2006).

⁶⁷ *AT&T Technologies Inc v. Communications Workers of America*, 475 US 643, 649 (1986).

⁶⁸ *First Options of Chicago Inc v. Kaplan*, 514 US 938, 944 (1995).

⁶⁹ Supra note 29

circumstances under which arbitrators, rather than courts, decide arbitrability questions.⁷⁰ In *First Options of Chicago, Inc. v. Kaplan*, the Supreme Court confirmed that parties could delegate arbitrability determinations to arbitrators through clear and unmistakable agreement.⁷¹ Later, in *Rent-A-Center, West, Inc. v. Jackson*, the Court extended this principle by enforcing a provision that specifically delegated to the arbitrator the authority to resolve challenges to the enforceability of the arbitration agreement itself.⁷²

Most recently, in *Henry Schein, Inc. v. Archer & White Sales, Inc.*, the Court rejected the “wholly groundless” exception that some lower courts had applied to delegation provisions.⁷³ This unanimous decision established that when a contract delegates arbitrability questions to an arbitrator, courts must respect that delegation even if they believe the argument for arbitration is wholly groundless.⁷⁴ These pronouncements collectively demonstrate a judicial willingness to enforce delegation clauses in interstate trade agreements, further expanding the role of arbitrators in determining the parameters of their own jurisdiction.⁷⁵

Class Arbitration: A Contested Terrain

Class arbitration—the aggregation of multiple similar claims within an arbitration proceeding—has emerged as one of the most contentious areas in arbitration jurisprudence.⁷⁶ The Supreme Court’s pronouncements on this issue have significantly impacted how courts handle class claims in interstate trade disputes, generally restricting the availability of class procedures in arbitration.⁷⁷

In *Stolt-Nielsen S.A. v. Animal Feeds International Corp.*, the Court held that a party cannot be compelled to submit to class arbitration unless there is a contractual basis for concluding that the party agreed to do so.⁷⁸ Silence in the agreement regarding class proceedings was

⁷⁰ *Supra* note 30

⁷¹ *Stolt-Nielsen SA v. Animal Feeds International Corp.*, 559 US 662, 684 (2010).

⁷² *Supra* note 5

⁷³ *Discover Bank v. Superior Court*, 36 Cal. 4th 148, 162 (2005), overruled by *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011).

⁷⁴ *GE Energy Power Conversion France SAS v. Outokumpu Stainless USA LLC*, 140 S Ct 1637, 1644 (2020).

⁷⁵ Thomas J Stipanowich, ‘The Third Arbitration Trilogy: Stolt-Nielsen, Rent-A-Center, Concepcion, and the Future of American Arbitration’ (2011) 22 Am Rev Int’l Arb 323, 328.

⁷⁶ Jean R Stern light, ‘As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?’ (2000) 42 Wm & Mary L Rev 1, 5.

⁷⁷ Richard Frankel, ‘The Arbitration Clause as Super Contract’ (2014) 91 Wash U L Rev 531, 544.

⁷⁸ Brian T Fitzpatrick, ‘The End of Class Actions?’ (2015) 57 Ariz L Rev 161, 169.

deemed insufficient to infer consent.⁷⁹ This decision marked a departure from previous practice where arbitrators had sometimes permitted class arbitration based on broadly worded arbitration clauses.⁸⁰

The Court's subsequent decision in *AT&T Mobility LLC v. Concepcion* went further by pre-empting a California rule that classified most class action waivers in consumer contracts as unconscionable.⁸¹ Justice Scalia's majority opinion characterized class arbitration as inconsistent with the fundamental attributes of arbitration contemplated by the FAA, emphasizing that the switch from bilateral to class arbitration sacrifices the informality, speed, and cost-effectiveness that are arbitration's principal advantages.⁸²

These judicial pronouncements have had profound implications for interstate trade disputes, effectively enabling businesses to insulate themselves from class proceedings through carefully drafted arbitration provisions.⁸³ Critics argue that this approach undermines the effective vindication of small-value claims and allows companies to evade accountability for widespread but individually minor harms.⁸⁴ Defenders counter that it preserves the essential character of arbitration as a streamlined, consent-based alternative to litigation.⁸⁵

STATE COURTS AND THE INTERPRETATION OF THE FAA

Resistance and Accommodation

State courts have exhibited varying degrees of resistance and accommodation to the Supreme Court's expansive interpretation of the FAA.⁸⁶ Some state judiciaries have openly questioned the doctrinal foundations of FAA pre-emption while nevertheless reluctantly applying binding precedent.⁸⁷ The California Supreme Court's decision in **Discover Bank v. Superior**

⁷⁹ Myriam Gilles, 'The Day Doctrine Died: Private Arbitration and the End of Law' (2016) U Ill L Rev 371, 381.

⁸⁰ Christopher R Drahoszal & Peter B Rutledge, 'Contract and Procedure' (2011) 94 Marq L Rev 1103, 1121.

⁸¹ Sarah Rudolph Cole, 'Arbitration and State Action' (2005) J Dips Resol 1, 5.

⁸² *Ibid* at 348.

⁸³ Brian T. Fitzpatrick, "The End of Class Actions?" (2015) 57 Arizona Law Review 161, 169.

⁸⁴ Myriam Gilles, "The Day Doctrine Died: Private Arbitration and the End of Law" (2016) University of Illinois Law Review 371, 381.

⁸⁵ Christopher R. Drahoszal & Peter B. Rutledge, "Contract and Procedure" (2011) 94 Marquette Law Review 1103, 1121.

⁸⁶ Sarah Rudolph Cole, "Arbitration and State Action" (2005) Journal of Dispute Resolution 1, 5 (discussing state court resistance to FAA pre-emption).

⁸⁷ David S. Schwartz, "State Judges as Guardians of Federalism: Resisting the Federal Arbitration Act's Encroachment on State Law" (2004) 16 Washington University Journal of Law & Policy 129, 141.

Court (2005), later overruled by Concepcion, exemplified this resistance by attempting to preserve state unconscionability doctrine in the face of federal pre-emption claims.⁸⁸

Other state courts have sought to carve out exceptions or limit the scope of federal pre-emption through creative statutory interpretation.⁸⁹ For instance, some state courts have interpreted the FAA's "involving commerce" requirement narrowly to preserve state regulation of purely local transactions.⁹⁰ Others have expansively construed the savings clause to accommodate state public policy concerns within the federal framework.⁹¹

These strategies reflect an ongoing tension between state sovereignty and federal supremacy in the regulation of arbitration agreements.⁹² While state courts must ultimately yield to binding Supreme Court precedent, their interpretive approaches reveal a complex interplay between federal mandates and local policy preferences.⁹³ This dynamic continues to shape the practical implementation of arbitration principles in interstate trade disputes.⁹⁴

Substantive and Procedural Differences Across Jurisdictions

Despite the federalization of arbitration law through expansive pre-emption, significant substantive and procedural differences persist across state jurisdictions.⁹⁵ These variations influence how arbitration agreements in interstate trade are interpreted and enforced, creating complexity for businesses operating in multiple states.⁹⁶

Substantively, states differ in their application of general contract principles to arbitration

⁸⁸ *Discover Bank v. Superior Court*, 36 Cal. 4th 148, 162 (2005), overruled by *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011).

⁸⁹ Michael H. LeRoy, "Judicial Enforcement of Pre-Dispute Arbitration Agreements: Back to the Future" (2007) 58 Alabama Law Review 537, 548.

⁹⁰ Jonathan R. Waldron, "The 'Involving Commerce' Requirement of the Federal Arbitration Act" (2008) 21 Loyola Consumer Law Review 29, 35.

⁹¹ Christopher R. Drahoszal, "Federal Arbitration Act Pre-emption" (2004) 79 Indiana Law Journal 393, 414 (exploring state efforts to utilize the savings clause).

⁹² Stephen J. Ware, "The Centrist Case for Enforcing Adhesive Arbitration Agreements" (2017) 23 Harvard Negotiation Law Review 29, 44.

⁹³ Thomas E. Carbonneau, "Arbitration and Federalism: The Role of State Law" (1997) 65 University of Cincinnati Law Review 873, 879.

⁹⁴ Peter B. Rutledge, "Arbitration and the Federal Balance" (2010) Journal of Dispute Resolution 1, 12.

⁹⁵ Thomas E. Carbonneau, "Federalism and the Federal Arbitration Act: A Policymaker's Guide" (2005) 79 Tulane Law Review 1227, 1230.

⁹⁶ Richard C. Reuben, "State Courts and the Federalization of Arbitration Law" (2006) 33 Pepperdine Law Review 647, 650.

agreements.⁹⁷ Some jurisdictions apply unconscionability doctrine more aggressively than others, particularly in consumer and employment contexts.⁹⁸ States also vary in their treatment of non-signatories to arbitration agreements, with some more readily extending arbitration obligations to corporate affiliates or beneficiaries under theories like equitable estoppel or third-party beneficiary status.⁹⁹

Procedurally, state courts exhibit different approaches to staying litigation pending arbitration, compelling arbitration, and reviewing arbitral awards.¹⁰⁰ Some states have adopted specialized procedures for arbitration-related motions, while others handle them under general civil procedure rules.¹⁰¹ These procedural variations can significantly impact the efficiency and predictability of arbitration enforcement in interstate disputes.

The persistence of these differences underscores the limits of federal pre-emption and highlights the continuing relevance of state law in the arbitration landscape.¹⁰² While the FAA establishes a national policy favouring arbitration, the practical implementation of this policy remains influenced by state-specific legal traditions and policy preferences.¹⁰³

CONTEMPORARY TRENDS AND EMERGING ISSUES

The Impact of Recent Supreme Court Decisions

Recent Supreme Court pronouncements continue to reshape the landscape of arbitration in interstate trade disputes.¹⁰⁴ The Court's decision in *Epic Systems Corp. v. Lewis*, reinforced the FAA's primacy by holding that neither the savings clause nor the National Labor Relations Act protected collective action waivers in employment arbitration agreements from enforcement.¹⁰⁵ This 5-4 decision, which split along ideological lines, illustrated the continuing controversy surrounding federal arbitration jurisprudence.

⁹⁷ Jean R. Stern light, "Panacea or Corporate Tool? Debunking the Supreme Court's Preference for Binding Arbitration" (1996) 74 Washington University Law Quarterly 637, 653.

⁹⁸ David Horton, "Unconscionability Wars" (2012) 106 Northwestern University Law Review 387, 394.

⁹⁹ GE Energy Power Conversion France SAS v. Outokumpu Stainless USA, LLC, 140 S. Ct. 1637, 1644 (2020) (discussing equitable estoppel and non-signatory enforcement).

¹⁰⁰ Stephen J. Ware, "Vacating Arbitration Awards: A National Survey of State Laws" (1995) 23 Hofstra Law Review 463, 470.

¹⁰¹ Christopher R. Drahoszal, "Federal Arbitration Act Pre-emption" (2004) 79 Indiana Law Journal 393, 411.

¹⁰² *Supra* note 27 at 555

¹⁰³ Sarah Rudolph Cole & Kristen M. Blankley, "Arbitration and Federalism: The Return of the Anti-Arbitration Doctrine" (2010) Journal of Dispute Resolution 1, 8.

¹⁰⁴ Thomas V. Burch, "Regulating Mandatory Arbitration" (2019) Wisconsin Law Review 1, 3.

¹⁰⁵ *Supra* note 9

In *New Prime Inc. v. Oliveira*, however, the Court unanimously adopted a more textually constrained approach to the FAA, holding that the statute's exemption for "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce" applied to independent contractor agreements with transportation workers.¹⁰⁶ This decision signalled potential limits to the expansive application of the FAA, at least for certain categories of workers involved in interstate trade.

Most recently, in *Morgan v. Sundance Inc.*, the Court unanimously rejected a waiver test that required a showing of prejudice, emphasizing that courts should not create arbitration-specific procedural rules.¹⁰⁷ This decision potentially marks a modest retreat from the Court's previously expansive approach to favouring arbitration, suggesting a more balanced application of traditional legal principles to arbitration agreements.

These recent pronouncements reflect a complex and evolving judicial attitude toward arbitration in interstate trade disputes.¹⁰⁸ While the Court continues to enforce arbitration agreements in accordance with their terms, there are signs of increased attention to textual limits and a willingness to apply traditional legal principles without special solicitude for arbitration.

Technology and Online Dispute Resolution

The rise of digital commerce has introduced new dimensions to arbitration in interstate trade disputes.¹⁰⁹ Online dispute resolution (ODR) platforms increasingly supplement or replace traditional arbitration procedures, offering technological solutions to resolve conflicts arising from interstate e-commerce.¹¹⁰ These developments raise novel questions about the application of existing arbitration jurisprudence to digital contexts.

Judicial pronouncements on ODR remain limited, but emerging cases suggest courts will generally enforce online arbitration agreements while scrutinizing their formation and

¹⁰⁶ *Supra* note 35

¹⁰⁷ *Morgan v. Sundance, Inc.*, 142 S. Ct. 1708, 1712 (2022).

¹⁰⁸ Imre S. Szalai, "The Supreme Court's New Arbitration Trilogy: Epic Systems, New Prime, and Henry Schein" (2019) 13 Harvard Law & Policy Review 321, 323.

¹⁰⁹ Amy J. Schmitz, "Expanding Access to Remedies through E-Court Initiatives" (2019) 67 Buffalo Law Review 89, 91.

¹¹⁰ Ethan Katsh & Colin Rule, "What We Know and Need to Know about Online Dispute Resolution" (2016) 67 South Carolina Law Review 329, 335.

presentation.¹¹¹ Issues of notice and mutual assent have proven particularly salient, with courts examining whether online terms and conditions adequately disclosed arbitration provisions to consumers.¹¹² The “clickwrap” versus “browse wrap” distinction has emerged as an important analytical framework, with courts generally enforcing the former while subjecting the latter to greater scrutiny.¹¹³

The integration of artificial intelligence into arbitration processes presents additional challenges for judicial oversight.¹¹⁴ Questions about algorithmic transparency, procedural fairness, and the preservation of human judgment in decision-making will likely generate new judicial pronouncements as these technologies become more prevalent in resolving interstate trade disputes.¹¹⁵

Arbitration and Constitutional Rights

The intersection of arbitration and constitutional rights continues to generate significant judicial discourse.¹¹⁶ Critics argue that mandatory arbitration may effectively deprive parties of constitutional protections such as the right to a jury trial, due process guarantees, and equal protection.¹¹⁷ These concerns are particularly acute in contexts involving power imbalances, such as consumer and employment relationships that cross state lines.¹¹⁸

Courts have generally rejected constitutional challenges to arbitration agreements in private commercial disputes, holding that state action is absent when private parties agree to arbitrate.¹¹⁹ However, some judicial pronouncements suggest potential constitutional limits on arbitration enforcement.¹²⁰ In *Rent-A-Center, West, Inc. v. Jackson*, Justice Stevens’ dissent argued that questions of consent to arbitration implicate fundamental due process

¹¹¹ Mark A. Lemley, “Terms of Use” (2006) 91 Minnesota Law Review 459, 469.

¹¹² *Nguyen v. Barnes & Noble Inc.*, 763 F.3d 1171, 1176 (9th Cir. 2014).

¹¹³ *Specht v. Netscape Communications Corp.*, 306 F.3d 17, 22 (2d Cir. 2002).

¹¹⁴ Thomas Schultz, “Online Dispute Resolution: The Future of Justice” (2011) 52 Harvard International Law Journal 257, 265.

¹¹⁵ Orna Rabinovich-Einy & Ethan Katsh, “Digital Justice: Technology and the Internet of Disputes” (2019) 34 Ohio State Journal on Dispute Resolution 611, 614.

¹¹⁶ David S. Schwartz, “Mandatory Arbitration and Fairness” (2009) 84 Notre Dame Law Review 1247, 1250.

¹¹⁷ Richard C. Reuben, “Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice” (2000) 47 UCLA Law Review 949, 961.

¹¹⁸ *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991).

¹¹⁹ Thomas V. Burch, “Regulating Mandatory Arbitration” (2015) Utah Law Review 583, 590.

¹²⁰ *Supra* note 29 (Stevens, J., dissenting).

concerns that courts should not delegate to arbitrators.¹²¹

More recently, some lower courts have shown increased sensitivity to procedural fairness concerns in arbitration, particularly where fundamental rights are at stake.¹²² This emerging judicial attention to constitutional values in arbitration contexts may signal a subtle shift toward greater scrutiny of arbitration agreements that potentially compromise core legal protections, even in interstate commercial relationships.¹²³

BALANCING FEDERAL UNIFORMITY AND STATE AUTONOMY

Federalism Concerns in Arbitration Jurisprudence

The tension between federal uniformity and state autonomy represents a central theme in judicial pronouncements on arbitration.¹²⁴ The Supreme Court's expansive interpretation of the FAA has significantly restricted states' ability to regulate arbitration agreements in interstate trade, raising fundamental questions about the appropriate balance of power in a federal system.¹²⁵

Critics of the Court's approach, including some state courts and dissenting justices, argue that it unduly infringes on state sovereignty without clear congressional authorization.¹²⁶ Justice O'Connor's dissent in *Southland* characterized the majority's interpretation as "unfaithful to congressional intent, unnecessary, and inexplicable."¹²⁷ Similarly, Justice Thomas has consistently maintained that the FAA does not apply in state courts and should not pre-empt state law.¹²⁸

Defenders of federal pre-emption counter that national uniformity in arbitration enforcement is essential for interstate commerce.¹²⁹ They argue that allowing states to impose varying

¹²¹ *American Express Co. v. Italian Colours Restaurant*, 570 U.S. 228, 240 (2013) (Kagan, J., dissenting).

¹²² Jean R. Stern light, "Rethinking the Constitutionality of Mandatory Arbitration" (2003) 32 Hofstra Law Review 109, 113.

¹²³ David S. Schwartz, "Mandatory Arbitration and Fairness" (2009) 84 Notre Dame Law Review 1247, 1250.

¹²⁴ Richard C. Reuben, "Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice" (2000) 47 UCLA Law Review 949, 961.

¹²⁵ Richard C. Reuben, "Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice" (2000) 47 UCLA Law Review 949, 961.

¹²⁶ Thomas V. Burch, "Regulating Mandatory Arbitration" (2015) Utah Law Review 583, 590.

¹²⁷ *Supra* note 3 (O'Connor, J., dissenting).

¹²⁸ *Supra* note 18 (Thomas, J., dissenting).

¹²⁹ Stephen J. Ware, "The Politics of Arbitration Law and Centrist Proposals for Reform" (2016) 53 Harvard Journal on Legislation 711, 720.

restrictions on arbitration would undermine the efficiency and predictability that make arbitration valuable for businesses operating across state lines.¹³⁰ This perspective prioritizes the needs of the national market over state regulatory autonomy.

This fundamental tension continues to animate judicial discourse on arbitration, with courts struggling to articulate a coherent theory of federalism that accommodates both national commercial interests and legitimate state concerns.¹³¹ The resulting jurisprudence reflects an uneasy compromise that tilts heavily toward federal supremacy while acknowledging limited spaces for state regulation.

Proposals for Reform and Rebalancing

Various stakeholders have proposed reforms to rebalance federal and state authority in arbitration regulation.¹³² Academic commentators have suggested narrowing the scope of FAA pre-emption to better respect state sovereignty, particularly in areas of traditional state concern like consumer protection and employment.¹³³ Others have advocated for congressional intervention to clarify the FAA's reach and explicitly preserve greater state regulatory authority.¹³⁴

Some proposals focus on procedural reforms, such as enhanced disclosure requirements for arbitration agreements or prohibitions on types of provisions deemed unfair.¹³⁵ Others call for substantive limitations on arbitrable issues, particularly where fundamental rights or public interests are at stake.¹³⁶ These approaches seek to preserve the benefits of arbitration while addressing concerns about fairness and access to justice.

Judicial pronouncements have occasionally acknowledged the need for recalibration. Justice Ginsburg's dissent in Epic Systems called for congressional attention to the Court's "exorbitant application of the FAA," suggesting that legislative intervention might be

¹³⁰ *Supra* note 16

¹³¹ Jean R. Stern light, "Panacea or Corporate Tool? Debunking the Supreme Court's Preference for Binding Arbitration" (1996) 74 Washington University Law Quarterly 637, 643.

¹³² *Supra* note 123 at 1262.

¹³³ Richard C. Reuben, "Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice" (2000) 47 UCLA Law Review 949, 984.

¹³⁴ Stephen J. Ware, "The Politics of Arbitration Law and Centrist Proposals for Reform" (2016) 53 Harvard Journal on Legislation 711, 734.

¹³⁵ Jean R. Stern light, "Disarming Employees: How American Employers Are Using Mandatory Arbitration to Deprive Workers of Legal Protection" (2015) 80 Brooklyn Law Review 1309, 1333.

¹³⁶ Thomas V. Burch, "Regulating Mandatory Arbitration" (2015) Utah Law Review 583, 606.

necessary to restore an appropriate balance.¹³⁷ Even some majority opinions have recognized potential limits to federal pre-emption, particularly where arbitration threatens to undermine the effective vindication of federal statutory rights.¹³⁸

These reform discussions reflect ongoing efforts to reconcile competing values in arbitration jurisprudence. While no consensus has emerged, the persistent calls for rebalancing suggest that the current allocation of authority between federal and state institutions remains contested and potentially unstable.

CONCLUSION

Judicial pronouncements on arbitration in interstate trade disputes have fundamentally transformed the legal landscape, establishing a robust federal framework that generally favors arbitration enforcement while limiting state regulatory authority.¹³⁹ This jurisprudential evolution reflects broader tensions in federalism and raises important questions about the appropriate balance between uniformity in commercial law and respect for state sovereignty.

The Supreme Court's expansive interpretation of the FAA has created a national policy that prioritizes arbitration as an efficient mechanism for resolving interstate trade disputes.¹⁴⁰ This approach has provided businesses with greater certainty and predictability in commercial relationships that cross state lines, potentially reducing transaction costs and facilitating interstate commerce.¹⁴¹ However, it has also generated significant criticism for potentially undermining important state consumer protection and employment laws without clear congressional authorization.¹⁴²

As commerce increasingly moves online and new technologies reshape dispute resolution processes, courts will face novel questions about the application of established arbitration principles to emerging contexts.¹⁴³ These developments will likely generate new judicial pronouncements that continue to refine the balance between federal and state authority,

¹³⁷ *Supra* note 9 (Ginsburg, J., dissenting).

¹³⁸ *Supra* note 8

¹³⁹ *Supra* note 123 at 1262.

¹⁴⁰ *Supra* note 5

¹⁴¹ *Supra* note 16

¹⁴² *Supra* note 9

¹⁴³ Richard C. Reuben, "Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice" (2000) 47 UCLA Law Review 949, 987

contractual autonomy and regulatory oversight, and efficiency and fairness in arbitration.

The ongoing dialogue between federal and state courts, legislative bodies, and private stakeholders suggests that arbitration jurisprudence remains in flux despite decades of development.¹⁴⁴ Future judicial pronouncements will continue to grapple with the fundamental challenge of constructing a coherent and balanced framework for arbitration in interstate trade disputes—one that respects both the national interest in commercial uniformity and the legitimate role of states in protecting their citizens.¹⁴⁵

¹⁴⁴ *Supra* note 35

¹⁴⁵ Thomas V. Burch, “Regulating Mandatory Arbitration” (2015) Utah Law Review 583, 606.

REVEALING WOMEN MARGINALISATION IN THE INDIAN JUDICIARY: OBSTACLES AND POSSIBILITIES FOR PARITY

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Abstract

The judiciary is one of the four pillars which make India one of the world's largest democracies. However, gender discrimination is deeply rooted in the Indian judicial system. The research, with the help of doctrinal methodology, delves into the current representation of women in the Indian judiciary and the obstacles faced by females in getting equal representation in judicial roles. The research analyses the development of the Indian judiciary over time and delves into societal barriers of caste, class and religion, which impede the judicial prospects of women in India. Case studies of gender stereotyping in Indian courts are also highlighted in the research. The research emphasises the integration of different approaches at institutional, societal, and political levels for the inclusivity and diversity of women in the Indian judicial system. The research aims to discuss government policies, gender awareness training initiatives, and guided mentorship, which can help overcome gender-based bias in India's judicial system. Lastly, the research contributes towards the ongoing debate on gender disparity and aims to provide suggestive measures for gender equality through coordination and the establishment of an equitable legal framework for all within the Indian judiciary.

Keywords: *Gender Disparity, Indian Judiciary, Women Marginalization, Inequality.*

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INTRODUCTION

"A woman cannot be herself in the society of the present day, which is an exclusively masculine society, with laws framed by men and with a judicial system that judges feminine conduct from a masculine point of view."

- Henrik Ibsen¹

Democracy is inherently characterised by diversity. But in many democracies, including India, the court is not a true reflection of the nation's vast diversity. Most judges in India's High Courts and Supreme Court are upper-caste men. This unifies the viewpoint on justice and the law. Structural obstacles that affect female judges and solicitors include discrimination, harassment, gender stereotypes, and a lack of institutional and infrastructural assistance.² There are various axes of oppression to struggle with, including caste, class, sexual orientation, and religious identity.³ The Indian judiciary has a long and rich history, but the inclusion of women in judicial roles has been limited.⁴ The Indian judicial system is predominantly male-dominated. When Cornelia Sorabji became the first woman to be registered in the Indian legal profession, she was restricted from practising in the Indian courts of British India, marginalising her achievements. The Legal Practitioners Women Act in 1923 gave women the opportunity to pursue legal careers. However, to date, women face many challenges while pursuing a career in the legal field.⁵ The women need not be only symbolised in judicial roles. Their inclusion shall provide gender perspectives in the courts, which is essential for holistic justice. In 1989, Justice Fatheema Beevi made history as the first woman judge to be appointed to the Supreme Court. This significant milestone occurred nearly four decades after the establishment of the Apex Court.⁶ Female advocates have been ostracised from important cases and law firms over a long period of time. Given that women make up about half of the population in the nation, the chief justice of India recently raised concerns regarding the marginal representation of women as High Court judges on the event

¹ Henrik Ibsen, Quotable Quote, available at: <https://www.goodreads.com/quotes/1006590-a-woman-cannot-be-herself-in-the-society-of-the> (last visited on: 23.03.2025)

² Nancy Shonak, "State of Women in Judiciary" 1 (3) Nyaayshastra L. Rev. (2020).

³ Gita Mittal and Dipika Jain, "Women's Equal Representation in the Higher Judiciary: A Case for Judicial Diversity in India" 47 (2) *International Journal of Comparative and Applied Criminal Justice* 185-199 (2023)

⁴ Vartika Vaishnavi, "Gender Disparity in the Indian Judicial System" 2 *Jus Corpus Law Journal* (2021).

⁵ Geetali Tilak, "Women Empowerment Issues, Challenges and Activism of Indian Judiciary" 11 (1) *International Journal of Disaster Recovery and Business Continuity* 475-484 (2020).

⁶ Animesh Kumar, "Women in Contemporary Indian Society: An Overview", 10 (1) *Chhattisgarh Law Journal* 90-93 (2024); available at: <https://ssrn.com/abstract=5022915> (last visited on: 23.03.2025)

of International Day of Women Judges celebrated on 10th March. The unequal representation affects the judicial outcome in Indian courts.

The proposed article seeks to gain insight into the chief exponents;

1. To analyse women's representation in the Supreme Court, high courts and subordinate courts in India.
2. To examine how gender biases and stereotypes influence judgements, particularly cases related to sexual harassment and gender-based violence.
3. To explore the socioeconomic challenges and discriminations faced by women in the Indian judiciary.
4. To propose policy reforms and legislative amendments for equal inclusion of women in judicial roles.

The research methodology includes a qualitative approach to examine gender discrepancy in the Indian judiciary. The research methodology incorporates doctrinal research and uses secondary sources with an extensive review of the literature related to gender inequality in the Indian judicial system. It includes reports from legal bodies, journal articles, previous case studies, and comparisons with other nations regarding the status of women's representation in judicial roles. A detailed study of the judicial decisions reflecting gender disparity and stereotypes in the judgments.

CONSTITUTION OF INDIA AND GENDER JUSTICE

The Indian Constitution focuses on achieving gender justice and equality. For example, the nation's legislature incorporates and implements the Preamble, the Directive Principles of state policies, Fundamental Rights, and many other rights through various schemes and policies.⁷

Gender equality and discrimination have been attempted to be addressed through notable and influential Acts, a few of them are as follows:

- Sati Abolition Act, 1829

⁷ Narendar Nagarwal, "Gender Justice Ideology and the Indian Constitution: Analysing Equality Rights" 4 *Indian Journal of Law & Justice* 111-123 (2013)

- Widow Remarriage Act, 1856
- The Dowry Prohibition Act, 1961
- The Protection of Women from Domestic Violence Act, 2005
- The Sexual Harassment of Women at Workplace (Prevention, Prohibition And Redressal) Act, 2013
- The Maternity Benefit (Amendment) Act, 2017
- The Surrogacy (Regulation) Act, 2021
- The Constitutional (Seventy-Third Amendment) Act, 1992
- The Constitutional (Seventy-Fourth Amendment) Act, 1992
- Nari Sakti Vandana Adhiniyam, 2023

The provisions of the constitution of India also discuss about gender justice and equality⁸:

- Article 14: The Indian Constitution assures equal protection under the law and equality before the law. In order to put all citizens on an equal footing, the State is permitted to practise positive discrimination thanks to the idea of equal protection under the law.
- Article 15 (1): The Constitution expressly forbids discrimination on the grounds of sex, among other things, under Article
- Article 15 (3): Nonetheless, the State is authorised to create particular provisions for women and children under Article 15(3)
- Article 16: Equality of opportunity is guaranteed to all parties with regard to public employment and appointment to all offices. It specifically outlaws discrimination based on a person's gender.
- Article 39: Ensuring that men and women have an equal means of subsistence and that they receive equal compensation for equal work is covered under Article 39 of

⁸ D. K. Malik, "Women Empowerment and Gender Equality: A Study of Indian Constitution" 9 (4) *Quest Journals Journal of Research in Humanities and Social Science* 27-33 (2021).

the DPSP.

- Article 42: In addition, Article 42 covers maternity leave and fair and humane working conditions.
- Article 15(A) (e): It is the responsibility of every citizen to abstain from actions that diminish the dignity of women.

Despite the existence of constitutional safeguards, legislative rules, and a plethora of proclamations in support of gender equality, cultural views and institutional structures have not appreciably changed.⁹ Constitutional mobilisation is heavily influenced by the wisdom of the people involved.¹⁰

CURRENT STATUS OF WOMEN IN INDIAN JUDICIARY

The two pillars of a man and a woman provide strong support for the social structure. Their duties, obligations, and rights are reciprocal, shared, and only advantageous when carried out in a way that enhances and balances one another. The weight of society cannot be supported by one of the foundations alone, and it is very likely that the entire building will collapse if it grows weak or breaks. Not only that, but gender equality is crucial for empowering women in order to ensure sustainable development and the steady, inclusive, and equitable progress of society. Despite the constitution of India strongly supporting women's equality, the Indian judiciary lacks equal representation of women in various roles. There has been some improvement over the years, but women are underrepresented in the Supreme Court and high courts and require a thorough reform for gender parity in the judiciary.

Women Judges in the Supreme Court

In 1989, Justice M. Fatima Beevi became the first female judge of the Supreme Court, and following her retirement as a Kerala High Court judge, only 11 women have served as Supreme Court judges in India since the court's foundation, and there hasn't even been a female Chief Justice. There were no women judges in the Supreme Court of India from the

⁹ Animesh Kumar and Pradeep Kumar Kulshrestha, "Examining the Contribution of the Judiciary in Promoting Gender Equality in India", 11 *Journal of the Campus Law Centre* 45-58 (2024); available at: <http://dx.doi.org/10.2139/ssrn.5070118> (last visited on: 18.03.2025)

¹⁰ *Ibid* at 57.

1950s to most of the 1980s.¹¹ There are just three female judges on the Supreme Court at the moment: Justices Kohli, B V Nagarathna, and Trivedi. In 2027, Justice Nagarathna is expected to become the first female Chief Justice of the nation.

Women Judges in High Courts

Women make up about 13% of the judges in High Courts. Only 17 of the 37 female candidates for high court judges who were suggested by the Supreme Court Collegium have been appointed so far. Only 107 out of 788 high court judges are women. Till June 2023, there was no women chief justice out of the twenty-five High Courts in India.¹²

Subordinate Courts

The situation in lower courts is much better, where women make up approximately 28% of judges at the district level.

- a) *Advocates*: only 15% of women represent out of 1.7 million advocates.
- b) *Bar Council*: Women make up just 2% of the State Bar Council's elected representatives. There is no female member of the Indian Bar Council.

OBSTACLES REGARDING LIMITED WOMEN REPRESENTATIVES IN INDIAN JUDICIARY

Patriarchal Society: Deeply rooted patriarchy in society is the main cause of women's underrepresentation in the judiciary. Courtroom environments are frequently unfavourable to women. Many women lawyers frequently talk about other painful situations, such as being harassed, having their ideas silenced, and receiving disrespect from the bar and bench.¹³

Opaque Collegium System: Because of the recruitment process that is based on entrance exams, more women are frequently admitted to the lower judiciary. The upper judiciary employs the collegium system, which tends to be more opaque and so more likely to reflect

¹¹ Gauri Kashyap, “4% of Supreme Court Judges of all time are Women” Supreme Court Observer, June 30, 2023; available at: <https://www.scobserver.in/journal/4-of-supreme-court-judges-of-all-time-are-women/> (last visited on: 22.03.2025).

¹² R. Sai Spandana, “Only 107 of 788 Sitting High Court Judges are Women” Supreme Court Observer, June 30, 2023, available at: <https://www.scobserver.in/journal/only-107-of-788-sitting-high-court-judges-are-women/> (last visited on: 16.03.2025).

¹³ P. Ganesan Palsamy and Dinesh Kumar, “Gender Discrimination in Indian Judicial System: Causes and Implications” April *International Journal of Recent Research Aspects* 698-702 (2018).

prejudice.¹⁴ A new system of appointment can change the gender gap between male and female judges.¹⁵

No Reservation for Women: Although numerous states have a reservation policy for women, neither the Supreme Court nor the High Courts do. Assam, Andhra Pradesh, Telangana, Odisha, and Rajasthan are among the states that have profited from this reservation; in these states, women currently make up 40–50% of judicial officials.¹⁶

Lack of Judicial Infrastructure: A further barrier keeping women out of the sector is a lack of judicial infrastructure. Little, cramped courtrooms, a dearth of restrooms, and a lack of childcare facilities enhance the challenges faced by women.

Fewer Women in Litigation: there are still not enough women serving as advocates, which reduces the pool from which female judges can be selected. A significant portion of judges on the high courts and Supreme were elevated from the bar to the bench.

INDIA AND OTHER NATIONS: A COMPARISON OF WOMEN IN JUDICIARY

The majority of women serving as chief justices and leading constitutional courts worldwide are found in Africa. Africa has four out of ten female judges on average, with representation varying from fifty percent in Kenya, Lesotho, and Zimbabwe to 18% in Burkina Faso and 22% in Sierra Leone.¹⁷ Currently, women make up more than 1/3rd of all active judges in the United States. These women preside over US District Courts, US Bankruptcy Courts, US Magistrate Courts, and US Court of Appeals. Of the 17,778 State Court Judges in the United States, 6,056 (34%) are women.¹⁸

The need to maintain gender parity in judicial leadership has also been emphasised by OECD nations as a crucial governance concern linked to justice, openness, and the efficacy of the rule of law. In the OECD-EU countries as of 2018, the proportion of women judges ranged from 81% in Latvia to 33% in the United Kingdom, with 61% of judges being women. The

¹⁴ M. Bhattacharjee, “The Leaking Judicial Pipeline” 4 (5) *Indian Journal of Law & Legal Research* (2022).

¹⁵ Shefali Soni, “Pre and Post Implications of Collegium System in India - A Need of Policy Reforms” 6 (3) *International Journal of Law Management and Humanities* 3749-3759 (2023).

¹⁶ Alok Prasanna Kumar, “Absence of Diversity in the Higher Judiciary” 51 (8) *Economic and Political Weekly* 10-11 (2016)

¹⁷ Gretchen Bauer and Josephine Dawuni (eds.), *Gender and the Judiciary in Africa: From Obscurity to Parity?* (Routledge, 2015)

¹⁸ Gbemende Johnson, “Gender, Diversity, and the United States Judiciary” 61 (41) *SAIS Review of International Affairs* (2021)

number of women judges in supreme courts of OECD-EU countries was 36% as of 2018.

Overall, gender representation in the judiciary has risen by two percentage points on average from 2016 to 2017 in the majority of OECD countries. Turkey witnessed the biggest increase of 5 percentage points in the proportion of female judges.¹⁹

ADDRESSING THE MISOGYNY IN INDIAN COURTROOMS²⁰

In *Sri Rakesh B v. State of Karnataka*²¹, The complainant accused the defendant of rape on false promise of marriage. The Karnataka High Court judge's remark "Unbecoming of Indian women" to fall asleep following a sexual assault, while granting the offender anticipatory bail, unavoidably caused a great deal of controversy and prompted debate on whether he was correct to make the comment and whether it was necessary. Such remarks are regrettably not unusual, even if the judge's remarks are an exception. In numerous instances, the judiciary has assisted in upholding patriarchal norms of behaviour and forcing them upon women.

In *M.I. Shahdad v. Mohd. Abdullah Mir*²², the Jammu & Kashmir High Court ruled that serving the summons exclusively to a male adult family member did not discriminate or disadvantage women. In fact, it relieves the defendant of all responsibilities while taking into account societal norms and conditions. The rationale offered was that women's roles in Indian society were primarily as housewives, and the majority of females were illiterate.

A division bench is made up of P. B. Majmudar and Anoop Mohta JJ. ruled in a divorce suit in 2012 that "women must be like Goddess Sita", meaning that a woman must follow her husband wherever he goes. This suggests, in the modern context, that the wife should resign from her work and blindly follow her spouse to a new place. The wife's income is usually seen as "lipstick money", something to be used sparingly and as a supplement. Appalling comments like "A wife should be minister in purpose, slave in duty, Lakshmi in appearance, Earth in patience, mother in love, and prostitute in bed" have been cited by the courts in

¹⁹ Organisation for Economic Co-operation and Development (OECD), "Government at a Glance 2017," available at: https://www.oecd.org/en/publications/government-at-a-glance-2017_gov_glance-2017-en.html (last visited on: 17.03.2025).

²⁰ Amrita Nair, "Unmasking the Misogyny of Indian Courts" *The Leaflet*, Aug. 6, 2020, available at: <https://theleaflet.in/unmasking-the-misogyny-of-indian-courts/#:~:text=In%202012%2C%20in%20a%20divorce,her%20husband%20wherever%20he%20goes> (last visited on: 23.03.2025).

²¹ Criminal Petition No. 2427/2020; available at: https://www.livelaw.in/pdf_upload/pdf_upload-376983.pdf (last visited on: 24.03.2025)

²² MANU/JK/0041/1966

numerous divorce cases.

In *Hadiya's case*²³, the Kerala High Court stated that a twenty-four-year-old girl is frail and fragile. She is vulnerable to manipulation in a variety of ways. Thus, the most significant life decision she will ever make in her marriage must be decided upon after careful consideration and input from her parents. Judges in sexual assault cases cast the victim's character in disarray and make declarations about what qualities an ideal Indian lady should possess. These limitations on agency and the dehumanisation of mature women are really troubling. However, the Hon'ble Supreme Court set aside the order of the Kerala High Court in the case of *Shafin Jahan v. Asokan K.M.*²⁴. The Court was of the view that assessed the allegation that Hadiya was deceived into marrying her husband, Mr Shafin Jahan and forcibly converted to Islam. The Court found that the allegation, which was made by her parents, was clearly false.

The trial court's sentencing for the rape of another student was suspended by the Punjab and Haryana High Court for three students. The court found that the victim's "misadventures and experiments", her "promiscuity", and the lack of severe violence that followed the sexual assault served as the foundation for suspension of sentence.

In a similar case, the Delhi High Court cleared director Mahmood Farooqui of rape on a visiting researcher during an appeal.²⁵ In doing so, the Delhi High Court interpreted the legal definition of consent, which appears to have been heavily impacted by the victim's prior relationship with Farooqui, her education (making her a "woman of letters"), the perceived weakness of her refusal to engage in sexual activity, and Farooqui's bipolar disorder. In appeal, the Supreme Court refused to interfere with the Delhi High Court verdict.²⁶

IMPACT OF WOMEN IN JUDICIAL ROLES IN INDIA

The importance of women in the Indian judiciary has been proven over time by several examples. The appointment of Justice Fatima Beevi in the Indian Judiciary created opportunities for other women to enter various judicial roles. The landmark judgements by Justice Ruma Pal during her tenure from 2000 to 2006, well known as the "Best Bakery case", Justice Gyan Sudha Sharma's decision which established sexual harassment at the

²³ *Asokan K.M. v. Superintendent of Police*, (2017) 2 KLJ 974

²⁴ (2018) 16 SCC 368

²⁵ *Mahmood Farooqui v. State (Govt. of NCT of Delhi)* 2018 Cri LJ 3457

²⁶ *State (Govt. of NCT of Delhi) v. Mahmood Farooqui* MANU/SCOR/59208/2018

workplace as a breach of fundamental rights and the judgement of Justice Indu Malhotra in “Sabrimala Case” which allowed women of all ages to visit the Sabrimala Shrine are some notable examples which lay down the significance and impact of women in the judicial sphere.²⁷

THE RELEVANCE OF WOMEN’S INVOLVEMENT IN THE JUDICIARY

A more diversified and varied judiciary will result in good institutional improvements. Women judges and advocates can sympathise more with female victims. The inclusion of women in the judiciary and legal profession will significantly enhance justice, which is more balanced.

Increasing the number of women serving on juries may contribute significantly to a more impartial and sympathetic handling of sexual assault cases. Gender sensitisation has been brought up numerous times, particularly in situations where male judges failed to demonstrate compassion for the female victims. If the court is seen as a place of privilege, exclusivity, and elitism, then people will not trust it. Consequently, women’s presence is necessary for the validity of the Indian judicial system. The discrimination faced by women provides a different perspective to the court by a female judge due to the relatability of bias of the society. This enables a sympathetic approach towards female victims. Furthermore, by being present, they effectively convey to the general public that women are capable of holding positions of power and responsibility inside the legal system. Moreover, the presence of female justices might, for instance, advocate for a victim-centric legal system where the rights and demands of the victim take precedence above those of the guilty.²⁸

INITIATIVES FOR WOMEN IN INDIAN JUDICIARY

India has implemented a number of measures to help women join the Indian courts. The formation of the National Commission for Women in 1992 stands out as a significant initiative that advises the government regarding matters related to the status of women in India. The commission safeguards women’s rights and promotes their fair participation

²⁷ Vipra Jain, “Women in Indian Judiciary” 3 (3) *Indian Journal of Integrated Research in Law* 1-8 (2023).

²⁸ Ayesha Malik, “The Importance of Women in the Judiciary to Integrate the Gender Perspective and Bring Equal Visibility” UNODC, available at: <https://www.unodc.org/dohadeclaration/en/news/2021/152/the-importance-of-women-in-the-judiciary-to-integrate-the-gender-perspective-and-bring-equal-visibility-.html> (last visited on: 18.03.2025)

across all sectors, including the judiciary.²⁹ Furthermore, the reservation policy to increase the representation of women by the government is another important step towards equality in the judiciary. Women presently constitute approximately 28% of the total number of judges in India after the implementation of the reservation policy in 1993. Progressive reforms for women pursuing legal careers have been initiated by the Bar Council of India. Scholarships for female students to pursue legal careers are introduced by colleges to motivate female representation in judicial roles. However, more initiatives from the government and from within the judiciary are required to achieve gender equality.³⁰

SUGGESTIONS FOR WOMEN REPRESENTATION IN THE INDIAN JUDICIARY

N.V. Ramana Recommendations³¹:

- a) 50% representation: The former Chief Justice of India expressed his endorsement of 50% female representation in the judiciary.
- b) Legal Education: He has brought attention to the necessity of expanding the representation of women in this field.
 - i. Colleges and universities that offer legal education should set aside a specific number of seats for female candidates.
 - ii. Due to this reservation, 40-50% of state judges in Assam, Andhra Pradesh, Telangana, Odisha, and Rajasthan are now female.
- c) Having access to basic amenities: He stated that there is an urgent need to address the lack of basic amenities, particularly for women.
- d) Need for a distinct entity: He insisted time and time again that the National Judicial Infrastructure Corporation be established as a separate organisation in order to implement inclusive court complexes and establish a comfortable environment in them.

²⁹ Pritam Jyoti Pegu Yasmin and Arkida, "Role of the Indian State and Judiciary in Ensuring Gender Justice: A Paradigm Shift in the Nature of Policy Making and Pro-active Role of the Judiciary" 8 (1) *Palarch's Journal of Archaeology of Egypt/Egyptology* 3675-3687 (2020).

³⁰ Anushka Singh, "Representation of Women in Indian Judiciary" 1 (6) *International Journal of Modern Developments in Engineering and Science* (2022).

³¹ Utkarsh Anand, "Prefer 50% Women at All Judicial Levels: CJI Ramana" *Hindustan Times*, Sept. 2021, available at: <https://www.hindustantimes.com/india-news/prefer-50-women-at-all-judicial-levels-cji-ramana-101630779145103.html> (last visited on: 18.03.2025).

Other Suggestions:

- a) The development of an Indian legal system that is gender-neutral will depend on the maintenance and advancement of gender diversity in the higher judiciary, with a set proportion of its members serving as female judges.
- b) Systematising and emphasising inclusivity is necessary to bring about institutional, social, and behavioural change among India's population.

CONCLUSION

India ranks 129th out of 146 nations in the World Economic Forum³² ranking on Gender disparity because of underperformance in areas of women empowerment, economic advancement, health and education. Spending on programmes tailored to a particular gender has also decreased over time. Therefore, much needs to be done to improve these metrics' performance, as well as the timely and efficient execution of government programmes and policies and the proper, sustainable administration of justice by the courts. Only then will society truly adopt a gender-just faith. In India, where the judiciary follows the "rule of precedents" and the *Doctrine of Stare Decisis*, the orders and judgements passed have a tremendous impact on future judgements. The gender-biased judgments disrupt impartial investigations due to prejudice established. This requires the inclusion of women in judicial roles to sympathise with victims. Nonetheless, gender diversity in Indian judiciary has advanced significantly, but more work remains. In the upcoming years, there is a substantial expectation that the number of women pursuing careers in law will lead to a notable increase in the representation of women in the Indian judiciary. Recognising the Indian judiciary's efforts to advance inclusion and gender diversity is crucial. Nonetheless, further laws and programmes are required to help women advance to positions of leadership in the judiciary. Recognising the difficulties women encounter in the Indian judiciary, such as harassment, stereotyping, and gender bias, is also crucial. To guarantee that all women in the judiciary work in a secure and welcoming atmosphere, these concerns must be resolved. All things considered, women's prospects in the Indian judiciary appear bright. We can expect for a judiciary that truly reflects the Indian populace as more women enter the field and as policies and programmes promoting gender diversity and inclusivity are implemented.

³² World Economic Forum, "Global Gender Gap Report 2024"; available at: https://www3.weforum.org/docs/WEF_GGGR_2024.pdf (last visited on: 11.04.2025)

CORPORATE LIABILITY FOR DATA BREACHES IN INDIA: LEGAL FRAMEWORK, CHALLENGES AND IMPLICATIONS

- Manisha Debnath*

Abstract

In today's digital world, companies collect, store and manage large amounts of user's personal data. They are also vulnerable to data breaches. This type of incident not only harms companies' reputations but also leads to legal and financial consequences. This article explores the legal accountability of corporations in data breach cases, and it also focuses on major regulations such as GDPR, CCPA, and India's DPDP Act of 2023. It explores real-world case studies and legal consequences and penalties. The article highlights the legal impact of breaches and suggests practical strategies for companies to improve their data security and ensure compliance.

Keywords: Data, Breach, Legal Framework, Cybersecurity, Criminal Liability, Civil Liability.

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INTRODUCTION

A data breach occurs when private or sensitive information is accessed by an unauthorized individual. Data breaches have become increasingly frequent since corporations and the government switched from paper to digital storage. A data breach may have serious financial repercussions for businesses, including direct expenses like fines and indirect ones like damaged brand reputation and lost customer trust. Data breaches may be caused by a variety of methods, including malware, phishing, hacking, etc. Sensitive data include financial information like credit card numbers and bank account numbers, protected health information like medical records and personal information, and identifiable information like name, address, date of birth, and social security number. The sectors and the particulars of the breach frequently determine the kind of private information that is targeted. According to a report by the think tank Data Security Council of India (DSCI), India saw an average of 761 cyberattack attempts every minute in 2024, with the healthcare sector being the most common target, followed by the hotel and banking industries.¹

OBJECT OF THE RESEARCH ARTICLE

1. To compare India's practices with other global practices for data breaches and
2. To study how effective the Indian data protection law is in preventing data breaches.

LEGAL FRAMEWORK AND REGULATIONS

General Data Protection Regulation (GDPR)

GDPR is the world's strictest law when it comes to privacy and security. The GDPR was drafted and adopted by the European Union. On May 25, 2018, marked the implementation of the GDPR. The GDPR applies to all businesses, regardless of their location, any businesses that handle and process the personal information of individuals residing in the European Union. Certain types of data are recognised under GDPR, such as ethical and political views, biometrics, etc. Users are granted rights under the GDPR, such as accessing personal data, deleting, restricting, porting data, and objecting to automated data processing. Before collecting data and setting cookies on the user's device, websites must obtain their consent.

¹ Aakash Sharma and Jainam Shah, "2024: A Year of Data Leaks, Espionage, and DDoS Attacks," *India Today*; available at: <https://www.indiatoday.in/india/story/2024-a-year-of-data-leaks-espionage-and-ddos-attacks-ransomware-data-breach-2654230-2024-12-23> (last visited on: 10.04.2025)

General Data Protection Regulation carries seven principles to safeguard user privacy and security:

- 1) *Lawfulness, fairness and transparency*: data processing must adhere to these standards,
- 2) *Purpose limitation*: the reason for processing the data must be valid,
- 3) *Data minimisation*: data will only be collected or processed as much as necessary,
- 4) *Accuracy*: the information gathered must be up to date and correct,
- 5) *Storage restriction*: the amount of personal information required for the intended use shall be kept on file,
- 6) *Integrity and secrecy*: processing must be done in a way that ensures sufficient security, integrity, and confidentiality; *for example* - encryption may be used, and
- 7) *Accountability*: the data controller is accountable for proving compliance with all of these GDPR principles.

GDPR guidelines for processing personal data

- 1) The user's consent must be sought before processing any data,
- 2) Processing is necessary to fulfil or be ready for a contract involving the data subject,
- 3) Processing is necessary for you to fulfil a legal obligation,
- 4) The data must be processed in order to save a life,
- 5) Processing is necessary to carry out an official responsibility or a job of public interest, and
- 6) You have a valid reason to process someone's personal data. This is the most adaptable legal basis, but the "*fundamental rights and freedoms of the data subject*" always take precedence over your interest, particularly when it involves a child's data.

GDPR facilitates two categories of measures that are made possible: technical measures and organisational measures. In technical measures, employees are advised to sign end-to-end encryption contracts with cloud providers or use two-factor authentication. Organisational measures include training workers, establishing a data privacy policy, and restricting access to personal data to only those employees who require it.

GDPR sanctions for non-compliance businesses who break the GDPR rules may be fined up to €20 million, or 4% of their yearly worldwide turnover. This is the highest penalty that may

be imposed for the most serious violations, such as processing data without sufficient customer authorisation or violating the core principles of Privacy by Design.

CALIFORNIA CONSUMER PRIVACY ACT (CCPA)

Most businesses that handle the personal data of Californians are comes under the data privacy rules “the California Consumer Privacy Act”. On January 1, 2020 the CCPA became operative. According to the CCPA, users have right to request that their information be removed, to be informed about and have access to their personal data, and to object to the sale of their personal data. The organization must notify users when their personal data was collected. When a third party sell a user’s personal information to another third party, they are also requiring to notify the user. Website can store cookies on user’s device without their explicit consent. Permission should be required if the user is under sixteen. Penalties under the CCPA are less severe. impose penalties up to \$2,500 for unintentional infractions, \$7,500 per intentional infractions, \$100-750 in civil court damages.

NATIONAL INSTITUTE OF STANDARDS AND TECHNOLOGY FRAMEWORK

“The NIST Cybersecurity Framework” was first introduced in 2014 version 1.0. it included a wide range of guidelines related to cybersecurity practices. The new version 1.1 of the NIST Cybersecurity Framework was introduce by NIST in 2018. Version 1.1 of the NIST Cybersecurity Framework included identity verification, authentication and supply chain risk management. National Institute of Standards and Technology cybersecurity Framework the most substantial revision to the framework. The new draft was publicly introduced in 2023 and finalized in February 2024. The new version includes six essential functions: Identity, Protect, Detect, Respond, Recover and Govern. These six principles were introduced to address privacy issues, emphasize continual improvement, and expand the framework’s reach to encompass businesses of all sizes and sectors. These six functions are further divided into six categories, it covers areas related to cyber, physical and personal security, with an emphasis on business results.² The 108 subcategories are goal-oriented statements that provide direction for creating or improving a cybersecurity program.³ It will reflect current cybersecurity landscape and provide protection to help manage these risks. These six

² National Institute of Standards and Technology (NIST), “Cybersecurity Framework,” available at: <https://www.nist.gov/cyberframework> (last visited on: 10.04.2025)

³ National Institute of Standards and Technology (NIST), “Cybersecurity Framework,” available at: <https://www.nist.gov/cyberframework> (last visited on: 10.04.2025)

principles will be beneficial for industries, such as financial services like banks, by helping them protect their financial data. It will also help the healthcare sector to protect patient's personal data. It will also help to protect intellectual property and secure the industrial system. The NIST Cybersecurity Framework will also safeguard Government Organizations by protecting vital infrastructure and national security. NIST CSF 2.0 introduced six core functions, a good cybersecurity program depends on each function. A new function called "Govern" was added in NIST 1.1. these pillars help understanding, manage and lower cybersecurity risks. The framework offers a holistic approach to cybersecurity risk management. Each element includes key activities that are vital for building an effective cybersecurity strategy.

DIGITAL PERSONAL DATA PROTECTION ACT, 2023

"The DPDP Act" was validated on August 11, 2023. Its main purpose is to safeguard individual's privacy. The European Union's data privacy law, particularly the GDPR, had an impact on the DPDP Act, 2023. However, the DPDP Act was written in accordance with India's data protection regime. "The DPDP Act" will apply worldwide wherever Indian customer's data is collected. It will only apply to personal data that is stored digitally. The Indian Government can impose restrictions on the transfer of data outside India through a notification. "The DPDP Act" also states that anyone can request that their personal data be erased when it is no longer needed. Data fiduciaries must follow this rule unless they are compelled to retain the data for legal or regulatory purposes. However, the government is not obligated to erase personal data in such cases if personal information is necessary for national security, governance, legal requirements, or other statutory needs. Under "the DPDP Act", users have the right to ask data fiduciaries how their data is being processed. User also has the right to request the correction or erasure of their personal data. Additionally, users can nominate a person who will manage data after his death. If a company is processing an individual's data, it should only be for legal purposes and require the customer's consent. To process a minor's data, consent must be obtained from their legal guardian or parents. Lastly, if an individual wants to withdraw their consent for any reason, they have the right to do so. In the case of a data breach, the affected person, along with the Data Protection Board of India and the affected data principal, should be informed. DPDP Act imposes a penalty for non-compliance of up to INR 250 crores; compared to the earlier legislation, the new law has increased the penalty.

Types of Corporate Liability for Data Breaches in India

Under the Information Technology Act, 2000, organisations face both civil and criminal liability if they do not comply with their legal provisions.

Civil Liability

Civil Liability mainly deals with damages and compensation for non-compliance with the IT Act. The IT Act, 2000 addresses “Penalty and compensation for damage to computer, computer system, etc.” under section 43 - (1) if someone gains illegal access to a computer, (2) Downloads, copies or extracts any information from a computer or computer system store in any removal storage medium, (3) introduces a computer or network with a virus, (4) the database stored in the computer system has been damaged, (5) interrupts a computer system, (6) refuse or causes the denial of access to any individual allowed to access any computer system by whatever means, (7) facilitates illegal access to a computer, (8) alters the system to charge services to another person’s account, (9) destroy, deletes or modifies any data stored in a computer resource adversely impacts it in any way, (10) aims to create harm by stealing, conceals, destroying or altering any computer source. He shall be liable for compensating the aggrieved party for damages pay damages by way of compensation to the person so affected.⁴

According to “Section 43A” of the IT Act, 2000, “Compensation for failure to protect data” - if a business handles, possesses or engages with sensitive personal data in its computer system and, due to its negligence, fails to implement and maintain proper security practices, resulting in wrongful loss or wrongful gain, the company must compensate the affected person.⁵

As per “Section 72A” of the IT Act, 2000, “Punishment for disclosure of information in breach of lawful contract” - if a person or an intermediary obtains personal information while performing services under the lawful contract, they cannot share it without consent. If they do so with the intent to cause or knowing it may cause harm or unfair benefit, they shall be punished with imprisonment, a fine up to five lakh rupees, or both.⁶

Criminal Liability

⁴ The Information Technology Act, 2000, Sec. 43

⁵ The Information Technology Act, 2000, Sec. 43A

⁶ The Information Technology Act, 2000, Sec. 72A

Criminal liability includes fines, imprisonment or both under the IT Act, 2000. Section 66 of the IT Act, 2000 deals with computer-related offences - if any person dishonestly or fraudulently conducts any of the computer-related offences listed in section 43, he shall be punished with imprisonment for a term which may extend to three years or with a fine of up to five lakh rupees or both.⁷

As per section 66 C of the IT Act, 2000, Punishment for identity theft - if someone fraudulently or dishonestly uses another person's electronic signature, password or any other unique identification, they shall be punished with imprisonment of either description for a term which may extend to three years and a fine of up to rupees one lakh.⁸

As per section 66 D of the IT Act, 2000, the Punishment for cheating by personation by using computer resource- whoever cheats by using any communication device or computer resource shall be punished with imprisonment, which may extend to three years and a fine up to be one lakh rupees.⁹

As per section 67 of the IT Act, 2000, Punishment for publishing or transmitting obscene material in electronic form - Whoever publishes or shares in the electronic form can be punished by imprisonment of any kind for a maximum of three years and a fine of up to five lakh rupees upon first conviction, and by imprisonment of any kind for a maximum of ten lakh rupees upon second or subsequent conviction.¹⁰

As per section 69 A of the IT Act, 2000, the Power to issue directions for blocking public access to any information through any computer resource - (1) any online material can be blocked by the Central Government or an authorised representative if needed for India's integrity and sovereignty, defence and security of the state, friendly relations with other countries, public order, preventing offences associated with these issues. (2) the blocking procedure must adhere specific rules and safeguards as prescribed by law. (3) any intermediary that disregards the blocking order may be fined and imprisoned for up to seven years.¹¹

REAL WORLD CASE STUDY

⁷ The Information Technology Act, 2000, sec. 66

⁸ The Information Technology Act, 2000, sec. 66C

⁹ The Information Technology Act, 2000, sec. 66D

¹⁰ The Information Technology Act, 2000, sec. 67

¹¹ The Information Technology Act, 2000, sec. 69A

Aadhaar Data Leak, 2023

According to a survey conducted by the US cybersecurity firm Security, the dark web has exposed the personal information of 815 million Indians. The threat actor, identified as “pwn0001”, stole phone numbers, addresses, aadhaar, and passport information for \$80,000. The Central Bureau of Investigation investigated the intrusion. There were indications that the personal information could have come from the Indian Council of Medical Research (ICMR) database. The Government’s digitalisation initiatives have been severely hampered by this hack, which has caused a significant setback.¹²

BharatPay Data Breach, 2022

In August 2022, a major data breach exposed the personal data and transaction details of 37,000 individuals from the digital financial services company BharatPay. The leaked data included employees’ official email addresses, UPI IDs, Phone numbers, passwords and user names from Indian banking and insurance companies. The breach was identified on August 13 by XVigil, CloudSEK’s threat intelligence team. It was discovered on a cybercrime site that BharatPay’s database, which contained transaction data, bank balance, and customer personal information, was leaked from 2018 to August 2022.¹³

LEGAL CONSEQUENCES AND PENALTIES FOR CORPORATE DATA BREACHES

Data Breaches occur, causing businesses and organisations to face legal consequences, reputational harm, a loss of consumer trust, and financial losses. The penalty will be imposed for several factors, including non-compliance with the DPDP Act, sharing user data with third parties without consent, and failing to maintain verifiable records of all user consents if the data fiduciary has financially benefited from the breach. The penalty will depend on the nature, gravity and duration of the violation. When failure to inform of a Data Breach, a fine is imposed up to INR 200crores; if failure to meet additional requirements regarding children, a fine of up to INR 200 crores; when a personal data breach occurs imposed fine of up to INR 250 crores; violation of additional obligations significant data fiduciary fine up to INR 150

¹² DPDP Consultants, "Top 5 Recent Data Breaches in India (2024)", available at: <https://www.dpdpconsultants.com/blog/top-5-recent-data-breaches-in-india-2024-2.php> (last visited on: 10.04.2025)

¹³ Sattrix, "25 Major Cyber Attacks in India that shocked the nation", available at: <https://www.sattrix.com/blog/biggest-cyber-attacks-in-india/> (last visited on: 12.04.2025)

crores. The IT Act also imposes penalties for corporate liability on businesses that fail to defend sensitive data. As per section 43A, 72, 72A, 66, 66C, 66D, 67, 69A of the IT Act, 2000.

RECOMMENDATION

1. Adopt best practices from the cybersecurity laws of other countries to help reduce data breaches and cyberattacks.
2. The IT Act does not clearly define several contemporary cybercrimes, such as online stalking, cyberbullying, identity theft and ransomware attacks. There is a need to amend the Act and introduce new cybersecurity policies to prevent data breaches.
3. Establish strict regulations regarding cross-border data transfers.
4. All companies should provide training to their employees on how to prevent personal data leaks to avoid such incidents.
5. All companies should adopt strong security on their computer software to protect against data leaks and hacks.

CONCLUSION

In the growing digital world, individuals are increasingly shifting to the internet. Data breaches have become common incidents nowadays. Companies and organisations face challenges in mitigating cyber threats. India's legal framework, including the IT Act and the DPDP Act, deals with protecting users' personal data. If any company or organisation fails to comply with its liability, i.e., protecting users' personal data, it may face monetary penalties based on the nature and gravity of the breaches. Adopting data protection practices will not only help minimise legal risks but also foster customer trust, prevent financial losses, and enhance long-term business credibility.

HUMAN RIGHTS IN INDIA: CONTEMPORARY CHALLENGES AND SOLUTIONS

- Vanshika Dhiman*

Abstract

Human rights have evolved as a cornerstone of modern legal and political frameworks, reflecting the global commitment to safeguarding individual dignity and freedoms. In legal terms, Rights are referred to as entitlements or justified claims recognised and protected by law. The Constitution of India guarantees basic human rights to every citizen of the country. This paper delves into the development of human rights, tracing their evolution and intersection with fundamental rights within constitutional law. A particular focus is placed on the Protection of Human Rights Act (PHRA), 1993, a legislation that protects human rights from violation, analysing its role and impact on strengthening human rights jurisprudence in India. The paper highlights key legal precedents that have shaped contemporary human rights discourse. A significant dimension of this study is the evolution of Article 21, which guarantees the right to life and personal liberty. However, the judiciary plays an important role in interpreting these rights. By examining the constitutional provisions that uphold human rights and their judicial enforcement, this study explores the intricate relationship between fundamental rights and human rights. Through a critical analysis of legislative frameworks and case laws, the research seeks to provide a comprehensive understanding of human rights protection mechanisms.

Keywords: Human Rights, Fundamental Rights, UDHR, DPSP, NHRC.

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“Human rights are not a privilege conferred by the government. They are every human being’s entitlement by virtue of his humanity.”

- Mother Teresa

INTRODUCTION

Human rights are inherent and inalienable entitlements that uphold human dignity. They are not granted by the State but exist by virtue of being human. These rights regulate interactions within society, the relationship between individuals and the State, and the State's obligations to its people. Human rights are fundamental principles that protect human dignity, freedom, and equality. These rights define the duties of the State towards individuals and regulate how individuals interact within society. The foundation of international human rights law is the idea that human rights are “universal.” Numerous international human rights conventions, declarations, and resolutions have since reaffirmed this principle, which was first highlighted in the 1948 Universal Declaration on Human Rights¹.

Objectives

- To examine the role of the Protection of Human Rights Act (PHRA), 1993, in strengthening human rights jurisprudence in India,
- To explore the Judicial Interpretation of Article 21 and its expanding scope in safeguarding human rights,
- To assess the effectiveness of Constitutional provisions in ensuring the protection and enforcement of human rights and
- To identify key challenges and opportunities in the constitutional protection of human rights in India.

Research Questions

- What is the relationship between fundamental rights and human rights in the Indian constitutional framework?
- How has the judiciary expanded the interpretation of Article 21 to include new dimensions of human rights?

¹ National Human Rights Commission, *A Handbook on International Human Rights Convention*, (NHRC, New Delhi, 2003)

- What role does the Protection of Human Rights Act (PHRA) 1993 play in safeguarding human rights?
- How can the constitutional framework be strengthened to ensure better enforcement of human rights?

HUMAN RIGHTS IN INDIAN CONSTITUTION

India's commitment to human rights is deeply embedded in its Constitution, particularly in Part III, which guarantees Fundamental Rights. These rights form the foundation of India's human rights jurisprudence and are enforceable by the judiciary. Part III of the Constitution enshrines the judicially enforced fundamental rights, which include all fundamental civil and political rights as well as some minority rights². The DPSP, outlined in Part IV, provides guidelines for the state to create laws and policies that promote justice, equity, and welfare.³

In *Kesavananda Bharati v. State of Kerala*⁴, the Supreme Court observed, "The Universal Declaration of Human Rights may not be a legally binding instrument but it shows how India understood the nature of human rights at the time the Constitution was adopted".

The Supreme Court of India recognizes these fundamental rights as 'Natural Rights' or 'Human Rights'. Individual liberties rely on fundamental rights like equality⁵, freedom⁶, and protection from exploitation⁷. Although the DPSP are not legally binding, they serve as a framework for the state to create policies and programs that promote justice and equity. They play an essential role in influencing laws and policies designed to enhance the quality of life for all individuals, especially those who are less privileged. These principles highlight social equity, economic fairness, and the entitlements to education, employment, and public support, with the goal of fostering a society where opportunities are accessible to everyone and the government gives precedence to welfare over profit. Initiatives such as the Pradhan Mantri Aawas Yojana, Jal Jeevan Mission, Swachh Bharat Mission, Ayushman Bharat, the Mid-Day Meal Scheme, and the National Rural Livelihood Mission (NRLM) demonstrate the state's dedication to human rights by tackling essential socio-economic needs and ensuring that every citizen can access basic services and opportunities to live with dignity.

² Constitution of India, art. 12 - 35

³ Ibid articles 36-51

⁴ AIR 1973 SC 1461

⁵ *Supra* note 2 at art. 14-18

⁶ *Supra* note 2 at art. 19-22

⁷ *Supra* note 2 at art. 23-24

Alongside constitutional protections, various laws have been enacted to safeguard the rights of marginalised communities and ensure their civil and political entitlements are respected. *For example*, the Mental Healthcare Act of 2017, the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Amendment Act, and the Transgender Persons (Protection of Rights) Act demonstrate the government's proactive approach to addressing the distinct challenges encountered by vulnerable and marginalised groups while ensuring their dignity and inclusion within the larger scope of human rights⁸. Collectively, these policies, provisions, and laws strengthen India's dedication to protecting human rights and promoting a just and equitable society.

The following table provides a comparative analysis of fundamental rights enshrined in the Universal Declaration of Human Rights (UDHR) and their corresponding provision in the Indian Constitution.

<i>Name of Rights</i>	<i>Universal Declaration of Human Rights (UDHR)</i>	<i>Indian Constitution</i>
Equality before law	Article 7	Article 14
Prohibition of discrimination	Article 7	Article 15(1)
Freedom of speech and expression	Article 19	Article 19(1)(a)
Freedom of peaceful assembly	Article 20(1)	Article 19(1) (b)
Equality of opportunity	Article 21 (2)	Article 16(1)
The Right to form associations or unions	Article 23(4)	Article 19(1) (c)
Protection in respect of conviction for offences	Article 11 (2)	Article 20 (1)
Protection of slavery and forced labour	Article 4	Article 23

⁸ Bharat Lal and Aiswarya S Kumar, "Institutional Framework for Protection and Promotion of Human Rights in India- a Perspective" 23 *Journal of the National Human Rights Commission*, India 4 (2024)

Freedom of conscience and religion	Article 18	Article 25(1)
Remedy for enforcement of rights	Article 8	Article 32
Right to social security	Article 22	Article 29(1)
Protection of life and personal liberty	Article 3	Article 21

LEGAL SAFEGUARDS UNDER THE PROTECTION OF HUMAN RIGHTS ACT, 1993

The Protection of Human Rights Act, 1993 was enacted to provide a legal framework for safeguarding and enforcing human rights in India. Section 2(d) of the Act defines human rights as:

“The rights relating to life, liberty, equality, and dignity of the individual guaranteed by the Constitution or embodied in International Covenants and enforceable by courts in India.”

This definition highlights the dual foundation of human rights in constitutional provisions and international human rights law, reinforcing India's commitment to human dignity and justice.

The act aims *“to provide for the constitution of National Human Rights Commission, State Human Rights Commissions in States and Human Rights Courts for better protection of human rights and matters connected therewith or incidental thereto.”*⁹

The above definition, however, limits the scope of the functioning of the National Human Rights Commission. Though India ratified the two Covenants, these are the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights¹⁰. While India has ratified the ICCPR and ICESCR, these international covenants do not automatically become enforceable domestically unless incorporated into

⁹ The Protection of Human Rights Act 1993 (Act 19 of 2019)

¹⁰ Devath Suresh, “Human Rights in India” (Atharv Publication, New Delhi, 2019); available at: https://www.researchgate.net/publication/347809368_Human_Rights_in_India (last visited on: 01.03.2025).

Indian law. The PHRA ensures that constitutional rights align with international human rights obligations. Therefore, the rights guaranteed in the Constitution conform to these International Conventions.

NATIONAL HUMAN RIGHTS COMMISSION

At the national level, the National Human Rights Commission was established on 12 October 1993, under the Protection of Human Rights Act of 1993, to fulfil this responsibility to protect the human rights of the people from any violation.

The NHRC's user-friendly 'Online Complaint Management System' (www.hrcnet.nic.in) allows individuals to submit complaints in any of the 22 languages recognised in the Eighth Schedule of the Constitution. This system has made it easier for people to communicate their grievances from anywhere, at any time, and in any language while also enabling the Commission to provide swift justice. The number of complaints lodged with the Commission has shown a decline, dropping from 91,887 cases in 2016-2017 to 76,628 cases in 2019-2020.¹¹

Section 12 of the Act empowers the National Human Rights Commission to perform the following functions:

- a) Investigation Powers: cases of suo motu or upon petition,
- b) Judicial Interventions: Intervene in pending court cases with approval,
- c) Inspection & Oversight: Monitor jails and detention centers,
- d) Review & Policy Recommendations: Comment on legislation, study human rights policies, and suggest improvements,
- e) Public Awareness & Research: Conduct research, publish reports, and promote literacy,
- f) Treaty Evaluation: Examine treaties, recommend implementation and promote research in the field of human rights,
- g) Human Rights Awareness: Educate society through media and seminars.

According to section 13 of the Protection of Human Rights Act 1993, the Commission works like a civil court - summoning witnesses, administering oaths, procuring documents, and

¹¹ National Human Rights Commission of India, *Annual Report 2019-20* (NHRC, New Delhi, 2020); available at: https://nhrc.nic.in/sites/default/files/AR_2019-2020_EN.pdf (last visited on: 12.04.2025)

gathering affidavits. It may also engage central or state investigative agencies with the necessary approvals. The Commission also has the jurisdiction to enter buildings and take papers, and when violations are discovered, to refer cases to a Magistrate for trial, ensuring that its actions are treated as judicial in nature. Moreover, Section 20 states that the Commission shall submit an Annual Report to the Central government as well as to the State government concerned Central and State governments as per the situation. The Commission's annual and special reports will be presented before both houses of the Parliament either it will go to the State legislature as per the circumstances, and focus will also be made on the memorandum, which will focus on the actions that are considered or have been suggested to be considered by the Commission as a recommendation as well as reasons can be given for not accepting these recommendations when it is required.

The Commission acts independently to address situations that might otherwise go unreported by taking suo motu cognisance of human rights violations through media reports. In the Gujarat Communal Riot case, the commission took suo motu action against the media. Reports on communal riots took place in Gujarat in early 2002¹². The Commission later prepared and published the Report on the riot, where the Commission observed that the State had failed in discharging its primary duty and inescapable responsibility to protect the rights to life, liberty, equality, and dignity of all of those who constitute it. The NHRC's report on the Gujarat riots found that the state had failed in its primary duty to protect life, liberty, and dignity, leading to legal and judicial interventions to ensure accountability.

The NHRC seeks to address the concerns of victims by suggesting compensation for them or their next of kin. The commission actively recommends monetary restitution to victims or their next of kin (NoK). In January 2014, approximately ₹180.9 lakh was recommended for relief, including death in judicial custody.¹³ The Madras High Court facilitated compensation payments of almost ₹25 lakh for victims of custodial death of minors.¹⁴

¹² Christophe Jaffrelot, "Communal Riots in Gujarat: The State at Risk" (Heidelberg Papers in South Asian and Comparative Politics, Working Paper No. 17, 2003); available at: https://www.researchgate.net/publication/33429564_Communal_Riots_in_Gujarat_The_State_at_Risk (last visited on: 12.04.2025)

¹³ NHRC, "Recommendations for relief" available at: <https://nhrc.nic.in/press-release/recommendations-relief-> (last visited on: 10.03.2025)

¹⁴ Suchita Shukla, "Madras High Court orders state to pay compensation of ₹25 Lakhs for custodial death of minor", *Verdictum*, 04 Sept 2023; available at: <https://nhrc.nic.in/press-release/recommendations-relief-52> (last visited on: 01.03.2025)

Additionally, the National Human Rights Commission issues key guidelines and recommendations on issues such as health, education, prison reforms, police conduct, food security, and violence against women. Recently, it has advised on prison reforms, the protection of human rights defenders, and matters related to leprosy and mental health. The Commission has played a pivotal role by acting on its own and on complaints in cases of human rights violations.

Thus, the Commission undertakes various functions, including investigating violations, conducting inquiries, advising, raising awareness, fostering collaboration with national and global human rights bodies, engaging with NGOs, and publishing annual reports.

STATE HUMAN RIGHTS COMMISSIONS

State Human Rights Commissions are established under section 21 of PHRA 1993. The Commission is a multimember body consisting of a chairperson and other members. The State Commission is empowered to perform similar functions, which have been entrusted to the National Human Rights Commission. State Commission inquiries into violations of human rights only with respect to matters related to any of the entries enumerated in List II and III.¹⁵ The study of treaties and other international instruments on human rights has been excluded from the purview of the State Human Rights Commission.

Concerning the process for addressing human rights complaints in Union Territories, the Human Affairs Minister suggested that an effective approach could be to expand the jurisdiction of the State Commissions from neighbouring States into the neighbouring Union Territories, similar to what has been done with High Courts.¹⁶

Human Rights Courts

The State Government established these courts in agreement with the Chief Justice of the High Court through a notification designating a court of session in each district as a Human Rights Court under the Protection of Human Rights Act.¹⁷ The State Government designates a Special Public Prosecutor to handle cases in the human rights court according to Section 31 of the Act.

¹⁵ Constitution of India, Schedule VII.

¹⁶ Arun Ray, *National Human Rights Commission of India: Formation, Functioning, and Future Prospects*, Vol-1 (Khama Publishers, 2nd Ed. New Delhi, 2004)

¹⁷ The Protection of Human Rights Act, 1993, section 30

JUDICIAL TRENDS ON HUMAN RIGHTS

Evolution of Article 21: Expanding the Right to Life and Personal Liberty

Article 21 of the Indian Constitution guarantees the right to life and personal liberty to all individuals, including both citizens and non-citizens. Over the years, the judiciary has played a crucial role in expanding its scope to include various socio-economic right essentials for human dignity.”

The noted jurist Dr. Durga Das Basu has referred article 21 as the most luminary provision in the constitution and occupies a pride of place therein, has often been declared as a rather plain statement of the most important of human rights, namely the fundamental rights. It is one of the most pivotal and widely interpreted provisions in Indian jurisprudence.

In *A.K Gopalan v. State of Madras*¹⁸, the very essence of personal liberty had a restrictive interpretation; in the following case, the court embraced a limited view of personal liberty, deciding that every fundamental right should be evaluated separately and could not be interpreted alongside others. Consequently, the ruling stated that due process of law was not required to limit personal freedom. This understanding imposed a major constraint, as it allowed for the enforcement of arbitrary detention laws without necessitating procedural protections for individual rights. However, this case was overruled by *Maneka Gandhi v. Union of India*¹⁹, in which the court interpreted the meaning of the right to life and personal liberty widely. In this case, Maneka Gandhi’s passport was impounded by the government under Section 10(3)(c) of the Passport Act, 1967, citing reasons of public interest. However, she was not given an opportunity to be heard, nor were the reasons for the action disclosed. She challenged this order, arguing that it violated her fundamental rights, particularly Articles Right to Equality, Freedom of Speech & Movement, and Right to Life and Personal Liberty. The court laid down procedural safeguards by preserving the principle of natural justice. The procedure must be just, fair and reasonable. Justice Bhagwati held, “*The expression ‘personal liberty’ in Article 21 is of the widest amplitude and includes rights that have been recognised as distinct fundamental rights under Article 19.*”

¹⁸ AIR 1950 SC 27

¹⁹ AIR 1978 SC 597

In *Olga Tellis v. Bombay Municipal Corporation*²⁰, also known as the “pavement dwellers case”, the Supreme Court held that the right to livelihood is an essential part of the right to life under Article 21. The Court ruled that pavement dwellers cannot be arbitrarily evicted without a fair and just procedure, as depriving them of their livelihood would amount to a violation of their fundamental rights. In another case of *M.C. Mehta v. Union of India*²¹, the “polluters pays principle” and “precautionary principle” were recognized by the Court, emphasising the need for environmental protection as a prerequisite for life. Further, in *K.S. Puttaswamy v. Union of India*²², a nine judges constitutional bench held that “Right to Privacy is a fundamental right which can be traced to Articles 14 and 19.”

The wide variety of rights under Article 21 also includes the right to travel abroad²³, the right against solitary confinement²⁴, the right to legal aid²⁵, the right to speedy trial²⁶, the right against handcuffing²⁷, the right against custodial violence²⁸, right to shelter²⁹, right to health³⁰, right to medical assistance³¹, right to fresh water and air³² etc.

The Indian judiciary has played an instrumental role in broadening the scope of Article 21, transforming it from a narrow guarantee of personal liberty into a dynamic and evolving safeguard of human dignity. By recognising socio-economic rights as essential components of life, the courts have ensured that fundamental rights are not merely theoretical but practical entitlements that adapt to contemporary challenges.”

Expansion of Rights through Public Interest Litigation

Public Interest Litigation is a broadened version of class action within the Common law is a procedural advancement that the Indian judiciary has adopted. The guideline of Locus Standi typically suggests that the individual who is approaching the court must establish his legal

²⁰ AIR 1986 SC 180

²¹ AIR 1987 SC 1086

²² AIR 2017 SC 4161

²³ *Satwant Singh Sawhney v. D. Ramarathnam, Assistant Passport*, AIR 1967 SC 1836.

²⁴ *Sunil Batra v. Delhi Administration*, AIR 1978 SC 1675.

²⁵ *Ramkant v. State of M.P.*, AIR 2012 SC 3034.

²⁶ *Hussainara Khatoon v. Home Secretary, State of Bihar*, AIR 1979 SC 1377.

²⁷ *Prem Shankar v. Delhi Administration*, AIR 1980 SC 1535.

²⁸ *Jogindar Kumar v. State of U.P.*, (1994) 4 SCC 260.

²⁹ *Chameli Singh v. State of U.P.*, (1996) 2 SCC 549.

³⁰ *Consumer Education and Research Centre v. Union of India*, AIR 1995 SC 922.

³¹ *Pt. Parmanand Katara v. Union of India*, AIR 1989 SC 2039.

³² *M.C. Mehta v. Union of India*, AIR 1988 SC 1037.

standing concerning the claim he aims to justify, often regarding a legal right or a legal duty breached by the defendant or respondent resulting in some form of harm or harm to him for which the law offers a solution.

*Hussainara Khatoon (I) v. State of Bihar*³³ was one of the first cases of public interest litigation in India. This case started as a result of several articles that exposed the appalling conditions of Bihar's undertrial inmates that appeared in The Indian Express. In order to draw the Supreme Court's attention to the injustice experienced by these inmates—many of whom had been imprisoned for longer than the maximum sentences allowed for their purported offenses—an advocate filed a writ petition. The Court acknowledged the advocate's locus standi to pursue the petition, leading to a series of rulings that emphasized the fundamental right to a speedy trial as an essential aspect of life and personal liberty.

In *Mumbai Kamgar Sabha v. Abdulhai Faizullahai*³⁴, Justice Krishna Iyer freely extended the locus standi litigation and observed that in our socio-economic environment, the public interest can be promoted through a wide-ranging legislative litigation system, representative litigation, free public litigation and the like...conform to the current justice and consent of ordinary people³⁵.

A major shift that facilitated the growth of PIL is the relaxation of traditional locus standi rules, allowing any individual with a genuine interest in a matter to seek judicial intervention. In several instances, courts have even taken suo motu cognizance of issues based on media reports or public grievances. Furthermore, the judiciary has played a significant role in making Directive Principles more enforceable by integrating them into the scope of Fundamental Rights. The right to life under Article 21, for example, has been expanded to include rights such as free legal aid, dignified living, education, employment, and protection from inhumane treatment, including torture and wrongful confinement.

CHALLENGES IN THE PROTECTION AND IMPLEMENTATION OF HUMAN RIGHTS IN INDIA

³³ (1980) 1 SCC 81.

³⁴ AIR 1976 SC 1455.

³⁵ Dr. Ausaf Ahmad Malik, "Human Rights and Judicial Activism in India" 11 (8) *International Journal of Research in Humanities and Social Sciences* 11 (2021); available at: https://www.ijmra.us/project%20doc/2021/IJRSS_AUGUST2021/IJRSS2Aug21.pdf (last visited on: 12.04.2025)

Judicial Constraints

Denial of 'timely justice' amounts to denial of 'justice' itself. Timely disposal of cases is essential for maintaining the rule of law and providing access to justice which is a guaranteed fundamental right. However, as the present report indicates, the judicial system is unable to deliver timely justice because of huge backlog of cases for which the current judge strength is completely inadequate³⁶.

The issue of judicial backlogs in India is exacerbated by several challenges that hinder the efficient delivery of justice. One of the primary concerns is the inadequate judge strength, as the number of judges remains insufficient compared to the rising volume of cases, leading to an overwhelming burden on the judiciary. Additionally, data collection inconsistencies across various High Courts make it difficult to track pending cases accurately, as different courts follow varied methods of recording case institutions, disposals, and pendency. Another significant factor contributing to delays is the high volume of petty cases, such as traffic violations and cheque-bouncing cases under the Negotiable Instruments Act, which consume substantial judicial resources despite requiring minimal judicial intervention. Moreover, lack of infrastructure and procedural inefficiencies further slowdown case resolution, with courts often struggling with outdated case management systems and frequent adjournments. The absence of strict case-specific timeframes results in prolonged trials, as proceedings are frequently delayed due to procedural complexities and advocate tactics. Lastly, limited adoption of technology in the judiciary has prevented effective case monitoring and faster resolution, despite the potential of digital case management systems and e-courts to streamline judicial processes.

Addressing these challenges requires a multi-pronged approach, including judicial manpower planning, infrastructure development, and procedural reforms to ensure timely justice delivery.

Legislative Limitation - Stronger Enforcement of Mechanism for PHRA, 1993

The Human Rights Commission is expected to be completely independent in its functioning but there is no provision for the independence of the Commission.

³⁶ Law Commission of India, Govt of India, "245th Report on Arrears and Backlogs" (July 2014); available at: <https://cdnbbsr.s3waas.gov.in/s3ca0daec69b5adc880fb464895726dbdf/uploads/2022/08/2022081643.pdf> (last visited on: 12.04.2025)

A major statutory loophole is the absence of a prescribed time limit for SHRCs to submit their annual reports. Additionally, these reports are only provided to the central and state governments, with no legal mandate requiring SHRCs to make them publicly accessible, raising significant transparency concerns. It is observed that only 16% of the total 25 SHRCs (28 states) had uploaded their annual reports for the year 2020-21.³⁷

Many human rights courts at district level but their impact is low due to procedural challenges. Hence, these limitations hinder the enforcement of Human Rights.

RECOMMENDATIONS

To effectively address judicial backlogs and ensure timely justice delivery, several crucial recommendations must be implemented. Doubling the strength of judges is essential to manage the increasing volume of cases and prevent further accumulation of pending matters.

Alongside this, the integration of technology and online case management systems should be prioritised to streamline judicial processes, enable digital tracking of cases, and minimise unnecessary delays.

Courts should also adopt case-specific timeframes, ensuring that trials progress without unnecessary adjournments and that cases are disposed of within a reasonable period.

Additionally, the enforcement of District Human Rights Courts must be made mandatory, as they play a critical role in protecting fundamental rights at the grassroots level.

- To strengthen the human rights framework, the National Human Rights Commission (NHRC) must be equipped with its own enforcement and investigative agency, allowing it to take direct action in cases of rights violations.
- The NHRC must provide mandatory and free legal aid to ensure that victims of human rights violations, particularly marginalised groups, receive proper legal representation. In the long term, education policy must incorporate human rights education, fostering awareness and empowering citizens with knowledge of their rights from an early stage.

³⁷ Nehru and Hitesh Manglani, “Human Rights Protection at State Level: A Critique of the Functioning of SHRCs in India” 5 *Shimla Law Review* 253 (2022); available at: <https://doi.org/10.70556/hpnlu-slr-v5-I1-2022-12>

- The State Human Rights Commissions (SHRCs) must be periodically reviewed and updated, ensuring their structural efficiency and operational effectiveness. A statutory provision must also mandate the submission of annual reports by SHRCs within the specific time frame, ensuring accountability and transparency in their functioning.

CONCLUSION

The constitutional protection of human rights in India has evolved through a combination of legal provisions, judicial activism, and international commitments. The Indian Constitution, particularly through Fundamental Rights and Directive Principles of State Policy, provides a robust framework for safeguarding human dignity, equality, and freedom. The judiciary has played a critical role in expanding the interpretation of Article 21, ensuring that the right to life and personal liberty encompasses a broad spectrum of socio-economic rights, including privacy, education, health, and environmental protection.

The Protection of Human Rights Act of 1993 has further institutionalised human rights protection by establishing National and State Human Rights Commissions. However, challenges such as judicial backlogs, weak enforcement mechanisms, and procedural inefficiencies continue to hinder the effective realisation of human rights. Addressing these issues requires strengthening judicial infrastructure, implementing case-specific timeframes, expanding legal aid, and enhancing transparency in human rights commissions.

Moving forward, a more proactive approach is needed to ensure the full realisation of human rights in India. This includes legislative reforms, technological advancements in the judiciary, and greater public awareness. By reinforcing these mechanisms, India can further strengthen its commitment to human rights and uphold the principles of justice, equality, and human dignity enshrined in its Constitution.

A COMPARATIVE LEGAL ANALYSIS OF LIABILITY AND INSURANCE REGIMES IN SPACE TOURISM: EVOLVING DOCTRINES AND REGULATORY CHALLENGES IN INDIAN NATIONAL LEGISLATION AND U.S. FEDERAL LEGISLATION

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Abstract

Space tourism has emerged as a rapidly evolving industry, raising complex legal and regulatory challenges. This article examines the legal frameworks governing space tourism, focusing on liability, insurance and emerging policies. It evaluates international treaties, national regulations and recent developments in environmental sustainability and governance. The study highlights gaps in the current legal infrastructure and explores emerging trends to ensure safety, accountability and growth in this frontier sector.

Keywords: Space Tourism, Liability, Insurance, Emerging Policies, International Law, National Regulations, Environmental Sustainability

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INTRODUCTION

The commercialization of space activities, particularly space tourism, necessitates robust legal frameworks to address liability, insurance and operational standards. With the advent of private players like SpaceX, Blue Origin and Virgin Galactic, the legal landscape must adapt to ensure safety, sustainability and compliance with international obligations. This paper explores the key legal provisions governing space tourism and examines emerging policies.

INTERNATIONAL LEGAL FRAMEWORKS

Key Treaties- International governance of space activities are primarily based on the following treaties:

Outer Space Treaty (1967)

The Outer Space Treaty (officially known as the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space including the Moon and Other Celestial Bodies) was implemented due to several key factors during the mid-20th century, primarily driven by geopolitical, scientific and security concerns. The Treaty established a legal foundation for activities in outer space, including prohibiting territorial claims and mandating the use of space for peaceful purposes. The Partial Nuclear Test Ban Treaty (1963) was growing emphasis on disarmament.

The Outer Space Treaty extended disarmament principles to space by prohibiting weapons of mass destruction (WMDs) in orbit or on celestial bodies. This treaty mandates following principles.¹

- Establishes principles for peaceful exploration and prohibits national sovereignty claims over celestial bodies,
- Mandates that nations are responsible for regulating private entities operating in outer space, and
- Enforces liability on states for damage caused by their space activities, even if conducted by private actors.

Liability Convention (1972)

¹ Michelle Bentley, *Weapons of Mass Destruction and US Foreign Policy: The Strategic Use of a Concept* (Routledge, London, 2014); available at: <https://doi.org/10.4324/9780203381649>

This convention imposes absolute liability on launching States for damages caused on Earth and fault-based liability for damages in outer space. It also defines procedures for claims and dispute resolution.

Registration Convention (1976)

The Registration Convention (1976), formally known as the Convention on Registration of Objects Launched into Outer Space, is administered by the United Nations Office for Outer Space Affairs (UNOOSA). The UNOOSA headquarters is located at the United Nations Office at Vienna (UNOV) in Vienna, Austria. The primary aim is to enhance accountability and transparency in space activities by creating a centralized registry, promoting peaceful use of outer space and preventing conflicts.

Rescue Agreement (1968)

The Rescue Agreement (1968), officially known as the Agreement on the Rescue of Astronauts, the Return of Astronauts, and the Return of Objects Launched into Outer Space, is one of the key international treaties governing space activities.²

Key Provisions:

1. Rescue of Astronauts (Articles 1 and 2):

If astronauts land accidentally or face an emergency, the host country must provide assistance and promptly notify the launching authority and the United Nations. Astronauts must be safely returned to their home country.³

2. Assistance to Astronauts in Danger (Article 3):

Requires all possible steps to rescue astronauts and render emergency aid if they are in distress, whether on Earth or in outer space.

3. Return of Space Objects (Articles 4 and 5):

Space objects or components that land unintentionally in foreign territories must be returned to the launching authority. The launching state must provide identification details to claim its property.

² Nandasiri Jasentuliyana, *International Space Law and The United Nations*, (Brill, Germany, 2023)

³ *Ibid.*

4. Notification to the United Nations:

Member states must notify the UN Secretary-General about any recovery operations and space objects found.

Moon Agreement (1984):⁴

The Moon Agreement, officially known as the Agreement Governing the Activities of States on the Moon and Other Celestial Bodies, is an international treaty that expands upon the principles of the Outer Space Treaty (1967) concerning the Moon and other celestial bodies. Recognizes the Moon and other celestial bodies as the 'common heritage of mankind.' It prohibits exploitation of resources without international regulatory frameworks, although it lacks widespread ratification.

ITU Regulations:

The International Telecommunication Union (ITU) is a specialized agency of the United Nations (UN) responsible for global telecommunication regulations and the management of radio-frequency spectrum and satellite orbits.

Emerging Frameworks

- Artemis Accords (2020):⁵ The Artemis Accords (2020) are a set of non-binding agreements established by NASA and several partner nations to promote peaceful, cooperative, and transparent exploration of the Moon, Mars, and beyond. They build upon the principles of the Outer Space Treaty (1967) and aim to establish a framework for international collaboration in space exploration, particularly under the Artemis Program, which seeks to land the first woman and the next man on the Moon by 2025. Initially signed by 8 countries (October 2020) including the USA, Australia, Canada, Japan, Luxembourg, Italy, UAE, and the UK. As of now, over 30 countries have joined. A U.S.-led initiative emphasizing lunar exploration and resource utilization with provisions for interoperability and transparency.

⁴ United States Senate, *The Moon Treaty: Agreement Governing the Activities of States on the Moon and Other Celestial Bodies*, (University Press of the Pacific, US, 2005)

⁵ Melissa de Zwart, Stacey Henderson (eds.), *Commercial and Military Uses of Outer Space*, (Springer Nature Singapore, 2021)

- Sustainability Guidelines: UN Space Debris Mitigation Guidelines focus on reducing space debris through best practices, including end-of-life disposal and collision avoidance systems.

NATIONAL REGULATIONS

United States- The U.S. has the most developed legal infrastructure for commercial space activities. The United States leads the forefront in space tourism due to its advanced technological capabilities, private sector innovation, strong regulatory framework and early investments in space exploration.

- FAA (Federal Aviation Administration): Licenses commercial launches and re-entries under the Commercial Space Launch Act (1984). It Sets liability and insurance requirements for operators.
- NASA (National Aeronautics and Space Administration): Facilitates partnerships with private entities and conducts regulatory oversight.
- NOAA (National Oceanic and Atmospheric Administration): Regulates remote sensing satellites.
- FCC (Federal Communications Commission): Allocates radio frequencies for communication and satellite operations.
- CFIUS (Committee on Foreign Investment in the United States): Reviews foreign investments in U.S. space firms for national security risks.

Significance of U.S. Space Regulations:

- Encourages Innovation: Supports private sector growth in space exploration and commercial ventures like satellite internet, space tourism, and resource mining.
- Ensures Safety and Accountability: Provides a legal framework for safety standards, liability rules, and insurance requirements.
- Protects National Interests: Safeguards U.S. technologies and critical infrastructure while promoting international leadership in space.
- Promotes Global Cooperation: Facilitates partnerships under agreements like the Artemis Accords to establish peaceful and sustainable exploration of outer space.

This legal infrastructure allows the U.S. to remain at the forefront of space exploration while addressing emerging challenges such as space debris, resource utilization, and military threats

in orbit.

India- Indian Space Research Organisation (ISRO) and Policies:

- ISRO is the governmental agency responsible for the development and launch of satellites, rocket technology, and space exploration programs in India,
- It has played a pivotal role in establishing India's global presence in space with cost-effective, efficient missions. Some of its landmark achievements include the Chandrayaan (lunar missions) and Mangalyaan (Mars Orbiter Mission), among many others,
- IN-SPACe is the regulatory body formed by the Indian government to promote private sector participation in space activities and streamline licensing and authorization of space-based activities, and
- Its mission is to facilitate private space ventures, provide clearance for launches, and ensure safety and compliance with national and international space law.

Key Policies and Regulations

Space Activities Bill (Draft)⁶

A *draft Space Activities Bill* has been proposed by the government, aiming to provide a comprehensive legal framework for the regulation of space activities in India. It focuses on:

- Licensing for space launches and satellite operations,
- Ensuring safety, security, and environmental protection,
- Addressing the liability and insurance aspects for commercial space operations, and
- Regulating the use of outer space in compliance with international space law (such as the Outer Space Treaty).

Key provisions:

- Ensures that space missions are conducted peacefully, in accordance with international treaties.
- Allows for commercial space operations under the supervision of government agencies like IN-SPACe.

⁶ Department of Space, Government of India, “Draft Space Activities Bill, 2017”, available at: https://prsindia.org/files/bills Acts/bills_parliament/1970/Draft%20Space%20Activities%20Bill%202017.pdf (last visited on: 27.03.2025)

- Establishes insurance norms for commercial launches.
- Establishes penalties and liabilities for non-compliance and damages caused by space activities.

Remote Sensing Data Policy (2011)⁷

- Regulates access to data generated from India's remote sensing satellites,
- Government control is maintained over sensitive and security-related data, while non-sensitive data is made available for commercial use,
- Ensures that data is provided with a clear framework for sharing and use, which is in line with international standards.

National Space Policy (Draft 2020)⁸

The Draft National Space Policy 2020 outlines the strategic goals and **vision** for India's space exploration and commercial space activities over the next decade. Some of the key provisions include:

- Promoting Private Sector Participation: Encouraging Indian private companies to take part in space research, satellite development, launch services, and space tourism,
- Space Exploration: Emphasizing India's human spaceflight program (Gaganyaan), lunar and Mars missions, and satellite constellations,
- International Cooperation: Enhancing India's role in global space governance, space law, and joint missions with other spacefaring nations, and
- Sustainability: Addressing the growing issue of space debris and space traffic management to ensure sustainable use of outer space.

Space Policy for Commercial Launches

- India has created a separate policy to encourage private sector involvement in commercial space launches, and

⁷ National Remote Sensing Centre, "Remote Sensing Data Policy" available at: https://www.nrsc.gov.in/EOP_irspdata_Policy/page_1?language_content_entity=en (last visited on: 27.03.2024)

⁸ Department of Space, Government of India, "Draft Space RS Policy 2020", available at: <https://ispa.space/indian-policies.html#:~:text=The%20Draft%20Space%20Remote%20Sensing,a%20wider%20variety%20of%20stakeholders> (last visited on: 27.03.2025)

- The government has opened up the launch market to private players under the framework of IN-SPACe.
- These private players are responsible for innovative technologies for space missions and launching small satellites, with ISRO providing technical support.
- The policy facilitates joint ventures, partnerships with foreign space agencies, and the development of satellite-based services in India.

LIABILITY AND INSURANCE FRAMEWORKS IN UNITED STATES AND INDIA

India's Liability and Insurance Framework

a) Governing Framework

- International Treaties: India is a signatory to the Outer Space Treaty (1967) and the Liability Convention (1972), holding the state liable for damage caused by space objects.
- Domestic Framework: Currently, India does not have a comprehensive domestic law governing liability for space activities. Instead, regulations are managed through ISRO and IN-SPACe policies.⁹

b) Liability and Insurance Policy

- State Responsibility: The Government of India is responsible for damages caused by space objects launched or operated under its jurisdiction. Private players must indemnify the government under contractual agreements when participating in launches.
- Proposed Space Activities Bill:
 1. Establishes clear liability provisions for private sector participation.
 2. Requires mandatory insurance coverage for third-party liability and potential damage caused during launches or re-entries.
 3. Ensures private operators indemnify the government against claims arising from damages.
- Current Practices:

⁹ Ibid

1. ISRO secures launch insurance for its missions based on project requirements.
 2. Insurance is tailored for each mission, covering risks related to launch, operations, and payloads.
- c) Challenges in India
- No Comprehensive Legislation: Reliance on administrative guidelines rather than codified laws.
 - Private Sector Regulation: The growing participation of private companies like Skyroot Aerospace and Agnikul Cosmos requires stricter legal frameworks.¹⁰
 - Insurance Gaps: Lack of detailed policies for space debris or human spaceflight insurance.

United States' Liability and Insurance Framework-

a) Governing Framework

- Commercial Space Launch Act (1984): Regulates commercial launches and establishes insurance and liability requirements.
- International Obligations: Fulfils obligations under the Outer Space Treaty (1967) and Liability Convention (1972).

b) Liability and Insurance Policy

- **Mandatory Insurance:** Operators must carry insurance coverage for:
 1. Third-party liability (personal injury, property damage). Government property damage (e.g., NASA facilities).
 2. The FAA (Federal Aviation Administration) sets minimum insurance levels based on risk assessments for each launch.
- **Government Indemnification:** The U.S. government provides indemnification above the insurance cap, up to \$3 billion for catastrophic losses.¹¹

¹⁰ Ahaana Chowdhry, “Regulating Private Space Ventures: Analyzing India’s Legal Framework for Commercial Space Launches and Operations” 2 (4) *International Journal of Legal Studies and Social Science* 11- 25 (2024); available at: <https://ijlsss.com/wp-content/uploads/2024/10/2.-Ahaana-Chowdhry.pdf> (last visited on: 27.03.2025)

¹¹ Jon Bateman, “War, Terrorism, and Catastrophe in Cyber Insurance: Understanding and Reforming Exclusions” (Working Paper, Carnegie Endowment for International Peace, October 2020); available at:

- **Operator Protections:** Private companies like SpaceX and Blue Origin are protected from unlimited liability, encouraging innovation in commercial space ventures.
- **Space Tourism Insurance:** New policies specifically cover space tourists and liability for injuries or fatalities during suborbital and orbital flights.

c) **Challenges in the U.S.**

- **Rising Space Traffic:** Increased launches and space debris risks require updated liability frameworks,
- **Human Spaceflight Insurance:** Balancing coverage for space tourists while limiting operator liability is complex, and
- **Foreign Investments:** CFIUS (Committee on Foreign Investment) reviews foreign investments in U.S. space firms to prevent national security risks.

EMERGING POLICIES AND REGULATORY FRAMEWORKS

Regulatory Moratoriums

- The U.S. FAA has extended its regulatory moratorium to allow industry growth before imposing safety regulations and
- International guidelines for space tourism are expected to be finalized by 2028, providing global regulatory clarity.

Environmental Sustainability

- Growing concerns about rocket emissions and space debris have prompted the inclusion of Environmental Impact Assessments (EIA) as licensing requirements, and
- Companies like SpaceX and Blue Origin are developing reusable launch systems to reduce environmental footprints.

COURT CASES AND DAMAGES AWARDED

- *Hughes Aircraft Co. v. United States*:¹² The U.S. government was found liable for patent infringement related to satellite technology, leading to a \$154

<https://carnegieendowment.org/research/2020/10/war-terrorism-and-catastrophe-in-cyber-insurance-understanding-and-reforming-exclusions> (last visited on: 25.03.2025)

¹² 520 U.S. 939 (1997)

million settlement. Though not directly linked to space tourism, it highlights liability for intellectual property in space.

- Virgin Galactic Test Flight Crash (2014): A fatal test flight accident resulted in lawsuits focusing on pilot safety and mechanical failures. Compensation was awarded to the pilot's family, though the exact amount remains confidential. This case emphasized the need for clearer safety regulations and pre-flight testing standards.
- Sea Launch Co. Bankruptcy (2009): Disputes over liability and insurance claims arose after a failed launch, showcasing the financial risks involved in commercial space ventures.

FUTURE DIRECTIONS

- Policy Harmonization: Harmonizing international treaties with national laws to ensure unified standards.
- Liability Revisions: Updating informed consent provisions and insurance requirements to balance innovation with passenger safety.
- Environmental Protocols: Establishing stricter sustainability protocols for space operations.

CONCLUSION

Space tourism represents the next frontier in commercial space activities, requiring comprehensive legal and regulatory frameworks. While international treaties and national regulations provide a foundation, emerging challenges necessitate continuous updates to address liability, insurance, and sustainability concerns. Collaborative efforts at both international and national levels are essential to ensure safe and sustainable growth in this sector.

TRANSGENDER INCLUSION IN INDIA: CHALLENGES IN EMPLOYMENT, EDUCATION, AND HEALTHCARE

- Urvashi Pacharya* & Dr. D. P. Gupta**

Abstract

Despite the progressive arc of constitutional jurisprudence in India, the promise of dignity, equality, and fraternity remains largely illusory for its transgender citizens. Landmark judgments like 'NALSA v. Union of India' and the Transgender Persons (Protection of Rights) Act, 2019 have laid essential legal foundations by recognising self-identified gender and prohibiting discrimination. However, these legal triumphs have not translated into tangible social inclusion. On the ground, transgender individuals continue to face systemic exclusion from education, employment, and healthcare, often compounded by social ostracisation and administrative apathy. Schools remain unsafe spaces, job opportunities are scarce, and medical care is deeply insensitive to gender diversity. The legal recognition of rights, while crucial, often exists in a vacuum when unaccompanied by institutional reform and societal awareness. This article critically examines the challenges of transgender inclusion in India across three core sectors- education, employment, and healthcare—arguing that meaningful inclusion demands structural change, not just symbolic representation. Only by confronting deep-rooted stigma and reshaping systems can the promise of equality become a lived reality.

Keywords: Transgender Rights, Inclusion, Structural Discrimination, LGBTQ+ Rights, Societal Stigma.

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INTRODUCTION

The question of transgender inclusion in India is not merely a legal or policy issue- it is a moral, social, and constitutional imperative that sits at the heart of the Indian Republic's promise of justice, liberty, equality, and fraternity. The rights of transgender persons are not charitable concessions granted by the state but deeply embedded entitlements flowing from the transformative vision of the Constitution. That vision articulated in the preamble and realised through a rights-based framework demands that the state actively dismantle social hierarchies and ensure substantive equality for all citizens, irrespective of gender identity. In this context, the inclusion of transgender persons is not an aspirational goal but a constitutional mandate.¹ It requires a profound restructuring of public institutions, legal mechanisms, and societal attitudes that have, for centuries, erased and marginalised trans lives. In 2014, the Supreme Court of India, in the landmark case of the *National Legal Services Authority (NALSA) v. Union of India*,² finally broke the silence around the state-sanctioned erasure of transgender persons. Recognising that gender identity is intrinsic to one's dignity and freedom, the Court declared that the right to self-identify as male, female, or third gender is protected under Article 21 of the Constitution. This historic ruling was not only a legal milestone but also a moral reckoning, a formal acknowledgement that the Indian state had failed a significant portion of its population by denying them visibility, protection, and dignity. The judgment emphasised that equality must be substantive, not merely formal and that the state had a positive obligation to protect and empower transgender persons affirmatively. However, a decade after NALSA, the question must be asked: has this constitutional recognition permeated the social and institutional fabric of India? Has legal visibility translated into lived equality?

Regrettably, the answer remains largely negative. While the legal landscape has witnessed important developments, such as the enactment of the Transgender Persons (Protection of Rights) Act, 2019, the implementation of these measures has been slow, uneven, and at times even counterproductive. For instance, the very process of issuing a transgender identity certificate under the 2019 Act has been criticised for being invasive, bureaucratic, and

¹ Ministry of Education, *Accessibility Guidelines and Standard for Higher Education Institutions and Universities*, 2022; available at: https://www.ugc.gov.in/pdfnews/8572354_Final-Accessibility-Guidelines.pdf (last visited on: 16.04.2025). See, Purnima Khanna, "Constitutionalism and Human Rights: A Critical Analysis of the Rights of Transgender People in India" 9 (3) *Lentera Hukum* 369 (2022); available at: <https://doi.org/10.19184/ejlh.v9i3.28631> (last visited on: 16.04.2025)

² (2014) 5 SCC 438

contrary to the principle of self-identification upheld by the Supreme Court. More fundamentally, legal reforms have yet to translate into structural change across India's public institutions. Transgender persons remain at the peripheries of mainstream life, often relegated to informal economies, unsafe living conditions, and invisibility within state records³. The discrimination they face is not episodic, but rather structural, systemic, and deeply entrenched. Even where laws exist, the spaces that transgender persons must navigate- schools, workplaces, and healthcare systems- are hostile, alienating, or entirely exclusionary. It is not merely a question of access but one of design. These institutions were never built with gender diversity in mind. Indian bureaucracies, curricula, hiring practices, and hospital protocols operate on a binary understanding of gender that renders transgender persons not only invisible but unintelligible.⁴ They are denied employment for being 'unfit', suspended from schools for being 'disruptive', and often refused medical treatment due to 'confusion' or moral judgment around their identity. In many cases, even basic administrative procedures, such as applying for a ration card, getting a driving license, or enrolling in a government scheme, become sites of humiliation and exclusion for trans persons, who are routinely forced to choose between invisibility and hostility. Importantly, the exclusion faced by transgender persons in employment, education, and healthcare is not compartmentalised. These are not separate injustices occurring in parallel but deeply interconnected outcomes of the same systemic design.

Denial of quality education leads to limited employment opportunities, which in turn results in economic precarity and lack of access to private or even public healthcare. Healthcare discrimination, meanwhile, reinforces educational and economic exclusion by denying the physical and mental well-being necessary to function in society. These exclusions form a closed loop, one that pushes many transgender persons toward informal or exploitative sectors such as begging and sex work by choice, but due to a complete failure of state structures to accommodate their needs. This article seeks to explore the realities of transgender exclusion in India through an interdisciplinary and intersectional lens. Focusing on three foundational pillars- employment, education, and healthcare interrogates how historical prejudices, policy inertia, and institutional apathy converge to produce an enduring

³ Ministry of Health and Family Welfare, *Guidelines for Hormone Therapy and Gender Reassignment Surgery*, 2022, <https://www.mohfw.gov.in/?q=documents%2Fprogram-guidelines> (last visited on: 14.04.2025)

⁴ PIB, Ministry of Health & Family Affairs, "Update on Access to Healthcare Services for Transgender Community," 2023; available at: <https://pib.gov.in/PressReleasePage.aspx?PRID=1982757> (last visited on: 16.04.2025)

regime of marginalisation. It moves beyond a narrow legalistic view of rights and emphasises the need to reimagine our institutions to accommodate, affirm, and celebrate gender diversity. True inclusion requires more than symbolic representation; it calls for a dismantling of the cisnormativity frameworks that dominate Indian society and the construction of new paradigms that centre the voices, needs, and experiences of transgender persons.

EMPLOYMENT: THE ILLUSION OF ACCESS AND THE REALITY OF ERASURE

To speak of employment as a pathway to dignity assumes the existence of equitable access, institutional receptiveness, and socio-cultural recognition. For transgender persons in India, however, employment is not just about financial sustenance- it is a site where visibility, autonomy, and human worth are constantly negotiated, denied, and, in many cases, completely erased. While the mainstream discourse often frames unemployment within the transgender community as a consequence of skill deficits or poverty, such a view is dangerously reductive. It conceals the structural discrimination that operates long before a trans person steps into a workplace and continues long after if they ever do. The Indian labour market, shaped by heteronormative norms and binary gender expectations, has, for the most part, been inhospitable to transgender persons, relegating them to the margins both economically and symbolically.⁵ The 2018 study conducted by the National Human Rights Commission offers a stark illustration of this systemic exclusion: over 92% of transgender individuals in India are excluded from formal employment, with a large proportion forced into begging or sex work, not as a matter of choice, but of survival. These are not merely the outcomes of economic deprivation; they are symptoms of a society that actively polices and punishes gender non-conformity. Trans persons often find themselves excluded from employment opportunities not because they lack skills, qualifications, or motivation, but because their very existence challenges the normative ideals of the workplace. The ideal employees are, in many cases, implicitly cisgender and conform to gender norms in appearance, behaviour, and identity.

Discrimination begins long before hiring. The recruitment stage itself becomes a gatekeeping mechanism. Even when transgender applicants meet or exceed eligibility requirements, they are routinely rejected under the pretext of concerns around ‘cultural fit’, ‘client comfort’, or

⁵ Kerala Development Society, “Study on Human Rights of Transgender as a Third Gender”, (New Delhi, 2017) available at: https://nhrc.nic.in/sites/default/files/Study_HR_transgender_03082018.pdf (last visited on: 14.04.2025)

‘team dynamics’. These coded phrases serve as polite euphemisms for deep-seated transphobia. Application forms that ask only for ‘male’ or ‘female’ end up either excluding trans persons entirely or forcing them to misrepresent themselves to be considered. In interviews, trans individuals frequently encounter invasive questioning, mocking attitudes, or outright hostility. For many, the process itself becomes a site of violence. For those who do manage to find a foothold in the formal economy, the workplace becomes a new battleground. Transgender employees often report chronic misgendering by colleagues and superiors, refusal to acknowledge chosen names, and the denial of even the most basic accommodations, such as access to gender-neutral washrooms. They are excluded from informal networks, ignored during team-building activities, and passed over for promotions or client-facing roles based on assumptions about their ‘presentation’. Moreover, HR departments, where they exist, are rarely trained to address trans-specific concerns, leaving affected individuals without any meaningful grievance redressal mechanism. Such environments foster isolation, mental health strain, and eventually, attrition.

Legal reforms have done little to alter this landscape. The Supreme Court in the NALSA case emphatically directed the state to implement affirmative action, including reservations in public employment. Yet, over a decade later, the contours of this policy remain distressingly vague. There is no consistent national framework for transgender reservations; only a few states, like Tamil Nadu and Karnataka, have made sporadic moves in this direction. The Central Government’s silence on whether trans persons qualify under the Other Backwards Classes category or deserve a separate classification has created bureaucratic confusion and policy paralysis. As a result, even highly qualified transgender individuals are unable to access opportunities in government service, where reservation could have served as a powerful equaliser. In the private sector, inclusion exists mostly in rhetoric. Corporate social responsibility campaigns during Pride Month often showcase superficial support, with rainbow logos and diversity slogans, but fail to implement any real structural changes. There is a glaring absence of anti-discrimination laws that specifically address gender identity in the workplace. Without statutory mandates, companies are not compelled to adopt trans-inclusive policies. Even initiatives aimed at improving transgender employability, such as skilling programs and vocational training, are often marred by a lack of institutional sensitivity, poor outreach, and gender-insensitive pedagogy. For instance, many training centres under the Skill India Mission lack safe spaces, inclusive materials, or instructors trained to interact

respectfully with transgender trainees. Consequently, even well-intentioned schemes collapse at the level of execution.

The need of the hour is not piecemeal reforms or symbolic gestures, but a radical reimagination of the workplace. True inclusion must be built on the foundations of accountability, empathy, and recognition. This involves institutionalising trans-inclusive hiring practices, creating gender-neutral documentation systems, offering medical and mental health support, building grievance redressal bodies that understand gender-based discrimination, and, most importantly, fostering a work culture that sees trans persons not as anomalies but as equals. Sensitisation modules must be embedded into employee onboarding, with regular workshops that address unconscious bias, workplace etiquette, and the nuances of gender identity. Moreover, corporate boards and public service commissions must include transgender representatives who can shape policy from within. Until these systemic changes occur, employment will continue to function as a conditional space for transgender persons, one where survival is possible only at the cost of erasure. The illusion of access must be dismantled, and in its place, we must build structures that affirm, accommodate, and celebrate the full spectrum of gender identity.

EDUCATION: THE FIRST EXCLUSION, THE LAST REFORM

Education, often hailed as the cornerstone of empowerment and mobility, becomes for transgender persons in India a site of early alienation and systemic silencing. While liberal narratives valorise education as the ‘great equaliser’, the reality for gender non-conforming children is far more sinister. For them, school is not a sanctuary of growth and learning, but the first institutional space where their identities are questioned, erased, and punished. It is in classrooms, playgrounds, and morning assemblies that the slow violence of misrecognition begins, where young trans children are told, implicitly and explicitly, that their existence is disruptive, unnatural, or simply unacceptable.

The magnitude of this exclusion is staggering. A joint report by UNESCO and the International Commission of Jurists revealed that over 60% of transgender children drop out of school before completing Class X. These figures are not individual tragedies; they are structural failures. They reflect the incapacity or unwillingness of the Indian education

system to accommodate those who do not conform to its rigid gender framework.⁶ The exclusion operates not only through bullying or violence but through the very design of educational institutions. The school, as a socio-pedagogical space, is structured around the binary of male and female: from uniforms and roll calls to seating plans, restrooms, and sports activities. The infrastructure itself becomes a constant reminder that trans identities are aberrations, not possibilities. Peer violence and bullying are rampant. Trans children are mocked for their mannerisms, clothes, voice, and names. Teachers, who ought to serve as allies and mentors, often participate in this violence, whether through ridicule, neglect, or forced erasure of identity. Many trans students are denied admission altogether, especially if their documents don't match their presentation. In other cases, students are forced to attend school under their assigned-at-birth gender, robbing them of the psychological safety to express themselves authentically. The classroom becomes a crucible of shame, isolation, and internalised trauma. And then there is the curriculum-a text deeply complicit in sustaining heteronormativity.⁷ School textbooks, across state and central boards, rarely mention LGBTQIA+ identities except as footnotes in moral science chapters or under disease-related contexts. Transgender histories, movements, or contributions to Indian society are glaringly absent. The curriculum not only denies visibility to trans persons but actively teaches cis-heteronormative conformity as the moral, natural order of things. There is no engagement with intersectionality, no acknowledgement of the layered marginalisation that Dalit, Muslim, Adivasi, or disabled trans children might face within these already exclusionary spaces.

Legal reforms, though significant, have been largely symbolic. The Right to Education Act, 2009-India's flagship legislation for universal schooling- remains silent on the inclusion of transgender and gender non-conforming children. Its gender provisions assume a cisgender binary and fail to mandate trans-inclusive policies in school enrolment, infrastructure, or curriculum⁸. The NALSA judgment of 2014 recognised the constitutional rights of transgender persons, but the directives around education remain under-implemented. Even the Transgender Persons (Protection of Rights) Act, 2019, which mandates the right to education without discrimination, offers no enforceable mechanisms or timelines.

⁶ Advocates for Justice & Human Rights, "International Commission of Jurists, "International Commission of Jurists Annual Report 2021" available at: <https://www.icj.org/wp-content/uploads/2022/11/FINAL-ICJ-ANNUAL-REPORT-2021.pdf> (last visited on: 17.04.2025)

⁷ Sangama and Aneka, *Access to Healthcare for Transgender Persons in Urban India*, (Bengaluru, 2017)

⁸ Arvind Narrain, *Queer: Despised Sexuality, Law and Social Change*, (Books for Change, 2004)

Administrative hurdles only deepen the crisis. Changing one's gender or name in school records- an essential step for many trans individuals- is often a bureaucratic nightmare, requiring multiple affidavits, psychiatric evaluations, and family approvals. Many school administrators are unaware of the procedures, while others actively obstruct the process. This not only dissuades trans persons from pursuing further education but also exposes them to continuous humiliation during entrance exams, document verification, and interviews. Higher education is equally unwelcoming. Universities rarely have gender-neutral hostels or grievance redressal bodies that can handle gender-based discrimination. Admission forms almost always offer only 'male' and 'female' as gender options, forcing trans applicants to either lie or be misgendered. State and central scholarships for transgender students exist mostly on paper. While several state governments have announced schemes to promote trans education, these are poorly publicised and even more poorly implemented. The lack of data collection on transgender students in schools and universities further invisibilises the community, making it difficult to design targeted interventions or allocate budgets. The UGC and CBSE, despite being apex bodies, have not issued binding guidelines on transgender inclusion, leaving educational institutions to operate in an ethical vacuum. What is required is not tokenism, but structural transformation. Awareness weeks, pride parades, or gender-sensitisation seminars, though helpful, are woefully inadequate without systemic change. Curriculum reform is essential. Indian textbooks must reflect the plural realities of gender and sexuality-not only to validate queer and trans students but to educate their peers.⁹ Educator training is non-negotiable. Teachers must undergo comprehensive modules on gender identity, intersectionality, and inclusive pedagogy. Infrastructure must evolve. Gender-neutral washrooms, flexible uniform policies, safe hostel spaces, and inclusive sports opportunities must become standard, not exceptional.

Moreover, anti-bullying laws must be introduced and enforced within educational institutions, with specific provisions addressing gender-based harassment. Counselling services should be expanded to provide mental health support tailored to the needs of LGBTQIA+ students. School Management Committees and Parent-Teacher Associations must be sensitised and actively involved in creating inclusive school environments. At the higher education level, universities must appoint Diversity and Inclusion Officers tasked with

⁹ Ratna Kapur, "Out of the Colonial Closet, But Still Thinking 'Inside the Box': Regulating 'Perversion' and the Role of Tolerance in Deradicalizing Rights," 2 (2) *NUJS Law Review* 381 (2007); available at: <https://nuslawreview.org/wp-content/uploads/2016/12/ratna-kapur.pdf> (last visited on: 14.04.2025)

ensuring that institutional policies respect and protect transgender students. Ultimately, education must not only tolerate diversity, but it must celebrate it. It must become a space where trans children can dream, thrive, and lead without fear or shame. The failure to provide such a space is not merely an educational failure- it is a constitutional one.

HEALTHCARE: THE POLITICS OF INVISIBILITY AND INSTITUTIONAL VIOLENCE

Suppose education marks the first systemic exclusion, and employment is the prolonged denial of economic agency. In that case, healthcare is where the transgender community in India faces the most visceral and life-threatening erasure- an erasure so complete that it often denies the very existence of transgender persons. It is not simply the absence of care that haunts this landscape; it is the active presence of structural violence, institutional neglect, and epistemic ignorance that transforms healthcare into a site of daily survival rather than holistic well-being. The medical system in India remains profoundly cisnormative, pathologising difference and erasing non-binary and transgender identities from both practice and pedagogy.¹⁰ The dominant framework of healthcare continues to be rooted in rigid, binary understandings of sex and gender, thereby rendering anyone outside this binary as an aberration, unworthy of serious clinical engagement, much less empathetic care. A landmark study conducted in 2017 by Sangama, a Bangalore-based rights organisation, revealed that more than 50% of transgender persons in urban India had experienced direct refusal of treatment from doctors simply because of their gender identity.¹¹ Such refusals are not only breaches of medical ethics; they are constitutional violations-of the right to life, dignity, equality, and non-discrimination as guaranteed under constitution¹². This institutional violence begins at the very base of medical education. MBBS, nursing, and allied health syllabi in India remain almost entirely silent on transgender health. There is minimal to no coverage of gender- affirming care, hormone replacement therapy, transition-related surgeries, or even the mental health vulnerabilities specific to trans persons. Medical students are never trained to approach a transgender patient with cultural humility or clinical

¹⁰ Nirantar Trust, *Gender in the Curriculum: An Analysis of Textbooks in India*, (New Delhi, 2016)

¹¹ Centre for Law and Policy Research, “Transgender Lives, Identity and Community in India: A Report on Transform 2022”, available at: <https://clpr.org.in/blog/transgender-lives-identity-and-community-in-india-a-report-on-transform-2022/> (last visited on: 14.04.2025).

¹² See, Constitution of India, arts. 14, 15, 21

competence.¹³ Instead, they inherit a legacy of pathologisation, where transgender identity is still often framed as a disorder, a deviation, or worse, a behavioural anomaly. In clinical settings, this translates into ridicule, invasive questioning, humiliating examinations, or outright dismissal. Many trans persons report being subjected to irrelevant and deeply personal queries about their bodies, sex lives, or transitions, all couched in voyeuristic curiosity rather than medical necessity.

This erasure has grave consequences. For basic needs, such as STI screening, hormone therapy, or even flu treatment, trans persons are forced to navigate a system that is not only hostile but frequently dangerous. For gender-affirming procedures such as sex reassignment surgeries or facial feminisation surgeries, trans individuals often have no option but to turn to unregulated private clinics, where quality, hygiene, consent protocols, and postoperative care are shockingly inconsistent¹⁴. In the absence of public provisioning, these procedures are not only exorbitantly expensive but also fraught with legal, psychological, and physical risks. Those who can afford it may travel abroad, but they too return to a domestic healthcare system that offers no continuity of care, no post-surgical support, and no legal scaffolding to protect them. The Transgender Persons (Protection of Rights) Act, 2019, in its Section 15, places a legal obligation on the State to ensure access to healthcare for transgender persons, including separate HIV surveillance centres, sex reassignment surgery facilities, and coverage under health schemes. Yet, like many laws in India, implementation remains a ghost story, present on paper but invisible in practice.¹⁵ The Ayushman Bharat Pradhan Mantri Jan Arogya Yojana (AB-PMJAY) was amended in 2020 to include transgender persons and to cover transition-related procedures. Still, ground-level execution has been piecemeal at best. Awareness among healthcare workers, insurance agents, and transgender persons themselves remains abysmally low. The process for enrolment lacks clarity and is often marred by administrative ignorance and social stigma.

¹³ Shamayeta Bhattacharya, Debarchana Ghosh *et.al*, “Transgender Persons (Protection of Rights) Act’ of India: An Analysis of Substantive Access to Rights of a Transgender Community”, 14 (2) *Journal of Human Rights Practice* 676 (2022); available at: <https://doi.org/10.1093/jhuman/huac004> (last visited on: 17.04.2025)

¹⁴ Jayna Kothari “Trans Equality in India: Affirmation of the Right to Self-Determination of Gender” 13 (3) *NUJS Law Review* 549 (2020); available at: <https://nuslreview.org/wp-content/uploads/2020/09/13-3-Kothari-Trans-Equality-in-India.pdf> (last visited on: 17.04.2025)

¹⁵ Rhea & Drishti Saraf, “The Implementation of Law in India,” available at: <https://www.jlsrjournal.in/the-implementation-of-law-in-india-by-rhea-and-drishti-saraf/> (last visited on: 17.04.2025)

What makes the healthcare crisis even more acute is the neglect of mental health, a domain already stigmatised in India but doubly so for transgender individuals. Studies globally, and in India, consistently show that transgender persons are at disproportionately higher risk of depression, anxiety, suicidal ideation, and post-traumatic stress disorder, owing to the cumulative impact of social ostracism, familial rejection, and institutional violence. Yet, India's mental health professionals are rarely trained to offer gender-affirming psychological care.¹⁶ Many trans persons seeking therapy are subjected to conversion attempts, religious moralising, or pathologisation, where their gender identity is viewed as a problem to be fixed rather than a reality to be affirmed. Even when therapists do not hold openly transphobic views, their lack of cultural competence and legal knowledge results in a dangerous form of negligence. In public hospitals, spaces meant to serve the most marginalised, there are almost no trans-inclusive wards, no sensitisation protocols for staff, and no grievance redressal mechanisms in case of discrimination. The physical environment is often unsafe, and administrative systems are not designed to recognise self-identified gender, thereby forcing trans persons to endure repeated instances of misgendering and bureaucratic violence. Insurance companies routinely reject claims related to transition procedures, labelling them 'cosmetic' or 'non-essential', despite overwhelming medical consensus that these procedures are vital to gender dysphoria treatment and mental health stabilisation. There exists no binding legal mandate to compel private hospitals or insurance firms to respect the healthcare rights of transgender individuals, leaving them vulnerable to unregulated discretion and exploitation.

CONCLUSION

The situation demands urgent, structural reform, not piecemeal policies or symbolic declarations. First, the medical education curriculum must be overhauled to integrate transgender health as a core component, not an elective or appendage. This includes training on hormonal and surgical transition care, inclusive sexual and reproductive health, and the legal rights of transgender patients. Second, national healthcare schemes must not only include transgender persons in theory but actively facilitate their participation through proactive outreach, simplified documentation, and targeted enrolment drives in collaboration with

¹⁶ International Commission of Jurists, "Living with Dignity: Sexual Orientation and Gender Identity-Based Human Rights Violations in Housing, Work, and Access to Public Spaces in India", International Commission of Jurists, (2019); available at: <https://ruralindiaonline.org/en/library/resource/living-with-dignity-sexual-orientation-and-gender-identity-based-human-rights-violations/> (last visited on: 17.04.2025)

community organisations.¹⁷ Transition-related care must be explicitly recognised as essential healthcare under both public and private insurance frameworks. Third, every public hospital must be mandated to develop trans-inclusive protocols, including the establishment of gender-neutral wards, sensitisation training for staff, grievance redressal cells, and the presence of counsellors trained in gender diversity. The government must establish state-wide centres of excellence for gender-affirming care that are regulated, affordable, and backed by public funds. Additionally, legal accountability mechanisms must be introduced to penalise discriminatory behaviour by healthcare providers and institutions, with provisions for both civil and criminal liabilities where harm is proven.¹⁸ Finally, there must be an epistemological shift in how the State, and society at large, understands health, not merely as the absence of disease, but as the presence of dignity, safety, and self-determination. The right to health is not a conditional right to be negotiated based on social acceptability; it is a fundamental right, and for transgender persons, it is time that this right is not merely recognised but realised in its fullest, most inclusive form.

¹⁷ United States Department of State, Bureau of Democracy, Human Rights and Labor, “Country Reports on Human Rights Practices for 2022”, available at: https://www.state.gov/wp-content/uploads/2023/03/415610_INDIA-2022-HUMAN-RIGHTS-REPORT.pdf (last visited on: 17.04.2025) 2022; See also, Ajay Singh Solanki, “India’s new law on the protection of rights of transgender persons”, available at: <https://www.ibanet.org/article/0F3AE21B-0170-4BF7-95DD-45B07EF1CAF6> (last visited on: 17.04.2025)

¹⁸ Akshat Agarwal & Dhvani Mehta, “Comments on the Draft Transgender Persons (Protection of Rights Rules, 2020”, available at: <https://vidhilegalpolicy.in/research/comments-on-the-transgender-persons-protection-of-rights-rules-2020/> (last visited on: 17.04.2025)