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# Preface

Human rights serve as the moral and legal compass of any society. Their inalienable and all-encompassing nature must be the driving force for any democratic society that wishes to ensure both individual and collective well-being of its citizens.

The National Human Rights Commission of India has been working tirelessly to protect and promote human rights in India. In its 30 years of existence, the Commission has worked towards not only protecting but also promoting the human rights of every section of society.

NHRC's Annual English Journal was first published in 2002 and since then, it has been a platform to bring together scholars, practitioners, activists, public servants, human rights defenders, and other subject matter experts to contribute towards enriching our collective understanding of human rights. The journal continues to promote scholarship of the highest quality and remains an important source of knowledge for human rights practitioners. In light of the ever-evolving nature of human rights, the journal includes articles written on several issues like Right to Development, Rights and Directive Principles and the implications on human rights, Combating Child Sexual Abuse Material, Bilateral Treaties impact on Environment, Rural India, Tribals' Rights, Education disparity, Surrogacy and Expanding horizon of Human Rights and Enforcement of human rights through duty jurisprudence, which require our immediate attention.

I sincerely hope that this year's journal will contribute towards enhancing our collective understanding of several emerging human rights issues, thus guiding us to be more sensitive human beings. I hope that these words will also help guide policies for good governance.

I express my deep gratitude to all the eminent experts who have graciously shared their insights on various topics in this journal. Last but not the least, I would like to express my heartfelt thanks to all the esteemed members of the Editorial Board whose knowledge and guidance have paved the way for the publication of this journal in NHRC's 30th year.

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# From the Editor's Desk

The Annual English Journal of the National Human Rights Commission is being published since 2002 as part of the Com- mission's statutory responsibility to spread human rights literacy and awareness under the Protection of Human Rights Act, 1993.

The National Human Rights Commission has been working for three decades to protect and promote human rights in India. The idea of "Sarve Bhawantu Sukhinah", meaning "Let everyone be happy", has been one of the guiding principles of the Commission.

The NHRC's Annual English Journal has been a treasure trove of knowledge on various human rights issues. In its 22nd Edition, domain experts, scholars, public servants, and others have come together to provide invaluable insights on newly emerging human rights issues like artificial intelligence, child sexual abuse material (CSAM), adoption etc. The Journal also contains articles on other issues like the relationship between Rights, Duties, and Directive Principles of State Policy, the role of Panchayati Raj Institutions, environmental justice, the future of human rights, to name a few. I sincerely believe that this edition will prove to be an indispensible source of knowledge to the readers. I hope that the articles in this journal will help in con- tributing to the existing discourse on human rights in our country.

I am grateful to all the esteemed members of the Editorial Board who have generously spared time and shared their wisdom to contribute to this journal's publication. Finally, I would like to express my heartfelt gratitude to all the authors who have been gracious enough to share their knowledge and insights on various human rights issues.

**(Bharat Lal)**

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# Right to Development in International Law: A Human Rights-Based Approach

D.P. Verma*

## Abstract

*A classical description of development as monopolised by economic thinkers puts emphasis on industrialisation, capital inflows and gross development product. The meaning of development has moved towards the human dimension since 1980s. The notion of economic growth has little to do with the renewed vision of development as it has found manifestation in the human rights-based approach to the right to development. Such a perception facilitates a different conception. In this context, the meaning and nature of development needs examination in order to conceptualise ingredients and contents of the right to development, alongwith its normative foundation as the third generation of human rights (the solidarity rights) under international law.*

**Keywords:** Solidarity, Interdependence, Cooperation, Individual Rights, Collective Rights

## INTRODUCTION

The idea of the right to development, as one of the several rights belonging to the third generation of human rights, was first conceptualised by a Senegalese lawyer Keba M'Baye in his first lecture at the International Institute of Human Rights (Strasbourg, France) in 1972.[1]While the first generation of human rights consisted of the civil and political rights as freedom from state intervention, the second generation comprised of the economic, social and cultural rights to be provided by the state. Contrary to them, the third generation of human rights is composed of solidarity for development, environment, peace, communication, humanitarian assistance, and common heritage of mankind.[2]

An earlier recognition to the right to development may be found in the Declaration of Philadelphia in 1944. Later, the Constitution of the International Labour Organization incorporated that principle of the Declaration in 1946 that all human beings, irrespective of race, creed or sex, "have the right to pursue both their material well-being and their

*Member, Law Commission of India, New Delhi.

[1] Krzystof Drzewicki, 'The Right of Solidarity — The Third Generation of Human Rights' (1984) 53 *Nordisk Tidsskrift for International Ret* 26, 29.

[2] Stephen Marks, 'The Human Right to Development: Between Rhetoric and Reality' (2004) 17 *Harvard Human Rights Journal* 137, 138; Stephen P. Marks, 'Emerging Human Rights: A New Generation for the 1980?' (1981) 33 *Rutgers Law Review* 435, 435-452.

spiritual development in condition of freedom and dignity, of economic security and equal opportunity."[3]

The African Charter on Human and People's Rights (1982) is the first human right instrument at the regional level to have recognised the right to development as the third generation of human rights. It has not only proclaimed under its Article 22(2) that states have the duty to ensure (individually or collectively) the exercise of the right to development, it has also incorporated under its Article 22(1) that "All peoples shall have the right to their freedom and identity and in the equal enjoyment of the common heritage of mankind". The African Charter on Human and People's Rights strengthens the substance of the right to development and its legal philosophy. It is until now the only regional instrument giving individual and people's collective right to development with obligatory and enforceable commitment required from states.[4]

Since the time of the initiation of the right to development, the developing states upheld the admittance of this right as human right through the United Nations. The support ultimately resulted in 1986 in the adoption of the UN Declaration on the Right to Development, which recognised the right as a basic principle of human rights.[5]The right to development was assorted again by the World Conference on Human Rights (1993) in its Vienna Declaration and Programme of Action. It laid down a significant authoritative example by pronouncing that human rights— whether civil and political rights or economic, social and cultural rights — are universal, indivisible, interdependent and interrelated. The Vienna Declaration was notable in the sense that it showed a vital agreement of states also that had registered their reservations to the acceptance of the UN Declaration on the Right to Development in endorsing it as a significant human right.[6]

## 1. Third Generation of Human Rights

Derived from the UN Charter, the UDHR, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights, the third generation of human rights has become a part of customary international

[3] Louis B. Sohn, 'The New International Law: Protection of the Rights of Individual Rather Than States' (1982) 31 *American University Law Review* 52

[4] 'African Charter on Human and People's Rights', (1982) 21 International Legal Materials 58; Richard Warrer Perry, 'Rethinking the Right to Development: After the Critique of Rights' (1996) 18 Law and Policy 228.

[5] United Nations Declaration on the Right to Development, General Assembly Resolution no. 41/128. (A/RES/41/128, 4 December 1986).

[6] D.P. Verma, 'The Right to Development: Conceptualization, Legal Realism and Prospect of Realization' (2016) 11 Universitas 1, 17; Karin Arts & Atabongawung Temo, 'The Right to Development in International Law: New Momentum Thirty Years Down the Line?' (1960) 63 Netherlands International Law Review 221, UN, United Nations Action in the Field of Human Rights 270-271, and 383-396. Centre for Human Rights (New York / Geneve 1994). ST/HR/2/Rev. 4.

law or of the UN law.[7] It is based on the idea of solidarity of individuals, civil societies, non-governmental organisations, states, non-state actors and international community in their concerted efforts. The right to development is an important characteristic of the third generation of human rights recognising the development of the individual as the ultimate objective of the development process, the linkage between development and human rights, substantive inequality of states, and principles of differential treatment of the developing states. The third generation of human rights expects development considerations in the application of international law and human rights. The idea of the right to development has emerged from a wider concept of development and has gained a broader support in international human rights law. Having thus included the right of every individual to benefit from overall development in society, it calls for joint efforts of communities or groups of individuals in working towards common goals in a spirit of solidarity.[8]

The right to development can be "accomplished with the help of involvement of all individuals, governments, public and private agencies and international community".[9] As a component of the third generation of human rights, the basis and characteristics of the right to development are related with the idea of solidarity, social responsibility and international cooperation in the promotion and protection of human rights. It is not only a subject of theoretical concern, but also of practical importance in the achievement of its universal compliance. Solidarity, as the fundamental basis of the third generation of human rights, specifies the nature of the bond of society, in absence of which liberty and equality may not have value. It is a unity bond of brotherly affection and denotes the internal strength of social cohesion. The multi-dimensional character of the right to development requires all the UN bodies and agencies to act in harmony with each other to achieve common objectives. The emergence of the third generation of human rights undoubtedly reflects the need of a shift from a law of coexistence to the law of cooperation, based on the interdependence of states in the solution of one state's problem by actions of others.[10]

The right to development is a human right with the precondition of justice, liberty, progress and creativity. Considering it as an imperative right, Mohammad Bedjaoui has maintained that "the right to development is, by its nature, so incontrovertible that should be regarded as belonging to *juscogens*." The international dimension of solidarity is the right to an equitable share in the economic and social well-being of the world. The most important aspect of the right to development is the right of

[7] The UDHR yearns for the conception of an international system where human rights of individuals may be exercised to a great extent in an international order. Russell Lawrence Barsch, 'The Right to Development asa Human Right: Results of Global Consultation' (1991) 13 *Human Rights Quarterly* 322.
[8] Verma, Supra note 6, at 11.
[9] Saeed Reza Abadi, 'Decent Work from the Perspective of the Right to Development and Human Development' (2011) 8 *US-China Law Review* 661.
[10] Verma, Supra note 6, at 11-12.

each person to freely choose economic and social model of development without outside interference.[11] So far as the ambit and content of the right to development is concerned, the respect for human rights is a prerequisite for the development of human personality. This needs a national as well as an international environment to identify the collective aspect of development with the possibility of each state to ensure free and full growth of the potential of its individuals.[12] Thus, the constituents of the right to development include:

(a) right to participation as an essential characteristic of all kinds of development;

(b) human centric development putting people first and supporting their development;

(c) right to fair distribution of benefits of economic development for states;

(d) right to non-discrimination in development without distinction of race, sex, religion, political opinion, nationality of origin, property, birth or other status; and

(e) right to self-determination to include inalienable right to full sovereignty over all their natural wealth and resources.[13]

## 2. Right to Development

The conceptual evolution of the right to development started with the UN Declaration on the Establishment of New International Economic Order (NIEO). It became a process of vehicle for the concretisation and promotion of this right, while the Charter of the Economic Rights and Duties of States specially mentioned respect for human rights and fundamental freedoms, and the promotion of international social justice among the fundamental principles of international economic relations.[14] The right to development places people at the heart of the development process, so that development is intended to advance "the well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution" of the consistent advantages.[15]

The ethical bearing of the right to development has the practical glimpse in the best interest of all states to endorse the universal accomplishment of the right as well as the fundamental philosophical value underlying the right to development in its expansive sense. These include points as under:

[11] Henry J. Steiner & Philip Alston, *International Human Rights in Context: Law, Politics, Morals* (Oxford, Oxford University Press 2000), 1321-1323.
[12] S.K. Verma, 'Development, Human Rights and Globalization of Economy' (1998) 40 *Journal of Indian Law Institute* 220; Ved P. Nanda, 'Development as an Emerging Human Right under International Law', (1984) 13 *Denver Journal of International Law & Policy* 161.
[13] Verma, Supra note 6, at 12.
[14] UN, General Assembly Official Records, 6th Spl. Sess., 2229th Mtg. [GA Resolution 3201 (S-VI), 1 May 1974].
[15] UN Human Rights Office of the High Commissioner, Development and Human Rights: OHCHR and the Right to Development, 2.

(a) basic nature of development;

(b) international obligation of solidarity for development;

(c) moral interdependence;

(d) economic interconnections;

(e) maintenance of international peace; and

(f) ethical responsibility of reparation.[16]

According to Arjun Sengupta, there are two descriptions of the right to development: a substantial perception as a proper right, and a procedural consideration.[17] The main components of the right to development are:

- public-centred development;
- human rights-based approach;
- participation;
- equity;
- non-discrimination; and
- self-determination.[18]

The right to development seeks development as an inclusive concept, comprising of non-discrimination and equal opportunity for everyone. The contents of the right to development are identified as:

(1) use of third generation of human rights in new areas of international pursuit;

(2) an umbrella right consisting of all rights;

(3) people's rights influenced by the development process to implement their human rights;

(4) a sum of economic, social and cultural rights;

(5) economic aspect of the right to development; and

(6) right to specific method and means of development.[19]

The real basis of the right to development finds its justification in the obligation to demonstrate solidarity, linked to Articles 1 and 28 of the UDHR. The right to

[16] 'The Emergence of the Right to Development: Report of the Secretary General' 7, 9-10 in UNHuman Rights Office of the High Commissioner, Realizing the Rights to Development: Essays in Commemoration of 25 Years of the United Nations Declaration on the Right to Development. (New York / Geneva 2013).

[17] UN General Assembly, 55th Sess., Item 116 (b) of the Provisional Agenda, Report of the Independent Expert on the Right to Development (A/55/306, 17 August 2000), 6, para. 22.

[18] UN Human Rights Office of the High Commissioner, Supranote 15, at 1-2.

[19] Khandakar Farzana Rehman, 'Linkage Between Rights to Development and Right Based Approach: An Overview'(2010) 1 *Northern University Journal of Law* 98.

development approaches development as a complex process which, through multiple interactions in the economic, social, cultural and political spheres, generates continuous process in terms of social justice, equality, well-being and respect for the fundamental dignity of all individuals, groups and peoples, based on their effective participation in all aspects of the development process.[20]

### 3. UN Declaration on Right to Development

The UN Declaration on the Right to Development was adopted in 1986 by a triumphant majority in the UN General Assembly with the dissenting vote of the US, and eight abstentions from voting.[21]The provisions of the UN Declaration circumscribe contents of the right to development, the right holders and duty bearers and a development process. It points the way to a right-based perspective considering international human rights norms, participation, non-discrimination, accountability, transparency, and decision-making and benefit sharing of the development process. The emphasis on fundamental element of the right to development is contained in its provisions relating to development for continuous advancement of the welfare of the entire community and for every individual on the foundation of their independence and meaningful cooperation. It is the object of development to provide equal opportunity to the accessibility of basic resources, health services, food, shelter, education, jobs, and fair distribution of income.

According to Stephen P, Marks,

[t]he Declaration takes a holistic, human-centred approach to development. It sees development as a comprehensive process aiming to improve the well-being of the entire population and in the fair distribution of the resulting process. In other words, recognising development as a human right empowers all people to claim their active participation in decisions that affect them — rather than merely being beneficiaries of charity — and to claim an equitable share of the benefits resulting from the development gains.

Alan Rosas has mentioned three facets of the UN Declaration on the Right to Development: *One*, the value of participation; *two*, basic needs and social justice; and *three*, national policies and programmes as well as international cooperation. These facts include another perspective as:

(a) social justice through inclusion, equality and non-discrimination with the human person as the subject of focus in development;

(b) participation and accountability;

[20] Shyami Puvimanasinghe, 'International Solidarity in an Interdependent World' in UN Human Rights Office of the High Commissioner, Supra note 16, at 185.

[21] A/RES/41/128, Supra note 5. Denmark, Federal Republic of Germany, Finland, Iceland, Israel, Japan, Sweden and the UK abstained from voting.

(c) sustainability as a result of the integral, indivisible and interdependent approach; and

(d) international cooperation.

The Preamble to the UN Declaration on the Right to Development had a clear basis in the UN Charter, the UDHR, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social, and Cultural Rights. Its basis can also be found in agreements, conventions, resolutions, recommendations and other instruments of the UN and its specialised agencies and the promotion of friendly relations and cooperation among states in accordance with the UN Charter.[22] Development is described in the Preamble to the UN Declaration as a comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire population and of all individuals, on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom.

The process of development acknowledged as a human right is one "in which all human rights and fundamental freedoms can be fully realized," with the constant improvement of well-being that is the object of development.[23] The UN Declaration on the Right to Development proclaimed four points:

(a) The right to development is an inalienable human right to which every human person and all people are entitled to participate, contribute and enjoy economic, social, cultural and political development so that all human rights and fundamental freedoms can be fully realised.

(b) individual, being the central subject of development, should be the active participant and beneficiary of the right to development;

(c) human beings have both individual and collective responsibility for development with full respect for their human rights and fundamental freedoms as well as their duties towards the community, and they should, therefore, promote and protect and appropriate political, social and economic order for development; and

(d) states have the right and duty to formulate national development policies for continuous improvement of the well-being of the entire population and of all individuals, with their active and free and meaningful participation in development and in the fair distribution of the benefits resulting therefore.[24]

Article 1(1) of the UN Declaration on the Right to Development states:

[22] Rehman, Supra note 19 at 104-105.
[23] Arjun Sengupta, 'Conceptualizing the Right to Development for the Twenty-First Century' in UN Human Rights Office of the High Commissioner, Supra note 16, at 68-69.
[24] Verma, Supra note 6, at 19-20.

The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human beings and fundamental freedoms can be fully realised.

The article expounds three principles:

(a) The right to development as an inalienable human right;

(b) all human rights and fundamental freedoms accomplished in the process of economic, social, cultural and political development; and

(c) every human person and all peoples entitled to participate, contribute and enjoy that particular process of development.

The *first principle* confirms the right to development as an inalienable human right and, as such, the right cannot be taken away. The *second principle* designates a process of development concerning the realisation of human rights, as set forth in the UDHR and other human rights instruments adopted by the UN and regional bodies. The *third principle* describes the rights to that development process with regard to entitlement of the right holders to be promoted and protected by the duty bearers.[25]

The states have the primary duty to create favourable national and international environment for development. Article 2(2) of the UN Declaration on the Right to Development states that

[a]ll human beings have a responsibility for development, individually and collectively, taking into account the need for full respect for their human rights and fundamental freedom as well as their duties to the community, which alone can ensure the free and complete fulfilment of the human being, and they should, therefore, promote and protect the appropriate political, social and economic order for development.

According to Article 2(3) of the UN Declaration, such a development process would be the goal of national development policies that states have the right and obligation to prepare.

With regard to the state's obligations carried out at the international level, the UN Declaration on the Right to Development directly draws attention to the determining significance of international cooperation. According to Article 3(3) of the UN Declaration, "States have the duty to cooperate with each other in ensuring development and eliminating obstacles to development" and should "fulfil their duties in such a manner as to promote a new international economic order based on sovereign equality, interdependence [and] mutual interest." Further, Article 4 of the UN Declaration clearly stipulates that states have the responsibility, individually and collectively, to formulate international development policies to design accomplishment

[25] Sengupta, Supra note 23, at 68.

of the right to development; this should be read together with the acknowledgement in the Preamble to the UN Declaration to the principles of "international cooperation in solving international problems of an economic, social, cultural or humanitarian nature and… promoting and encouraging respect for human rights and fundamental freedoms" as incorporated in the UN Charter.[26]

Article 8 of the UN Declaration on the Right to Development provides more specifically that in accomplishing the right to development, states shall assure "equality of opportunity for all in their access to basic resources, education, health services, food, housing, employment and the fair distribution of income," and take constructive actions to make certain that "women have an active role in the development process," as well as implement "[a]ppropriate economic and social reforms… with a view to eradicating all social injustices."

Thus, the UN Declaration on the Right to Development obviously specifies that the main responsibility for realising the right to development belongs to states and that individuals are the beneficiaries. The international community has the duty to equip states in carrying out that obligation. But the obligation to realise the right to development through international cooperation needs the realisation of the right in careful manner in conjunction with sustainable growth of the economy and suitable changes to its structure.[27]

Considering the nature and scope of the right to development as one of the components of the third generation of human rights under international law, it is worth examining the *human rights-based approach* to the right to development (development as a process promoting the implementation of human rights). This perspective of study will *inter alia* take into account (1) *the connect between development and human right* (interrelated and interdependent human rights); (2) *individual and collective dimensions* (acknowledgement of the right to development as both an individual and collective right); and (3) *international solidarity* (responsibilities of nation states and international society to fulfil the right to development).[28]

## 4. Human Rights-based Approach

The human rights-based approach to the right to development is a conceptual framework for the process of development dependant on international human rights norms and actively aimed at the promotion and protection of human rights. It gives attention to inequalities at the core of development problems and remedies discriminatory practices and unjust distributions of power that obstruct development progress causing groups of people left behind.[29]

[26] Ibid., at 72.
[27] Id., at 72-73.
[28] Verma, Supra note 6, at 5.
[29] UN Sustainable Group, Human Rights-based Approach, 2.

Under the human rights-based approach, the process of development is secured firmly in a system of rights and reciprocal duties under international law, including civil, cultural, economic, political, social right and the right to development. The human right-based approach stands in need of human rights principles (universality, indivisibility, equality and non-discriminations, participation, accountability) to steer the UN development cooperation in the capacity building of duty-bearers to meet their responsibilities and that of right-holders to assert their rights. The UN agencies have concurred on a common understanding on several essential features of the human rights-based approach to development cooperation:

- All programmes, policies and technical assistance for development cooperation should help in the realisation of human rights as laid down in the UDHR and other international human rights instruments.
- Human rights standards derived from the UDHR and other international human rights instruments direct development cooperation and planning at every stage of the development process.
- Development cooperation contributes to the development of the capacities of duty-bearers to meet their duties and of right-holders to assert their rights.[30]

The right to development is a human right of every individual and all peoples to economic, social, cultural and political development. It has both *internal* and *external* dimensions. The *internal dimension* is manifested in the state obligation to draw up national development policies towards the accomplishment of human rights. The *external dimension* includes responsibilities of all states to cooperate in the realisation of the right to development. From the viewpoint of determining norms, the *internal dimension* of the right to development is a component of the international human rights law. While human rights treaty law generally applies *ratione loci* and *ratione personae* to the territory of the state party as the sole duty-holder, the Committee on Economic, Social and Cultural Rights has outlined extra-territorial obligations of international assistance and cooperation. The *external dimension* of the right to development lies in a common obligation for achieving the right among a number of duty-holders, including non-state actors and in the additional specific detail about the collectiveaspects of the right.[31]

When the right to development is taken as a process for progressive realisation of all rights, some rights could be achieved earlier than the others without violation of any right. Progress would then be judged by the gradual change in the achievement

[30] The right to development (encompassing both the human right to development as well as development as human right) was also endorsed by the 1993 Vienna Declaration and Programme of Action, which gave attention to democracy, development and respect for human rights and fundamental freedoms as mutually reinforcing. ST/HR/2/Rev. 2, Supra note 6.

[31] Stephen P. Marks & Beate Rudolf et al., 'The Role of International Law' in UN Human Rights Office of High Commissioner, Supra note 16, at 459-460.

of a particular right rather than relinquishing some rights at the cost of progress in realisation of others. The right to development as the right to a developmental process is an umbrella right; it is the right to a process expanding capacities or the individual's freedom to improve their well-being and to achieve what they value.[32]

The process is not similar to the outcome of the process, while the right to development both as the process and the outcome of the process are human rights. Several rights may be realised separately by individuals in accordance with human rights norms with transparency, accountability, justice and equity in a participatory and non-discriminatory manner. However, the right to development may not be accomplished without taking into consideration the interrelationship between the different rights. In cases of all civil, political, economic, social and cultural rights not being fully realised forthwith andeven in the event that chances of the process will accelerate the expected result, asserting that process as a right may be the best alternative in a particular case.[33]

The right to development as a distinct process of development is a carrier of all the different rights and freedoms. Each segment of the carrier is a human right to be realised correspondingly with the human right norms. The achievement of one right is contingent on achieving the other rights. The right to development as a vector of rights carries obviously that any initiative that elevates the level of any other components of the vector without lowering the level of other components would expand the development. Such a proposition would mean improving civil and political rights as well as economic, social and cultural rights of all people, and respecting principles of equity, non-discrimination, participation, accountability and transparency that account for the fundamental human rights standards. Several plans that give greater value to the touchstone of each of these rights by and large will be a constant element of the development. Any scheme for achieving the right to development must be able to augment resources through a process of sustainable growth in harmony with human right norms.[34]

The explicit content of human rights to development can be set on by a complete examination of the various sources on which the right is rooted. To make the concept of the right to development further clear and to bestow on it greater practical importance, an examination could be made towards identifying and explaining the particular rights and duties, which on the basis of existing and evolving international instruments relating to the right, are to be set down to all relevant entities, including the international community as a whole and states, peoples, transnational corporations and individuals in particular.[35]

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[32] Sengupta, Supra note 23, at 78.
[33] Ibid.
[34] Id., at 79.
[35] Emergence of the Right of Development, Supra note 16, at 15.

### (A) Human Rights— Development Connect

Development is linked with human rights with individuals at the centre of development and by affirming the avoidance of human rights breaches as an important component of development. It is a method for the realisation of welfare and expanding freedom as a human right under the right to development.[36]

The human rights-based approach to the right to development is one approach, while the other approach considers development as human rights in itself. Conceptualisation of development in terms of methods and engrossment is important.[37] A chief element of the perspective is that the human rights-based approach needs international development cooperation and assistance by an agreed structure of international human rights law under the condition of duties of both beneficiaries and donors.[38] The human right-development connect has got strength with the recognition giving momentum. The idea of development has changed to "a general conception of development as a process incorporating material and non-material needs [and] human rights…"[39]

The concept of human rights-development connect is expanding and converging as an integrated approach. Jack Donnelly writes that "[d]evelopment and human rights must be seen as fundamentally complementary and mutually reinforcing in time frame." A right is a claim to do something needed for development. Further, the acceptance of the claim by others, as a part of the development process, guarantees the exercise of rights on the basis of an implicit desire to develop human rights, are the claims to the *sine qua non* of the process itself. The blending of the idea of human rights with development gives a valuable device. The moral system manifests both laws of development and the changing conditions of the process. From the moral foundation comes out particular confidence as to what should be done and how to do it for development plan of actions. Among these faith and identifications of needs, human rights are derived. The confidence and plans of action all the time affect each other, but initially some fundamental exigencies and propensities always continue to exist there.[40]

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[36]Arjun Sengupta, 'On the Theory and Practice of the Right to Development' in Arjun Sengupta, Archana Negi & Maushami Basu (ed.), *Reflections on the Right to Development* (Oaks/London, Sage Publications 2005), 67; Arjun Sengupta, 'On the Theory and Practice of the Right to Development' (2004) 24 *Human Rights Quarterly*, 848.

[37] Other writers have catalogued different approaches of connecting human right to development. Stephen P. Marks, 'The Human Rights Framework for Development: Seven Approaches' in Sengupta, Negi & Basu, Ibid., at 23.

[38] UN Development Programme, Human Rights Report 2001: Making New Techniques Work for Human Development, 9-15.

[39] Theodor Meron, *The Humanization of International Law*. (Leiden, Martiaus Nijhoof 2006), 476. Hague Academy of International Law Monograph, Vol. 3.

[40] John O'Manique, 'Human Right and Development' (1992) 14 *Human Rights Quarterly* 78, 83 and 102-103.

### (B) Indivisibility of Human Rights and the Right to Development

Indivisibility and interrelatedness of human rights and the right to development is a holistic concept. Based on the economic, social and cultural aspects, the right to development cannot be achieved completely unless rights in other spheres are accomplished at the same time. The universality and indivisibility of human rights include all types of rights. The UN Declaration on the Right to Development has exceptional merit that it incorporates economic, social and cultural rights essential for human dignity and the undistracted development of the individual personality. The right to development aims to realise the assimilation of all these rights by employing a dual role of development. By emphasising upon the importance of international cooperation, where the right to development may be achieved to the full measure, it has laid the basis for the content of the right to development.

### (C) Individual and Collective Right Dimension

As pointed out by the Commission on Human Rights, it is difficult to demarcate between the right to development of the individual and of the collectivity. The right to development is uniquely both an individual and collective entitlement. Apart from individual claim, it is also an entitlement in relation to societies, states and regions. The parameter for achieving development is associated with groups on the presumption that development depends upon individual welfare in the society.[41] This denotes the right to development "partly away from the individual-centric approach of other international human rights instruments, and more in favour of the people's rights is ascribed to the philosophical impact of third generation of human rights in the formulation of the UN Declaration on the Right to Development."[42]

The right to development with *individual dimension* is to be enjoyed by every person, while the *collective dimension* is guaranteed to entire people. Though an individual perspective does not provide it further precision, it only influences its normative strength. However, the dual characteristics of the right cause problems in clarifying beneficiaries and duty-holders under the right. Mohammad Bedjaoui states that restricting the right to development to individual only will conceal the true international perspective of the fundamental problem. According to him, it is "much more a right to the state or of the people, than a right of the individual."[43] Since individuals with political association of state are the expected beneficiaries of this right, it is people who play a part in the international system with the help of their state, except in certain situations. Ian Brownlie has held that states are the subject of the right to development in the strict sense of the term either staking out a claim or

[41] A/RES/41/12B, Supra note 5, Article 1.
[42] The right to development has been declared prominently as right to people in the African Charter on Human and People's Rights. African Charter, Supra note 4.
[43] Mohammad Bedjaoui, 'The Right to Development' in Mohammad Bedjaoui (ed.). International Law: Achievements and Prospects. (Dordrecht/Boston/London, Martinus Nijhoff), 177.

acknowledging these claims.[44] The right to development cannot be realised without the help of states and their governments.[45]

In view of the peculiar nature and historical evolution, the right to development is relevant in the external relations between states at horizontal level, and not in vertical relations between a state and its own people. The original concept of the right to development, as a third generation of human rights, is precise as a legally binding dictate primarily a collective right of people *erga omnes*.[46] This entitlement is different from the individualistic model of human rights. Keeping in view the right to development both as collective as well as individual, the UN Declaration on the Right to Development has put individual and all peoples as beneficiaries of the right.

The collective right to development belongs to people and states. While each state is expected to take steps for accomplishment of this right, the individual dimension of the right to development has the fundamental aim of integral development for attainment of the basic needs of the individual. The individual right to development is multidimensional covering the first and the second generation of human rights. This serves the purpose for full development of individual and the protection of dignity, where equality of opportunity among all people can be possible. With the base of collective right, the right to development appears to be an aggregate of social, economic and cultural rights of individuals. In other words, "this vision… has the merit of shedding light on the link between the rights of the individual and the right of the collectivity; a link which is crucial."[47] It may be important to regard it as a collective right for the benefit of own state vis-à-vis the international community.

Considering it as a right of every individual, it exposes some definitional problem. The traditional thinkers argue that a right cannot simultaneously be individual and collective. One can deplore that researches on the right to development have exceeded the core meaning of this right to development. It is broadened to include all dimensions of development and it will be more arduous to identify breaches of the right because any violation and obligation would be diluted.[48]

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[44] Noel G. Vellaroman, 'The Right to Development: Exploring the Legal Basis of a Supernorm' (2010) 22 *Florida Journal of International Law*, 308-309.

[45] Cheru Fantu, 'Developing Countries and the Right to Development: A Retrospective and Prospective African View' (2016) 37 *Human Rights Quarterly*, 1268.

[46] Bedjaoui, Supra note 43, at 1188.

[47] Sohn, Supra note 3, at 52.

[48] Villaroman, Supra note 44, at 306; Isabella Bunn, 'The Right to Development: Implications for International Law' (2000) 15 *American University Law Review* 1435; Joop De Kort, 'Stretching Law Too Far: The Difficulties To Assure the Right to Development' (2011) 9 *International Journal of Civil Society Law* 12; Ved P. Nanda, 'The Right to Development under International Law – Challenges Ahead' (1985) *California Western International Law Journal* 431. While Amartya Sen has considered the right to development as "a conglomeration of a collection of claims, varying from basic education, health care and nutrition in political liberties, religious freedoms and civil rights," Arjun Sengupta, on the other hand, has enumerated this right as

Both the individual and collective dimensions of the right to development are interdependent and complimentary to each other. In an attempt to use both the interest of individual and that of international means in realisation between the interest of the individual and the community is required. "A healthy regard for the rights of the individual is indispensable for a state's success in pursuing its right to development. At the same time, the right to development is for people what human rights are for individuals."[49] The human right to development as a collective right has attained a coherent configuration of all of its elements in international law.[50]

A question as to whether the right to development be designed as collective or individual or both needlessly gives rise to the problem about the possibility of choice. The right to development implies a harmony between the collectivity and individualistic. It would be fallacy to contemplate the right to development only at one level or the other. It must not be taken for granted that the engrossment of the individual and those of collectivity will be incompatible.[51]

## 5. International Solidarity

International solidarity is recognised in a number of ways:

(a) with reference to the right to development;

(b) an advancement of this proposition within the structure of progressive development of international law as associated with the obligation to assist for global social justice; and,

(c) realities of interrelationship as ordinarily challenges to peoples for sustainable development solutions.

The comprehensive essence of the right to development by international solidarity contributes to a public-centric perspective to human welfare. International solidarity is a solution to the actualisation of the right to development. The vital content of this right is procured from the exigency for fairness at the national and international levels. It derives its power from the obligation of solidarity manifested in international joint action. This right to development as a human right has the prospect to deal with global challenges in an interrelated world economy because its perception of development

> … a process of development which leads to the realization of each human right and all of them together and which has to be carried out ina manner known as right-based, in accordance with the international human rights standards, as a participatory, non-discriminatory, accountable and transparent process with equity in decision-making and sharing of the fruits of the process.

Sengupta, Supra note 36, at 846.

[49] Arjun Sengupta, 'The Right to Development as a Human Right' (2001) 36 *Economic and Political Weekly*, 2533.

[50] Verma, Supra note 6, at 9.

[51] Emergence of the Right to Development, Supra note 16, at 11.

rises above economic progress to add to a comprehensive standard for human being. It is essential for all individuals and peoples to anticipate a method which promotes all human rights; its goal of rights and obligations cuts across the geographical surroundings of states.[52]

International solidarity carries the same idea of the UN Charter; peace and security, development and human rights. Solidarity in international law and policy is reflected in international combined effort. The duty of states of work together is found in Articles 1, 55 and 56 of the UN Charter. Article 1 calls for international system to encourage the economic and social progress of all peoples and for international collaboration in dealing with matters of economic, social, cultural or humanitarian nature, a basic object of the organisation. Under Article 55 of the UN Charter, the UN shall promote higher standards of living, full employment and environment of economic and social development; solution to international economic, social and health concerning issues; international cultural and educational cooperation; and universal respect for, and observance of human rights and fundamental freedoms. In Article 56, "Member States pledge themselves to take joint and separate actions in cooperation with the organization for the achievement of the purposes set forth in Article 55," establishing a legal duty on states.[53] Article 55 of the Charter is aimed at the implementation of the purposes of the UN, laid out in Article 1 of the UN Charter. The UN General Assembly's repetitive recommendations have continually articulated the need of cooperation.

According to the UN Declaration on the Right to Development, states have the principal obligation for the setting up of national and international environment advantageous for achieving the right to development and the obligation of working together in development and in eradicating the impediments to development. States also have the obligation to adopt measures, individually and collectively, to prepare international development plans for the overall achievement of this right. Bearing in mind the national and international aspects of the right to development, it is important to address the collaborative and external obligation of states in accomplishing this right as a solidarity-based right. The international community has an essential role-play in the development of participatory institutions at every level. Besides securing the structure of the international community to make possible an overall and equal

[52] Puvimanasinghe, Supra note 20, at 179 and 181.

[53] UN General Assembly, Human Rights Council, Agenda Item 3, Human Rights and International Solidarity. (A/HRC/12/27, 22 July 2009), 9 and 16, paras. 21 and 42. Member States' collective or individual actions to defeat this pledge may violate the principle of *juscogens* under certain circumstances. This position supports the view that international cooperation and solidarity involve legal obligations of prime nature. Obligations based on international solidarity, where they concern the most fundamental human rights, can go beyond the limits of state borders, as they are owed *erga omnes*, rather than merely *inter partes*.

participation, the community can assist and help the exchange of information between states and groups.[54]

International solidarity is not only confined to international support, cooperation, aid, charity or humanitarian assistance; it is a wider conception that incorporates legitimacy of international economic relations, the peaceful co-existence of all members of the international community, mutual support and the just and fair carving up of interests and responsibilities avoiding impediment to the larger welfare of others.[55]

**(A) International Obligation**

It is a fundamental principle of international law that states have the obligation to work together with one another for the purpose of maintaining international peace and security and to support international economic stability and development without discrimination. The specialised agencies must be deemed to have the responsibility to assist the accomplishment of the right to development. The obligation of states in promoting the human right to development has two aspects. *Firstly*, it is the obligation of states that connects with the people's living within their jurisdiction. The right to self-determination, as enumerated in Article 1 of both the international covenants on human rights, requires duties of states to respect rights of peoples under their jurisdiction to decide clearly their political status and to freely pursue their economic, social and cultural development. *Secondly*, states in their association with others have the obligation to collaborate for the universalisation of the right to development. Similar contemplations are correspondingly relevant in ascertaining the obligation of the state groupings in accordance with Article 56 of the UN Charter. Thus, state's obligations in their individual capacities are not in any circumstances narrowed down when they take measures jointly at the regional or sub-regional levels.[56]

While states have conventional duty with regard to human rights and the right to development, the UN Declaration on the Right to Development gives great significance to international obligation of states to help each other in assuring development, dealing with obstacles to development, and in promoting universal respect for all human rights and fundamental freedoms.[57] The duty to cooperate can be easily found in international human rights treaties. So far as the economic, social and cultural rights

[54] Emergence of the Right to Development, Supra note 16, at 14.
[55] Puvimanasinghe, Supra note 20, at 179-180; D.P. Verma, 'International Law of Development' (2010) 7 *Soochow Law Journal* 41-82.
[56] Sengupta, Supra note 23, at 13.
[57] A/RES/41/128, Supra note 5, Articles 2, 3, 3(3), 4(2), 5, 7, and 10. The UN General Assembly has also adopted the Charter of Economic Right and Duties of States, which guaranteed the obligation of every state to strengthen economic, social and cultural development of its own people and those of developing states. They may include financial and technical support, assuring better conditions of business, and the technology transfer to developing states. Charter of Economic Rights and Duties of States, General Assembly Official Records, 29th Sess., Agenda Item 48, 2229th Mtg., Suppl. No. 31 (A/9631), General Assembly Resolution 3281 (XXIX), 50-51 (A/RES/29/3281, 12 December 1974).

are concerned, states have collective obligations to ratify the International Covenant on Economic, Social and Cultural Rights. The Committee on the Economic, Social and Cultural Rights has observed in its General Comment on the nature of state's obligations that the term "to the maximum of its available resources" comprised of both resources within a state and those attainable from the international society.[58] The right to development accepts the right to equal satisfaction of all people in material and intellectual resources and assets in the progression of the international community.[59]

The obligation to carry out the right to development has also bearing upon transnational corporations, producers' associations, trade unions and others. While some framework of international guidelines of enterprises of transnational corporations is preferable, a procedural structure which could make them more supportive mechanism of international affluence and cooperation has yet to be worked out. The responsibility of the individual towards other individuals and the community need endeavour to the promotion and realisation of all human rights, including the right to development. Every individual as an elementary part of the community has the obligation to participate diligently in determining and in realising the common target of social programmeand development of the society.[60]

**(B) Participatory Process**

The principle of participation and accountability is central to the right to development. The UN Declaration on the Right to Development is the only instrument, which drives the participation in development so clear with emphasis that states should invigorate, secure free, purposeful and spirited participation in the plan and in keeping track and realisation of development policies.

It calls for broadening the participatory sphere, giving strength to democratic substance, which does not restrict as to who participates, but must also include participation founded upon the principles of transparency and accountability, giving prominence to human beings as force of democracy. The upsurge of participatory activities at the local level has taken different manifestation, stimulating citizen participation. People should be energetic participants in realising development plans instead of being considered as passive beneficiaries. Participation should be purposeful as an implied manifestation of popular sovereignty in assuming development plans and strategies. Meaningful participation and authorisation are found in the people's power to express their views in institutions that permit the use of competence considering citizenry as the genesis and the reason of public control.

[58] International Covenant on Economic Social and Cultural Rights, UN General Assembly Official Records, 21st Sess., Agenda Item 62, General Assembly Resolution 2200A (XXI), (A/RES/2200A, 16 December 1966); Committee on Economic, Social and Cultural Rights, General Comment 3, para. 13.
[59] Abadi, Supra note 9, at 662.
[60] Sengupta, Supra note 23, at 13.

## CONCLUSION

The appearance of the human right to development as a conceptualisation of vital significance is a contemplation of its strong traits. The sustained growth of the idea and its application into a pragmatic direction and inspiration founded upon international human rights norms in relation to development enterprises is to be the subject to the subsequent plan of action.[61]

The right to development involves a system with fairness and righteousness. Any human rights-based approach to economic and social strategies must be built on the premise of righteousness because justice comes from the idea of human dignity and from a social contract, in which all members of a civil society are expected to be involved. It is intelligible from the UDHR that equity is a basic concern as its Article 1 propounds that "all human beings are born free and equal in dignity and rights." Similarly, the UN Declaration on the Right to Development is based on the idea that this right involves a demand for and equity-based social order. A number of its provisions necessitate equality of opportunity, equality of access to resources, equality in allocation of advantage and uprightness of distribution, and equality in the right to development.[62]

An important principle of the human rights-based approach to the right to development calls for insistence on participatory responsibility of individuals. To be specific, people have a productive role in development programmes. An active and informed participation of stakeholders is to be in accordance with the human rights-based approach because the international human rights system asserts rights of individuals in the management of public affairs. The other principle of this approach responds to the progressive fulfilment of rights. The discourse on human rights acknowledges obstacles in the realisation of many rights immediately are because of the lack of resources, which may have to be satisfied in a progressive manner. The states admit that speedy progress towards the achievement of many human rights is thinkable within the existing resource limitations, while the realisation of some rights may be delayed because of the lack of resources.[63]

While the high level task force on the realisation of the right to development has concentrated that partnership between the developed and developing countries have given strength to the right to development in practice, the UN General Assembly Resolution 64/172 has recommended that "an international legal standard of a binding nature" on this right should be prepared.[64] The changing awareness about the process

[61] Emergence of the Right to Development, Supra note 16, at 16.
[62] Sengupta, Supra note 23, at 69.
[63] Siddiq R. Osmani, 'The Human Rights-Based Approach to Development in the Era of Globalization' in UN Human Rights Office of the High Commissioner, Supra note 16, at 122-123.
[64] Marks & Rudolf, Supra note 31, at 465.

of development and the appearance of strong acknowledgement of the necessity to attain a new international order in social, economic, political and cultural terms have provided an additional feature to the right to development. It is hoped that a further holistic admiration of the right would become apparent in future.[65]

[65] Emergence of the Right to Development, Supra note 16, at 15.

# Fundamental Duties in Indian Constitutional History

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## Abstract:

*This paper traces the place of duties in Indian political and constitutional thought, primarily through contemporary constitutional references to them. Spanning the period from 1895 to 1950, it focuses only on the invocation of fundamental or political duties in 'constitutional discourse' prior to the adoption of the Constitution of India in 1950, looking at historical constitutions and Constituent Assembly Debates. The paper explores three questions: nature of duties, that is, the conception of duty and underlying principles along with the matrix of whom the duty is owed to and by whom; the content of duties, that is what are the duties owed and what are the justifications for these duties. Through this tracing it appears that there are a few analytical types of duties that are proposed and enshrined in the various texts. First, where rights are seen to generate horizontal duties on citizens in order to protect the rights themselves. Second, that the entitlement and enjoyment of rights is conditional on the fulfillment of duties that is, each right has a corollary duty. Third, duties act as limitations or constraints over broad fundamental rights. The paper shows that duties were not salient in modern Indian political thought — either from 1895 to 1946 or 1946 to 1950. This salience was absent not just in terms of the occurrence of duties, but also in the lack of consistency in the nature, justification and content of the duties, which are proposed in various antecedent documents and debates.*

**Keywords:** Fundamental duties, Constituent assembly debates, Historical constitutions, Constitutional history

## INTRODUCTION

"The Azadi Ka Amrit Kaal is the time for duty towards the country. Be it people or institutions, our responsibilities are our first priority."[1]

The Constitution of India 1950 that came into force on 26 January 1950 made no place for fundamental duties. These duties were introduced into the Constitution at a most inauspicious time: the 42nd Constitution (Amendment) Act, 1974, introduced Article 51A at the height of the national emergency declared by the Indira Gandhi government. Since that time, these duties have languished in a dark corner of Indian judicial and popular constitutional discourse and academic scholarship. However, in

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[1] Prime Minister Narendra Modi, Speech at the Constitution Day Celebration (Narendmramodi.in, 26 November 2022) https://www.narendramodi.in/text-of-prime-minister-narendra-modis-address-on-constitution-day-566083 (accessed 29 September 2023).

the last three years, a sudden surge of political interest in 'fundamental duties' have brought it out of cold storage.

In 2019, Prime Minister Narendra Modi, while addressing the Joint Session of Parliament on Constitution Day, emphasised the importance of fundamental duties. In distinguishing between voluntary service and mandatory duties, Prime Minister Modi stressed the importance of focusing on and performing these duties in interactions with people.[2] In his *Pariksha Pe Charcha* programme, conducted in 2020, Prime Minister Modi also spoke about duties, stating, "There's a fine connection between our rights and responsibilities. Our rights are directly dependent on the responsibilities performed by others. I hope this generation takes it upon themselves to act on some of the Fundamental Duties enshrined in our Constitution."[3]

In his Constitution Day address in 2019, then President Ram Nath Kovind also spoke of fundamental rights, emphasising the difference between the rights and duties in the Constitution. The then President invoked Gandhian ideology of interdependence of rights and duties to suggest the priority of performing one's duties before one may exercise rights.[4] He went beyond the duties enumerated in Article 51A to highlight the spirit of humanism[5] as a fundamental duty—one that requires us to serve all compassionately.[6]

In early 2022, the Supreme Court of India issued notice to the Government of India to respond to a petition filed before the court that sought the enforcement of fundamental duties.[7] This is not the first petition to seek enforcement of fundamental duties, but is before the court at a time when there is widespread effort to reshape the historical and cultural emphasis on fundamental duties in Indian political and constitutional thought.

This paper explores the place of duties in Indian political and constitutional thought. A full account must trace this history across the ancient, medieval and modern periods. Across these periods, Indian political thought responds to the questions of justice and statecraft, as well as the concept of duties. Early references to duties include Manu's work on *dharma* as well as the concept of duty, specifically *Rajdhamma*, the

[2] Prime Minister Narendra Modi, Address on 70th Constitution Day https://www.narendramodi.in/pm-addresses-joint-session-of-parliament-on-70th-constitution-day-547448 (accessed 29 September 2023).
[3] Prime Minister Narendra Modi, First Session of *Pariksha Pe Charcha*.https://www.mygov.in/campaigns/pariksha-pe-charcha-2020/ (accessed 29 September 2023).
[4] Address by the Hon'ble President of India Shri Ram Nath Kovind at the inaugural Function of 'Constitution Day' https://pib.gov.in/newsite/PrintRelease.aspx?relid=194988 (accessed 29 September 2023).
[5] *See also*, Deendayal Upadhyay, *Integral Humanism* (Jagriti Prakashan, 1968); Thomas Blom Hansen, *The Saffron Wave: Democracy and Hindu Nationalism in Modern India* (Princeton University Press, 1999).
[6] Supra note 4.
[7] Durga Dutt v. UoI and Ors. WP(C) No. 67/2022.

duties owed by the king to his people.[8] Abul Fazl's work on the duty of the king or the *badhshah* to make every effort towards the welfare of the people.[9] Similarly, it is the duty of the people to obey the *badshah.* These references require more careful philological and philosophical study.[10]

However, as this paper is concerned primarily with contemporary constitutional references to duties, the focus is on a narrower historical period: from 1895 to 1950. CA Bayly in his work, Recovering Liberties, takes the late eighteenth century as the starting point for a discussion on Indian political and constitutional ideas, tracing the meanings of liberalism from colonial India and tracking its transformation till 1950.[11]The paper follows Bayly's periodisation and focus on modern Indian political thought in this period.

In this period, several modern political thinkers, some of whom are prominent leaders of the Indian freedom movement, invoked the concept of duties while responding to the questions of caste, freedom, violence, and government. These include significant figures like Vivekananda, Tagore, Gandhi, Ambedkar, Nehru and Aurobindo.[12] Other prominent figures include Muhammad Iqbal, Vinayak Savarkar, Bal Gangadhar Tilak, Har Dayal and Sardar Patel.[13] A fuller account of the evolution of the modern concept of duty in Indian political thought will need to give an account of key thinkers in this period.

However, this paper focuses only on the invocation of fundamental or political duties in 'constitutional discourse' prior to the adoption of the Constitution of India 1950.[14] Constitutional discourse in this period includes several proposals for a new constitution made by individuals as well as social and political groups. These proposals may be referred to as 'historical' or 'antecedent' constitutions.[15] The formal process of Constitution making began with the creation of the Constituent Assembly in 1946, when the Assembly sat in session for the first time on 9 December 1946. Over the next two years and eleven months, the Assembly sat for 167 days to debate and frame the Indian Constitution as it came into force in 1950. The Assembly debated a number of issues, not all of which were included in the text of the Constitution.

[8] Patrick Olivelle, *Manu's Code of Law* (Oxford University Press, 2005).
[9] Kamla, 'Abul Fazl: Governance and Administration', in MP Singh and Himanshu Roy (eds), *Indian Political Thought* (Pearson, 2011).
[10] Ibid.
[11] C.A. Bayly, *Recovering Liberties Indian Thought in the Age of Liberalism and Empire*(Cambridge University Press, 2011).
[12] Shruti Kapila, *Violent Fraternity: Indian Political Thought in the Global Age* (Princeton University Press, 2021).
[13] Ibid.
[14] Niraja Jayal, *Citizenship and its Discontents*, (Harvard University Press, 2013).
[15] Rohit De, 'Constitutional Antecedents', in Madhav Khosla, Pratap Bhanu Mehta, Sujit Choudhry (eds), *Oxford Handbook of the Indian Constitution* (Oxford University Press, 2016).

However, the arguments presented by the members of the Constituent Assembly and the trajectory of each provision, through its various iterations, culminating in either inclusion or exclusion make the records of these Debates a useful source to think about Constitution making.

The focus on the period up to 1950 deserves explanation as the Constitution of India, 1950, did not contain fundamental duties. As we noted earlier, these duties were introduced by amendment in 1976, adopting the recommendations of the Swaran Singh Committee Report, first submitted on 3 April 1976.[16] Hence, the emergency period and the Committee Report are critical to an understanding of Article 51A as introduced. This proximate history would be explored in a separate paper. This paper seeks to explore how duties were discussed and understood in Indian constitutional discourse prior to the 1950 Constitution. These discussions invoke a richer and thicker account of duties than what is found in the Swaran Singh Committee Report and, arguably, it should shape our understanding of fundamental duties in Article 51A today.

Three questions are explored in this study: nature of duties, that is the conception of the duty and underlying principles along with the matrix of whom the duty is owed to and by whom; the content of duties, that is, what are the duties owed and what are the justifications for these duties. These questions are explored in two periods of time: 1895-1946 and in the Constituent Assembly Debates from 1946 to 1950.

## Part A: Historical Constitutions — 1895-1946

Modern Constitution making in India began in earnest in the late 1800s. These proto-constitutional documents were drafted by several actors — key figures in the Indian freedom movement, collective association, and the British colonial government among others. The study of these 'historical' or 'antecedent' constitutions has grown in importance as the salience of historical continuities and discontinuities with current constitutional law and politics becomes increasingly contested.

Kim Lane Scheppele argues that,

> [Co]nstitution drafters invariably look even more toward a past than they do toward a future. In fact, this is impossible to avoid. Constitution drafters know about the past experiences of their country and its people; these drafters are usually selected for the constituent assembly or other constitution-drafting body precisely because of their roles in the immediate past crisis that provided the opportunity for a new constitution. What they do not know, and in fact cannot know, is the future. If they are well-prepared—and many Constitution drafters prepare themselves for their tasks with extensive research all

[16] Granville Austin, *Working of a Democratic Constitution* (Oxford University Press, 1999)353.

> they can be informed about is what has already happened, not what is yet to come.[17]

Tom Ginsburg in his work on constitutional antecedents in East Asia, similarly argues,

> To what degree can traditional Asian political and legal institutions be seen as embodying constitutionalist values? This question has risen to the fore in recent decades as part of a new attention to constitutionalism around the world, as well as the decline in orientalist perceptions of Asia as a region of oppressive legal traditions.1 As constitutionalism has spread beyond its alleged homeland in the West, it behooves us to ask about the relationship between the particular ideas that emerged in enlightenment Europe and North America with the previous political-cultural understandings of non-European societies. This inquiry has implications for thinking about legal transplants, and for our understanding of how constitutions work in the contemporary world. Ultimately, it calls into question the Western narrative of exceptionalism, in which constitutionalism and the rule of law are seen as distinctive Western contributions.[18]

Niraja Jayal in her work on citizenship also relies on historical antecedents, specifically in looking at socio-economic rights. Referring to proto-constitutional documents, Jayal includes in this category, 'proto-constitutional documents sponsored by the Indian National Congress, others conducted under the auspices of all-parties or nonparty conferences and committees; and finally, alternative and competing political imaginings explicitly offered as draft constitutions for a possible future.'[19] Specifically, she refers to the Nehru Report 1928, the Karachi Resolution 1931, Manabendra Nath Roy's Constitution of India: A Draft 1944, the Socialist Party's Draft Constitution of Indian Republic 1948, and Shriman Narayan Agarwal's Gandhian Constitution for Free India 1946.[20] Jayal, does not, however, make references to the work of Scheppele or Ginsburg.

While Rohit De refers to Scheppele's work on aversive constitutionalism, De's constitutional antecedents refer to a much larger set of documents, including British Charters, colonial era legislation and legislative reforms, the Government of India Act of 1919 and 1935, and the cultural and political reception of these documents. De states that,

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[17] Kim Lane Scheppele, 'A Constitution between Past and Future' (2008) 49 Wm. & Mary L. Rev. 1377, 1379.

[18] Tom Ginsburg, *Comparative Constitutional Design* (Cambridge University Press, 2012); Tom Ginsburg, 'Constitutionalism: East Asian Antecedents' Chi.-Kent L. Rev., 88.

[19] Niraja Gopal Jayal, *Citizenship and its Discontents* (Harvard University Press, 2013) 137.

[20] Ibid at 143.

> instead of rejecting earlier texts as "imperial" and therefore contaminated, it recognizes the active participation of several members of the future constituent assembly in the drafting and reception of these earlier documents. The members of the constituent assembly and their advisors did not operate behind a veil of ignorance but carried a certain conception of the constitutional order in their mind.[21]

Several historical constitutions refer to 'duties' as a juridical concept. However, the nature of duties and their significance in these documents varies greatly. The section below discusses the place of duties in Indian historical constitutions in a chronological order. While some readers may anticipate some of these historical constitutions that emphasise duties, all readers will be surprised by the absence of a reference to or a weak reliance on duties as a key constitutional instrument.

### 1. All India Hindu Mahasabha Constitution, 1944

In 1944, the All India Hindu Mahasabha adopted the Constitution of the Hindustan Free State.[22] At that time, the All India Hindu Mahasabha was led by Vinayak Savarkar and the constitutional document itself was drafted by D.V. Gokhale, Laxman Bhopatkar, K.V. Kelkar and M.R. Dharmadhere, with a foreword by N.C. Kelkar. The Mahasabha was composed by Pandit Madan Mohan Malaviya, Swami Shraddhanand, Shankaracharya Dr Kurtkoti, N.C.Kelkar, Lala Lajpat Rai, Raja Narendranath, Ramanand Chatterjee, Vijayaraghavacharya, Bhai Parmanand, Bhikustootama, Veer Vinayak Damodar Savarkar, Dr B.S.Moonje, Dr Shyama Prasad Mukherjee, Dr N.B.Khare, N.C.Chatterjee, Prof V.G.Deshpande, N.N.Banerjee, Vikram Savarkar and Balarao Savarkar. The Mahasabha was motivated by ideals of Hindutva, and this Constitution developed on Savarkar's speech in 1939 about the future Constitution of India.[23] Significantly, the Constitution includes chapters on fundamental rights of citizens and extensively provides for executive, legislature and judicial institutions at the federal and provincial levels. However, duties are conspicuously absent. The strain of contemporary debate in Indian politics that emphasises constitutional fundamental duties as a reversion to Hindu moral and political values, finds no support in the All India Hindu Mahasabha Constitution, 1944.

### 2. Gandhian Constitution of Free India, 1946

The second dominant strain of contemporary Indian political debates on fundamental duties claims to elevate a Gandhian approach to political and civic life. M.K. Gandhi

[21] Rohit De, 'Constitutional Antecedents', in Madhav Khosla, Pratap Bhanu Mehta, Sujit Choudhry (eds), *Oxford Handbook of the Indian Constitution* (Oxford University Press, 2016).
[22] https://archive.org/details/the-constitution-of-hindusthan-free-state-act/page/n5/mode/2up?view=theater
[23] Vikram Sampath, *Savarkar: A Contested Legacy* (Penguin Random House, 2021) 270.

was not a member of the Constituent Assembly and did not write or authorise a draft constitution. However, Narayan Agarwal drafted the Gandhian Constitution of Free India in 1946 based on Gandhian thought.[24] M.K. Gandhi wrote a foreword that partially endorsed the document as not being 'inconsistent with what I would like to stand for'.[25]

The Gandhian Constitution is organised into two Parts. Part 1 reads like a preface to the draft Constitution and reveals motivations and explanations for the proposed constitutional model. Part 2 sets out the draft Constitution with the draft clauses of the Constitution itself. I will review the references to duties in each part in turn below.

In Part I of the Gandhian Constitution, in the section titled 'The End of the State', Agarwal undertakes an inquiry into the various strands of thought put forth by major Western political thinkers as well as Indian political thought. While examining the teachings of the Ramayana and Mahabharata, the Manusmriti, Kautilya's Artha-Sastra, and Shukracharya's Nitisara, he concludes that while it is the duty of the state to harmoniously balance the interests of the state and the individual, tactfully negotiating both Liberty and Authority, it is also the duty of the individual to perform his duty to the state. He further quotes the work of Prof. Tawney, relying on the concept of a 'Functional Society' where rights are contingent on social service.[26]

This strand of thinking is developed in the section titled the 'Case for Democracy'. While discussing the importance of the democratic model of governance as perhaps the only form of government that allows for individual growth and development within an organised government, Agarwal goes on to reiterate that along with the exercise of rights, individuals must also discharge duties towards the State or Society.[27] He relies on thinkers to further establish that the moral and religious basis of democracy implies a sense of brotherhood and contribution to the success of others.[28]

This focus on duty, brotherhood and contribution to society finds expression once again in the section on 'Decentralisation'. Agarwal argues for the inclusion of local self-governance in the form of village republics to avoid the pitfalls of centralisation and modernisation that invariably pits individual, group, and state interests against one another. In this section, Agarwal talks about the rights and powers of the individual within the Panchayat system while still maintaining ties to fellow-citizens. In such a system of government, while individual personality development was fostered,

[24] *Gandhian Constitution of Free India*, 1946.
[25] Foreword, *Gandhian Constitution of Free India*, 1946.
[26] R.H. Tawney, Acquisitive Society, quoted in Part I, *the Gandhian Constitution*.
[27] Article 24, Part I, Gandhian Constitution of Free India, 1946.
[28] Article 24, Part I, The Moral Basis of Democracy, p. 13, Eleanor Roosevelt. *See also*, Article 38, The Gandhian Way, Part I, Gandhian Constitution of Free India, 1946, quoting Lord Bryce, Modern Democracies. p. 666.

citizens remained a useful and responsible member of the state.[29] This vision of an organic village community that ensured republican virtue through citizen participation in everyday government develops on a utopian view of traditional Indian society that was seriously challenged by several figures in the Indian freedom movement, notably, including Dr B.R. Ambedkar.[30]

In Part 2 Agarwal develops on Gandhi's earlier published work to develop a model of interdependent rights and duties where 'the true source of rights is duty, if we all discharge our duties, rights will not be far to seek.'[31] This interdependence of fundamental rights and duties is more fully set out in Chapter V of the Gandhian Constitution titled 'Fundamental Rights and Duties'. After enumerating the fundamental rights of citizens, these rights are made contingent on the performance of these duties. The part of the Chapter that sets out duties begins with a clause that states: 'but all these rights shall be contingent on the performance of the following fundamental duties'.[32] It is important to note that Agarwal's Gandhian Constitution is not written in the form of a legal document and often resembles a political manifesto. So, it is difficult to state precisely how the interlocking rights and duties may operate in real terms. For example, the Constitution provides for a fundamental right to 'free speech and expression'[33] and also provides that all citizens shall have a duty 'to be faithful to the State'.[34] So if such a Constitution were to be applied, would criticism of the government be constitutionally justifiable? These questions remain contentious even without a constitutional duty as with the pending Supreme Court cases on the validity of sedition law under the Constitution of India, 1950.[35] It's unclear whether making the enjoyment of fundamental rights contingent on the performance of constitutional duties modifies the nature of this inquiry significantly.

There are three duties set out in Part 2, Chapter 5 of Gandhian Constitution. While the first and second duty of the citizen is directed to the state,[36] the third duty is owed to

[29] Part I, Greek City States, Article 55, Gandhian Constitution of Free India, 1946, *see also* Article 79, Gandhian Constitution of Free India, 1946.

[30] On 4th November 1948, Dr B.R. Ambedkar said, "What is the village but a sink of localism, a den of ignorance, narrow-mindedness and communalism," during the Constituent Assembly Debates.

[31] Young India, 8-1-1925, pp.15-16, cited by Narayan Agarwal https://www.constitutionofindia.net/historical-constitution/gandhian-constitution-for-free-india-shriman-narayan-agarwal-1946/#2388.

[32] Part II, Chapter V, Article 114, Gandhian Constitution of Free India, 1946. https://www.constitutionofindia.net/historical-constitution/gandhian-constitution-for-free-india-shriman-narayan-agarwal-1946/#2441.

[33] Part II, Chapter V, Fundamental Rights and Duties, Clause 3, Gandhian Constitution of Free India, 1946, 'Subject to the principles of non-violence and public morality, every citizen shall enjoy freedom of speech; freedom of assembly, combination and discussion.'

[34] Part II, Chapter V, Fundamental Rights and Duties, Gandhian Constitution of Free India, 1946'1. All citizens shall be faithful to the State especially in times of national emergencies and foreign aggression.'

[35] *S.G. Vombatkere* v *Union of India WP* (C) 682/2021.

[36] 1. All citizens shall be faithful to the State especially in times of national emergencies and foreign aggression. 2. Every citizen shall promote public welfare by contributing to State funds in cash, kind or labour as required by law, Gandhian Constitution of Free India, 1946.

fellow citizens.[37] By combining a political conception of duty with a social conception of duty, the Gandhian Constitution significantly expands the scope and application of constitutional law and thinking.

It is important to note, however, that Agarwal is not the only scholar invoking or studying Gandhi's concept of duties. Gandhi's approach to rights and duties was complex. Bhikhu Parekh in his work elucidates how beyond the interdependence of duties and rights, and the dependence of individuals in society on each other for corresponding performance of rights and duties, Gandhi also believed that one had a duty to exercise rights and the right to perform duties.[38] Gandhi viewed these as inseparable, where self-development was both a right and a duty, where an individual was free to evolve uniquely and autonomously to fulfill their duty to uniquely contribute to society.[39] It is possible then, that other scholars, who study Gandhi's work and ideology, could have a different, and, perhaps, more holistic conception of duties as Gandhi constructed them.

### 3. Draft Constitution of the Republic of India (Socialist Party, 1948)

The third model of duties that is invoked in support of fundamental duties in the Constitution of India 1950 is rooted in socialist or communist constitutional traditions. Among historical Constitutions in India, M.N. Roy's Constitution of Free India (A draft, 1944) and the Draft Constitution of the Republic of India (Socialist Party, 1948) are attempts at constitution making in an Indian socialist vein. The Socialist Party drafted a constitution in response to that of the Indian National Congress, which they criticised as unsatisfactory on 'economic and equalitarian parameters'.[40] The stated objective of the Draft was to establish a socialist order, and it is not surprising that it includes duties as a key constitutional instrument.

Chapter II, titled Citizenship, sets out the supreme duty of the citizen to have allegiance to the republic.[41] This duty does not create a precondition for citizenship and is not specifically owed to the state political regime. In this abstract sense, the duty of allegiance is one that may be found in liberal constitutional arrangements as well. In the section titled, 'Rights of Freedom', provides that every citizen shall have equal civil rights and duties as that of other citizens.[42] These rights and duties are not interdependent as is the case in the Gandhian Constitution — hence, citizens are not obligated to discharge their duties before they may exercise their rights. However, the precise relationship between rights and duties is not set out with greater clarity.

[37] 3. Every citizen shall avoid, check and if necessary, resist exploitation of man by man, Gandhian Constitution of Free India, 1946.
[38] Bhikhu Parekh, *Gandhi — A Very Short Introduction* (Oxford University Press, 2001) 52.
[39] Bhikhu Parekh, *Gandhi — A Very Short Introduction* (Oxford University Press, 2001) 62-63
[40] Draft Constitution of the Republic of India (Socialist Party, 1948).
[41] Chapter II, Citizenship, Article 17, Draft Constitution of the Republic of India (Socialist Party, 1948).
[42] Chapter II, Rights of Freedom, Article 25, Draft Constitution of the Republic of India (Socialist Party, 1948).

Notably, the equality posited by this provision is between citizens and not the equal normative weight of rights and duties inter se.

Lastly, in the section titled, 'Rights regarding Autonomy', we find a curious expression of rights and duties:

> No citizen may be compelled to be present at any religious act or ceremony or take part in religious exercise, or to use any form of religious oath, or to disclose his religious conviction unless his rights and duties are dependent thereon. Nor shall any religious instruction be imparted in state educational institution.[43]

The force of this provision appears to be to restrain the State from compelling citizens to exercise religious rights, take religious oaths or disclose religious convictions. In order to preserve the autonomy of citizens, any such compulsion may arise only where a citizen first claims legal rights or duties emerging from their religious status. In this provision, duties are not used to evoke constitutional or fundamental duties. Instead, it restrains the state from interfering with the religious autonomy of citizens by compelling them to discharge religious duties.

The socialist tradition of duties is one that is more fully developed in other constitutional traditions. The 1936 Soviet Russian Constitution had four duties, which laid out the duty of the citizen to abide by the Constitution of the Union of Soviet Socialist Republics, to observe the laws, to maintain labour discipline, honestly to perform public duties, and to respect the rules of socialist intercourse; to safeguard and strengthen public, socialist property as the sacred and inviolable foundation of the Soviet system; to serve in the army; and to defend the fatherland is the sacred duty of every citizen of the U.S.S.R.[44] These duties place a great emphasis on collective action to better provide for both collective and individual interests.[45] Real progress for the individual comes from subsuming individual interests within the collective state interests.[46]

In China's 1982 Constitution, the guarantee of liberty is limited by stated duties.[47] Citizens must perform duties prescribed by law and the Constitution,[48] have the duty to work,[49] receive education,[50] practice family planning, rear and educate children

[43] Chapter II, Rights Regarding Autonomy, Article 33, Draft Constitution of the Republic of India (Socialist Party, 1948).
[44] Articles 130, 131, 132, and 133, Union of Soviet Socialist Republics 1936.
[45] Thomas Towe, 'Fundamental Rights in the Soviet Union: A Comparative Approach' (1967) *University of Pennsylvania Law Review*, June 1967, Vol. 115, No. 8, 1251, 1264.
[46] Ibid.
[47] Fundamental Rights and Duties of Citizens, Constitution of China, 1982.
[48] Article 33, Constitution of China, 1982.
[49] Article 42, Constitution of China, 1982.
[50] Article 46, Constitution of China, 1982.

and support their parents,[51] safeguard unity,[52] uphold the Constitution,[53] honour and defend the motherland,[54] and pay taxes.[55] This conception of duties as limiting the rights, especially as some have interpreted implicit restrictions on rights such as the freedom of speech.

### 4. Minor references

So far in the sections in this part of the paper the key historical Constitutions that reference duties prominently are reviewed. There are other historical Constitutions that contain minor references to duties. The 'Draft of Indian Woman's Charter of Rights and Duties, 1946,' prepared by the All-India Women's Conference sets out seven duties in Part XII titled the 'Duties of Woman'. These duties are preceded by Chapters II and III which set out the fundamental rights and civic rights of all citizens. By contrast, the duties, which include social, cultural and political duties, are addressed specifically to women. The duties in Part XII include a 'duty of women, equal to that of men, to serve the nation when the need so arises, be it in cases of natural calamity or national crisis.'[56] Apart from the political duty to offer national service, the social duties of women include the duty to educate oneself and one's children.[57] Finally, Part XII includes a cultural duty to 'set and maintain a high standard of morality in all spheres of life.'[58] The duties set out in this draft Constitution distinctly move away from the socialist and Gandhian models of duties in that they are specifically cast upon women. Unsurprisingly, this model finds little resonance in subsequent Constituent Assembly Debates or in the Constitution of India 1950.

The Manipur State Constitution Act of 1947 also contained fundamental duties. Ordered to be drafted by Maharaja Bodhchandra Singh in the political and historical context of India's imminent independence, prior to Manipur's eventual merger with the Union of India, it sought to reflect the democratic desires of the people of Manipur. Chapter X of the Act is promisingly titled Fundamental Rights and Duties of Citizenship. However, on closer review, it enumerates only the rights of citizens and does not set out any discrete duties to be performed by citizens. The only duties mentioned are duties to be fulfilled by the officials of state.[59]

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[51] Article 49, Constitution of China, 1982.
[52] Article 52, Constitution of China, 1982.
[53] Article 53, Constitution of China, 1982.
[54] Articles 54 and 55, Constitution of China, 1982.
[55] Article 56, Constitution of China, 1982.
[56] IWC.12, Part XII Duties of Women, Draft of Indian Woman's Charter of Rights and Duties (All India Women's Conference, 1946).
[57] Part XII (3) and (5), Draft of Indian Woman's Charter of Rights and Duties (All India Women's Conference, 1946).
[58] Part XII (6), Draft of Indian Woman's Charter of Rights and Duties (All India Women's Conference, 1946).
[59] Article 55, Chapter X, Manipur State Constitution. *See also* Article 9(d) and Article 15, Manipur State Constitution.

Part A of the paper reviews the prevalence of duties among historical Constitutions in the period 1895 and 1950. This was a period of fervent renaissance of Indian political thought.[60] The analysis in this part establishes clearly that duties were not the primary constitutional instrument or normative category through which political and constitutional reform was sought to be achieved. The Gandhian and socialist political traditions evoke and use duties more extensively, albeit in contrasting ways. The next part of the paper explores to what extent these traditions shape and influence the Constituent Assembly Debates in India.

## Part B: Constituent Assembly Debates

The Constituent Assembly comprising 389 members began proceedings on 9 December 1946 and adopted the Constitution of India, 1950, on 26 November 1949. The deliberations of the Assembly were duly recorded and published in twelve volumes. These volumes provide the fullest account into the motivations of the drafters of the Constitution and deserve careful review. This part of the paper explores the extent to which duties of citizens are proposed to be included in the Constitution or deliberated upon in any other context.

A comprehensive search for 'duties' in the Debates reveals that duties are invoked in three different modes: duties of citizens, duties of state officials and the duties as a synonym for taxes and levies. Of these three modes, only the first is relevant for the purposes of this paper. Duties of citizens or individuals are referred to twenty-one times,[61] a relatively small number which confirms that duties were not a significant topic of deliberation in the Assembly. The references to duties are concentrated in two specific periods in 1948 and 1949, respectively. Hence, the discussion in this part is organised chronologically below.

### 1. 1948 Deliberations

The first mention of citizens' duties was when V.S. Sarwate proposed an amendment to Article 40 of the Draft Constitution (Article 51, Constitution of India 1950) on 25 November 1948 to include after the phrase 'The State shall…' the clause '(a) foster truthfulness, justice, and sense of duty in the citizens'.[62] Sarwate sought to memorialise Gandhian ideology which was central to the freedom struggle that secured Indian independence. He emphasised M.K. Gandhi's belief in truth being equivalent to God and the basis of society.[63] He conceded that the clause may be

[60] C.A. Bayly, *Recovering Liberties Indian Thought in the Age of Liberalism and Empire*(Cambridge University Press, 2011).

[61] 22 July 1947, 8 November 1948, 22 November 1948, 23 November 1948, 25 November 1948, 30 November 1948, 2 December 1948, 3 December 1948, 9 December 1948, 26 May 1949, 11 August 1949, 24 August 1949, 10 September 1949, 12 September 1949, 14 September 1949, 17 November 1949, 18 November 1949, 21 November 1949, 23 November 1949, 24 November 1949, 25 November 1949

[62] 25 November 1948, Amendment No. 1018 to Article 40 of the Draft Constitution.

[63] 7.60.64, Constituent Assembly Debates on 25 November 1948, https://www.constitutionofindia.net/debates/25-nov-1948/ (accessed 9 October 2023).

vague but as there were no references to Gandhian ideology in the draft Constitution,[64] this amendment was needed to anchor the Constitution. He envisaged that such a reference Gandhian thought was analogous to how Marxist ideology frames the Constitution of the Union of Soviet Socialist Republics.[65]H.V. Kamath's response to Sarwate's proposed amendment clarified that as Article 40 of the Draft Constitution dealt with international relations,[66] a reference to citizen duties was misplaced. There is no further discussion on Sarwate's amendment proposal.

K.T. Shah consistently pressed for the inclusion of citizen's duties in the Constitution. First, he dissented in the Report of the Sub-Committee on Fundamental Rights dated April 6, 1947.[67] He was concerned with the one-sided nature of obligations,[68] that ignored individual duties necessary for coexistence and cooperation among fellow individuals.[69] In the Assembly, he moved a separate amendment proposing that the Fundamental Rights chapter under Part III of the Constitution be renamed as 'Fundamental Rights and Obligations of the State and the Citizen'.[70] He observed that the Draft Constitution ignored obligations of human behaviour, including the obligation of citizens to not be traitorous, and provide concrete evidence that they seek to be a part of the country.[71] He conceptualised these duties to be an integral part of citizenship.[72],[73] This proposal was avoided on the grounds that such a Chapter title would misrepresent the contents of the Chapter. K.T. Shah's insistence that his proposed amendment had more to do with the substantive failure of Part III to provide for duties did not persuade other members.[74]

A third mention of duties of citizens in 1948 was in the context of fundamental rights and their limitations.[75] Following a lengthy discussion on the scope of rights that

[64] 7.60.65, Constituent Assembly Debates on 25 November 1948, https://www.constitutionofindia.net/debates/25-nov-1948/ (accessed 9 October 2023).
[65] 7.60.66, Constituent Assembly Debates on 25 November 1948, https://www.constitutionofindia.net/debates/25-nov-1948/ (accessed 9 October 2023).
66 7.60.73, Constituent Assembly Debates on 25 November 1948, https://www.constitutionofindia.net/debates/25-nov-1948/ (accessed 9 October 2023).
[67] Shiva Rao, The Framing of India's Constitution (Volume II, The Indian Institute of Public Administration 1967) 169-175.
[68] Minutes of the Dissent to the Report, April 17-20, 1947, Shiva Rao, The Framing of India's Constitution (Volume II, The Indian Institute of Public Administration 1967) 176-198
[69] Shiva Rao, The Framing of India's Constitution (Volume II, The Indian Institute of Public Administration 1967) 192-193.
[70] Constituent Assembly Debates on 25 November 1948, https://www.constitutionofindia.net/debates/25-nov-1948/ (accessed 9 October 2023).
[71] 7.60.130, 7.60.131, Constituent Assembly Debates on 25 November 1948, https://www.constitutionofindia.net/debates/25-nov-1948/ (accessed 9 October 2023).
[72] 11 August 1949, https://www.constitutionofindia.net/debates/11-aug-1949/ (accessed 9 October 2023).
[73] 9.116.134, 11 August 1949, https://www.constitutionofindia.net/debates/11-aug-1949/ (accessed 9 October 2023).
[74] See also 11.158.86, 17 November 1949, https://www.constitutionofindia.net/debates/17-nov-1949/ (accessed 9 October 2023).
[75] 2 December 1948 https://www.constitutionofindia.net/debates/02-dec-1948/ (accessed 9 October 2023).

could be exercised by citizens in Article 13 of the Draft Constitution (Article 19, Constitution of India, 1950), Algu Rai Shastri urged that constitutional freedoms are not absolute and unabridged.[76] Shastri emphasised that in an independent India these freedoms must not be endangered or misused and the duty to be good citizens necessarily implied restrictions.[77] This invocation of citizen duties as a limitation on rights found no further support in the Assembly in the 1948 Debates, but reappeared in 1949.

### 2. 1949 Deliberations

Kishorimohan Tripathi reaffirmed the view that limited fundamental rights implied corollary citizen duties.[78] His observation with respect to the right to property did not draw a direct engagement.[79] However, Nandkishore Das, in a separate thread of the debate, went further to suggest the inclusion of enumerated rights correlated with enumerated duties to be performed by citizens to be eligible for their rights.[80] In a later session, G. Durgabai also lamented the lack of explicit duties of citizens in the Constitution,[81] but suggested that they were implicit as citizens owe an obligation and duty to the state from which rights and protections are demanded.[82] Unlike other references to citizen duties, Durgabai explicitly recognises citizen duties to be owed to the state rather than fellow citizens.

The most elaborate view on fundamental duties in relation to fundamental rights was presented by B. Pattabhi Sitaramayya.[83] Sitaramayya noted that despite the inability to enumerate these duties, fundamental rights necessarily implied and included within them duties in any case.[84] He clarified that duties arose from the horizontal application

[76] 7.65.103 - 7.65.109, 2 December 1948 https://www.constitutionofindia.net/debates/02-dec-1948/ (accessed 9 October 2023).
[77] 7.65.110, 7.65.111, 2 December 1948 https://www.constitutionofindia.net/debates/02-dec-1948/ (accessed 9 October 2023).
[78] 10 September 1949 https://www.constitutionofindia.net/debates/10-sep-1949/ (accessed 9 October 2023). Fundamental duties were explicitly also mentioned by Prabhudayal Himatsingka, who lamented the absence of fundamental duties along with fundamental rights. However, this was stated overarchingly in the context of the working of the Constitution and the people in charge of its implementation. To target these lacunae, Himatsingka proposed that fundamental duties, had they been incorporated, could have helped with the difficulties that could arise in the context of fundamental rights. 11.159.105, 18 November 1949 https://www.constitutionofindia.net/debates/18-nov-1949/ (accessed 9 October 2023).
[79] 9.137.119, 10 September 1949 https://www.constitutionofindia.net/debates/10-sep-1949/ (accessed 9 October 2023).
[80] 23 November 1949, https://www.constitutionofindia.net/debates/23-nov-1949/ (accessed 9 October 2023).
[81] 24 November 1949, https://www.constitutionofindia.net/debates/24-nov-1949/ (accessed 9 October 2023).
[82] 11.164.91, 24 November 1949, https://www.constitutionofindia.net/debates/24-nov-1949/ (accessed 9 October 2023).
[83] 25 November 1949, https://www.constitutionofindia.net/debates/25-nov-1949/ (accessed 9 October 2023).
[84] 11.165.178, 25 November 1949, https://www.constitutionofindia.net/debates/25-nov-1949/ (accessed 9 October 2023).

of fundamental rights, and rights of citizens were to be protected by imposing duties on citizens. For instance, the right accrued to one was the duty to be performed by another, a neighbour, where the right of the wife to equality was the duty of the husband to respect such equality. Thus, rights and duties go together, two faces of the same coin. This conception of duties would mean that they are included in the Constitution as rights necessarily contemplated duties regardless of explicit mention. This view of duties resembles the Hohfeldian logical model of rights and duties.[85]

N.G. Ranga builds on the Gandhian model of citizen duties and suggests that for fundamental rights to be enjoyed and protected, each individual must do their duty to safeguard these rights, much like the satyagrahis of the Gandhian independence struggle.[86] Ranga went further to claim that the enjoyment of rights was contingent on the performance of duties; hence, dissident groups who would not do their duty towards society had no sense of responsibility, restraint or morality should not be allowed to benefit from their rights.[87] This argument drew on an analogy between citizen duties and the duty of satyagraha[88] that deserved a fuller clarification but was not pursued further.

While Ranga invoked a Gandhian view of duties, V. Subramaniam developed a fuller cultural duty of citizens to work along with the state to carry out the Constitution in letter and in spirit, making reference to both fundamental rights and the directive principles of state policy.[89] Subramaniam refers to duties as emanating from dharma, but not as varna as a method of structuring society or as a means of dictating set occupations and further entrenching distinctions based on birth or status.[90] A similar distinction between duties arising out of dharma and out of democracy was made by Ammu Swaminathan who stated that for the Constitution to work and for India to be a democratic state, all citizens must know not just their rights but also their duties, so as to not see freedom as license.[91]

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[85] Wesley Newcomb Hohfeld, 'Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1917) *The Yale Law Journal*, Vol. 26, No. 8.

[86] 7.70.131, 9 December 1948 https://www.constitutionofindia.net/debates/09-dec-1948/ (accessed 9 October 2023).

[87] 7.70.133, 9 December 1948 https://www.constitutionofindia.net/debates/09-dec-1948/ (accessed 9 October 2023).

[88] 7.70.142, 9 December 1948 https://www.constitutionofindia.net/debates/09-dec-1948/ (accessed 9 October 2023).

[89] 11.164.97, 24 November 1949, https://www.constitutionofindia.net/debates/24-nov-1949/ (accessed 9 October 2023). This duty to carry out the Constitution was also stated during the same session by Kaka Bhagwant Roy, specifically in the context of the duty of people to eradicate discrimination. 11.164.115, 24 November 1949, https://www.constitutionofindia.net/debates/24-nov-1949/ (accessed 9 October 2023).

[90] 11.164.98, 24 November 1949, https://www.constitutionofindia.net/debates/24-nov-1949/ (accessed 9 October 2023). Dharma was once again invoked as a path to societal betterment in the same session by Shri Har Govind Pant. 11.164.191, 24 November 1949, https://www.constitutionofindia.net/debates/24-nov-1949/ (accessed 9 October 2023).

[91] 11.164.211, 24 November 1949, https://www.constitutionofindia.net/debates/24-nov-1949/ (accessed 9 October 2023).

A cursory reference to duties, as well as a reference to dharma, which the individual owes to society was also brought up by Alladi Krishnaswami Ayyar in the context of zamindari and land reforms.[92] Dharma was said to be the law of social well-being and, along with duty, formed the basis of India's social framework.[93] He urged that capitalism was a Western and alien ideal and thus property relations should be organised to serve a social purpose, or yagna, as found in Gandhian teachings.

The dharmic idea of duty was not embraced by the Assembly and encoded in the Constitution of India 1950. Besides a superficial reference to dharma and duty in the context of Hindi being designated as the national language, this view found no further support.[94] One may have anticipated a vigorous debate between this dharmic view of duty and Dr Ambedkar's critical response to attempts to import such views into the Constitution. However, on the topic of duties, Ambedkar's views are merely to affirm that the obligation regarding (non-)accepting of titles[95] may be construed as a condition or duty of continued citizenship in India.[96]

This part of the paper reviews the references to fundamental duties in the Constitutional Assembly Debates in 1948 and 1949.[97] The discussion above confirms that fundamental duties as envisaged in Article 51A of the Constitution of India 1950 were neither anticipated nor extensively considered in the Debates. The several references to duties above may be organised into two analytical categories: first, the source of duties and secondly, the nature of duties. These two concerns are closely related and intertwined and considered briefly below.

Members, who expressed the need for duties, relied on diverse justifications for such duties. Some saw duties essentially as logical correlates to the fundamental rights guaranteed in the Constitution. Hence, if there are rights, there are duties not merely on the state but also on fellow citizens. This horizontal application of rights gave rise

[92] 9.138.62, 12 September 1949 https://www.constitutionofindia.net/debates/12-aug-1949/ (accessed 9 October 2023).
[93] 9.138.62, 12 September 1949 https://www.constitutionofindia.net/debates/12-aug-1949/ (accessed 9 October 2023).
[94] 14 September 1949 https://www.constitutionofindia.net/debates/14-sep-1949/ (accessed 9 October 2023).
[95] 30 November 1948 https://www.constitutionofindia.net/debates/30-nov-1948/ (accessed 9 October 2023).
[96] 7.63.269, 30 November 1948 https://www.constitutionofindia.net/debates/30-nov-1948/ (accessed 9 October 2023).
[97] *See also*, another duty that was mooted but summarily rejected due to changing circumstances of its proposal was the duty to bear arms for the state. 7.65.169, 2 and 3 December 1948 https://www.constitutionofindia.net/debates/02-dec-1948/ (accessed 9 October 2023). There are several mentions with respect to the duty of the majority towards the minority in securing their sacred rights, in the context of societal equality and reservations (8 November 1948, 23 November 1948, 9 December 1948, 26 May 1949, 24 August 1949). A few mentions have been to isolated and specific duties, without much delving into the philosophical underpinnings of these duties, such as the duty to respect the flag (22 July 1947), the sacred duty of women towards caring for their children and fostering their families (22 November 1948), and the duty to vote (21 November 1949).

to corollary citizen duties. In other versions of this argument, duties are advanced as limitations or exceptions to fundamental rights. In the latter case, duties constrain the scope of the right and are seen to arise inherently when broad rights are simultaneously claimed by multiple individuals in a society.

A second view was Gandhian in inspiration. The fullest account of the Gandhian view developed on a model of satyagraha ethics whereby before asserting one's rightful claims, the claimant must discharge their moral duties. In the context of constitutional law, this translated into a model of rights contingent on the performance of one's duties. The Gandhian duty was owed to one's fellow citizens but may operate as a basis for the state/society to deny one's rights.

The third source of duties was the dharmic model of duties. The invocation of dharma as the basis of moral claims has a significant basis in several Indic traditions. However, several members in the Assembly expressly disavowed a traditional dharmic model that rests on varna or caste and sought to replace it with a secular foundation. Such a dharmic duty was owed to society at large though it's unclear who may enforce dharma in a modern political society.

## CONCLUSION

Despite these varied, albeit sporadic, references and understandings of duties throughout the Constituent Assembly Debates, they were not included in the Constitution of India, 1950 as it was then adopted. The chapter on duties was only included through the 42nd Amendment in 1976.

The discussion above shows that duties were not salient in modern Indian political thought — either from 1895 to 1946 or 1946 to 1950. This salience was absent not just in terms of the occurrence of duties, but also in the lack of consistency in the nature, justification and content of the duties are proposed in various antecedent documents and debates.

Through this tracing, it appears that there are a few analytical types of duties that are proposed and enshrined in the various texts. First, where rights are seen to generate horizontal duties on citizens in order to protect the rights themselves. Second, that the entitlement and enjoyment of rights is conditional on the fulfillment of duties, that is each right has a corollary duty. Third, duties act as limitations or constraints over broad fundamental rights. References to duties also arose from various conflicting intellectual traditions, ranging from Gandhian ideology to Marxist traditions and religious and cultural underpinnings.

Duties were invoked inconsistently, some commentators and documents saw duties owed by the citizen to the state, while others saw duties owed among citizens. Some conceptions of duties saw them as rights limiting, while others saw rights as arising from duties. There was also considerable variance on the question of implementation

of duties, not just in terms of which institution ought to be in charge of implementation, but whether duties ought to be implemented and enforced at all.

Many of these confusions continue today. For instance, in the 2001 case of *AIIMS Student Union* v. *AIIMS and Ors.*, the court held that the fundamental duties, though unenforceable by law, were as important as fundamental rights given the shared prefix of "fundamental" before both the rights and the duties.[98] Further, the court held:

> State is all the citizens placed together and hence though Article 51A does not expressly cast any fundamental duty on the State, the fact remains that the duty of every citizen of India is the collective duty of the State.[99]

In this case, then, the court read the fundamental duties, to not just being obligations placed on citizens but also being a collective duty placed on the State as a collective body of citizens. Further, since both fundamental rights and fundamental duties in the Constitution are 'fundamental', this is the basis of the correlation between the rights and the duties. Such an understanding, however, is neither consistent with the prevailing body of case law, which rarely attempts to locate the underlying principles or the historical trajectory of duties, and nor does it locate itself within a specific conception of the nature of duties.

By excavating these historical debates, we better understand the sources of these confusions. As a next step, we will, in a subsequent article, discuss the adoption of fundamental duties in the Constitution of India through the 42nd Amendment.

[98] *AIIMS Student Union* v.*AIIMS and Ors.* (2002) 1 SCC 428.
[99] Paragraph 58, *AIIMS Student Union* v.*AIIMS and Ors*. (2002) 1 SCC 428.

# Prevailing Challenges in Access, Digital Divide, and Language of Instruction in School Education

Anita Karwal,[*] Rajnish Kumar,[**] Rashi Sharma[***]

## Abstract

*India has a rich cultural legacy, and diversity knocks doors in every neighborhood and community. The population and geographical spread are so huge, that many countries can be encompassed within India. Due to the multiplicity of languages, and regional priorities and contexts, the education offered by schools varies significantly across the nation. While this diversity does present several opportunities, it does have a few gaps and challenges to be overcome. Resource-constraint, regional disparities, and a definite policy direction for making education more engaging have been the main difficulties in closing the gap.*

*The language gap is a specific difficulty, which is being singularly recognized and focused upon now. India's population is diverse, speaking more than 22 official languages and several dialects. Due to this, it is challenging for students from various regions to communicate with one another and their teachers if the language of instruction is alien to them. Another important issue is the digital divide. While some schools have access to the most recent tools and resources, others find it challenging to give their children a foundational understanding of digital literacy.*

*However, India is now poised for change and transformation in the education sector. Various initiatives that can assist in closing the gap and giving the students more equal learning opportunities are being undertaken by the government, in line with the visionary National Education Policy 2020. School education promises to be much more engaging, relevant, and inclusive as the policy implementation unfolds across the length and breadth of the country.*

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## 1. INTRODUCTION

**"We are one earth, one family, and we share one future." (Preamble, G-20[1])**

Education is not just a means to an end. It is much more than that. Education is vital for the physical and mental well-being of individuals, their ability to collaborate and social cohesiveness, their levels of productivity and ultimate contribution to the growth and development of the society and economy. Moreover, quality education is a life-changing, mind-crafting, and character-building experience that positively impacts citizenship. Empowered learners not only contribute to the growth and development of the country, but also participate in creating a just and equitable society. Education is the mainstay of any democratic society and realising and utilising its potential to create a more just, inclusive, equitable, prosperous, and environmentally sustainable world is putting the best foot forward for a democracy.

Since independence, our educational system has expanded to reach the last mile and improved considerably. Our literacy rate increased from 18 per cent in 1951 to 73 percent in 2011. With almost 15 lakh schools, 96 lakh teachers, and 26 crore students, currently, India has the most extensive school education system in the entire world. The release of the groundbreaking National Education Policy (NEP) in July 2020 is already having a far-reaching impact on education. The policy envisions a significant transformation in schooling through *"an education system rooted in Indian ethos that contributes directly to transforming India, that is Bharat, sustainably into an equitable and vibrant knowledge society by providing high-quality education to all, thereby making India a global knowledge superpower".*[2] The five guiding pillars of Access, Equity, Quality, Affordability, and Accountability serve as the foundation for NEP 2020; the policy emphasizes quality education across all stages of school education.

In the recently concluded G 20 summit held in New Delhi, India, on 9 and 10 September 2023, the participating countries led by India, have reinforced their commitment to inclusive, equitable, high-quality education and skills training for all, including those in vulnerable situations.[3]

The technological and digital revolution has changed the landscape of education and its delivery process. However, not every student has equal access to the Internet and digital gadgets. Additionally, NEP 2020 clearly points out that the inaccessibility of language can become a huge hurdle in the learning process. Language serves as both a means of communication and a vehicle for disseminating knowledge. Language obstacles can prevent students from understanding what is taught in class. This state of exclusion from learning may begin as early as the foundational stage, or from pre-school itself. Teachers might also lack the skills or materials necessary to support pupils or kids who speak languages other than the regional language or the prevalent medium of instruction. Due to this, these pupils have only restricted access to educational

[1] G-20 New Delhi leaders' Declaration, New Delhi, India, 9-10 September 2023, https://www.mea.gov.in/Images/CPV/G20-New-Delhi-Leaders-Declaration.pdf

[2] National Education Policy 2020, Ministry of Education, Government of India, https://www.education.gov.in/sites/upload_files/mhrd/files/NEP_Final_English_0.pdf

[3] G-20 New Delhi leaders' Declaration, New Delhi, India, 9-10 September 2023.

options, which can lead to academic success gaps. A UNESCO study in 2011, stated —*"Research confirms that children learn best in their mother tongue as a prelude to and complement of bilingual and multilingual education. Studies show that six to eight years of education in a language are necessary to develop the level of literacy and verbal proficiency required for academic achievement in secondary school."*[4]

A progressive society, anywhere on earth, is frequently viewed as having a solid foundation in education, which equips people with the information and abilities they need to live fulfilling lives and make a positive impact on their communities. In today's quickly expanding digital world, the traditional classroom paradigm of education across the world is confronted with challenges relating to access, inclusion and quality, digital gap, and language inaccessibility that need to be overcome. These concerns can have an enormous impact on the growth of the individual and, eventually, on the future of the planet.

While we will discuss these challenges in more detail hereon, however, it is pertinent to point out that extensive efforts have been undertaken by the Central and state governments to bridge gaps in education.

## 2. ACCESS TO EQUITABLE, INCLUSIVE, AND QUALITY EDUCATION

While India boasts a rich history of educational excellence and is home to some of the world's top institutions, it also grapples with a few access-related challenges, which are multifaceted, encompassing regional, gender, economic, and social dimensions. The National Family Health Survey, Human Development Index, Human Capital Index, and the National Achievement Survey point out to some of these areas and have been briefly touched upon here, in this context.

**National Family Health Surveys (NFHS):** As per NFHS, some of these gaps have been reducing, but they continue to be a matter of concern. The last NFHS was conducted in 2019-21.[5]

Data sub-set on the population of children aged 6 to 17 years, who were enrolled in schools, shows that the percentage of this age group, who attended school in 2019–20, is higher in urban areas than in rural areas. However, when it comes to attendance at school, there was not much difference between the number of males and number of females attending schools. Further, the data also revealed that the proportion of girls, children living in rural areas, those belonging to Scheduled Castes (SCs) and Scheduled Tribes (STs), children aged 11-13 years, and children from the poorest families not attending school are areas of concern.

**Human Development Index (HDI) and Human Capital Index (HCI)**: A child's right to an education now legally includes access to a school for every 6-14 years old. Additionally, India has been working towards meeting the Sustainable Development

[4] Ball, Jessica. 2011, "Enhancing learning of children from diverse language backgrounds: Mother tongue-based bilingual or multilingual education in the early years," UNESCO.
[5] National Family Health Survey (NFHS-5), 2019-21, Ministry of Health and Family Welfare, Government of India, https://main.mohfw.gov.in/sites/default/files/NFHS-5_Phase-II_0.pdf

Goals or SDG target of achieving secondary education for all by 2030. Even though India's standing and score on the Human Development Index (HDI) have improved slowly over time, the challenges of infrastructure, access to early childhood education, quality in education, and regional disparities in participation in education need to be overcome for better scores.

| India's score on HDI over time | | | | | | |
|---|---|---|---|---|---|---|
| Component | 2010 | 2014 | 2015 | 2017 | 2018 | 2019 |
| HDI Rank | **134** | **130** | **131** | **130** | **129** | **131** |
| HDI Score | **0.579** | **0.616** | **0.624** | **0.64** | **0.642** | **0.645** |
| Life Expectancy at Birth (Years) | **65.4** | **68** | **68.3** | **68.8** | **69.4** | **69.7** |
| Expected Years of Schooling (Years) | **10.3** | **11.7** | **11.7** | **12.3** | **12.3** | **12.2** |
| Mean Years of Schooling (Years) | **4.4** | **5.4** | **6.3** | **6.4** | **6.5** | **6.5** |
| Gross National Income (GNI) Per Capita (PPP $) | **3468** | **5497** | **5663** | **6353** | **6829** | **6681** |

*Source*: Economic Survey 2021[6] and Country Economy

The HCI scores over time also show improvement over time, though again, at a slow rate.

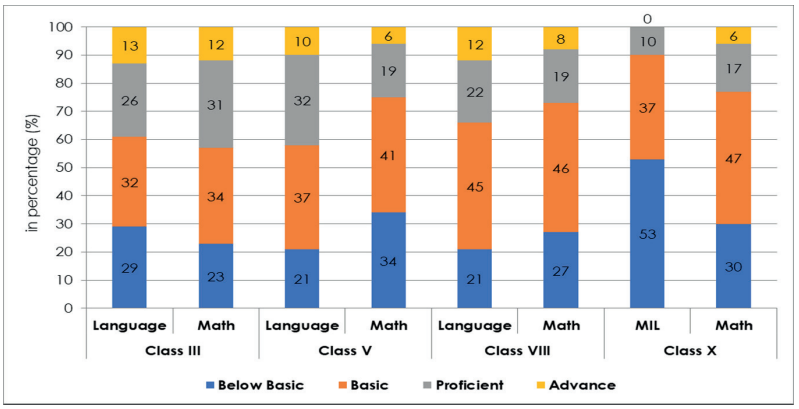
| Component | 2018 | 2020 |
|---|---|---|
| Human Capital Index | 0.48 | 0.49 |
| Probability of survival to age 5 | 0.96 | 0.96 |
| Expected years of school | 10.2 | 11.1 |
| Harmonized test scores | 355 | 399 |
| Learning adjusted years of schooling | 5.8 | 7.1 |
| Adult survival rate | 0.83 | 0.83 |
| Fraction of children under 5 not stunted | 0.62 | 0.65 |

*Source*: World Bank[7]

**The National Achievement Survey (NAS):** NAS 2021 conducted by NCERT for Classes III, V, VIII and X, highlights the problem of low learning levels in school.NAS 2021 was conducted during and in the aftermath of the century's worst disruptor, the COVID-19 pandemic. It obviously showed learning losses at all levels. This situation too is receiving urgent and focused attention to ensure that the students can achieve the desired learning competencies at each grade.

[6] Economic Survey 2021, https://www.indiabudget.gov.in/economicsurvey/ebook_es2021/files/basic-html/page701.html and https://countryeconomy.com/hdi/india.
[7] World Bank, Human Capital Project,https://www.worldbank.org/en/publication/human-capital#Index.

Proficiency levels in Language and Maths for all Grades (NAS 2011)




*Source*: National Achievement Survey, 2021[8]

On disaggregating the above data, various kinds of access-related challenges of equitable, inclusive, and quality education become evident. These are briefly discussed below.

## 2.1 Challenges relating to access to equitable education

### 2.1.1. Regional differences

Urban areas tend to have better-equipped schools, qualified teachers, and better access to resources, while rural areas may not always have these advantages. This rural-urban divide perpetuates unequal access to quality education, resulting in disparities in academic outcomes and opportunities. However, urban poor children constitute another group of children whose participation in education remains low. As per the 75thround of household survey by National Sample Survey[9] (NSS) in 2017-18, the number of Out of School Children (OOSC) in the 6-to-13-years age group is at 5.2 percent. However, this figure hides wide variations in the urban and rural situations. While 3.3 per cent of children in urban areas are out-of-school, the figure is 5.8 per cent in rural areas. Similarly, while the national average Adjusted Net Enrolment Ratio[10] (ANER) for primary education was 97.3 per cent in 2019-20, the ANER ranged from 100 per cent in some states (Assam, Delhi, Maharashtra, Manipur, Meghalaya, Mizoram, Punjab, Telangana, Tripura, Uttarakhand, and West Bengal) to lower in others. This situation has received extremely focused attention by states ever since, and initiatives such as the Vidya Samiksha Kendra, NIPUN Bharat, and Samagra Shiksha have reduced these gaps substantially. In fact, the annual average dropout rate has come down to only 1.5 per cent at the primary level and 3 per cent

[8] National Achievement Survey, 2021, Ministry of Education, Government of India, https://nas.gov.in/report-card/2021.

[9] Household Social Consumption on Education in India, NSS 75thRound, 2017-18, Ministry of Statistics and Programme Implementation, Government of India. https://mospi.gov.in/sites/default/files/publication_reports/Report_585_75th_round_Education_final_1507_0.pdf

[10] UDISE+ 2021-22, Ministry of Education, Government of India, https://udiseplus.gov.in/#/page/publications.

at the upper primary level, while the Gross Enrolment ratio is 100 per cent at the elementary level.[11]

### 2.1.2 Socio-economic differences

Despite enormous efforts in the past, a small proportion of school-age children in remote locations, children from nomadic families, migrant children, and other vulnerable/disadvantaged groups continue to remain out of school. The profile of Out of School Children as per the 75th round of survey by NSS highlights the fact that most of them (two-thirds) have never enrolled in school, while one-third dropped out.

Additionally, according to NSS data, socio-economic disadvantages appear to be the leading causes for children being out of school in the 6-13 age group:

| Reasons for being out of school | Boys | Girls | Total |
|---|---|---|---|
| Engaged in economic activities | 21.5 | 21.4 | 21.5 |
| Not interested in education | 20.3 | 15.9 | 18.1 |
| Financial constraints | 17.4 | 17.1 | 17.2 |
| Other | 17.2 | 14.4 | 15.8 |
| Engaged in domestic activities | 9.9 | 9.5 | 9.7 |
| Marriage | 3.3 | 9.6 | 6.4 |
| Completed desired level/class | 4.3 | 6.0 | 5.1 |
| Unable to cope with studies/failure in studies | 0.9 | 2.9 | 1.9 |
| Preparation for competitive examination | 2.0 | 1.5 | 1.8 |
| School is far off | 1.6 | 1.0 | 1.3 |
| Inadequate number of teachers | 1.1 | 0.0 | 0.5 |
| No tradition in the community | 0.0 | 0.5 | 0.3 |
| Unfriendly atmosphere at school | 0.4 | 0.0 | 0.2 |
| Timings of educational institution not suitable | 0.1 | 0.2 | 0.1 |

*Source*: NSS data of 75th round of household survey, 2017-18

If we have a look at annual average drop-out rate gender wise and community wise, it appears that there is not much difference in the drop-out rate of boys and girls, but in social groups, the drop-out rate of ST is a higher in comparison to SC and OBC.[12]

### 2.1.3 Gender-related disparities

Though there is significant progress in the empowerment and socio-economic status of women, the remnants of cultural norms, along with safety concerns, do exist even today. This can limit the access of girls to secondary and higher education and career opportunities, reinforcing social inequalities.

[11] Ibid.

[12] UDISE+ 2021-22, Ministry of Education, Government of India, https://udiseplus.gov.in/#/page/publications.

### 2.1.4 Basic amenities, infrastructure, and resources

Absence of basic facilities adversely influences the enrolment and retention at the school level. India took up a drive to ensure the presence of functional toilets in all schools in 2014-15 and completed the same in record time. Similarly, the Jal Shakti Ministry's prioritization of schools for provisioning of drinking water in schools has resulted in 98.22 per cent schools having drinking water facilities as per Unified District Information System for Education Plus (UDISE+) data of 2021-22. The huge reduction in the dropout rates and significant increase in Gross Enrolment Ratio can be considered to be a result of these interventions. Now the need is to focus on completing the provisioning of libraries, electrification, and ramps in the small percentage of schools that do not have them.

### 2.1.5 Access to secondary education

While the national average secondary education Gross Enrolment Ratio (GER) for secondary level is almost 80 per cent in 2021-22, the GER is much lower in some states. With the release of the National Education Policy 2020, the school education sector through its Samagra Shiksha scheme is focusing on providing equitable access to secondary education. The Gross Access Ratio (GAR) to secondary schools is now over 95 per cent as per UDISE+ data of 2021-22.

## 2.2 Challenges related to inclusive education

### 2.2.1 Inclusion

Although NSSO does not provide data on children with disabilities, but the SRI-IMRB survey in 2014 shows that almost one-third (28%) of Children with Special Needs (CwSN) are not in school. The reason could, of course, be the higher level of disabilities and the kind of disability. Since 2014, concerted efforts have been made to ensure enrolment of children with disabilities in neighbourhood schools. The Samagra Shiksha scheme provides for various aids and accessories required by such children. A huge number of e-resources and physical teaching and learning material, such as the Barkha series, have been prepared by NCERT to provide easy access to learning for children with disabilities. The Department of School Education and Literacy, Ministry of Education, Government of India, in September 2022, even notified a 1:10 pupil-special educator ratio in primary schools for learners with disabilities, and 1:15 in upper primary onwards.[13] This step shall go a long way in establishing inclusivity at all levels in school education.

### 2.2.2 Language as a barrier to inclusion

According to the Census of India,[14] 2011, there are 121 mother tongues, of which 22 languages are included in the eighth Schedule of the Constitution. Each of the 121

[13] Amendment to the Schedule of the Right of Children to Free and Compulsory Education Act, 2009, Ministry of Education, Government of India,https://dsel.education.gov.in/sites/default/files/rte/Gazette_rte.pdf

[14] Census of India 2011, Paper 1 of 2018, Language – Indian States and Union Territories, https://censusindia.gov.in

languages is spoken by 10,000 or more people in India. Of the total population of India, 96.71 per cent have one of the Scheduled languages as their mother tongue, the remaining 3.29 per cent are accounted for by other languages. An analysis of UDISE+ data of 2021-22 shows that in States/Union Territories (UTs) of India, there are more than 30 languages used as the first medium of instruction at primary level up to Grade 5. This may be the largest basket of medium of instruction in the world.

| S.No. | Language as Medium of Instruction | Number of Schools with Primary sections having this as first Medium of Instruction |
|---|---|---|
| 1 | Hindi | 5,57,220 |
| 2 | English | 1,90,768 |
| 3 | Bengali | 83,628 |
| 4 | Marathi | 81,105 |
| 5 | Telugu | 57,156 |
| 6 | Odia | 49,733 |
| 7 | Kannada | 47,457 |
| 8 | Gujarati | 39,237 |
| 9 | Assamese | 35,833 |
| 10 | Tamil | 32,476 |
| 11 | Urdu | 26,806 |
| 12 | Punjabi | 17,606 |
| 13 | Malayalam | 9,513 |
| 14 | Khasi | 3,689 |
| 15 | Garo | 3,419 |
| 16 | Bodo | 2,557 |
| 17 | Mizo | 898 |
| 18 | Nepali | 679 |
| 19 | Sanskrit | 457 |
| 20 | Manipuri | 237 |
| 21 | Santhali | 87 |
| 22 | Konkani | 79 |
| 23 | Hmar | 78 |
| 24 | Other Indian Mediums | 75 |
| 25 | Karbi | 26 |
| 26 | Bodhi(Ladakhi) | 12 |
| 27 | Sindhi | 11 |
| 28 | French | 5 |

| | | |
|---|---|---|
| 29 | Purgi | 3 |
| 30 | Balti | 2 |
| 31 | Bhutia | 1 |
| 32 | Bishnupriya Manipuri | 1 |

***Source*: UDISE+ 2021-22**

It is not always possible to include each dialect/mother-tongue as medium of instruction, however, teaching and learning can take place through these dialects/mother tongues in the classroom. This can be a game-changer in removing the challenge of accessing learning in languages not familiar to the child. This aspect is discussed in more detail in a later section.

### 2.2.3 Assessment as a barrier to inclusion

We have been following a typical system of assessment, more or less, since pre-independence, with hardly any changes or reforms. Our outdated assessment systems that are heavily reliant on rote memorization, are not able to account for the learning styles and requirements of children, including those with disabilities. Many children are not able to complete school education or prefer to drop out in the face of incomprehensible and archaic systems of assessment. The National Education Policy 2020 has provided for a complete revamp of the system and the recently released National Curriculum Framework for School Education 2023 has laid down the strategy and timelines for implementing a more learner-centric system of assessment that aims to ensure than all assessments also lead to progress in learning and acquiring of skills and competencies, rather than focusing on judging the child.

### 2.2.4 Bringing focus on mental well-being

In 2022, the National Council of Educational Research and Training (NCERT) surveyed mental health among students in schools for the first time in the nation. Over 3.79 lakh students participated in it from all 36 states and Union Territories. The survey was conducted to understand students' perception of their own mental health and well-being. The respondents were divided into two groups—the middle stage (Classes VI-VIII) and the secondary stage (Classes IX to XII).Studies, exams, and results cause anxiety, said 81 per cent of the 3.79 lakh students. As students move from the middle to secondary stages, the decline in their happiness related to their personal and academic lives was evident in the survey report. The issues of an identity crisis, increased sensitivity to interpersonal interactions, peer pressure, fear of board exams, anxiety and uncertainty experienced by students for their future admissions, careers, etc., are all characteristics of the secondary stage.[15]

NEP 2020, for the first time, has brought focus on this issue and emphasized holistic development as against simply cognitive development of the child as more crucial for a better learning curve. NEP 2020's emphasis on mental well-being and its

[15] Mental Health and well-being of students, a survey, 2022, NCERT, https://dsel.education.gov.in/sites/default/files/rte/Gazette_rte.pdf

interlinkage with all aspects of health—physical, social, and emotional, as well as with the growth of cognitive abilities, also stresses that compromising on any of these aspects necessarily impacts on the rest.

### 2.3 Issues related to quality of education

The typical perception of the "access" issue in education has chiefly been about the scarcity of school infrastructure and the inadequate availability of educational facilities. However, new research, including NAS surveys conducted recently, indicate issues that include more internal or micro-features that are directly related to teaching and learning in the classroom and at school, as well as external or macro-factors that need to be changed to create a more enabling environment for strengthening access to education. Some of the key challenges are discussed below.

#### 2.3.1 Access to pre-school

According to NEP 2020,[16] universal access to high-quality early childhood development, care, and education must be attained as soon as practicable, and no later than 2030, to guarantee that all pupils entering Grade 1 are prepared for school. There are almost 1.95 billion children between the age of 3-6 years who are enrolled in roughly 13.87 lakh Anganwadis in India. In addition, according to UDISE+ 2020-21, there are 1.98 lakh government and government-aided schools with pre-primary sections and 2.68 lakh government primary schools with co-located Anganwadis. However, not all children in the 3 to 6 age cohort are enrolled in any formal system. Numerous scientific studies have demonstrated that the brain grows rapidly until the age of 5 or 6; hence, it is crucial to expose young children to high-quality Early Childhood Care and Education (ECCE). As per UDISE 2021-22, 53.32 per cent of children joining primary schools have pre-school experience. This area has been dealt with in a scientific fashion by NEP 2020. The policy has recommended a three-month school readiness related intervention to be delivered to all fresh entrants in Grade 1. To implement this, the NCERT has come out with 'Vidya Pravesh',[17] a 3-monthplay based School Preparation Module in 2021, which has now been implemented across all states and UTs in the country.

#### 2.3.2 Gaps in foundational skills

FLN stands for Foundational Literacy and Numeracy, and it is the capacity to read and comprehend simple texts, write clearly, and carry out elementary addition and subtraction operations even in everyday conditions. NEP 2020 places the utmost focus on acquiring fundamental literacy and numeracy abilities.

As discussed earlier, about 39 per cent and 43 per cent of students were found proficient in literacy and numeracy skills, respectively, in Grade 3 in the National Achievement Survey (NAS) conducted in 2021. Not acquiring these skills at early Grades makes children unlikely to succeed in later Grades, or achieve their full potential. In later Grades, when all subjects require students to be able to 'read to learn', the lack of

[16] National Education Policy 2020, op cit, page 2
[17] Vidya Pravesh, NCERT, https://ncert.nic.in/pdf/vidyapravesh.pdf.

this basic ability can become a major hindrance to further learning and progress. According to research, foundational learning is the key to academic performance in later Grades (Duncan et al., 2007[18]). According to World Bank 2019,[19] "Children who cannot read and understand a simple text will struggle to learn anything else in school. They are more likely to repeat a Grade and more likely to drop out of school. They are less likely to benefit from further training and skills programs." Moreover, investing in foundational learning has several long-term advantages, including improved life outcomes and greater economic growth (Graham and Kelly, 2018[20]).

In accordance with the recommendations of NEP 2020, Ministry of Education (MoE), Government of India, had set-up a National Mission, 'NIPUN Bharat' (National Initiative for Proficiency in Reading with Understanding and Numeracy) to ensure acquisition of Foundational Literacy and Numeracy skills by all students by Grade 3.

### 2.3.4 Access to learning materials

Access to textbooks has been ensured by governments; however, timely access can be an issue in pockets. The availability of other Teaching Learning Materials (TLMs), including through educational technology, also varies significantly from Grade to Grade, school to school, urban to rural, and region to region. It is established that the more the variety of TLMs, the more the learner's engagement in the learning process, as different TLM can take care of different learning styles and make the teaching-learning process more inclusive. Variegated TLMs are also known to foster curiosity and creativity.

### 2.3.5 Accessible curriculum and pedagogy

By curriculum, we mean, Teaching Learning Material, innovative pedagogies, multiple formats of assessment, pre-defined learning standards, etc. What happens in the classrooms decides what learning the young learner shall imbibe. When schools or teachers do not have access to the same curriculum and when they use outdated pedagogical methods (for example, chalk and board), learning cannot be an effective and engaging process. The state and UT governments are now emphasizing upon this area with the support from the Samagra Shiksha scheme.

### 2.3.6 The digital divide

The digital divide refers to the gap between those who have access to digital technologies, such as computers, the Internet, and related resources, and those who do not. It encompasses both the availability of physical infrastructure and the ability to effectively utilize digital tools for educational and personal purposes. In today's rapidly evolving world, access to digital technology and the Internet has become crucial for

[18] Duncan et al. 2007, *School Readiness and Later Achievement, Developmental Psychology*, Vol. 43, https://www.apa.org/pubs/journals/releases/dev-4361428.pdf.

[19] World Bank, 2019, Commitment to action on foundational learning, https://www.worldbank.org/en/topic/education/brief/commitment-to-action-on-foundational-learning.

[20] Graham, Jimmy; Kelly, Sean. 2018. "How Effective Are Early Grade Reading Interventions?: A Review of the Evidence." Policy Research Working Paper; No. 8292. © World Bank, Washington, DC. http://hdl.handle.net/10986/29127.

educational and personal growth. However, not all individuals and communities have equal access to these resources, leading to the "digital divide." The digital divide can have a multiplied effect on school education, and there can be severe implications for the deprived student's future. Opportunities for learning, motivation, and outcome of learning, all may be impacted. This aspect is discussed in more detail in Section 3.

### 2.3.7 Teacher quality and teacher training

The quality of instruction is highly dependent on the quality of teachers, and the quality of teachers is hugely determined by the quality of pre-service as well as in-service training. All teachers may or may not get the requisite opportunities for professional development, or they may not get it timely. The quality of teachers also varies from school to school. Teacher vacancies, teacher absenteeism, and engagement of teachers in works other than teaching, are areas that are being focused upon for filling the gaps by state and UT governments.

## 3. THE DIGITAL DIVIDE

Education is no longer confined to just textbooks and teaching spaces bound by four walls; it has been amalgamated with technology, creative teaching methods, and digital information. The traditional and digital approaches to teaching overlap more and more because of the Internet's increased accessibility and affordability. The education of children and their future chances may be significantly impacted by a lack of technology in the classroom. Students who do not have access to computers or Internet connectivity are often at a disadvantage when it comes to research, communicating, and picking up new skills. This may hinder their capacity to compete in the digital age and gain access to higher learning and employment. For all students, regardless of background or region, equitable chances must be achieved by closing the digital divide in schools. Digital information and communication technology literacy, including meta-literacy, shall become mandatory skills for the workforce in the coming years, and without them, our learners will not succeed in the digital age.

### 3.1 Factors contributing to the digital divide in school education

**3.1.1 Infrastructure and access challenges**: Let us look at the digital infrastructure in schools. UDISE+ 2021-22 data shows that 47.5 per cent schools have a functional computer facility, indicating a significant effort to provide computer resources in these schools. Internet access in classrooms is unquestionably essential for modern education. Access to a wealth of knowledge is made possible, and learning resources are enhanced with collaboration, and communication is also encouraged, as are skill development and worldwide exposure through connectivity. Students are also better prepared for the digital world and their future employment. So far 33.9 per cent of the schools in India have Internet access; however, coordinated measures to close the digital divide and guarantee fair Internet connectivity in all schools across India are being taken by the Central and state governments under the BharatNet Project.[21] This project is aiming to ensure connectivity in 100 per cent schools in the coming days.

[21] BharatNet Project, Ministry of Communications, Government of India, https://usof.gov.in/en/bharatnet-project.

**3.1.2 Regional differences**: The IT related infrastructure is not distributed evenly in the country. There are regional differences, particularly due to terrain and remoteness issues. It is also seen that rural areas face these challenges much more than urban areas. These gaps are a hindrance to access and, therefore, create digital divide. However, as mentioned above, BharatNet Project is slated to overcome these difficulties in the near future. Already, 202,028 Gram Panchayats are connected through the BharatNet project, and 658,685 km of Optical Fibre Cable (OFC) has been laid. Additionally, 643,789 Fibre-To-The-Home (FTTH) connections are commissioned, and 104,675 Wi-Fi hotspots are installed to ensure last-mile connectivity. (as on 11.09.2023).[22]

**3.1.3 Socio-economic challenges:** Technology adoption might also be a function of socio-economic status. Though there is no UDISE+ data to this effect, but it is seen that sections of students from Socio-Economically Disadvantaged Groups[23] (SEDG) may lack access to personal devices and connectivity, implying lower ability to engage in digital learning.

**3.1.4 Teacher capacities:** Before the pandemic struck, it was next to impossible to imagine that teachers in India would become adept in the use of technology for teaching and learning, or at least for administration, monitoring and governance. The pandemic has changed this situation. There is not only a huge section of teachers that are already using technology for classroom instruction, but there is also a hunger for learning more and delving deeper into this area for their teaching and learning process. Both the pre-service and in-service teacher training curricula are now being completely revamped for including aspects related to integration of technology in education. As a result, the use of digital tools as Teaching Learning Materials has taken off. The pedagogical methods, too, are transforming with the strategies laid down by NEP and NCFSE, thereby increasing the scope for technology integration.

**3.1.5 Clarity on integration:** How is technology to be integrated into the teaching-learning process? Does the curriculum have scope for its use? Can it be used for assessment? What are the 21st century skills, knowledge, and information that can be effectively imbibed with the help of educational technology? There used to be no clear guidelines or laid down strategies on the ways and means of integrating technology with education, and most teachers ended up treating its use as a supplementary aspect and, that too, if time permitted! With the advent of NEP 2020 and the subsequent National Curriculum Framework for School Education (NCFSE) 2023 based on it, there are clear guidelines and strategies for integrating technology at every stage of education.

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[22] Ibid.

[23] The term SEDG has been used for the first time in the National Education Policy 2020,which broadly categorizes this group based on gender identities (particularly female and transgender individuals), socio-cultural identities (such as Scheduled Castes, Scheduled Tribes, OBCs, and minorities), geographical identities (such as students from villages, small towns, and aspirational districts), disabilities (including learning disabilities), and socio-economic conditions (such as migrant communities, low income households, children in vulnerable situations, victims of or children of victims of trafficking, orphans including child beggars in urban areas, and the urban poor).

**3.1.6 Teaching methods:** The routine teaching methods have taken a toll on student engagement and retention. The NEP 2020 and NCFSE 2023 have laid down provisions for making pedagogy and assessment more joyful, engaging and project-based to open the learning process to much wider adoption and integration of technology. Adaptive learning systems, personalised instructions, gamification of learning, etc., are all possible through these innovative pedagogical approaches.

## 4. CHALLENGES RELATED TO THE LANGUAGE OF INSTRUCTION

'Language' and 'Literacy' are two aspects of learning that are essential for every young learner. While 'Language' is understood to be the social tool that allows us to interact and cooperate with one another through oral communication, 'Literacy' also includes reading, writing and comprehension skills aside from communication skills. If the language of instruction is inaccessible, the child neither acquires language nor literacy skills and is left to 'sink or swim' on their own, in the classroom. As per Section 29(f) of 'The Right of Children to Free and Compulsory Education Act, 2009', medium of instruction shall, as far as practicable, be the child's mother tongue. NEP 2020 notes that young children learn and grasp non-trivial concepts more quickly in their home language/mother tongue. Home language is usually the same language as the mother tongue or that which is spoken by local communities.

### 4.1 Importance of literacy skills

As per UNESCO, acquiring literacy is a continuous process. Beyond its traditional definition as a set of reading, writing, and math skills, literacy is seen as a way of identifying, comprehending, interpreting, creating, and communicating in a world that is becoming increasingly digital, text-mediated, information-rich, and dynamic. A larger range of abilities, such as digital skills, media literacy, education for sustainable development and global citizenship, and job-specific skills, are all included in the concept of literacy, which is a continuum of learning and proficiency in reading, writing, and using numbers throughout life. As people interact with information and learn through digital technology more and more, literacy skills are growing and evolving as a result. People are empowered and liberated by literacy.

Beyond its significance as a component of the right to education, literacy enhances people's lives by increasing their capacity, which decreases poverty, boosts labour market participation, and has favourable effects on health and sustainable development. Empowerment of women via literacy has a good knock-on effect on many facets of development. They have more personal freedom and an immediate impact on their families' health and education, particularly the education of young girls. For retention and progress in subsequent Grades, learning to read in the early years of primary school is essential. The foundation of development is literacy. Better health, more favourable employment prospects, and safer and more stable societies are the results.

When students have higher literacy levels, our economy benefits. Effective literacy abilities open up more educational and employment opportunities, enabling people to escape poverty and persistent underemployment. It is crucial for individuals to continuously broaden their knowledge and pick up new skills in order to stay up with

the pace of change in our technologically advanced and rapidly evolving world.

Children's academic achievements and outcomes in later life depend on their ability to read well. One of the most critical aspects in deciding whether children develop strong literacy abilities that are the cornerstone of all later learning is whether they learn to read in a language that they use and understand, whether it is a spoken or sign language. If kids cannot grasp the language their teacher uses in class, even the best-designed reading courses will not help them learn to read. Predictably, poor learning outcomes in the early Grades lead to grade repetition and high dropout rates when students do not have the option of learning to read in a language they comprehend.

### 4.2 Importance of using language of the learners

According to research, mother tongue education is essential for inclusivity and high-quality learning. It also enhances learning outcomes, academic achievement and eliminates knowledge gaps and quickens learning and comprehension, especially at foundational stages. Most importantly, mother tongue-based multilingual education gives all students the ability to participate fully in society. It promotes respect and understanding amongst people and aids in the preservation of the rich cultural and historical legacy of our languages.

Children are placed in a new physical environment when they begin school. The teacher is a stranger, most of the other students in the class are strangers, and the classroom is new. The issue can become more problematic when, in addition to these factors, there is a sudden change in the language of engagement. This results in a teacher-centred approach and fosters passiveness and silence in classrooms when students begin school in a language that is still new to them. In consequence, this limits young learners' potential and freedom of expression. It saps the motivation of young brains to learn, stifles their originality, and taints the learning process, all of which is certain to have a detrimental impact on learning. It can hinder a child's overall development. However, by speaking in their native tongues, educators can bridge the gap between the knowledge students gain in the classroom and the life experiences they bring from home. Learners are more likely to participate in the learning process when instruction is in their native tongue. All educationalists advocate the interactive learner-centric method, which flourishes in a setting where students are sufficiently fluent in the language of teaching. It enables students to generate and enthusiastically express new knowledge while asking and answering questions. It boosts students' self-esteem and supports the affirmation of their cultural identities. This, in turn, has a favourable effect on how students perceive the value of education in their life.

### 4.3 Provisions under NEP 2020

Some of the key provisions of NEP 2020 to make languages of instruction more accessible for every learner include:

- Wherever possible, the medium of instruction until at least Grade 5, but preferably till Grade 8 and beyond, will be the home language/mother tongue/local language/ regional language.

- Teachers will be encouraged to use a bilingual approach, and use bilingual teaching-learning materials, with those students whose home language may be different from the medium of instruction.
- A language does not need to be the medium of instruction for it to be taught and learned well.
- Children will be exposed to different languages early on (but with a particular emphasis on the mother tongue), starting from the Foundational Stage onwards.
- High-quality bilingual textbooks and teaching-learning materials will be prepared for science and mathematics, so that students are enabled to think and speak about the two subjects both in their home language/mother tongue and in English.
- Indian Sign Language (ISL) will be standardised across the country. Local sign languages will be respected and taught as well, where possible and relevant.

**4.3 Challenges in mother tongue education**

According to UNESCO estimates, 40 per cent of the world's population lacks access to education in a language they can comprehend or speak. There are approximately 7,097 living languages currently, of which 50 per cent are in Asia-Pacific.[24] However, due to the alarming rate at which languages are vanishing, linguistic diversity is coming under greater threat. Furthermore, when a language dies, a whole cultural and intellectual legacy goes with it. Teaching in the mother tongue is easier said than done, as there are several challenges that need to be overcome, to get there.

**4.3.1 Availability of high-quality material**: India has many different languages and dialects, therefore, producing high-quality instructional materials in each of them takes time and effort. Providing top-notch educational resources in local languages will necessitate a large investment in infrastructure and resources. Post NEP 2020, to provide standardized instructional materials in regional languages, the Central and state governments are collaborating with educational institutions, experts, and other stakeholders.

**4.3.2 Standardising evaluations:** The standardisation of the evaluation process may be hampered by using different languages for tests. Students from one part of the country may find it difficult to participate in assessments in another part of the country. The government and educational institutions need to provide educators with language training in their native regions and make sure they are aware of the evaluation criteria to overcome this challenge.

**4.3.3 Availability of qualified and language-specific teachers:** Another issue that NEP 2020 has pointed out that needs to be addressed is the availability of qualified teachers who can communicate clearly in local languages. Investment in training and in development of materials to make sure that teachers are prepared to teach in these languages has been initiated.

[24] UNESCO, https://bangkok.unesco.org/content/mother-tongue-based-education-unesco-infographics-1

**4.3.4 Choice of language for study and examination:** Having the option of mother tongue for writing examinations is crucial. If it can be ensured that students take tests in a language they speak fluently, their learning achievements will automatically go up. Also, efforts are required to prevent language barriers for students studying outside of their home state, and to ensure that their education is not negatively impacted by using regional languages. Several steps have been taken in this direction. The Navodaya Vidyalayas use the regional language as the medium of instruction up to Grade 8, for students who join at Grade 6. The Central Board of Secondary Education offers more than 35 languages for choice of subjects. The National Institute of Open Schooling offers the Indian Sign Language as a subject to students. E-content is available in over 30 languages on the DIKSHA platform and in over 11 languages in the Swayam Prabha TV channels of Government of India.

**4.3.5 Contextualisation of the teaching-learning process**: Effective instruction and pedagogy must consider contextual factors and involve a variety of stakeholders to ensure that the context of the learners is addressed and integrated into the curriculum transaction. Children learn best when they can recognise the concepts learnt in their real lives, in their situations, languages, culture, etc. NEP 2020 and NCFSE 2023 have delineated a strategy for implementing this.

## 5. SOLUTIONS - EXISTING, PROPOSED AND POSSIBLE

Quality education and its effect on closing the gap in academic achievement among students have received much attention recently, particularly with the launch of India's NEP 2020. The NEP 2020 seeks to transform the educational system and guarantees that all students have access to high-quality instruction, minimising inequalities in student learning results. Additionally, UN's 2030 Agenda for Sustainable Development includes Quality Education (SDG 4) as one of its goals, recognising the transformational impact of education. The objective underlines the necessity of ensuring inclusive and equitable quality education and fostering possibilities for lifelong learning for everyone. Consolidated efforts are being taken at the policy and implementation level, and along with this, more efforts at the community and individual levels will surely help to close the access gap to high-quality education in all areas.

### 5.1 At the policy level

**5.1.1 The National Education Policy (NEP) 2020:** NEP 2020 represents a paradigm shift in the process and delivery of education and aims to address the many expanding developmental imperatives of our nation. The policy proposes the revision and revamping of all elements of the educational framework to create a new system that is in keeping with the aspirational goals of the 21st-century and builds upon India's traditions and value systems. Moving away from the current culture of rote learning and towards actual understanding and learning how to learn will be the primary objective of all stages of curriculum and pedagogy reform. The purpose of education will be to develop students' character and cognitive capabilities to produce well-rounded individuals equipped with crucial 21st-century skills. According to NEP

2020, education should be comprehensive, integrated, joyful, and engaging. The salient features of NEP are as follows:

- Restructuring school curriculum and pedagogy in 5+3+3+4 design
- Focus on all domains of learning for the holistic development of learner
- Reduce curriculum to enhance essential learning and critical thinking
- Experiential and activity-based learning as pedagogy at every stage
- Empowering students through flexibility in course choices
- Teaching in the local languages and focus on multilingualism
- Curricular integration of essential subjects with 21stcentury skills and capacities
- National textbooks with local content and flavour
- Transforming assessment for students' development
- Support for gifted students
- Vocational exposure at early ages in middle and secondary school, quality vocational education will be integrated smoothly into higher education
- Every child to learn at least one vocation and be exposed to several more
- Technology integration will be done in various areas, such as teaching, learning and assessment, education planning, administration, and management
- Teaching-learning e-content will be developed in regional languages.

NEP 2020 calls for investment in digital infrastructure, addressing digital divide, online teaching platforms and tools, virtual labs, digital repositories, online assessments, technology and pedagogy for online teaching-learning etc., with the promotion of multilingualism and the power of language in teaching and learning through innovative and experiential methods, including through gamification and apps by weaving in the cultural aspects of the languages, such as films, theatre, storytelling, poetry, and music, and by drawing connections with various relevant subjects and real-life experiences.

Furthermore, NEP 2020 suggests bringing back out-of-school children and mainstreaming them, including alternative forms of instruction, child monitoring, raising learning levels, and creating school complexes for resource sharing, among other things, in order to guarantee 100 per cent Gross Enrolment Ratio at all levels.

**5.1.2 National Curriculum Framework for School Education 2023 (NCFSE):**How we approach education is likely to undergo a revolutionary change under NCFSE. The NCFSE is a teacher-led and learner-centric document that enables teachers to adopt changes and transform their instruction by meeting the pre-defined 'Learning Standards'. The achievement of Learning Standards has been underlined by this NCFSE as the primary goal of education. Therefore, instead of textbooks, the achievement

of specified learning outcomes shall be the emphasis of classroom interactions, and textbooks will be relegated to become just one of the many resources available to teachers and students for achieving these learning standards. Since learning outcomes can be attained through a variety of pedagogies and assessment formats, the NCFSE presents an inclusive and holistic approach to the access of school education by stressing upon them.

### 5.2 At the implementation level

**5.2.1 Schemes for school education:** The implementation of the RTE Act and the Sarva Shiksha Abhiyan (SSA) have been crucial in ensuring that all children in elementary school (Classes I through VIII) have access to education. In the neighbourhood, there are now significantly more primary and upper primary schools, most of which were sanctioned under SSA. In 2021–2022,[25] according to the norms of the neighbourhood, the Gross Access Ratio (GAR) of the educational facility at the primary level is 97.49 per cent of habitations and 97.01 per cent at the upper primary level. The Rashtriya Madhyamik Shiksha Abhiyan (RMSA), which was established with the aim to expand secondary school access and enhance its quality, has achieved a GAR of 95.48 per cent within a 5 km radius.

All the above schemes are now subsumed under Samagra Shiksha,[26] an integrated scheme for school education covering all levels from pre-school to senior secondary. The Centrally Sponsored Samagra Shiksha Scheme offers assistance to states and UTs in many areas, including the improvement of current facilities, the opening of new schools based on GIS mapping, funding for additional teachers, special training for out-of-school children and interventions for children with disabilities.

### 5.2.2 Initiatives of the Government of India to bridge the digital divide

A comprehensive initiative, PM e-Vidya[27] was launched by the Ministry of Education, Government of India, as a part of the Atma Nirbhar Bharat Programme. It unifies all efforts related to digital/online/on-air education to enable coherent multi-mode access to education with the aim to bridge the digital divide. It includes:

DIKSHA[28] (Digital Infrastructure for Knowledge Sharing) is the One Nation One Digital Platform for School Education. The content includes over 6700 Energized Textbooks and 3.17 lakh e-contents in 29 Indian and seven Foreign languages.

Swayam Prabha[29] or learning through 200 TV Channels (which has more than 13,000 e-contents in 31 languages).Learning through Radio[30]/Podcasts, through which more than 4200 content pieces is already disseminated, and E-content for students with disabilities, with over 4200 Audio books, 4000+ contents in Indian Sign Language, etc., all hosted on DIKSHA.

[25] UDISE+data, 2021-22.
[26] Samagra Shiksha, Ministry of Education (MoE), Government of India (GoI).https://samagrashiksha.ssagujarat.org/en/home.
[27] PM e-Vidya, MoE, GoI,https://pmevidya.education.gov.in/.
[28] DIKSHA, MoE, GoI,https://www.diksha.gov.in/.
[29] Swayam Prabha, MoE, GoI,https://www.swayamprabha.gov.in/.
[30] Gyan Vani, NCERT, https://ciet.ncert.gov.in/gyanvani.

Just as UPI transformed payment systems in India by connecting all stakeholders of the ecosystem, similarly, the NDEAR[31] (National Digital Education Architecture) blueprint for education has been prepared to serve as a super-connector for all stakeholders and their needs—from teaching and learning to evaluation and monitoring of individual progress to administrative, governing, and monitoring functions, among others. The blueprint has been activated in all states and UTs and as a first step, student registry is to be completed soon in the country.

Vidya Samiksha Kendra[32] (VSK) aims at leveraging data and technology to aid a giant leap in retention, transition and learning outcomes, and it aims to cover the data of all schools, teachers and students. It has the capability to analyze this data meaningfully using big data analysis, artificial intelligence, and machine learning to enhance the overall monitoring of the education system and thereby improve learning outcomes. It helps to keep track of enrolled students, dropouts, information on mainstreamed and out-of-school children, etc. It also empowers educational administrators and teachers to take data-driven decisions and monitor the real-time status of progress of various project components/activities under the ambit of School Education. The Government of India is funding all states and UTs to set up VSKs on an urgent basis.

The Information and Communication, Technology (ICT) component of the Samagra Shiksha scheme establishes ICT labs and Smart classrooms and Virtual labs in Classes VI to XII in those government schools, where the provision of Internet connectivity is extended to schools, as a part of the scheme. Tablets for Primary School teachers are also provided.

### 5.2.3 Initiatives for teacher training

NEP 2020 encourages teacher autonomy and the reduction of administrative work so that educators can devote more of their time to teaching and learning. The National Initiative for School Heads' and Teachers' Holistic Advancement (NISHTHA) is an integrated training programme that was launched by the Ministry of Education, Government of India, in August 2019 with the goal of promoting the holistic development of teachers.

In all, 33 states/UTs and eight autonomous bodies under Ministries of Education, Tribal Affairs and Defense have rolled out three categories of NISHTHA. The first, NISHTHA for Elementary stage teachers is completed by approximately 40 lakh teachers; NISHTHA 2.0 for Secondary level teachers is completed by about 7.8 lakh teachers; and NISHTHA 3.0 on Foundational Literacy and Numeracy made available in 11 languages (Hindi, English, Urdu, Gujarati, Punjabi, Telugu, Kannada, Odia, Assamese, Marathi and Mizo) is completed by around 12 lakh teachers as of March 2023. Deep and professional training of such large number of teachers in such a short span of time is a first in our country.

It is pertinent to point out that each of these training programmes has included mandatory components, such as inclusive education, integration of technology in

[31] NDEAR, MoE, GoI,https://www.ndear.gov.in/.
[32] Vidya Samiksha Kendra, MoE, GoI,https://www.ndear.gov.in/vidya-samiksha-kendra.html.

education, classroom transaction based on local languages and context, etc.

### 5.2.4 Initiative for community involvement

Vidyanjali[33] is an initiative taken by the Ministry of Education, Government of India, with the aim to strengthen schools through community and private sector involvement. This initiative connects schools with varied volunteers from the Indian Diaspora, namely, young professionals, retired teachers, retired government officials, retired professionals, NGOs, Private Sector and Public Sector Companies, Corporate Institutions, and many others. Vidyanjali has two verticals: "Participate in School Service/Activity" and "Contribute Assets/Material/Equipment" in which volunteers can support and strengthen the government and government aided schools. As per data on the website, 6.58 lakh schools of India have on boarded Vidyanjali, and with the participation of 4.39 lakh volunteers, about 58 lakh children have been positively impacted.

## 5.3 Solutions based on policy

The far-reaching and path-breaking provisions of NEP 2020 have already kick-started transformation in the school education sector. Some of the key actions under implementation/consideration shall indeed go a long way in bridging the accessibility gap.

**5.3.1 Mother tongue-based education:** The key actions would include—linguistic mapping of each school neighbourhood, sensitization and orientation of educational administrators towards the need to use the local language alongside the regional language in their classroom transactions, creation of learning material in local languages, initiating the classroom teaching in mother tongue in certain areas on priority (such as remote areas, areas with a spoken language other than those in the Schedule of the Constitution), and phase-wise introduction in the rest of the schools. This kind of teaching-learning process of subjects in Classes 1 to 5 through a bilingual approach that focuses on the mother tongue, while simultaneously attempting to establish links with the local/regional language, will require very targeted pedagogical training of teachers. The NCERT[34] and the SCERTs[35] have already initiated the development of such training modules.

**5.3.2 Strong links between Anganwadi Centers (AWC) and elementary schools:** These are an essential component of the continuum approach described in the NEP 2020 document, which addresses access from pre-school through higher secondary education. There are numerous ways to accomplish this. The physical co-location of AWC in the elementary school's compound may enable greater resource sharing for infrastructure and human resource coordination between the two institutional entities. Even without physical co-location, there must be regular communication between AW

[33] Vidyanjali, Ministry of Education, Government of India, https://vidyanjali.education.gov.in/en/about-us.

[34] National Council of Educational Research and Training, under the aegis of MoE, GoI.

[35] State Council of Educational Research and Training, under the aegis of governments of states/Union Territories.

workers and primary school teachers, especially those teaching Grades 1 and 2. Both institutions are accountable for putting activity-based learning into practice along a continuum from AWC to the early years of formal schooling.

**5.3.3 Focus efforts on foundational skills:** The NIPUN Bharat[36] initiative of the Government of India, which began in July 2012, provides a framework, strategy, and budget for implementing and achieving foundational literacy and numeracy skills in Grades 1 and 2. It is being implemented in all states and UTs in very innovative ways with a great deal of emphasis on teacher training, development of teaching-learning material in local languages, play-based pedagogy, family engagement, local self-government involvement, and close monitoring at all levels.

**5.3.4 Improving access to education at the secondary stage:** Mapping based on Geographical Information Systems has become the basis for building new schools, expanding vocational education, and reinforcing open schooling systems to improve access at the secondary and higher secondary levels. Budgetary provisions have been made accordingly in the Samagra Shiksha scheme.

**5.3.5 Differential planning for improving access to SEDGs:** Regardless of gender, race, religion, ethnicity, or socio-economic background, all children should have equal access to educational services. The efforts adopted under the Samagra Shiksha scheme to secure the inclusion of SEDGs are being implemented and closely monitored. In addition, pre-service and on-the-job training has mandatory inclusion of component that emphasizes inclusive and fair education.

**5.3.6 Curriculum for improving learning outcomes:** Under achievement among students is a phenomenon that reflects the quality issues that the educational system is dealing with. Inadequate levels of student learning highlight the need for improving learning outcomes and fostering quality education as the main areas of concentration in the upcoming years. Many of the problems with quality can be solved with a curriculum focused on 21st century skills with adequate room for local contextualization and school-based formative assessment. The NCFSE 2023 is a step in the right direction.

**5.3.7 Personalized learning interventions**: A personalized learning strategy is extremely sensitive to individual needs and highly adaptable to changes. This does not imply that learning turns into a personal project based on preferences. It implies that learning possibilities, whether collaborative or autonomous, adapt to the needs of each student while being guided by the educational systems' established learning objectives. The formulation of personalized development and learning plans, the provision of one-on-one or very small group mentoring or instruction, and, for older students, the provision of flexible learning options, routes, and transitions are examples of intervention approaches of this type which could be implemented.

**5.3.8 Multiple entry-exit option/credit system:** The Academic Bank of Credits (ABC) will support interdisciplinary/multidisciplinary student mobility nationwide with an appropriate "credit transfer" mechanism. A system that allows students to

[36] NIPUN Bharat, Department of School Education and Literacy, Ministry of Education, Government of India, https://nipunbharat.education.gov.in/.

select their learning route to acquire a degree, diploma, or certificate will be in place under the provisions of NEP 2020. The standard tool for enabling seamless integration and coordination across institutions and all levels of education will be a National Credit Framework for secondary, higher, and vocational education. With flexible curricula, inventive topic pairings, the integration of vocational education, and many entry and exit points, such a framework will make it possible to provide students with a broad-based, multidisciplinary, holistic education.

**5.3.9 Family and community involvement:** The joint efforts of parental demand and government supply have enabled India to achieve close to universal enrollment in primary schools. It is crucial to engage parents and families in educational activities for smoother access to learning opportunities. Aside from regular interactions between parents and teachers, learning standards that the child is expected to achieve, learning tools including, books, toys, games, and activities that can be taken up at home, must be shared with families to emphasize and strengthen family interaction. The NIPUN Bharat programme is an example of implementation of this aspect.

The most common venue for human learning is and will continue to be formal schooling in institutionalized, professionalized settings, at least, in the near future. However, the majority of early education takes place in families and communities. Significant experiences outside of the classroom reinforce and complete what kids learn in the classroom. Therefore, the role of the community cannot be overlooked. Community involvement, mainly through the local self-government, can go a long way in closely monitoring the children's progress in that area. Both, NIPUN Bharat and Samagra Shiksha focus on these areas and provide for capacity building of the community to garner their full engagement. In coordination with the Ministry of Panchayats, local self-governments are being encouraged to declare and implement annual targets such as, zero dropout gram panchayat, 100% enrolment, 100% transition to secondary stage, etc.

**5.3.10 Bridging the digital divide:** The National Education Policy 2020 places a strong emphasis on integrating technology into the teaching and learning process. The policy acknowledges the transformative role of technology in education. It promotes the integrating of technology, such as smart classrooms, online learning platforms, and digital resources, to make learning more accessible and interactive. A great deal of research is needed on both the technological and educational fronts because new technologies such as artificial intelligence, machine learning, blockchains, smart boards, handheld computing devices, adaptive computer testing for student development, and other forms of educational software and hardware will not only alter what students learn in the classroom, but also how they learn. To enable all school students to read and learn with books even when they do not have physical access to libraries, and to have a broader range and larger selection of books in regional languages, a national digital library for schools will be developed with works by reputable Indian and international authors. The policy also states that Digital platforms and ongoing ICT-based educational initiatives such as SWAYAM, DIKSHA etc., will be optimised and expanded.

The COVID-19 Pandemic not only brought out the nation's digital divide into the open, but it also sped up attempts to make digital education accessible to everyone. Over 67.6 per cent of Indian families now have access to a device, and nearly 27.9 per cent of those households have purchased a smartphone for their child's education due to school closures. Efforts to provide the appropriate digital infrastructure to enable learning in this modern day are being undertaken under Samagra Shiksha with the objective of ensuring engaging, joyful, equitable, and inclusive education.

**5.3.11 Best practices show the way**

It is innovative practices across the country that continue to reaffirm our faith in the scope and possibilities for bridging the gaps in school education, and veritably transforming it. Following are a few innovative initiatives that are transforming the educational landscape in states.

- Operation Kayakalp and Mission Prerna of Uttar Pradesh aim to saturate infrastructure in schools in eighteen basic parameters and improve the quality of education in 1.6 lakh schools with a special focus on foundational learning skills, respectively.
- Madhya Pradesh has initiated Shaikshik Samvad, or the CM Rise Teacher Professional Development Programme, with the objective of professional development of teachers in joyful and innovative methods of teaching and learning.
- Nadu Nedu of Andhra Pradesh is an initiative for transforming school infrastructure over a period of three years over three phases, by provisioning for major and minor repairs; toilets with running water; drinking water supply; painting of entire campus; electrification; English labs; compound wall; kitchen sheds, etc.
- In Gujarat, Daily Attendance is closely monitored through an online system at the Command and Control Centre
- Karnataka’s Student Achievement Tracking System (SAT), "Shikshana Kirana" is a project to track every child’s enrolment, retention, and progress in school through unique identity and name.
- Odisha: Mother Tongue-based Multilingual Education Programme (MLE) aims to improve tribal students’ literacy by using mother tongue instruction in early Grades.
- Kerala has initiated crowd-sourcing for setting up community-level device banks for providing devices to all secondary level students at home along with data packs to ensure continuous learning.

## 6. CONCLUSION:

In conclusion, it may be difficult, but not insurmountable, to achieve equitable and high-quality education given the current challenges, including the digital gap and the language of instruction for classroom interactions. These issues are intricately related and reflect both past and contemporary socio-economic issues. These barriers have been identified and coordinated efforts by governments, educational institutions, families, and communities are in place which aim to create a more inclusive and just educational environment. The path-breaking NEP2020 and the equally futuristic, equitable and inclusive National Curriculum Framework for School Education 2023 have in no uncertain terms delineated the path for India and its schooling ecosystem in the coming years. In fact, the NEP 2020 has given timelines for completion of its implementation. We quote from the policy itself to sum up our discussion—"In the decade of 2030-40, the entire policy will be in an operational mode, following which another comprehensive review will be undertaken." India is poised to assume leadership role in the world in the education sector in the coming years.

# Safeguards for the Protection of the Rights of Children Born from Surrogacy Arrangements

Geeta Narayan*

**Abstract**

*It is universally accepted that children should not face any adversity owing to the circumstances of their birth. The rights of children, as identified and accepted internationally as well, should not be violated just because they are born from surrogacy. Safeguarding the rights of these children has been of paramount significance among different countries of the world because surrogacy as an option for reproduction has gained demand due to various factors including rising rates of infertility, late marriages, and career aspirations. Uncertainties have crept in the erstwhile settled issues such as legal parentage when a child is born from surrogacy. This article deliberates upon the safeguards of the rights of children born from surrogacy in the backdrop of the basic conceptsand the extent of surrogacy practice in India and how India is fairing in the context of the international scenario. The focus has been kept on the said safeguards as ensured through the recent enactments of The Surrogacy (Regulation) Act, 2021[1] and The Assisted Reproductive Technology (Regulation)Act, 2021[2] and other extant laws. The areas of concern within the country and with respect to International Surrogacy Arrangements (ISAs)[3] have also been touched upon along with some factual examples.The article, further, reveals how there has been an*

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[1] Surrogacy (Regulation) Act, 2021(Hereinafter— The Surrogacy Act) was enacted on 25 December 2021 after being passed by both Houses of Parliament (Act No. 47/2021) to constitute National Assisted Reproductive Technology and Surrogacy Board, State boards and Appropriate Authorities for regulation of the practice and process of surrogacy and in the process, provide all rights to the children born through surrogacy, prevent exploitation of the surrogate mothers and provide ethical opportunity of parenthood to the needy intending couples/women.

[2] The Assisted Reproductive Technology (Regulation) Act, 2021(Hereinafter— The ART Act) was enacted on 18 December 2021 after being passed by both Houses of Parliament (Act No. 42/2021) for the regulation and supervision of ART clinics and ART banks, prevention of misuse, safe and ethical practice of ART services for addressing the issues of reproductive health where ART is required for becoming a parent or for freezing gametes, embryos, etc. for further use due to infertility, disease or social or medical concerns and for regulation and supervision of R & D and other connected matters.

[3] ISAs are the cross-border surrogacy arrangements.

*extensive interest in the topic in various international fora and how it has not been possible to reach a consensus in spite of a dire felt need for protection of rights of children born from surrogacy.*

**Keywords:** Safeguards, Child rights, Surrogacy, International surrogacy arrangements, Laws

## 1. Introduction

'Safeguards for the Protection of the Rights of Children Born from Surrogacy Arrangements'— The title itself indicates that these children's rights need to be protected. Surrogacy and stages of embryo development are mentioned even in ancient Indian scriptures. Bhagavat Purana talks about an embryo getting transferred from Devaki's womb to save the child from Kansa. However, the rights of children born through surrogacy during those times did not presumably have any threats as are experienced in the present times.The current scenario is very complex with difficulties in adoption procedures, cases of child trafficking and prostitution, establishment/ commercialisation of surrogacy procedures, the creeping in of illegal and unethical malpractices in Assisted Reproductive Technology (ART) and the availability of surrogates from the poor strata of society.

The need for focussing on the safeguards for the protection of the rights of children born from surrogacy arrangements and related issues has arisen due to the fact that the last quarter of the 20th century was witness to several major advances in reproductive medicine and technology, starting with the birth of the world's first test tube baby, Louise Brown, resulting from the In-vitro fertilisation (IVF) on 25 July 1978 and the first Indian test tube baby, Kanupriya Agarwal, born on 3 October 1978.

The number of children born through this method grew, based on these medical advances, as IVF soon became a routine procedure and widely accepted treatment for infertility, though methods and morals continue to be debated upon. Parallelly, and more so during the last two decades, India became one of the major global centres of IVF with reproductive medical tourism becoming a significant activity. Along the way, further research and development led to newer advancements with respect of ART based surrogacy and this, in turn, led to the boom in the availability and usage of surrogacy services in India.

## 2. The Concept of Surrogacy

The rights of children born from surrogacy can be better appreciated after delineating on the concept of surrogacy, and what it entails. Surrogacy is a kind of ART involving a third person. It is an arrangement, where a woman (the surrogate) agrees to carry the baby through pregnancy, achieved through ART, with an intention to carry it to the

term and hand over the child to the intending parent(s) once born.

Surrogacy can be gestational or traditional. Traditional surrogacy involves insemination of the surrogate naturally or artificially with the gamete of the male partner of the intending couple and thus the child gets genetically related to the surrogate mother. This kind of arrangement has peculiar set of problems for the parents and the child, as was exhibited in an old Bollywood movie 'Chori-Chori Chupke-Chupke' where the surrogate is not ready to part with the child. In gestational surrogacy, an embryo from the ovum and sperm of intended couple is fertilised and implanted to the womb of the surrogate. In this case, the resulting child has no genetic relation to the surrogate mother.

Besides the kinds of surrogacy, the surrogacy arrangement can be on the commercial or altruistic basis.In commercial surrogacy, the surrogate mother is remunerated above all the required medical and other expenses involved in the process whereas in altruistic surrogacy, only the necessary medical and other expenses are expended by the intending couple.

## 3. The Indian Context

The Indian law allows only gestational surrogacy on altruistic basis.The regulation of surrogacy varies in different countries with an overall progression towards altruistic surrogacy. Based on the information available online, it is understood that many countries like Austria, France, some states of USA, Norway, China, Italy, Spain, Switzerland, etc. have banned surrogacy. Altruistic surrogacy is being supported by UK, Netherlands, Australia, Brazil, Belgium, Canada, some states of USA, etc. On the other hand, very few countries like Iran, Georgia and Russia allow commercial surrogacy legally and this is not viewed positively in the international fora. Besides, there are countries, where surrogacy is not regulated at all and these can seriously impede the rights of the children born there through surrogacy arrangements.

The problems pertaining to the rights of the children born through surrogacy arrangements get compounded in the cases of International Surrogacy Arrangements (ISAs) and many international agencies have deliberated upon the relevant matters. 'Children face becoming commodities as surrogacy arrangements become more prevalent, and urgent action is needed to protect their rights', the UN Special Rapporteur on the sale and sexual exploitation of children warned in a meeting held in Geneva on 6 March 2018.[4]With a growing industry driven by demand, surrogacy became an area of concern for rights and protection of children. As per UNICEF's[5]

[4] Extract from the press release on a UN meeting in Geneva on, 'Children risk being "commodities" as surrogacy spreads, UN rights expert warns — Surrogacy Concerns'. The link is: https://www.ohchr.org/en/press-releases/2018/03/children-risk-being-commodities-surrogacy-spreads-un-rights-expert-warns

[5] UNICEF—United Nations International Children's Emergency Fund. UNICEF's briefing note on 'Key considerations: Children's Rights andSurrogacy' of February 2022. The related link is:https://www.unicef.org/media/115331/file#:~:text=Children%20born%20through%20surrogacy%2C%20

briefing note on 'Key considerations: Children's Rights and Surrogacy' of February 2022, 'children born through surrogacy have the same rights as all children under UNCRC.[6]Regardless of individual State positions on surrogacy, all States have a duty to protect the human rights of all children born through surrogacy without discrimination, including ensuring appropriate legal and regulatory frameworks existing at the national level to protect and promote their rights.' India being the hub of surrogacy services, faced the impact of ISAs.

## 4. Evolution of Safeguards of Rights of Children Born from Surrogacy and Related Laws

Prior to the Surrogacy (Regulation) Act, 2021 and the Ministry of Home Affairs (MHA) Order[7] of 2015, India grew into a hub for surrogacy servicesand the scenario remained largely unregulated. The situation abroad became an additional factor in the growth of this practice in the country. This led to a number of cases of abandonment of children, unsure parentage, denial of citizenship and custody to/of children born through surrogacy. Commercial surrogacy was rampant in the absence of any regulation in this field. The problems, with respect to rights of children born through surrogacy, surfaced, inter-alia, with certain cases in the Supreme Court and media reports.

The Law Commission, in its 228th Report[8] in 2009, emphasised on protection of all rights for any child born through surrogacy among other issues relating to surrogate mothers, etc. Further, the need to regulate unethical practices in surrogacy had been raised a number of times in the Parliament.

The present day safeguards for protection of rights of children born through surrogacy arrangements, have evolved through a number of intense consultations between the Government of India (GOI) and various stakeholders over the last decade. The Department of Health Research (DHR), Ministry of Health and Family Welfare (MOHFW), Government of India, the nodal department for ART/Surrogacy, introduced the Surrogacy (Regulation) Bill in 2016 and this was exhaustively deliberated upon by the Group of Ministers (GOM)[9] headed by Smt. Sushma Swaraj(the former External Affairs Minister) and Parliamentary Standing Committee during the 16th Lok Sabha.

especially,to%20not%20be%20sold%20%5Bthe

[6] UNCRC— United Nations Convention on the Rights of the Child adopted on 20 November 1989 by the General Assembly resolution 44/25

[7] Ministry of Home Affairs, Government of India, banned all foreigners from commissioning surrogacy in India vide an order no. 25022/74/2011-F.1(Vol.III) dated 3 November 2015.

[8] Law Commission of India's Report No. 228dated 5 August2009, on the subject — 'Need for Legislation to Regulate Assisted Reproductive Technology Clinics as Well as Rights and Obligations of Parties toa Surrogacy'.

[9] Group of Ministers (GOM) headed by Smt. Sushma Swaraj (the former EAM) considered the draft Surrogacy Bill, 2016, aiming at regulating commissioning of surrogacy in the country in a proper manner and had referred it to the Union Cabinet for a final call.

During the 17th Lok Sabha, 'The Select Committee'[10] constituted in Rajya Sabha delved deep into all aspects of surrogacy through series of meetings with bureaucrats, NGOs, medical professionals, lawyers, researchers, commissioning parents, surrogate mothers and surrogate children. It also gathered first-hand knowledge by meeting all concerned at the hubs of surrogacy in Anand (Gujarat), Hyderabad and Mumbai. Thus, the safeguards have been studied, exhaustively discussed and very carefully and comprehensively incorporated in the Surrogacy (Regulation) Act,2021. The regulation of the ART services, which forms the basis of surrogacy, was also processed by GOI parallelly and The ART (Regulation) Act, 2021, got enacted in December 2021.

## 5. Existing Safeguards as per the Extant Laws in the Country

The need to regulate the surrogacy services in the country was primarily to protect all rights of the children born through surrogacy, prevent exploitation of the surrogate mothers and provide ethical opportunity of parenthood to the needy and intending couples/women. Safeguards of the rights of the children born through surrogacy arrangements as per the two recently promulgated Acts viz, The ART (Regulation) Act, 2021 and the Surrogacy(Regulation) Act, 2021, are elaborated below starting with the relevant provisions of the Surrogacy (Regulation) Act, 2021:

(i) As per Section 3(i) of the Surrogacy Act, only registered surrogacy clinics can carry out surrogacy services as per all relevant provisions of the Act to ensure greater accountability, primarily towards the children born through surrogacy.

(ii) Only altruistic surrogacy {Section 4(ii)(b) of The Surrogacy Act} is allowed to prevent commercial dealing of children involved.

(iii) Qualifications of manpower including paediatricians, gynaecologists, embryologists, etc. have been specified for the registered surrogacy clinics for ensuring quality services and health of the children born through surrogacy.

(iv) Sex selection at any stage of surrogacy is prohibited. The Pre-Conception and Pre-Natal Diagnostic Techniques (PCPNDT)[11] Act and Medical Termination of Pregnancy (MTP)[12]Act will hold good for surrogacy processes as well.

(v) Section 4(iii)(a)(I) of The Surrogacy Act outlines strict eligibility criteria for intending couples, ensuring that only couples who genuinely require surrogacy due to medical conditions, can opt for gestational surrogacy. It should not amount

[10] The Report of the Select Committee on The Surrogacy (Regulation) Bill, 2019, was presented to Rajya Sabha on 5 February 2020.
[11] The Pre-Conception and Pre-Natal Diagnostic Techniques (PCPNDT) Act, 1994, is an Act of the Parliament of India that was enacted to stop female foeticides and arrest the declining sex ratio in India. The act banned prenatal sex determination.
[12] The Medical Termination of Pregnancy Act, 1971 — An Act to provide for the termination of certain pregnancies by registered Medical Practitioners and for matters connected therewith or incidental thereto.

to acquisition of children from the baby bazaar without there being a genuine need for initiating surrogacy arrangement. Commodification of children born through surrogacy will be detrimental to the best interest of these children.

(vi) Foreigners cannot avail surrogacy services in India. Only the Overseas Citizens of India (OCI)card holders can avail after following the due process provided the child/ren born through surrogacy would be accepted in their respective countries of residence as per the laws prevalent there. This is to ensure that these children are not abandoned due to citizenship issues and their right to an identity, nationality and family is not denied to them. India has witnessed abandonment of surrogate children in the past specially through the court cases emanating from the related issues.

(vii) Section 4(ii)(d) specifically states that surrogacy procedures shall be conducted 'when it is not for producing children for sale, prostitution or any other form of exploitation'.

(viii) The intending couple or the intending woman have to secure a 'parental order'[13] from the court of the Magistrate and the said order shall be the birth affidavit after the surrogate child is born. This step will prevent backing out by intending parent(s) and thus, ensure that the child gets the biological family. In this context, it is pertinent to refer to Articles 7 and8of UNCRC,[14]which imply that children must be registered when they are born and given a name which is officially recognised by the Government. Children have the right to their own identity, their name, nationality and family relations and children should know their parents and be looked after by them. The Indian law has gone a step further adopting an a-*priori*[15]approach by mandating 'a parental order' prior to even commissioning of any surrogacy procedure.

(ix) The Act also specifies that a surrogate child would not be genetically related to the surrogate mother {Section 4(ii)(a) of The Surrogacy Act}.Further to this, the Surrogacy (Regulation) Amendment Rules, 2023[16] state that:

[13] Section 4(iii)(a)(II) of the Surrogacy Act.

[14] UN Convention on the Rights of the Child adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989 and this was widely ratified eventually. Articles 7 and8 in this are:

- Article 7 — The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and as far as possible, the right to know and be cared for by his or her parents.
- Article 8 — States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognised by law without unlawful interference.

[15] Adopting an '*a-priori*' approach is 'determining beforehand'.

[16] Department of Health Research, Ministry of Health and Family Welfare, GOI, notified [G.S.R. 460(E)] the Surrogacy (Regulation)Rules, 2022 on 21 June 2022 in exercise of the powers conferred by Section 50 of the Surrogacy(Regulation). Act, 2021 (47 of 2021). 'Surrogacy (Regulation) Amendment Rules, 2023' refer to the subsequent amendment{G.S.R.179(E) dated 14 March 2023} to these rules.

'1(d)(I)Couple undergoing surrogacy must have both gametes from the intending couple and donor gamete is not allowed.

(II) Single woman (widow/divorcee) undergoing surrogacy must use self-eggs and donor sperm'

The above provisions attempt to remove any complexities related to legal parentage of children born through surrogacy arrangements. In this context, I would like to refer to Rajya Sabha's Select Committee Report on "The Surrogacy (Regulation) Bill, 2019" that states in its preface that:

> *"Legal issues relating to surrogacy get manifested in a number of court cases— the prominent being the Baby Mcase in USA, Jaycee B.* v. *Superior Court, Baby Manji Yamada* v. *Union of India, Israeli gay couple's case, etc., which were widely debated in the media. Baby Jaycee case is a classic example of legal complexities involved in the surrogacy procedure. The custody of the child was sought by five parents — genetic mother, the commissioning mother, the surrogate mother, the commissioning father and the genetic father."*

In the past, the 228th Report of the Law Commission of India also stated that —'the bond of love and affection with a child primarily emanates from biological relationship. Also, the chances of various kinds of child-abuse, which have been noticed in cases of adoptions, will be reduced.'

(x) Section 4(iii)(b)(I) of The Surrogacy Act also specifies the age limits for the surrogate mother (25 to 35) years and the intending couple (23-50 years for female and 26-55 years for the male as per Section 4(iii)(c)(I) of The Surrogacy Act).These age limits have been prescribed in the interest of the health of the child as 25 to 35 years is considered to be the most suitable period for reproduction and the instances of abnormalities in the child increase if the birth mother's age is beyond 35 years. Moreover, in the absence of age bracket for the surrogates, young girls in their teens, who would themselves fall into the category of children, going by the accepted definition of a child[17], were reportedly being forced into egg donation and surrogacy.

Additionally and significantly, the age of the intending parents has been prescribed keeping in view the life expectancy in the country, reproductive physiology, and deterioration of the quality of gametes with advancing age, risking genetic defects in a child. The child's right to be born healthy and to be reared appropriately gets

[17] UN Convention on the Rights of the Child, while adopting the General Assembly resolution 44/25 of 20 November 1989, had defined 'child' under Article 1 as:
Article 1 — For the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.
This has been the accepted definition of a child world over.

fulfilled only when parents have enough balance life span to do so. The fulfilment of parental responsibilities is central to children's enjoyment of their rights. Moreover, in the process of fulfilling the desire of a couple to become parents, the rights of the unborn child/children, brought in this world through surrogacy cannot be overlooked. The surrogate child should have similar parental care like children born by normal way of reproduction. Therefore, this provision of the Surrogacy Act is very significant in safeguarding the health and upbringing of children born from surrogacy.

(xi) Section 7 of the Surrogacy Act states that:

> '*The intending couple or intending woman shall not abandon the child, born out of a surrogacy procedure, whether within India or outside, for any reason whatsoever, including but not restricted to, any genetic defect, birth defect, any other medical condition, the defects developing subsequently, sex of the child, or conception of more than one baby and the like.'*

Article 21 of our Constitution is on the right to live.This also holds good for the child. Each child has a human right to be born with dignity and be provided with a complete family. Section 7 of the Surrogacy(Regulation) Act, 2021,is taking care of human rights of the child (born through surrogacy) that are at risk of violations in surrogacy situations. Decisions may be made by adults in these situations which are discriminatory based on child's disability, gender etc. and these may not be in the best interest of the child. It is, therefore, very crucial that Section 7 and other Sections related to human rights of children born through surrogacy are efficiently implemented.

(xii) Besides the safeguards provided in the Surrogacy (Regulation) Act, 2021, the ART(Regulation) Act, 2021, promulgated in December 2021, also provides for certain safeguards that are very relevant for surrogate children. Infact, surrogacy procedures cannot be conducted without Assisted Reproductive Techniques. Section 25 of the ART Act delves deeper into the matter relating to the right to health of the child to be born through surrogacy by provisioning for 'The Pre-implantation genetic testing to screen the human embryo for known, pre-existing, heritable or genetic diseases'. The pre-implantation genetic testing serves to protect the rights of a surrogate child by increasing the likelihood of a healthy birth, reducing the risk of genetic diseases and adhering to ethical principles. The prospective parents can make informed choices to safeguard their child's health and well-being, aligning with the child's right to a life free from preventable suffering.

(xiii)Section 8 of the Surrogacy Act specifies that:

*'A child born out of surrogacy procedure, shall be deemed to be a biological child of the intending couple or intending woman and the said child shall be entitled to all the rights and privileges available to a natural child under any law for time being in force.'*

Parents are the main people responsible for bringing up a child and ensuring all child rights due to him. The intending parents of a surrogate child cannot dilute their responsibilities just because the child is born through surrogacy. Section 8 of the Act is very significant and will obliterate any ambiguities about legal parentage of the child.

As per the preamble to the 'Verona Principles',[18] (published by 'International Social Service,' Geneva in 2021), these principles are based on the premise that no child should be disadvantaged, suffer harm, be punished because of the circumstances of their birth, whether through discrimination, exploitation or any other action that might deprive them of a right established in international law. The UNCRC,1989, in its Preamble, recognises that,'the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding.'This, in turn, will be possible only if the child doesn't have to worry about or be uncertain about his/her family.The surrogate child has to be ensured the same rights as the children born naturally to their parents and this safeguard is incorporated as Section 8 of the Surrogacy Act.

Further, Section 8 of the Surrogacy Act has provided legitimacy to the child born through surrogacy by deeming the said child to be the biological child of the intending parent(s).Prior to the promulgation of this Act, the legitimacy of the birth of children was governed by the personal laws. For example, the Hindu Marriage Act, 1955 and Special Marriage Act, 1954 confer legitimacy only on children born biologically to their parents. In this context, the Law Commission of India, in its 228th Report, recommended that — legislation itself should recognise a surrogate child to be the legitimate child of the commissioning parent(s) without there being any need for adoption or even declaration of guardian. The relevant rights of the children born through surrogacy stand safeguarded thereof.

(xiv) Section 38 of The Surrogacy (Regulation) Act, 2021 has provisioned 'Offences and Penalties' to ensure the rights of children born through surrogacy as provisioned in the Act and explained in the preceding points.'Any person, organisation, surrogacy clinic, laboratory or clinical establishment of any kind

[18] 'Verona Principles' (published by 'International Social Service,' Geneva in 2021), for the protection of the rights of the child born through surrogacy following a comprehensive consultation process as well as substantive contributions from over 100 different experts covering multiple disciplines and perspectives, regions, national and international contexts. The link is:https://www.iss-ssi.org/wp-content/uploads/2023/03/VeronaPrinciples_25February2021-1.pdf

shall be punishable with imprisonment for a term which may extend upto ten years and with a fine which may extend to ten lakh rupees on contraventions of the provisions of clauses (a) to (g) of sub-section (I) of Section 38' and out of these, the clauses relating to the children are:

> *'(c)abandon or disown or exploit or cause to be abandoned, disowned or exploited in any form, the child or children born through surrogacy;*
>
> *(d)exploit or cause to be exploited the surrogate mother or the child born through surrogacy;*
>
> *(e)sell human embryo or gametes for the purpose of surrogacy….*
>
> *(g)conduct sex-selection in any form for surrogacy'.*

Offences and penalties will be a big deterrent to prevent violation of rights of a surrogate child.These provisions will help ensure that surrogacy arrangements are carried out with the best interests of the child in mind, including adherence to the provisions related to parentage, citizenship, inheritance, health and care.

(xv) Section 24 of the ART Act lists out the duties of ART clinics using human gametes and embryos including:

> *'24(d)a clinic shall never mix semen from two individuals for the procedures specified under this Act;*
>
> *24(e)the embryos shall not be split and used for twinning to increase the number of available embryos;'*

In addition to this, Section 23 of the ART Act, 2021,mandates the ART Clinics and ART Banks to maintain detailed records of all donors' oocytes, sperm or embryos used or unused.Also, Section 46(I) of the Surrogacy(Regulation) Act, 2021, mandates all surrogacy clinics to maintain records, charts, forms, reports, consent letters, agreements and all documents specified under the Act. All these provisions will go a long way in protecting the identity and origins of children born through ART or Surrogacy.The ART Act, thus, emphasises and protects the best interests of the child by ensuring legal and ethical practices by the ART clinics and ART Banks.

(xvi) Section 27(3) of the ART Act, 2021 provides that, an ART Bank shall not supply the sperm or oocyte of a single donor to more than one commissioning couple.

This signifies that one male donor's gamete cannot be used for more than one single woman (divorcee or widow) intending to avail surrogacy.

(xvii)Sections 49 and 8 of the Surrogacy Act, respectively, read as:

> — *'The provisions of this Act shall be in addition to, and not in derogation of, the provisions of any other law for the time being in force:'*
>
> — *'a child born out of surrogacy procedure, shall be deemed to be a biological child of the intending couple or intending woman and the said child shall be entitled to all the rights and privileges available to a natural child under any law for time being in force.'*

These two Sections reinforce that all child rights, conferred under various child related and other laws of the country, are assured for children born through surrogacy.

## 6. Existing Practices and Impact of Law

The regulations and reforms brought about through the Surrogacy (Regulation) Act, 2021, the ART(Regulation) Act, 2021 and other related laws will inevitably have an impact on the prevalent system. However, it will not get noticed till some time has lapsed as the commencement of these Acts in January 2022 is quite recent.

The comparison between the situations prior to/post promulgation of these laws will reveal the effect of the same. However, this will be a daunting task because the related information is more hidden than shared as it serves the vested interests of certain people operating in this ecosystem. It has been observed in the past, i.e., prior to the enactment of the Surrogacy Act, that 'every surrogate birth is not followed by a formal application for legal parenthood. A child may be handed over by the surrogate mother and live with the commissioning couple without any legal formalities.'[19]

The main issue is that the data/information on surrogate children is not being maintained separately amongst the children abandoned or surrendered. The information on abrogation/violation of any of the child rights may exist, but not categorised based on the origin of these children. When any child is either given up in adoption by the adoption authorities or presented before the Child Welfare Committee, his/her origin as to whether born through surrogacy, etc. is not known/recorded (as is understood from reliable sources).This is probably because exercising surrogacy option by the intending parents remains stigmatised and, more often, not disclosed among the people known to them. Moreover, categorising a child as a 'surrogate child' may prove discriminatory against him/her. The provision of 'parental order' in the Surrogacy Act may go a long way in determining this and may, in fact, cease/reduce the problem itself.

[19] Para 3.1.8.2 of the book on, *Surrogacy — Law, Practice and Policy in India* by Dr. Rekha Pahuja.

The hope lies in the above-mentioned provision of 'parental order' and various other provisions of the new laws,which will act as a deterrent against the malpractices and lack of compassion towards the rights of children born through surrogacy or even IVF for that matter. The penalties and offences will further strengthen the implementation of these laws that have been so carefully legislated with the prime objective of protecting the rights of the children born through surrogacy, the surrogate mothers and the intending parent(s) from exploitation, ensuring quality services by the clinics and most importantly, the commissioning parents will be more sure of their child's genealogy,children will have access to information about their origins whenever required and both will be confident about the ethical and transparent treatment by the clinics.

As regards the data deficit, the question may arise that if no concrete data is available, what factors established the need to bring about the related laws. The answer to this is that the need has been felt through innumerable other sources like court cases, failed paternity establishments (DNA, etc.), custody disputes, citizenship denials in case of International Surrogacy Arrangements(ISAs), surrogates divulging when wronged, Members of Parliament from certain constituencies (that have been hubs of surrogacy) raising the issues in the House, issues raised by activists, and so on.

The surge in surrogacy hubs in India during the last three decades could not contain the issues infesting the system and they came out of the closet. There have been reported incidents of unethical practices, abandonment of children born out of surrogacy and trading in human embryos and gametes as well. Also, there were reports of the deaths of surrogate mothers and egg donors, stranded disabled children and custody battles over children. Desperate surrogate mothers lodged complaints when they did not receive the promised amounts from the clinics, the agents or the intending parents. These matters have been regularly reflected in different print and electronic media for the last few years. In 2008, a Japanese couple began the process with a surrogate woman in Gujarat, but before the child was born, they split with both of them refusing to take the child.[20] In 2012, an Australian couple commissioned surrogacy and decided to choose one of the twins born through the process.[21] The fate of the other twin remained unknown.

The rights of children born through surrogacy were further violated when they were born pre-term and underweight and needed intensive care because the surrogate mothers were unable to carry them to full term. The intensive care raised the hospital bills exponentially, which the intending couples found impossible to pay and, therefore, abandoned the child. Some of these cases got resolved, though, at police intervention

[20] *Baby Manji Yamada* v. *Union of India*[2008 13 SCC 518]

[21] An Australian couple case link:https://timesofindia.indiatimes.com/india/aussie-couple-abandoned-surrogate-baby-in-india/articleshow/44766805.cms

as understood based on conversation with some clinics. However, the health of the surrogate children born pre-term will remain a question mark. It is, therefore, essential that end-to-end care of all aspects of surrogacy services and in the process child rights are ensured.

One of the other important rights of the child is to have mother's milk for adequate nutrition for his/her well-being. The surrogate child is not fed by the birth mother directly. It is felt that a few months of breast feeding will establish an emotional attachment of surrogate child with the surrogate mother and it will be difficult for her to give up the child. In order to harmonise the conflicting interests inherent in the process of surrogacy, the child is generally provided breast milk by way of Human Milk Bank services.

In an article on 'Surrogacy Biomarkets in India: Troubling Stories from before the 2021 Act' by Mrs Sheela Suryanarayanan,[22] it is written, inter alia, that:

> *'The characteristics of the child (or children) such as sex, weight, and skin colour determined the final payment to the surrogate mother. Twins fetched a higher 'price'. Children born through surrogacy were thus commodified and treated like products .... Disabled children were treated like defective products and left in orphanages.'*

She further states that:

> *'The Surrogacy(Regulation) Act, 2021, is quite detailed and well thought out, but its implementation needs to be effective. Although there is a fear that surrogacy will go underground and comparisons are being made with the PC-PNDT Act, it is not that easy because surrogacy is a year-long procedure.'*

In this observation by Mrs. Suryanarayanan, there is a sense of optimism towards the future of the safeguards of rights of children born from surrogacy and others involved in the process, based on effective implementation of the extant laws. The more the transparency in the system, more will be the surety of protection of rights of surrogate children. A robust implementation machinery in the Government of India with network in all States/Union Territories and necessary will power at all levels will be essential for this and a lot still needs to be covered. However, given the progress already made in a short span after the commencement of the Acts in setting up the operational mechanism and in registration of surrogacy clinics, there is confidence that all children born out of surrogacy in future will be accounted for and their rights pursued/ensured.

[22] A journal magazine on current issues, *The India Forum*, published an article in September 2022 on, 'Surrogacy Biomarkets in India: Troubling Stories from before the 2021 Act' by Mrs Sheela Suryanarayanan, who is with the Centre for Women's Studies, University of Hyderabad. Her research focuses on reproductive health, surrogacy, sex selective abortion, and prenatal screening.

As regards the apprehensions and actual incidents of the surrogate child getting ill-treated, abused, sold, trafficked or exploited in any manner, it has been opined that to prevent such mishaps, the intending couple should be screened for their fitness to be parents, their socio-economic background, criminal records in past, family information, etc. Although, the chances of these occurrences would be minimal owing to the provision in the Surrogacy Act mandating that only couples with a medical condition necessitating surrogacy will be permitted by the appropriate authority to go ahead with the surrogacy procedure, all the same, certain precautions of this kind can further help in dealing with the problem.

Some of the Court/other cases relating to violation of rights of children born through surrogacy may be worth looking into in the context of the subject of this article:

- In *Jan Balaz* v.*Union of India*[23], the court conferred Indian citizenship on twin babies fathered through compensated surrogacy by a German national. The court observed that: "We are primarily concerned with the rights of two newborn, innocent babies, much more than the rights of the biological parents, surrogate mother and the donor of the ova. Eventually, the Supreme Court of India intervened and the babies were provided exit permits.

- A Japanese commissioning couple refused to accept their surrogate child born through an Indian surrogate mother due to divorce and break of their marriage. The surrogate mother was also not capable to accept the child. Court intervened[24] and directed the custody of the child to the grandmother.

- An Australian couple took home only one of the twins born to an Indian surrogate mother. National inquiry was initiated[25] by the Family Court in Sydney.

- In another incident[26], the Indian authorities busted an alleged racket when a Malaysian man was arrested while smuggling live human embryos to an IVF clinic in Mumbai. They suspected the embryos were meant to be used for surrogacy through Indian women because Malaysia did not permit surrogacy. The impact on the rights of children born in the process is not beyond imagination.

All these and other such cases give insight into the scenario that existed prior to the Surrogacy (Regulation) Act, 2021.They were, in fact, instrumental in the initiation of the formulation of the law on the subject and highlighting the need for safeguarding the rights of children born out of surrogacy. It was also observed that most of the

[23] *Jan Balaz* v. *Anand Municipality*[AIR 2010 Guj. 21]
[24] *Baby Manji Yamada* v. *Union of India*[2008 13 SCC 518]
[25] An Australian couple case link:https://timesofindia.indiatimes.com/india/aussie-couple-abandoned-surrogate-baby-in-india/articleshow/44766805.cms
[26] Smuggling embryos incident: https://timesofindia.indiatimes.com/city/mumbai/flyer-from-malaysia-held-for-trying-to-smuggle-in-embryo/articleshow/68473046.cms

reported cases were involving international surrogacy arrangements(ISAs) leading to banning foreigners from surrogacy in India in 2015 vide an order from the Ministry of Home Affairs(MHA) and retaining a similar position in the Surrogacy (Regulation) Act, 2021.While analysing the domestic scene is very important, it would be relevant to delve into the international scenario as well in respect of the rights of children born out of surrogacy.

## 7. International Scenario

The issue pertaining to the rights of children born through surrogacy is complex and evolving on the international canvas. Uncertainties have arisen as a result of changing family patterns and advances in reproductive medical science. Different countries have varied legal frameworks, policies and cultural perspectives regarding surrogacy and the rights of children born through it. Difficulties have arisen because these frameworks have not been globally uniform and there is increased frequency of families crossing borders in an era of globalisation. Quoting from UNICEF's note on 'Child Rights and Surrogacy'—

> *'Surrogacy, especially through international arrangements, is increasingly used as a method of family formation around the world. Although there are no precise global figures on how many children have been born through surrogacy, the development of Assisted Reproductive Techniques (ART), changes in social norms and the trend for having children later are leading to more children being born through surrogacy'.*

Moreover, it has become well known that surrogacy is a global business and the business interests often over-ride the rights of persons affected by it including those of surrogate children and more so when they are vulnerable and at risk.

Besides, the variation in the laws governing the rights of surrogate children born in different countries, there are differences in the basic types of surrogacies supported. For example, there are countries supporting altruistic surrogacy like UK,Denmark, Netherlands, some states in USA, Australia, Brazil, Belgium, etc. Russia supports commercial surrogacy and others in this race are Iran and Georgia. Then, there are many countries which have banned surrogacy totally including Austria, France, Norway, Pakistan, Japan, China, Italy, Spain, Switzerland, certain States of USA, etc. Thailand banned surrogacy, making it a criminal offence when a child with downs syndrome was left behind with an unmarried surrogate mother.

India has avoided the extreme stands and adopted a middle path by facilitating surrogacy but in a regulated way. The 'Rajya Sabha Select Committee report on Surrogacy' mentions that 'law must keep pace with the emerging/developing technologies so that

their positive benefits could be availed by those in need'.The Surrogacy (Regulation) Act, 2021, of India is a step in that direction which allows altruistic surrogacy in a regulated way and at the same time ensures protection of rights of the children born out of surrogacy.

The Constitution of India had a deep foresight and, therefore, spelt out children's rights in a way that they have withstood the test of time and remain relevant in current times. Right to equality (Article 14), Right against discrimination (Article 15), Right to personal liberty and due process of law (Article 21), Right to being protected from being trafficked and forced into bonded labour (Article 23), etc. hold very relevant in the context of children born from surrogacy. Besides this,children born through surrogacy have the same rights as are enshrined to all children under the United Nations Convention on the Rights of Child (UNCRC).All States/countries, therefore, have a duty to protect the human rights of all children born through surrogacy without any discrimination regardless of individual State positions on surrogacy.

International cooperation and dialogue, thus,become a must to resolve this complex issue and look into the best interests of the child. Efforts are on at multi-lateral, bilateral and at the level of international organisations. Some of the important ones include:

(i) The United Nations Convention on the Rights of the Child (UNCRC) is a widely ratified international treaty that recognises the rights of children. While it does not specifically address surrogacy, it encompasses principles on the best interests of the child, identity and protection from exploitation, which are relevant to the rights of children born through surrogacy. These rights are often invoked to highlight the importance of safeguarding them in various contexts including surrogacy.

(ii) The Permanent Bureau of the Hague Conference on Private International Law (HCCH)[27] has been involved in studying the private international law issues being encountered in relation to legal parentage of children and more specifically in relation to ISAs and exploring the development of an international convention/ instrument/protocol in this regard.

(iii) In 2013, International Social Service (ISS) called for urgent international regulation of ISAs as they affect the children concerned. In 2016, it launched an initiative to draw up a set of principles that could be agreed on globally to guide policy and legislation. Continued work on these principles was supported by UN Special Rapporteur on the Sale and Sexual Exploitation of children in 2018 and recommended them to be in accordance with human rights norms. The 'Principles for the protection of the rights of the child born through surrogacy (Verona Principles)' were thus drafted by independent experts with an aim to identify

[27] The Permanent Bureau of the Hague Conference on Private International Law (HCCH) has been involved in studying the private international law issues being encountered in relation to legal parentage of children and more specifically in relation to ISAs and exploring the development of an international convention/instrument/protocol in this regard.

the most problematic areas and formulate procedural and safety requirements to ensure protection of the rights of these children. The UN Committee on the Rights of Child supports the 'Verona Principles' as an important contribution to developing normative guidance in this area.

(iv) Besides, there have been a number of other bilateral, regional and international researches and discussions on the rights of children born through domestic or international surrogacy arrangements. However, an international agreement or treaty that comprehensively addresses the rights of children born through surrogacy, is still elusive. The UN rights expert, Ms Maud de Boer-Buquicchio[28], presented a report to the UN Human Rights Council in 2018. She stated, inter-alia, that 'There is an undeniable, urgent need for surrogacy to be regulated. If nothing is done, abusive commercial surrogacy networks will continue to move from one jurisdiction to the other.'

(v) The 'International Bioethics Committee' of UNESCO(IBC),[29] in its report on 'ART and parenthood' of 2019, observes that:

> *'Whether States accept or reject surrogacy, in all cases the position of the child, born with the help of a surrogate, should be regulated. On this issue, the European Court of Human Rights developed a doctrine about surrogacy. This doctrine considers that the principle of the best interests of the child must guide the decisions about a minor's registration, even in States where surrogacy is forbidden'.*

It is not that all cases of violation of rights of children born through international surrogacy arrangements get reported. However, well-reported situations speak plentiful about the extent of the problem. Many members of the international community are involved in addressing these issues. However, a comprehensive international agreement specifically addressing the rights of children born through surrogacy is yet to be developed and adopted by different countries of the world. This vacuum existing in the regulation of ISAs is a major factor breaching the rights of children born through this method.

A lot has been written and discussed about surrogate mothers and commissioning parents in a surrogacy arrangement. However, the end motive and outcome of the entire

[28] The UN rights expert, Ms Maud de Boer-Buquicchio, former Special Rapporteur (2014-2020) on the sale and sexual exploitation of children and who presented a report to the Human Rights Council in Geneva plus footnote number 3.

[29] The 'International Bioethics Committee' of UNESCO (IBC), in para number 171 at page-33 of its report on 'ART and parenthood' of 2019. Link is:
https://unesdoc.unesco.org/ark:/48223/pf0000367957#:~:text=Paris%2C%2020%20December%202019%20Original,technologies%20(ART)%20and%20parenthood%2C

process is the child born out of this arrangement and this child is the most vulnerable, most impacted and cannot have any say. It, therefore, becomes imperative to secure the rights of this child comprehensively. Surrogacy, as a means of reproduction may be on the rise at varying degrees in different countries, but how this practice is moulded to suit the best interests of the children born in the process, depends on the people and authorities handling surrogacy. India has taken a big leap by enacting the relevant regulatory laws. However, the implementation challenges need to be overcome to avert any violation of rights of even a single surrogate child.

## 8. Conclusion

Issues of human rights, particularly of children, already intricate, get further complicated in cases of children born through surrogacy arrangements. Such issues relating to the welfare and well-being of children born out of surrogacy, have been attempted to be dealt with by the ART(Regulation) Act, 2021 and the Surrogacy (Regulation) Act, 2021 which were recently enacted after extensive deliberation and consultation across various stakeholders. This achievement has brought respect to the country internationally. Nevertheless, the need of the hour is to maintain eternal vigil to guard against the miscreants to protect the rights of children born through surrogacy.

# Artificial Intelligence in the Digital ERA: New Sense or Nuisance to Privacy

Prof. (Dr) S. Surya Prakash*

Just Imagine! 'You are late for an important conference and searching frantically for a parking spot. So, you are using an app you downloaded called "Find my Car". The app enables you to easily find the right location when you come to retrieve your car. This may sound good and useful. But could you predict a variety of privacy concerns in a digital world of Artificial Intelligence?

**Abstract**

*Society has advanced from the stone age to a smart and space age. Artificial Intelligence (AI) has played a significant role in advancement. Artificial Intelligence technology has a lot of potential advantages, and on the other hand of the coin, there are also a lot of serious drawbacks if the technology is not sufficiently evaluated for compliance with national constitutional principles and international norms. The advancement of technology continues to progress at an unprecedented rate, and the use of artificial intelligence has become increasingly prevalent in many areas of our lives. As a result of rapid increase in the amount of data we create and exchange online, privacy issues are more significant than ever. The right to privacy is the ability to protect one's personal information from misuse and unauthorised access. It guarantees that people have control over their personal data and how it is used. It is a fundamental human right and an undeniable fact that privacy is essential. One benefit is that it safeguards people from damage like fraud or identity theft. Additionally, it supports preserving a person's autonomy and control over their personal information, which are crucial for upholding one's own respect and dignity. Additionally, privacy permits people to continue their personal and professional interactions without worrying about monitoring or interference. The digital age has broken up many social norms and structures that have developed over the centuries; among them, basic values such as privacy, autonomy, and democracy stand out.*

**Keywords:** Artificial Intelligence, Cyber-attacks, Digital technology, Privacy, Violation of human rights.

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## Introduction

Artificial Intelligence (AI) has had a profound impact on society across various domains. While AI technologies offer numerous benefits, they also present challenges and raise important ethical considerations. Artificial Intelligence and privacy are two important and interconnected topics that have gained significant attention in recent years. In order to raise living standards, a huge amount of personal information is kept as digital data and used by artificial intelligence systems. On the other hand, artificial intelligence is used to gather, store, process, and profile all personal data, including our fingerprints, travel information, frequent interactions with a certain individual, medical reports, and more. Our entire way of life has been transformed by the Internet revolution, ushering us into the "smart age". As AI technology becomes more prevalent and sophisticated, it has the potential to impact individual privacy in various ways. "The implementation of AI principles, in particular, would have to strictly adhere to Part III of the Indian Constitution's anti-discrimination, privacy, freedom of speech and expression, right to peaceful assembly, and freedom of association provisions."[1] Data is intrinsic to Artificial Intelligence, but when personal data is not aptly protected, it can be the antithesis of privacy.

## Artificial Intelligence: Issues and Challenges

Humans are the most complicated beings on earth, and they have brought so many advancements in the field of science and technology to solve their complicity. In today's digitalised world every individual, in one or the other way, is subject to the use of technology. As innovations in digital technology have enabled previously unimagined forms of collecting, storing and sharing personal data, the right to privacy has evolved to encapsulate State obligations related to the protection of personal data.[2]

Economic Disruption (Job Displacement): AI has the potential to automate many tasks, leading to increased efficiency and productivity in various industries. However, this can also result in job displacement, especially for tasks that can be easily Automated.[3] It creates a need for retraining and upskilling the workforce to adapt to new roles. The widespread implementation of AI and automation may lead to job displacement and unemployment, impacting on the right to work and the right to a standard of living adequate for health and well-being.

Economic Impact: AI is expected to bring significant economic growth and innovation.

[1] Comments to The Niti Aayog on the Working Document: Towards Responsible #AIForAll, Centre for Communication Governance at National Law University, Delhi (2020), available at <https://ccgdelhi.org/wp-content/uploads/2020/08/CCG-NLU-Comments-to-NITI-Aayog-on-theTowards-Responsible-AI-for-All-Document.pdf> accessed on 22.07.2023

[2] Human Rights Committee general comment No. 16 (1988) on the right to respect of privacy, family, home and correspondence, and protection of honour and reputation (Article 17)

[3] Xu, Min; M. David, Jeanne & Hi Kim, Suk. (2018). "The Fourth Industrial Revolution: Opportunities and Challenges," International Journal of Financial Research, 9. 90. 10.5430/ijfr. v9n2p90

It can create new markets, products, and services, boosting economies. However, it may also exacerbate income inequality if not properly regulated and managed, as those with access to AI resources might gain disproportionate advantages.

Privacy and Surveillance Concerns: AI applications often involve processing vast amounts of personal data. This raises concerns about privacy and data protection, as misuse or unauthorised access to sensitive information could lead to serious consequences.[4]

Ethical Dilemmas: AI technologies raise ethical questions regarding decision-making processes. For instance, algorithms used in criminal justice systems may display biases, leading to unfair outcomes. Ensuring ethical AI development and deployment is crucial to prevent unintended harm and discrimination.

Autonomous Systems: The development of AI-powered autonomous systems, such as self-driving cars and drones, has the potential to transform transportation and logistics. However, ensuring the safety and reliability of these systems poses challenges.[5]

Education and Learning: AI can "transform education by offering personalized learning experiences and educational content. It can also assist teachers in administrative tasks, allowing them to focus more on individualised instruction."[6]

Security and Cyber Security: AI has both positive and negative implications for security. While it can be used to enhance cyber security by detecting threats and vulnerabilities, it can also be used by malicious actors to develop sophisticated attacks.

Fake Content and Misinformation: AI-generated deep fakes and synthetic media raise concerns about the authenticity of digital content. This can contribute to the spread of misinformation and disinformation.

Human-machine Interaction: As AI becomes more pervasive, the way we interact with machines and technology is changing. Natural Language Processing (NLP) and voice assistants are becoming more prevalent, altering the way we communicate and access information.

The issues like "invasive surveillance such as facial recognition, which can erode individual autonomy and exacerbate power imbalances, and unauthorised data collection, which can compromise sensitive personal information and leave

[4] Dorothy J. Glancy, "The Invention of the Right to Privacy," Arizona Law Review (1979) Vol. 21, No.1, at page 1. The article attributes the Roscoe Pound quotation to "Letter from Roscoe Pound to William Chilton (1916)" as quoted in Alpheus Mason, Brandeis: A Free Man's Life, 70 (1956).

[5] Hila Mehr, 'Artificial Intelligence for Citizen Services and Government', Harvard Ash Center for Democratic Governance and Innovation, August 2017, available at: https://ash.harvard.edu/files/ash/files/artificial_intelligence_for_citizen_services.pdf

[6] W Denton, Sarah; Pauwels, Eleonore; He, Yujia & G Johnson, Walter. (2018), "Nowhere to Hide: Artificial Intelligence and Privacy," in the Fourth Industrial Revolution.

individuals vulnerable to cyber-attacks. AI can be used to create convincing fake images and videos, which can be used to spread misinformation or even manipulate public opinion."[7] Additionally, AI can be used to create highly sophisticated phishing attacks, which can trick individuals into revealing sensitive information or clicking on malicious links.

## Right to Privacy

Human Rights form the foundation and cornerstone of any civilised society. The right to privacy has been classified as a first-generation human right. The Greek philosopher, Aristotle spoke of a division between the public sphere of political affairs (which he termed the polis) and the personal sphere of human life (termed oikos). This dichotomy may provide early recognition of "a confidential zone on behalf of the citizen."[8] The Right to Privacy is an important human right that is essential for the protection of personal autonomy and freedom.[9] "Privacy is a concomitant of the right of the individual to exercise control over his or her personality. It finds an origin in the notion that there are certain rights that are natural to or inherent in a human being. Natural Rights are inalienable because they are inseparable from the human personality. The human element in life is impossible to conceive without the existence of natural rights."[10] A fundamental human right, the right to privacy refers to the freedom for an individual to live their private life without interference or intrusion from others, including the state and other organisations.

Privacy constitutes "the right to be let alone; the right of a person to be free from any unwarranted publicity; the right to live without any unwarranted interference by the public in matters with which the public is not necessarily concerned."[11] It encompasses various aspects, such as personal autonomy, informational privacy, and bodily integrity. The right to privacy is recognised by various international human rights treaties and many national constitutions. The fascinating history of the development of the right

[7] Stanford University, 'Artificial Intelligence and Life in 2030', One Hundred Year Study on Artificial Intelligence: Report of the 2015-2016 Study Panel, Section III: Prospects and Recommendations for Public Policy, September 2016, available at: http://ai100.stanford.edu/2016-report

[8] Michael C. James, "A Comparative Analysis of the Right to Privacy in the United States, Canada and Europe", Connecticut Journal of International Law (Spring 2014), Vol. 29, Issue 2, at page 261

[9] Universal Declaration of Human Rights Article 12, United Nations Convention on Migrant Workers Article 14, UN Convention of the Protection of the Child Article 16, International Covenant on Civil and Political Rights, International Covenant on Civil and Political Rights Article 17; regional conventions including Article 10 of the African Charter on the Rights and Welfare of the Child, Article 11 of the American Convention on Human Rights, Article 4 of the African Union Principles on Freedom of Expression, Article 5 of the American Declaration of the Rights and Duties of Man, Article 21 of the Arab Charter on Human Rights, and Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms; Johannesburg Principles on National Security, Free Expression and Access to Information, Camden Principles on Freedom of Expression and Equality.

[10] Edwin W. Patterson, "A Pragmatist Looks at Natural Law and Natural Rights", in Arthur L. Harding ed., Natural Law and Natural Rights (1955), at pages 62-6

[11] Black Law Dictionary

to privacy spans several centuries. Numerous legal and societal developments are involved. Ancient societies like Greece and Rome, where people were required to keep their personal concerns confidential, are where the idea of privacy first emerged. The stepping stone to a right to privacy, Brandeis and Warren asserted, was what they described as a then-existing common law right for a person to decide if, when, and to what extent his "thoughts, sentiments, and emotions [would] be communicated to others.[12]" In the 1960s, the right to privacy took on a new dimension with the rise of the civil rights movement and the feminist movement. These movements sought to expand the definition of privacy to include the right to personal autonomy, freedom of choice, and control over one's own body.

The problem of privacy protection has been made more difficult by the inter-connectedness of AI systems that optimise every element of our lives, including our genomes, faces, finances, emotions, and environment. As the digital world expands, there is an increased risk of cybercrime, online abuse, and challenges to civil freedoms. Traditional laws and constitutional principles have been put to the test by the digital age, and there is a rising demand for new legal frameworks that can take these changes into account. The proliferation of AI technologies has impacted most of the spheres of our lives. 'A significant impact of AI is its potential to amplify discrimination and undermine the right to fair treatment. Many AI systems have been shown to exhibit biased decision-making based on data inputs that reflect societal prejudices. In addition, data-driven systems can perpetuate biases and marginalise the social control mechanisms that govern human behaviour'.13[13] The novel phase of Internet governance may deeply shake the current architecture of rights and freedoms.

## Legal Framework

In India, the protection of privacy is mandated by numerous piecemeal judicial and legislative developments in the lack of statutory law. India does not have a specific, comprehensive law dedicated solely to the right to privacy. However, the right to privacy is recognised as a fundamental right under Article 21 of the Indian Constitution. The constitutional right to privacy in India is subject to a number of restrictions. These restrictions have been culled out through the interpretation of various provisions and judgements[14] of the Supreme Court of India. The Indian judiciary has consistently upheld the right to privacy as an integral part of the right to life and personal liberty. The right to life within Article 21 is freely interpreted and, therefore, it includes all aspects of life that make a person's life more meaningful and the right to privacy is one of these rights. This issue was first raised in Kharak Singh v. the state of U.P,[15]

[12] Samuel D. Warren and Louis D. Brandeis, 4 HARv. L. REv. 193 (1890)
[13] CJI DY Chandrachud, speaking at the 60th Convocation Ceremony of Indian Institute of Technology (IIT), Madras
[14] Maneka Gandhi v. Union of India, AIR 1978 SC 597
[15] AIR 1963 SC 1295

the Supreme Court held "that Regulation 236 of the UP Police Regulations violated the Constitution because it violated Article 21 of the Constitution. The Court held that the right to privacy is part of the right to protect life and personal freedom. In this case, the Court equated privacy with personal freedom." The Hon'ble Supreme Court while disposing of the case of Gobind v State of M.P.[16] observed that "There can be no doubt that privacy-dignity claims deserve to be examined with care and to be denied only when an important countervailing interest is shown to be superior. If the Court does find that a claimed right is entitled to protection as a fundamental privacy right, a law infringing it must satisfy the compelling state interest test. Then the question would be whether a state interest is of such paramount importance as would justify an infringement of the right."

In 2017, the Supreme Court of India, in the landmark judgement of Justice K.S. Puttaswamy (Retd.) v. Union of India17[17] declared "the right to privacy as a fundamental right protected under the Indian Constitution. Even though there is no dedicated privacy law, certain statutes, and regulations in India touch upon privacy-related issues in specific sectors. The Supreme Court of India declared that the right to privacy is a fundamental right protected under the Indian Constitution. This landmark judgement had significant implications for various government initiatives, including the Aadhaar programme, which collects biometric and demographic data from Indian residents."

Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011:[18] These rules, issued under the Information Technology Act, 2000, lays down guidelines for the collection, storage, processing, and protection of sensitive personal data or information. The IT Act of 2000 is an important piece of legislation in India that governs electronic transactions and communication. One of the key aspects of the Act is the right to privacy for individuals in the digital space and recognises the right to privacy as a fundamental right that needs to be protected in the online world.

Aadhaar Act, 2016: The Aadhaar Act[19] governs the unique identification system in India, known as Aadhaar. It addresses privacy concerns related to the collection and use of biometric and demographic information.[20]

Indian Penal Code (IPC), 1860: The IPC contains provisions related to invasion of

[16] 1975 SC 1378
[17] (2017)10 SCC 1
[18] In exercise of the powers conferred by clause (ob) of sub-section (2) of section 87 read with section 43A of the Information Technology Act, 2000 (21 of 2000), the Central Government hereby makes the rules.
[19] An Act to provide for, as a good governance, efficient, transparent, and targeted delivery of subsidies, benefits and services, the expenditure for which is incurred from the Consolidated Fund of India.
[20]https://www.mondaq.com/india/privacy-protection/744522/the-supreme-court39s-aadhaar- judgement-and-the-right-to-privacy accessed on 23.07.2023

privacy, such as "voyeurism" and "breach of confidentiality."[21]

It is important to note that data protection laws and privacy regulations may evolve over time. India has been in the process of formulating a comprehensive data protection law to address issues related to privacy and data security. The Information Technology (IT) Rules, 2011, are outlined in Section 43A of the IT Act, 2000, which addresses cybercrime and e-commerce and deals with "reasonable security practices"[22] for the processing of "sensitive personal data or information."[23] These regulations place restrictions on the ability of organisations to gather, use, keep, and disclose individuals' personal data and call for them to establish a privacy policy.

India has ratified the International Covenant on Civil and Political Rights ('ICCPR'). Article 17 of the ICCPR provides that "no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation." 'The Human Rights Committee has noted that states party to the ICCPR have a positive obligation to "adopt legislative and other measures to give effect to the prohibition against such interference and attacks as well as to the protection of privacy rights."[24]

The K.S. Puttaswamy v. Union of India,[25] which is commonly known as the Aadhaar case, challenged the constitutionality of the Aadhaar programme and its potential violation of the right to privacy. The Supreme Court upheld the constitutionality of Aadhaar with certain limitations, emphasising that it should not be made mandatory for essential services, except for government welfare schemes.

WhatsApp-Pegasus Spyware case[26] was brought before the Supreme Court of India after reports emerged that the Pegasus spyware was being used to target individuals, including journalists and activists, through WhatsApp. The court asked the Indian government and WhatsApp to respond to the issue and ensure that citizens' privacy rights were protected. In Internet Freedom Foundation v. Union of India[27], the Supreme Court upheld "the right to privacy and issued an interim order that prevented the government from using the Aarogya Setu app data for any purpose other than COVID-19 containment efforts."

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[21] Section 354 c of Indian Penal Code, 1860

[22] Section 43 A (ii) IT Act, 2000 "reasonable security practices and procedures" means security practices and procedures designed to protect such information from unauthorised access, damage, use, modification, disclosure or impairment, as may be specified in an agreement between the parties or as may be specified in any law for the time being in force and in the absence of such agreement or any law, such reasonable security practices and procedures, as may be prescribed by the Central Government in consultation with such professional bodies or associations as it may deem fit.

[23] Section 43 A (iii) IT Act, 2000 "sensitive personal data or information" means such personal information as may be prescribed by the Central Government in consultation with such professional bodies or associations as it may deem fit.

[24] General Comment No. 16 (1988), para. 1

[25] (2017)10 SCC 1

[26] Justice K.S. Puttaswamy (Retd.) v. Union of India (2019)

[27] (2020) SCC Online SC 25

The intersection of artificial intelligence and human rights is a complex and concerning issue that requires careful consideration and regulation. While AI has the potential to bring about numerous benefits and advancements in various fields, it also poses certain risks and challenges that could lead to human rights violations. Addressing the potential violations of human rights requires a multi-faceted approach.

Robust Regulation: Governments and policymakers need to establish clear and comprehensive regulations to govern the ethical development, deployment, and use of AI technologies.

Ethical AI Development: The AI community should prioritise the development of algorithms and models that are transparent, fair, and free from bias.

Privacy Protection: Strong data protection laws and privacy frameworks must be in place to safeguard personal information and prevent unauthorised access or misuse.

Accountability and Transparency: AI systems should be designed with transparency in mind, allowing for explanations of how they arrive at their decisions, which is essential for accountability.

Human Rights Impact Assessments: Prior to deploying AI systems, organisations should conduct human rights impact assessments to identify potential risks and take appropriate measures to mitigate them. By promoting the responsible and ethical use of AI and integrating human rights considerations into AI development and deployment, we can maximise the benefits of this technology while minimising the risks of human rights violations.

As AI continues to evolve, privacy considerations will remain a critical aspect of its responsible development and deployment. Balancing the benefits of AI with the protection of individual privacy requires a concerted effort from policymakers, technologists, and society as a whole.

## Conclusion

The digital age has brought unprecedented comforts and conveniences to our daily lives, and it has changed the way we live and work. With the rapid growth of the Internet, physical boundaries have become increasingly irrelevant, and digital technologies have become a cornerstone of our social and economic systems. Overall, AI's impact on society is multifaceted and continually evolving. To maximise its benefits and mitigate its challenges, it is essential to have robust regulations, ethical guidelines, and ongoing research to ensure responsible and inclusive AI deployment. There was a

ray of hope for privacy protection when the Justice Sri Krishna Committee[28] submitted the draft Personal Data Protection Bill, 2018. The bill gave importance to the consent of individuals for the purpose of sharing data. If personal data had to be shared or processed, express consent of the data subject had to be taken. To make an informed choice, the burden falls on the data subject. The personal data must be processed in a fair and reasonable manner. AI can become man's best non-canine friend. However, before that, the developers, analysts, and scientists who create AI systems will need to ensure that they never violate any human rights. To address these concerns and prevent AI from violating human rights, there is a growing need for robust legal and ethical frameworks. Governments, policymakers, and organisations must work together to establish regulations that ensure AI technologies are developed, deployed, and used in a manner that upholds human rights, fairness, and accountability. Public awareness and education about AI's potential implications are also essential to foster responsible and ethical AI adoption. Striking the right balance between technological advancements and the preservation of human rights is a complex but essential task in the modern digital age. It is submitted that AI is necessary for India to compete and stand on par with developed nations. However, it is extremely necessary that AI should not interfere with the human rights of the citizens. I would like to conclude with a suggestion that it is essential to conduct regular audits of AI systems to identify and address misuse and ensure fairness, and also to promote AI education and awareness among users about potential risks and rights implications. The plain truth is that no technology is bad, but the technology (data) should not fall in the hands of the unscrupulous elements to exploit the citizens. It is the duty of the State to protect the (Human) Rights of the citizens from misuse of advanced technology through the Rule of Law.

[28] The Justice Srikrishna Committee, officially known as the "Expert Committee on Data Protection Framework for India," was constituted by the Government of India in August 2017 to study various issues related to data protection, recommend measures for addressing these issues, and draft a data protection law for the country. The committee was chaired by Justice B.N. Srikrishna, a former judge of the Supreme Court of India.

# Expanding Horizon of Human Rights Identification and State's Response - Future of Human Right

Ashutosh Kumar*

*Twenty first Century has witnessed huge advancement in science and technology. This advancement has also changed the perception of human rights. From first generation of human rights, there has been expansion of human rights moving to second generation to third generation. The adoption of Sustainable Development Goals has moved the traditional notion of human rights into modern developmental based approach, where inclusive aspect has been taken into account favouring social, economic, environmental, cultural and political dimensions. We can say that human rights identification and its recognition by state is now not limited but expanding continuously according to changing behaviour pattern of human beings and flexibility provided by state in the era of post-modernism. This paper attempts to cover expanding horizons of human rights and obligation of states to accept expanding avenues of human rights. It covers the journey of expanding dimension of human rights and its related variables with respect to state response to human rights.*

**Keywords**: Human Rights, Sustainable Development Goals, Generation of Human Rights, Post-modernism

"***Everyone has right in all circumstances to be treated with humanity and with respect for the inherent dignity of human person. Thus, international law, in field of human rights is no longer vanishing point of jurisprudence but is catalyst for free and full development of every individual in fertile milieu of just society***"[1]

## Introduction

The concept of human rights is based on natural law theory and described as a bundle of rights which is inherent in human beings. But the enjoyment of human rights is dependent on state response and recognition. In the given political and economic administration, basically, the rules of human rights are declared by the State in order to have uniform practice to rule and maintain the rules of administration. A vivid description of identification of human rights and state's obligations towards its people

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[1] V.R. Krishna Ayer, *Human Rights and the Law* (Vedpal Law Publishing House, 1984).

was discussed in Chanakya's enriching text of "***Arthsastra"***[2]. Further***, Nichomachean ethics*** contributed by Aristotle emphasised the obligation of the state adhering to the rule of law and protecting the rights of the individuals in the given political system. The journey of human rights ascertainment is a journey of struggle for human beings for survival. From Hammurabi's code[3]which is regarded as one of the first identification of protection of human rights as it covered all the classes of Babylonian people including widow, orphans and slaves after a major breakthrough was achieved in the form of Magna Carta, 1215.[3]

There has been a number of struggles and revolutions where people in a given political set-up struggled and fought war of independence to get basic human rights recognised. The government, in order to rule the state, gave its acceptance for the welfare of the people. In the 19thcentury, the major concern of people wasto establish the right to self-determination[4] where people's say must be recognised for ruling with the establishment of rule of law. Initially, the identification of human rights was through the right to equality, and right against non-discrimination, which was demanded from the state through freedom struggle against colonisation and imperialism. These rights were recognised after the American War of Independence. These were also visible in the French revolution, which is the best example where liberty, equality, and fraternity were the different dimensions of human rights. It has inspired many countries, which resulted into freedom from slavery and the establishment of republic democracies across the globe.

The Westphalian approach of peace developed the element of respect of human rights directly linked to peace and security. It resulted in the establishment of international regime of peace. In the meantime, the role of state was moving towards economic preferences as the economic perspective of human rights was more preferred for paving the way to prosperity and peace. With passage of time from ancient to modern, the world witnessed new forms of human rights with gradual change in governance and changing geopolitics. The classification of human rights on the basis of passage of time was identified and mentioned by Karel Vasek. Modern global geopolitics and international relations also affected the human rights availability from traditional to modern human rights regime. Apart from state recognition of the role of international court of justice, courts of domestic jurisdiction have also helped in the identification

[2] Essentials of Indian Statecraft, *Kautilya's Arthasastra for Contemporary Readers* (Munshiram Manoharlal, 2007); Patrick Olivelle, *King, Government, and Law in Ancient India: Kautilya's Arthasastra* (OUP, 2013).

[3]*Laws of Hammurabi as cited in Martha Roth, Law Collections from Mesopotamia and Asia Minor* (2nd edn, Scholars Press, 1997

[3] The petition was endorsed by Sir Edward Coke based four Principle: (i) No taxes may be levied without consent of parliament, (ii) No subject may be imprisoned without reasonable cause,(iii) Martial law may not to be used in peace time,(iv)No soldier may be quartered upon the citizenry.

[4] UNGA Resolution, A/RES/637 16 December 1952

and establishment of human rights recognition. Today, human rights regime has witnessed expansion as well as challenge due to prevailing political, social, economic and environmental concerns. The rise of economic imperialism have always affected the domain of human rights. The State is under the sacrosanct obligation to protect the human rights of its people.

## Post Second World War Phase of Human Rights Expansions and Development

A major breakthrough in the expansion of human rights was achieved after the establishment of the United Nations. The preamble of United Nations Charter made human rights protection an international obligation for the member-states, a prime requirement for international peace and security. At the same time, the international negotiations under the umbrella of Economic and Social Council and United Nations' General Assembly resolutions started categorisation of human rights for women, child and rights for basic human development. This led to the adoption of UDHR covering civil and political rights. Further adoption of UNGA declaration of independence of state[5] and acceptance of right to self-determination started anti-slavery movement, which started the independence of colonial countries from the clutches of slavery, apartheid (racial discrimination). The Tehran Conference on Human Rights in 1968 directly linked human rights and development relationship by drawing attention of the world towards the right to development.[6]

## Formation of Regional Conventions on Human Rights leading to expansion of Human Rights

The Second World War resulted in the creation of the United Nations system for international peace and security. Further, many international, inter-governmental, and regional organisations came into existence based on cooperation and regional affinity. It resulted in the adoption of regional conventions of human rights to promote regional trust and convenience of people having cultural and regional affinity. This resulted in uniform acceptance of human rights based on regional and cultural affinity. For instance, the African Charter or Banjul Charter,[7] European Conventions on Human Right,[8]American Convention on Human Rights, expanding the regional and cultural approach to human rights. Thus, the rise of regional and inter-governmental

[5] UNGA Resolution 1514 (XV), declaration on the granting of independence to colonial countries and peoples, acknowledging the determination proclaimed by the peoples of the world in the Charter of the United Nations to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small and to promote social progress and better standards of life in larger freedom.

[6] Article 2(1) of International Covenant on Economic Social and Cultural rights. Including Articles 55 and 56of United Nations Charter discussed the word development, appreciating development as means of achievement of Human Rights.

[7] Adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21 October 1986.

[8] Signed on 4 November 1950 and enforced on 3 September 1953.

organisations expedited the expansion of newly recognised human rights with wider dimension, such as the right to self-determination, which has wider interpretation and means the right to self-rule by people with all freedom inherently available for human beings. When we critically analyse each regional convention on human rights, it reveals that, in some way, all regional conventions contributed to the expansion of human rights; each regional convention shows difference in acceptance of human rights along with similarities.

## Karel Vasek's Classification of Human Rights[9]

On the basis of identification of human rights from one generation to another, it was found that every succeeding generation experienced upgraded or expanded version of Human rights, which was classified by Karel Vasek[10] into three Generations as follows:

1. First Generation of Human Rights[11]
2. Second Generation of Human Rights[12]
3. Third Generation of Human Rights.[13]

Now, in modern political, social, and economic system of governance, new human rights have been recognised. The rights of transgender[14] under Indian domestic legislation; same-sex marriage rights[15] has been adopted in many countries, which was earlier not available, but with the passage of time, the countries with liberal democratic principles are allowing the recognition of new human rights, thereby widening the scope of human rights. Adoption rights,[16]and succession rights with respect to personal law was earlier not accepted under the customary practice. The State, under welfare obligation, has continuously adopted rules of harmonious interpretation. With passage of time and reform in legal system, it has always advocated for the inclusion of new identified human rights demanded by its people.[17]

## Intellectual Property Rights as Human Rights

The International Convention on Economic Social and Cultural Rights 1966, in its text

[9] Karel Vasak, a French Scholar, gave three generation theory of Human Rights on the basis of its development.
[10] Classification of Human Rights into three generations.
[11] Adoption of UDHR.
[12] Second generation focusing on positive dimension of the state in realisation of social, economic, and cultural rights.
[13] Collective Rights, right to self-determination.
[14] Transaction Protection Act, 2019, Sec. 4.
[15] Recognised in 34 Countries including Estonia, Italy, Japan.
[16] Hague Convention on Private International Law relaxed the norms of international law on adoption which was earlier very limited and restricted.
[17] Recognition of Third Gender Rights in Case of NALSA vs. UOI.

of Article 15, made obligation on the party to this convention to protect the rights of its people to encourage culture and protection of scientific temperament and protection of literary benefit and intellectual benefit.[18]

This type of human rights, which was identified and got acceptance by the state, was in the form of Intellectual Property Rights which linked the intellectual capacity of human being to economic benefit. This right appreciated the creative, innovative quality of human beings and presented a distinct version of human rights whose credit must go to the person who has created it. This type of human rights, basically right to intangible property, became a legal right, which was accepted by the state through domestic legislation. This intellectual property right gained momentum due to its economic significance and availability of human intellectual capacity. The creation of World Intellectual Property Organisation ensured progressive development and codification process of Intellectual property rights of human beings.

## Progressive Development and Codification of International Law and Expansion of Human Rights

Progressive development and codification of international law played an organised role in the acceptance and recognition of a new form of human rights. With gradual UNGA resolutions on Human rights, the adoption of UDHR and adoption of a number of International Conventions have expanded the human rights horizons and paved the way for new types of human rights, which are as follows:

a. Four Geneva Conventions (identifying the human rights protection during war time/conflict zones) was a landmark achievement in the history of human rights and law of war where parties to four Geneva conventions agreed on humanrights protection of civilians, combatant, prisoners of war treatment, which is believed to be the most modern and flexible approach to respect human rights at the time of war or in conflict situations.

b. The Refugee Convention 1951 addressed the human rights issues of refugee protection. The human rights of refugee were recognised through the Refugee Convention, which advocated for the idea of availability and accessibility of all human rights protection to refugees. It was recognised by the member state after the codification of the International Refugee Law.

c. The International Convention on Civil and Political Rights, 1966,included Optional Protocols on Civil and Political Rights. The global movement for the abolition of death penalty (second Optional Protocol 1989)was recognised as the most refined version of human rights protection.

d. International Convention on Economic, Social and Cultural Rights, 1966

e. Convention on Elimination of Discrimination against Women, 1979

[18] Article 27 UDHR and Article 15 UNCESCR,1966.

f. International Torture Convention, 1984

This convention identified the rights of an arrested person and prevented the torture of an accused from police during custody.

g. International Convention on Rights of Child, 1989

h. United Nations Framework Convention on Climate Change, 1992

These above-mentioned conventions along with many other conventions are evidence of expansion of human rights according to different conditions and sectoral categorisation of human rights. This shows how the different elements of human rights have expanded and with change in the rule of international law codification process, member-states and parties to these conventions, protocols and declarations have adopted human rights law in domestic framework either through monist or dualist approach according to the law of the land.

## Business and Human Rights as an Expanding Horizon and State Obligation[19]

With the onset of the era of globalisation, the removal of economic barriers, and the realisation of the goal of distributive and economic justice, the idea of business and human rights gained momentum. The new international economic order movement in 1970s, and rise of newly independent states created huge economic challenge for new nations. It has also resulted in the north-south divide. Thus, bilateral and multilateral investment and rise of multinational corporations, and non-state actors interlinked human rights with business. The global economic recession and challenges are being resolved through the idea of business and human rights.[20] Thus, countries have started negotiating the idea of business and human rights. The relationship between human rights and business plays an important role in the enjoyment of other dependent rights guided by economic preferences.

United Nations adopted the International Convention against Corruption[21] for establishing transparency and accountability in governance and administration in order to reduce the victimisation of common people. It has ensured the right to get informed, right to get time bound services in order to avail basic human right services offered and promised by the state under social contract and welfare approach of the state. Global economic recession has stressed on the need for international cooperation and coordination as every country in the world has limited resources, which must be shared and distributed. This has moved sharing of human and natural

[19] These Guiding Principles of Human Rights and Business are grounded in recognition of: (a) States' existing obligations to respect, protect and fulfil human rights and fundamental freedoms.

[20] The Special Representative annexed the Guiding Principles to his final report to the Human Rights Council (A/HRC/17/31), which also includes an introduction to the Guiding Principles and an overview of the process that led to their development

[21] United Nations Convention against Corruption approved in 2003 by the UN General Assembly. With its entry into force on 14 December 2005, the Convention became the first anti-corruption legal instrument to establish binding rules to the signatory countries.

resources in a transparent and effective manner for which a transparent ecosystem in administration is required, which propelled member states of United Nation to adopt the convention on corruption so that a transparent and accountable workforce can be created, boosting the growth of international economy. This has helped in the creation of effective business and human rights protection regime, which focuses on the creation of investment friendly environment, thereby boosting economy.

### Adoption of Sustainable Development Goals, thus, expanding the Horizon of Human Rights[22]

Human rights can never be enjoyed in the absence of quality of life and compromised state of Human Development Index. Global warming resulting into climate change has adversely affected the enjoyment of human rights. It has restricted the right to health, right to employment, right to food, right to education and right to clean environment. Climate change has affected all countries across the globe causing environmental catastrophe and natural disaster. Agenda-21 and our Common Future-blueprint for sustainable development has rationalised and expanded the human rights approach from the angle of sustainable development and sustainability. The most important development of 21st century was the adoption of Sustainable Development Goals in order to save mankind and the planet from the menace of climate change. The idea of sustainable development took shape from *Agenda-21 document* deliberated in Rio-1992 conference, which became the blueprint of human development in the form of "*Our Common Future and 2030 Agenda"*[23] after the expiry of millennium development goal. The concept of sustainable development is inherently linked to development and expansion of human rights regime from the perspective of common but differentiated responsibility, which is the obligation of the state as well as individual. The impact of climate change has negatively affected the enjoyment of human rights. Thus, Sustainable Development Goals implementation is basically the extension of enjoyment of human rights. Sustainable Development Agenda 2030 inherently covers the human rights which are interlinked with the human rights regime. These Sustainable Development Goals are centred towards human rights to improve the quality of life by ending hunger, poverty, availing human rights to clean drinking water, right to health, etc. It has reaffirmed all aspects of human rights based on the idea of social, economic, and environmental justice.

### Right to Internet[24] as Modern Expanding Dimension of Human Right

Twenty first century is an age of information and cyberspace. The invention of world wide web gave world the concept of global communication network where

[22] Human Rights Council Resolution 52/8 on promoting human rights and sustainable development.
[23] TRANSFORMING OUR WORLD: THE 2030 AGENDA FOR SUSTAINABLE DEVELOPMENT sustainabledevelopment.un.org A/RES/70/1
[24] In 2001 Estonia became the first country in the world to declare right to Internet as Human Rights.

any one can connect to any person in the world with a click of the mouse. This has changed the way of communication and freedom of expression through Internet. It has also ensured the right to education, and freedom of expression through various digital platform. The Supreme Court of Costa Rica declared the right to Internet as a fundamental right. The Kerala High Court in India declared the right to Internet as a basic human right interlinked with the right to information and right to education which are already established fundamental rights[25]provided in the Constitution of India.[26] As United Nations[27] has already stressed on the need to recognise the right to Internet as a basic human right. Further, the Human Rights Council has adopted the resolution of UNGA[28] on the recognition of right to Internet as a basic human right under the ambit of ICCPR, 1966. Further, the right to Internet access played a vital role during Covid-19 crisis as it was proved to be a safe option to enjoy the freedom of expression as well as the right to education through online mode as it saved the lives of billions of people through Internet communication. This was realised that without information and freedom of expression human being cannot develop and contribute to the society. The Right to Internet proved to be an important tool of communication, learning, and means to enjoy the right to education. The right to Internet as a basic human right has been recognised through the Justice delivery system as well.

## Covid-19 and Human Rights Assessment in Identification and Expansion of Human Rights

The Covid-19 pandemic moved the nations to get its machinery prepared for human rights challenges in unforeseen circumstances that the whole world experienced. This moved WHO to declare health emergency[29] across the globe and issuance of advisory such that human rights of people cannot be compromised, and basic amenities should be made available to the people during the lock-down. In India and the world, massive special arrangements were undertaken to protect the rights of the migrants, labourers and a number of bilateral and multilateral arrangements were done at national and international levels to protect the right to health of the people across the globe. The

[25] *Faheema Shirin R.K.* v. *State of Kerala* (2019) WP(C) No. 19716 of 2019.
[26] Article 21-A of Indian Constitution.
[27] A/HRC/47/L.22
[28] The Commission on Human Rights and the Human Rights Council on the right to freedom of opinion and expression, in particular Council resolutions 31/7 of 23 March 2016 on the rights of the child: information and communications technologies and child sexual exploitation, 38/7 of 5 July 2018 on the promotion, protection and enjoyment of human rights on the Internet, 42/15 of 16 September 2019 on the right to privacy in the digital age, and 44/12 of 16 July 2020 on freedom of opinion and expression, and recalling also General Assembly resolutions 70/125 of 16 December 2015 containing the outcome document of the high-level meeting of the Assembly on the overall review of the implementation of the outcomes of the World Summit on the Information Society, 75/176 of 16 December 2020 on the right to privacy in the digital age, 75/202 of 21 December 2020 on information and communications technologies for development.
[29] WHO adopted, A75/A/CONF./2 Agenda item 16.2 24 May 2022, Strengthening health emergency preparedness and response in cities and urban settings.

National Human Rights Commission of India[30] issued advisory for the protection of Human Rights during Covid-19 for vulnerable sections of the society. It has released advisory for free health care access, and medical treatment, acknowledging the right to health as a basic human right as well as a fundamental right in India. The Covid-19 crisis created special ecosystem for the protection of human rights through the use of technology such as the right to Internet or contactless use of digital infrastructure of the country, realising the importance of information and technology. Indian Supreme Court[31]also rationalised human rights protection through Suo-moto cognizance and eased the guideline relating to supply of essential goods for basic enjoyment of right to life of the people. Covid-19 crisis, though, created hurdle and challenges for human rights enjoyment but, at the same time, it established a new innovative ecosystem for survival and helped in devising new alternatives such as the right to work from home under unforeseen circumstances.[32]

Further, India has witnessed a new paradigm shift after Covid-19 crisis and adopted, identified and reformed its administrative workforce and adapted its economic, and social governance by adopting digital means in its infrastructure be it educational right, or health right during Covid-19, which was fixed by the Supreme Court of India and Statutory bodies like the National Human Rights Commission of India, which has always played a pivotal role in recognising and interpreting the human rights dimension in the light of circumstances and need according to prevailing social and economic situations. Covid-19 crisis has compelled state action to restrict the enjoyment of human rights but, at the same time, a new alternative mechanism to ensure the right to food and availability of basic amenities under the welfare schemes was launched by the state and central governments of India.[33] Thus, the whole world witnessed a sense of universal solidarity during Covid-19 crisis. International World Health Organization with participation of international organisations ensured the supply of vaccines and drugs highlighted the role of international participation and cooperation to boost human rights assistance.

## Conclusion

In the era of globalisation, no state can survive in isolation. In the same manner, no human rights can be enjoyed in isolation. It is the duty of state to recognise and avail

[30] https://nhrc.nic.in/sites/default/files/NHRC%20Advisory%20on%20Right%20to%20Health%20in%20context%20of%20covid-19.pdf

[31] Suo Motu Writ Petition (Civil) No.3 of 2020 IN RE: COGNIZANCE FOR EXTENSION OF LIMITATION.

[32] Examples from the Netherlands, Poland and Austria were drawn from: ILO, ensuring decent working time for the future, general survey concerning working-time instruments, Report III (Part B), Committee of Experts on the Application of Convention and Recommendations, International Labour Conference, 107th Session, (Geneva, 2018) p. 744.

[33] Section 3 of the National Food Security Act, 2013 provides for Right to receive foodgrains at subsidised prices by persons belonging to eligible households under Targeted Public Distribution System.

human rights protection to each and every individual for all round development of human beings. As the development of human beings means development of each and every element of planet including flora and fauna. Under social-contract obligation, the state is bound to recognise and accept each and every ingredient of human rights. The human rights elements are very wide and must be interpreted with inclusive and expansionist approach according to given social, economic, regional and intellectual approach. When we say human right protection, it means all dimensions of human rights, be it civil, political, economic, cultural, environmental or intellectual variables. As the flexibility of human rights availability varies from country to country, depending upon how a nation treats its people. No doubt, with passage of time and technological advancement and the rise of Artificial Intelligence and digital technology will add new version of human rights such as, today, the right to Internet has already been identified as one of the expanding horizon of human rights which has passed the test of recognition by the state. Although geopolitical status of countries and international relations among the countries is always going to decide the future of human rights. Today, we are living in the era of nuclear weapons and technological advancement in the field of AI, where there is constant threat to human rights due to international armed conflict. But it is the sacrosanct obligation of the state under international as well as domestic laws to not only protect the human rights of its people, but also recognise and accept expanding horizons of human rights for the betterment of world peace and humanity.

# Combatting CSAM through Laws and International Cooperation

N. S. Nappinai*

## Abstract

*Nations across the world have been innovating to combat and curb online dissemination of Child Sexual Abuse Material (CSAM) but with little effect, as was evidenced by the exponential increase in the circulation of such content during the pandemic lockdowns. The Convention on Cybercrime (Budapest Convention) of 2001 took the first steps in using legal frameworks to combat CSAM. Even countries such as India, which are not signatories to the Budapest Convention, have introduced stringent provisions to penalize child pornography. India also led by example by taking Suo Motu cognizance of the issue of dissemination of violent imagery of women and children in Criminal Writ Petition in "Re: Prajwala Letter dated 18.2.2015. Violent Videos and Recommendations" (2018) 15 SCC 551) and consensus mediated proposals introduced innovative solutions to combat inter alia CSAM, which now form part of India's legal framework. The United Nations' initiative, which will culminate in the formulation of a soft law that includes substantive provisions to combat CSAM online and extensive provisions for international cooperation is a welcome development in combatting CSAM online. The paper undertakes a deep dive into existing Indian laws applicable to combat CSAM online, case laws that provide succour to victims and delves into existing and evolving international soft laws and conventions that address the increasing menace of online dissemination of CSAM. The paper argues that it is for want of effective enforcement that CSAM dissemination online has emerged as a serious threat to child rights and not the absence of laws or regulations. The paper points to the need for strengthening the hands of law enforcement through international cooperation in fields of investigation and trial to bring to book pedophiles and for a relook of Indian laws to bring about less onerous or cumbersome processes in prosecuting CSAM crimes and finally for a victim centric legal framework.*

## Background

Child sexual exploitation online was identified as a critical issue to be addressed well before the Convention on Cybercrime or the Budapest Convention.[1] This convention,

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[1] https://rm.coe.int/1680081561; The provisions are more elaborately dealt with hereunder

however, helped with even non-signatory countries, such as India, adapting stringent zero-tolerance towards child sexual abuse online. India introduced amendments *inter alia* to its Information Technology Act, 2000 in 2008, incorporating a specific provision to combat child pornography online.

Yet studies on Child Sexual Abuse Material (CSAM) note the increasing intensity of this menace of child sexual abuse online. The *New York Times* (NYT) report of September 2019 probably captures it best with its caption, "*Twenty years ago, the online images were a problem; 10 years ago, an epidemic. Now the crisis is at a breaking point.*"[2] In 2019, as per this report, nearly "45 million online photos and videos of children being sexually abused" were being circulated. Statistics relied on in the NYT report, i.e., of CSAM reported indicate that in 1998 CSAM imagery was at about 3000 online. It soared to 100,000 in 2008 and to one million in 2014. In 2018, i.e., just four years later, the numbers increased to 18.4 million and in 2019, NYT reported CSAM online at 45 million.

The Internet Watch Foundation ("IWF"), which *inter alia* runs reporting portals/ hotlines in 50 countries, including the UK, reflects in its IWF Report of 2021[3] on the increasing menace of CSAM online. IWF Report of 2021 says that every two minutes a child sexual abuse imagery is shown online. The IWF Report indicates that possibly '7 out of 10 instances of child sexual abuse involved 11-13 years old children and of the imagery online of children being sexually abused 97 per cent were of girls. It clarifies that this did not mean that boys were not victims but that they were indeed victims too. The shocking statistics reflect abuse against even toddlers, babies and young children.[4] Significantly, the IWF Report highlights the menace of social grooming of children for pornography and child sex trafficking.

It is apparent that the menace of online child abuse has been increasing despite global efforts. The COVID-19 lockdown phase saw an unprecedented increase in online CSAM abuse.[5] With the 2019 data for CSAM being so high as nearly 90 per cent increase is not something to ignore or turn a blind eye to. The IWF Report spotlighted the harms of 'self-generated' CSAM content and shockingly it reports that children aged 7 to 10 were being manipulated to record and share self-abuse. It is a fair assumption that laws and penal provisions also have not been effective deterrents. The issue that arises is — what other alternatives could nations adopt to combat this growing menace.

Grooming through online platforms including social media and multiplayer gaming domains expose children and young adults to the threats of self-generated CSAM

[2] https://www.nytimes.com/interactive/2019/09/28/us/child-sex-abuse.html
[3] https://annualreport2021.iwf.org.uk/trends/total
[4] https://annualreport2021.iwf.org.uk/trends/
[5] https://www.orfonline.org/wp-content/uploads/2022/06/ORF_IssueBrief_557_ChildSafetyOnline.pdf

being shared (Nappinai, N.S. (2022)[6]). Children are the softest targets to online harms including of early exposure to pornographic and violent content through online sources, as a study with a large sample size of 10,000 children in the European Union disclosed.[7]

Several developments in India are aimed at combatting *inter alia* the online harm of CSAM. Whilst some have evolved through case laws and precedents other developments are through changes to the legal and regulatory fabric in India.

In 2015, the heinous crimes of criminals uploading rape and gang rape videos online was brought to the notice of the Supreme Court of India through a letter from the non-profit organization 'Prajwala', which was then registered as a *Suo Motu* Writ Petition (Criminal) No.3 of 2015 in Re: "*Prajwala Letter Dated 18.2.2015. Violent Videos & Recommendations."* In 2017, the Supreme Court included the harms from child pornography or CSAM within the ambit of this *Suo Motu* proceeding. In April 2017, a Government Committee was appointed by the Supreme Court to evaluate the use of Artificial Intelligence in combatting the above heinous crimes online. The Committee included several technology companies apart from Government agencies, the Petitioner and the *Amicus Curiae*[8]appointed by the Supreme Court. The report of the Government Committee of July 2017 pertaining to consensus proposals were made an order of the Court (in Order dated October 23, 2017[9]). Several critical outcomes that help combat CSAM and offences against women online emanated from this case and the proceedings of the Committee. The final Order dated 01 August 2023, was passed by the Supreme Court in this case after the Committee submitted its final report wherein further consensus proposals were formulated and accepted by the Committee.[10] The outcomes and the relevance thereof are briefly enumerated hereunder.

The Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, was further notified. These guidelines replaced the existing rules guiding intermediary liability. The criticality of these guidelines is the victim-focussed provisions that specifically addressed the immediate concerns of victims, i.e., expedited takedowns of CSAM and violent imagery of women from online sources. These provisions are more elaborately extracted hereunder.

The recent deliberations spearheaded by the United Nations Office on Drugs and Crimes (**UNODC**) of the "*Ad Hoc Committee to Elaborate a Comprehensive International*

[6] Nappinai,N.S. (2022). *CSassy Tales – Cybercrime Stories & The Law*. Oakbridge Publishing
[7] <https://netchildrengomobile.eu/reports/>(lastaccessedAugust19,2022)
[8] The author Ms. N.S. Nappinai, Advocate, was appointed as *Amicus Curiae* by the Supreme Court in this case.
[9] (2018) 15 SCC 551)
[10] (2023) 10 SCALE 631

*Convention on Countering the Use of Information and Communications Technologies for Criminal Purposes*" (AHC) is a critical development, particularly with respect to combatting CSAM online. The deliberations have resulted in the inclusion of two expansive substantive provisions pertaining to CSAM, in the proposed soft law, the final version of which the United Nations (UN) would be tabling for adaptation in or about September 2024.

Each of these developments take serious note of not just the harm of CSAM but also the means and methodologies being adopted by online predators. Whether these developments would see more success remains to be seen. However, it is critical that there is a substantial move in the right direction, taking note not only of the harm itself, but also the modes and methodologies being adapted to perpetrate the same. That provisions include criminal penalties for such processes such as grooming and collation of CSAM is even more critical. More so when there was such ignorance as to assume such online CSAM crimes to be 'victimless crimes' (Audrey Rogers (2008)[11]) in several cases in the USA, till appellate courts stepped in to correct this grave miscarriage of justice (Nappinai N.S. (2019[12])). Before venturing further hereunder is a quick look at the existing legal and regulatory framework in India and the recent developments at the UNODC's AHC deliberations.

## Indian Laws for Combatting CSAM:

### 1. Indian Laws — Existing:

India has led from the front in combatting child pornography (CP) or Child Sexual Abuse Material (CSAM) being disseminated and more so against online dissemination (Nappinai, N.S. (2020)[13]). Its existing laws, general and special, namely the Indian Penal Code, 1860 (IPC) and The Protection of Children from Sexual Offences Act, 2012 (POCSO), specifically Sections 11 to 15 of the POCSO Act were further buttressed by Section 67B of the Information Technology Act, 2000 (as amended) (IT Act) and Rules framed thereunder to combat online CSAM.

#### a. POCSO:

POCSO provisions are quite extensive in their application to combat and punish sexual harassment of children.

POCSO, pursuant to the amendments of 2019, defines Child Pornography, as under:

[11] Audrey Rogers (2008). *Child Pornography's Forgotten Victims*. Pace Law Faculty Publications.
[12] Nappinai,N.S. (2019). "Rethinking Social Media – Through the Prism of Freedoms, Liberties & Victim Rights" in Nani Palkivala's Festschrift Book titled *Essays & Reminiscences*. LexisNexis. Refer cases of *United States* v. *Goff* (501 F.3d 250, 251 (3d Cir. 2007)); *United States* v. *Pugh* (515 F.3d 1179 (11th Cir. 2008)), and *United States* v. *Goldberg (*491 F.3d 668 (7th Cir. 2007)wherein the courts let off pedophiles with nil to negligible sentences and the appellate court had to intervene to ensure justice.
[13] Nappinai, N.S. (2022). *CSassy Tales – Cybercrime Stories & The Law*. Oakbridge Publishing.

"**Child pornography**" means any **visual depiction** of sexually explicit conduct involving a child which **includes photograph, video, digital or computer-generated image** indistinguishable from an actual child and image created, adapted, or modified, but appear to depict a child.[14]

The provisions relevant to combatting CSAM online are briefly enumerated hereunder:

**Section 11. Sexual harassment:** (Section 12: Punishment for violating Section 11: three years)

- Obscene gestures, word, sound or exhibiting an object or part of body at a child;
- Making a child exhibit his body or part thereof;
- Showing pornographic content to child
- stalking a child including through digital mode;
- threatening to use real or fabricated nude or sexual content of child
- entices or gives gratification to a child for pornographic purposes.

**Section 13: Using Child for Pornographic purposes:**

Using child in any media for sexual gratification through:

- Display of private parts;
- Using child for sexual or simulated sexual acts (with or without penetration);
- Indecent or obscene representation of a child.

**Section 14** provides the punishment for the violations under Section 13, as five years for first offenders with enhanced punishment of seven years imprisonment. For those who participate in acts depicted, there is a higher punishment prescribed of a minimum of ten years and maximum of life imprisonment. Other punishments under this provision range from eight years to life imprisonment.

**Section 15** deals with **Storing Paedophilia**: Section 15 originally applied to storing child pedophilia specifically for commericial purposes in any form, and carried a maximum punishment of three years or fine or both. However, after the amendment of 2019, storage/possession of child paedolophilia for any purpose shall be liable to fine not less than five thousand rupees, and in

[14] Section 2 (*da*) POCSO Act.

the event of second or subsequent offence, with fine which shall not be less than ten thousand rupees.

**Sections16 and 17:** Punish **abetting and conspiracy** to commit any of the crimes in POCSO with the same punishment, as for offence (Section 17 provides the punishment).

**Section 18** punishes **attempt** to commit any of the offences under POCSO with one half of maximum punishment prescribed **or** fine or both.

**Section 20** sets out the **obligation of media, studio and photographic facilities to report cases:**

This requirement is for personnel of media, hotel, lodge, hospital, club, studio, photographic facilities, by whatever name called, to inform the Special Juvenile Police Unit, or to the local police, if they come across any material or object, which is sexually exploitative of the child including pornographic, sexually-related or making obscene representation of a child or children, on any medium.

The above provisions appear to provide substantial protection *inter alia* against CSAM online. The provisions are gender neutral and apply equally to any child below the age of 18 years. Yet the above provisions have not been able to either prevent or protect against the increasing threat of paedophilia on digital domains.

**b. IT Act and the Rules:**

IT Act and the Rules framed thereunder, in particular the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 (Intermediary Guidelines, 2021), as amended provide substantial protections to combat CSAM/ CP under Section 67B IT Act.

There is one primary provision under the IT Act to combat CSAM, i.e., Section 67B IT Act. Whilst so, it is a fairly comprehensive provision. IT Act does not define child pornography.

Section 67B elaborates the actions that amount to an offence and provides the punishment for publishing or transmitting of material depicting children in sexually explicit act, etc., in electronic form.

This provision punishes, unless covered under one of the exemptions in the provisos to Section 67B, anyone who commits any of the following against a child (who is under 18 years of age):

*"(a)**publishes or transmits** or causes to be published or transmitted material*

*in any electronic form which depicts* ***children engaged in sexually explicit act or conduct****; or*

*(b)* ***creates*** *text or digital images, collects, seeks,* ***browses****, downloads, advertises, promotes, exchanges or distributes material in any electronic form* ***depicting children in obscene or indecent or sexually explicit manner****; or*

*(c)* ***cultivates, entices or induces children*** *to online relationship with one or more children for and on sexually explicit act or in a manner that may offend a reasonable adult on the computer resource; or*

*(d)* ***facilitates abusing children online****, or*

*(e)* ***records in any electronic form*** *own abuse or that of others pertaining to sexually explicit act with children."*

Punishment for first conviction is five years imprisonment and fine up to ten lakh rupees and for second or subsequent convictions, imprisonment of seven years and fine up to ten lakh rupees.

**Exemptions under Section 67B IT Act:**

Book, pamphlet, paper, writing, drawing, painting, representation or figure in electronic form, not covered by provisions under Section 67, Section 67A and Section 67B IT Act, if:

(*i*) publication is justified for public good on the ground that such book, pamphlet, paper, writing, drawing, painting representation or figure is in the interest of science, literature, art or learning or other objects of general concern; or

(*ii*) which is kept or used for *bonafide* heritage or religious purposes.

The above provision is quite expansive and brings within its umbrella an array of actions that would amount to an offence. Whilst so, there has been an inexplicable increase in CSAM online in India, particularly after the COVID-19 lockdowns and the statistics with respect to the reporting and prosecutions do not appear to match reports of such increased CSAM abuse activities from India.

The absence of specificity, fear of reporting CSAM and poor enforcement may all be adding to the extensively prevalent CSAM abuse situation, which fails to abate and which causes serious harm and threat to children (Nappinai, N.S. (2017)).[15] The need, therefore, for India to evaluate alternatives including

[15] Nappinai, N.S. (2017). *Technology Laws Decoded*. LexisNexis.

more specific provisions and awareness amongst public of the remedies and the protections available to them are essential and imperative.

The Intermediary Guidelines, 2021 (and its predecessor Rules) also play a key role in providing victim protection and rights. Several of the provisions under the Intermediary Guidelines are grounded on the outcomes of a crucial case pending before the Supreme Court of India and wherein an interim order was passed making several preventive and protective measures to combat CSAM and violence against women online, law of the land, through precedent law. The provisions under the Intermediary Guidelines, 2021, that lend themselves to combat CSAM are, therefore, extracted after the outcomes of the Prajwala case.

**c. In *Re: Prajwala Letter dated 18.2.2015. Violent Videos & Recommendations:***

In 2015, the Hyderabad, India based non-profit Prajwala wrote to the Chief Justice of India enclosing tapes of actual rapes and gang rapes that had been uploaded by the criminals on social media platforms, seeking intervention of the Hon'ble Supreme Court to protect victim rights through takedowns and for further action. The Supreme Court took *Suo Motu* cognizance and *Suo motu* Writ Petition (Criminal) No.3 of 2015 was registered to evaluate the harms to and remedies for victims of such heinous crimes as those enumerated above, i.e., of dissemination of videos and images (collectively **imagery**) of rapes and gang rapes (**RGR**) on social media platforms. This scope was expanded in or about 2017 to include dissemination of CSAM online. In April 2017, a Government Committee was constituted to undertake the exercise of formulating technology enabled consensus-based mechanisms to combat CSAM online (**Prajwala Committee**).

Pursuant to the Prajwala Committee recommendations, the Supreme Court ordered the implementation of the consensus recommendations by its order dated October 23, 2017.[16] Consequently, India led through precedent law, in implementing technology enabled preventive and protective measures to combat *inter alia* CSAM online.

The Consensus Recommendations that became part of the Order dated October 23, 2017[17] of the Hon'ble Supreme Court, which pertains to CSAM, are elaborated hereunder:

**Proposal 1 and Recommendation**

**Proposal 1** pertained to creation of Keyword banks *inter alia* for CSAM online to enable warnings/public service messages to be then activated when

[16] (2018) 15 SCC 551
[17] (2018) 15 SCC 551)

the identified keywords formed part of an upload. Such collation was to be in English and vernacular languages.

**Outcome of Recommendation:** Government of India initiated the process of collation of English and vernacular key words and search engines commenced issuance of warning ads pursuant to this recommendation. This was and is a work in progress.

**Proposal 2** was for the creation of a Central Reporting mechanism in line with the National Center for Missing and Exploited Children (**NCMEC**),[18] to provide an online reporting platform for any person to submit a report of CSAM identified online to the Central reporting authority and for law enforcement to evolve processes for prosecuting based on such reports. There was also a recommendation for India to evaluate membership of INHOPE, as India's hotline. Further recommendations include creation of a hash bank of CSAM content with a Central Government Agency.

**Outcome of Recommendation:** NCRB was authorized to create the hash bank and as more fully set out hereunder, an online portal for the submission of cybercrime complaints was set up – www.cybercrime.gov.in.

**Proposal 3** brought with it one of the most critical developments to combat cybercrimes in general and CSAM and offences against women online, in particular. The recommendation under Proposal 3 was for setting up an online portal for the submission of cybercrime complaints. This also includes anonymous submissions for offences against women and children.

**Outcome of Recommendation:** As mentioned above, www.cybercrime.gov.in was set up pursuant to this recommendation. A separate Section deals with offences against women and children. Submission of anonymous complaints is a special feature for complaints pertaining to offences against women and children. A helpline was also set up, subsequently, which is presently functional on the number '1930'.

Another critical development simultaneous with the Prajwala hearings was the setting up of the Indian Cybercrime Coordination Centre (**I4C**),[19] which acts as the nodal point for combatting cybercrimes in India. The main objective of I4C is to undertake research, develop technologies and forensic tools, suggest amendments in cyberlaws and to coordinate all activities related to the implementation of Mutual Legal Assistance Treaties (MLAT) with other

[18] A USA based private, non-profit organisation established in 1984 by the United States Congress.
[19] Details about Indian Cybercrime Coordination Centre (I4c) Scheme | Ministry of Home Affairs. (n.d.). https://www.mha.gov.in/en/division_of_mha/cyber-and-information-security-cis-division/Details-about-Indian-Cybercrime-Coordination-Centre-I4C-Scheme

countries related to cybercrime in consultation with the concerned nodal authority in Ministry of Home Affairs.

**Proposal 4** is creation of awareness and capacity building *inter alia* about CSAM threats online by the Government of India and for technology companies/online content hosting platforms to cooperate and contribute to such initiatives forms part of the recommendations under this Proposal. This was a forward thinking recommendation, which now forms part of international normative recommendations.

**Outcome of Recommendation:** Government of India and companies represented in the Prajwala Committee initiated several awareness programmes and capacity building exercises pursuant to this recommendation. The constant and repeated warning messages through SMS by Government of India agencies is a critical outcome of this recommendation.

**Proposal 5** dealt with identifying and taking down of rogue sites carrying CSAM content and RGR.

**Outcome of Recommendation:** Government of India with the assistance of companies represented in the Committee were to initiate this process.

**Proposal 6** ensured a critical development for India, i.e., a tie-up with NCMEC. Extensive action by Indian law enforcement agencies ensued after this tie-up to identify and prosecute India based violators of extant CSAM laws in India, in particular dissemination of CSAM through online platforms and chat apps.

**Outcome of Recommendation:** This recommendation was one of the most critical developments for India to combat CSAM. NCRB was designated as the Indian Government agency for this tie-up. The outcome has ensured an ongoing process to identify India-based offenders and to apprehend and prosecute such offenders. This is an ongoing process also.

**Proposal 7** again was a critical recommendation. Content hosting platforms agreed to initiate processes to block uploads of identified CSAM content and to also voluntarily remove and prevent previously existing content on their platforms.

**Outcome of Recommendation:** The above recommendation ensures protection of victim rights. It was another forward-looking recommendation providing effective victim protection. One of the threats identified from innumerable instances is of content being migrated to alternate URLs when blocked at one platform. This recommendation was intended to stop such further uploads on the same or other platforms and to also search for earlier

uploads and to block such offensive content as CSAM and violent imagery of women/ RGR being disseminated online. Extensive technology mediated initiatives have been undertaken by different content hosting platforms pursuant to this recommendation, as disclosed in their mandatory reporting processes.

**Proposal 8** was a consensus proposal and recommendation by the Committee that pertained to the commencement of research for use of Artificial Intelligence (AI) tools including Machine Learning (ML) or Deep Learning (DL) tools to actively identify CSAM and violent imagery of women at the time of upload and before it was published.

**Outcome of Recommendation:** The companies represented on the Committee undertook to develop technology pursuant to this recommendation. This proposal in a way formed the bedrock of the referral by the Supreme Court of technical aspects to the Government Committee. The Supreme Court of India had considered submissions on the feasibility of use of technology to identify previously unidentified CSAM/ RGR content through active filtration and for quarantining such content till verified through human intervention. Acceptance of the above recommendation was, therefore, a critical first step to deployment of technology to combat CSAM at a preventive stage itself.

**Proposal 10** pertained to RGR content. The recommendation was for removal and de-indexing URLs identified as those containing RGR and to do so expeditiously, as would be done for CSAM. Whilst this recommendation did not pertain directly to CSAM, the processes elaborated herein are also solutions to combat CSAM online and, hence, are noteworthy.

**Outcome of Recommendation:** The above recommendation needed to be implemented by content hosting platforms and search engines.

**Proposal 11** was for content hosting platforms and social media platforms to provide specific links for reporting CSAM and RGR content. This was critical as a separate button for reporting CSAM would also ensure expeditious actioning for removal of such content from the platform.

**Outcome of Recommendation:** The above recommendation is a critical development for expediting the removal of CSAM content from online platforms. The represented companies were to provide specific buttons to report CSAM content. This would enable removal of such content expeditiously and, hence, was a critical requirement.

**Proposal 12 (a)** was intended to assist law enforcement in combatting CSAM through cooperation from the content hosting platforms preserving and

retaining information of uploader and the other details needed to prosecute the criminals. The recommendation acknowledged the action being taken already by the companies represented on the Committee.

**Outcome of Recommendation:** Preserving, retaining and sharing, as per due process is part of the IT Act at Section 67C IT Act. Further clarifications with respect to preservation forms part of the Intermediary Guidelines, 2021 (and was part of the Rules that the Intermediary Guidelines replaced). This recommendation is also, therefore, an ongoing process that would require continued compliance with and adherence to.

**Proposal 18** recorded the recommendation for the chat app, WhatsApp to effect improvements in its reporting processes such that the reporting would not result in deletion of content.

**Outcome of Recommendation:** WhatsApp made some changes to its reporting processes even during the hearing of the Prajwala case and this was a work in progress thereafter.

The outcomes of the above case were, therefore, seminal and path-breaking in many ways. The G7 Charter on Cybercrime[20] records several recommendations, which, in fact, reflect that which India achieved through the intervention of the Supreme Court of India and are already part of India's legal framework as precedent law.

On 01 August 2023, the Supreme Court finally disposed the above case taking on record the Government Committee's final report and recommendations and noting that further consensus proposals have been formulated by the Committee.[21]

The criticality of the above case was the timeliness in terms of evolving solutions to combat CSAM and offences against women online, using technology enabled tools. That the Supreme Court of India led from the front in this initiative is commendable and path breaking. It is, however, apparent that a lot more is required to be done to ease the harms of online sexual abuse harming children, particularly with the exponential increase in India based paedophilic activity noted during the recent COVID-19 pandemic lockdown period.

### d. Intermediary Guidelines, 2021

The Intermediary Guidelines of 2021 gave victims facing remedies, which are

[20] Refer: Nappinai, N.S. (2020). "Rethinking Social Media – Through the Prism of Freedoms, Liberties & Victim Rights", Published in the Festschrift Book for Nani Palkivala titled *Essays & Reminiscences*. LexisNexis.
[21] (2023) 10 SCALE 631

substantial and if utilized and implemented could be powerful tools to combat CSAM online.

In brief, the Intermediary Guidelines, 2021 provide under Rules 3 (for all Intermediaries) & Rule 4 (applicable to the category of Significant Social Media Intermediaries), as under:

- For Intermediaries (which includes content hosting platforms and search engines) to ensure *inter alia* that content harmful to a child is not uploaded. The Intermediary Guidelines, 2021 as amended places a higher responsibility on Intermediaries than its predecessor rules by making the Intermediary responsible to ensure compliance;
- For appointment of Grievance officers in India, who are required to action content such as CSAM containing nudity or exposure of private parts, including morphed or fabricated imagery within 24 hours. Other forms of violative content are to be removed within 72 hours and any response from the Grievance officer is required to be within 15 days.
    - For Intermediaries to voluntarily deploy automated tools to identify offensive content including CSAM and to issue warnings to users;
    - For preservation and retention of content including those taken down or blocked to assist prosecutions;

    Provision under Rule 4 (2) was also introduced for tracing originators of offensive content but the same is under judicial review before High Courts.

    The Intermediary Guidelines, 2021 also makes failure to adhere to the Rules itself a violation that would result in Intermediaries losing the exemption or protection of safe harbor under Section 79 of the IT Act.

    The Intermediary Guidelines have in effect codified some of the recommendations in the Prajwala case and have also added further provisions to combat online crimes. These provisions would also help combat CSAM online.

**e. IPC[22]:**

The Indian Penal Code, 1860("IPC") has stood the test of time in being able to deal with an array of offences affecting the nation, economy and individuals.

The Criminal Laws (Amendment) Act, 2013, introduced substantial amendments to IPC. However, in the light of the horrific Nirbhaya incident and the consequent

[22] Refer: *CSassy Tales – Cybercrime Stories & The Law* by N.S. Nappinai (2022). Published by Oakbridge Publishing for a more detailed elaboration on the IPC provisions that may be evoked to combat cybercrimes including offences against women and children.

Justice Verma Committee Report[23], most provisions introduced are gender specific[24] and apply to offences against women or girls (Sections 354A[25], 354B[26], 354C[27] and 354D[28] IPC being illustrative).

Of the above Sections 354A, 354C and 354D IPC along with 354 IPC could also be invoked where applicable (subject to the facts and circumstances of each case) to prosecute CSAM offences pertaining to girl child (see Section 10 IPC which interprets 'woman' to be female of any age).

Apart from the above, Sections 366A IPC (procuring minor girl for illicit intercourse), Section 370 IPC (trafficking including of minors) and Section 370A IPC (exploiting a trafficked person)) are provisions that may be invoked for CSAM prosecutions including for CSAM online. The applicability of these provisions, needless to add would be contingent on the facts and circumstances of each case.

**f. Commissions for Protection of Child Rights Act, 2005**

In furtherance of Commissions for Protection of Child Rights Act, 2005, an online complaint management system named **eBaalnidan[29]** have been set up whereby complaints related to any violation of child rights may be lodged with National Commission for Protection of Child Rights ('**NCPCR'**). This is yet another initiative that could be better utilized to combat CSAM.

## 2. International Soft Laws:

The UN Special Rapporteur's statement on the sale of children, child prostitution and child pornography "*Children are coerced into participation in pornographic performances online. Young girls and boys are lured with false promises and coerced into sex trade, domestic servitude, forced labour, begging and forced marriage"*[30] indicates that the menace continues unabated despite international initiatives.

Several soft laws or treaties and conventions have dealt with child rights including the United Nations Convention on the Rights of the Child (1989) ("**UNCRC**")[31].

[23] https://prsindia.org/policy/report-summaries/justice-verma-committee-report-summary;
[24] *See* Section 10 IPC, which defines "Man" and "Woman", as follows: *The word "man" denotes a male human being of any age; the word "woman" denotes a female human being of any age."*
[25] Sexual Harassment.
[26] Assault or use of criminal force to woman with intent to disrobe.
[27] Voyeurism.
[28] Stalking.
[29] Ebaalnidan |National Government Services Portal. (n.d.). https://services.india.gov.in/service/detail/ebaalnidan
[30] Report to Member States at the UN Top Rights Forum (March 2020): https://news.un.org/en/story/2020/03/1058501#:~:text=%E2%80%9CChildren%20continue%20to%20be%20sold,participation%20in%20pornographic%20performances%20online.
[31] https://www.unicef.org/child-rights-convention#:~:text=In%201989%2C%20world%20leaders%20made,children's%20lives%20around%20the%20world.

India ratified the convention in 1992. UNCRC calls upon signatory countries to adapt suitable measures to prevent 'sexual abuse' of the children (Article 19). Article 34 of the convention recognizes the right of children to protection against all forms of exploitation, including sexual exploitation and abuse.

In addition to UNCRC, India is signatory to the Optional Protocol to the Convention on the Rights of the Child on the 'Sale of Children, Child Prostitution and Child Pornography' (2002) ("**OPSC**")[32], which enumerates the rights of children against sale of children, child prostitution and child pornography (Article 3).

The United Nations adopted the '*Guidelines regarding the implementation of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and Child Pornography'* in 2019. These guidelines aim to prevent, and combat the sexual exploitation of children through legislative frameworks, developing prevention programs and initiatives, promoting awareness and collaborating with other countries and organizations.

The Convention on Cybercrimes (2001) or what is colloquially referred to as the 'Budapest Convention' explicitly addressed the issue of "Child Pornography' and encouraged signatory countries to adapt legislative and other measures to combat this menace[33].The Budapest Convention seeks signatory states to criminalize production, distribution and possession of child pornography (Article 9). India is not a signatory to the Budapest Convention. Yet it adapted the above mentioned Section 67B into its IT Act through the amendments in 2008.

Apart from the above the UN also launched its '*Global Plan of Action to Combat Trafficking in Persons'* in 2010[34].This plan includes *inter alia* actions for combatting trafficking and exploitation of children, which are intrinsically linked to CSAM through "*Prevention, Protection, Prosecution and Partnership*". The UN Sustainable Development Goals (SDGs) at SDG16 include ending all forms of violence against children including sexual exploitation and abuse of children and to ensure justice for child victims[35].

## 3. International Soft Laws: UNODC Ad Hoc Committee:

The UNODC Ad Hoc Committee or AHC has prioritized child protection online and has dedicated two provisions specifically for combatting CSAM i.e., Articles

[32] https://www.ohchr.org/en/instruments-mechanisms/instruments/optional-protocol-convention-rights-child-sale-children-child#:~:text=States%20Parties%20shall%20take%20all%20necessary%20steps%20to%20strengthen%20international,child%20prostitution%2C%20child%20pornography%20and

[33] https://rm.coe.int/1680081561;

[34] United Nations launches global plan of action against human trafficking. (n.d.). United Nations: Office on Drugs and Crime. //www.unodc.org/unodc/en/frontpage/2010/September/un-launches-global-plan-of-action-against-human-trafficking.html

[35] https://data.unicef.org/sdgs/goal-16-peace-justice-strong-institutions/

13 and 14. The draft remains to be finalized and is likely to be ready by or about January 2024 and the draft is expected to be placed before the United Nations General Assembly for ratification in September 2024. Whilst substantial changes to the above two Articles have been suggested by several countries, broadly the contours remain the same i.e., of protection of children from sexual exploitation online.

Article 13 deals with substantive violations amounting to online child sexual abuse, child sexual exploitation material or child pornography, as some countries have classified it. The scope of the provision, which if adapted would result in sweeping changes in domestic laws across a substantial part of the globe, encompasses multiple forms of violations against a child online.

**Articles 13 &14:**

In brief, Article 13 covers intentional violations without right, through a computer system or an information and communications technology device ("**ICT**" device), child sexual abuse or child sexual exploitation material ("**CSEM**"), the following conduct:

- Producing, offering, selling, distributing, transmitting, broadcasting, displaying, publishing or otherwise making available CSEM;
- Soliciting, procuring, accessing or otherwise engaging with CSEM;
- Possessing or controlling CSEM on a computer or ICT device or another storage medium;
- Financing, facilitating or profiting from the offences established under this article.

The proposal is to make each of the above conduct, whether it pertains to an actual child or a person appearing to be a child an offence. Similarly, the sexual activity covered is intended to include both real or simulated sexual activity or pose. "Material" in CSEM is intended to include images, video and live-streaming media, written material and audio recordings.

The most important addition proposed by the AHC is to ensure that children are not criminalised for content such as sexting. Article 13 provides that State parties may therefore take steps to exclude "*criminalization of children for self-generated material"* as described in paragraph 2 of the above article. The article draft proposed also notes the possibility of children being perpetrators and calls upon State parties to provide appropriate safeguards for children accused of offences under this Article adapted into domestic law.

Article 14 criminalises the preparatory processes in combatting CSAM or what the Convention draft tentatively refers to as CSEM. Under Article 14, Solicitation

of a child for sexual purposes through a computer system or ICT device is required to be criminalised. Communicating, soliciting, or making any arrangement with a child for sexual purposes, including for the commission of any of the offences established in accordance with article 13, when committed intentionally by an adult through a computer system or ICT device is proposed to be penalized under this article. Substantial inclusions and modifications have been proposed under this Article by various Nations. This article when adapted would help combat the exponential and worrisome developments in social engineering being used as a tool to solicit and abuse CSAM.

Whilst the above provisions are expansive, the need to protect children against morphed imagery, deep fakes, caricatures and other depictions, which harm them equally, as exposure of their actual imagery, is required. Some suggestions from various nations lend support to this proposition. A lot of the above is captured by India in its provisions under IT Act and POCSO. Substantially, the Intermediary Guidelines also cover child protection online including against morphed and fabricated imagery. This broader scope needs adaptation globally for better enforcement, as more fully set out hereunder.

**Article 15:**

Apart from the above two provisions that directly impact criminalization of CSAM, Article 15 will also play a critical role in protecting children online. Article 15 combats the heinous and willful crime of sexploitation or what is colloquially referred to as 'revenge porn'. Article 15 requires Nations to adapt into domestic law, the criminalization of '*Non-consensual dissemination of intimate images'*. The acts of offering, selling, distributing, transmitting, publishing or otherwise making available an intimate image of a person through a computer system or ICT device intentionally and without the consent of the person depicted. The provision covers a recording or representation of a 'natural person' "*by any means, including a photograph, film or video recording in which the person is nude, is exposing their genital organs, anal region or breasts, or is engaged in sexual activity, and in respect of which, at the time of the recording, there were circumstances that gave rise to a reasonable expectation of privacy*".

Several modifications have been suggested to this provision also. In this provision too, fabricated imagery such as morphed pictures or deep fakes needs inclusion. The use of the phrase 'natural person' may lend itself to an assumption that criminalization is only of capture of the private parts of a natural person. However, as abovementioned, deep fakes and morphed imagery or fabricated imagery in any form creates as much harm. For instance, victims of sexual harassment in an online game have voiced the mental trauma they felt though the harassment was completely virtual (Nappinai N.S (2022))[36]. In an instance titled 'A Rape in

[36] Nappinai,N.S. *CSassy Tales – Cybercrime Stories & The Law*. Oakbridge Publishing.

Cyberspace' (Dibbels (1998)[37])recounts the case of a virtual meeting place being hacked and the hacker taking control of the avatars on the platform and making them perform sexual acts in front of other avatars[38]. The victims i.e., those who created the violated avatars felt personally abused. Effective provisions to combat such instances of violations may also be essential as a virtual violent act does have physical and psychological impact in the real world and inhibit a person's individual including fundamental rights. The above text however is work in progress and hence once hopes that there would be changes to include the wider spectrum of violations, as offences.

## 4. CSAM & Procedural Laws

Apart from the above substantive provisions that have been suggested for inclusion in the convention text, several procedural provisions find place, which would substantially assist in ensuring better enforcement and international cooperation. These include *inter alia* provisions for data sharing, cooperation in investigations and prosecutions for all of the offences listed in the convention. These are covered by the UNODC AHC in the proposed convention text. The procedural aspects in particular have substantial inputs from various Nations and the final outcome will decide the extent to which international cooperation will assist in combatting cybercrimes in general and CSAM in particular.

The Indian general laws including the Criminal Procedure Code, 1973 ("**Cr.P.C**") and the Indian Evidence Act, 1972 ("**IEA**") will have a bearing in effective enforcement against CSAM. For instance, there has been substantial concern over the onerous processes mandated under Sections 65A and 65B of the IEA. India's general laws are now likely to be replaced by new alternatives[39] but each of these also carry forward a substantial portion of existing laws. In particular, the new alternative to IEA being The Bharatiya Sakshya Bill, 2023 continues to perpetuate the onerous requirements of Sections 65A and 65B IEA. A detailed relook at procedural provisions including for protecting the identity of minor victims, expedited takedowns and for speedy enforcement is essential.

## 5. Way Forward

The details of existing laws and regulations under the Indian legal framework are intended to emphasize the fact that it is not for want of laws or provisions that there has been such increase in CSAM harms. The need of the hour is more for effective enforcement of existing provisions than for new or additional provisions.

[37] Julian Dibbell "A Rape in Cyberspace" Chapter One of "My Tiny Life, 1998" (First published in *The Village Voice*) http://www.juliandibbell.com/articles/a-rape-in-cyberspace/

[38] A virtual persona that a user may create using the tools provided on a platform and for use or depiction of the person on such platform.

[39] The BharatiyaSakshya Bill, 2023 ("Bill/Evidence Bill"); Bharatiya Nyaya Sanhita 2023 (Penal Code); and the Bharatiya Nagarik Suraksha Sanhita Bill, 2023 (Procedural code).

Having said that the UNODC AHC Convention draft once ratified will result in changes to the domestic laws including of India. Apart from what the UNODC's AHC may mandate, it is also open for India to evaluate what additional provisions are required for better protection of children online. For this, a complete overhaul not only of the substantive criminal provisions but also of procedural laws is required. Until such time, the requirement is for better enforcement of existing provisions, with sensitivity and understanding. The need of the hour is for improving trust in systems. For victims to trust the system i.e., police or judiciary, they have to see it functioning and in a timely manner.

For instance, the provisions under IT Act, POCSO and IPC give a wide range of protections against various violations against children. Practically, however, when a victim attempts to file a complaint, the first obstacle for them is in understanding where their remedy lies. This opacity is not only for victims, but also for police and the legal systems. Ensuring that laws for child protection are in a single enactment, therefore, helps better enforcement. Victims are still reluctant to seek remedies and most violations are not even reported due to fear of systems and their lack of trust in legal systems. In the rare instance of a report, the victims feel more victimized given the inquisition they are subjected to before a case is registered or investigations against the culprits initiated. Thereafter, justice is still a long road ahead.

Clarity and awareness amongst citizens and residents on laws and their elucidation on what amounts to an offence and the punishment for violation is critical to ensure deterrence. Hence, a drive to ensure such awareness would go a long way in victim protection. For instance, in the book, *CSassy Tales – Cybercrime Stories & The Law*,[40] instances are extracted of how children may not know the difference between a prank and a crime and may cross the line inadvertently. Knowing when not to cross such a line may stop many a crime.

The important aspect highlighted by UNODC's AHC, i.e., children should not be punished for self-generated content is critical. Often it is out of fear of retribution for their own acts that children remain silent in the face of abuse. Ensuring that this protection is built into the Indian legal framework is critical. Whilst we await new laws, a clarification on provisions such as Sections 67 and 67A IT Act that sharing or transmission of self-generated content would not amount to an offence, be it by a child or an adult, will go a long way in helping prosecute offences of sexploitation and revenge porn.

Sensitizing the system, from police to judiciary on issues such as sexting and making them aware that mere voluntary sharing does not deprive a victim of their rights or that an online crime is not a victimless crime is critical.

[40] N.S. Nappinai (2022). Published by Oakbridge Publishing.

Steps are already underway for Special Courts for offences against children and for complaints under POCSO. Having a unified and special legal process which is time bound is critical. This could be through Special Courts with trained presiding officers where all offences against children may be directed.

Support of civil society members even at the stage of filing a complaint or recording of statements where victims or even perpetrators are minors ought to be made mandatory. Presence of parents or guardians at the time of investigation, special processes on what may or may not be asked during questioning (such as restrictions on character assassination, badgering of a witness etc.) and recording even of investigation processes to ensure victim protection and/or protection of human rights are further possibilities.

Ensuring protection of victim's identity from the commencement to conclusion of legal proceedings is and ought to be made strictly mandatory. In a recent case involving the sexual harassment of a minor girl, for instance, the judgement cause title reads as "X" but the judgement itself records the name of the victim explicitly and thereby violates victim rights. The Supreme Court in *Nipun Saxena* v. *Union of India*[41] explicitly mandates the need to ensure confidentiality of victim's identity and handling sensitive content in rape and POCSO cases. Despite this, there is an error in implementing the same. Having a clear manual setting out procedure will ensure uniform application across India.

Protecting the privacy and dignity of victims is critical. For instance, in compliance with Section 207 Cr.P.C, a Court could permit only inspection to the lawyers for the prosecution and defense instead of sharing violative imagery. In *Sri Anish Loharuka* v. *The State of West Bengal,*[42] the Calcutta High Court held granting inspection instead of copies would suffice where it may, otherwise, expose a minor victim's identity.

Witness protection becomes even more important for children. Often in the discussions on victims and perpetrators, the fact that often children may be the witnesses in offences involving children is missed out. The Supreme Court set out extensive guidelines for witness protection in its decision in *Mahender Chawla* v. *Union of India.*[43] Ensuring that directions are complied with is a first step and evaluating whether additional protections may be needed for child witnesses is the further requirement. Further, children are much more evolved and aware of today's Internet driven world. Relooking the evidentiary value of a child witness in the current context is also critical.

[41] 2018 SCC OnLine SC 2772.
[42] 2022 LiveLaw (Cal) 216.
[43] 2018 SCC OnLine SC 2679.

Ensuring international cooperation is critical and essential to combat CSAM dissemination. In this world without borders, it is only through international cooperation that enforcement can be strengthened without losing sovereignty.

Children are soft and easy targets and whilst very bold when undertaking adventurous explorations including of digital domains, they remain vulnerable and easy targets of manipulation by criminals and predators. It is, therefore, imperative that our laws remain simple yet effective to ensure better protection, as a preventive measure and an effective enforcer against violations when they occur. Such visible effectiveness will buttress trust in systems, which is the need of the hour, not only in India, but globally.

# Environment, Development, Human Rights, and Climate Change in India: A Comprehensive Analysis

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## Abstract

*This article aims to explore the intricate connections between environment, development, human rights, and climate change in the context of India. It examines the complex interplay between environmental degradation, socio-economic development, the protection of human rights, and the challenges posed by climate change. This research article also seeks to shed light on the multifaceted relationships and their implications for sustainable development and climate action in India. It also offers insights into nation's challenges, and opportunities, shedding light on the path forward to a more sustainable and equitable future for India and the world.*

**Keywords:** Environment, development, human rights, climate change, India, sustainable development, environmental degradation.

## 1. Introduction

This article provides an analysis of the intricate relationships between environment, development, human rights, and climate change in India. By examining the various dimensions of these issues, it offers insights into the challenges and opportunities for sustainable development and climate action in the country.

Policy frameworks play a crucial role in addressing the complex interconnections between environment, development, and human rights. In the context of India, both national and international policy initiatives have been instrumental in guiding and shaping efforts towards sustainable development, environmental protection, and the promotion of human rights. This section will explore some key policy frameworks in India and their relevance in addressing these interconnected issues.

At the national level, India has established several policy frameworks that emphasise the integration of environmental considerations into development planning and decision-making processes. The National Environment Policy

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(NEP) of 2006 provides a comprehensive framework for sustainable development by addressing key environmental challenges, promoting conservation and sustainable use of natural resources, and ensuring the participation of stakeholders in decision-making. It recognises the need to balance economic development with environmental sustainability and emphasises the importance of integrating environmental concerns into sectoral policies. The National Environmental Policy is a response to our national commitment to a clean environment, mandated in the Constitution in Articles 48 A and 51 A (g), strengthened by judicial interpretation of Article 21. It is recognised that maintaining a healthy environment is not the state's responsibility alone, but also that of every citizen.[1]

The National Action Plan on Climate Change (NAPCC), launched in 2008, outlines India's strategy to address climate change and its impact on various sectors. The plan encompasses eight national missions that focus on areas, such as solar energy, energy efficiency, sustainable agriculture, and water conservation. It outlines a national strategy that aims to enable the country to adapt to climate change and enhance the ecological sustainability of India‘s development path. It stresses that maintaining a high growth rate is essential for increasing living standards of the vast majority of people of India and reducing their vulnerability to the impacts of climate change.[2] These missions provide a policy framework for promoting renewable energy, reducing greenhouse gas emissions, and enhancing climate resilience in the country.

In addition to these national initiatives, India is also a signatory to various international agreements and conventions that address environmental protection, sustainable development, and human rights. The United Nations Framework Convention on Climate Change (UNFCCC) and the Paris Agreement are key international frameworks that guide global efforts to combat climate change. India has actively participated in these forums and has committed to nationally determined contributions (NDCs) to mitigate climate change and adapt to its impacts.

India's commitment to environmental sustainability and human rights is reflected in its legal framework as well. The Environment Protection Act of 1986 provides a robust legal framework for environmental management and pollution control. It empowers the Central Government to take measures to protect and improve the environment and sets standards for various industries and activities.[3]The Wildlife Protection Act of 1972 and the Forest Rights Act of 2006 are examples of

[1] National Environmental Policy, 2006, Preamble.
[2] National Action Plan on Climate Change (NAPCC) –Press Information Bureau. Available at: https://static.pib.gov.in/WriteReadData/specificdocs/documents/2021/dec/doc202112101.pdf (Accessed: 01 September 2023).
[3] Environment Protection Act of 1986, Section 3, Chapter 2.

legislation that aim to protect biodiversity and safeguard the rights of indigenous and forest-dwelling communities.

Furthermore, India has established institutions and bodies to implement and monitor environmental and human rights-related policies. The Ministry of Environment, Forest and Climate Change (MoEFCC) is responsible for formulating and implementing environmental policies and programmes. It plays a vital role in coordinating efforts to protect the environment, conserve biodiversity, and address climate change. The National Green Tribunal (NGT) is another important institution that adjudicates on environmental disputes and promotes environmental justice.

While these policy frameworks provide a solid foundation for addressing environment, development, and human rights, there are challenges in their implementation. One of the key challenges is the need for effective coordination and collaboration among different government departments and agencies to ensure policy coherence and integrated decision-making. Additionally, there is a need for increased public awareness, participation, and capacity building to effectively implement and monitor these policies.

Overall, policy frameworks at the national and international levels play a vital role in addressing the complex interplay between environment, development, and human rights in India. These frameworks provide guidelines and strategies for promoting sustainable development, protecting the environment, and safeguarding human rights. However, there is a need for continuous efforts to ensure effective implementation, monitoring, and evaluation of these policies, as well as addressing the challenges and ensuring inclusive participation of stakeholders in the decision-making process.

## 2. Environmental Degradation and Sustainable Development: Navigating India's Challenges

India, a land of diverse cultures, landscapes, and aspirations, has embarked on a journey of rapid economic growth and development. However, this progress has come at a significant cost to its environment. The escalating environmental challenges facing the nation have raised crucial questions about the sustainability of this trajectory. Balancing the imperatives of development with environmental preservation has become a paramount concern, giving rise to the concept of sustainable development.

**Overview of Environmental Challenges in India:** India's economic growth and urbanisation have brought about a range of environmental challenges that affect both urban and rural areas. Air pollution, fuelled by vehicular emissions

and industrial activity, has led to severe public health concerns, with cities like Delhi often making headlines for hazardous air quality. Water pollution, due to inadequate waste management and industrial discharge, has contaminated water sources, compromising access to clean drinking water. Deforestation, habitat loss, and soil degradation are jeopardising biodiversity and reducing the capacity of ecosystems to provide essential services.

These challenges are not isolated; they intertwine with one another, exacerbating their collective impact. The Ganges, a sacred river for millions of Indians, is a striking example. Rapid urbanisation, industrial effluents, and untreated sewage have severely polluted its waters. This environmental degradation has far-reaching consequences for the health of the river's ecosystems and the communities that depend on it.

**Impact of Environmental Degradation on Development Goals:** The consequences of environmental degradation reverberate across various sectors, directly affecting the realisation of development goals. One such impact is on public health. Poor air quality and contaminated water contribute to a myriad of health issues, straining healthcare systems and impeding productive economic activities. Additionally, the loss of biodiversity and degradation of ecosystems can undermine food security and livelihoods, particularly in rural areas where many depend on natural resources for their sustenance.

Economic growth, a central tenet of development, can be compromised as well. Diminished ecosystem services, such as clean water provision and climate regulation, may result in increased costs for industries that rely on these services. Extreme weather events, exacerbated by climate change and linked to environmental degradation, can disrupt supply chains, damage infrastructure, and lead to economic losses.

**The Concept of Sustainable Development and its Relevance in the Indian Context:** Amidst these challenges, the concept of sustainable development emerges as a guiding principle for India's growth trajectory. In 1987, the United Nations Brundtland Commission defined sustainability as "meeting the needs of the present without compromising the ability of future generations to meet their own needs."[4] It integrates economic, social, and environmental dimensions, recognising their interdependence.

In the Indian context, sustainable development holds immense relevance. India's cultural and socio-economic diversity requires policies that are equitable and inclusive. By prioritising sustainability, the nation can ensure that development

[4] 'Sustainability' (United Nations) <https://www.un.org/en/academic-impact/sustainability> accessed 1 September 2023.

benefits are distributed across various segments of society, preventing further marginalisation of vulnerable communities.

Sustainable development also aligns with India's commitments on the global stage. As a signatory to international agreements, such as the United Nations' Sustainable Development Goals (SDGs) and the Paris Agreement on climate change, India has recognised the necessity of balancing economic growth with environmental responsibility. These agreements underscore the interconnectedness of development and environmental preservation, emphasising the need to achieve both concurrently.

Investing in sustainable practices can catalyse innovation and create new economic opportunities. For instance, India's push towards renewable energy sources, such as solar and wind power, not only contributes to reducing carbon emissions, but also stimulates the growth of the green energy sector, generating employment and fostering technological advancements.

India's path towards sustainable development is fraught with challenges stemming from environmental degradation. The urgency to address these challenges cannot be overstated, as their impacts reverberate through public health, economic growth, and social equity. Embracing the concept of sustainable development offers a holistic framework to address these challenges, aligning with global commitments and safeguarding the well-being of current and future generations. As India navigates its developmental trajectory, striking a harmonious balance between progress and preservation will be pivotal in shaping a prosperous and sustainable future.

## 3. Human Rights and Environmental Justice: Fostering Equilibrium in India

In an era of interconnected global challenges, the intersection between human rights and the environment has emerged as a critical domain of discourse. The nexus between these two seemingly distinct spheres is profound, with each influencing and shaping the other in intricate ways. This article delves into the linkages between human rights and the environment, zooming in on the context of marginalised communities in India, and highlighting the pivotal role that human rights frameworks play in addressing environmental issues.

**Linkages between Human Rights and the Environment:** The connection between human rights and the environment is rooted in the fundamental premise that environmental conditions have a profound impact on the realisation of human rights. Clean air, safe drinking water, and a healthy environment are prerequisites for the enjoyment of rights, such as the right to life, health, and an adequate

standard of living. Conversely, the degradation of the environment can infringe upon these rights, disproportionately affecting vulnerable populations.

The right to a healthy environment is increasingly recognised as a fundamental right. International human rights instruments, such as the Universal Declaration of Human Rights and regional conventions, acknowledge the close interrelationship between environmental sustainability and human dignity. This recognition is reflected in the broader concept of environmental justice, which emphasises equitable access to environmental benefits and the mitigation of environmental harms.

**Environmental Justice and Marginalised Communities in India:** In India, the impacts of environmental degradation are not distributed evenly across the population. Marginalised communities, often residing in proximity to industrial areas or ecologically fragile regions, bear a disproportionate burden of environmental injustices. These communities, already grappling with socio-economic disparities, face heightened risks to their health and well-being due to pollution, lack of clean water, and exposure to hazardous waste.

One stark example is the impact of air pollution on urban slums. These informal settlements, where marginalised communities often reside, tend to be located near industrial zones or major roadways. As a result, residents are subjected to higher levels of air pollutants, contributing to respiratory illnesses and undermining their overall quality of life.

The concept of environmental justice is closely intertwined with social justice.[5] Addressing environmental disparities requires acknowledging historical injustices and working towards equitable distribution of resources and protection from harm. Ensuring that marginalised communities have a voice in decisions affecting their environment is not only a matter of human rights but also a step towards rectifying systemic inequalities.

**Role of Human Rights Frameworks in Addressing Environmental Issues:** Human rights frameworks provide a crucial avenue for addressing environmental challenges and promoting environmental justice. The recognition of the right to a healthy environment empowers individuals and communities to demand accountability from governments and corporations for actions that lead to environmental degradation. This, in turn, encourages more responsible and sustainable practices.

Moreover, human rights provide a legal and ethical basis for safeguarding the rights of environmental defenders—individuals and groups advocating for

[5] Hansel, H. "How social justice and environmental justice are intrinsically interconnected," Pachamama Alliance's Blog. Available at: https://blog.pachamama.org/how-social-justice-and-environmental-justice-are-intrinsically-interconnected (Accessed: 01 September 2023).

environmental protection. In many instances, these defenders face threats, violence, and intimidation for their activism. Human rights mechanisms offer a means to protect their rights and hold those responsible for such violations accountable.

The adoption of human rights-based approaches in environmental policies can lead to more inclusive and effective outcomes. Such approaches involve engaging communities in decision-making processes, conducting environmental impact assessments, and ensuring that vulnerable populations are not disproportionately affected by development projects.

International agreements like the Paris Agreement on climate change underscore the inextricable link between human rights and environmental sustainability.[6]Climate change impacts, from rising sea levels to extreme weather events, disproportionately affect marginalised communities. As such, climate justice—a concept that intertwines environmental and social justice—has gained prominence in international negotiations.

The intersection of human rights and environmental justice is an arena where the struggles for social equity and ecological sustainability converge. The experiences of marginalised communities in India epitomise the critical importance of recognising and addressing these linkages. By upholding the right to a healthy environment, promoting environmental justice, and integrating human rights frameworks into environmental policies, a more equitable and sustainable future can be forged. Ultimately, the journey towards environmental harmony is intricately tied to the pursuit of dignity, justice, and equality for all.

## 4. Climate Change Impacts and Vulnerability: India's Unfolding Crisis

As the global climate crisis intensifies, its impacts are increasingly felt across the world, and India stands at the forefront of this unfolding reality. The consequences of climate change transcend environmental shifts; they permeate through society, reshaping landscapes, economies, and most critically, human rights.

**Climate Change Impacts on India's Ecosystems and Communities: A Human Rights Perspective:** Climate change's effects ripple through the very fabric of ecosystems, disrupting delicate balances that communities depend upon. In India, where many livelihoods are directly tied to agriculture, changing precipitation patterns and increasing instances of extreme weather events, such as floods and droughts pose severe threats. This nexus between climate change and human rights becomes evident in the context of the right to food, as crop failures can

[6] Paris Agreement English – UNFCCC<https://unfccc.int/files/meetings/paris_nov_2015/application/pdf/paris_agreement_english_.pdf> accessed 1 September 2023.

lead to food shortages, malnutrition, and ultimately, an erosion of the right to an adequate standard of living.

Furthermore, the rising sea levels and coastal erosion associated with climate change imperil the rights of communities living in coastal areas. These communities often rely on marine resources for their sustenance and livelihoods. Displacement due to sea-level rise not only disrupts their cultural and social fabric but can also lead to conflicts over resources and access to land. Population displacement due to rising seas is taking place in India, with many families migrating or already relocated to other areas. It is highly likely that climate change may intensify the current pattern of displacement along the coastal areas of India, such as the Sundarbans.[7]

**Vulnerability Assessment and Identification of At-risk Populations:** Vulnerability to climate change is not evenly distributed, and marginalised populations often find themselves at the forefront of its impacts. Vulnerability assessments help identify the communities most susceptible to the adverse effects of climate change. These assessments take into account socio-economic factors, geographic location, and access to resources.

In India, rural communities, particularly those engaged in subsistence agriculture, are highly vulnerable. Their dependence on weather patterns and natural resources makes them susceptible to shifts in climate. Similarly, urban slums are vulnerable due to their exposure to extreme heat, inadequate infrastructure, and lack of access to clean water and sanitation. Indigenous communities, who often possess traditional knowledge and practices that can aid adaptation, are also at risk due to their reliance on fragile ecosystems.

**Socio-economic Implications of Climate Change in India:** Climate change reverberates through India's socio-economic landscape, impacting livelihoods, economic growth, and exacerbating existing inequalities. As agriculture, a major contributor to India's GDP, becomes increasingly uncertain due to changing weather patterns, rural communities face economic instability. Crop losses result in reduced incomes and increased debt burdens, pushing already marginalised communities towards further vulnerability.

Moreover, the increasing frequency of extreme weather events disrupts infrastructure and services, leading to economic losses that disproportionately affect low-income groups. In urban areas, where many livelihoods depend on informal sectors, the lack of social safety nets exacerbates the impacts of climate change-induced economic shocks.

[7] 'Climate Change, Displacement, and Managed Retreat in Coastal India - India' (*ReliefWeb*, 26 May 2020) <https://reliefweb.int/report/india/climate-change-displacement-and-managed-retreat-coastal-india>accessed 1 September 2023.

The human rights dimension becomes pronounced in these socio-economic implications. As communities grapple with displacement and resource scarcity, their right to housing, health, and water is jeopardised.

Climate change is not merely an environmental crisis; it is a human rights crisis that threatens the very foundations of well-being and equity. India's ecosystems and communities are intricately intertwined, and as the climate changes, so do the dynamics of vulnerability and socio-economic stability. The pursuit of climate justice—an endeavour to safeguard human rights while addressing climate change—becomes paramount.

Addressing climate change's impacts requires a comprehensive approach that integrates human rights principles. Policies must be devised with a deep understanding of vulnerability, ensuring that the most marginalised communities are not left behind. This entails promoting equitable access to resources, ensuring adequate protection for displaced populations, and fostering resilience through sustainable development strategies.

As India navigates the challenges posed by climate change, a collective effort is needed to uphold human rights, safeguard vulnerable populations, and chart a course toward a more sustainable and just future. The urgency of this endeavour cannot be overstated; it is a call to action that resonates not only with environmental ethics, but also with the principles of dignity, equity, and justice that underpin human rights.

## 5. Tribal Peoples in India and Environmental Protection: Guardians of Knowledge, Custodians of Nature

The intricate interplay between tribal peoples, environmental protection, and sustainable development constitutes a tapestry rich in cultural heritage, human rights, and ecological wisdom. In the context of India, where diverse tribal communities have lived harmoniously with nature for generations, the recognition of their rights, knowledge, and struggles assumes paramount significance.

**Recognition of Tribal Rights, Human Rights, and Traditional Knowledge:** Tribals across India are often the custodians of centuries-old traditional knowledge about the land, biodiversity, and natural resources. Their holistic understanding of ecosystems is deeply intertwined with their cultural heritage and way of life. Recognising their rights not only aligns with the principles of human rights but also acknowledges the intrinsic link between cultural preservation and environmental conservation.

The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) acknowledges the urgent need to respect and promote the inherent rights of indigenous peoples, which derive from their political, economic and social

structures and from their cultures, spiritual traditions, histories and philosophies, especially their rights to their lands, territories and resources.[8] India, as a signatory to UNDRIP, is obligated to safeguard these rights. This recognition is particularly vital in light of historical injustices that have often marginalised indigenous communities and their unique relationship with the environment.

**Conservation and Sustainable Management of Natural Resources:** Tribal communities in India have practised sustainable resource management for generations, reflecting a deep-rooted harmony with nature. Their traditional practices emphasise the preservation of biodiversity, soil fertility, and water resources. The Bishnoi community in Rajasthan, for example, has a longstanding tradition of conserving trees and wildlife, showcasing the coexistence of cultural values and environmental protection. The Bishnois inhabit western Rajasthan and parts of Haryana and Punjab. In 1542 AD, Guru Jamboji (or Jambeshwar), while forming the new sect, laid out twenty-nine tenets, of which, eight relate to the preservation of bio-diversity, non-felling of green trees and non-killing of animals particularly antelopes.[9]

These conservation practices extend to sacred groves, community-managed forests, and agro-ecological systems. Such initiatives not only contribute to biodiversity conservation, but also provide valuable lessons for modern-day sustainable development strategies.

**Human Rights of Tribals in the Face of Development Projects and Climate Change Impacts:** Despite their invaluable contributions to environmental protection, tribal communities often find themselves at the crossroads of development projects and climate change impacts. Large-scale infrastructure projects, mining, and deforestation pose threats to their lands and livelihoods. These encroachments not only violate their rights but also disrupt their delicate balance with nature.

Climate change exacerbates the vulnerability of tribal communities. Traditional livelihoods, which are closely tied to seasonal patterns, become increasingly uncertain. Changing weather patterns, erratic monsoons, and extreme events affect food security, water availability, and the integrity of ecosystems.

Furthermore, the forced displacement of tribal communities due to development projects violates their rights to their ancestral lands and disrupts their cultural and social fabric. For centuries, the Niyamgiri Mountains have been the home of

[8] (United Nations Declaration on the Rights of Indigenous Peoples) <https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP_E_web.pdf> accessed 2 September 2023.

[9] 'The Power of Community' (*Down To Earth*) <https://www.downtoearth.org.in/blog/wildlife-biodiversity/the-power-of-community-60245> accessed 2 September 2023.

the Dongria Kondh tribe. They are a small community of about 8000 Adivasis, residing in the Eastern Ghats of the Indian state of Odisha. Their symbiotic relationship with nature involves sustainable agriculture and traditional systems of kinship. However, the state-industry nexus threatened this peaceful fabric of existence. The Niyamgiri Movement is a grassroots people's movement against exploitative corporations. It is a tale of resistance against neo-colonialism, nation-building, cultural discrimination and environmental racism.[10]

The relationship between indigenous peoples and environmental protection is a harmonious symphony of knowledge, rights, and resilience. Recognising and upholding the rights of tribal communities is a pivotal step toward promoting environmental conservation and sustainable development. Tribal knowledge and practices offer valuable insights into coexisting with nature, even in the face of changing environmental conditions.

India's commitment to sustainable development, human rights, and environmental protection necessitates a comprehensive approach that respects and integrates indigenous voices. By ensuring their participation in decision-making processes, respecting their traditional knowledge, and safeguarding their lands, India can forge a future where cultural diversity, ecological integrity, and human rights intertwine.

The challenges faced by tribal communities demand a shift in perspective—one that views development through the lens of sustainability and justice. As India navigates the complexities of a rapidly changing world, its choices will resonate not only with the tribal peoples within its borders but also with the global endeavour to strike a harmonious balance between human needs and the health of the planet.

## 6. Policy and Legal Frameworks for Environment, Development, and Human Rights: Navigating Complex Intersections

In an era defined by the urgency of climate change, socio-economic development, and the protection of human rights, crafting comprehensive policy frameworks that address the intricate interplay of these dimensions has become imperative. Let's delve into the intricate landscape of national policy initiatives, and underscore the critical need for integrating environmental and human rights considerations in policy-making.

### National Policy Initiatives in India: Navigating the Trifecta of Environment, Development, and Human Rights

[10] Rana S, 'Niyamgiri Movement: Questioning the Narrative of Developmental Politics' (*Feminism in India*, 26 March 2020) <https://feminisminindia.com/2020/03/27/niyamgiri-movement-questioning-narrative-developmental-politics/> accessed 2 September 2023.

India, a nation of diverse landscapes, cultures, and aspirations, grapples with the complex challenge of harmonising environment, development, and human rights. As a rapidly developing country, India's policy initiatives must strike a delicate balance between economic growth, environmental conservation, and the protection of its citizens' rights.

**Integrated Policy Frameworks:** Recognising the inseparable linkages between environment, development, and human rights, India has adopted several integrated policy frameworks that encapsulate these dimensions holistically. The National Action Plan on Climate Change (NAPCC) is a prominent example. The NAPCC was formally launched on 30 June 2008. The NAPCC identifies measures that promote development objectives while also yielding co-benefits for addressing climate change effectively.[11]NAPCC outlines strategies for mitigation and adaptation while acknowledging the equity concerns of developing nations. This plan aligns climate action with development goals, recognising that sustainable growth and environmental stewardship must go hand in hand.

**National Green Tribunal (NGT):** India's legal infrastructure includes mechanisms to safeguard environmental rights and address developmental concerns. The National Green Tribunal (NGT), established in 2010, serves as a specialised judicial body dedicated to addressing environmental disputes and violations. The Tribunal's dedicated jurisdiction in environmental matters shall provide speedy environmental justice and help reduce the burden of litigation in the higher courts. The Tribunal is mandated to make and endeavour for disposal of applications or appeals finally within six months of filing of the same. Initially, the NGT is proposed to be set up at five places of sittings and will follow circuit procedure for making itself more accessible. New Delhi is the Principal Place of Sitting of the Tribunal and Bhopal, Pune, Kolkata and Chennai shall be the other four places of sitting of the Tribunal.[12] The NGT plays a vital role in holding industries and institutions accountable for their impact on the environment and the rights of communities affected by their activities.

**Sustainable Development Goals (SDGs):** India's commitment to the United Nations' Sustainable Development Goals (SDGs) reflects its dedication to weaving together environmental, developmental, and human rights considerations. The 17 interconnected goals address a spectrum of challenges, ranging from poverty alleviation and gender equality to clean energy and climate action. By embracing the SDGs, India showcases its intention to achieve progress that is inclusive, equitable, and environmentally responsible.

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[11] 'Vikaspedia Domains' (Vikaspedia) <https://vikaspedia.in/energy/policy-support/environment-1/climate-change> accessed 1 September 2023.

[12] National Green Tribunal <https://greentribunal.gov.in/about-us> accessed 1 September 2023.

**Challenges and Opportunities:** Despite these policy initiatives, India faces formidable challenges in translating them into effective action. Inconsistent implementation, gaps in enforcement, and limited awareness remain significant hurdles. Additionally, balancing development aspirations with environmental conservation and human rights protection requires navigating complex trade-offs.

The way forward requires addressing these challenges while capitalising on the opportunities provided by evolving policy frameworks. The integration of technology, data-driven decision-making, and stakeholder engagement can enhance the effectiveness of policies. Leveraging international partnerships for knowledge exchange and capacity-building can also facilitate more informed policy-making and implementation.

In the intricate tapestry of addressing environment, development, and human rights, legal frameworks stand as the backbone that provides structure, accountability, and a pathway for equitable progress. India, a nation grappling with the challenges of rapid development and environmental conservation, has constructed a web of legal instruments aimed at harmonising these dimensions.

**Foundations of Legal Frameworks:** The legal underpinning for India's approach to environmental protection, development, and human rights is embedded in a combination of statutes, constitutional provisions, and judicial interpretations. The Indian Constitution itself forms the bedrock, emphasising the state's responsibility to protect and improve the environment for the well-being of its citizens.

**Environment Protection Act (1986):** The Environment Protection Act (EPA) of 1986 is a cornerstone in India's legal framework for environmental conservation. The EPA empowers the central government to take measures to safeguard and improve the environment, set standards for emissions and pollutants, and regulate activities with potential environmental impact.[13]

**Air and Water Acts:** Parallel to the EPA, the Air (Prevention and Control of Pollution) Act (1981) and the Water (Prevention and Control of Pollution) Act (1974) delineate specific measures for controlling air and water pollution, respectively. The Water (Prevention and Control of Pollution) Act was enacted in 1974 to provide for the prevention and control of water pollution, and for maintaining or restoring the wholesomeness of water in the country.[14] The Air (Prevention and Control of Pollution) Act was enacted in 1981 and amended in 1987 to provide for the prevention, control and abatement of air pollution in India.[15]These Acts empower regulatory authorities to set emission and effluent

[13] Environment Protection Act of 1986, Section 3, Chapter 2.
[14] 'Central Pollution Control Board' (CPCB) <https://cpcb.nic.in/water-pollution/> accessed 1 September 2023.
[15] 'Central Pollution Control Board' (CPCB) <https://cpcb.nic.in/air-pollution/> accessed 1 September 2023.

standards, oversee compliance, and take punitive measures against violators. Their effectiveness, however, often hinges on the enforcement capabilities of the regulatory bodies and the adequacy of penalties.

**Wildlife Protection Act (1972):** In the realm of biodiversity conservation, the Wildlife Protection Act (1972) aims to protect wildlife, including endangered species, their habitats, and ecosystems. It is an Act to provide for the protection of wild animals, birds and plants and for matters connected therewith or ancillary or incidental thereto with a view to ensuring the ecological and environmental security of the country.[16]The Act balances the need for biodiversity conservation with human development activities, regulating activities like hunting, poaching, and habitat destruction.

**Forest Rights Act (2006):** The Forest Rights Act (FRA), 2006, recognises the rights of the forest dwelling tribal communities and other traditional forest dwellers to forest resources, on which these communities were dependent for a variety of needs, including livelihood, habitation, and other socio-cultural needs.[17]The Forest Rights Act is a transformative legislation that exemplifies the integration of human rights and environmental considerations. By recognising the rights of forest-dwelling communities over traditional forestlands, the FRA empowers marginalised communities to participate in decision-making regarding resource management and conservation. It seeks to rectify historical injustices while fostering sustainable development practices.

**Effectiveness and Challenges:** The effectiveness of India's legal frameworks for environment, development, and human rights is a nuanced and evolving story. While these legal instruments provide a solid foundation, challenges such as inconsistent enforcement, regulatory gaps, and limited awareness persist.

**Judicial Interventions:** One noteworthy aspect is the role of India's judiciary in interpreting and enforcing these legal frameworks. Courts have stepped in to bridge the gaps in policy implementation, often taking a proactive stance in cases of environmental degradation or human rights violations. Public interest litigation (PIL) has been a powerful tool for citizens and environmental groups to seek judicial remedies in cases of neglect or non-compliance.

**Enforcement and Capacity:** The effectiveness of legal frameworks is closely tied to the capacity and independence of regulatory bodies. Adequate enforcement mechanisms, regular monitoring, and the imposition of penalties are crucial to ensure compliance. Weak enforcement undermines the deterrent effect of laws and can lead to non-compliance becoming the norm.

[16] The Wild Life (Protection) Act, 1972 - mpforest.gov.in) <https://mpforest.gov.in/img/files/WildLife_Act.pdf> accessed 2 September 2023.

[17] Samvaad D, 'Ministry of Tribal Affairs, Government of India' (Ministry of Tribal Affairs – Government of India) <https://tribal.nic.in/FRA.aspx> accessed 2 September 2023.

**Balancing Development and Conservation:** The challenge of balancing development aspirations with environmental conservation is ever-present. Legal frameworks should evolve to address these complexities, acknowledging the need for sustainable growth while safeguarding the rights of citizens and the environment. Striking this balance requires comprehensive assessments, stakeholder engagement, and an understanding of potential trade-offs.

India's policy initiatives for environment, development, and human rights underscore the nation's commitment to finding a harmonious equilibrium in the face of complex challenges. Integrated frameworks, legal mechanisms, and legislative acts exemplify the nation's resolve to tackle these issues holistically. As India strives to become a global leader in sustainable development, the evolution of its policy landscape will remain pivotal in steering the nation toward a future where growth is equitable, the environment is conserved, and human rights are upheld. The continued dedication to finding synergies between these dimensions is not just a national pursuit but a contribution to the global endeavour of achieving a just, sustainable, and resilient world.

India's legal frameworks form the legal scaffolding upon which the nation's approach to environment, development, and human rights is built. They provide the structure for accountability, the avenues for redressal, and the mechanisms for aligning policies with constitutional values. While these frameworks set the stage, their effectiveness depends on a confluence of factors, including robust enforcement, judicial interventions, and responsive governance. As India navigates the challenges of a rapidly changing world, these legal instruments remain crucial tools in its pursuit of sustainable development, environmental protection, and the preservation of human rights.

**Integration of Environmental and Human Rights Considerations in Policy-Making:** The integration of environmental and human rights considerations in policy-making is not merely a theoretical concept but a moral imperative. Policies that fail to acknowledge the intrinsic connection between these dimensions risk exacerbating vulnerabilities and injustices.

Integrating environmental and human rights considerations requires a multidisciplinary approach that recognises the complexities of interactions between ecosystems, societies, and economies. For example, policies addressing urban planning and infrastructure development should consider not only economic growth, but also the rights of communities to clean air, water, and green spaces.

Participatory processes are essential in ensuring the integration of diverse perspectives. Stakeholder engagement, particularly from marginalised communities and indigenous groups, can provide insights into the impact of

policies on their well-being, culture, and livelihoods. The Forest Rights Act in India is an example of legislation that acknowledges the rights of forest-dwelling communities, aligning with both environmental conservation and human rights principles.

In the pursuit of sustainable development that upholds human rights and safeguards the environment, policy frameworks become the guiding compass. India's efforts to navigate this complex terrain exemplify the challenges and opportunities that other nations also face. The global interconnectedness of environmental challenges and human rights concerns demands a unified approach that transcends borders.

National and international policy initiatives set the direction, signalling commitment to addressing the intersection of environment, development, and human rights. Legal frameworks provide the necessary legal backing to ensure accountability and enforcement. However, their effectiveness hinges on institutional capacity, public awareness, and the political will to prioritise these issues.

The seamless integration of environmental and human rights considerations in policy-making represents the fulcrum of progress. It acknowledges that development should not come at the expense of human rights or environmental well-being. Instead, it envisions a future where policies uphold the dignity of every individual, regardless of their socio-economic status, while preserving the planet for future generations.

The challenges ahead are formidable, but they are not insurmountable. By fostering interdisciplinary collaboration, promoting participatory governance, and embedding environmental and human rights considerations into the fabric of policies, nations can navigate this intricate landscape with purpose and foresight. The policy frameworks that emerge from this endeavour will not only shape the trajectory of individual countries, but also contribute to the collective efforts required to build a just, sustainable, and resilient world.

## 7. Climate Change Mitigation and Adaptation Strategies in India: Pioneering a Resilient Future

In the face of escalating climate change impacts, India stands at a critical juncture, compelled to forge a sustainable and resilient path. As a nation with vast ecological diversity and a burgeoning population, India's strategies for climate change mitigation and adaptation hold global significance. This article delves into the intricate tapestry of India's endeavours in mitigating carbon emissions, adapting to a changing climate, and how these efforts intertwine with technology, innovation, and human rights.

**Renewable Energy Initiatives and Carbon Mitigation Efforts:** India's transition to renewable energy sources exemplifies its commitment to mitigating the carbon footprint. The National Solar Mission, launched in 2010, aims to promote the deployment of solar energy and catalyse innovation in this sector. India's ambitious target of achieving 175 GW of renewable energy capacity by 2022, further raised to 500 GW by 2030, underscores its determination to reduce reliance on fossil fuels.[18]

The expansion of wind power, hydro-power, and bio-energy also feature prominently in India's mitigation strategy. The development of smart grids, decentralised energy systems, and incentives for private investment in clean energy contribute to a diversified and sustainable energy portfolio.

**Adaptation Measures for Vulnerable Communities:** Climate change disproportionately affects vulnerable communities, and India's adaptation strategies are crucial for safeguarding their rights and well-being. These measures span various sectors, from agriculture to urban planning, and place a strong emphasis on inclusive and participatory approaches.

The National Action Plan on Climate Change integrates adaptation actions, acknowledging that adaptation is not a one-size-fits-all approach. Special attention is directed toward marginalised communities, including indigenous populations, to ensure that their voices are heard, and their unique vulnerabilities are addressed. The adaptation measures align with the principles of human rights, striving to protect lives, livelihoods, and dignity.

**Human Rights and Climate Adaptation:** The nexus between climate change adaptation and human rights is profound. Ensuring the rights of vulnerable communities, such as the right to life, health, and adequate housing, is intrinsically linked to their ability to adapt to changing climatic conditions. Adaptation measures should respect the rights of these communities, avoiding displacement or degradation of their living conditions.

**Role of Technology, Innovation, and Research in Climate Resilience:** Technology and innovation play pivotal roles in enhancing climate resilience. India's strides in climate-smart agriculture, which harnesses data, sensors, and precision farming techniques, exemplify this synergy. Advanced weather forecasting and early warning systems enable farmers to adapt their practices to changing conditions, enhancing their ability to secure livelihoods.

Furthermore, research institutions and academia in India are at the forefront of

[18] 'Government is Committed to Provide Energy and Food Security: Union MOS Shri Bhagwanth Khuba (Press Information Bureau) <https://pib.gov.in/PressReleaseIframePage.aspx?PRID=1944075> accessed 2 September 2023.

developing innovative solutions. From heat-resistant crop varieties to sustainable urban planning, these advancements translate research into actionable strategies for resilience.

India's pursuit of climate change mitigation and adaptation is not merely an environmental endeavour—it is a statement of commitment to human rights, innovation, and global responsibility. By embracing renewable energy, mitigating carbon emissions, and fostering technological innovation, India showcases its determination to transition to a sustainable future.

Moreover, India's adaptation strategies, grounded in inclusive policies and human rights principles, exemplify its recognition of the vulnerable communities most affected by climate change. The nation's efforts resonate with the global call for a just transition that safeguards human dignity while addressing environmental challenges.

As India's journey continues, the harmonious interplay between mitigation, adaptation, technology, and human rights will be pivotal. This nation's experiences and strategies offer valuable lessons for the world—a blueprint that demonstrates that a resilient and sustainable future is not just an aspiration, but a tangible reality within our grasp.

## 8. Environmental Governance and Participation in India: Paving the Path to Sustainable Futures

In the realm of environmental sustainability, effective governance and meaningful participation are indispensable. As a nation grappling with diverse ecological challenges, India recognises the pivotal role of institutional mechanisms, stakeholder engagement, and civil society organisations in shaping its environmental policies.

**Institutional Mechanisms for Environmental Governance:** Environmental governance in India is underpinned by a network of institutions tasked with formulating policies, enforcing regulations, and overseeing compliance. The Ministry of Environment, Forest and Climate Change (MoEFCC) serves as the central body responsible for formulating and implementing environmental policies. Under MoEFCC's umbrella, agencies like the Central Pollution Control Board (CPCB) and State Pollution Control Boards (SPCBs) focus on monitoring and mitigating pollution.

Furthermore, National Green Tribunal is a specialised body equipped with the necessary expertise to handle environmental disputes involving multi-disciplinary issues. The Tribunal shall not be bound by the procedure laid down under the Code of Civil Procedure, 1908, but shall be guided by principles of natural justice.[19]Its

[19] National Green Tribunal <https://greentribunal.gov.in/about-us#> accessed 1 September 2023.

establishment in 2010 marked a significant step towards expediting environmental justice by providing a dedicated forum for environmental cases.

**Stakeholder Engagement and Public Participation:** Meaningful participation of stakeholders and the public is a cornerstone of effective environmental governance. Environment Impact Assessment or EIA can be defined as the study to predict the effect of a proposed activity/project on the environment. A decision-making tool, EIA compares various alternatives for a project and seeks to identify the one which represents the best combination of economic and environmental costs and benefits.[20]In India, the Environmental Impact Assessment (EIA) process necessitates public consultation for projects with potential environmental impacts. This participatory approach ensures that the voices of communities, especially those affected by proposed projects, are heard, and their concerns are taken into account.

Public hearings, as part of the EIA process, provide a platform for communities to express their opinions and apprehensions. This not only enhances transparency but also fosters a sense of ownership over environmental decisions. However, challenges such as the accessibility of information and the need for genuine representation persist, highlighting the need for continuous improvement in the public participation process.

**Civil Society Organisations and Environmental Advocacy:** Civil society organisations (CSOs) are instrumental in environmental advocacy, acting as conduits for public concerns and champions for sustainable policies. These organisations bridge the gap between the public and policymakers, advocating for environmentally sound practices while often emphasising human rights and social equity.

CSOs play a pivotal role in holding authorities accountable for environmental violations and promoting policy reforms. Their actions extend beyond advocacy to include education, awareness campaigns, and community empowerment. Notably, organisations like Greenpeace India and the Centre for Science and Environment have catalysed public discourse on issues ranging from air pollution to waste management.

**Human Rights and Civil Society Environmental Advocacy:** The connection between environmental advocacy and human rights is deeply intertwined. Environmental degradation often exacerbates social inequities and impacts vulnerable communities disproportionately. CSOs, therefore, championing environmental causes, inherently advocate for human rights by safeguarding communities' rights to clean air, water, and a healthy environment.

[20] 'Understanding Eia' (Centre for Science and Environment) <https://www.cseindia.org/understanding-eia-383> accessed 2 September 2023.

The Bhopal gas tragedy is a poignant example of how human rights and environmental advocacy converge.[21] The disaster resulted in both loss of lives and long-term health impacts. Civil society organisations have been at the forefront of seeking justice for the victims, underlining the inextricable link between environmental protection and human rights.

In India's journey towards sustainable development, environmental governance and participation stand as pillars of progress. Institutional mechanisms, ranging from governmental bodies to specialised tribunals, provide the framework for formulating and implementing environmental policies. Meaningful stakeholder engagement and public participation ensure that decisions resonate with the needs and concerns of communities.

At the heart of this landscape, civil society organisations have emerged as catalysts for change. Their tireless efforts not only advocate for environmental sustainability but also champion human rights, particularly of marginalised communities disproportionately affected by environmental degradation.

As India navigates a future shaped by climate change and ecological challenges, the synergy between governance, participation, and civil society advocacy becomes paramount. The lessons learned, the improvements made, and the successes achieved in this arena will not only shape India's trajectory but will also offer insights for nations worldwide. In the grand tapestry of sustainable development and human rights, the threads of environmental governance and participation are intricately woven, forming a resilient fabric that holds the promise of a more just and harmonious world.

## 9. Conclusion: Forging a Harmonious Future: Integrated Approaches to Environment, Development, Human Rights, and Climate Change in India

The tapestry of environment, development, human rights, and climate change in India weaves a complex narrative that transcends sectors, boundaries, and ideologies. As we journey through the intricate intersections of these dimensions, one resounding truth emerges: the future of India lies in embracing integrated approaches that harmonise these threads into a cohesive fabric of progress, justice, and sustainability.

From the recognition of indigenous rights and the empowerment of marginalised communities to the pursuit of climate justice on the global stage, India's efforts are reflective of a nation's commitment to balancing its diverse needs with the well-being of the planet. The harmonious coexistence of these dimensions is not just an

[21] 'Bhopal Gas Tragedy: "Financial Compensation will never be Sufficient without Clean-up" – UN Rights Expert' (OHCHR, 24 November 2014) <https://www.ohchr.org/en/press-releases/2014/11/bhopal-gas-tragedy-financial-compensation-will-never-be-sufficient-without> accessed 2 September 2023.

aspiration; it's a strategic imperative that encapsulates the essence of responsible governance.

The way forward demands a holistic perspective—one that acknowledges the interdependence of these elements. Sustainable development cannot be achieved at the cost of human rights or the environment. Environmental protection must be inclusive, considering the diverse needs of communities. Human rights should underpin every policy, ensuring that development is equitable and just. Climate change mitigation and adaptation must be integrated into every facet of planning, fostering resilience for all.

India's integrated approach requires not just governmental action but active participation from civil society, private sectors, and academia. It necessitates a paradigm shift in policy-making, one that values long-term impact over short-term gains, and prioritises collaboration over isolation. It demands innovative solutions that balance economic growth with environmental stewardship and social equity.

The challenges are formidable, but the opportunities are transformative. India's advancements in renewable energy, sustainable agriculture, and community-led conservation exemplify the potential of integrated approaches. By harnessing the power of technology, knowledge, and partnerships, India can pave the way for a future where environment, development, human rights, and climate change are not competing interests but harmonious forces that propel the nation forward.

As India envisions its role on the global stage, the integrated approach becomes a beacon of hope for other nations grappling with similar complexities. It offers a blueprint for sustainable development that is not just theoretical but rooted in action, demonstrating that a balance can be struck—a balance where communities thrive, the environment flourishes, human rights are upheld, and progress knows no borders.

The journey ahead is not without challenges—policy conflicts, trade-offs, and global uncertainties—but India's commitment remains steadfast. The pursuit of integrated approaches is not a solitary endeavour; it is a collective journey that transcends generations. It is a legacy that speaks to the heart of responsible governance, of resilience in the face of adversity, and of a nation's determination to forge a harmonious future.

Balancing national development aspirations with global climate responsibilities is a delicate tightrope that requires astute policy-making and visionary leadership. India's growth trajectory is intertwined with the need to uplift millions out of poverty, provide energy access to all, and foster economic development. Simultaneously, it acknowledges the environmental constraints and the imperative to transition to low-carbon pathways.

In the global theatre of climate justice and international cooperation, India emerges as a leading protagonist—a nation that speaks not only for its own people but for vulnerable communities worldwide. Its stance on climate justice reflects a commitment to equity and fairness, recognising that the consequences of climate change are disproportionately borne by those who have contributed the least to the problem.

In this symphony of environment, development, human rights, and climate change, India is poised to play a pivotal role—a role that transcends rhetoric and transforms into action. The integrated approach is the compass that guides this journey, guiding India toward a destination where a sustainable, equitable, and resilient future awaits. As we navigate this path, let us remember that the success of this integrated approach is not just a victory for India; it is a triumph for humanity and the planet we call home**.**

# Realising Human Rights in Rural India through Panchayati Raj Institution

Dr. Puneet Pathak*

## Abstract

*Human Rights are basic entitlements for a life with dignity. A human being becomes entitled to these rights solely by the reason of his birth. Human rights are inherent to every individual, irrespective of their colour, gender, nationality, ethnicity, language, religion, or any other societal classification. Despite consensus on a standard definition of human rights, there is a unanimous agreement on the attributes of these rights. They are said to be universal, inalienable, indivisible, interdependent and interrelated. Frequently, the realisation of human rights is measured using the "respect, protect, and fulfil" framework. Although it was originally developed in relation to the realisation of social, economic, and cultural rights, it is now applied to human rights in general. Indian Constitution provides an organisation of rural and urban local self-governance. The 73rd Amendment to the Constitution establishes a three-tier system of rural governance i.e., Panchayati Raj Institutions (PRIs),whereas the Eleventh Schedule includes numerous Panchayat responsibilities that directly relate to the realisation of the rural populace's human rights. This paper endeavours to understand the role of PRIs in realising human rights at the grassroots level within the respect, protect, fulfil, and promote framework. This paper is divided into four parts. The first part discusses the concept of human rights and respect, protect, fulfil, and promote framework which is used to measure the realisation of human rights. The second part deals with the role of PRIs in realising human rights at the Panchayat level. The third part discusses selective human rights, which are being implemented at the panchayat level and involves the PRIs role in its implementation. The fourth is the discussion part, where the implementation, challenges and suggestions for realising selective human rights are discussed. The study suggests a need to empower Panchayati Raj Institutions responsible to implement various government schemes responsible for realising human rights for the vast population living in rural India.*

**Keywords:** Human rights, Fundamental rights, Local self-governance, Panchayati raj, PRIs

## Introduction

The foundational principles of freedom, justice, and peace in the world are rooted in

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the inherent dignity and equal, inalienable rights possessed by all individuals within the human family.[1] Despite the foundational difficulty, human rights are universally recognised and considered the touchstone for measuring the State's performance regarding protecting their citizen's rights.[2]Ernest Barker states:"Rights are the external conditions necessary for the greatest possible development of the capacities of the human personality."[3]These principles are derived from the growing societal need to ensure that every individual's inherent dignity and worth be acknowledged and safeguarded.[4]Human rights encompass the fundamental rights that every individual is against the State or public authority only by virtue of their membership in the human family, without regard to any other factors.[5]The universally recognised human rights encompass various fundamental entitlements, such as the right to access nourishment, adequate housing, healthcare services, education, freedom of conscience, expression, peaceful assembly, religion, press, mobility, privacy, and engagement in governance.[6]

Human rights were made explicit, systematically elaborated, and codified in the 17th and 18th centuries, although individual rights were found in an early document of the Magna Carta (1215). The English Petition of Rights (1628) and the English Bill of Rights (1689) were early documents establishing civil liberties. Philosophers such as John Locke and Baron De Montesquieu gave an intellectual basis for human rights. The idea of individual rights and freedom was further embodied in the US Declaration of Independence (1776), in the Bill of Rights, the First ten amendments to the US Constitution (1791), and in the Declaration of the Rights of Man and of the Citizen (1789).[7] In the words of US President Jefferson, human rights are" inherent and inalienable rights of man and hence a state that violates them in its laws and its actions breach one of the very prerequisites of civil co-existence with theState and

[1] V.R. Krishna Iyer, 'The Dialectics & Dynamics of Human Rights in India (Yesterday, Today and Tomorrow)'*Tagore Law Lectures* (first published 1999, Eastern Law House, 2010) 208.

[2] O. Hofe, 'Human Rights in International Discourse: Cultural Concerns' in Smelser Neil J. and Baltes Paul B. (eds), *International Encyclopaedia of the Social and Behavioural Sciences* (Pergamon, 2001) 7018.

[3] Quoted in Abdulrahim P. Vijapur, 'The Concept of Human Rights: National and International Perspectives', (2009) 2(4) *Int. Politics* 7

[4] Oscar Schachter, 'Human Dignity as a Normative Concept,' (1983) 77 AJIL 848, 851; D.D. Basu, *Human Rights in Constitutional Law* (Prentice Hall of India Pvt. Ltd., 1994), 1, 5.

[5] Jerome J. Shestack, 'The Jurisprudence of Human Rights' in Theodor Meron (ed.), in *Human Rights in International Law: Legal and Policy Issues* (Clarendon Press 1985) 69, 74; Louis Henkin, 'International Human Rights and Rights in the United States', 25 in Meron, Ibidem.

[6] Edmund Jan Osmanczyk, *The Encyclopedia of the United Nations and International Agreement*, (2nd edn, Taylor & Francis 1990), 390.

[7] G.M.D. Howat (ed.), *Dictionary of World History* (Thomas Nelson and Sons Ltd. 1973), 926; Peter Lasleft (ed.) *John Locke's Two Treaties of Government*, (Student edn. Cambridge University Press, 1988); Melvin Richter, *The Political Theory of Montesquieu*, (Cambridge University Press, 1977), at 172-177; Mark H. Waddicor,*Montesquieu and the Philosophy of Natural Law*, (The Hague: Martinus Niihoff 1970); Rolph Barton Perry, 'The Declaration of Independence' 1-8 in: Earl Latham (ed.), *The Declaration of Independence and the Constitution*, (Revised edn, (Boston: D.C. Heath and Company 1956); Bernard Schwartz, *The American Heritage History of the Law in America*,American Heritage Publishing Co. Inc. 1974) 368-369; S.N. Eisenstadt (ed.), *Political Sociology: A Reader* (Basic Books, Inc.1971) at 341-342.

may be legitimately brought to account".[8]

The Preamble of the UN Charter references "the dignity and worth of the human person and the equal rights of men and women".[9] Article 1(3) of the Charter states that the very purpose of the UN is to promote and encourage respect for human rights.[10]The United Nations, by means of the universal declaration and subsequent agreements, established a comprehensive and widely accepted catalogue of human rights, the impact of which has been extensive in the realm of political affairs.[11]Modern human rights jurisprudence began when the United Nations Commission of Human Rights was tasked with the preparation of an International Bill of Human Rights.[12] The Universal Declaration of Human Rights is a milestone for the international human rights discourse as it sought to consolidate the basic rights and fundamental freedoms that applied universally to all human beings.[13] The Preamble of the UDHR rightly proclaims that "the recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world".[14]The two human rights Covenants emphasise the obligation of state parties to utilise their available resources to the fullest extent possible, in order to gradually attain the complete fulfilment of the rights acknowledged under the Covenants.[15] At the international level, the realisation of human rights is measured on the basis of respect, protect, fulfil framework by treaty bodies. Treaty bodies[16] under human rights treaties, Human Rights Council[17] and the UN Office of the High

[8] Adrienne Koch and William Penden (ed.), *The Life and Selected Writing of Thomas Jefferson*, (Random House, 1944), 22.

[9] Bruno Simma, *The Charter of the United Nations: A Commentary*, (Oxford University Press, 1994) 46-47.

[10] Woldo Chamberlin, Thomas Hovet and Erica Hovet (eds.), *A Chronology and Fact book of the United Nations 1994-1976*, (Oceana Publications Inc., 1976), 163-164.

[11] James Griffin, *On Human Rights*, (Oxford University Press, 2008) 17.

[12] UN Centre for Human Rights, UN Action in the Field of Human Rights (New York & Geneva, 1994), 303

[13] Abdulrahim P. Vijapur, The Universal Declaration of Human Rights: A Cornerstone of Modern Human Rights Regime, 3-23 at 10 in: Abdulrahim P. Vijapur and Kumar Suresh (ed.), *Perspective on Human Rights*, (Manak Publication Pvt. Ltd., 1999).

[14] Universal Declaration of Human Rights, GAOR, 3rd Sess., A/810 (1948) [GA Res. 217A (III), 10 December 1948].

[15] International Covenant on Civil and Political Rights, GAOR, 21st Sess., Suppl. No. 16 (A/6316), at 52-58 [GA Res. 2200A (XXI), 19 December 1966]; International Covenant on Economic, Social and Cultural Rights, GAOR, 21st Sess., Suppl. No. (A/6316), at 49-50 [GA Res. 2200A (XXI), 19 December 1966].

[16] There exist seven treaty bodies responsible for the implementation of the fundamental international human rights treaties: The Human Rights Committee (HRC), the Committee on Economic, Social and Cultural Rights (CESCR), the Committee on the Elimination of Racial Discrimination (CERD), the Committee on the Elimination of Discrimination Against Women (CEDAW), the Committee Against Torture (CAT), the Committee on the Rights of the Child (CRC), and the Committee on Migrant Workers (CMW).

[17] UN Commission of Human Rights replaced by Human Rights Council by UNGA Res.60/251, 15 March 2006.

Commissioner for Human Rights[18] are institutional mechanism to ensure protection and promotion of human rights.[19]

As a party to various international human rights treaties, India is obligated to ensure the realisation of human rights within its jurisdiction. Human rights recognised under these treaties were incorporated under part third (fundamental rights— justiciable rights) and part fourth (Directive Principles of State Policy— non-justiciable rights) of the Indian Constitution. Various state welfare schemes implemented by the centre and the state government through local self-governance are responsible for realising various human rights at the grassroots level. These schemes are in line with the obligation under international treaties, which mandate its state parties to take positive steps for progressive realisation of the rights recognised under human rights treaties.[20]

The state actors cannot hope to achieve the progressive realisation of these rights unless they are supported in this endeavour by the local and regional actors. Indian Constitution envisages local self-governance at the rural and urban levels. The 73rd Constitutional Amendment provides for a three-tier rural governance: Gram Panchayat, Panchayat Samiti, and Zila Parishad.[21] Article 243 Gprovides for powers, authority and responsibilities of panchayats and entrusts panchayats with the responsibility to prepare plans for economic development and social justice and for implementation of such plans, including those matters listed in the Eleventh schedule of the Constitution. The Eleventh Schedule of the Constitution includes various responsibilities of Panchayats, which directly relate to the realisation of the human rights of the rural population. It covers a wide range of matters which have a direct bearing upon the realisation of human rights. These domains include access to potable water, initiatives aimed at reducing poverty, educational provisions encompassing both primary and secondary schooling, technical and vocational training, adult and non-formal education, healthcare and sanitation facilities such as hospitals, primary health centres, and dispensaries, programmes focused on family welfare, women and child development, social welfare encompassing the well-being of individuals with disabilities and mental impairments, as well as the public distribution system.[22]

The present study endeavours to understand the role of Panchayati Raj Institutions (PRIs) in delivering India's human rights obligations. This paper is divided into four parts. The first part discusses the concept of human rights and respect, protect, fulfil,

[18] The Office of the High Commissioner for Human Rights (OHCHR) established on 20 December 1993, subsequent to the 1993 World Conference on Human Rights, as a result of a resolution passed by the UNGA Res. 48/141.

[19] UNGA Res. A/RES/48/141, 85th plenary meeting, 20 December 1993.

[20] India is the state party of five core human rights treaties, namely the International Covenant on Economic, Social and Cultural Rights (ICESCR), the International Covenant on civil and Political Rights (ICCPR), International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the Convention on the Rights on the Child (CRC).

[21] Panchayati Raj Institution was constitutionalised through the 73rd Constitutional Amendment Act, 1992. It added a new Part-IX to the Constitution (Articles 243 to 243 O) and 11th Schedule which contains 29 functional items of the panchayats.

[22] The Constitution of India, 1950, Eleventh Schedule.

and promote framework which is used to measure the realisation of human rights. The second part deals with the role of Panchayati Raj Institutions (PRIs) in realising human rights at the Panchayat level. The third part discusses selective human rights, which are being implemented at the panchayat level and involves the PRIs role in its implementation. The fourth is the discussion part, where the implementation, challenges and suggestions for realising selective human rights are discussed.

## 1. Framework for Measuring the Realisation of Human Rights

According to Jacques Fomerand, the realisation of a human right occurs when persons are able to exercise the freedoms encompassed by that right and when their ability to enjoy such rights is safeguarded. The realisation of an individual's human rights is contingent upon the presence of adequate social structures that safeguard them against potential infringements upon their ability to exercise the liberties encompassed by said rights.[23]

The realisation of human rights is often measured in terms of the "respect, protect and fulfil" framework. This typology, though introduced by Henry Shue[24] in 1980, is credited to Asbjørn Eide who introduced it in a slightly different form in 1987 when he functioned as a Special Rapporteur to the UN Sub-Commission.[25] Although this framework was devised in connection with the realisation of social, economic and cultural rights, however, this framework is now used in connection with human rights in general. This framework was formally adopted only in 1997 when it was mentioned in the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights.[26] Later, the framework appeared in General Comment 12 on the right to food (1999),[27] General Comment 13 on the right to education (1999)[28] and General Comment 13 on the right to health (2000).[29] Since then, the framework has been used to categorise and analyse the responsibility of human rights,[30] operationalise and measure the responsibility of human rights,[31] and understand the nature of human rights obligations of the state parties to the human rights treaties.[32]

[23] Jacques Fomerand, *Historical Dictionary of Human Rights*, (2ndedn, Rowman & Littlefield Publishers, 2020)

[24] Henry Shue, *Basic Rights: Subsistence, Affluence and U.S. Foreign Policy*, (2nd edn, Princeton, 2020)

[25] Asbjørn Eide, Report on the right to adequate food as a human right (1987), E/CN.4/Sub.2/1987/23.

[26] International Commission of Jurists (ICJ), Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, 26 January 1997 Article 6.

[27] Committee on Economic, Social and Cultural Rights, The right to adequate food, General comment No. 12 General Comment No. 12 (1999) E/C.12/1999/5.

[28] Committee on Economic, Social and Cultural Rights, The right to education, General comment No. 13 (1999) E/C.12/1999/10.

[29] Committee on Economic, Social and Cultural Right, The right to the highest attainable standard of health, General comment No. 14 (2000), E/C.12/2000/4at the Twenty-second session, 11 August 2000.

[30] Thomas Pogge, 'Severe Poverty as a Human Rights Violation'in Thomas Pogge (eds), *Freedom from Poverty as a Human Right: Who Owes What to the Very Poor?* (Oxford, 2007).

[31] Maria Green, 'What We Talk About When We Talk About Indicators: Current Approaches to Human Rights Measurement' (2001) 23(4) HRQ 1062

[32] Olivier De Schutter, *International Human Rights Law: Cases, Materials, Commentary*, (2nd edn.,Cambridge University Press, 2018)

The framework was defined under Masstricht Guidelines on Violations of Economic, Social and Cultural Rights, 1997 in the following manner:

> "Like civil and political rights, economic, social and cultural rights impose three different types of obligation on States: the obligations to respect, protect and fulfil. Failure to perform any one of these three obligations constitutes a violation of these rights. The obligation to respect requires States to refrain from interfering with the enjoyment of economic, social and cultural rights. Thus, the right to housing is violated if the State engages in arbitrary forced evictions. The obligation to protect requires States to prevent violations of such rights by third parties. Thus, the failure to ensure that private employers comply with basic labour standards may amount to a violation of the right to work or the right to just and favourable conditions of work. The obligation to fulfil requires States to take appropriate legislative, administrative, budgetary, judicial and other measures towards the full realisation of such rights. Thus, the failure to provide essential primary health care to those in need may amount to a violation."[33]

The "respect, protect and fulfil" framework now has been extended to include "promote within itself". The fourth aspect of human rights realisation was added, i.e., promoted by Van Hoof in 1984.[34] The obligation to promote requires the States to further the understanding of and respect for human rights. The General Comments by the Committee on Economic, Social and Cultural Rights, however, does not consider the obligation to "promote" separately. It conceives the obligation to "promote" as a part of the obligation to "fulfil" itself since the obligation to "fulfil "was taken to include three parameters, i.e., the obligation to "provide", the obligation to "facilitate" and the obligation to "promote".[35]

**Figure 1: RPFP Framework for the realisation of Human Rights**

[33] International Commission of Jurists (ICJ), Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, 26 January 1997

[34] G.J. Van Hoof, 'The legal nature of economic, social and cultural rights: a rebuttal of some traditional views in the right to food' in P. Alston and K. Tomasevski (eds), *The Right to Food*, (Brill, 1984) 97

[35] I.E. Koch, 'Dichotomies, trichotomies or waves of duties?' (2005) 5 (1) *Hum. Rights Law Rev*. 81

RPFP Framework for the realisation of Human Rights has four components (Respect, Protect, Fulfil and Promote). A person aware about human rights (refrain from violating rights of people only when conscious about other's rights) is able to respect human rights. Protection of human rights is possible when PRIs member prevent third parties for violating human rights of people. It is possible when a person is known about the potential violator of a specific right. In other words, a person protects human rights of people when he is acquainted about the implantation aspect of a statute/programme/scheme and those involve in its implementation (could be a protentional violator by denying/delaying/ manipulating the people's rightful entitlement). Fulfil aspect of human rights is related to the initiatives taken by members of PRIs by making suitable policy in order to implement programme and schemes relating to specific human rights. Promote aspect of human rights is related to advertisements of government schemes and programmes linked to specific human rights. Human rights violators exploit the ignorance of people to prevent them for exercising their human rights. The right holder's ignorance surrounding their rights makes it much easier for others to violate those rights. In order to realise human rights at rural level, all components i.e. respect, protect and fulfil and promote are required to compliance.

## 2. Role of PRIs in realising HR

Panchayati Raj Institutions constitute the lowest rung of the pyramidal structure of administration in India. They have proved to be efficient and effective institutions in delivering goods and services to the common public. The panchayats at present symbolise the incorporation of indigenous systems of self-governance within the existing system of governance. Mahatma Gandhi understood the importance of village swaraj and envisioned villages as self-contained and self-supporting units. He was of the view that: "Independence must begin at the bottom. Thus, every village has to be self-sustained and capable of managing its affairs even to the extent of defending itself against the whole world."[36] The idea of Gram Swaraj is incorporated under Article 40 in the Constitution, which provides that "the State shall take steps to organise village panchayats and endow them with such powers and authority as may be necessary to enable them to function as units of self-government."[37]

When the Balwant Rai Mehta Committee came up with the proposal of local self-governing institutions for rural areas, i.e., the PRIs, it was done to facilitate the efficient and effective implementation of rural development projects. It was suggested that the state government must ensure that local-level rural development projects were executed through these bodies only. The committee proposed the three-tier structure known as Village Panchayat, Panchayat Samiti and Zila Parishad with a view to highlight the importance of democratic decentralisation. The Sarkaria Commission also noted that "the objectives of the decentralised planning cannot be achieved unless the Panchayati Raj and other local bodies are

[36] Mahatma Gandhi, *India of My Dreams*, (first published 1947, Rajpal & Sons, 2009) 99.
[37] The Constitution of India, 1950, Article 40

allowed full scope to play their role."[38]It was the 73rd Constitution Amendment Act, which conferred constitutional status on the PRIs and established them as the third tier of the Indian federal structure. Certain provisions were made binding on the states to ensure that the PRIs transformed into a vibrant unit of democracy, enabling the participation of the masses. The foremost objective of the PRIs is to achieve rural well-being. PRIs have been associated with the implementation of several governmental schemes aimed at poverty alleviation, strengthening of village industries, provision of food grains, housing, primary and secondary education, primary health care, sanitation, women empowerment and providing employment opportunities.

PRIs in India have played an important role in bringing about a turnaround in the conditions of the rural people. There are 255346 village panchayats, 6697 block panchayats and 665 district panchayats in India which cater to approximately 64.13 percent of India's population (World Bank collection of development indicators, 2023). The number of total PRI representatives in India stands at 3187320 and out of which 1453973 PRI representatives are women (as on September 2020). Being the third tier of governance, the PRIs are directly connected to the masses and play a key role in fulfiling the wants of people in a speedy manner. Panchayati Raj institutions are important because they are the way through which all-around development in rural India may be ensured. In order to ensure the delivery of basic amenities and services to the rural people, the Central and state governments have come up with several right-based legislations and schemes. These legislations and schemes could be operationalised only with the help of the PRIs. PRIs are the primary implementing agency at the panchayat level.[39]

The respect, protect and fulfil framework is meant to measure the implementation of human rights by the State parties. This framework needs to be redefined in context of the different tiers of government taking into account their settings. PRIs are states within Article 12 and they can only respect the rights only when they are fully aware about these rights. PRIs can be said to protect rights of rural people when PRIs have knowledge about the potential violation of human rights associated with government programmes/schemes. PRIs can be said to fulfil when they take all the appropriate measures towards the full realisation of such rights. PRIs can be said to promote human rights when they advertise rights of people, governmental schemes and programmes linked to specific human rights.

## 3. Human Rights implemented through PRIs

The major human rights which are being implemented at the PRI level are the right to education, the right to health, the right to gender equality and women empowerment, the right to social security, the right to work, the right to political participation, right to safe drinking water and sanitation. These rights, along with the corresponding schemes and legislations, have been discussed below:

[38] Government of India, Commission on Centre-State Relations, 358
[39] The Right of Children to Free and Compulsory Education (RTE) Act, 2009, s 9

### 3.1 Right to Education

"Education is the process of facilitating learning or the acquisition of knowledge, skills, values, beliefs and habits."[40] It is both a human right in itself and an indispensable means of realising other human rights.[41] It is recognised by various international human rights instruments (art. 26 of UDHR; art. Article 13(2) (a) of ICESCR; art. 28 of CRC). National Educational Policy 2020 proclaims education as fundamental for achieving full human potential, developing an equitable and just society, and promoting national development.[42]The right to education also finds a mention in the Sustainable Development Goals (SDG). SDG 4 aims to ensure inclusive and equitable quality education for all.[43]

The Indian School Education System is one of the largest in the world, with nearly 14.89 lakh schools, more than 95 lakh teachers and nearly 26.52 crore students of pre-primary to higher secondary level from varied socio-economic backgrounds.[44]Prior to 86th Amendment 202, the Indian Constitution under Article 45 provides that the State make every effort to provide free and compulsory education for all children up to the age of fourteen. By the Amendment (2002), a new fundamental right (Article 21A) was added, which stipulates that the State shall provide free and compulsory education to all children aged six to fourteen years in such manner as the State may by law designate. Furthermore, the Right of Children to Free and Compulsory Education (RTE) Act 2009 is the follow-up law to ensure that every child has the right to a full-time basic education of satisfactory and equitable quality in a formal school that meets certain essential norms and requirements. To guarantee the right to education, governmental schemes were introduced in India from time to time, among which 'Sarva Shiksha Abhiyan and Integrated Child Development Services' are the major ones.

The Sarva Shiksha Abhiyan (SSA) is a constituent of the Samagra Shiksha programme, which was introduced in 2018 as a comprehensive initiative for school education. This programme encompasses the entire educational journey from pre-school to Class XII. SSA was launched in 2001 with the aim of attaining the Universalisation of Elementary Education (UEE). The legal backing to SSA was provided when the right to free and compulsory education for children aged 6-14 was made a fundamental right in the Indian Constitution under Article 21A. It is implemented through Primary school (Class Ito V) and Upper Primary School (Class VI to VIII). SSA provides schools to children within a reasonable walking distance. S. 9 of The Right of Children to Free and Compulsory Education (RTE)

[40] UNESCO, SDG Resources for Educators — Quality Education, accessed 1 September 2023 https://en.unesco.org/themes/education/sdgs/material/04

[41] E/C.12/1999/10, Committee on Economic, Social and Cultural Rights General Comment No. 13, Twenty-first Session, 1999

[42] Government of India, Ministry of Human Resource Development. National Education Policy 2020

[43] UN General Assembly, Transforming our world: the 2030 Agenda for Sustainable Development, (2015) A/RES/70/1

[44] Department of School Education and Literacy, Report on Unified District Information System for Education Plus (USIDE+), 2021-22 Flash Statistics (2023)

Act, 2009 lists the duties of the local authorities. It states that the local authorities i.e., the PRIs, must provide free and compulsory elementary education to every child residing within their jurisdiction, including the children of migrant families, ensure availability of a neighbourhood school, ensure that the children belonging to weaker sections and disadvantaged groups are not discriminated against. The PRIs must also maintain records of enrolled children and monitor admission, attendance, and completion of elementary education by every child residing within its jurisdiction. They must also provide infrastructure, including school buildings, teaching staff and learning materials. The Section further requires PRIs to prescribe curriculum and courses timely and to ensure that the education imparted is as per the standards.[45]

The Integrated Child Development Services (ICDS) programme was initiated in 1975 to cater to the health, nutrition, and developmental requirements of young children and pregnant and lactating mothers. This programme is distinct in its approach toward early childhood development. The programme is specifically designed to reach disadvantaged and low-income groups for effective disparity reduction. ICDS Programme is implemented through Anganwadi at Panchayat Level. On a population of 800, one Anganwadi centre is required to be established at the rural level. Through Anganwadi centre, Pre-School Education is provided to children in the age group of 03 to 06 years. It is an important part of the integrated child development project. Anganwadi is the first step in education before children go to primary school. Its purpose is to develop children's physical, moral, and social development, language, and intelligence. Thus, the panchayats become an important stakeholder in ensuring the right to education. Samagra Shiksha report provides that for effective and equitable access to benefits of the Samagra Shiksha scheme at the State, district, community, and school levels, greater linkage and coordination are needed between all the stakeholders. [46]

### 3.2 Right to Health

WHO defines the right to health as "the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, as enshrined in the Universal Declaration of Human Rights."[47] Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family[48](art. 25 UDHR, 1948). The right to health includes several elements, such as the availability, accessibility, acceptability, and quality of healthcare goods and services[49] (art. 12 ICCPR, 1966). SDG Goal-3 aims to ensure healthy lives and promote well-being for all at all ages. The Supreme Court of India has held that the right to health is a fundamental right inherent in the right to life, and the State is obligated to ensure that its citizens have access to adequate healthcare facilities

[45] The Right of Children to Free and Compulsory Education (RTE) Act, 2009, s 9.
[46] Ministry of Education, Samagra Shiksha Framework for implementation (2022)
[47] Constitution of the World Health Organization, 17 November 1947, A/RES/131
[48] Universal Declaration of Human Rights, 10 December 1948, 217 A (III),
[49] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171

and services.[50] Article 47 of the Constitution directs the State to raise the level of nutrition and the standard of living and to improve public health. In regard to the role of Gram panchayat in facilitating the right to health, entry 23 of Schedule 11 of the Constitution mandates one of the functions of Gram panchayat is to ensure the health and sanitation of people through hospitals, primary health centres and dispensaries.

The National Rural Health Mission (NRHM), a component of the National Health Mission, was established on April 12, 2005, with the goal of bringing accessible, reasonable, and high-quality healthcare to the rural population. In order to ensure simultaneous action on a wide range of health determinants, such as water, sanitation, education, and nutrition, the mission is to establish a fully operational, community-owned, decentralised health delivery system with inter-sectoral convergence at all levels. The three-tiered structure of the healthcare infrastructure in rural regions is as follows:

a. Sub Centre (Population norms 5000 in Plan Area 3000 Hilly Area): Most peripheral contact points between the Primary Health Care System and community are manned with one HW(F)/ANM &and one HW(M).

b. Primary Health Centre (PHC) Population norms 30,000 in Plain Area 20,000 in Hilly Area): A Referral Unit for sixSub Centres 4-6 bedded manned with a Medical Officer in charge and four subordinate paramedical staff.

c. Community Health Centre (CHC) Population norms 120,000 in Plain Area 80,000 in Hilly Area): A 30 bedded Hospital/Referral Unit for 4 PHCs with Specialised services.

At the gram panchayat level, an institution known as a sub-centre is responsible for protecting the right to health of the rural people living in the constituency of the Panchayat. Sub Centres are assigned tasks related to interpersonal communication in order to bring about behavioural change and provide services in relation to maternal and child health, family welfare, nutrition, immunisation, diarrhoea control and control of communicable diseases programmes.

The Village Health, Sanitation, and Nutrition Committee (VHSNC) constitutes a crucial component of the National Rural Health Mission. The committee has at least 15 members, comprising elected Panchayat members, all those working for health and health-related services, community members/ beneficiaries. The roles and responsibilities of VHSNC include creating awareness about nutritional issues, carrying out a survey on nutritional status and nutritional deficiencies in the village, especially among women and children, identifying locally available foodstuffs of high nutrient value, as well as disseminating and promoting the best practices through a process of community consultation. Other responsibilities include the inclusion of nutritional needs in the Village Health Plan, monitoring and supervision of Village Health and Nutrition Day, facilitating early identification

[50] *Consumer Education and Research Centre* v. *Union of India* AIR 1995 SC 922

of malnourished children in the community, coordinating referral to the nearest Nutritional Rehabilitation Centre (NRC) and follow-up to ensure a sustained outcome.

### 3.3 Right to Gender Equality

Females constitute a significant half of the global populace, thereby signifying an equivalent proportion of its prospective capacity. The attainment of peaceful societies, utilisation of complete human potential, and sustainable development are contingent upon gender equality, which is a basic human right. Women empowerment stimulates both productivity and economic growth. The UDHR proclaims that "All human beings are born free and equal in dignity and rights" and that "everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion … birth or other status."[51]

Convention on the Elimination of All Forms of Discrimination against Women (CEDAW, 1979) mandated that state parties shall take into account the particular problems faced by rural women and the significant roles which rural women play in the economic survival of their families, including their work in the non-monetised sectors of the economy.[52] Women have a critical role to play in all of the Sustainable Development Goals (SDGs), with many targets specifically recognising women's equality and empowerment as both the objective and as part of the solution. Goal 5, to "achieve gender equality and empower all women and girls," is known as the stand-alone gender goal because it is dedicated to achieving these ends. The Constitution of India not only guarantees women's empowerment but also encourages the State to adopt various measures of equality and empowerment in favour of women.[53]

Swarna Jayanti Gram Swarozgar Yojana (SGSY) was launched on 1 April 1999, under which Self-help groups (SHGs) were set up to provide self-employment opportunities. SHGs ensure economic independence for individuals through income-generating activities. SHGs enhance the social, economic, and social status of women. SHGs comprise a maximum of 20 members. SHGs have an elected chairperson, a deputy, a treasurer and other office holders. The group members meet every week to discuss the group savings, rotation of funds, bank loans, terms to the repayment of loans, social and community action programmes, etc. SHGs are formed for the sake of savings and credit activities. It creates a common fund for the members through their regular savings, which will be pooled in a democratic way. It conducts periodic meetings to make needed decisions. It provides small and reasonable loans with affordable interest rates varying from group to group, which helps easy repayment on time. Women who are getting training are utilising

[51] Article 2 Universal Declaration of Human Rights, 1948.

[52] Article 14 Convention on the Elimination of All Forms of Discrimination against Women, 1979

[53] Article 14, Article 15, Article 15(3), Article 16, Article 39(a), Article 39(b), Article 39(c) and Article 42 of the Constitution are of specific importance in terms of gender equality and equality in the general sense.

loans in an optimum manner and this allocated credit is invested in productive activities related to their own business.[54]Studies have indicated that membership in SHGs has lowered the domination of males in the decision-making process and increased the involvement of women in the decision-making process.[55]

### 3.4 Right to Work

Everyone has the right to work, to free choice of employment, to just and favourable conditions, and to protection against unemployment. Everyone, without any discrimination, has the right to equal pay for equal work.[56]In addition, India is a signatory to the International Covenant on Economic, Social, and Cultural Rights, which recognised the right to work, including the right of everyone to the opportunity to gain his living through work which he freely chooses or accepts (art. 6 ICESCR). Article 39 of the Indian Constitution specifically requires the State to direct its policies towards securing the two principles which are related to the 'right to work', including equal rights of men and women to adequate means of livelihood and equal pay for equal work for both men and women. Mahatma Gandhi National Rural Employment Guarantee Act, 2005 (MNREGA) programme was initiated in February 2005 to improve the financial stability of those residing in rural parts of the country. The MGNREGA is the most massive employment guarantee programme worldwide.

Mahatma Gandhi National Rural Employment Guarantee Act, 2005 (MNREGA) programme was initiated in February 2005 to improve the financial stability of those residing in rural parts of the country. Adult members of any rural family prepared to perform public work-related unskilled manual labour at the statutory minimum pay are eligible for employment under the MGNREGA, giving a legal guarantee for one hundred days of employment each fiscal year. After completion of an inquiry about eligibility, the Gram Panchayat will register homes and issue an employment card to applicant. The employment card includes a photo of the adult member along with all of the member's identifying information. An application for employment must be made in writing to either the Panchayat or the Programme Officer, and it must be for at least fourteen days of continuous labour.[57]

The applicant will be provided with wage employment either within 15 days of applying or from the day work is requested. Individuals have the right to receive unemployment assistance if gainful employment is not secured within fifteen days after the submission of the application or from the date of job inquiry. The Gram Sabha serves as the primary platform for labourers to express their opinions and

[54] Ravi Kumar Gupta, Udit Maheshwari and Debendra Nath Das, 'An analysis of factors influencing empowerment of rural women through Deendayal Antyodaya Yojana – National Rural Livelihood Mission (SGSY)' (2023) 30(1) TAE 153

[55] A.P. Pati, 'Subsidy impact on sustainability of SHGs: An empirical analysis of micro lending through SGSY scheme' (2009) 64(2) *Indian J. Agric. Econ* 276

[56] Article 13 Universal Declaration of Human Rights, 1948.

[57] Sirsendu Sarbavidya and Sunil Karforma, 'Applications of Public Key Watermarking for Authentication of Job-Card in MGNREGA' (2014) 4(1) BVICAM'S IJT 435

assert their requests. The Gram Panchayat is responsible for the identification and planning of works and the development of a project shelf that involves determining the order of priority for each project. The allocation of priority for works shall be determined by the Gram Panchayats during the convening of the Gram Sabha.

### 3.5 Right to Political Participation

Political rights are those basic rights that allow an individual to participate directly or indirectly in the political activities of the State, including the right to vote (art. 326 of the Indian Constitution), the right to be elected, the right to take part in public affairs, etc. These rights help individuals to be part of the formation and working of the Government. Everyone has the right to participate in the Government of his country, directly or indirectly, through freely chosen representatives. Periodic and genuine elections shall be open to every citizen of the country, with universal and equal suffrage. (art. 21 of UDHR; art. 25 of ICCPR). Liberty of opinion and expression without any interference is vital for political participation (art. 19 of the UDHR & ICCPR). The right to political participation is linked to SDG 16, which deals with peace, justice and strong institutions. The goal is to promote peaceful and inclusive societies for sustainable development.

At the Panchayat level, Gram Sabha is a collective entity comprising individuals whose names are enlisted in the electoral rolls for the Panchayat at the village level. The Gram Sabha is open to all eligible voters residing in the village. As per the Constitution, the Gram Sabha is empowered to exercise certain powers and carry out specific functions at the village level, subject to the provisions laid down by the Legislature of a State through law. The Gram Sabha's decisions are irrevocable by any external entity except for the Sabha itself. This scheme of the PRI system increases cooperation among people, democratic participation and decentralisation. Gram Panchayat is an executive body constituting elected representatives of Gram Sabha. It has been entrusted with providing essential services in the villages and planning for local economic development. The formulation of the Gram Panchayat Development Plan (GPDP) at the Gram Sabha meeting is implemented by Gram Panchayat.

### 3.6 Right to Safe Drinking Water and Sanitation

The availability of safe, consumable water and sanitation facilities is a fundamental aspect of leading a dignified life. It requires drinking water, water for domestic usage, sanitation and hygiene facilities to be available, accessible, safe, acceptable and affordable for all without discrimination. UN General Assembly in a resolution recognising "the right to safe and clean drinking water and sanitation as a human right that is essential for the full enjoyment of life and all human rights"[58]. Furthermore, the Human Rights Council have recognised both the right to safe drinking water and the right to sanitation as closely related but distinct human rights.[59] Safe water and access to proper sanitation are essential to eradicate

[58] A/RES/64/292, Sixty-fourth Session Agenda item 48, Resolution adopted by the General Assembly on 28 July 2010.

[59] A/HRC/RES/16/2, Human Rights Council Sixteenth Session Agenda item 3 Resolution adopted by the Human Rights Council on 8 April 2011.

poverty, build peaceful societies and ensure that no one is left behind on the path toward sustainable development (UN World Water Development Report, 2019)

Sustainable Development Goal 6 is about "clean water and sanitation for all". It ensures availability and sustainable management of water and sanitation for all." The goal has eight targets to be achieved by 2030. The assessment of progress towards the targets would be carried out by employing eleven indicators. The six outcome targets involve the supply of clean and affordable drinking water, the elimination of open defecation, and the facilitation of access to sanitation and hygiene. The inclusion of the right to water in the Indian Constitution is absent, nevertheless, the judiciary has construed Article 21 of the Constitution to encompass the entitlement to clean and adequate water, thereby guaranteeing individuals the right to a dignified and satisfactory standard of living. Sanitation is encompassed within the purview of the 'Directive Principles of State Policy (DPSP)' as outlined in Part IV of the Constitution (Article 48A). According to Article 47, the government is obligated to enhance the quality of life.

The Village Health, Sanitation and Nutrition Committee (VHSNCs) is regarded as a crucial component within the National Rural Health Mission framework. The VHSNC must consist of a minimum of 15 members. At least 50% of the members should be women, and there should be adequate representation of SCs, STs, and minorities. The activities carried out by the Village Health and Sanitation Committee (VHSNC) can be grouped into two main categories. The first category involves the core processes necessary for the effective functioning of the VHSNC, such as holding monthly meetings, managing the United Village Health Fund, maintaining accurate accounting records, and keeping proper documentation. The second category encompasses activities like monitoring and ensuring access to vital public services, organising community actions to promote health, facilitating service delivery within the village, developing health plans for the village, and conducting community monitoring of healthcare facilities. Thus, the VHSNC is responsible for ensuring the right to safe drinking water and sanitation to the local population.

### 3.7 Right to Social Security

Social security encompasses the measures implemented by society to provide individuals and families with a safeguard against potential vulnerabilities, ensuring their capacity to receive healthcare services and maintain financial stability. This support system is especially crucial in situations such as advanced age, unemployment, illness, disability, occupational accidents, maternity, or the unfortunate event of losing the primary income earner. It ensures that individuals and households have access to health care and safeguard their income security. In essence, it can be understood as an indicator of the level of societal safeguarding extended to individuals, encompassing a range of public interventions aimed at mitigating economic and social hardships that might otherwise occur by the cessation or significant reduction of earnings because of old age, disability, demise

of the primary income earner in a family or unemployment.[60] The right to Social Security is part of economic, social and cultural rights (art. 22 UDHR, 1948; art. 09 ICESCR).

The Social Security (Minimum Standards) Convention of 1952 establishes a set of minimum standards that govern the provision of social security benefits across nine key areas of social security. These areas include medical care, sickness, unemployment, old age, employment injury, family, maternity, invalidity, and survivors' benefits.[61] Maintenance of the right to social security can be said to be implicitly related to SDG 1, which calls for an end to poverty, ensuring a basic, dignified living.

The Indian Constitution, as stated in Article 41, acknowledges the responsibility of the State to allocate resources in a manner that enables the realisation of the right to employment, education, and public assistance in situations of unemployment, old age, illness, disability, and other instances of unmerited deprivation. According to Article 42, it is mandated that the State must establish measures to provide equitable and compassionate working conditions, as well as provide assistance for maternity-related matters. The National Social Assistance Programme (NSAP) provides pensions to old-age people, widows and disabled people. Under the programme, three schemes i.e., Indira Gandhi National Old Age Pension Schemes,Indira Gandhi National Widow Pension Scheme and Indira Gandhi National Disability Pension Scheme are implemented at rural level with the help of PRIs. These schemes provide pension ranging from Rs. 200 to 500 per month to the beneficiaries. In addition to these central government sponsored schemes, states are also providing old age and disability pensions through various social security schemes. The amounts disbursed under these schemes varies from state to state from Rs. 400 (Mukhyamantri Vridhajan Pension Yojana Scheme, Bihar) and Rs. 2,750 (Old Age Samman Allowance Scheme, Haryana).

## 4. Discussion

The progress of a state can be measured by the extentto which its citizens realise basic human rights. When a nation accedes to an international convention on human rights, it undertakes the responsibility to respect, protect, fulfil and promote human rights. Article 4 of the Draft Articles on the State responsibility provides that: "The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organisation of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State."[62]

[60] International Labour Standards on Social security, https://www.ilo.org/global/standards/subjects-covered-by-international-labour-standards/social-security/lang--en/index.htm

[61] International Labour Organization (ILO), Convention Concerning Minimum Standards of Social Security, 28 June 1952, C102, available at: https://www.refworld.org/docid/5c77a1bc7.html [accessed 16 September 2023]

[62] International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, November 2001 Supplement No. 10 (A/56/10).

With such provision, Panchayat at the rural level is considered an organ of the State. The Indian Constitution acknowledges that any local or other authority operating within the geographical boundaries of India or under the jurisdiction of the Government of India are considered integral components of the State as defined by Article 12 of the Indian Constitution. Thus, by virtue of the principle of shared responsibility, any violation of human rights which occurs at the local level owing to the negligence of the local authorities can be directly attributed to the state party under international law. Local authorities or panchayats are needed to translate rights-based legislation, policies and schemes into action. If a state party wants to ensure that it is performing its human rights obligations as per the treaty, it must see to it that the local bodies are well-equipped to ensure the same at the local level. It may very well be argued that even in the absence of constitutional or legal provisions within the domestic framework, the local governments are still obligated to comply with the international human rights obligations.[63]

In India, PRIs functions are intrinsically related to basic human rights. PRIs are closest to the rural people, and their efficiency and effectiveness directly impact the implementation of human rights at the rural level. As the rural populace is vulnerable and prone to human rights violations, effective PRIs may increase the possibility of its inhabitants to realise human rights to a great extent.

To guarantee the right to education, multiple governmental schemes were introduced in India, among which 'Sarva Shiksha Abhiyan' and 'Integrated Child Development Services' are major ones.While there has been some progress toward the goal of universal primary education since the Sarva Shiksha Abhiyan's inception in November 2000, much more work remains.[64]

Lack of knowledge among gram panchayat members about their roles and responsibilities in educational settings was a major barrier.[65]They must undertake enrolment drives, ensuring physical safety and zero tolerance for breaches of child rights, tracking out-of-school children, monitoring children's health, and ensuring zero drop-outs. Poverty reduction programmes need to be accelerated so that children are freed from domestic chores and wage-earning responsibilities.[66] Despite a rise in community involvement in school management, enrolment in school was low and there was little communication between PRIs and Parent Teacher Associations.[67]Adukia, puts stress on the importance of toilets in elementary schools in a research study where it found that accessibility of school latrines has a positive impact on enrolment ratio and drop-out ratio. However,

[63] Human Rights Council Advisory Committee, Role of local government in the promotion and protection of human rights, (2015) A/HRC/30/49.
[64] G.S. Kainth, (2006). 'A mission approach to Sarva Shiksha Abhiyan,'*Economic and Political Weekly*, 3288-3291.
[65] Rajni, 'Delegation of Powers to Village Panchayat for Schools: Ground Reality in Rural Punjab' (2021) 10(1) *Education India,* 7.
[66] Ministry of Education, Samagra Shiksha Framework for implementation (2022).
[67] R.S. Tyagi, (2012). 'Management of school education: role of Panchayati Raj Institutions,'*Journal of Rural Development*, 31(1), 95-114.

sex-specific toilets have a greater impact on the female enrolment ratio[68]. One of the studies indicated that School Management Committee members considered that the lack of engagement from parents hindered the outcome, that the teaching-learning process was inadequate, that teachers lacked the necessary abilities, and that SMC members were unaware of the importance of their role in creating the "School Development Plan."[69]Advertising about the scheme, its benefits among SMC members and other stockholders will ensure the realisation of right to education**.** PRI needs to be involved in the planning process while preparing plans and execute them by converging the resources available to them under different schemes.

To realise the right to health, multiple governmental schemes were formulated in India, among which the National Rural Health Mission (NRHM) is crucial to ensure health concern at rural level. The lack of coordination between Public Health officials and the PRIs, the lack of awareness of healthcare schemes among the poor and the complicated procedures to avail of the benefits continue to impede the implementation of NRHM at the rural level.[70]The PRI officials need to monitor and oversee the activities at the health centres so that they may ensure the timely availability of quality pharmaceuticals and other important medical products for PHCs/SCs.[71]

Maternal Mortality Ratio (MMR) continues to remain high in India even though NRHM, through its 'Janani Suraksha Yojna' especially focuses on reproductive health.[72] NRHM is implemented with the help of ASHA workers, but these workers are often overworked, underpaid and face mobility issues.[73]Strategic deployment of funds and existing NHM personnel towards empowering VHSNCs could ensure equitable community engagement and positive health outcomes.[74] Even though VHSNCs are operational in almost all villages, their functionality is not as per the guidelines, also poor organisation and lack of participation continue to affect the workings of VHSNCs.[75] There is a need to undertake focused health education measures to train these community-level stakeholders through

[68] Anjali Adukia, 'Sanitation and Education'(2017) 9(2) Am. Econ. J.: Appl. Econ. 23

[69] Dipak Bhattacharya and Ramakanta Mohalik, 'Problems faced by the SMC members in implementing the RTE act, 2009: An analysis.' (2015) 4(2) *Eduquest* 15

[70] D.C. Nanjunda, 'Panchayati raj and rural health care delivery system in Karnataka' 2020 66(1) *IJPA* 97

[71] H. Gupta, 'Institutions in health and health services', (2010) 98 *Accountability Initiative* 23

[72] Satish Kumar,'Challenges of Maternal Mortality Reduction and opportunities under National Rural Health Mission — A Critical Appraisal,' (2005) 49(3) *Indian J Public Health* 163.

[73] Sadhana Meena, Monika Rathore, Pragya Kumawat and Arpit Singh, 'Challenges Faced by ASHAs during their Field Works: A Cross Sectional Observational Study in Rural Area of Jaipur, Rajasthan,' (2020) 10(3) *Int J Med. Public Health* 97.

[74] Rajani Ved, Kabir Sheikh, Asha S. George and Raman VR, 'Village Health Sanitation and Nutrition Committees: reflections on strengthening community health governance at scale in India,' (2018) 3(3) *BMJ Glob Health* e000681.

[75] E.P. Abdul Azeez, P. Subramania Siva, A.P. Senthil Kumar and Dandub Palzor Negi, 'Are village health, sanitation, and nutrition committees functional? Evidence from Chhattisgarh and Madhya Pradesh,' (2021) 46 *Indian J Community Med* 80.

structured educational interventions.[76] The state governments must increase the amount of untied funds at the disposal of the VHSNCs. The members of these bodies must be trained and sensitised regularly. Further, efforts must be made to transform VSHNCs into inclusive, participatory spaces.[77]

One of the studies showed that VHSNCs are very important to health planning.[78] ANMs and AWWs had the highest levels of knowledge of the VHNSC, its role, and its obligations.[79]A researcher found that there is almost no coordination between the officials of public health institutes and those of PRIs and that PRI members are generally unaware of the many health plans available to them.[80]

To realise gender equality Swarna Jayanti Gram Swarozgar Yojana (SGSY) was launched to provide micro credit facilities to Self-help Groups (SHGs) which were constituted by rural women to provide them with self-employment opportunities. The scheme aims to empower SHG members by creating assets and lowering risks, but this does not guarantee women's empowerment. Most of the time, the credit availed by the women is utilised to add to the income and assets of households, women having no ownership rights over such assets.[81] It has been reported that disbursal of credit without any substantial training to the women will not empower women as vocational training helps the women to utilise the credit in an optimal manner.[82]Studies also underline the importance of literacy among women members of SHG, as illiteracy is one of the major impediments in hindering the objective of women empowerment sought to be achieved by SGSY.[83]It is important that in addition to ensuring micro-financing to the SHGs through banks, the governments also ensures that there are market linkages and income-augmenting opportunities for the SHGs to prosper.[84] The implementation of SGSY will be further boosted if the women associated with

[76] Praveen Kulkarni, Sunil Kumar D, Hugara Siddalingappa, Renuka M and M.R. Narayana Murthy, 'Perception and Practices of Village Health Sanitation and Nutrition Committee (VHSNC) members prevention and control of Dengue,' (2018) 3(4) *RNJPH* 1

[77] Kerry Scott, Asha S. George, Steven A. Harvey, Shinjini Mondal, Gupteswar Patel and Kabir Sheikh, 'Negotiating power relations, gender equality, and collective agency: are village health committees' transformative social spaces in northern India?' (2017) 16 *Int. J. Equity Health* 1

[78] V. Kumar and Jayanta Mishra, A., 'Healthcare under the Panchayati Raj Institutions (PRIs) in a decentralised health system: Experiences from Hardoi district of India,' (2016) 29(2)Leadersh. Health Serv. 151

[79] Pramod Kumar Sah, Abhishek V. Raut, Chetna H. Maliye, Subodh S. Gupta, Ashok M. Mehendale, Bishan S. Garg, and Wardha Sewagram, 'Performance of village health, nutrition and sanitation committee: a qualitative study from rural Wardha, Maharashtra' (2013) 1(4) *The Health Agenda* 112

[80] D.C. Nanjunda, 'Panchayati raj and rural health care delivery system in Karnataka' 2020 66(1) *IJPA* 97

[81] S. Ray, 'Alleviating poverty through micro-finance: SGSY experience in Orissa' (2008) 57(2) Social Bull. 211

[82] V. Puhazhendhi and K.J.S. Satyasai, 'Economic and Social Empowerment of Rural Poor Through Self-Help Groups' (2001) 56(3)*Indian J. Agric. Econ* 450

[83] Nirupama Panda, A.S. Mahapatra and Rasmiprava Samal, 'Impact evaluation of SGSY on Socio-Economic Development of Women in Aquaculture in Eastern Hills of Orissa' (2012) 20 *Aquac Int*., 20 233

[84] Raji Ajwani-Ramchandani, *Role of Microfinance in Women Empowerment: A Comparative Study of Rural and Urban Group*, (1st edn, Emerald Publishing Limited, 2017).

the SHGs are imparted vocational training and skill development. There must be opportunities for the members to upgrade their education level. The PRIs must oversee the functioning of SHGs within the panchayats to ensure that there is no embezzlement of funds by the group leaders of the SHGs concerned. It has been found that "women are well-informed about issues about panchayats."[85]

In order to guarantee right to work, Mahatma Gandhi National Rural Employment Guarantee Act 2005 (MGNREGA) was passed. The Act guarantees at least 100 days of employment every year at minimum wages to at least one person from every rural poor household. Studies have reported that MGNREGA workers have to face issues of payment delays and are unable to get steady work throughout the year.[86] It was also reported that most often, the MGNREGA work sites lack access to drinking water, washrooms, crèche facilities, first aid facilities etc.[87] Studies have also found that MGNREGA's implementation is hindered by rampant corruption and procedural lapses, with incomplete job cards being issued to workers. The workers were only provided around 35 days of work on average and no unemployment allowance was being provided to them.[88]

The implementation of MGNREGA would certainly improve if the gram panchayats were able to have a shelf of works that would be adequate to meet work demand under MGNREGA.[89] Further, it was important that real-time disbursal of payments were made. The operationalisation of cluster facilitation teams (CFT) to support clusters of gram panchayats through intensive participatory planning exercises.[90] Right to work also includes the right to work in a safe working environment with the provision of drinking water, washrooms, crèche etc.

Political participation promotes peaceful and inclusive societies for sustainable development. Political participation at the local level is ensured with the help of Gram Sabha. The Gram Sabha ensures the preparation of Gram Panchayat Development Plan to ensure the all-round development of the villages. The approach employed in this context is a bottom-up strategy that aims to align with the requirements of diverse stakeholders.[91]Studies have reported that the reservation of one-third of seats for women in the gram panchayats has

[85] Nirmala Buch, 'Women's Experience in New Panchayats: The emerging Leadership of Rural Women'(CWDS Occasional Paper 35, 2000) Political Mobilisation of Women Towards Panchayati Raj 339.

[86] Shubhashish Dey and Arjun S Bedi, 'The National Rural Employment Guarantee Scheme in Birbhum' (2010) 41 *EPW* 19.

[87] Ministry of Rural Development, A study on Socio-Economic Empowerment of Women under National Rural Employment Guarantee Act (Report, 2008) National Federation of Indian Women.

[88] Reetika Khera and Nandini Nayak, 'Women Workers and Perceptions of the National Rural Empowerment Guarantee Act' (2009) 44 *EPW* 49.

[89] Deepta Chopra,'They don't want to work' versus 'They don't want to provide work': Seeking explanations for the decline of MGNREGA in Rajasthan (ESID Working Paper No. 31,2014).

[90] Mihir Shah, 'Should India do away with the MGNREGA?' (2016) 59(1) *IJLE*125.

[91] K. Rajeshwar,'Role of PRI Functionaries in Adaptation of e-Governance at Gram Panchayat: A Study of Two States' in Yu-Dong Zhang, Tomonobu Senjyu, Chakchai So-In and Amit Joshi (eds), *Computing and Communications*, (Springer Singapore,2023).

only increased the representation of women but failed to create a ripple effect in other forms of exclusions present in local politics.[92] It has been found that financial reporting and budgeting of the local governments is very dismal and since municipal budgets form a point of entry in other jurisdictions, the same must be replicated in India as well.[93] State governments regulate the functioning of PRIs. The majority of states have primarily assigned traditional civic roles rather than developmental responsibilities. Moreover, there is a lack of regularity in the conduction of elections for these local bodies. The statutes and functions of the Gram Sabha exhibit a lack of standardisation throughout the nation. In most states, Gram Sabha's functions are reduced to considering annual accounts, administrative reports, and audit notes.[94]

The State must ensure that real devolution of power takes place. It must also be seen that the gram panchayats are able to function as an independent body and have substantial financial resources at their disposal. States should view gram panchayats as capable bodies and must hold consultations with them before framing policies and schemes.[95]Benefits provided by local governments did not correlate with wealth, caste, education, gender, or political connections within villages. Distribution of benefits showed bias against low caste and impoverished groups. These biases were more pronounced in communities with uneven land ownership and lower rates of village meeting attendance.[96]Women's engagement in voting has significantly increased over the past few years but that their participation in other political activities has been quite low. Candidates who are elected as women represent their families' male members.[97] Neither the gender-specific reservation nor women's actual participation in the Panchayat had increased their sensitivity to issues affecting village women. Many elected women complained that neither their opinions nor those of other women were taken into consideration while choices were being made.[98]

The availability of safe consumable water and sanitation facilities is a fundamental aspect of leading a life based on dignity and uplifting standards of living and human rights. The Village Health, Sanitation, and Nutrition Committee (VHSNC) constitutes a crucial component of the National Rural Health Mission. A committee has been established to collaboratively address matters pertaining to health and

[92] Aparimita Mishra, 'Multiple Marginalities: A Study of Participation of Women in Panchayati Raj Institutions in Arunachal Pradesh,' (2018) 48(4) *Soc. Change* 558.
[93] M.A. Oommen, 'Democracy and Local Governance: Challenges before Kerala' (2014) 49 (25) *EPW* 42
[94] T. Brahmanandam, 'Review of the 73rd Constitutional Amendment: Issues and Challenges' (2018) 64(1) *IJPA*103.
[95] K.M.Sharma, Jiwan Devi and Anjali Verma, 'Impact of Religion, Caste and Political Parties on Tribal Voters of District of Kinnaur of Himachal Pradesh' (2012) 73(1) *IJPS*175.
[96] Pranab Bardhan, Sandip Mitra, Dilip Mookherjee and Abhirup Sarkar,'Political Participation, Clientelism and targeting of Local Government Programs: Analysis of Survey Results from Rural West Bengal, India' (2011) presented at Columbia UniversityConference on Institute for Policy Dialogue.
[97] Hardeep Kaur and Manvendra Singh,'Barriers to Political Participation of Women: A Case Study of Punjab, India' (2021) 12(8) *TOJQI*, 2808
[98] Shashi Kaul and Shradha Sahni,'Study on the Participation of Women in Panchayati Raj Institution.' (2009) 3(1) *Stud Home Comm Sci*29.

its social determinants within the village. It also monitors and promotes health, developing health plans for the village, and conducting community monitoring of healthcare facilities. Thus, the VHSNC is responsible for ensuring the right to safe drinking water and sanitation to the local population.

Panchayats have a great potential to change water and sanitation service delivery and play an active role in promoting community participation in water supply enhancement and hygiene promotion. The participation of PRIs and Gram Sabhas is especially significant in this context because it has been demonstrated that these grass-roots organisations can effectively address such challenges.[99]The government has taken many steps to protect individual health and people are made aware towards using toilets, water, soaps(handwash), rainwater harvesting, and dustbins. To ensure the right to safe drinking water and sanitation government and grassroots level leaders must monitor their operations.[100] Despite recent high levels of public spending, water, sanitation, and hygiene (WASH) service levels in rural India remain persistently low.[101]

The right to social security, as guaranteed by pension schemes, represents a societal safeguard implemented through a range of public initiatives. Its purpose is to mitigate potential economic and social hardships that may arise from the loss or substantial decrease in income due to factors such as advanced age, disability, mortality, or joblessness. It has been reported that the beneficiaries of these pension schemes find it difficult to access banks and face delays in delivery mechanisms. There is a need to index the amount transferred with the inflation levels.[102] It has also been reported that political connections help in gaining access to pension schemes.[103] It has been found that the states makes uneven contributions towards IGNOAPS. Also, the eligibility age for availing pensions varies across states. While some states have fixed the eligibility age at 65, others have fixed it at 60 or 58.[104]

Identification of beneficiaries for social security schemes lies with PRI's responsibility. The PRIs must ensure that the beneficiaries are chosen without any bias and on their fulfiling of the prescribed criteria. Such individuals who are APL should be screened. Further, PRIs must ensure that the beneficiaries are identified and informed about the scheme and its application procedure.

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[99] Udaybhanu Bhattacharyya,'Community Participation in Water and Sanitation Services—Role of Panchayati Raj in India' (2015) Lougborough University Conference Contribution.

[100] S. Rajendran, N. Rajasekaran and P. Vijayakumar, 'Panchayat Raj System and Rural Sanitation from Pakkanadu Gram Panchayat of Salem DistrictinTamil Nadu' (2014) 2(2) *Shanlax Int. J. Economics*1.

[101] V. Ratna Reddy & Charles Batchelor, 'Cost of Providing Sustainable Water, Sanitation and Hygiene (WASH) Services: An Initial Assessment of a Life-cycle Cost Approach (LCCA) in Rural Andhra Pradesh, India' 2012, 14(3) Water Policy, 409

[102] Aashish Gupta, 'Old-age pension scheme in Jharkhand and Chhattisgarh,' (2013) *EPW* 24.

[103] Vidhya Unnikrishnan, 'How Well targeted are Social Assistance Programs in India: A Case Study of Indira Gandhi Old Age National Pension Scheme' (2016) in 12thAnnual Conference on Economic Growth and Development. Delhi.

[104] Neeraj Kaushal, 'How Public Pension Affects Elderly Labour Supply and Well-Being: Evidence from India' (2014) 56 *World Dev.*214.

A survey was conducted of 10 states that showed the pension system to be healthy. There is abundant evidence suggesting that the allocated money is being dispersed as planned. This study proved it as the PRIs of three states have ensured all aspects of the right to social security, including availing of pension, care, and protection of vulnerable individuals or households; even PRIs actively monitored and facilitated the Public Distribution System and helped people who required Aadhar card, Health card, Bank account.[105]Panchayati Raj Institutions have a considerable impact on shaping the environment for disabled children.[106]

## 5. Conclusion

*"Na Lok Sabha na Vidhan Sabha, Sabse badi hai Gram Sabha"* (The biggest power lies with neither the Lok Sabha nor the Vidhan Sabha but with the Gram Sabha).[107] The slogan above represents the importance of Panchayati Raj Institutions in the life of the common man. Even though these local bodies attained constitutional status way back in 1992, there are challenges to achieve genuine decentralisation and make Panchayat an independent unit of government. Local bodies are not just meant for local governance but they must play an important role in policy formulation, legislation and implementation as well. The closeness of citizens with their elected representatives at the local level makes them best suited to identify the problems and redress them. The level of realisation of the rights which are being implemented at the panchayat level depend greatly on the effectiveness and the efficiency of the PRIs. Measures like capacity building of the PRI, complaint mechanisms, substantial Panchayat funds and its timely disbursal, preparation of annual budgets akin to central and state governments to ensure transparent and fair allocation of the resources as per development needs and timely elections of PRIs have great ramifications for the rural well-being. It is undoubtedly true that the realisation of rights requires substantial resources and developing nations can ensure such rights only to the best of their abilities. The existing framework to measure the realisation of human rights (respect, protect, fulfil and promote framework) applicable to state parties is not fully applicable in the context of PRIs. It must be understood that the realisation of such rights at the local level is a progressive exercise. Thus, frameworks measuring the realisation of human rights should be formulated locally.

[105] S. Chopra and J. Pudussery, 'Social Security Pensions in India: An Assessment,' (2014) 49(19) *EPW*, 68.
[106] Nimisha Agarwaland Garvita Mehrotra,'Impact of Panchayati Raj Institutions on Children with Disabilities' (2013) 2 *Politics Gov.* 94.
[107] Priyanshu Gupta and Arnab Roy-Chowdhury 'Harnessing Gram Sabhas to Challenge State Profligacy in Chhattisgarh,' (2017) 52(48) *EPW* 58.

# Protection of Human Rights of Tribal Peoples in Jharkhand

Dr Raju Majhi*

**Abstract**

*Jharkhand is the homeland of tribes in India. Tribals have their own language, religion, traditions, and culture. The tribals are rich in their culture and traditions. Their lives are entirely managed, controlled, and regulated by their own rich culture and traditions. They have their own religion known as 'SARNA'. Tribals are nature-lovers and each and every festival is dedicated to nature only. The state is rich in minerals, like coal, iron, uranium, and copper. There are dense forests also. These tribal people's human rights are violated in many ways. Displacement, human trafficking, naxalism, poverty, education, and lack of proper rehabilitation are the major issues that cause gross violation of human rights in Jharkhand. Besides the many international efforts for the protection of tribal peoples' rights like the Indigenous and Tribal Peoples Convention, 1989, and the United Nations Declaration on the Rights of Indigenous Peoples, 2007, there are various national and local legislations like the Fifth Schedule, PESA, Chhota Nagpur Tenancy Act, 1908, Santhal Pargana Tenancy (Supplementary Provisions) Act, 1949, The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006, Tribal Advisory Council, Tribals Self-governance systems, etc., are available which aim to protect the rights of tribal peoples in Jharkhand. Unfortunately, despite having various laws on paper it is experienced that there are gross violations of the human rights of tribal peoples in Jharkhand. Against this background, the paper aims to examine thoroughly the reason why there is gross violation of the human rights of tribal peoples as well as non-recognition of their rich culture, traditions, languages, and religion in Jharkhand.*

**Keywords**: Tribal peoples, human rights, international instruments, rehabilitation, etc.

The present paper deals with the human rights of tribal people in the State of Jharkhand. To discuss in detail, it is divided into the following parts:

I. Introduction

II. Concept and Meaning of Human Rights

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III. Protection of Human Rights of Tribal People under International Instruments
IV. Protection of Human Rights of Tribal Peoples under the Constitution of India
V. Traditional Panchayat Systems which Protect the Rights of Tribal Peoples in Jharkhand
VI. The Important Enactment that Protects the Human Rights of Tribal Peoples in state of Jharkhand
VII. Massive Violation of Human Rights of Tribal Peoples in Jharkhand
VIII. Conclusion and suggestions

## I. Introduction

Jharkhand state was carved out of the southern part of Bihar on 15 November 2000 on the occasion of the birth anniversary of Bhagwan Birsa Munda. Jharkhand shares its border with the states of Bihar to the north, Uttar Pradesh and Chhattisgarh to the west, Odisha to the south, and West Bengal to the east. The city of Ranchi is the state capital and Dumka is the sub-capital, while Jamshedpur is the largest and the most significant industrial city of the state. The state has an area of about 79,000 square kilometres, and is one of the smallest states in India in terms of area, and consists of several administrative units. The population of Jharkhand is 33 million, of which 76 percent live in rural areas and the balance of 24 percent live in urban areas, in accordance with the Census of India 2011, making it the 13th most populated state in India. The state makes up about 2.7 percent of the country's total population. Jharkhand holds the sixth rank in terms of the Scheduled Tribe (ST)[1] population among other Indian states. It has thirty-two Tribal groups, major among them being Santhal, Munda, Oraon, and Ho. Eight out of thirty-two tribes of Jharkhand fall under the Primitive Tribal Group (PTG).[2]Their lives are closely associated with nature as they eke out their livelihoods from the natural environment— streams, trees, plants, animals, etc. The two notable features of Jharkhand are its high proportion of Scheduled Tribes population, which is about 28 percent against an all-India average of eight percent, and a high percentage of area under forest cover which is about 29 percent against the Indian average of 23 percent. It is also very pertinent to mention here that each and every tribal group has its own rich culture, traditions, languages, rituals, and festivals. They are not idol worshipers. They worship nature and their religion is popularly known as 'SARNA'. Their religion is not recognised by the government, which results in these tribal peoples not being in a position to put 'SARNA' as their religion during the Census.

[1] Article 366 (25) of the Constitution of India defines Scheduled Tribes as "such tribes or tribal communities or parts of or groups within such tribes or tribal communities as are deemed under Article 342 to be Scheduled Tribes for the purpose of this Constitution".

[2] Among Scheduled Tribes, there are certain tribal communities that have declining or stagnant populations, low levels of literacy, pre-agricultural levels of technology, and are economically backward. Seventy-five such groups in 17 States and one Union Territory have been identified and categorised as Primitive Tribal Groups (PTGs).

It is a long-time demand of tribal peoples to recognise 'SARNA' as their religion, but it is not recognised even today when, they have their tribal Chief Minister in the State and tribal President in the country. They have high expectations from the State and Central Governments that their culture, tradition, language, and religion will get proper recognition and respect like others.

The State is rich in minerals, like coal, iron, uranium, and copper. There are dense forests also. However, the state is surrounded by grave issues concerning its tribal population. Displacement, human trafficking, naxalism, poverty, education, and lack of proper rehabilitation are the major issues that cause gross violation of human rights in Jharkhand. Besides the many international efforts for the protection of tribal peoples' rights like the Indigenous and Tribal Peoples Convention, 1989, and the United Nations Declaration on the Rights of Indigenous Peoples, 2007, there are various national and local legislations like the Fifth Schedule, PESA, Chhota Nagpur Tenancy Act, 1908, Santhal Pargana Tenancy Act (Supplementary Provisions) Act, 1949, The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006, Tribal Advisory Council, Tribals' Self-governance systems, etc., which aim to protect the rights of tribal peoples in Jharkhand. Besides this, there is gross violation of human rights of tribal peoples in Jharkhand. Scheduled Tribes face a wide variety of human rights violations. These range from individual violations of civil and political rights—such as killings and illegal detentions—to widespread violations of social, economic, and political rights, including mass displacement and multiple forms of social discrimination. Against this background, the paper aims to examine thoroughly the reason why there is gross violation of human rights of tribal peoples as well as non-recognition of their rich culture, traditions, languages, and religion in Jharkhand.

## II. Concept and Meaning of Human Rights

Going further, it is pertinent to discuss the concept and meaning of human rightsand the same is discussed in this segment. In ancient times, human rights were known as natural rights. Natural Rights were recognised by the monarchs everywhere in the world. Magna Carta, 1215, Petition of Rights, 1628, Bill of Rights, 1689, Act of Settlement, 1701, and Crown Proceedings Act, 1947 in the United Kingdom recognised the natural rights of citizens.[3] The concept of Human Rights, as we hear today, is of recent origin. It emerged from the Post-Second World War International Covenants and Conventions. The first documentary use of the expression 'human rights' is to be found in the Charter of the United Nations, which was adopted after the Second World War in San Francisco on 25 June 1945.The United Nations General Assembly on 10 December 1948, by adopting the Universal Declaration of Human

[3] S.S. Dhaktode, *Human Rights and Indian Constitution: Dr B.R. Ambedkar's Enduring Legacies*, (2nd edn. Bhashya Prakashan, Mumbai, 2014), p.84.

Rights, took concrete steps by way of formulating the various human rights. It was to be followed by an International Bill of Rights, which could be binding on the covenanting parties. The Universal Declaration of Human Rights was not a legally binding Covenant and the United Nations had no machinery for its enforcement. The deficiency was sought to be removed by the United Nations General Assembly by adopting on 16 December 1966 two Covenants for the observance of human rights: (i) The International Covenant on Civil and Political Rights and (ii) The International Covenant on Economic, Social and Cultural Rights. Both of these Covenants came into force in December 1976, after the requisite number of member states ratified them. The Covenants are, therefore, legally binding on the ratifying states. India is a party to the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social, and Cultural Rights, adopted by the General Assembly of the United Nations. The human rights embodied in the aforesaid Covenants stand substantially protected by the Constitution.

In general understanding, human rights are inherent to all human beings, regardless of race, sex, nationality, ethnicity, language, religion, or any other status. Human rights include the right to life and liberty, freedom from slavery and torture, freedom of opinion and expression, the right to work and education, and many more. Everyone is entitled to these rights, without discrimination. In other words, human rights are seen as those minimal rights that human beings are entitled to by the virtue of being human beings, irrespective of any other consideration.[4] Every individual must have some rights against the State or other public authority by virtue of his being a member of the human family and such rights are 'human rights'. Human rights are the rights that entitle mankind to a decent, civilised life in which the inherent dignity of each human being will receive respect and protection. Above all, human rights are fundamental to our nature and in the absence of these rights, we cannot live as human beings.[5] All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.[6]'Human rights' means the rights relating to life, liberty, equality, and dignity of the individual guaranteed by the Constitution or embodied in the International Covenants and enforceable by courts in India.[7]After discussing the general concept and meaning of human rights, it is relevant to throw light on international covenants, declarations, and resolutions that specifically protect the human rights of tribal peoples.

[4] Debi Chatterjee, 'Human Rights in India, Introducing the Subject' in Amit Bhattacharyya & Bimal Kanti Ghosh (eds), *Human Rights in India — Historical Perspective and Challenges Ahead,*(Setu Prakashani, Kolkata, 2017).

[5] A.N. Sen, *Human Rights* (3rd edn., Sri Sasi Law Publications, Law Publishers Faridabad, Haryana, 2012).

[6] Universal Declaration of Human Rights, Article 1.

[7] The Protection of Human Rights Act, 1993, Section 2(d).

## III. Protection of the Human Rights of Tribal People under the International Instruments

### (i) International Labour Organisation (ILO) Convention No. 107

International Labour Organization Convention No. 107 of 1957 is the binding international instrument. This Convention was adopted by the International Labour Organization Conference at its Fortieth Session in Geneva on 26 June 1957 and entered into force on 2 June 1959.India was among the first few countries to ratify[8] this in 1958. Articles 11 to 14 of the Convention deal with the provisions concerning the land right of indigenous peoples. It proclaims that the right of ownership, collective or individual, of the members of the populations concerned over land that those populations traditionally occupy shall be recorded.[9] Further, it states that the indigenous populations shall be removed without their free consent from their habitual territories except in accordance with national laws and regulations for reasons relating to national security, or in the interest of national economic development or of the health of the said population. When removal is necessary as an exceptional measure, they shall be provided equal measure of land or compensation as they prefer. They shall be compensated for any resulting loss or injury.[10]It also guarantees that the procedures for the transmission of rights of ownership and use of land which are established by the customs of the populations concerned shall be respected, within the framework of national laws and regulations, in so far as they satisfy the needs of these populations and do not hinder their economic and social development.[11]Finally, it directs that national agrarian programmes shall secure to the populations concerned treatment equivalent to that accorded to other sections of the national community with regard to: (a) the provision of more land for these populations when they do not have the area necessary for providing the essentials of a normal existence, or for any possible increase in their numbers; (b) the provisions of the means required to promote the development of the lands which these populations already possess.[12]

### (ii) International Labour Organisation (ILO) Convention No. 169

The Convention No. 107 of 1957, however, was revised by the ILO Convention No. 169 of 1989 (Convention Concerning Indigenous and Tribal Peoples in Independent Countries). The Convention states that "governments shall respect the special importance for the cultures and spiritual values of the peoples concerned of their

[8] 27 Countries have ratified ILO Convention No. 107 of 1957: Angola, Argentina, Bangladesh, Belgium, Bolivia, Brazil, Colombia, Costa Rica, Cuba, the Dominican Republic, Ecuador, Egypt, EI Salvador, Ghana, Guinea-Bissau, Haiti, India, Iraq, Malawi, Mexico, Pakistan, Panama, Paraguay, Peru, Portugal, Syria and Tunisia.
[9] ILO Convention No. 107 of 1957. Article 11
[10] Ibid. Article 12
[11] Ibid., Article 13(1)
[12] Ibid., Article 14

relationship with the lands or territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship.[13]It also provides for the recognition of the rights of ownership and possession of lands traditionally occupied and recommends adequate legal procedures to be established to resolve land claims.[14] Further, it guarantees the protection of natural resources and the right of indigenous people to participate in the use, management, and conservation of these resources. It also establishes procedures for consultation in the exploration or exploitation of such resources and in the benefits from them.[15]It provides that the people concerned shall not be removed from the lands which they occupy. Where the relocation of these peoples is considered necessary, they must be notified and take their free and informed consent. This Article establishes the right to return to their traditional lands when conditions permit; when such return is not possible, they must be provided with lands of equality and legal status at least equal to that of the lands previously occupied by them. It further provides for full compensation for any loss or injury occasioned by the relocation.[16] It also provides for respect for traditions as regards the inheritance of land. The machinery for consultation in the event of the alienation of their land from the community is specified. The third paragraph of this Article states that: "persons not belonging to these peoples shall be prevented from taking advantage of their customs or of lack of understanding of the laws on the part of their members to secure the ownership, possession or use of land belonging to them."[17]Very importantly, it also declares that "adequate penalties shall be established by law for unauthorised intrusion upon or use of the land of the peoples concerned and governments shall take measures to prevent such offences.[18]

**(iii)Protection of Rights of Indigenous Peoples Related to Tradition, Cultural, Language, Religion, Education, and Development, etc.,**

An important criterion for the identification of indigenous peoples is their culture as a whole.[19] Culture is a complex pattern of social relationships and spiritual values, which gives meaning and identity to a community's life. It is also a source of problem solving in everyday life, through basic concepts inherent in a particular culture. Indigenous groups preserved their own basic conceptions through their cultural values, through centuries, in isolation from other segments of the population. Their encounters with the dominant cultures, however, created serious repercussions for the indigenous and tribal cultures. The Universal Declaration of Human Rights, 1948, contains an express reference to cultural rights. This declaration recognises the "right to culture" in several

[13] International Labour Organisation (ILO) Convention No.169., Article 13.1.
[14] International Labour Organisation (ILO) Convention No.169, Article 14.
[15] Ibid. Article 15.
[16] Ibid., Article 16
[17] Ibid., Article 17
[18] Ibid., Article 18
[19] Martinez Cobo Study, Conclusion, at Para, 380.

places, as when it explicitly states that "everyone, as a member of society" is entitled to cultural rights,[20] "Everyone has the right to freely participate in the cultural ties of the community."[21]Furthermore, the covenant recognises the right of everyone to take part in cultural life. But both the declaration and the covenant refer to "national" cultures and not the indigenous cultures.[22]

The covenant recognises the cultural rights of minorities, which is more relevant for indigenous peoples than the foregoing two instruments. Further, it proclaims that in the States in which ethnic, religious, or linguistic minorities exist, persons belonging to such minorities shall not be denied rights, in the community with the other members of their groups, to enjoy their own culture, to profess and practice their own religion, or to use their own language.[23]

To give special attention to the protection of indigenous peoples' human rights, the United Nations adopted the Declaration on the Rights of Indigenous Peoples[24] in the year 2007. The Declaration states that indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.[25]

It provides the indigenous peoples the right to maintain and strengthen their distinct political, legal, economic social, and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social, and cultural life of the state.[26] It also provides that the indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture and the States shall provide effective mechanisms for prevention of, and redress for: (a) any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities; (b) any action which has the aim or effect of dispossessing them of their lands, territories or resources; (c) any form of forced population transfer which has the aim or effect of violating or undermining any of their rights; (d) any form of forced assimilation or integration; (e) any form of propaganda designed to promote or incite racial or ethnic discrimination directed against them.[27]

The Declaration provides that the indigenous peoples and individuals have the right

[20] Universal Declaration of Human Rights, 1948., Article 22.
[21] Ibid., Article 27.
[22] The International Covenant on Economic, Social, and Cultural Rights, 1966. Article 15
[23] The International Covenant on Civil and Political Rights, 1966, Article 27
[24] United Nations Declaration on the Rights of Indigenous Peoples, 2007 adopted by General Assembly Resolution 61/295 on 13 September 2007
[25] Ibid., Article 4.
[26] Ibid., Article 5.
[27] United Nations Declaration on the Rights of Indigenous Peoples, 2007., Article 5.

to belong to an indigenous community or nation, in accordance with the traditions and customs of the community or nation concerned. No discrimination of any kind may arise from the exercise of such a right.[28]Further, it proclaims that indigenous peoples have the right to practice and revitalise their cultural traditions and customs. This includes the manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature. The states shall provide redressal through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions, and customs.[29]

The declaration further states that the indigenous peoples have the right to manifest, practice, develop, and teach their spiritual and religious traditions, customs, and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use of controlling ceremonial objects; and the right to repatriation of their human remains. It states that the States shall seek to enable the access and or repatriation of ceremonial objects and human remains in their possession through fair, transparent, and effective mechanisms developed in conjunction with the indigenous peoples concerned.[30]Further, it speaks about the rights to the dignity and diversity of their cultures, traditions, histories, and aspirations which shall be appropriately reflected in education and public information of indigenous peoples. It also states that the State shall take effective measures, in consultation and cooperation with the indigenous peoples concerned, to combat prejudice and eliminate discrimination and to promote tolerance, understanding, and good relations among indigenous people and all other segments of society.[31]It also proclaims that the indigenous peoples have the right to practice and revitalise their cultural traditions and customs. This includes the manifestations of their cultures, such as archaeological and historical sites, and literature, and the States shall provide redressal through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious, and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions, and customs.[32]It also provides that the indigenous peoples have the right to manifest, practice, develop, and teach their spiritual and religious traditions, customs, and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains. It states the States shall seek to enable the access and or repatriation of ceremonial objects and human remains

[28] Ibid., Article 9.
[29] Ibid., Article 11.
[30] Ibid., Article 12.
[31] United Nations Declaration on the Rights of Indigenous Peoples, 2007, Article 15.
[32] Ibid., Article 11.

in their possession through fair, transparent, and effective mechanisms developed in conjunction with indigenous peoples concerned.[33]

The declaration speaks about the rights to the dignity and diversity of their cultures, traditions, histories, and aspirations which shall be appropriately reflected in education and public information of indigenous peoples. It also states that the States shall take effective measures, in consultation and cooperation with the indigenous peoples concerned to combat prejudice and eliminate discrimination and to promote tolerance, understanding, and good relations among indigenous peoples and all other segments of society.[34]It also provides that indigenous peoples have the right to determine their own identity or membership in accordance to their customs and traditions. This does not impair the right of indigenous individuals to obtain citizenship in the States where they live. It also states the right to determine the structures and to select the membership of their institutions in accordance to their own procedures of the indigenous peoples.[35]It puts forth that indigenous peoples have the right to promote, develop, and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices, and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards.[36]

According to the declaration, ethno-development is "the extension and consolidation of the elements of its own culture, through strengthening the independent decision-making capacity of the culturally distinct society to direct its own development and exercise self-determination, at whatever level, which implies an equitable and independent share of power." The declaration also expresses its conviction that the ethnic group is "a political and administrative unit, with authority over its own territory and decision-making powers within the confines of its development project, in a process of increasing autonomy and self-management.[37]The indigenous peoples concerned shall have the right to decide their own priorities for the process of development that affects their lives, beliefs, institutions, and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development.[38]

After discussing the international protection of the human rights of indigenous people under various international instruments, it is very important to see what protections are granted to these vulnerable populations under the law of the land, which is the guardian of all the laws. The following passages discuss protection granted under the Constitution of India.

[33] Ibid., Article 12.
[34] Ibid., Article 15
[35] Ibid., Article 33
[36] United Nations Declaration on the Rights of Indigenous Peoples, 2007, Article 34
[37] UNESCO Declaration of Ethno-development, 1981, the document also known as Declaration of San Jose on Ethnocide and Ethno-development, 1981.
[38] International Labour Organization (ILO) Convention No. 169, Article 7.

## IV. Protection of Human Rights of Tribal Peoples under the Constitution of India

The Constitution of India, which came into force on 26 January 1950, is amongst the most comprehensive constitutions in the world. The Indian Constitution is considered a living instrument,[39] one that can be adapted and changed according to the developments in the society and the needs and exigencies of the people. It contains 448 Articles divided into 26 parts and 12 Schedules. The Preamble, Part III of the Constitution consists of Fundamental Rights, Part IV comprises Directive Principles of State Policy, and Part IV(A) contains Fundamental Duties that constitute the human rights framework in our Constitution. The Preamble outlines the basic structure of the Constitution and sets out the aims and aspirations of the people that have been translated into various provisions of the Constitution. It is a declaration of the nature of justice, liberty, and equality that India seeks to secure for all its citizens and the basic type of government and polity to be established.[40]Fundamental rights contained in Part III of the Constitution are enforceable or justiciable rights. This implies that, upon violation or denial of his or her fundamental rights, a citizen is entitled to exercise fundamental rights to constitutional remedy contained in Article 32.[41]

The Constitution of India introduced the term "Scheduled Tribes" and technically defined it. Article 366(25) of the Constitution defines "Scheduled Tribes" to mean such tribes or tribal communities or parts or groups within such tribes or tribal communities as are deemed under Article 342 to be Scheduled Tribes for the purposes of this Constitution. Article 342(1) empowered the President of India to specify the tribals or tribal communities in India. Hence, the President has exercised the power vested in him by virtue of this Article in specifying and identifying various tribal communities in India since 1950 till date.[42]

A splendid task done by the founding fathers of our Constitution is to protect the customary laws of the tribal people in India.[43] Their customs, which form the centre of their life and are mixed with their day-to-day life, have been protected under the Constitution of India. The customs of the tribes have been elevated to the status of law. The definition of law under Article 13(3)(a) includes custom or usage in the territory of India having the force of law.

At the level of the law and policy, tribes in India have been brought to equal footing with the rest of the society."Equality" is the keynote of democratic systems like India. Part III of the Constitution deals with a series of fundamental rights guaranteed to

[39] The Supreme Court has made this clear in a huge number of its judgments; *see* e.g., *I.R. Coelho* v. *State of Tamil Nadu*, AIR 2007 SC 861.
[40] *Kesasvananda Bharti* v. *State of Kerala*, AIR 1973 SC 1461.
[41] South Asia Human Rights Documentation Centre (SAHRDC), *Human Rights and Humanitarian Law, Development in Indian and International Law*, (Oxford University Press, New Delhi, 2008), p. 205.
[42] Constitution of India, Article 366(25).
[43] Ibid., Article 13(3)(a).

citizens. The first and foremost of these is "Equality before Law".[44]

The trilogy of Articles (i.e., Articles 12,[45] 13[46], and 14[47] of the Constitution) … ensures non-discrimination in State action both in the legislative and the administrative spheres in the democratic republic of India.[48] It is evident from the foregoing that Article 14 of our Constitution is a great protection against any form of unfair or unreasonable discrimination, whether legislative or administrative. Equality is further granted in Article 15.[49]The philosophy of equality is further adumbrated in Article 16 which declares that there will be quality of opportunity for all citizens in matters relating to employment or appointment to any office under the State. It further states that no citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence, or any of them, be ineligible for, or discriminated against in respect of any employment or office under the States.[50]Article 19 of the Constitution guarantees six freedoms, while Article 21 guarantees the right to life and personal liberty to all people living in India. Articles 20 and 22 deal with the rights of detainees and arrestees.

The Supreme Court has repeatedly held that the right to legal aid is implicit in Article 21 of the Indian Constitution, which is an important aspect of the right to life and personal liberty. The Legal Services Authorities Act, 1987, which was enacted for the realisation of Article 39A, provides an elaborate machinery for the delivery of legal and to the indigent and needy including the tribal population. It has been made clear that the law is not only to speak justice but also deliver justice and hence, legal aid is an absolute imperative. Legal aid is really nothing else but equal justice in action. Legal aid is, in fact, the delivery system of social justice.[51]As far as the fundamental

[44] The Constitution of India, 1950, Article 14 states that "The State shall not deny to any person equality before the law within the territory of India."

[45] Article 12 defines the State, it says that, in this Part, unless the context otherwise requires, "the State" includes the Government and Parliament of India and the Government and the Legislature of each of the states and all local or other authorities within the territory of India or under the control of the Government of India.

[46] Article 13 speaks that Laws inconsistent with or in derogation of the fundamental rights—(1) All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void.(2) The State shall not make any law which takes away or abridges the rights conferred by this part and any law made in contravention of this clause shall, to the extent of the contravention, be void.

[47] Article 14 provides that Equality before law—The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.

[48] *State of West Bengal* v. *Anwar Ali Sarkar*, AIR 1951 SC 41.

[49] Article 15 provides that "Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth: (i) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.

[50] The Constitution of India, 1950, Article 16(2).

[51] *People's Union for Democratic Rights* v. *Union of India*, AIR 1982 SC 1473.

right against exploitation is concerned, it has been embodied in Articles 23[52] and 24[53] of our Constitution.

It is well known that during the Middle Ages, the accepted motion was that sovereigns were entitled to impose their own religion on their subjects, and those who did not conform to it could be dealt with as traitors.[54]It is this concept that is embodied in Articles 25[55], 26[56], 29[57], and 30[58] of the Constitution. Article 330 of the Constitution of India provides for reservation in the House of People. It also provides reservation of seats to Scheduled Tribes in the Legislative Assembly for every State under Article 332.The Governor is also empowered to deal with tribal areas shown in Parts A and B of the Sixth Schedule of the Constitution.

The Fifth Schedule, Part B, paragraph 4, provides for the setting up of Tribes Advisory Councils for each State having Scheduled Areas and, if the President so directs, also in any State having Scheduled Tribes but not Scheduled Areas, therein, a Tribes Advisory Council consisting of more than twenty members of whom, as nearly as may be, three fourth shall be representative of the Scheduled Tribes in the Legislative Assembly of the State, provided that if the number of representatives of Scheduled Tribes in the Legislative Assembly of the State is less than the number of seats in the Tribes Advisory Council to be filled by such representatives, the remaining seats shall be filled by other members of those tribes. The Tribes Advisory Council shall advise on such matters pertaining to the welfare and advancement of the Scheduled Tribes in the State as may be referred to them by the Governor.

After discussion of the constitutional provisions relating to the protection of human rights of tribal peoples. It is very significant to see the customary laws of various

[52] It provides that Prohibition of traffic in human beings and forced labour—(1) Traffic in human beings and the beggar and other similar forms of forced labour are prohibited and any contravention of this provision shall be an offence punishable in accordance with the law. (2) Nothing in this Article shall prevent the State from imposing compulsory service for public purposes, and in imposing such service the State shall not make any discrimination on grounds only of religion, race, caste, class, or any of them.

[53] It provides that Prohibition of employment of children in factories, etc.— No child below the age of fourteen years shall be employed to work in any factory or mine or engaged in any hazardous industry, mines, or other works.

[54] *People's Union for Democratic Rights* v. *Union of India*, AIR 1983 SC 1490.

[55] It speaks about the freedom of conscience and free profession, practice, and propagation of religion.

[56] It provides the provision for freedom to manage religious affairs.

[57] It provides the protection of the interest of minorities: (1) any section of the citizens residing in the territory of India or any part thereof having a distinct language, script, or culture of its own shall have the right to conserve the same. (2) No citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, language, or any of them.

[58] It provides the right of minorities to establish and administer educational institutions— (1) All minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice.

tribals of Jharkhand through which they regulate themselves.

## V. Traditional Panchayat Systems which Protects the Rights of Tribal Peoples in Jharkhand

Four forms of Panchayat system existed in different tribal regions of Jharkhand.

### (i) Munda-Manki System in Ho Areas

The Munda-Manki system normally has three levels of organisations prevalent, the first level of organisation at the lineage level, the second at the village level, and the third at the inter-village level. However, in some areas, inter-village organisations are weak.In Ho areas, Mundas are the headmen of the village and are subject to the authority of Mankis, who are the heads of inter-village Panchayat (known as Pirs). The post of Munda is hereditary. Some of the Pirs are larger so these are divided into a number of sub-divisions each presided over by a Manki. The British vested these Mundas with the power of collecting revenue and taxes.

### (ii) Parha System in Oraon Villages

There are two types of village heads in an Oraon village, one is a secular head, known as Mahto, who acts on social issues and the other is a religious and sacred head, known as Pahan, who looks into religious matters. The villagers elect the Mahto once every three years. He presides over the village council. The inter-village organisation of the regional Panchayat is known as Parha. The head of the Parha is called Parha-Raja. The number of villages in different Parha organisations varies from region to region.

### (iii) Munda-Manki System

At the lineage level the elder or the lineage head, leads the own lineage people, whereas village head is the Munda. There are two types of inter-village organisations known as Parha and Patti as political and social organisations, respectively. The Khunkhatti area is divided into circles called Pattis. A Patti is a group of villages, generally at least ten or twelve. The Head of Pattis is called Manki. The Patti organisation is again of two types, Bhunhari Pattis and Khuntkhatti Pattis. While Patti organisation is territorial, Parha is based chiefly on the Khilli, i.e., clan.

### (iv) Manjhi-Paragnait System

Santhal law, as it now exists, is not an arbitrary creation of individual Santhals. To command obedience, to exist as a law at all, it must be a collective product, the creation of the tribe itself. If in one sense, it is the highest common factor of recent village decisions it is equally the mature outcome of regional reviews. In giving it a logic and a pattern, each grade of tribal council plays a

part. Santhal law is actually a synthesis of tribal attitudes expressed through a hierarchy of tribal courts.[59]The Santhal justice system is well settled and works in four ties systems, i.e., Manjhi Baisi, Mapanjhi Baisi, Pargana Baisi, and Lo Bir Baisi. In these judicial systems, the apex court is the *lo bir baisi*, while the lowest court is the *Manjhi Baisi*.

After discussing the customary tribal laws of various tribal communities, we now look at some important enactments that were enacted with the aim of protecting the rights of tribal peoples.

## VI. The important enactment that Protects Human Rights of the Tribal Peoples in the state of Jharkhand

### (i) The Provisions of the Panchayats (Extension to the Scheduled Areas) Act, 1996

By way of the Constitution (Seventy-third Amendment) Act, 1992, Part IX was inserted in the Constitution of India. Article 243B of Part IX of the Constitution mandated that there shall be Panchayats at the village, intermediate, and district levels in accordance with the provisions of this Part. Article 243-C provides that the legislature of a State may, by law, make provisions with respect to the composition of Panchayats.

This Amendment[60] of the Constitution mandated that there shall be a Panchayat at the village, intermediate, and district levels in accordance with the provisions of this part.[61] It also provides that the Legislature of a State may, by law, make provisions with respect to the composition of Panchayats.[62] The Constitution clearly identifies the intended beneficiaries in the form of persons belonging to Scheduled Castes, Scheduled Tribes, women, and other backward classes of citizens.[63] Fifty percent of reservations in favour of the Scheduled Tribes in Panchayats at all three tiers is clearly an example of 'compensatory discrimination', especially in view of the fact that the Scheduled Areas under consideration were completely under a separate administrative scheme under the Constitution.[64]

### (ii) Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006

This legislation, known as the Forest Rights Act, is a landmark in the evolution of the Government's attitudes on tribal people and their rights. It attempts not only to correct a "historic injustice" committed by the colonial and postcolonial

[59] W.G. Archer, *Tribal Law and Justice* (Asha Books, Delhi, 2018) p. 21.
[60] The Constitution (Seventy-third Amendment) Act, 1992, Part IX
[61] The Constitution of India, 1950, Article 243B of Part IX
[62] The Constitution of India, 1950, Article 243C
[63] Ibid., Article 243D
[64] As per the Fifth Schedule of the Constitution of India, 1950.

rules but also to vest in forest communities a primary role in sustaining forest ecosystems by restoring their rights as well as their environmental duties. It became active on 31 December 2007, and its implementing rules were issued on 1 January 2008.The law basically grants legal recognition to the rights of traditional forest-dwelling communities, partially correcting the injustices caused by successive forest laws in the 19th and 20th centuries, and it marks a beginning towards giving those communities a public voice in forest and wildlife conservation. It is an Act to recognise and vest the forest rights and occupation in forest land in forest dwelling Scheduled Tribes and other forest dwellers who have been residing in such forests for generations but whose rights could not be recorded. It also aims to provide a framework for recording the forest rights so vested and the nature of evidence required for such recognition and vesting in respect of forest land.[65]Most importantly, the Forest Rights Act provides the provision to recognise the rights of forest dwellers including the conservation of forests and biodiversity.[66]

(iii) **Provisions under the Santhal Pargana Tenancy (Supplementary Provisions) Act, 1949, and Chhota Nagpur Tenancy Act, 1908**

The Santhal Pargana Tenancy Act, 1949, provides for the appointment of village headmen."Village headmen" as per the said Act means that "the person appointed or recognised whether before or after the commencement of this Act by the Deputy Commissioner or other duly authorised officer to hold the office of village headmen whether known as Pradhan, Mastajur, Manjhi or otherwise, but does not include a Mulraiyat".

Similarly, the Chhota Nagpur Tenancy Act provides that the rights and obligations of village headmen are part of the record of rights. These headmen are variously known as Pradhans, Manjhis, Mandals, etc. This Act was enacted with the aim that it is land rights legislation which was created to protect the land rights of the tribal population of Jharkhand, instituted by the British. A major feature of the Act is that it prohibits the transfer of land to non-tribals to ensure community ownership. The Act is listed in the Ninth Schedule of the Indian Constitution; hence, it is beyond judicial review. It can only the repealed by the Parliament.

(iv) **The Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989**

In the year 1989, the Government of India enacted the Scheduled Castes and Tribes (Prevention of Atrocities) Act, in order to prevent atrocities against

[65] The Preamble to the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Right) Act, 2006.
[66] Ibid., Section 5.

the Scheduled Castes and Scheduled Tribes. This Act aims at preventing the commission of offenses by persons other than Scheduled Castes and Scheduled Tribes, to provide for Special Courts for the trial of such offenses and for the relief and rehabilitation of victims of such offenses and for matters connected therewith or incidental thereto. The Act provides a provision for a periodic survey of the working of the provisions of this Act with a view to suggest measures for better implementation of the provision of this Act.[67]

(v) **Wilkinson's Rule**

The Sadar subdivision of Chaibasa, West Singhbhum, and Seraikella areas of Jharkhand from the Kolhan region is where Wilkinson's rule applies. After the failure of the British to subjugate the Ho tribal community in 1834, Thomas Wilkinson, the then Governor General's agent legalised the traditional Manaki-Munda system and debarred the authority of Civil Courts in the Kolhan area. As a part of Wilkinson's Rule, it was agreed that authorities should not interfere with the local administrative system of the tribal community.

## VII. Massive Violation of Human Rights of Tribal Peoples in Jharkhand

Besides the above human rights protected under the various measures nationally and internationally, the situations are quite different. There are massive violations of human rights taking place in different shapes. Some of these are discussed here:

(i) **Human Trafficking**

Human Trafficking is one of the gravest forms of deprivation of human rights and dignity. The Constitution of India, Article 23 has mandated that trafficking in every form is prohibited. The report shows that 55 percent of the migrants belonged to Scheduled Tribes. The trafficking of child labourers is a very common phenomenon due to poverty. It is also reported that there is bride trafficking. Above and over, it is not surprising that the state is facing organ trade trafficking also.[68]

(ii) **Poverty and Hunger**

Jharkhand has a higher rural poverty rate than other Indian states, it is ranked third lowest in the monthly income per capita, and the seventh highest in the number of people living below the poverty line (BPL). Jharkhand is, therefore, regarded as a relatively poor state in India. Jharkhand is one of the most food-insecure and malnourished states in the country. More than 10 percent of the households face seasonal food

[67] The Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989, Section 21.
[68] *See* A Study on Human Trafficking in Vulnerable Districts in India, 2019organised by TISS available at https://wcd.nic.in/sites/default/files/Jharkhand%20pdf.pdf access on 14/09/2023 at 16:06 Hrs.

insecurity.[69]

(iii) **Migration**

Migration is one of the major problems in Jharkhand. It happened due to major development projects, like, mining, minerals, coals, dams, and other projects, which lead to migration. Due to lack of proper rehabilitation, people migrate to other parts of the country in search of their survival and livelihood. The tribals became landless and helpless and it compelled them to leave their homeland and migrate to other places, where they found loneliness and lost their identity because their identity was based on their land only. Once they lost their land, they lost everything. Sometimes it is found that these conditions lead in other directions and the tribal young joined any Naxalite groups in search of their survival.

(iv) **Education**

Education is one of the significant human rights. It plays a vital role in giving the right shape to any society. An educated society helps in nation-building. It must be available to each and every one for their overall development. The education level of Jharkhand is not very good. The students migrate to other states to get their higher education. It seems that the education system is not working properly. As we know, by introducing the National Education Policy 2020, the government intends to promote education in regional languages at the primary level. The tribals have their own very rich literature and script like Santhali script, i.e. Ol Chiki, Ho script, i.e., Barang Chhiti. It requires proper recognition and promotion, so that the tribals can get their primary education in their own mother language.

(v) **Religion**

The tribals have their own religion which is known as 'SARNA' religion. They are not an idol worshipper. They love nature and their religion 'SARNA' is dedicated to nature only. Their Supreme God is 'Marang Buru' which means big mountain. Their God is 'Sinj Chando' means Sun and 'Nind Chando' means Moon. It seems that they worshipped nature and each and every ritual, culture, tradition, festivals are nature friendly. The present world has global environmental problems; the tribal culture, tradition, and religion may help the world community to come out from this crisis. As discussed above, the tribals have had long-time demands to recognise their religion 'SARNA', but it is very unfortunate for the

[69] *See* National Sample Survey Office of India (National Sample Survey Organisation (NSSO), 55th round) available at: https://openjicareport.jica.go.jp/pdf/12183141_02.pdf access on 14/09/2023 at 16:25 Hrs.

tribal peoples that besides they have their own tribal Chief Minister in the state and tribal President in the country, their religion 'SARNA' is not recognised by the government till today.

(vi) **Naxalism**

As we have seen industrialisation, mining, and other development projects lead displacement of the tribal peoples. Lack of proper and appropriate rehabilitation in the state causes naxalism. We found that naxalism is one of the major issues in Jharkhand, but the state is not serious about it to find out its root cause and take necessary actions to get rid of it.

(vii) **Displacement and Rehabilitation**

The land is needed for industrialisation, urbanisation or some public purposes. Acquiring land for development projects without providing for resettlement violates the basic rights of the tribal people, displacing the tribal peoples without providing for their resettlement deprives them of their basic right of occupation of their land which results in several problems like deprivation of their means of livelihood, migration to other places in search of work and living in poor conditions, all of this just goes to show that displacement worsens the current position of the people.

## VIII. Conclusion and Suggestions

From the above discussion, it is clear that there are various human rights available to the tribal peoples and they must be respected and protected by the state. It is the prime duty of the state to protect the human rights of tribal peoples. As we know, India is a signatory of majority of international instruments relating to human rights, which mandates the implementation of all these instruments and protect human rights. Massive violations of human rights are taking place in Jharkhand state, particularly in the context of tribal peoples. The following suggestions can be put forward, which may help to protect human rights of tribal peoples in Jharkhand:

(i) The action regarding human trafficking must be taken up as a serious concern by the State Police Administration, and offenders must be dealt with strictly as specified under the provisions of the law.

(ii) It is one of the most important duties of the state to provide adequate nutritious food to their people. The State government has ample resources, and if these are put to efficient use coupled with the creation of job opportunities for its people, it can result in making them independent and self-sufficient. It will help to eradicate poverty and hunger and protect human rights.

(iii) If job opportunities are created by the state government, people will not migrate to other states in search of employment, and migration will not take place.

(iv) Improvement in the education system is required. The quality of education must be improved. Under the New Education Policy, education must be given in their mother language.

(v) The tribal peoples scriptures like, Ol Chiki, Barang Chhiti and others must get proper recognition by the State and Central government.

(vi) At the earliest possible time, their religion SARNA must be recognised by the government and notified in the Gazette, so that the SARNA religion can be used as a record during the Census. It will not only make them proud but it will help them to protect the global environment.

(vii) It is also very significant that their cultures, traditions, languages, their traditional judicial system must be respected and promoted, which will lead to a new way of life in the world community that is nature friendly.

(viii) Proper rehabilitation must be done by the government wherever displacement is taking place so that people can resettle in a better way.

(ix) The government must respect international instruments which protect the human rights of the tribal peoples. If it is implemented with action, human rights will never be violated and all the demands of the tribal peoples can be met.

In the end, it can be concluded that it is an undeniable and true fact that development is an essential tool for the improvement of peoples' lives. It is also true that it requires land for building, industries, communication, civil infrastructure and services that obviously need land acquisition from citizens, which are traditionally a source of their livelihood. Jharkhand is an emerging state having a large number of Scheduled Tribes and Scheduled Castes and Other Backward Classes population whose socio-economic conditions are not at par with citizens in other states. Therefore, there is an acute need for effective and appropriate legislation and provisions to safeguard the rights and development of the tribal peoples. It is utmost necessary to uplift their socio-economic conditions by providing reasonable compensation and livelihood means, especially to the tribes by diversifying resources for reducing poverty and socio-economy depravities. The government must introduce pro tribal schemes, that may help the overall development of the tribal peoples of Jharkhand. At the same time, it is very pertinent to mentioned here that it can be possible only by protecting the human rights of tribals in Jharkhand.

# Bilateral Investment Treaty Regime and Environmental Justice: The Indian Dilemma

Dr. Santosh Kumar* and Rupak Kumar Joshi**

**Abstract**

*There is an ongoing debate among scholars of international investment law on the conflict between investment protections on one hand and regulatory autonomy on the other. Many states raised the issue of shrinking policy space for legitimate policy objectives. Currently, people of the world are facing a severe environmental crisis. Right from Johannesburg, the environmental concern poses the greatest challenge to the world. Leaders of the world devised various mechanisms over the years to cope with such problems. One such device is the idea of sustainable development which strikes a balance between developmental objectives and environmental objectives. They agree that both must go hand in hand. Climate justice is another mechanism through which the leaders of the world want to achieve environmental justice.*

*Now crisis of international investment law basically does not strike an adequate balance among various objectives. It has failed in its effort to strike a proper balance between environmental objectives and investment protection objectives. Now the question before policy makers is how to draft an International Investment Agreements which strikes adequate balance between the two. It is also acknowledged that a customary rule of police powers is not the safest defence upon which a host state could rely to defend its measures. This paper first discusses the concept of BITs and traces the evolution and development of BITs around the world. It also introduces the global debate over regulatory freedom and the bilateral investment treaty which is going on nowadays. The second part of the paper will focus on the concept of police power doctrine in International Investment Law and the practice and regulatory autonomy of the host state to pursue legitimate policy objectives, which is an essential component of sovereignty. It also analyses the challenges and limitations of police power doctrine with respect to the environmental crisis. Third part of the paper examines the concept of environmental justice with special emphasis on SDGs and climate justice. It also shows the relationship between environmental justice and sustainable*

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*development on one hand and the relationship between environmental justice and climate justice on the other. The fourth part of the paper assesses the limitations of environmental regulatory measures under the police power doctrine. The fifth part finally concludes that it is not safe for the host state to rely on the police power doctrine in its defence. The decisions of the various tribunals are not consistent.*

**Keywords:** BITs, Sustainable Development Goals, ISDS, NPM, Treatment Standard

## 1. INTRODUCTION

Bilateral investment treaties (BITs) often accord protection to covered-investment through various treatment standards like full protection and security clause, fair and equitable treatment clause, national treatment clause, most-favoured nation treatment clause, and the protection against expropriation clause.[1] At the same time, such treaties also contain a non-precluded measure clause which essentially provides defences to the host state's action in violation of these treatment standards. These provisions provide host state with necessary policy space which is required to pursue legitimate public policy objectives. These provisions are like the GATT Art.XX in their ambit and scope. The doctrine of police power in international law also provides certain latitude to the host state to pursue public policy objectives. It emerges from the principle of sovereign equality of states in international law.

India has signed many BITs since 1994 as part of overall strategy for liberalisation, privatisation and globalisation. India is also party to many international environmental conventions.[2] One of the major concerns among the states these days is how to reconcile among different international obligations. States are in a legal as well as a moral dilemma, the reason being, if they try to perform one international obligation it results into violation of another international obligation. One of the ways to avoid these conflicts is to draft the BITs with great caution and circumspection. UNCTAD has many times warned states to include sustainable development goals in their BITs. Despite this fact many states still do not put these goals in their NPM provisions. In face of increasing Investor-State Dispute settlement ISDS claim in India has terminated 77 of its BITs unilaterally after the release of new Indian Model BIT, 2016.[3]The Government of India is facing an unprecedented difficulty in negotiating new BITs with their old partner. However, India has succeeded in signing new BITs with only three countries like Belarus,

[1] M. Sornarajah, *The International Law on Foreign Investment* (5th edn, CUP2021)
[2] Prabhash Ranjan, *India and Bilateral Investment Treaties: Refusal, Acceptance, Backlash* (OUP,2019)
[3] Prabhash Ranjan, 'The Future of India's Investment Treaty Practice: An Important Parliamentary Intervention'[2022] *MJIEL* 112, 125

Brazil and is still in the process of negotiation with 37 countries or blocks.

The concept of environmental justice has undergone various changes over the years. However, consensuses among word leaders has not been reached on the normative content of this controversial idea. Therefore, world leaders have adopted different devices to promote the idea of environmental justice amongst different states at different footings. Among those devices, the ideas of sustainable development and climate justice are of prime importance and India is committed to achieving both.

India along with other leaders of the world formally adopted the resolution titled "Transforming our World: The 2030 Agenda for Sustainable Development" which enunciates 17 SDGs and 169 related targets at the special UN Summit held in New York from 25 to 27 September 2015. It came into force on 1January 2016 and the SDGs are expected to stimulate developmental actions in areas of critical importance such as ending poverty and hunger, providing healthy lives and quality education, achieving gender equality, providing modern energy, promoting sustainable economic growth, reducing inequality, among other goals by the year 2030. As a part of its overall strategy to attain these goals, particularly goal 13, (Take urgent action to combat climate change and its impacts and Ensure access to affordable) and 7(reliable, sustainable and modern energy for all), India has adopted various policy measures for the realisation of the same. Some of which might give rise to the investment claim in the long run.

India also ratified its 2015 Paris agreement on 2 October 2016 and undertook many environmental obligations. These commitments include, decarbonising its economy and keeping global temperature increase "well below" 2 degrees Celsius and to pursue efforts to limit it to 1.5 degrees Celsius by 2030. The cabinet approval of the national green hydrogen mission is a step in this direction. India in order to boost its renewable energy sector has permitted Foreign Direct Investment (FDI) up to 100% through automatic route. At the same time, to smoothen this transition, India — as agreed at COP27— plans to phase down around 81 coal-fired power plants by 2026. However, there is a catch. This laudable objective of decarbonising the economy may face certain challenges under BIT. BIT allows foreign investors to bring claim directly against the sovereign states for the violation of one or more provisions of such treaties. In Europe, specifically, such claims have been brought against some countries like the Netherlands. In 2019, the Netherlands adopted a law prohibiting the use of coal for power generation, aiming at a complete phase out by 2030. In a recently decided case, *Rockhopper* v. *Italy*[4], a British oil firm challenged the decision of the Italian government to ban oil

[4] *Rockhopper Italia S.p.A., Rockhopper Mediterranean Ltd, and Rockhopper Exploration Plc v. Italian Republic* [2033] ICSID Case No. ARB/17/14, Final Award (23 August 2022).

exploration and production within 12 nautical miles owing to environmental and local communities concerns, and was awarded 190 million euro in compensation.[5]

Given this background, this paper focuses on the impact of these regulatory measures on the rights of foreign investors under different Indian BITs signed post new Model BIT,2016. Supposing that these measures result in investment claims, more particularly for the regulatory taking, can a state rely upon the doctrine of police power available under general international law. Paper further examines recently concluded Indian BITs with the central question in mind that whether these investment treaties contain sustainable development goals in their NPM provision and if not, whether India could rely on the police power doctrine in the wake of future ISDS claims. Therefore, formulation of these NPM provisions is crucial for the regulatory autonomy of India as a host state. Draftsman has to strike proper balance amongst various conflict of interests of host state and foreign investors. India's commitment towards sustainable developmental goals might trigger ISDS claim in future due to defective formulation of these provisions in its BITS.

The present study is divided tentatively into five parts. The first part introduces the concept of BITs and traces the evolution and development of BITS around the world**.** It also introduces the global ongoing debate over regulatory freedom and the bilateral investment treaty. The second part of the paper focuses on the concept of police power doctrine in International Investment Law and the practice and regulatory autonomy of the host state to pursue legitimate policy objectives, which is an essential component of sovereignty. It also analyses the challenges and limits of police power doctrine with respect to the environmental crisis. The third part of the paper examines the concept of environmental justice with special emphasis on SDGs and climate justice. It also shows the relationship between environmental justice and sustainable development on one hand and the relationship between environmental justice and climate justice on the other. The fourth part of the paper assesses the limitations of environmental regulatory measures under the police power doctrine. The fifth part finally concludes that it is not safe for the host state to rely on the police power doctrine in its defence. It reiterates that the decisions of the various tribunals are not consistent.

## 2. THE EVOLUTION AND DEVELOPMENT OF BITs AROUND THE WORLD

### 2.1. Meaning and Scope

Since the end of the World War II, countries have been negotiating investment

[5] Prabhash Ranjan and Pushkar Anand, 'Challenges await India in decarbonising its economy' (*Hindustan Times*, 30January 2023) <https://www.hindustantimes.com/opinion/challenges-await-india-in-decarbonising-its-economy-101675002518916.html> accessed 16 August 2023

treaties to establish a global regime for investment. Investment treaties, often referred to as International Investment Agreements (IIAs), are essentially instruments of the law of nations with the help of which a host state makes promises with the other states regarding the treatment of investors and investments from the respective states. It also decides on the procedure regarding execution and enforcement of those promises. As their names suggest, one of the primary goals of investment treaties is to promote and protect investment.[6]

There are three types of international investment treaties. These are (1) bilateral investment treaties (BITs); (2) bilateral economic treaties with investment chapters; and (3) other regional trade agreements with investment chapters involving more than two countries. Bilateral Investment Treaties (BITs) are basically agreements/ treaties between two countries which seek to protect investments made by investors of both countries.[7] BITs protect investments by limiting the host state's regulatory behaviour and preventing undue interference with the rights of foreign investors.[8] These limitations include barring host states from taking investments without just compensation and following due process unless they are in the public interest; requiring host countries to offer fair and equitable treatment (FET) to foreign investment and to refrain from discriminating against it; and allowing profits to be repatriated subject to conditions agreed upon by the two countries. In addition, Bilateral Investment Treaties define what constitutes an 'investment' and who qualifies as an 'investor'.[9] This suggests that BITs only protect those investors and their investments which fall under the definitions of a particular BIT. Today, bilateral investment treaties (BITs) constitute the most significant source of international investment law.

Individual investors have rights under BITs to file cases to settle investment disputes against the host state's sovereign regulatory actions that violate the BIT for monetary compensation. This is referred to as investor-state dispute settlement (ISDS). The ISDS clause in BITs coexists with the State-State Dispute Settlement (SSDS) provisions, which allow contracting parties, i.e. states, to sue each other over the treaty's interpretation or implementation. The mandates of the ISDS and the SSDS are not the same. While ISDS is focused on settling investment disputes between foreign investors and host countries, SSDS is concerned with the interpretation and application of the treaty.[10] Most BITs contain ISDS clauses

[6] Jeswald W. Salacuse, *The Law of Investment Treaties* (1st edn, OUP, 2015)
[7] Ibid.
[8] Rudolf Dolzer, Ursula Kriebaum, and Christoph Schreuer, *Principles of International Investment Law* (OUP 2012);Andrew Paul Newcombe and Lluís Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (KLI BV, 2009)
[9] Ibid.
[10] A. Roberts, 'State to State Investment Treaty Arbitration: A Hybrid Theory of Independent Rights and Shared Interpretative Authority' (2014) 55*Harv Intl L.J.* 1.

that allow foreign investors to file claims against the host state even before local remedies have been exhausted.[11]These ISDS clauses provide foreign investors with written consent to arbitration in the vast majority of BITs.

The ISDS mechanism under BITs assures that states may be held responsible for their use of public power by a third party, namely an international tribunal with authority to assess the host state's actions —whether executive, judicial, or legislative[12].

### 2.2. Evolution and Development

Although the roots of the modern treaty rules on foreign investment protection can be traced back to 1796, when the United States (US) and France signed the first Friendship, Commerce, and Navigation treaty. The era of current investment treaties began in 1959, when Germany and Pakistan signed a Bilateral Investment Treaty that came into effect in 1962[13]. According to Salacuse, Germany took this move because it had lost all of its foreign investment as a result of the World War II humiliation and hence desired to engage in bilateral treaties regulating and protecting foreign investment.[14] Moreover, numerous European nations felt it necessary to safeguard their citizens' investments in their former political colonies, which began attaining political independence in the 1950s and 1960s.[15] Countries were also compelled to engage in BITs due to gaps in customary international law on foreign investment.[16] As Salacuse points out, customary international law provided no guidance on foreign investors' right to make monetary transfers from a host country.[17] Similarly, while customary international law mandated the payment of compensation in the event of the nationalisation of foreign investment, the particular principles governing how this compensation should be calculated was yet to be determined.[18] Bilateral Investment Treaties were designed to spell out the laws on these matters so that any uncertainties on foreign investment protection under international law could be resolved.

The global number of BITs has constantly expanded, from 500 in the 1990s to more than 2200 by the end of February 2022. The increase in the number of disputes between host states and investors, and BITs is directly proportional

[11] Dolzer and Schreuer (n 9) 265. Also see Helnan International Hotels A/S v. Arab Republic of Egypt, CSID Case No ARB/05/19, Decision on Annulment, 14 June 2010, paras 43-57; Generation Ukraine, Inc v. Ukraine, 1CSID Case No. ARB/00/9, Award, 16 September 2003, para 13.4.
[12] Andreas Kulick., *Global Public Interest in International Investment Law* (CUP 2012) 93;*See also*, S.W. SCHILL, *Muttilateralization Of International Investment Law* (CUP 2009)
[13] Dolzer and Schreuer (n 9) 1
[14] Salacuse (n 7) 101
[15] Ibid;*Also see* R Mann, *British Treaties for the Promotion and Protection of Investments* (52 BYIL 1981) 241
[16] Ibid 85.
[17] Ibid.
[18] Ibid.

as evident from the data published by UNCTAD which clearly shows that the number of investment treaty disputes have gone up from approximately 50 in 1996 to 1104 in October 2021.[19]

### 2.3. The Global Debate On Bilateral Investment Treaties and Regulatory Freedom

A country has sovereign right to regulate stems from its authority over its own territory and yet, BITs oblige governments to utilise this sovereign right in accordance with their commitments to protect foreign investors. This brings BITs and the regulatory autonomy of the host country face to face. One might think about the interrelationship between BITs and the regulatory power of the host nation in a variety of ways. For example, one could argue that BITs cause a 'regulatory chill' in the host country.[20] According to this reasoning, the host nation does not exercise its regulatory autonomy because it believes that its measures may breach the BIT, exposing it to a claim from the investor, resulting in a "chilling effect".[21] This hypothesis will be tested by looking into arbitral awards where the host nation had restrained itself from exerting its regulatory authority because it believed the regulation in question would violate the BIT. This idea has been contested on the grounds that host-state authorities are frequently unaware of BITs and the nature of investment disputes likely to sprout from them.[22]It was observed that identifying these conflict creating circumstances is not easy "because they need counter-factual evidence concerning the regulations that would have existed if the putative chilling had not occurred".[23]Itis also argued that when confronted with legal action by foreign investors under the BIT, the host states go back on their words even after adopting regulatory measures which they consider to be in consonance with the BIT.Tienhaara argues for the regulatory chill theory, using examples from NAFTA and Costa Rica.[24] The 'regulatory chill' theory is predicated on the idea that regulators in host countries are well aware of BITs and the kind of challenges that can be filed against them under such international treaties. This assumption, however, is debatable, particularly in the case of underdeveloped nations, where officials are unfamiliar with BITs.[25]

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[19] UNCTAD, 'International Investment Agreements Navigator | UNCTAD Investment Policy Hub' <https://investmentpolicy.unctad.org/international-investment-agreements>accessed 19 April 2023

[20] Kyla Tienhaara, *The Expropriation of Environmental Governance: Protecting Foreign Investors At The Expense of Public Policy* (CUP 2009) 262

[21] JM Bonnitcha, C Brown, K Miles, 'Outline of a Normative Framework for Evaluating Interpretations of Investment Treaty Protections' in C Brown and K. Miles (eds), *Evolution in Investment Treaty Law and Arbitration*(CUP 2011)

[22] J Coe and N. Rubins, 'Regulatory Expropriation and the Tecmed Case: Context and Contributions' in Todd Weiler (eds), *International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law* (Cameron May2005).

[23] Eric Neumayer, *Greening Trade and Investment* (Earthscan 2001) 78

[24] Tienhaara (n 21) 617,626

[25] L. Poulsen, *Sacrificing Sovereignty by Chance: Investment Treaties, Developing Countries and Bounded Rationality* (PhD Thesis: London School of Economics 2011).

This is especially true for countries with little or no experience defending their regulatory actions in the ITA. In other words, if foreign investors have previously challenged a nation's policies under BITs, regulators in that country may begin to internalise BITs in their regulatory power. Even this, however, is dependent on a number of conditions, including whether regulators in underdeveloped nations have the necessary internal technological competence.

'BIT disputes' is another way of thinking about the link between BITs and regulatory authority. According to this interpretation, the host nation applies its regulatory power, uninformed of the consequences of BITs, which the foreign investor challenges under the ITA. As a result, the ITA tribunal will interpret the relevant BIT to determine whether the host country's regulatory measure is valid or not. This will also mean that the way in which the BIT's various clauses are interpreted will finally decide the applicability of the regulatory measures of the host states. As a result, the attention will shift to how the BIT's provisions are framed and whether these provisions strike a balance between investor protection and regulatory power. If an ITA tribunal finds that the host state's regulatory measure is unlawful, the host state will be required to compensate the foreign investor. Paying damages to a foreign investor will drive up the cost of regulation, thereby discouraging the host nation from enacting similar restrictions in the future. The tribunal will not concern itself with the quashing of the host state's regulatory measure; even then the host state will not be willing to carry on with those regulatory measures which are inconsistent with international law, as this could harm the host country's reputation as an appealing investment destination. Furthermore, keeping such a regulatory measure in place may encourage additional foreign investors to challenge it.

In other words, according to this conception, the link between BITs and the regulatory power of the host nation should be seen in terms of the possibility of disputes to be made against the host country for breaching BITs. As a result, the focus here is on gaining a better grasp of the BITs that a particular country has signed.

## 3. DOCTRINE OF POLICE POWER IN INTERNATIONAL INVESTMENT LAW AND PRACTICE

Regulatory autonomy is an essential attribute of sovereignty. Every State has the right to regulate its social, political and economic affairs as an attribute of sovereignty; at the same time, the state gives away a part of its regulatory autonomy by making commitments under a treaty. This right to regulate public interest is recognised in international law as the doctrine of police power. When a state takes regulatory measures to pursue legitimate policy objectives like environmental measures, public health measures, taxation measures etc., it sometimes affects

the economic interest of the domestic as well as foreign investors. A regulatory measure within the legitimate exercise of the State's police power does not tantamount to indirect expropriation even if it may considerably affect foreign investment.[26]

This doctrine of police power is invariably used in international investment law, especially with respect to indirect expropriation, by the states to justify the non-payment of compensation. Many of the ISDS tribunals upheld the doctrine of police power in international investment law while deciding the question pertaining to indirect expropriation, while many other ISDS tribunals expressed doubt over this doctrine. One of the earliest cases decided by the investment tribunal was *Feldman* v. *Mexico,*[27] in which the issue was whether the imposition of certain taxes on the exportation of cigarettes by the claimants amounts to expropriation or not. The Tribunal, in this case, said:

> [G]overnments must be free to act in the broader context of public interest through the protection of the environment, new or modified tax regimes, the granting or withdrawal of government subsidies, reductions or increases in tariff levels, imposition of zoning restrictions and the like. Reasonable governmental regulation of this type cannot be achieved if any business adversely affected may seek compensation, and it is safe to say that customary international law recognizes this.[28]

The Tribunal, in this case, stated that as regards the most important public objectives are concerned, the government should be free to act in that broader public interest. This case sowed the seeds of what in international investment law has been known as the doctrine of police power. The most appropriate articulation or significant pronouncement of the police power doctrine in international investment law was made in a case decided in *Methanex* v. *USA*[29]in 2004. This was in the context of public health measures the US Government adopted to achieve specific public health objectives. In this case, the Tribunal held:

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[26] James Crawford and Ian Brownlie, *Brownlie's Principles of Public International Law* (4thedn, OUP 2019). Ian Brownlie said: "State measures, prima facie a lawful exercise of powers of government, may affect foreign interests considerably without amounting to expropriation. Thus foreign assets and their use may be subjected to taxation, trade restrictions involving licenses and quotas, or measures of devaluation. While special facts may alter cases, in principle such measures are not unlawful and do not constitute expropriation".

[27] *Marvin Feldman v. Mexico* [2002] ICSID Case No. ARB(AF)/99/1, Award (Dec. 16, 2002).

[28] Ibid.103.

[29] *Methanex Corporation v. United States of America,*NAFTA, Final Award (Aug. 3, 2005). <https://jusmundi.com/fr/document/decision/en-methanex-corporation-v-united-states-of-america-final-award-of-the-tribunal-on-jurisdiction-and-merits-wednesday-3rd-august-2005> accessed 3rd April 2023

> [A]s a matter of general international law, a non-discriminatory regulation for a public purpose, which is enacted in accordance with due process and, which affects, inter alias, a foreign investor or investment is not deemed expropriatory and compensable unless specific commitments had been given by the regulating government to the then putative foreign investor contemplating investment that the government would refrain from such regulation.[30]

Methanex tribunal categorically said that the key test for deciding whether a measure constitutes an expropriation or valid non-compensable regulation depends on being taken for a public purpose and through a law backed by due process and non-discriminatory principles. So, according to Methanex tribunal, if the above-stated requirement is fulfilled or satisfied, then those regulatory measures will not amount to expropriation. The only exception to this provision is if the host state commits not to enact such regulatory measures. This differs from the earlier stance that a regulatory measure that constitutes a taking is deemed compensable expropriation, and the existence of a public purpose, for example, merely serves to reduce the amount of compensation. This difference is crucial in preserving the host state's regulatory freedom.

Similarly, it was also recognised by another ISDS tribunal in *Saluka* v, *Czech Republic.* The Tribunal, in this case, held that "[i]t is now established in international law that States are not liable to pay compensation to a foreign investor when, in the normal exercise of their regulatory powers, they adopt in a non-discriminatory manner *bona fide* regulations that are aimed at the general welfare".[31] Salukav tribunal, in a way reiterates police power rule that the earlier tribunals have laid down.

Recently ICSID tribunal in *Philip Morris* v. *Uruguay,*[32]affirmed the rule laid down by the Methanex tribunal. In this case, the issue involves adopting various regulatory measures by the Uruguay government pertaining to preserving public health. The Tribunal said:

> [A]s indicated by earlier investment treaty decisions, for a State's action in the exercise of regulatory powers not to constitute indirect expropriation, the action must comply with certain conditions. Among those most commonly mentioned are that the action must be taken *bona fide* for protecting the public welfare and must be non-discriminatory and proportionate. In the Tribunal's view, the SPR and the 80/80 Regulation satisfy these conditions.[33]

[30] Ibid Part IV-Chapter D-Page 4.
[31] *Salukav Investments BV v. Czech Republic* [2006] Partial Award 255 (Perm. Ct. Arb. 2006).
[32] *Philip Morris SARL, Philip Morris Products S.A. and AbalHermanos S.A. v. Oriental Republic of Uruguay*, [2016] ICSID Case No. ARB/10/7, Award (July 8, 2016).
[33] Ibid 305.

In another recent decision, the Tribunal reaffirmed the rule laid down in Salukav case and established that expropriation does not occur when a bona fide non-discriminatory action is approved through due process for the general welfare.[34]

## 4. ENVIRONMENTAL JUSTICE AND SDGs

Human race is on the verge of a deep and frightening abyss concerning the environment. The ecosystem has been on the losing end in this race of development whether it be with regard to extinction of species or the destruction of planet's climate. The uninhibited activities in the name of economic development which results in irreversible ecological harm has brought about a new geologic era of "Anthropocene".[35] It has catastrophic implications on the regenerative capacity of our life giving mother-nature. The fact is that every person or every state is not equally liable for the resultant annihilation of the environment. Many fragments of society have even chosen to lead a very sustainable lifestyle. But the sad conundrum still remains that those who contributed the least to environmental degradation are the hardest hit when it comes to being exposed to the resultant harm. This phenomenon is one of the components of environmental injustice. Many 'environmental' problems are, by their very nature, problems of injustice.[36]

### 4.1. Environmental Justice

The concept of environmental justice opens discourse about the analysis of competing benefits and burdens of environment and its equitable distribution[37], the recognition of suffering individuals and communities on the basis of political and cultural factors[38,39] and the procedures to be followed in order to bring forth a methodology for participatory mechanisms.[40] Environmental justice actions are expansive and inclusive, so in the same way its definition should also be broad enough to encompass within itself, a wide spectrum of justice so as to not only include individual complaints based distribution but also include within its ambit peaceful community survival.[41]Schlosberg defined environmental justice by basing it on four notions. Firstly, fair distribution of resources of environment and liability for its harm; secondly, gaining individual and community recognition thereby asserting self-respect and autonomy; thirdly, the existence of deliberative and democratic participation; and fourthly, the construction of capabilities among

[34] *WNC Factoring Ltd.*V. *The Czech Republic,* Award (PCAtrib 2017) <hwww.italaw.com/ sites/default/files/case-documents/italaw8533.pdf> accessed 12 November 2022
[35] P. J. Crutzen, 'Geology of Mankind – The Anthropocene' (2002) 415 Nature 23.
[36] Sharachchandra Lele, 'Sustainable Development Goal 6: watering down justice concerns' (2017) 4.4 Wiley Interdisciplinary Reviews: Water e1224.
[37] Michael Walzer, *Spheres of Justice* (University of California Press, 1983) 6.
[38] Peter Taylor, *Respect for Nature* (*Princeton University Press*1986).
[39] Iris Young, *Justice and the Politics of Difference* (Princeton University Press 1990).
[40] David Schlosberg, *Defining Environmental Justice* (Oxford University Press 2007) 25-29
[41] Ibid 5

individuals, groups and non-human parts of nature.[42]

Environmental justice scholars and activists have tried to formulate a four dimensional definition of environmental justice which inculcates within itself distributive justice, procedural justice, corrective justice, and social justice.[43]The distributive justice aspect necessitates the need of fair appropriation among the nations of the positive as well as negative impact of economic activities on the environment.[44] Procedural justice strengthens the democratic ideals of decision-making, i.e., transparency, accountability, and participation in decision-making processes.[45] Corrective justice imposes an obligation on the governments to make compensation for the violation of rights of people and also impose prohibition on harmful activities.[46] Social justice emphasises that the relationship between environmental issues and social and economic justice is so intricate that it is impossible to isolate one from the other.[47] Hence it goes without saying that environmental injustice cannot be studied and perfected in isolation without making allowances for various determinants like economic disparity and exploitation, race and gender subordination, marginalisation of weaker sections like children, elderly, immigrants, and persons with disabilities, dispossession of indigenous peoples from their natural habitat, and the domination of the Global South by the Global North.

Although various human rights treaties do not expressly recognise environmental justice as a human right, yet, the demand for environmental justice is still advocated through the language of human rights. Keeping at par with these demands, national and international tribunals have conceded that environmental degradation violates various existing human rights, including the right to life, health, food, and water; the procedural rights to information, participation, and access to justice; the collective rights of Indigenous peoples to their ancestral lands and resources; and the right to a healthy environment which has already been inculcated in the National laws by the legislatures of most of the States.[48]In order to achieve environmental justice it is imperative to recognise, protect and punish transgressions against environmental human rights.

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[42] Ibid.

[43] R. R. Kuehn, 'A Taxonomy of Environmental Justice' (2000) 30 *Environmental Law Reporter* 10681

[44] D. French, 'Sustainable Development and the Instinctive Imperative of Justice in the Global Order' in D. French (ed.), *Global Justice and Sustainable Development* (Leiden 2010) 8

[45] R.R. Kuehn (n 9) 10688.

[46] Ibid.10693–10698

[47] C. G. Gonzalez, 'An Environmental Justice Critique of Comparative Advantage: Indigenous Peoples, Trade Policy, and the Mexican Neoliberal Economic Reforms' (2011) 32 University of Pennsylvania *Journal ofInternational Law* 728.

[48] L. Kotzé, *Global Environmental Constitutionalism in the Anthropocene* (Oxford University Press, 2016)

The sustainable development goals (SDGs) have the potential to lead environmental justices and injustices.[49] The SDGs are highly relevant to environmental and social justice, and vice versa.[50]

### 4.2. Environmental Justice to SDG

The right to development was promoted by the Global South as a manifestation of their right to self-determination.[51] Before the adoption of the SDGs in 2015, there was no juncture where right to development and sustainable development could converge, as there was a lack of system which could harmonise them with each other.[52]

Sustainable development has emerged as the guiding principle for environmental management[53] and a potential alternative to the prevalent paradigm of economic development.[54] Defined as "development that meets the needs of the present without compromising the ability of future generations to meet their needs,"[55]the concept, initially, required a balance between two pillars: economic growth and environmental protection.[56] A third pillar, social development, was added in the World Summit for Social Development 1995.[57]The Johannesburg Declaration 2002 on Sustainable Development[58] affirmed "collective responsibility to advance and strengthen the Interdependent and mutually reinforcing pillars of sustainable development — economic development, social development and environmental protection — at the local, national, regional and global levels."[59]

Sustainable development encompasses the integration of economic development, environmental sustainability, and social inclusion. The environment is basic to

[49] Mary Menton and others, 'Environmental justice and the SDGs: from synergies to gaps and contradictions' (2020) 15 Sustainability Science 1621
[50] Ibid. 1626
[51] *See* K. Mickelson, 'The Stockholm Conference and the Creation of the South–North Divide in International Environmental Law," in S. Alam, S. Atapattu, C. G. Gonzalez, and J. Razzaque (eds.) *InternationalEnvironmental Law and the Global South* (Cambridge University Press 2015) 109
[52] UN General Assembly, Transforming Our World: The 2030 Agenda for Sustainable Development, Oct. 21, 2015, UN Doc. A/RES/70/1
[53] D. Hunter, J. Salzman, and D. Zaelke, *International Environmental Law and Policy* 5th edn, (Sunderland, UK: Foundation Press, 2015) 114
[54] UN World Commission on Environment and Development, *Our Common Future, Report of the World Commission on Environment and Development* (Oxford University Press,1987)
[55] Ibid. 43
[56] Ibid.
[57] UN, Report of the World Summit for Social Development, Copenhagen, Mar. 6–12, 1995, UN Doc. A/CONF.166/9 [Copenhagen Declaration].
[58] UN World Summit on Sustainable Development, Johannesburg Declaration on Sustainable Development, Sept. 4, 2002, UN Doc. A/CONF.199/20.
[59] Ibid. para. 5.

any sustainable development approach.[60]The State's sovereign right to exploit their own natural resources is not absolute and the rights must be exercised in accordance with legal principles, taking into consideration the potential negative consequences on both human rights and the environment.[61]

Considering the indispensable role of ecosystem services in sustaining both human society and the economy, it is imperative that environmental conservation serves as the fundamental basis for all developmental endeavours.[62]

India, the world's third largest energy consumer and fifth largest economy, finds itself in a contentious position under the classification of 'developing countries', as specifically evident in negotiations regarding promises to mitigate climate change.[63]

In 2015, India formally submitted its first set of international climate commitments, known as its Nationally Determined Contribution (NDC), to the United Nations. The 2015 NDC comprised eight goals; three of these have quantitative targets upto 2030 namely, cumulative electric power installed capacity from non-fossil sources to reach 40%; reduce the emissions intensity of GDP by 33 to 35 percent compared to 2005 levels and creation of additional carbon sink of 2.5 to 3 billion tonnes of CO2 equivalent through additional forest and tree cover. India at COP26 pledged to zero out its greenhouse gas emissions by the year 2070.

In 2022, India formally submitted its second set of international climate commitments to the United Nations which include two primary targets for 2030. One is to reduce emissions per unit of gross domestic product, or GDP, by 45%, relative to the year 2005. The other is to increase "non-fossil" electricity — solar, wind, nuclear and hydro-power — to half of the country's electricity capacity. It also formally stated the goal of net zero by 2070.

## 5. ASSESSING THE LIMITS OF ENVIRONMENTAL REGULATORY MEASURE UNDER THE POLICE POWER DOCTRINE

In the light of the above rulings, it is now established that there is a police power doctrine in international investment law and practice; however, the next question is whether there is any limitation on this power under international investment law. In other words, if regulatory measures adopted in pursuance of international environmental commitments/obligations affect the economic value

[60] Dawe and K. Ryan, "The Faulty Three-Legged-Stool Model of Sustainable Development" (2003) 17 Conservation Biology 1459.
[61] P. Birnie, A. Boyle, and C. Redgwell, *International Law and the Environment* (3rd edn, Oxford: Oxford University Press, 2009) 115
[62] D. Hunter (n 19) 8
[63] J Dreze& A Sen, *India: Development and participation* (2nd edn, Oxford: Oxford University Press, 2002)

of the investment, will it amount to expropriation or non-compensable legitimate regulation? According to prevailing jurisprudence on the topic, it is well settled that a bona fide non-discriminatory regulation adopted by the State following due process will not amount to expropriation even if it affects the investment of a foreign investor.

The doctrine of police powers mainly invokes in matters concerning the protection of the environment, health and safety. However, the criteria to meet the essential requirement of police power doctrine is very high. In many decisions, as quoted above, the tribunals have elaborated on the conditions for the application of the doctrine but ultimately concluded that they were not met in the instant case. Right from the beginning, the application of the doctrine was problematic. Tribunals did not apply the doctrine consistently and that is why there is no consistency amongst the different ISDS tribunals. The ICSID tribunal in *Santa Elena* v. *Costa Rica,*where dispute arose out of expropriation of landed property by the host state in order to conserve its biodiversity, firmly maintained that:

> [E]xpropriatory environmental measures — no matters how laudable and beneficial to the society as a whole —are, in this respect, similar to any other expropriatory measures that a state may take in order to implement its policies: where property is expropriated, even for environmental purposes, whether domestic or international, the state obligation to pay compensation remains.[64]

This position was also vigorously maintained in *Metalclad v. Mexico*[65]. Without mentioning the police powers of the state, tribunals reaffirmed the "sole effect doctrine". According to this doctrine, "if a governmental measure effectively deprives the owner of control over his property or substantially affects its commercial value, compensation is required even if the state may purport to have adopted the measure in the exercise of its police powers."[66]

Again in *Chemtura* v. *Canada*[67]*,* where the claim arose out of the ban imposed upon the claimant company which was manufacturing Lindane (an agricultural pesticide), the tribunal concluded that:

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[64] *Compañia del Desarrollo de Santa Elena S.A.* v. *Republic of Costa Rica* [2000] ICSID Case No. ARB/96/1, Final Award (17 February 2000) Para. 72.

[65] *Metalclad Corporation v. The United Mexican States* [2000] ICSID Case No. ARB(AF)/97/1, Final Award (30 August 2000). Paras. 85, 89,103,106-107 and 111.

[66] Viejo Heiskanen, 'The Contribution of the Iran-United States Claims Tribunal to the Development of the Doctrine of Indirect Expropriation' (2003) 3 Int'l L.F. D. Int'l 176,177

[67] *Chemtura Corporation* v. *Government of Canada* [2010] UNCITRAL Final Award (2 August 2010) <www.italaw.com/sites/default/files/case-documents/ita0149_0.pdf>accessed on 12 Sep. 23.

> [I]rrespective of the existence of a contractual deprivation, the Tribunal considers in any event that the measures challenged by the Claimant constituted a valid exercise of the Respondent's police powers. … [T]he PMRA [Pest Management Regulatory Agency] took measures within its mandate, in a non-discriminatory manner, motivated by the increasing awareness of the dangers presented by lindane for human health and the environment. A measure adopted under such circumstances is a valid exercise of the State's police powers and, as a result, does not constitute an expropriation.[68]

In other words, tribunals consider that the exercise of the State's police powers precludes not only the obligation to pay compensation but disqualifies the measure concerned as expropriation. This case has firmly established doctrine of police power in the jurisprudence of international investment law. However, as argued by Alain Pellet,the beneficial impact of the doctrine must not be overestimated due to the following reasons: (a) it is of no use for dealing with several aspects of deprivation of property; (b) the absolute thesis according to which a taking of property decided under the regulatory power of the State is not an expropriation with the consequence, that in all cases no compensation is due is hardly tenable; and (c) for the time being the conditions for the application of the doctrine unfortunately remain uncertain.[69]

As discussed in the second part of the paper, the *Philip Morris* case read one more condition for the application of the doctrine of police power in international investment law and practice. As per the tribunal the measure adopted, the State must be proportionate to benefit sought to be achieved by such measures. The existence or extent of this doctrine is still unclear, especially when the applicable investment treaty does not specifically address this principle.

## 6. ENVIRONMENTAL CONCERNS IN NPM PROVISIONS

Non-Precluded Measures (NPM) in a BIT provides the regulatory autonomy to the host state to pursue legitimate public policy objectives. It is also known as a general exception clause which generally starts with words like 'nothing in this agreement precludes the host state...'. It gives flexibility to the parties of the treaty to deviate from the substantive obligation in certain circumstances. Given the debate on the conflict between investment protection and the host state's right to regulate, the NPM clause in BITs is a useful device that allows the host state to adopt measures for the fulfilment of non-investment objectives without attracting

[68] Ibid.265-266

[69] Alain Pellet, 'Police Powers or the State's Right to Regulate' in Meg Kinnear (eds), *Building International Investment Law – The First 50 Years of ICSID* (Kluwer Law International, 2016) 630

any liability under international investment law.[70] A NPM provision has two main elements: first, the permissible objectives, and second, the nexus requirement. Permissible objectives include those objectives mentioned in the NPM clause for which the host state can deviate from its treaty obligations. Nexus requirements means the objectives sought to be achieved through the measures in question must have direct nexus with the permissible objectives otherwise it would be considered violation of the substantive provisions of the treaty.[71]

NPM provisions or general exception clause is mentioned in Article 32 of the Indian Model BIT, 2016. This Article contains general exceptions with a long list of permissible objectives, which includes protection of public morals;[72] maintenance of public order;[73]*protection of human, animal or plant life or health;*[74] *protection and conservation of the environment*;[75] to ensure compliance with domestic laws that are not inconsistent with the provisions of the treaty.[76] The inclusion of so many permissible objectives will provide India with much needed sufficient policy space. Another interesting aspect of the general exception clause is that it contains 'necessary' as the only nexus requirement for all the above mentioned permissible objectives. The text for the 2016 Indian Model BIT also clarified in its footnote 6, that in considering whether a measure is necessary, the tribunal shall take into account whether there was no less restrictive alternative measure reasonably available to the country or not. It requires balancing or proportionality test which requires balancing different factors like the importance of the regulatory value pursued, the contribution made by the challenged measure to the regulatory value and the restrictive effect of the measure on the investment. In this sense, it will help in reducing arbitral discretion.

Upon analysis, it becomes clear that if India adopts any measures in order to achieve various commitments that have been undertaken under different international environmental law, India would defend her measures under the NPM clause. It would be better if India specifically mentions the climate goals as well as SDGs in their long list of permissible objectives. In *RAKIA* v. *India*[77] disputes stem from certain actions of the Government of Andhra Pradesh that allegedly have adverse impact on RAKIA's investment in India. The Andhra Pradesh Government has rescinded contract with RAKIA due to stiff opposition from the tribal groups of

[70] Prabhash Ranjan (n 3) 1979
[71] Ibid. 198
[72] Indian Model BIT, 2016, art 32.1 (i)
[73] Ibid.
[74] Ibid.Article 32.1(ii).
[75] Ibid. Article 32.1(iv).
[76] Ibid.Article 32.1(iii).
[77] *Ras-Al-Khaimah Investment Authority (RAKIA)* v. *Republic of India,* [2022] UNCITRAL, PCA, Final Award.

Jerrela bauxite deposits. Basically the said bauxite deposits fall entirely within the area of reserve forest and notified tribal area. However, this particular case was based on India-UAE BIT (2013) which did not provide for the express permissible objectives (protection and conservation of environment) under its NPM clause. Due to this reason the AP government did not mention environmental purposes for annulling the contract. But after 2016, the Indian Model BIT problem has been sorted out by mentioning a long list of permissible objectives under NPM provisions. Now, India has secured a much needed policy space through elaborate list of subjects in its NPM clause.

## 7. CONCLUSION

The environmental crisis has put both states and international investors in an untenable position. Many corporations have collaborated with governments to mitigate the climate's human cost significantly, while others have filed claims against the host states. Reliance on the doctrine of police power is not free from doubt, the reason being some tribunals did not subject this doctrine to substantial deprivation test while the others subjected this doctrine to various other tests like proportionality. *Philip Morris* tribunal, which subjected police power doctrine to the proportionality test, basically favours investment protection over regulatory autonomy. This proportionality test has its origin in human rights jurisprudence. This test was propounded in order to strike a balance between the impacts of regulation on human rights. Its use in the investment treaty regime is questionable. When states adopt regulation and especially environmental regulation, it is always for achieving its most sacrosanct public welfare objective. If such regulation is bona fide and non-discriminatory, it should not be considered expropriation, even if it indirectly affects the economic value of the foreign investment.

The proportionality test or substantial deprivation test basically weighs the impact of the measure with the public purpose objectives sought to be achieved by the measure. However, it is a challenging task to ascertain the benefit of the measure in economic terms. Applying the proportionality test would defeat the very purpose of attracting more and more foreign investment for achieving sustainable development. Simultaneously, arbitral tribunals failed to articulate a commonly accepted notion of measures which qualify as a police power doctrine. So, it is difficult to anticipate in advance which measure will fall under police power doctrine and which measure will not.

States like India adopt various measures in order to achieve various goals under 'The 2030 Agenda for Sustainable Development' and under the 'Paris Agreements on climate' that may fall under the police power doctrine, provided such measures must be adopted bona fide, non-discriminately following due process. India has

already shown its intent by adopting the new model BIT in 2016 without subjecting its police power to the proportionality test or substantial deprivation test. This intention is further strengthened by signing Joint Interpretative Notes (JIN) with countries like Bangladesh and Columbia as a part of their respective BIT. Both JINs contain the following notes as a part of the expropriation provision:

> [L]egislative, executive, regulatory, administrative or judicial measures or actions of general applicability that are designed or applied to further a Contracting Party's public policy objectives shall not constitute expropriation. These public policy objectives include, but are not limited to:
>
> a) protection or improvement of natural resources and the environment;
>
> b) protection and improvement of human, animal or plant life or health . . .

When India is faced with an investment treaty, these notes will provide a guide to the investment tribunal while interpreting police power doctrine.

# Enforcement of Human Rights through Duty Jurisprudence: A Perspective

Anurag Deep*

**Abstract**

*In this article, the author proposes to discuss that duty jurisprudence is not only restricted to our ancient Indian philosophy, but the framers of the Constitution had in mind this ancient thought of duty first and right next. Duty in its typical Indian transcendental sense is a promise to do something [unconditionally]. The preamble itself is an embodiment of various duties. Part III invokes duty on the State in the form of various restrictions, negative and positive obligations to ensure human rights in the form of fundamental rights, which is enforced unconditionally. With reasonable restrictions, duty is also imposed on citizens to honour restrictions. Moreover, a few fundamental rights like Article 15(2), 17, 23, impose duty not only on the State but also on Citizens which shall be punishable under Article 35 to insist how significant and inviolable this duty is. They indeed are exceptional legal instruments to enforce basic human rights. Now, the Kaushal Kishore case[2023] makes Article 19 also a duty on citizens. Human rights are also enforced through Part IV, which makes it a "duty of the State to apply" even if it is not independently enforceable by the court. Part IVA is the express embodiment of this duty jurisprudence. This research paper explores the idea of duty jurisprudence in the Constitution and also evaluates to what extent the stakeholders were able to realise the dream of architects of the Constitution in enforcing human rights through duty jurisprudence.*

## I. Perspective

It is often said that "rights and duties are two sides of a coin"[1] because the observance of the duties "creates the proper environment for the enjoyment of rights."[2] The 'duty jurisprudence' is a term which is not frequently used in the academic discourse. Among the western legal thinkers and schools, there are only a few like the French jurist Leon Duguit who advances the concept of duty. "His objective was to supplant the traditional system of legal rights by a system which would recognise only legal duties. The only right which any man might be said to

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[1] National Commission to Review the Working of the Constitution (NCRWC) Report, (2002), 1.3.1.

[2] Address to the nation by the President of India, Shri Ram Nath Kovind on the eve of the Republic Day 2022, para 5,available at file:///C:/Users/comp52/Downloads/speechpdf.pdf

possess under this theory is the right to always do his duty."[3]Duty jurisprudence is often understood as if it is about the duties of citizens only and in this sense, it has a limited meaning. In the Indian context, the year of 1976 is said to be the launching pad for duty jurisprudence when the Constitution of India recognised fundamental duties under Article 51A.[4] However, it will be an unfair assessment because the constitutional architecture has recognised the duties of citizens under various provisions since the beginning of 1950. These duties can be traced in the "solemn resolve" under the Preamble,[5] horizontal approach under the express provisions of fundamental rights[6] and the recent judicial pronouncement by the Constitution Bench in *Kaushal Kishore* case.[7] Classical approach of duty imposed on States and new approach of duty on the individual can ensure a welfare state. It is rightly said that the "advancement and protection of human rights is our pious duty."[8] This terminology (duty jurisprudence) has further liberal meaning and scope for this paper. It includes the duty of State and non-state actors (like private sectors, groups and individuals).However, it is desirable to begin with conceptual understanding of human rights.

## II. Human Rights

Human rights literally mean the rights of human beings. Basic human rights are inherent, inalienable, innate rights which are co-existent with the life and liberty of a person. They are essential for human dignity. Jurisprudentially speaking, they owe their origin to natural law and, therefore, are called as natural rights. As natural law has divine origin, they are the mandates of superior order and, therefore, also termed as rights recognised by higher law. Universality of nature makes human rights universal in nature. At the same time, they are interdependent as well as interrelated. The origin of human rights may be traced in the philosophy of treating people good or bad.

### Human Rights as Positive Rights

People may treat each other 'well' or 'badly'. If they are motivated by love, generosity, gratitude, co-operation, and creativity they treat others 'well'.On

[3] Edgar Bodenheimer, "The Revival of Natural Law-Section 36: Duguit's Legal Philosophy" in *Jurisprudence —The Philosophy and Method of Law,*pg-147-148 (Harvard University Press,1974).

[4] Ten duties were incorporated through the 42nd amendment of the Constitution. This amendment was very controversial because it was brought in when India was under an emergency imposed by Mrs Indira Gandhi. Most of the opposition leaders were inside jail, the press was under great pressure and democracy was compromised. Later on,one more duty was added in the 86th Amendment Act, 2002.

[5] "WE, THE PEOPLE OF INDIA, having solemnly resolved…"

[6] Horizontal approach means the fundamental rights are available against individuals also like those under Article 15(2), 17, 23 etc.

[7] *Kaushal Kishore* v. *State of UP* (2023)4 SCC 1.

[8] Speech of Mr. Justice Arun Mishra, Chairperson, NHRC, India, Human Rights Day function, 2021 *available at* https://nhrc.nic.in/sites/default/files/Human%20Rights%20Day%20Speech-%20HCP_1.pdf

the contrary, if they are driven by hatred, greed, envy, competitiveness, and destructiveness, they will treat others 'badly'. Deeply buried somewhere in that observation are the origins of what are today called 'human rights'.[9] In the beginning, these rights were mere moral precepts without positive contents, in the sense that they could not be enforced as legal rights. This is why the term Human Right was not known to the legal world prior to the 20thcentury. Western thinkers trace the origin of human rights in the Magna Carta, 1215. "By declaring the sovereign to be subject to the rule of law and documenting the liberties held by "free men", the Magna Carta provided the foundation for individual rights in Anglo-American jurisprudence." King John "had a basic desire to give good government to his subjects."[10] Such desire was the recognition that the sovereign had certain "duties" though not mandatory and individuals could claim certain rights, subject to the desire of the king. In the process of the development of the concept of Human Rights, the first stage was the inclusion or recognition of these rights in various national documents/Constitutions.[11] The ground, therefore, was prepared for the launching of an international movement for the development of norms and standards for universal recognition. First came the fundamental freedom for which the constraints and limitations were on the State authority like non infringement of liberty without authorities of law. Such limitations conceive the idea of duty of states. Afterwards the concept of positive rights under the name of Human Rights matured. For example, provision for food so that no one dies because of hunger. Such positive rights inaugurated the idea of positive duties. As a later development, the rights came to be classified with 'generational approach'. First generation rights are civil and political rights. The State has a binding duty to fulfil it and the State cannot argue lack of resources. For example, primary education is free of cost.They were followed by second generation rights as social, economic, and cultural rights. Many of these rights-imposed duties on states are non-binding in nature. The State can argue lack of funds. Like higher education to all free of cost[12] or Covid-19 test of anyone free of cost.[13]Subsequently, the third generation of human rights, variously termed as solidarity rights and collective rights have emerged. They include the right to development, right to the environment. The duties of the Stateare hybrid in nature because they are a blend of binding and non-binding duties. This generational approach is useful only as a broad classification and not straight jacket pigeon-holes.

One of the challenges with human rights discourse is the definitional dilemmas.

[9] Paul Sieghart, *The International Law of Human Rights*, p xix, (Claredon Press, Oxford,1984).
[10] https://www.britannica.com/topic/Magna-Carta.
[11] 1689, Bill of Rights-UK, 1789 French Revolution Documents, 1791-USA Amendments-1-10-Bill of Rights.
[12] *J.P. Unni Krishnan* v. *State of Andhra Pradesh*, AIR 1993 SC 2178.
[13] *Shashank Deo Sudhi* v. *Union of India*(2020) 5 SCC 132:2020 SCC OnLine SC 358.

There are hardly any international instruments, which define human rights precisely. India has taken a lead by providing a statutorydefinition of human rights under the Protection of Human Rights Act, 1993. It is as under:[14]

> "Human rights" means the rights relating to life, liberty, equality, and dignity of the individual guaranteed by the Constitution or embodied in the International Covenants and enforceable by courts in India.

This description is unique because even the fundamental documents like UDHR, ICCPR, etc. do not dare to define human rights though they provide some idea of what they mean by human rights and further enumerate it under various provisions. Before 1993, India recognised human rights in the form of guaranteed and unguaranteed rights in the Constitution of India. Part three of the Constitution contains fundamental rights and part four contains directive principles of state policies. The human rights in the Indian Constitution extend to various other provisions of the Constitution of India like the Right to Property under Article 300A, rights under Article 301-308. There are a number of statutes that also recognise and enforce human rights, like the Right to Information Act, 2005I, Mahatma Gandhi National Rural Employment Guarantee Act (MGNREGA), Protection of Children from Sexual Offences Act, 2012, etc. Hundreds of State and Union enactments impose duties and confer rights on individuals and States. The rights-duty discourse in modern India is influenced by the western theories.

## III. Western Philosophy

In the western philosophy States led by Kings were presumed to be above any duty. The King was supposed to be the representative of God. His command was the law. The reason, reasonableness, necessity, proportionality or morality of his command was out of question. Among the analytical positivists, one of the most influential thinkers, John Austin advocated the "imperative character of law",which is conceived as the "command of the sovereign."[15] "The correspondence ascertained, his duty is to obey."[16] Whatever he did for his subjects,was not because of any obligation but a type of mercy bestowed on the subjects. The concept of rule of law was hardly known.The idea of "King can do no wrong" is a later reflection of this very philosophy. In other words, the King was above law, indeed he was the law. His decisions used to be arbitrary and therefore atrocious. The welfare of people and fairness was the no or low priority.

[14] Sec.2(1)(d) of Protection of Human Rights Act,1993 of India.

[15] Austin considered only general commands and not all commands. Edgar Bodenheimer, "Analytical Positivism-Section 25:" in *Jurisprudence —The Philosophy and Method of Law,*pg-97 (Harvard University Press,1974).

[16] Benjamin N Cardozo, *The Nature of Judicial Process*, 14, (1920 Yale). https://archive.org/details/natureofthejudic008454mbp/page/n25/mode/2up?q=GENERATIVE. The statement was in a different context.

The protection, preservation and promotion of the interest of the King was the top priority. The rights of people were at the mercy of the State functionaries. They were trampled and violated aggressively. Therefore, in the later period, the thinkers and architects of the Constitution were focussed on rights. The 'rights jurisprudence'caught the attention of scholarsand volumes have been devoted by various experts which pushed it at the centre of intellectual discourse. The international instruments also advanced this rights regime for individuals.[17] Rights discourse led to the obligationof the State which was debated and determined at various levels. However,the idea of 'duty of individuals' remained peripheral in the western thought process. Western thinkers trace the origin of rights in the Magna Carta, 1215. "By declaring the sovereign to be subject to the rule of law and documenting the liberties held by "free men", the Magna Carta provided the foundation for individual rights in Anglo-American jurisprudence." King John "had a basic desire to give good government to his subjects."[18] Such desire was the recognition that the sovereign had certain "duties" though not mandatory and individuals could claim certain rights, subject to the desire of the king. The regime of the Kings and colonial rulers which were devoid of any mandatory duty towards individuals were oppressive and suppressive in nature. This has developed a great desire for rights. The State was almost restriction-less and the rights of individuals were the casualty as constitutional development insisted on the rights of individuals and restrictions on States only. The US Constitution is the pioneer in the constitutionalisation of the rights-duty dynamics being the oldest known written Constitution. The first ten amendments of the US Constitution, often called the Bill of Rights of 1781 comprised only rights of individuals and restrictions on States. The State was made duty bound not to infringe or abridge the fundamental rights. The duty jurisprudence is expressly limited to imposing obligations on States only. The Constitution of the USA does not contain any express restrictions on the rights of people. Restrictions on the rights of individuals are a form of duty on the individuals. In other words, the constitutionaljurisprudence does not include the citizen in its duty regime. This is why the fundamental rights in the USA are said to be a "near absolute" model of the rights regime. The duty is for the States only and not for the individuals. The restriction on individuals means duties of individuals. Such restriction was invented by the Supreme Court of the USA through various judicial pronouncements. For example,in *Schenck*[19](1919) the Supreme Court propounded the theory of "clear and present danger". In other words, an individual is obliged not to create clear and present danger against the state interest. It was the beginning of an implied duty which attracted various

[17] UDHR, Article 29 is among rare provisions in which "Everyone has duties to the community in which alone the free and full development of his personality is possible".
[18] https://www.britannica.com/topic/Magna-Carta.
[19] 249 U.S. 47 (1919).

criticisms as well as celebrations.If this implied duty is breached, it could attract criminal action besides civil remedies. The rights regime was restored to considerable extent in the case of *Brandenburg*.[20] One can do whatever s/he likes pleasant or unpleasant, but s/he has the duty to see that the conduct does not sleep into "imminent lawless action." There was again a shift in *Holder* v. *Humanitarian Law project.*[21] The fundamental right to join an organisation comes with the duty not to join a terrorist organisation. It shall attract penal consequences.

**Rights Regime: The Initial Bottlenecks**

However, the journey of the "rights regime" in the west was not a journey of fairness and equality because the right seekers never wanted the right for all.The Magna Carta was worried for "free men" and not all human beings. The French Declaration of Rights of *Man*,1789, intended to consider 'man' as more deserving of protection. The US Constitution of 1787 did not propose fundamental rights because they were uncomfortable with the notion that 'women' can also get rights similar to a 'man'. It was more troublesome for them to think that even 'blacks and slaves' will have similar rights *vis a vis* those of whites and masters. Under the pressure of the agrarian States, the USA passed the first ten amendments in 1791. But even then, it did not contain the right to equality.The reason was the hard and ugly fact that the drafters of the Bill of Rights had reservations for women, blacks and slaves. If rights are provided to them equally, it would impose duty on States and other powerful bodies which were dominated by whites. In 1868, the fourteenth amendment of the US Constitution incorporated the equal protection clause. The State has a duty to treat everyone equally. However, the duty to treat black and white as equals was understood as formal and not substantive. In *Plessy* v. *Ferguson*,[22] the US Supreme Court held that if fares of trains, other facilities are the same, it does not amount to violation of equality. This is known as "separate but equal" doctrine. If we contextualise it with duties, the black passengers had the duty not to occupy the seats made for whites (and *vice versa*). Ultimately, in *Brown* v. *Board of Education of Topeka*,[23] the aberration was rectified. Such separate and exclusive seat arrangement was declared violative of the principle of equal protection clause. The Constitution of India makes elaborate provisions of right to equality under Article 14 to 18, right against exploitation (Article 23-24) as the architects of the Constitution were very well aware of the problem because of the *Dred Scott case,*[24] *Plessy* v. *Ferguson,*[25] etc. Our Constitution declared in

[20] Brandenburg v. Ohio, 395 U.S. 444 (1969)
[21] 561 U.S. 1 (2010).
[22] 163 U.S. 537 (1896).
[23] 347 U.S. 483 (1954).
[24] *Dred Scott* v. *Sandford*,60 U.S. (19 How.) 393 (1857). A slave cannot be free even if his owner died. African Americans were not and could never be citizens of the United States. The judgement was 7:2.
[25] 163 U.S. 537 (1896).

1949 what *Brown* had achieved in 1954. Indian wisdom has been more conscious of duties and rights since ages.

## IV. Duty under Indian Philosophy

The ancient Indian philosophy, centred around the idea of duty and rights of individuals, did not get wide recognition. The Indian norm of a duty-oriented society automates the fulfilment of rights of others. It is argued that there is no need to enforce rights once duties are taken care of. Ancient Indian wisdom was more advanced. The Indian system was regulated by *dharma*. उक्तवानस्मिदुर्बुद्धिंमंदंदुर्योधनंपुरा।यतःकृष्णस्ततोधर्मोयतोधर्मस्ततोजयः [26][where there is dharma, there is jaya (victory)] was the controlling idea of governance. The meaning was that wherever there is righteousness, there is victory.The concept of *dharma* was more basic than that of law because law was made by human beings, but *dharma* was the command of almighty.There were scriptures and statements which mandated that the King is duty bound in various respects.He was also bound by law. *Brihadaranyaka Upanishad* states that "Law is the King of Kings, far more powerful and rigid than them; nothing can be mightier than Law, by whose aid, as by that of the highest monarch, even the weak may prevail over the strong."[27]The wisdom of *Gita* कर्मण्येवाधिकारस्तेमाफलेषुकदाचन।माकर्मफलहेतुर्भूर्मातिसङ्गोऽस्त्वकर्मणि [28] is a spiritual inspirational mandate for the Kings and their subjects. In other words, unlike ancient western philosophy, in India the ruler as well asthe ruled both were bound by duties. Both were treated equally before law, and both were bound by law. Though India had the established concept of "dharma and duty" the architects of the Constitution did not follow the ancient roots but relied more on modern development of the rights regime. Initially, the interim report on the fundamental rights presented by Sardar Patel contained a very broad collection of civil, political, economic, cultural, and educational rights. However, it was finally divided into fundamental rights and Directive Principles of State Policies. Fundamental rights imposed binding and enforceable restrictions on states. The State is duty bound not to infringe fundamental rights subject to the reasonable restrictions provided in the Constitution itself. On the other hand, Directive Principles of State Policies expressly impose that "it shall be the *duty* of the State to apply these principles in making laws". The rights-duty dynamics has been condensed in the case of *Supriyo @ Supriya Chakraborty* v. *Union of India*(2023)popularly known as *Homosexual Marriage* judgement as under:[29]

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[26] The current emblem of the Supreme Court of India contains this verse. *Mahabharat* 13.153.39. The full verse is उक्तवानस्मिदुर्बुद्धिंमंदंदुर्योधनंपुरा।यतःकृष्णस्ततोधर्मोयतोधर्मस्ततोजयः॥ 39 ॥

[27] *Brihadaranyaka Upanishad*, 1-4.14.

[28] कर्मण्येवाधिकारस्तेमाफलेषुकदाचन।माकर्मफलहेतुर्भूर्मातिसङ्गोऽस्त्वकर्मणि।।2.47।।

[29] Writ Petition (Civil) No. 1011 of 2022, decided on Oct. 17, 2023. It was a Constitution Bench decision. Para 154 of Dr D.Y. Chandrachud, CJI. Though he was in minority on the issue, on the principle of categorisation of rights as stated in the passage all judges share the same sentiments.

Fundamental rights are characterized as positive rights and negative rights. In fact, some draw a distinction between fundamental rights (Part III) and the Directive Principles of State Policy (Part IV) by arguing that the former consists of negative rights and the latter of positive rights. In constitutional theory, negative rights are understood to involve freedom from governmental action whereas, positive rights place a duty on the State to provide an individual or a group with benefits which they would not be able to access by themselves.

In case the fundamental rights are violated by States, Article 32 and Article 226 imposes a duty on the Supreme Court and the high courts to protect fundamental rights.[30] In case of Directive Principles of State Policies, Section 37imposes a duty on judiciary not to enforce it through writ independently.

## V. Constitution of India: A blend of Rights Duties Dynamics

The inclusion of Part III in the Constitution of India demonstrates the western idea of rights-based model led by the US Constitution. However, there was a crucial difference. The Indian model of rights regime has not followed the US model blindly. It has learnt from the experiences of the jurisprudential developments of the US. While the express provisions of the US Constitution present a "near absolute" model of rights, the Constitution of India does not copy it. The architects of the Constitution led by Dr Ambedkar designed a model which can be termed as the "Rights with Restrictions" model. Restrictions on the fundamental rights of individuals which can be imposed by the State under the umbrella of the Constitution of India. Whenever restrictions are expressly imposed, it is the duty of the citizen to honour the restrictions. Article 19(1) recognises six basic human rights in the form of fundamental rights. At the same time, it prescribes restrictions on the citizen under Article 19(2-6). In other words, the right to freedom of speech and expression comes with duties not to speak in an irresponsible manner because it may lead to legal consequences. The consequences of not observing these duties are not limited to civil consequences only. They can lead to penal consequences under statutes like the offence of defamation under Section 499 or the Contempt of Court Act, 1971.Indeed, with the passage of time, the fundamental rights were further restrictedand duties in the form of restrictions were enhanced in the Constitution. The very first amendment of the Constitution in 1951 placed two

[30] Article 32. Remedies for enforcement of rights conferred by this Part.
(1) The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed.
(2) The Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, whichever may be appropriate, for the enforcement of any of the rights conferred by this Part.

more restrictions under Article 19(2).[31] After 12 years of the republic, Article 19(1)(a) was further restricted through the sixteenth amendment of the Constitution in 1963.[32] Not only the restrictions were increased, but the right was also reduced. In 1978, the right to property was taken out of part III(fundamental rights) and placed in another part of the Constitution.[33] This has diminished the value of the right to property as human rights. Such dilution was essential as the States experienced various obstacles in the discharge of their obligations under part four of the Constitution of India. The rights model in India was different from the USA and was further restricted because the fundamental rights can be suspended during Emergency except Article 20 and 21. Freedom of speech and expression is automatically suspended.

**Horizontal presence of duty**

The Constitution of India contains duties through its horizontal presence in the fundamental right part. In order to understand it, it is pertinent to reproduce from another Constitution Bench pronouncement, i.e., *Kaushal Kishore* v. *State of UP*[34] which is as under:

> Wherever Constitutionalrights regulate and impact only the conductofthe Government and Governmental actors, in their dealings with private individuals, they are said to have "*a vertical effect*". But wherever Constitutional rights impact even the relations between private individuals, they are said to have "*a horizontal effect*".

The concept of fundamental rights emerged and was concretised to impose restrictions or duties on States, which is called vertical application as above, like right to equality under Article 14. The State is duty bound to ensure "equality before the law or the equal protection of the laws". However, the Constitution of India has been amended to ensure that the private educational institutions are also duty bound to make arrangements for "the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes or the Scheduled Tribes,"[35] or "any economically weaker sections of citizens"[36] while taking admission of the students. It was a duty of the State only but the same has been extended to private sectors. The duty jurisprudence has received expansion.

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[31] Security of State, friendly relations with foreign States, public order, incitement to offence were added by 1st Constitutional Amendment.

[32] The 16th Amendment of the Constitution added 'sovereignty and integrity of India' as one more reasonable restriction.

[33] Part XII- Finance, Property, Contracts and Suits, Chapter IV, Article 300A.

[34] (2023)4 SCC 1. It was a Constitution Bench judgement on various issues on freedom of speech and expression. One of the issues was whether Article 19 is available against non-state actors or not. The Supreme Court held that it is available also against non-state actors.

[35] rticle 15(5),the Constitution (Ninety-third Amendment) Act, 2005.

[36] Article 15(5), the Constitution (One Hundred and Third Amendment) Act, 2019.

The original Constitution of 1950 was also conscious that a duty to ensure non violation of fundamental rights is not restricted to the State only. Article 15(2), 17, 23, of the Constitution of India is speaking illustrations of recognition of duty jurisprudence when an individual can also be held responsible, and a writ can also be issued against him under Article 32 or 226. A brief description of these Articles is desirable to appreciate the rights duty dynamism which is as under:

**Article 15: Duty of Individuals**

> Article 15 (2) —No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to—
>
> (a) access to shops, public restaurants, hotels and places of public entertainment; or
>
> (b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public.

If A1 is denied access to shops, hotels etc. because of his faith or caste, the shopkeeper, the hotel manager shall be responsible under this provision. Article 15(2) imposes an enforceable constitutional duty on them that no one is denied the use of services. These days there are social media posts which provoke people of one faith to deny access to services to people of other faiths. It is not only a violation of human rights but also a breach of fundamental rights. It is also noticeable to note that any breach of duty by any individual under Article 15(2) can be remedied by following means:

a. the aggrieved can go to the Supreme Court under Article 32 or High Court under Article 226 for declaration of his fundamental right and human rights and the courts will be duty bound to issue suitable writs,

b. the aggrieved can also get compensation under constitutional tort which can be granted by the Supreme Court and the High Courts,

c. the aggrieved can also get compensation under the law of tort through civil procedure,

d. the aggrieved can proceed in criminal court also against the individual violator of fundamental rights under suitable provisions of IPC[37] or special legislation.

[37] 153B. Imputations, assertions prejudicial to national integration.
(a) Whoever, by words either spoken or written or by signs or by visible representations or otherwise.
(b) Asserts, counsels, advises, propagates or publishes that any class of persons shall, by reason of their being members of any religious, racial, language or regional group or caste or community, be *denied, or deprived of their rights* as citizens of India, shall be punished with imprisonment which may extend to three years, or with fine, or with both.

Similarly, people from LGBTQ+ cannot be denied access to shops, public restaurants, hotels and places of public entertainment because such action would amount to discrimination on the basis of sex. In *NALSA* v. *Union of India*[38] the Supreme Court has declared that Trans Gender (TG) can also claim rights under Articles 14 and 15.

**Article 17**

This provision is also applicable against individual, i.e., non-state actors. The words "practice in any form is forbidden" indicate that it is the duty of everyone not to practice untouchability. What is a unique feature of Article 17 is that it criminalises the conduct of untouchability in the provision itself. The architects of the Constitution did not leave it to the discretion of legislature (Parliament or State legislature) to enforce any breach of duty. This may be noticed that caste-based remarks are already addressed under various provisions of IPC, viz Sections 153A, 153B, 499, 505.Under Article 35, the Parliament is duty bound to make special penal law to punish the conduct of untouchability. It is also noticeable that criminal law is in concurrent list where Union Parliament and State Legislature both can make legislation. However, Article 35 takes out the jurisdiction of the State Legislature and exclusively mandates that the "Parliament shall have, and the Legislature of a State shall not have, power to make laws… for prescribing punishment for those acts which are declared to be offences under this Part." Indeed, such provision is not in conformity with the rules of federalism, but the makers of the Constitution were more worried for uniformity and seriousness in the enforcement of the duty not to practice untouchability. It is further corroborated by the fact that the Parliament was asked to pass legislation "as soon as may be". This leads to the inferences that for the enforcement of certain rights and breach of duties the framers of the Constitution did not want to put off the matter for the future legislature to decide. In pursuance of this mandate, the Parliament passed the Untouchability (Offences) Act, 1955, which became the Protection of Civil Rights Act, 1955 through amendment in 1976. The Scheduled Tribes (Prevention of Atrocities) Act, 1989 is also passed.

**Articles 23-24**

Articles 23 and 24 come under the sub head "Right against Exploitation" which is also a horizontal application of fundamental right. It is available against State or non-state actors.[39] Article 23 also criminalises the conduct and mandates the Parliament to make

[38] (2014) SCC 438. It was a division bench judgement.

[39] 23. Prohibition of traffic in human beings and forced labour.—(1) Traffic in human beings and begaar and other similar forms of forced labour are prohibited and any contravention of this provision shall be an offence punishable in accordance with law.

(2) Nothing in this Article shall prevent the State from imposing compulsory service for public purposes, and in imposing such service the State shall not make any discrimination on grounds only of religion, race, caste or class or any of them.

24. Prohibition of employment of children in factories, etc.—No child below the age of fourteen years shall be employed to work in any factory or mine or engaged in any other hazardous employment.

suitable laws as discussed above in context of Article 17. Trafficking in human being, forced labour was already punishable under various provisions of IPC like Section 370. However, to fulfil the constitutional mandate, the Parliament passed the Immoral Traffic (Prevention) Act, 1956 (ITPA). Article 23(2) presents a unique reflection of duty jurisprudence because it permits "compulsory service for public purposes". Article 24 is also applicable against individuals, factory owners, mine managers, etc.

**New Dimension of Article 19: Emergence of Duty**

Unlike Articles 15(2), 17, 23 and 24, Article 19 is never considered as a fundamental right against individuals. It was always thought that freedom of speech and expression is available only against State and not against non-state actors. However, *Kaushal Kishore* v. *State of UP*[40] held that "A fundamental right under Article 19/21 can be enforced even against personsotherthan the State or its instrumentalities." This is a further and horizontal extension of Article 19. Freedom of speech and expression is one of the most important fundamental rights. It is also a human right under various international institutions like UDHR and ICCPR. The Internet revolution has transformed this human right. Social media has given this right to all, rich and poor. It has given a new description to creativity. At the same time, it has reduced the difference between responsible and irresponsible speech. Social media is being used to protect human rights as well asto violate human rights. It has put pressure on powerful bodies to protect human rights. Aggrieved persons take to twitter when FIR is not registered, or investigation is not conducted properly. At the same time, rumours andfake news have led to killing of innocent people, riots, people taking law in their hand. YouTube is being used for radicalisation against caste or religion or race, etc. This is a gross violation of human rights. After *Kaushal Kishore* judgement, this human right can be enforced against individuals also. This will make individuals more responsible. Now the eight restrictions under Article 19(2) can be applicable against individuals also. A defamation by A1 against A2 will also cause a constitutional wrong besides civil and criminal wrong. In many cases, criminal law cannot give remedy because it is applicable only in more serious cases. Now constitutional remedies may be sought in these cases. It may be a new beginning of enforcement of duties of individuals.

## VI Absence of Fundamental Duties: Possible Reasons

Despite the awareness about the significance of duties and the duty oriented ancient Indian foundation, the architects of the Constitution did not provide space for fundamental duties of citizens in the original Constitution. Such absence was also noticeable because the Constitution is detailed enough to cover various aspects. It could have easily incorporated one more page.Following reasons may be attributed for this absence:

[40] (2023)4 SCC 1. It was a Constitution Bench judgement on various issues on freedom of speech and expression. One of the issues was whether Article 19 is available against non-state actors or not. The Supreme Court held that it is available also against non-state actors.

1) Moral reason—The makers of the Constitution were freedom fighters. They spent several years in jail.They performed their duties towards the nation, towards society They forgo their personal amenities, sacrificed their family life and pleasure. According to them, duties are something which are inherent in a human being. They need not be written. If someone comes at home, we ask our children to do *pranam* (a form of greetings). We do not write a charter of duties at our home. These things travel from generation to generation and flow automatically. These moral duties are part of human civilisation. they are universal in nature. Indians are more passionate about moral duties which are cultivated because of a joint family system. Therefore, they thought that these are inherent amongst us and will come from the values given at home.

2) Education — They also thought that the education imparted at school will also inculcate duties. In other words, informal education at homeand formal education at schools will impart this value called duties. Such values are also widely acknowledged and not likely to be controversial. Therefore, there was no need to write this.

3) Constitution as basic norm only—Third reason may be the idea that a Constitution is something which involves only essential, important aspects of the life of a country which may create some disputes. In order to reduce disputes, the provisions are required to be written. The Constitution is not made to write everything.

4) Horizontal application—The makers of the Constitution were aware that Part III of the Constitution, i.e., fundamental rights do contain duties of citizens. Article 15(2), 17, 23,24, etc. which are horizontal applications as discussed above include mandatory duties of citizens.

5) Reasonable restriction as duties—The express restrictions under Article 19 or Article 25 also impose duties on the individuals. In the original Constitution Article 19(2) contained six limitations on individuals. Article 25 contains around ten restrictions. Every such limitation or restriction is a duty on the individuals.

6) Preambular promises as implied duties— In the Preamble 'we solemnly resolve'. When we resolve, it means we make a promise. Every such promise is as good as a duty. *Ramcharitmanas* says "रघुकुल रीत सदा चली आई प्राण जाई पर वचन न जाई." (Promises are made to be kept, even at the cost of life. Promises are meant not to be broken). We have given our promise at the very first page itself. We have promised to the entire nation. The promise is not to the government. It is not by the government. It is by "we the people". We solemnly resolve "secure to all its citizens: JUSTICE, social, economic and political; LIBERTY of thought, expression, belief, faith and worship; EQUALITY of status and of opportunity".

It is written. we the people have given it to ourselves. The responsibility is not of the government. The responsibility of the government is in Part III and other parts. Preamble talks about our own responsibilities. It is our responsibility that we fulfil the promise we have made. We promised to each other justice, liberty and equality. To fulfil our promise is nothing, but our duty. National Commission to Review the Working of the Constitution (NCRWC) Report(2002)[41] also suggests:

> 1.2.6 Secondly, the duties were spelt out by the Preamble to the Constitution which contains the ideals and aspirations of the people of India and the dedication of Constitution for fulfilling such ideals and aspirations. We have solemnly resolved to secure to all the citizens of India justice, liberty, equality and fraternity. Whatever is needed to achieve these goals, is our obvious duty to perform – is a dictate of the Preamble.

Therefore, maybe, this was the reason there was no need of mentioning Fundamental Duty when the Constitution was drafted.

## VII. Fundamental duties under the Constitution: Background

Then why were fundamental duties provided if the framers of the Constitution thought it is not desirable? The answer rests in the context and history. As the background has a direct nexus with rights-duty dynamics, a brief elaboration is desirable.

### Emergency: The Decline of Moral and Constitutional Duties

The High Court of Allahabad through Jagmohan Lal Sinha, J. has declared the election of Indira Gandhi, as Member of Parliament as illegal and void because of corrupt practices on June 12, 1975.[42]She was the Prime Minister ofIndia. Justice Sinha has demonstrated the highest level of courage and his commitment to constitutional duty. He indeed sacrificed his career also. Had he delivered a verdict in favour of Indira Gandhi, he must have been elevated to the Supreme Court. This path breaking judgement led to three significant but sad developments to establish that during hours of crisis how does the three wings of the State discharge their duties. *Firstly*, to secure her post of Prime Ministership, the Government of India declared emergency under Article 352 on the ground of internal emergency on June 25, 1975. The union executive issued this proclamation breaching the procedure provided in the Constitution.[43]Another proclamation of emergency was

[41] A Consultation Paper on EFFECTUATION OF FUNDAMENTAL DUTIES OF CITIZENS, https://legalaffairs.gov.in/sites/default/files/%28V%29Effectuation%20of%20Fundamental%20Duties%20of%20Citizens.pdf

[42]https://www.barandbench.com/columns/why-indira-gandhi-election-set-aside-allahabad-high-court-46-years-ago

[43] It was without the approval of her Cabinet. https://indianexpress.com/article/opinion/columns/indira-gandhi-emergency-indian-constitution-7376157/

already continuing since 1971 on the ground of war. On behalf of the political executives, the opposition leaders, activists and even innocent people were stuffed in jails. Some of them were tortured and killed. *Secondly,* to legitimise the position of Prime Ministership, the power of Parliament under Article 368 was abused when 39th Amendment of the Constitution was passed on August 10, 1975.This amendment had set aside the judgement of the Allahabad High Court and declared the election as valid. Indeed, this was the beginning of the old idea "King can do no wrong" where the King was above the rule of law.[44]*Thirdly,* on April 28, 1976, the Constitution Bench of the Supreme Court delivered its infamous verdict of *Additional District Magistrate,Jabalpur* v. *S. S. Shukla*[45] which held that the citizens have no fundamental right under Article 21 and a writ of *habeas corpus* cannot be issued. There is no hesitation in stating that the Supreme judiciary failed miserably to perform its duties in the Constitution. Indeed, in this testing time, the High Courts were more duty conscious than the Supreme Court of India. The Allahabad High Court declared the election of Indira Gandhi as illegal. The Delhi High Court,[46] Gujarat High Court, Bombay High Court declared that fundamental rights are not suspended for all purposes. A *habeas corpus* can be issued. Bombay High Court went to the extent of permitting a gathering of lawyers to discuss civil liberties.[47] However, the Supreme Court demolished all this effort to protect, preserve and promote human rights. These three incidents of executive, legislature and judiciary are interconnected and have a common thread. They all show the weakness of the democratic institutions. If the institutions of democracy are weak, human rights can never be protected. All three wings of the State abusedHuman rights, civil liberties and fundamental freedom were crushed by the executive.

**Swaran Singh Committee**

Due to the emergency, there was demand for restoration of democracy, democratic

[44] In *Indira Nehru Gandhi* v. *Shri Raj Narain*, AIR1975 SC 2299, the Constitution Bench declared these provisions which gave immunity to election of the constitutional authorities, as unconstitutional. Khanna, J. said that I hold unconstitutional "clause (4) of Article 329A on the ground that it violates the principle of free and fair elections which is an essential postulate of democracy and which in its turn is a part of the basic structure of the Constitution."

[45] AIR 1976 SC 1207. The order by majority of 4:1 was as under:

> "In view of the Presidential order dated 27 June 1975 no person has any *locus standi* to move any writ petition under Article 226 before a High Court for habeas corpus or any other writ or order or direction to challenge the legality of an, order of detention on the ground that the order is not under or in compliance with the Act or is illegal or is vitiated by malafides factual or legal or is based on extraneous consideration." and "Section 16A(9) of the Maintenance of Internal Security Act is constitutionally valid."

[46] Delhi High Court dismissed a detention order. https://www.juscorpus.com/role-played-by-the-judiciary-during-the-emergency-period/

[47] *N. P. Nathwani* v. *The Commissioner of Police*, 78 (1975) Bom LR. https://www.juscorpus.com/role-played-by-the-judiciary-during-the-emergency-period/#_ftn5

values, rights, freedom and liberty of individuals. There was pressureon the State to perform their constitutional duties. The regime thought to counter the clamour for "rights" of individuals and "duties" of the State. Therefore, they came with the idea of duties of citizens.On February 26, 1976, All India Congress Committee constituted a twelve-member Committee headed by Swaran Singh to formulate a list of fundamental duties. The Committee took note of the fact that foreign jurisdictions do have the provisions of fundamental duties. In Japan, the Constitution[48] states that the freedom and rights guaranteed to the people under the Constitution shall be maintained by the constant endeavour of the people who shall refrain from any abuse of these freedoms and will be responsible for utilising them for public welfare. The Constitution of Finland[49], (as amended in 1957) imposes a duty on the citizens to take part in the defence of the country. Vietnam also imposes various duties on its citizens, viz the duty of every citizen to respect and protect public property.[50]

In August 1976, the Swaran Singh Committeeproposed eight duties including duty to pay taxes.[51] He also proposed radical provisions for enforcement of fundamental duties. The Committee empoweredthe Parliament to enact law to penalise non-performance of duties. Moreover, it debarred the jurisdiction of the courts in these caseson the ground of violation of fundamental rights or repugnancy with other provisions.[52] However, on the point of fundamental duties the 42nd Amendment Act passed with three changes. The penal sanction, the exclusion of the judiciary, was dropped. The content of fundamental dutieswere changed. Some were dropped and some were added. Finally, ten fundamental duties were incorporated under Part IVA, Article 51A of the Constitution. The 43rd and 44th Amendment of the Constitution brought during the Janata Party regime had undone many changes made in the 42nd Amendment but 51A remained untouched which can be said to be deemed approval. In other words, Article 51A has the unique distinction that it had the support of almost all the political parties. It was an express support during the 42nd amendment and implied support by 44th amendment. The eleventh fundamental duty was added through the 86th constitutional amendment in the year 2002, which made a citizen duty bound to provide opportunity of education to their children between the age of six to fourteen. In 2002 itself the Justice Venkatachaliah Committee also recommended two more duties to be added to

[48] The Constitution of Japan, 1946, Article 12.
[49] The Constitution of Finland, 1919,Article 75.
[50] The Constitution of Vietnam, 1946,Article 40.
[51] Mrityunjay Kumar, *Fundamental Duties: A Touchstone of Constitutional Mirror*, 102 (Regal Publications, 2015).
[52] Id. at 103.

fundamental duties.[53] The foundation of fundamental duties was suspicious. But it was a good move because for a big country like India the mention of fundamental duties is essential to create the persuasive value of a legal system.

## VIII. Fundamental Duties: An Internal Aid to Interpretation

The provisions under Article 51A have also been used by the judiciary in the interpretation of the Constitution and other laws. *Rural Litigation & Entitlement Kendra* v.*State of Uttar Pradesh*[54] and *M.C. Mehta* v. *Kamal Nath*[55]has relied upon the Article 51A(g).[56]*Chameli Singh* v. *State of UP*[57] used Article 51A (j)[58]. *Balaji Raghavan* v.*Union of India*[59] held that national awards do not violate the Article 14. Rather they motivate the citizens to achieveexcellence and rise to higher levels, a fundamental duty under Article 51A (j). *Bijoe Emmanuel* v. *State of Kerala*[60] has expended the doctrine of liberty by upholding the right of students, who are followers of Jehovah's Witnesses not to sing the song. The Court noted that Article51-A(a) of the Constitution which enjoins a duty on every citizen of India "to abide by the Constitution and respect its ideals and institutions, the National Flag and the National Anthem." However, the court held that if the students have respect for the national anthem, there is no need to sing it. *Vishaka* v. *State of Rajasthan*[61] can be seen in the light of 51A (e) "…to renounce practices derogatory to the dignity of women." In *Hon'ble Shri Ranganath Mishra* v. *Union of India,*[62] a letter was written by the former Chief Jurisprudence of India to highlight the importance of fundamental duties and to pass necessary directions to the government. The Supreme Court took note of the reports of two expert bodies, viz Justice J.S. Verma Committee on operationalisation of fundamental duties of citizens (1999) and Justice M.N. Venkatachaliah Report of the National Commission to Review the Working of the Constitution(2002). The Supreme Court agreed with the report of Justice Venkatachaliah and Verma Committee that awareness and social sanction is more useful to enforce duties.

[53] (i) To foster a spirit of family values and responsible parenthood in the matter of education, physical and moral well-being of children. (ii) Duty of industrial organisations to provide education to children of their employees available in the National Commission to Review the Working of the Constitution (NCRWC) Report, https://legalaffairs.gov.in/sites/default/files/chapter%203.pdf. *See* 3.40.4.
[54] (1985) 2 SCC 431.
[55] (1997) 1 SCC 388.
[56] Article 51A(g) —to protect and improve the natural environment including forests, lakes, rivers and wildlife, and to have compassion for living creatures;
[57] (1996) 2 SCC 549.
[58] (j) to strive towards excellence in all spheres of individual and collective activity so that the nation constantly rises to higher levels of endeavour and achievement.
[59] (1996) 1 SCC 361.
[60] AIR 1987 SC 748.
[61] AIR 1997 SC 3011.
[62] JT 2003(7) SC 206, Order dated 31 July 2003.

## IX. Concluding Remarks: Enforcement of Fundamental Duties

If a law cannot be enforced, it is mere moral precept. The life in law comes with its enforcement. Regarding enforcement of fundamental duties there are three questions: Is it desirable to enforce fundamental duties? Is it constitutionally permissible to enforce fundamental duties? And is it possible to enforce fundamental duties?

A. The issue of desirability of enforcement of fundamental duties has been addressed by the Justice Verma Committee, Justice Venkatachaliah Commission, PIL of Justice Rang Nath Mishra, etc. The year 2019 was marked by the Government of India with "Nagrik Kartavya Palan Abhiyan from 26 November 2019 to 26 November 2020, to create mass awareness about the Fundamental Duties as enshrined in our Constitution."[63]In 2023, the Government opined that "Amrit Kaal has been named as Kartavya Kaal."[64]These indicate that the desirability of enforcement of fundamental duties is well established.

B. The second question is regarding its legal enforceability. Are the courts empowered to enforce it? This is a pure legal question. Enforceability of a law has three classifications in the Constitution of India.

   a. Certain provisions aredeclared as enforceable. For example, fundamental rights. Article 32 and Article 226 expressly mandate that writs can be issued (and has to be issued in appropriate cases) for the enforcement of Part III.

   b. Certain provisions aredeclared as non enforceable by courts. The Directive Principles of State Policies under Article 37 states that "The provisions contained in this Part shall not be enforceable by any court." However, the judiciary has made it enforceable with Part III, but not independently.

   c. For certain provisions, there is neither a mandate to enforce by the courts nor express prohibition for the enforcement by the courts. Part IVA, fundamental duties is one such illustration.Can the silence of the Constitution as to enforceability by the court be treated as an area of discretion for the court whether to enforce or not. When fundamental duties were incorporated, the Parliament had both the models. One

[63]https://pib.gov.in/PressReleasePage.aspx?PRID=1593590#:~:text=The%20current%20year%202019%20marks%20the%2070th%20year,the%20Fundamental%20Duties%20as%20enshrined%20in%20our%20Constitution.

[64]https://www.aninews.in/news/national/general-news/amrit-kaal-has-been-named-as-kartavya-kaal-pm-modi20230704114046/

expressly states enforcement and other expressly states prohibition on enforcement by judiciary. Is it a chance omission in Part IVA or a deliberate omission? This is also to note (as discussed in previous pages) that the Swaran Singh Committee had proposed that penal sanction has to be imposed for non-enforcement for which the Parliament was required to make a law. However, the final provision dropped that provision for penal sanction. What was the intention of the Parliament? It seems the Parliament was not sure about enforcement through an enactment and it left the question open either for the future Parliament or for the judiciary to dilate on it. Can the judiciary enforce it? To deal with such situations, there are two distinguished authorities with two contrary approaches. Justice Cardozo observes that:[65]

> It is true that codes and statutes do not render the judge superfluous, nor his work perfunctory[66] and mechanical. *There are gaps to be filled. There are doubts and ambiguities to be cleared. There are hardships and wrongs to be mitigated if not avoided.* [emphasis added]

On the other hand, Jeremy Waldron[67] insists that the gap or ambiguity plays differently for State and non-state actors. If there is a gap, the benefit will go to non-state actors. If a law is silent on a certain thing, the individual (non-state actor) can successfully argue that his conduct is permissible under law and he need not look for an express authority under law. On the other hand, if a law is silent a state actor (here judiciary) ought to look for authority and cannot argue that law does not prohibit which means law permits or authorises it. This author feels that the approach of Justice Cardozo is the correct approach because enforcement of duty assigned to a citizen has great potential to promote human rights. To enforce human rights the judiciary can and has to walk an additional mile. It has to dilute the idea of separation of power to a limited extent. If the Parliament has not expressly prohibited the enforcement of fundamental duties, this authorises the judiciary to enforce it in suitable cases.

C. The issue of feasibility is the most complex question. There are various laws to enforce fundamental duties. First four provisions of Article 51A may be

[65] Benjamin N. Cardozo, *The Nature of Judicial Process*, (1920, Yale).

[66] Perfunctory—pə□f□ŋ(k)t(ə)ri/Submit, adjective, (of an action) carried out without real interest, feeling, or effort. He gave a perfunctory nod, cursory.

[67] Jeremy Waldron, 'The Rule of International Law' (2006) 30 Harv JL & Pub Pol'y 15

considered.[68] The Emblems and Names (Prevention of Improper Use) Act, 1950; The Prevention of Insults to National Honour Act, 1971; Unlawful Activities Prevention Act, 1967, Section 124A etc. are laws to enforce it. Article 51A (e)[69] can be enforced by the National Service Act, 1972. Article 51A (f)[70] can be enforced by Sections 153A, 153B, 295A etc. of IPC.[71] For the protection of the dignity of women there are various laws.[72] The difficulty is that the provisions of fundamental rights cannot be enforced through a comprehensive enactment. The Protection of Human Rights Act, 1993 contains a provision for Human Rights Courts under Section 30. It has been thirty years that Human Rights Courts are not notified or working well. The reason is not only infrastructural but also overlapping of jurisdiction. Which types of cases the Human Rights Court will examine. The states already have SC, ST Court, *Mahila* Court, Juvenile Boards, etc. Is it possible to merge them to Human Rights Courts? Another issue is the reluctance of the state governments as to the creation of the State Human Rights Commission. Section 21 of the PHRA, 1993, gives discretion to the state government to set up a Human Rights Commission as Section 21 uses the words "a state government may constitute a body…" The Supreme Court has to interfere and interpret "may" as "shall" in the case of *Shri Dilip K. Basu* v. *State of West Bengal*.[73] When the discretionary duty is changed into mandatory duty states have started implementing the provisions of the PHRA, 1993. In such a scenario, it seems a pipe dream that the enforcement of fundamental duties through courts can be a strong possibility.

There may be six ways to enforce the PHRA, 1993 or fundamental duties. First is *educative* means. As submitted earlier, education at home and schools can be helpful. Second is *persuasive* means. This may be done by using medium of mass communications, social media, conferences, etc. Third is an *incentive* way of enforcement. To encourage people through incentives, rewards and

[68] (a) to abide by the Constitution and respect its ideals and institutions, the National Flag and the National Anthem; (b) to cherish and follow the noble ideals which inspired our national struggle for freedom; (c) to uphold and protect the sovereignty, unity and integrity of India.
[69] (d) to defend the country and render national service when called upon to do so.
[70] (e) to promote harmony and the spirit of common brotherhood amongst all the people of India transcending religious, linguistic and regional or sectional diversities; to renounce practices derogatory to the dignity of women.
[71] IPC, 153A. Promoting enmity between different groups on grounds of religion, race, place of birth, residence, language, etc., and doing acts prejudicial to maintenance of harmony, 153B. Imputations, assertions prejudicial to national integration, 295. Injuring or defiling place of worship, with intent to insult the religion of any class.
[72] The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 is a civil law provision while Sections 354, 354A, 354C and 354D are penal provisions under IPC.
[73] (2015) 8 SCC 744.

recognition if they do good work. An informer of FIR, an eyewitness of an incident, a whistleblower, a Samaritan, etc. has to be recognised and rewarded. *Fourth* is *compulsive*. The environment is created in such a fashion that the parties are required or compelled to follow a human rights approach. This can be done by use of technology and monitoring, etc. The digitalisation and link of AADHAAR with bank accounts has helped millions to get subsidies and other benefits. It is compulsory to have an account which has checked leakage. *Fifth* is coercive. If duty is not performed or performed well, civil action or administrative action shall be taken, like show cause, inquiry, suspension. *Sixth* is punitive measures,like those under criminal laws. But this measure should be the last measure.

# Artificial Intelligence: Implications for Human Rights in India

Dr. Sonali Singh*

**Abstract**

*Artificial Intelligence (AI) is a revolutionary technology that is metamorphosing human lives in manifold ways and is characterised as ubiquitous, transformative, and disruptive in nature. A double-edged sword, AI has generated unprecedented opportunities not only for the promotion of human rights but it has also given rise to certain human rights risks. Advantages of AI include enhancement of social inclusion, efficiency, productivity, ease of living, quality services and potentialities to mitigate the barriers in the path of realisation of human rights. But ironically, it is also posing foundational challenges to being 'human', 'human autonomy' and 'rights', by redefining 'human intelligence' in multiple dimensions. It has triggered debates over control of data, violation of privacy, algorithmic opaqueness, loss of job and discrimination, as they have deleterious effects on human rights.*

*All these dimensions of AI need to be carefully examined with respect to its application in India, which has unique demographic characteristics and its own strengths and weaknesses. India has been alert to these issues and is proactive and conspicuous in declaring its strategy towards AI in a human rights framework. It has pledged to lead the world by setting precedents in responsible and egalitarian use of AI. It has already taken major initiatives to harness the potentialities of AI in crucial social sectors like health, education, agriculture, building smart cities, transportation, etc. But it also has to take into account numerous roadblocks in anchoring AI with human rights, like lack of representative data, digital divide, grievance redressal mechanism, state regulations, etc. Hence, the article aims to analyse various implications of AI-human rights interface in India and Government of India's strategy towards it. It recommends measures to make it more collaborative-synergetic as well as to adopt an evaluative and regulatory approach to use of AI, guided by human rights precepts.*

**Keywords:** Intelligence, Human Rights, Responsible AI, Collaborative intelligence, Autonomy

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## Understanding Artificial Intelligence (AI): Ubiquitous, Transformational and Disruptive

Artificial intelligence (AI) — a revolutionary technology, constitutes the core of fourth industrial revolution, which is characterised by rapid technological progress and digital transformation. To define AI, it "is a machine's ability to perform the cognitive functions we associate with human minds, such as perceiving, reasoning, learning, interacting with an environment, problem solving, and even exercising creativity."[1] The US Association for the Advancement of Artificial Intelligence (AAAI) defines AI as "the scientific understanding of the mechanisms underlying thought and intelligent behaviour and their embodiment in machines."[2] According to the National Strategy for Artificial Intelligence (NSAI),2018:

> AI is a constellation of technologies that enable machines to act with higher levels of intelligence and emulate the human capabilities of sense, comprehend and act… These human capabilities are augmented by the ability to learn from experience and keep adapting over time.[3]

AI covers a wide landscape of different technologies like Machine learning, Deep learning, Computer vision, Neural networks, Data analytics, Natural Language Processing, Robotics, Chatbots, etc. Artificial Intelligence has been designated as ubiquitous because it is not only pervading human lives, businesses and governance, but is also impacting non-human entities. Like, Machine learning can help in enhancing scientific understanding of climate change and AI based App can predict the state of soil health. Further, AI is a transformational technology because it is bringing about changes across multidimensional levels. At individual level, it has enhanced ease of living through efficient use of online platforms and smart phones; at societal level, it's tremendous potentialities in delivering social goods and services; at the national level, through strengthening state, democracy, and governance, managing epidemics, etc.; and, at the international level, managing global problems like climate change and sustainable development. From convenient shopping experiences, navigation, interactive learning, health care, gaming to ChatGPT, robotics, self-driving cars, AI is reshaping our lives across manifold levels.

AI is also termed as disruptive technology and,

> "a technology is considered to be disruptive if it succeeds in bringing about a major change in the processes and mechanisms that preceded its emergence, as well as change in user behaviour…and when such a

[1] What is AI? (April, 24, 2023), <https://www.mckinsey.com/featured-insights/mckinsey-explainers/what-is-ai> accessed 20 September,2023.
[2] Dr.Prabhat Kumar.*Artificial Intelligence: Reshaping Life and Business*, BPB Publications 2019, 24.
[3] National Strategy for Artificial Intelligence#AIforAll, June, 2018, 12.<https://indiaai.gov.in/documents/pdf/NationalStrategy-for-AI-Discussion-Paper.pdf>, accessed 18 July 2023.

technology emerges, it can create a new market with its own values and risks."[4]

AI will disrupt existing equilibriums on multiple fronts, thereby creating conflicts and new challenges before the society. For example, retrenchment of workers in jobs powered by AI will cause violation of the right to employment of the workers. It is disruptive in another sense that it is redefining the ambit of intelligence, impacting cognitive and physical capabilities of human, the effects of which are yet to be fathomed.

To be intelligent, just like a human, a machine, or often a system, has to learn. The learning process in AI systems is inspired by the functioning of human brain.[5] Machine learning is the result of (a) its ability to SENSE the environment, for instance, through image processing and speech recognition; (b) the availability of massive quantities of data('big-data') to educate the system;[6] and (c), based on learning, performs certain functions or takes decisions. Barry Smith, Professor of Computer Science at University College Dublin, says: "Data is to AI what food is to humans."[7] Data analysis is an important step in the AI functioning as, "AI works by combining large amounts of data with fact, iterative processing and intelligent algorithms, allowing the software to learn automatically from patterns or features in the data."[8] Like human beings, machines are made to learn through more and more data, which helps it in improving it's functioning and effectiveness. Much like humans, AI systems also learn things without knowing how they learn it.[9]

Depending upon the cognitive capabilities of AI vis-a-vis human, there are different categories of AI. Narrow AI describes an AI that is limited to a single task or a set number of tasks. General AI can perform a wide range of cognitive tasks, just like humans, but scientists are not yet successful in fully replicating cognitive functioning of human brain.

Weak AI describes "simulated" thinking. That is, a system which appears to behave intelligently, but doesn't have any kind of consciousness about what it's doing.[10] Strong AI describes "actual" thinking. That is, behaving intelligently, thinking as human does, with a conscious, subjective mind.[11] Super-intelligence: It is often used

[4] What are the disruptive technologies and what are the benefits? <https://www.telefonica.com/en/communication-room/blog/>accessed 19th September 2023
[5] Kaushiki Sanyal & Rajesh Chakrabarti. *Oxford India Short Introductions: Artificial Intelligence and India*, Oxford University Press, 2020, 23.
[6] Ibid. 22
[7] Supra note 3 at 14
[8] "Artificial Intelligence what it is and why it matters" https://www.sas.com/en_in/insights/analytics/what-is-artificial-intelligence.html accessed on 16 September 2023.
[9] Supra note 5 at 25
[10] Supra note 3 at 15
[11] Ibid.

to refer to general and strong AI at the point at which it surpasses human intelligence, if it ever does.[12]

## Artificial Intelligence and Human Rights: Foundational implications

### 1. AI and Human Rights: A double-edged sword

AI is a double-edged sword as it has immense potentialities to augment human rights and, on the contrary, its use can also diminish/violate rights. Through various AI powered applications, the right to education, health, information, dignity, decent standards of living and justice can be promoted. For example, AI based digital assistants and Chatbots provide instant reliable information, thus enhancing right to information. By improving health care services, AI can promote right to health and life. AI can predict school-dropouts, thereby helping in taking timely measures and promoting the right to education.

There are also multiple human rights risks associated with AI, some of which are general in nature, whereas others vary across different sectors and type of AI used. Violation of human rights may take place, first, due to inherent shortcomings in the AI technology, which can be rectified with improvements in technology; and second, the intentions, with which technology is used, driven by social good or profit motives, will have different human rights implications. Some of the debated impact of AI on the rights are right to privacy, right against discrimination, right to autonomy, right to job, decent standards of living, etc. Privacy concerns are raised when data is breached, consent is not sought for using data, and sensitive information is mis-used or manipulated. The technologies used for surveillance like facial recognition and biometric data could violate right to privacy. If AI is fed with insufficient and biased data, then it can produce inaccurate and discriminatory outcomes, like in the field of health, employment, lending and criminal justice systems. Most of the violations of human rights are linked with impact of AI applications, but there are certain generic features of AI that have foundational implications for human rights, especially in the way AI has redefined intelligence.

### 2. Redefining 'Intelligence' and Diminishing 'Human Autonomy': Need for Right to Intelligence

Intelligence constitutes the very essence of being 'human' and 'rational being'. It has not only distinguished humans from other species but it is also the basis of human evolution and civilisational growth. Therefore, "Intelligence is…essentially a human quality: an ability to connect pieces of information to somehow recognise a pattern and to apply it on new information."[13] AI mimics human intelligence in

[12] Ibid.
[13] Supra note 5 at 21-22.

a similar pattern, but in this process, it has redefined 'intelligence' at manifold levels:

1. Nature of Intelligence: Intelligence which was earlier 'natural' and a unique repository of human beings can now be manufactured 'artificially' and external to human agency.
2. Scope of Intelligence: 'Expanded' the boundaries of human intelligence thereby surpassing its limitations and possibilities of 'replacing' human intelligence in future.
3. Use of Intelligence: 'Manipulation' of human intelligence
4. Effects: 'Diminishing' of human intelligence

That human intelligence can be built 'artificially' is based on a "reductionist view of human to be a purely material system built of parts just like a machine."[14] Therefore, "such a reduction of the human being into biological algorithms is a modern breakthrough that makes it possible to go to the next step: transferring these human algorithms from natural biological hardware to run a silicon or some other man-made hardware."[15] Weak or narrow AI have already exceeded human intelligence, performing jobs, earlier unimaginable by humans. The possibilities of General AI replacing human intelligence completely are remote in the near future, but not impossible. Further, big companies are utilising data to understand behavioural patterns and using it for manipulation of thoughts and actions. As thinking/decision-making and various jobs are increasingly being done by AI, it is leading to diminishing of cognitive capabilities of human beings:

> A troubling trend is that as machines get smarter, growing number of humans are becoming dumber. In a sense, the public has outsourced its critical thinking, memory and agency to increasingly sophisticated digital networks…People are operating on autopilot rather than thinking and learning on their own.[16]

So, in this backdrop, the right to intelligence is relevant, which will ensure protection of human cognitive capabilities from being hijacked/manipulated/ diminished by intelligent innovative systems. Innovative technologies are important for supplementing human capabilities and increasing efficiency, but it should not be at the cost of threatening the essence of being human. Human evolution and progress were possible because of ingenious use of human intellect and if it is outsourced to machines, what will be the future of human evolution and progress?

[14] Rajiv Malhotra.*Artificial Intelligence and the Future of Power*,Rupa Publications, 2021, 204.
[15] Ibid.
[16] Ibid. xviii.

Connected with human intelligence is human autonomy, especially mental autonomy and how it forms the cornerstone of human rights. Developing the epistemology of human rights, from two generic features of human action, Alan Gewirth said:

> One is voluntariness or freedom, in that the agents control or can control their behaviour by their unforced choice while having knowledge of relevant circumstances. The other generic feature is purposiveness and intentionality, in that the agents aim to attain some end or goal which constitutes their reason for acting…[17]

One of the key requisites for exercise of free choice is mental autonomy. The key elements that enable mental autonomy are, attentional agency and cognitive agency.[18] Attentional ability is the ability to control one's focus of attention. Cognitive agency is the ability to control goal/task related, deliberate thought.[19] Both these agencies are increasingly getting manipulated and hijacked by AI based technologies, thereby jeopardising our mental autonomy. Further, technologies do not simply shape human beings but individuals themselves use technology to shape their self: "Technologies such as AI, which permits self-surveillance, self-tracking, self-care and self-disciplining, are also used as 'technologies of the self': not just for domination and disciplining others…but also for exercising a form of power over oneself…"[20] This is threatening the very essence of being 'human' and 'rights' and, most importantly, this is happening very surreptitiously, often without the knowledge of the human beings. Hence, it is rightly said: "AI is not just a technical matter or just about intelligence; it is not neutral in terms of politics and power. AI is political through and through."[21] It is contributing to new form of digital slavery and atrophying of physical and mental capabilities. The International Bill of Human Rights does not take into account this particular form of intellectual deprivation and digital slavery.

## Artificial Intelligence and India

### 1. Position of India vis-a-vis World

India with the largest population in the world and being the fifth largest economy, has a significant stake in AI revolution. It is estimated that AI has the potential to add USD 957 billion, or 15 percent of current gross value added to India's

[17] Alan Gewirth, 'The Epistemology of human rights', Social Philosophy and Policy (1984) 1:2 as quoted in Alan Finlayson (ed.) *Contemporary Political Thought*,Edinburgh University Press, 2003, 126

[18] T.K. Metzinger,'The myth of cognitive agency: subpersonal thinking as a cyclically recurring loss of mental autonomy' (2013) 4:931 Front. Psychol. as quoted in Simon McCarthy Jones, *The autonomous Mind: The right to freedom of thought in the twenty first century*, (26 Sept., 2019) Vol.2 Front.Artif. Intelli<https://www.frontiersin.org/articles/10.3389/frai.2019.00019/full#B103> accessed 22 July 2023,

[19] Ibid.

[20] Mark Coeckelbergh. *The Political Philosophy of AI*, Kindle version, Polity Press, 2022, 151.

[21] Ibid.11.

economy in 2035.[22] AI will boost India's annual growth rate by 1.3 percentage points by 2035.[23]

India ranked first in terms of Artificial Intelligence skill penetration and AI talent concentration. In fact, India's AI skills Penetration Factor has been reported to be 3.09, the highest among all G20 and OECD countries. This showed that the country's tech talent was 3x more likely to have or report AI skills than other countries.[24] India has been ranked 1st for 'AI Adoption by Organisations' and 3rd for 'No. of AI Journal Publications' and 'No. of AI Conferences'.[25]

India stood fifth in terms of investment received by startups offering artificial intelligence-based products and services in 2022, according to Stanford University's Annual AI Index report.[26] India received $3.24 billion in total investments in AI startups in 2022, outpacing nations like South Korea, Germany, Canada and Australia. The US, China, UK and Israel are among the nations that are listed before India.[27] In 2022, the United States produced the greatest number of significant machine learning systems with 16, followed by United Kingdom (8) and China (3). India stands 7th, with only one system.[28] In 2022, for the first time, researchers from Canada, Germany and India contributed to the development of large language and multimodal models. As of 2022, a large population of GitHub AI projects were contributed by software developers in India (24.2%).[29]

## 2. Government of India's Approach to AI: National Strategy for Artificial Intelligence(NSAI) Document, 2018

With an objective to establish a National Programme on AI, NITI Aayog has adopted a three-pronged approach– undertaking exploratory proof-of-concept AI projects in various areas, crafting a national strategy for building a vibrant AI ecosystem in India and collaborating with various experts and stakeholders.[30]It has published the National Strategy for Artificial Intelligence in June 2018 that aims

[22] RESPONSIBLE AI #AI FOR ALL Approach Document for India Part 1 – Principles for Responsible AI (FEBRUARY 2021) 6.
[23] Supra note 3 at 18.
[24] 'India's AI penetration factor at 3.09, highest among all G20, OECD countries: Nasscom,' *The Hindu*, (17th Feb 2023)<https://www.thehindu.com/business/Industry/indias-ai-penetration-factor-at-309-highest-among-all-g20-oecd-countries-nasscom/article66522647.ece> accessed 18 September 2023.
[25] 2023 India and AI, Looking Ahead <https://indiaai.gov.in/article/2023-india-and-ai-looking-ahead#> accessed 12 July 2023.
[26] India ranks fifth among countries with largest investments in artificial intelligence (April 15, 2023).<https://www.wionews.com/india-news/india-ranks-fifth-among-countries-with-largest-investments-in-artificial-intelligence-582437#>, accessed on 18 September 2023.
[27] Ibid.
[28] India tops world nations in AI skill penetration: Stanford AI Index Report 2023 (April4 2023) <indiaai.gov.in>, accessed 18 September 2023.
[29] Ibid.
[30] Supra note 3 at 5.

to achieve India's "own brand of AI leadership, #AIforAll – the brand proposed for India implies inclusive technology leadership, where the full potential of AI is realised in pursuance of the country's unique needs and aspirations."[31] The Strategy document consists of three inter-related components:[32]

1. Opportunity: the economic impact of AI for India
2. AI for Greater Good: social development and inclusive growth
3. AI Garage for 40 per cent of the world: solution provider of choice for the emerging and developing economies (ex-China) across the globe.

India is focusing more on second component, that is using AI technology to address various challenges of inclusion, accessibility, social justice, etc. Through its applications in health, farming, building smart cities and infrastructure, education, etc. India aims to develop AI-based solutions not only for itself but also for other developing countries. For example, "AI based solution for early diagnosis of tuberculosis (one of the top-10 causes of deaths worldwide), could easily be rolled out to countries in South East Asia or Africa, once developed and refined in India."[33] Therefore, one of the foundational pillars of India's AI-approach is AI ethics and governance—which involves guiding responsible and transparent development and deployment of AI systems to ensure fairness, accountability and societal benefit.[34] Hence, Indian government's approach to AI is harnessing its potentials for building solutions along with leveraging it for economic growth, guided by ethics and regard for human rights.

## AI for augmenting human rights in India

AI based applications have enormous potential to augment human rights in India by enhancing quality services and mitigating various barriers that obstruct the realisation of human rights. NITI Aayog has focused on five sectors,[35] where application of AI technologies can substantially ameliorate the condition of common man:

1. Healthcare: increased access and affordability of quality healthcare,
2. Agriculture: enhanced farmers' income, increased farm productivity and reduction of wastage,
3. Education: improved access and quality of education,
4. Smart Cities and Infrastructure: efficient and connectivity for the burgeoning urban population, and
5. Smart Mobility and Transportation: smarter and safer modes of transportation and better traffic and congestion problems.

[31] Ibid. 7.
[32] Ibid. 18.
[33] Ibid. 19.
[34] <indiai.gov.in> accessed 20 July 2023.
[35] Supra note 3 at 7.

Government of India along with private sector has taken various AI-based initiatives in the above sectors that have created noteworthy impact in securing rights. Out of multifarious decisive outcomes of AI and the concomitant human rights it promotes, some are enumerated below:

**1. Quality inclusive and accessible education: Right to Education**

India is facing the challenges to provide quality and accessible education because about 50 per cent of its population are below the age of twenty-five. The education system in India is besieged with many predicaments like unequal accessibility, poor quality, high dropouts, poor learning outcomes, etc. which are impediments towards the realisation of the Right to Education enshrined in Article 21-A of the Constitution of India.

AI has the potential to transform education system across multiple levels, by making learning personalised, immersive, and interactive in nature. In India, because of heterogenous character of students in the classroom with different learning abilities, poor student-teacher ratio and lack of infrastructure, teachers are unable to cater to different learning needs of students. In this regard, AI can "greatly assist teachers in efficiently and effectively managing multi-level/multi-grade classrooms by judging learning levels of individual students, and allowing automated development of customised educational content adapted to each child's class and learning level."[36]

Further, the current professional training courses for the teachers are archaic and do not address the knowledge/skill gap in the teachers. The result is poor teaching and learning outcomes. For this, "adaptive AI tools can be used to design automated, customised professional development training content for the teachers based on their performance, identification of their knowledge and skill gaps."[37]

In India, the Gross Enrolment Ratio (GER) is 97 per cent at elementary level. The retention rate of 70.7 per cent at elementary level indicates that one-third of enrolled children drop out before completing Class VIII.[38] AI based predictive tools, based on certain indicators, analyse students' behaviour, predict possible dropouts and suggest preemptive action. For instance, in Andhra Pradesh, AI applications have helped the government identify students likely to drop out.[39]

Apprehending the future possibilities of AI-based immersive and interactive learning, Raghav Gupta, (MD, INDIA& APAC, COURSERA) said:

[36] Supra note 3 at 37.
[37] Supra note 3 at 38.
[38] Ibid. 35.
[39] Supra note 3 at 37.

> Imagine a future in which every learner has a personal tutor where students will be able to experience what they learn through immersive learning at scale—sending them on virtual field trips to the core of the earth, the inside of human body, or into deep space. New education technology is creating these possibilities and will dramatically transform how we learn. Generative AI will take us to the next frontier of personalised and interactive learning.[40]

AI tools can be used to develop automated teacher posting and transfer systems, using analytics based on demand–supply gaps across schools.[41] Hence, by augmenting the quality of education and making it accessible, AI can significantly promote Right to Education as enshrined in Article 26(1) of Universal Declaration of Human Rights (UDHR) 1948, and Article 13 of International Covenant on Economic, Social and Cultural Rights(ICESCR), 1966.

**2. Enhancement of health services: Right to health and life**

The health sector in India is a very crucial sector that needs immediate improvement because of burgeoning population, poor health services and rising prevalence of diseases. The betterment of health sector will significantly facilitate the actualisation of human rights like right to health, life, and adequate health care facilities. But this sector is beset with many serious problems like shortage of qualified doctors, paramedical staff, unequal accessibility, poor diagnosis, poor conditions of government hospitals, etc. In India, there is 0.76 doctors and 2.09 nurses per 1000 population as compared to WHO recommendations of one doctor and 2.5 nurses per 1000 population, respectively, and 1.3 hospital beds per 1000 population as compared to WHO recommended 3.5 hospital beds per 1000 population.[42] The doctors are able to spend only about two to five minutes per patient– increasing the possibility of errors and misdiagnosis.[43] Rural population constitutes 66% of India's total population but the percentage of doctors in rural areas is 33 per cent, just the reverse of urban which constitutes 34 per cent of the population and percentage of doctors is 67 per cent.[44]

More than 70 per cent of the medical cases in both rural and urban areas are treated in private hospitals.[45]The Poor and marginalised are the worst sufferers as they fall in debt trap and poverty due to exorbitant expenditure in private hospitals.

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[40] *The Times of India* (Aug 19, 2023) 10.
[41] Supra note 3 at 38.
[42] Supra note 3 at 24.
[43] Balaji, Sindhuja, AI filling the gap in India's abysmal physician:patient ratio. IndiaAI. gov.<https://indiaai.gov.in/article/ai-filling-the-gap-in-india-s-abysmal-physician-patient>as quoted in Aishani Rai, Vinay Narayan & Dr. Sarayu Natarajan, "Artificial Intelligence and Potential Impacts of Human Rights in India" (Commissioned by UNDP, May 2022) Aapti Institute's Report, 49.
[44] PwC Analysis, World Bank Data (2017), as quoted in Supra note 3 at 24.
[45] Ibid.

AI is having the potential to significantly improve health care in India along multiple dimensions, most importantly, it can bridge the huge gap between doctor-patient ratio, help doctors in decision-making based on data-based evidence and compensate for shortage of resources and staff in hospitals. Predictive analytics can identify patients at risk of developing certain diseases, facilitating preventive treatment, thereby saving time and lives. Cancer screening and treatment is an area where AI provides tremendous scope for targeted large-scale interventions.[46]

These measures will augment the Right to Health enshrined in Article 25 of UDHR, 1948 and Article 12 of the ICESCR, 1966 and the Right to Life, in Article21 of Indian Constitution.

**3. Enhancement of Productivity in key sectors and Smart Services: Protection of multiple rights**

Agriculture and industry constitutes the key sectors of Indian economy and the use of AI based solutions will play a key role in increasing productivity, efficiency, income, better decision making, standard of living, etc. Along with that, AI powered Smart Cities and mobility will enhance the quality of life and help in mitigating, rising deaths in road and rail accidents, thereby protecting the right to life.

Agriculture is the most crucial sector of Indian economy and is connected not only with country's growth but is also with securing right to life, food, sustainable living, adequate remuneration etc. Agriculture and allied sector still accounts for 49% of India's workforce, 16% of the country's gross domestic product (GDP) and ensures food security to roughly 1.3 billion people.[47] But Indian agriculture is beset with many fundamental problems like low farm productivity, lack of proper remuneration for farmers, low use of technology for agricultural practices, lack of proper supply chain, unsustainable agricultural practices, etc. As a result, the income of farmer has gone down and the income disparity between a farmer and non-agricultural worker has increased over the years.[48]

AI based solutions can increase productivity by soil and crop health monitoring and providing requisite guidance to the farmers. NITI Aayog and IBM have partnered to develop a crop yield prediction model using AI to provide real time advisory to farmers. The project is being implemented in ten Aspirational Districts across the states of Assam, Bihar, Jharkhand, Madhya Pradesh, Maharashtra, Rajasthan and Uttar Pradesh.[49] Trithi Robotics uses drone technology to allow

[46] Supra note 3 at 28.
[47] Ibid. 30.
[48] R.Chand, R.Saxena and S.Rana, *Estimates and analysis of farm income in India* (2015) as quoted in Supra note 3 at 31.
[49] Supra note 3 at 34.

farmers to monitor crops in real time and provide precise analysis of their soil.[50] Predictive analytics using AI tools will remove intermediaries and will help farmers in getting genuine prices for their products. In Industry, AI is increasing productivity, efficiency, and also faster decision-making because, "machines can measure, identify patterns, create data models, categorise the requirements and indicate the risks with phenomenal accuracy and precision."[51] AI can handle repetitive tasks in an organisation, while the employees can focus on creative and complex problems.

India's urban population is estimated to stand at 675 million in 2035, the second highest behind China's one billion, according to United Nations-Habitat's World Cities Report 2022.[52] Most of the urbanisation is unplanned; as a result, it presents challenges of congestion, over pollution, high crime rates, poor living standards and can potentially put a huge burden on the infrastructure and administrative needs of existing cities. The Government of India has already taken various initiatives to address these challenges like setting up of Smart Cities, Atal Mission for Rejuvenation and Urban Transformation (AMRUT), based on utilising IT solutions. Some of the ways in which AI can augment the features of a Smart City are:[53] creation of Smart Parks and public facilities, Smart Homes, AI driven service delivery, crowd management, intelligent safety systems, and preventing cyber attacks. AI will play a decisive role in crowd management and security during Maha Kumbh Mela in 2025 at Prayagraj.

The Indian transportation sector is facing a number of problems, like congestion, road accidents, lack of public transportation, etc. During 2021, a total of 4,12,432 accidents were recorded in the country of which 1,28,825 (31.2%) took place on the National Highways (NH).[54] AI will identify the accident-prone zones on roads, alert the drivers about possible collision and help in monitoring and engineering roads. More than 500 train accidents occurred between 2012- 2017, 53% of them due to derailment. Recently, the Ministry of Railways, Government of India, has decided to use AI to undertake remote condition monitoring using non-intrusive sensors for monitoring signals, track circuits, axle counters and their sub-systems of interlocking, power supply systems including the voltage and current levels,

[50] Ibid. 32.

[51] Quote of Kamal Kant Paliwal, Principal-AppDev, Advaiya Solutions, 'How Artificial Intelligence is changing your life unknowingly' The Economic Times ( 15 March 2013) <https://economictimes.indiatimes.com/news/how-to/how-artificial-intelligence-is-changing-your-life-unknowingly/articleshow/98455922.cms?from=mdr> accessed 10 September 2023

[52] India's urban population to stand at 675 million in 2035, behind China's 1 billion: U.N. ( 30 June 2022)< https://www.thehindu.com/news/national/indias-urban-population-to-stand-at-675-million-in-2035-behind-chinas-1-billion-un/article65584707.ece# > accessed 12 September 2023

[53] For more refer Supra note 3 at 39&40

[54] Government of India, 'Road Accidents in India, 2021' ( Ministry of Road Transport and Highways) xi,< https://morth.nic.in/sites/default/files/RA_2021_Compressed.pdf >accessed 13 September 2023

relays, timers.[55]

**5. Promotes Inclusion: Right to equality and dignity**

In India, a large section of population needs finance but do not have access to formal and genuine sources of credit; as a result they, especially the poor and the marginalised, have to depend upon informal channels of lending, who charge exorbitant interest rates and trap them into huge debt, which, sometimes, drives them to suicides also. As per an estimate, only 15 per cent of Indian households have access to formal channels of credit, making India one of the most underserved credit markets of the world.[56] Authorised AI-based lending Apps can create huge possibilities to provide credit to these uncharted segments, thereby fostering financial inclusion.

Furthermore, AI brings up opportunities for those excluded from health services in remote areas. In rural areas, there is lack of qualified clinical staff for diagnostic jobs. Artificial intelligence could perform these functions in such areas. For instance, the first AI-enabled portable chest X-ray device, which is launched for early diagnosis of tuberculosis, can help in the eradication of tuberculosis in India by 2025 and it will cost almost the same as normal X-ray tests.[57] Similarly, 3 Nethra, a portable device which can screen for common eye problems, when integrated with AI capabilities, enables operators of this device to get AI-powered insights, even when they are working at eye check-up camps in remote areas with nil or intermittent connectivity to the cloud.[58]

## Negative impact of AI on human Rights: Issues and Concerns

AI, like other technologies, along with their positive impact has also certain issues and concerns that have negative implications for human rights. The issues discussed are those which are associated with the functioning of AI technology and its outcomes and there are concerns over challenges that act as barriers in integrating rights with AI technology.

### Issues

**1. Unequal control over data and its misuse: Right to Privacy**

Big Companies powered by AI based technologies have access to different

[55] Supra note 3 at 44
[56] IFMR Finance Foundation, Insights from the "Digital Credit Roundtable." Dvara Research Blog (3 July 2017) <https://www.dvara.com/research/blog/2017/07/03/insights- from-the-digital-credit-roundtable-hosted-by-the-future-of-finance-initiative/> , as quoted in Aishani Rai, Vinay Narayan & Dr. Sarayu Natarajan, Artificial Intelligence and Potential Impacts of Human Rights in India (Commissioned by UNDP, May 2022) aapti institute's Report, 34
[57] Supra note 3 at 29
[58] Ibid.

types of data of the citizens, but, often, it is obtained as well as used without the informed consent of the customer. Further, there is risk of data breach as well as the possibility of misuse of personal data of citizens, thereby jeopardising their right to privacy. The human rights at stake are Right to Privacy under Article 12 of UDHR, 1948, Article 17 of ICCPR, 1966 and Article 21 of the Constitution of India. Privacy is one of the least understood issues in India because of many reasons; firstly, people, even educated ones, are not aware of privacy policies and do not understand the intricacies; secondly, companies are recalcitrant about protecting the right to privacy of the consumers and often lack of enforcement leads to non-compliance.

2. **Loss of Jobs: Right to work and right to decent standards of living**

Use of AI-led automation in manpower dominated sectors like retail and agriculture will lead to job loss. For example, there is fear of job loss due to AI automation among retail employees as only 26 per cent of them are supportive of AI adoption (the lowest among all industries surveyed).[59] This will affect their livelihood and well-being, which is a violation of the Right to Work(Article 23, UDHR, 1948; Article 6, ICESCR, 1966), Right to Standard of Living (Article 25, UDHR 1948) and Right to enjoyment of just and favourable conditions of work(Article 7, ICESCR, 1966). With 1.42 billion population and present level of unemployment at 7.7 per cent, adoption of AI can have disruptive impact on employment.

3. **Algorithmic opaqueness and discrimination: Right against discrimination and right to equality**

AI technology uses algorithm based decision-making but does explain the reasons behind it. This is termed as 'algorithmic invisibility' because "algorithmic neural networks are highly complex. However, even if algorithms are explainable, businesses hesitate to explain the workings of their algorithms to regulators given the lack of intellectual property safeguards and propriety concerns."[60] For example, AI-based credit scoring based on certain data, assigns a credit score, which determines the creditworthiness or non-worthiness of a customer but it does not explain the reasons, if the customer is not considered credit-worthy. This makes them incapable to contest the decision and seek redressal of their grievances, which is a violation of the Right to Effective Remedy under Article 8, UDHR, 1948 and Article 2, ICCPR, 1966.

[59] KPMG, Living in an AI World 2020 Report: Retail Insiders ( 2020) <https://advisory.kpmg.us/content/dam/advisory/en/pdfs/2020/retail-living-in-an-ai-world.pdf>, as quoted in Aishani Rai, Vinay Narayan & Dr. Sarayu Natarajan, Artificial Intelligence and Potential Impacts of Human Rights in India ( Commissioned by UNDP, May 2022) aapti institute's Report, 26

[60] Aishani Rai, Vinay Narayan & Dr. Sarayu Natarajan, Artificial Intelligence and Potential Impacts of Human Rights in India ( Commissioned by UNDP, May 2022) Aapti Institute's Report, 46

Further, if the metrics that are used in AI for coming to certain decisions are not transparent, relevant and authoritative, the result it may produce may be discriminatory, inaccurate and biased. For example, if the metrics used to determine the creditworthiness of an individual are not proper, then it may reproduce societal discrimination in the result also. Like, cases have been reported of AI scoring female applicants lower than males despite similar financial backgrounds.[61] Women are more likely to face loan rejections if lenders determined credit worthiness is based on the number of phone contacts, given that men have more social mobility than women in India.[62] Further, during the interim period, when AI is trained to attain accuracy, it can miscalculate data and produce inaccurate and biased results and if it is used for decision-making, it will have grave impact on the customers.

Algorithms may appear to be gender neutral, but it perpetuates discriminatory practices, as it fails to take into account special needs of women. For example, contractual women whose employment conditions are digitally determined, do not get pay protection/support when they are unable to work because of child-bearing responsibilities.

**4. Poor working conditions: Right to decent standards of living and Right to dignity**

Gig work involves temporary jobs, typically in the service sector, where the worker is engaged as an independent contractor or freelancer. It uses algorithms to intermediate work, mainly for allocating work and determining workers' compensation.[63] The rating given by the user is final and is not subject to review or challenge by the worker.[64] Poor ratings leads to less job allocation, loss of incentives, more hours of work for less pay that results in poor working and living conditions. It is violative of Right to standard of living (Article 25, UDHR, 1948) and Right to enjoyment of just and favourable conditions of work (Article 7, ICESCR, 1966)

**5 Loss of individual autonomy: Right to freedom/choice**

AI-based services may, sometimes, lead to loss of individual autonomy or right to exercise choice. For example, in the health sector, because of poor knowledge of AI among people, patients may not be informed or asked about receiving

[61] Ibid. 43

[62] Lina Sonne, 'What do we Know about Women's Mobile Phone Access and Use? A review of evidence' (Dvara Research Working Paper Series No. WP-2020-03, 2020), <https:// www.dvara.com/research/wp-content/uploads/2020/06/What-Do-We-KnowAbout- Womens-Mobile-Phone-Access-Use-A-revie-wof-evidence.pdf> as quoted in Aishani Rai, Vinay Narayan & Dr. Sarayu Natarajan, Artificial Intelligence and Potential Impacts of Human Rights in India ( Commissioned by UNDP, May 2022) Aapti Institute's Report,43

[63] Supra note 60 at 62

[64] Supra note 60 at 63

AI-assisted medical care. AI may arrive at decisions, which may conflict with doctor's viewpoints thereby undermining the autonomy of doctors. Moreover, if the decisions arrived at come from insufficient or biased data, it may misdiagnose, and lack of any explanations can violate patient's autonomy.

**6. Absence of humane approach**

Human intervention is essential, because when AI takes decisions related to human beings, it cannot take a humane approach to understand different challenges that individual faces in everyday life. For example, biometric attendance can record a worker absent from duty, but cannot understand the reasons for his absence, which may be sudden sickness or casualty. Similarly, when deciding whom to grant credit through online platforms or dispensation of services/goods to the poor, there is need for human intervention to check the eligibility of the recipient.

## Concerns

**1. Lack of representative and diverse data**

High quality data is a prerequisite for the success of AI-based applications. The National Strategy for Artificial Intelligence, 2018, has identified absence of enabling data ecosystems as one of barriers to achieve the goals of AI for all. Lack of representative and diverse data will produce inaccuracy and discrimination in the results. There is need for data, which is representative of Indian diversity, and for that both Government and private sector have to invest in developing datasets.

**2. Absence of state regulations**

India does not have a specific regulatory framework for AI. The Ministry of Electronics and Information Technology (MeiTY) is the regulatory body of AI in India. It has the responsibility for the development, implementation and management of AI laws and guidelines in India. There are certain provisions mentioned under Intellectual Property Law and several provisions as Section 43A and 72A of Information Technology Act, 2000, which imply that if anyone commits crime by using AI, then he will be liable under IT Act, criminal law and other cyber laws.[65]

**3. Exacerbation of digital divide**

The digital divide is manifested at multiple levels: firstly, there is a large segment of population who do not have Internet facilities, computers, laptops, smart phones etc.; secondly, many do not have skills to use these technologies; and thirdly, poor and marginalised cannot afford these systems because of high cost.

[65] Laws related to Artificial Intelligence in India, <https://inbaviewpoint.org/laws-related-to-artificial-intelligence-in-india/#:~:text> accessed 24 August 2023

A segment of the population, who cannot access online sources, may get excluded from benefiting from AI-based services and products. For example, in cases of credit-scoring and lending, those who do not have online facilities, will be excluded from availing credit. The digital divide in India is one of the reasons for non-availability of adequate and representative data.

**4. Lack of grievance redressal**

The inexplainable nature of AI makes the workers or consumers unable to seek grievance redressal. Further the absence of legal requirement to give explanation for AI based decisions, aggravates the plight of those discriminated against. Hence, there is need for "explainers":

> …these "explainers" are particularly important in evidence-based industries, such as law and medicine, where a practitioner needs to understand how an AI weighed inputs into, say, a sentencing or medical recommendation… And explainers are becoming integral in regulated industries-indeed, in any consumer-facing industry, where a machine's output could be challenged as unfair, illegal or just plain wrong.[66]

Here, EU General Data Protection Regulation (DDPR) is notable, because it includes provisions that address the use of AI, such as the right to explanation through automated decision-making under Articles 13-15.[67]

**Building AI in Human Rights Framework: Initiatives of the Government of India**

NITI Aayog's Responsible AI #AIFORALL Document, February 2021, establishes broad ethical principles for design, development and deployment of AI-drawing from similar global initiatives, but grounded in fundamental rights provided to the citizens by the Constitution of India.[68] They are:

1. Principle of Safety and Reliability— AI should be deployed reliably as intended and sufficient safeguards must be placed to ensure the safety of relevant stakeholders.
2. Principle of Equality—AI systems must treat individuals under the same circumstances equally relevant to the decision.
3. Principle of Inclusivity and Non-discrimination—AI systems should not deny

[66] H.James Wilson and Paul R.Daugherty, Collaborative Intelligence: Humans and AI are joining forces, ( July-August, 2018) Harvard Business, Review, <https://hbr.org/2018/07/collaborative-intelligence-humans-and-ai-are-joining-forces> accessed 18 July 2023

[67] Amar Patnaik, 'AI needs responsible regulation' (23 July 2023) <https://www.thehindubusinessline.com/opinion/ai-needs-responsible-regulation/article67143172.ece> accessed 27 September 2023

[68] Supra note 22 at 41-42

opportunity to a qualified person on the basis of their identity. It should not deepen the harmful historic and social divisions based on religion, race, caste, sex, descent, place of birth or residence in matters of education, employment, access to public spaces, etc.

4. Principle of Privacy and Security— AI should maintain privacy and security of data of individuals or entities that is used for training the system.
5. Principle of Transparency—The design and functioning of the AI system should be recorded and made available for external scrutiny and audit to the extent possible to ensure the deployment is fair, honest, impartial and guarantees accountability.
6. Principle of Accountability—All stakeholders involved in the design, development and deployment of the AI system must be responsible for their actions. Stakeholders should create mechanisms for grievance redressal in case of any adverse impact.
7. Principle of Protection and Reinforcement of Positive Human Values—AI should promote positive human values and not disturb in any way social harmony in community relationships.

These principles are subject to revision in the future as technology advances and poses other possible human right risks.

Digital Personal Data Protection Bill, 2023, is another important initiative that aims at curbing the misuse of individuals' data by online platforms. The Bill seeks to protect the privacy of Indian citizens while proposing a penalty of up to Rs 250 crore on entities for misusing or failing to protect the digital data of individuals. Companies dealing with user data will have to protect personal data even if it is stored with a third-party data processor. In case of a data breach, companies must inform the Data Protection Board (DPB) and users. Children's data and data of physically disabled persons with guardians must be processed after consent from guardians. Furthermore, companies must now appoint a Data Protection Officer and provide details to users.[69]

Further, the Government of India has taken commendable initiative towards combining AI technology with human rights in DigiYatra project, which is based on Facial Recognition Technology (FRT). DigiYatra aims to achieve seamless and contactless processing of passengers at airport. Its use is based on consent and not mandatory. The Ministry of Education joined hands with the chip making giant Intel and Central Board of Secondary Education (CBSE) to announce the launch of AI for All'—an initiative that aims to create a basic understanding of AI for all Indian citizens.[70]

[69] Digital Personal Data Protection Bill 2023 passed in Rajya Sabha : Key Points (11th August, 2023)
[70] <indiaai.gov.in> accessed 12 July 2023

India's commitment towards responsible AI in a human rights framework also got reflected in the G-20 New Delhi Leaders Declaration, 9-10 September 2023.[71]

## Conclusion

To surmise, India has made considerable progress in preparing the groundwork for embracing AI revolution and is set to provide leadership to the world about how technology can be used for empowering people and fostering rights. India's vision of Responsible AI and AI for All is in sync with Article 27(1) of UDHR, which states that everyone has the right to share in scientific advancement and its benefits. The National Strategy for Artificial Intelligence (NSAI), 2018, and Responsible AI #AIFORALL Document, February 2021, provide a complete roadmap and strategy about how AI will be implemented in India— combining innovation with regulation, efficiency with responsibility, productivity with social welfare, technology with needs, and development with human rights. In this endeavour, the government is playing a lead role in research, innovation and adoption of AI and will provide guidance to all stakeholders—businesses, workers and citizens. It has already taken various commendable initiatives based on AI technologies to promote social good and enhancement of quality of delivery services, education, health, agriculture, etc.

But all these initiatives are taken by the government, there are substantial sections of companies in the private sector, and online platforms who are not so much concerned with ethics and human rights aspects of AI. They are using it for innovation, productivity, efficiency and increasing profit, rather than social goods. Further, the way AI operates in the present— the nature of data sets, methods of obtaining data, the metric used for analyses, the algorithm functioning have posed serious human rights risks. The most notable being job loss, violation of privacy, discrimination, and loss of autonomy. The lack of literacy about AI, absence of state regulations, grievance redressal mechanisms can further exacerbate the risk of violation of rights.

Hence, there is an urgent need for state regulations specific to AI to regulate its deployment in private sector within a framework of human rights. The legal and regulatory frameworks should take into account the protection of privacy, equitable access to AI technologies, transparency, accountability and elimination of biases and discrimination in AI algorithms. There is also need for sectoral specific regulations to deal with human rights violations resulting from AI applications in specific sectors like industry, agriculture, education, health, etc. In the face of rapidly changing technology, it is very challenging to develop a set of principles, rules and regulations, which remain relevant in the foreseeable future. As rightly pointed out, "A key challenge is to balance regulation with innovation. Regulations world over have struggled to

[71] G20 New Delhi Leaders' Declaration New Delhi, India (9-10 September 2023) 24 <https://www.g20.org/content/dam/gtwenty/gtwenty_new/document/G20-New-Delhi-Leaders-Declaration.pdf> accessed 12 September 2023

remain relevant alongside the increased pace of technological developments."[72] Any regulation or laws have to be dynamic, evolving with changes in technology.

There is need to develop collaborations between all stakeholders, including citizens in responsible management of Artificial Intelligence in India. Businesses should also be sensitised to the fact that it is in their interest to take measures for respecting human rights, while adopting AI technologies. Respect for human rights by companies will add to employees retention, good will, customers' trust, more reputation, ultimately contributing to productivity. Sometimes, industries want to adopt human rights measures, but they do not have the capacity and the necessary resources to mitigate the risks. Here, the role of the state is crucial, its role should not be limited to making regulations, but also to provide help and necessary guidance in the protection of human rights. United Nations Guiding Principles on Business and Human Rights can serve as a useful framework to suggest what actions are required to be taken by states and business to protect human rights, while deploying AI in business.

Regarding resolving the most important point of conflict between humans and AI, which is job loss, concept of collaborative intelligence, is relevant which means, "humans and AI actively enhance each other's complementary strengths: the leadership, teamwork, creativity and social skills of the former, and the speed, scalability and quantitative capabilities of the latter."[73] Human rights and technology are not antagonistic but collaborative in the sense that they complement each other and can together work for human development not displacement. In are search involving 1,500 companies, it was found that firms achieve the most significant performance improvements when humans and machines work together.[74] The approach to AI and human rights should be based on synergistic relationships.

The Government of India should make regulations to ensure that industries, instead of retrenching employees straightway, should re-skill them in AI based technology as much as possible and reemploy them, which will be beneficial not only for them, but will also be a milestone towards achieving the goals of Responsible AI. Further, Government should make laws to mandate the companies to provide the explanations behind AI-based decisions and make human interventions essential at all stages of AI deployability—starting from data collection, algorithmic calculations to final outcomes. Citizens should be educated about AI, privacy issues, so that they can take informed decisions and seek redressal of grievances if their rights are violated. Social scientists in India along with other countries should seriously contemplate over larger and foundational questions of how AI is redefining intelligence– implications it has for human beings, rights, and setting limits for AI. In a nutshell, there should be continuous evaluation of AI on human beings from human rights perspective, as it innovates and expands its applications.

[72] Akhilesh Tuteja, 'This will fit the Bill for years to come' The Times of India *(* 4 August 2023) 10
[73] Supra note 66
[74] Ibid.

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समानी प्रपा सह वोन्नभागः।
समाने योक्ते सह वो युनज्मि।
अराः नाभिमिवाभितः।।

– अथर्ववेद-संज्ञान सूक्तम्

"All have equal rights to articles of food and water. The yoke of the chariot of life is placed equally on the shoulders. All should live together in harmony, supporting one another like the spokes of a chariot wheel connecting its rim and hub."

सर्वे भवन्तु सुखिनः

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