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BREAKING THE SILENCE: UNCOVERING THE LEGAL GAPS IN PROTECTING MALE VICTIM OF SEXUAL HARASSMENT AT WORKPLACE

- SHILPA KHANDELWAL[1]

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ABSTRACT

Sexual Harassment is a form of harassment that encompasses explicit or implicit sexual overtones, including unwelcome and inappropriate promises or rewards in exchange for sexual favours. Verbal offenses, physical assaults, and sexual assault are all considered forms of sexual harassment. In a variety of social contexts, including the workplace, family, and school, harassment can take place. Any gender or sex might be a victim or a harasser. Men's vulnerability becomes apparent when there are no legal protections in place to prevent workplace sexual harassment, leaving them susceptible to possible exploitation and harm. Gender equality is a pressing issue in contemporary society. There exists a considerable gap in legal protections for men addressing sexual harassment at workplace. This Article addresses this challenge by focusing on the deficiency in legal safeguards for men against sexual harassment at workplace and explores the inadequacies of existing legislation, and suggests required amendments to make them more gender-neutral. The research methodology is doctrinal and employs a comprehensive analysis of primary sources, including governmental statutes and legislation data alongside secondary sources such as scholarly journals, articles, books, and reports. By examining the current legislative and legal framework and its effectiveness, this study aims to identify areas for improvement and propose necessary amendments to ensure equitable treatment and protection against sexual harassment for all genders.

Keywords: Workplace, Gender equality, Sexual harassment, legislative and legal framework.

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INTRODUCTION

When we hear the term sexual harassment, a disturbing image often comes to mind: a man making unwanted advances or comments towards a woman, creating a sense of unease for her. Nevertheless, the actual scenario differs, and anyone can fall prey to sexual harassment, regardless of age, gender, or sexual orientation. Typically, the instances of harassment or assaults we observe are predominantly linked to females, resulting in women being the primary focus of lawmakers and legislation. Upon examining the actual situation, it becomes evident that many men also experience sexual harassment and are victims of it, despite the lack of a mechanism to address their issue.

The primary question that needs to be addressed is who will safeguard men from sexual harassment? India's legal framework focuses on addressing matters concerning sexual harassment and rape against women. There are currently no legal safeguards or laws in place to shield men from the violent acts of harassment and rape. In India, there is a specific provision in the Indian Penal Code known as Section 377[2] that deals with 'sodomy'. Except for this part, all other regulations and sections pertain only to women.

It can be argued that there is unequal access to justice. India is recognized for its focus on the rights of its citizens, yet violations of the 'Right to equality' persist. Why is this the case? In India, the legal system, societal norms, and laws highlight the significance of ensuring equal rights and fair treatment for all genders. It is evident that the presence of these loopholes and the lack of laws addressing sexual harassment, sexual assault, or rape indicate a blatant disregard for the 'Right to equality'.

STATISTICS OF SEXUAL HARASSMENT AGAINST MEN

Sexual Harassment cases are predominantly perceived and documented in relation to women, which explains why legislation is enacted exclusively for the benefit of female victims. However, this does not exempt males from the perils of sexual harassment. Although males and young children who have experienced sexual harassment may share similar emotions with other survivors of sexual assault, they encounter numerous additional obstacles due to "social ridicule"

[2] Indian Penal Code, 1860 § 377. Now deleted from Bhartiya Nyay Sanhita, 2023 (BNS, 2023)

and "stereotypes" regarding the masculinity of men.

There are many instances covered by surveys and reports of governmental as well as nongovernmental organizations, which revealed numerous cases of men facing incidents of sexual harassment in the workplace.

For instance, a male intern at a Bengaluru-based mobile marketing company accused one of the organization's product managers of sexual harassment at the 'workplace'. In his conversation with the organization, the victim stated that he had been invited by the project manager "to their place after being manipulated and falsely comforted". During this interaction, he attempted to force himself on him, touched him inappropriately, and said unpleasant things[3].

India's most extensive survey conducted on workplace sexual harassment, led by the Indian National Bar Association. The survey took place from April 2016 to October 2016 and involved 6047 participants both male and female and 45 victims both male and female. Approximately 22% of the reported victims were male[4].

Another survey carried out by the Indian Government in 2007 found that among children who reported severe sexual abuse such as rape or sodomy, 57.3% were boys and 42.7% were girls. In a recent study, the Delhi-based Centre for Civil Society discovered that around 18% of Indian adult men surveyed stated that they had been coerced or forced into engaging in conjugal relations. Out of those, 16% reported a female perpetrator and 2% reported a male perpetrator[5].

Furthermore, an editorial in The Hindu reveals accounts of sexual harassment encountered by men in their workplaces. An individual worked as a crime reporter. He frequently received unsuitable messages in his Facebook inbox. He usually ignored couples who received inappropriate sexual comments from female colleagues. One day, he was taken aback when he

[3] Sanath Prasad, 'Forced himself on me, touched me inappropriately': male intern of Bengaluru company accuses manager of sexual harassment, The Indian Express (Sept. 20, 2023), https://indianexpress.com/article/cities/bangalore/bengaluru-company-male-intern-sexual-harrassment complaint-8948217/

[4] Netrika Consulting and Investigation, INBA, Garima: Sexual Harassment at Workplace (Prabhat Books, 2017).

[5] Lalit Bhardwaj, Babu Shivnath Agrawal, sexual harassment of men: a crime that is a reality, Volume II, IJIRL, 7 (2022), https://ijirl.com/wp-content/uploads/2022/06/SEXUAL-HARASSMENT-OF-MEN-A-CRIME-THATIS-A-REALITY.pdf

received a call from an unfamiliar number. A woman on the other line provided him with clear directions on what she expected him to accomplish. After a few weeks, the frequency of incidents rose, prompting him to eventually go to the police station to lodge a formal complaint against the culprit. He is subjected to extremely inappropriate remarks by a female Superintendent of Police - "Ladki chhed rahi hai toh chhid jaona!"[6]

LEGAL FRAMEWORKS FOR ADDRESSING SEXUAL HARASSMENT IN INDIA AND ITS LOOPHOLES

I. POSH ACT

The Sexual Harassment of Women at Workplace (Prevention, Prohibition, and Redressal) Act, 2013 which is also called the Prevention of Sexual Harassment Act ("POSH Act") is the primary legislation that deals with workplace sexual harassment against women. This history of the POSH Act stems from the famous case of ***Vishakha v. the State of Rajasthan***[7]. It was enacted to incorporate the Vishakha Guidelines of 2007 and fulfill international obligations under the Convention on the Elimination of All Forms of Discrimination against Women.

The Act is silent on male or LGBTQ+ employees who may be subjected to workplace sexual harassment. Section 2(a)[3][8] defines an aggrieved woman as one who claims to have been subjected to an act of sexual harassment. Section 3[4][9] specifies that no woman shall be subjected to sexual harassment in the workplace. Thus, by limiting the scope to women, the Act precludes the opportunity to resolve sexual harassment complaints raised by men or other individuals.

II.INDIAN PENAL CODE

Indian Penal Code (IPC) Sections 354[10], 509[11], and 376[12] {Now Bhartiya Nyay Sanhita, 2023

[6] Zara Khan, Adam, what do you mean you were teased?, The Hindu (May 2, 2017), https://www.thehindu.com/thread/reflections/men-too-may-be-sexually-harassed/article18351375.ece
[7] Vishaka & Ors. vs. State of Rajasthan MANU/SC/0786/1997.
[8] Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 § 2(a)[3].
[9] Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 § 3[4].
[10] Indian Penal Code, 1860 § 354.
[11] Indian Penal Code, 1860 § 509.
[12] Indian Penal Code, 1860 § 376.

(BNS, 2023) Sections 74, 79, 64} address different forms of sexual assault, including outraging modesty, eve-teasing, and rape, specifically focused on women. Although it is positive in its own right, it is disappointing that the IPC only addresses sexual assault on men through section 377, which criminalizes sodomy and is often used to discriminate against the LGBT community. It also fails to distinguish between consensual and non-consensual sexual acts among two adult males. Even the Vishakha guidelines established to prevent and address sexual harassment in workplaces only focus on women.

Moreover, Sodomy is the only recognized sexual offense for men, and it is protected by Section 377 of the IPC. However, it exclusively defends against men-on-men assault. What happens if a woman assaults a man? Assume a female boss harasses a weaker subordinate. The absence of regulations protecting female-on-male harassment, or the non-applicability of sections 354 and 509 { Sections 74, 79 BNS, 2023} to male victims, violates Article 14[13] of the constitution[14].

SUGGESTIONS FOR AMENDING EXISTING PROVISIONS ON SEXUAL HARASSMENT

Several countries, such as Denmark, the United Kingdom, and Australia, have put forth and implemented gender-neutral legislation. It's interesting how, despite global changes, the Indian judiciary has continuously refused to adopt gender-neutral laws on sexual harassment. With the increasing number of sexual harassment cases involving men, it is essential to introduce gender-neutral laws in India.

Suggestive amendments can be made to bring gender neutrality in the above legislation. For example, Section 3[4] of the POSH Act could replace the term 'women' with the term 'person' to make the act gender-neutral. Nonetheless, there are gender-neutral elements in the Act; this approach should be expanded to include other aspects of the legislation as well. For example, Section 18[15] of the Act, which concerns the protocol for appealing decisions made by the Internal

[13] INDIA CONST. art. 14.
[14] Shivam Sharma & Aneisha Kaushik, Protection of Men against Sexual Harassment - Need of the Hour, 13 SUPREMO AMICUS 271 (2019).
[15] Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 § 18.

Complaints Committee or Local Complaints Committee, uses the term "any person" who is eligible to appeal. This suggests that the aggrieved party could be a man, a woman, or someone who identifies as any other gender.

Gender and sexuality are no longer regarded to be as black and white as they were when the Act was conceived. Furthermore, such a biased regulation perpetuates the long-standing stereotype of a male harasser and a female victim, undermining the concept of workplace equality. In the case of ***Hiral P. Harsora v. Kusum Narottamdas Harsora***[16], The Supreme Court noted that while the primary aim of the statute is to protect women across various aspects of life, Section 2(m)[17] of the POSH Act defines the term "Respondent" to encompass all genders. Consequently, the POSH Act acknowledges that both males and females can be perpetrators of sexual harassment. As a result, a gender-neutral regulation can be suggested that requires workplaces to have appropriate procedures in place to handle sexual harassment of both men and people who identify as LGBTQ+. Expanding this neutral application to accommodate all victims in the workplace, regardless of gender, would effectively empower them to speak out against detrimental situations and foster an inclusive work environment.

Moreover, In May 2016, the University Grants Commission introduced a set of regulations known as the "UGC Sexual Harassment Regulations," which require higher educational institutions to take strong action against all forms of gender-based violence. According to Regulation 3(1)(d) of the Regulation: "Higher educational institutions must take strong action against all forms of gender-based violence targeting employees and students of all genders, acknowledging the vulnerability of primarily women employees and students, as well as some male students and students of the third gender, to various types of sexual harassment, humiliation, and exploitation."[18]

According to a study, media coverage of sexual assaults against men has no impact on male labor participation. There is no evident link between interpersonal violence and male labor participation. Nevertheless, media reports on sexual assaults against women can lead to feelings

[16] Hiral P. Harsora vs. Kusum Narottamdas Harsora MANU/SC/1269/2016.
[17] Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 § 2(m).
[18] Adab Singh Kapoor, *POSH Act: Discussing Gender Neutrality, Transgender Rights & Inclusion Of LGBTQ*, (June 6, 2020).

of anxiety and fear. There is a tendency for to women perceive a higher risk of becoming victims due to fear, even when the actual risk remains unchanged. It is possible that women reduce their work outside the home due to fear stemming from heightened media coverage of sexual attacks. This led to arguments that altering gender-sensitive laws such as the POSH Act and the Indian Penal Code to be gender-neutral could potentially compromise their goal of safeguarding and empowering women. On the other hand, some research indicates that men are similarly impacted mentally and physically by sexual harassment, as a study demonstrates that men do experience distress. National Intimate Partner and Sexual Violence Survey (NISVS) in 2010 reports a higher prevalence of various health issues in men who have experienced rape, stalking, or physical violence by an intimate partner.[19]

Also, the above-mentioned study indicates the impact of sexual harassment on the workforce in the economy but our primary concern should be the effect of sexual harassment on victims.

All individuals whether male or female who have faced sexual harassment should receive fair treatment and seek help from legal frameworks such as the POSH Act to ensure equal protection under Article 14 of the Indian Constitution.

Additionally, the POSH Act is not sufficiently inclusive to cover women from all sectors of work. Horizontal inequality is evident in legislation. Inequality between individuals of a group but with different identities is known as Horizontal inequality. Since more than 80% of Indian women workers are employed in the informal sector, the law is generally inaccessible to them.[20] Gender is the dominant determinant of labor force participation in the informal economy in India, as 95 percent of the female workforce is engaged in informal sector employment. Women perform a variety of occupations in the unorganized sector, including street vendors, construction workers, domestic workers, and agricultural laborers. Given the substantial proportion of female workers employed in the informal sector, the matter concerning the efficient enforcement of legislation about sexual harassment in the workplace requires a deeper

[19] Jai Vipra, A case for gender-neutral rape laws in India, (CCS Working Paper # 286, Page No. 15, 2013), https://ccs.in/sites/default/files/202210/A%20Case%20for%20Gender%20Neutral%20Rape%20Laws%20in%2 0India.pdf

[20] *Diksha Munjal, Explained | What is the POSH Act and why has the Supreme Court flagged lapses in its implementation?*, The Hindu (May 15, 2023), https://www.thehindu.com/news/national/explained-the-indianlaw-on-sexual-harassment-in-the-workplace/article66854968.ece

analysis.

The 2013 Justice J.S. Verma Committee Report stressed the need for a workplace sexual harassment law that covers "every female member of the national workforce". The report stressed the need to include the unorganized sector and ensure that the informal sector was not immune from regulation[21]. The need to amend the POSH Act is further exacerbated by this horizontal inequality.

IS GENDER-NEUTRALITY DETRIMENT TO WOMEN'S PROTECTION?

Article 15(3)[22] of the Indian Constitution addresses the enforcement of special measures for women. Implementing special provisions for women through protective discrimination can lead to legislation that protects women from sexual harassment in the workplace. The POSH Act was established as a unique provision for women because of their susceptibility to workplace sexual harassment. However, the paper suggests that women are not the sole vulnerable group. Other groups could also encounter comparable risks and find themselves at a disadvantage. This disparity in protection for men and other groups contradicts the equal protection promised in Article 14 of the Constitution.

Furthermore, by ensuring equal protection under the law through Article 14 of the Indian Constitution to amend laws and make them gender-neutral, it does not infringe upon the special provision of Article 15(3) as this approach does not aim to exclude women from the protection provided for them; instead, gender-neutral laws will encompass men and LGBTQ+ individuals who are also at risk of sexual harassment in the workplace.

CONCLUSION

We have come to a point where ensuring the protection of men's dignity is just as crucial as safeguarding the modesty and dignity of women in the country. The advancements in modernization and culture have not only achieved gender equality but have also resulted in cases

[21] INDIA CONST. art. 15, cl. 3.
Avanti Deshpande, Does The POSH Law Protect Women Working In The Unorganised Sector? Ungender (January 6, 2021), https://www.ungender.in/sexual-harassment-against-women-in-the-unorganised-sector/
[22] INDIA CONST. art. 15, cl. 3.

of women sexually harassing men in workplaces or educational institutions. The issue has now become more complex as harassment between men was already a challenge to address, and now harassment from women towards men is also a significant concern. Hence, creating laws to protect potential victims is crucial. Extensive research is being conducted on sexual violence against men worldwide, with many countries implementing legal provisions. Indian Courts need to address sexual violence against men and implement laws to protect them from such crimes.

However, implementing laws is the second priority for our society, with the first being to acknowledge the importance of gender-neutral laws. Due to practical necessities, exceptions to standard rules may need to be made at times, so why can't we accept that there might be an exception to the typical scenario of men sexually harassing women? This issue is becoming increasingly prominent in addressing gender-neutral laws. Our society seems unprepared to acknowledge the existence of sexual harassment towards men, making finding solutions to such issues seem distant. Like if we do not acknowledge the presence of a disease in our body and seek medical attention for treatment, doctors and medications will not be able to assist us. To address the problem of sexual harassment against men, it is essential to acknowledge that "MEN CAN ALSO BE VICTIMS OF SEXUAL HARASSMENT."

PROTECTING PEOPLE AND PLANET: INTEGRATING HUMAN RIGHTS WITH ENVIRONMENTAL LAW

- SAMPADA GAUTAM[23] & DR. MAHENDRA SINGH MEENA[24]

INTRODUCTION

Environmental degradation has emerged as a pressing global issue, with profound implications not only for ecological systems but also for human wellbeing. The interconnectedness between environmental harm—manifested through climate change, deforestation, pollution, and loss of biodiversity—and fundamental human rights is increasingly recognized. This intersection highlights the necessity of robust legal frameworks that simultaneously protect the environment and uphold human dignity

The intersection highlights the need for robust legal frameworks that protect both the environment and fundamental rights of everyone. As the crisis intensify, the inadequacies of existing legal mechanisms to address this issue has become evident. This article explores how the environmental law and human rights intersect.

HUMAN RIGHTS AND THE ENVIRONMENT: AN INEXTRICABLE LINK

The relationship between healthy environment and human rights is rooted in the recognition that a healthy environment if needed to fully enjoy the human rights which the individual possess. Without clean air, clean drinking water and a stable climate, right to life is compromised. Environmental degradation disproportionally affects the vulnerable and marginalized communities, thereby increasing the present inequalities which are already hindering their ability to access basic needs.

THE RIGHT TO A HEALTHY ENVIRONMENT

The right to a healthy environment is recognized a human right both in international law as well as in the constitutions of various countries. Over 100 countries have enshrined this right in their

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national constitutions reflecting growing consensus on the importance of environmental protection for human dignity and quality of life. Internationally, the United Nations human rights council has recognized the right to healthy environment as a component of the right to life and in 2021 the un general assembly adopted a resolution formally recognizing thi right as universal.

Despite this progress the legal recognition of the right remains uneven, and enforcement mechanism are often weak because in many countries economic often take precedence over environmental and human rights considerations leading to gaps in accountability and justice for the affected communities.

LEGAL FRAMEWORK AT THE INTERSECTION OF HUMAN RIGHTS AND ENVIRONMENTAL LAW

Several frameworks at both international and national levels seek to address the intersection of human rights and environmental law. These aim to provide individuals and communities for the adverse effects of environmental degradation while ensuring that their fundamental rights are upheld.

INTERNATIONAL LEGAL INSTRUMENT

At this level several treaties and declaration explicitly link environmental protection to human rights. The Stockholm declaration of 1972, adopted at the United Nations conference on the human environment was one of the first international instruments to recognize the connection between the two. Principle 1 of the declaration states that "man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being."[25]

Building on this foundation, the Rio declaration on environment and development(1992) further emphasized on the connection between human rights and environment sustainability. Principle 10 of the declaration calls for the participation of all concerned citizens around the world for decision making processes, underling the importance of access to information, public

[25] Stockholm Declaration, *Declaration of the United Nations Conference on the Human Environment*, U.N. Doc. A/CONF.48/14/Rev.1 (1972).

participation and justice in environmental matters.[26]

More recently the Paris agreement of 2015 has highlighted the human rights implications of climate change acknowledging the need to respect, promote and consider human rights obligations in climate change. The agreement recognizes that climate change poses a serious threat to the realization of human rights and call for its protection of the most vulnerable population including indigenous peoples, local communities, migrants and children[27].

NATIONAL LEGAL FRAMEWORKS

National legal frameworks also play a crucial role in protecting human rights in the context of environmental degradation. Some countries have adopted specific laws or constitutional provisions that recognizes the right to a healthy environment and provide mechanisms for individual to seek redress for environment harm.

Like the constitution of south Africa have a provision that guarantees everyone the right to an environment that is not harmful to their health or well being and mandates the state to take reasonable measures to prevent pollution and ecological degradation[28]. Similarly in the constitution of Ecuador recognizes the rights of nature and granting legal personhood to ecosystem and allowing citizens to enforce these rights in courts of law this also reflective a commitment to protect the environment as a fundamental right and providing mechanisms for individuals as well as communities[29]

However, the effectiveness of these national frameworks varies widely, depending on factors such as the strength of the legal institutions, the level of public awareness and participation and the political will to enforce the environmental protections. Many of these cases, the provisions that protect rights and environment are undermined by corruption, weak governance and the prioritization of economic development over environmental sustainability.

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[26] Rio Declaration, *Rio Declaration on Environment and Development*, U.N. Doc. A/CONF.151/26 (Vol. I) (1992).

[27] Paris Agreement, *Paris Agreement under the United Nations Framework Convention on Climate Change*, adopted Dec. 12, 2015, entered into force Nov. 4, 2016, T.I.A.S. No. 16-1104.

[28] Constitution of South Africa, 1996.

[29] Constitution of Ecuador, 2008.

ENVIRONMENT JUSTICE: ENSURING EQUITY IN ENVIRONMENTAL LAW

The concept of environment justice has emerged as a crucial framework for addressing the intersection of human rights and environmental law. Environmental justice seeks to ensure that no group of people particularly marginalized and vulnerable communities bears a disproportionate burden of environmental harm. It also emphasizes the importance of equitable access to environmental benefits such as clean air, water and green spaces but in practice the justice fails of the notable example is case of Ogoni people which belong to the African nation of Nigeria, who have suffered extensive environmental degradation due to oil extraction by multinational corporations here the economic factor was kept above the environment factored still the people of the country suffer from poverty now alongside with the environment degradation[30]. The pollution of their land, water and air has led to severe health issues to the community leading to wide spread of human rights violation.

The Flint water crisis in the United States is a notable example of environmental injustice. The predominantly African American community of Flint, Michigan, was exposed to lead-contaminated drinking water for years, exposing deep-seated racial and economic inequalities. The failure of local, state, and federal authorities to protect the community's right to safe drinking water has been criticized for its inadequacy, underscoring the importance of environmental justice in safeguarding human rights[31].

Despite the growing recognition of justice, challenge remain the same that is the implantation of it.

EMERGING TRENDS AND FUTURE DIRECTIONS

The intersection is an evolving field with several branches from it that holds a promise for the future these include recognition of rights of nature, climate litigation and integration of human rights into environmental policies

Rights of nature

[30] Ogoni Case (The Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v. Nigeria), African Commission on Human and Peoples' Rights, *Comm. No. 155/96 (2001).*

[31] U.S. House of Representatives Committee on Oversight and Reform, *Flint Water Crisis: Majority Staff Final Report,* 117th Cong. (2020).

- The nights of nature represent a significant shift in environmental law. this approach grants a legal person hood to ecosystem, allowing them to be represented in court and have their right protected like rivers have been granted legal personhood, including in India, New Zealand, and the United States:

- India: In 2014, Mohammed Salim filed a lawsuit in the Uttarakhand High Court against illegal construction and encroachments along the Ganges River[32]. In April 2017, the court ruled that the Ganges and Yamuna rivers are legal entities with the same rights as a legal person, including human rights. The court also appointed two state officials as the rivers' "legal guardians". However, in March 2017, the Indian Supreme Court overturned the decision after the Uttarakhand Government petitioned that the rivers' legal status was unsustainable.

- New Zealand: In 2017, New Zealand passed The Awa Tupua (Whanganui River Settlement Act) which granted personhood status to the Whanganui River. The law states that the river is a living whole, from the mountains to the sea, and that all parties are committed to ensuring its health and well-being.[33] The Whanganui River is sacred to the Mori people, who consider it "tupuna," or ancestor.

- United States: The Klamath River in the United States has also been granted personhood[34].

Climate litigation

Climate litigation is a legal action that uses arguments related to climate change to combat climate change. It's a tool that individuals and communities use to force corporations and governments to do more to prevent dangerous climate change. Climate litigation typically engages in one of five types of legal claims: Constitutional law (focused on breaches of constitutional rights by the state), administrative law (challenging the merits of administrative decision making), private law (challenging corporations or other organizations for negligence,

[32] MANU/UC/0050/2017

[33] Awa Tupua (Whanganui River Settlement) Act 2017 (N.Z.).

[34] Yurok Tribe, *Resolution Recognizing the Rights of the Klamath River* (2019).

nuisance, etc., consumer or fraud (challenging companies for misrepresenting information about climate impacts), or human rights (claiming that failure to act on climate change is a failure to protect human rights). climate litigation has the potential to drive significant changes in environmental policies and practices, particularly when successful cases set legal precedents that compel governments and corporations to take more ambitious climate action

The *Urgenda Foundation v. State of the Netherlands*[35] case serves as a pivotal example of how climate litigation can bridge the gap between these two fields. The case, decided by The Hague District Court in 2015, marked a significant moment in legal history by establishing that governments have a legal duty to protect their citizens from the dangers of climate change. The court ruled that the Dutch government must take more ambitious action to reduce greenhouse gas emissions, highlighting the connection between environmental protection and fundamental human rights, such as the right to life and the right to private and family life under the European Convention on Human Rights.

This landmark case illustrates how courts can enforce stronger environmental policies by framing climate change as a human rights issue. The *Urgenda* decision underscores the potential for climate litigation to serve as a powerful tool in advancing environmental justice, ensuring that governments are held accountable for their role in contributing to environmental harm. This case not only set a legal precedent in the Netherlands but also inspired similar actions globally, reinforcing the essential role of legal frameworks in safeguarding both human rights and the environment.

In *Juliana v. United States*[36], a landmark climate change litigation case, a group of young plaintiffs filed a lawsuit against the U.S. government, asserting that its policies and inaction on climate change violate their constitutional rights. The plaintiffs argued that the government's failure to address climate change impairs their rights to life, liberty, and property under the Constitution. They sought judicial intervention to compel the government to take more aggressive action to mitigate climate change impacts. Although the case faced numerous procedural hurdles, including challenges to its standing and justiciability, it highlighted the

[35] Urgenda Foundation v. State of the Netherlands, Case C/09/456689 / HA ZA 13-1396 (Hague District Court, 2015).

[36] *Juliana v. United States*, 217 F. Supp. 3d 1224 (D. Or. 2016).

potential of constitutional claims in climate litigation and attracted significant attention to youth-driven climate justice movements.

CONCLUSION

The intersection of environmental law and human rights underscores the crucial link between a healthy environment and the protection of fundamental rights. As environmental degradation intensifies through phenomena such as climate change, deforestation, pollution, and loss of biodiversity, it increasingly undermines essential human rights, including the right to life, health, and access to clean resources. The global acknowledgment of the right to a healthy environment, reflected in international agreements and national constitutions, marks a significant step toward integrating environmental protection with human rights. However, the uneven legal recognition and weak enforcement mechanisms highlight ongoing challenges.

International frameworks like the Stockholm Declaration, Rio Declaration, and Paris Agreement emphasize the need for coordinated action to address these issues. National legal frameworks, such as those in South Africa and Ecuador, offer progressive models but face implementation hurdles due to governance issues and economic priorities.

Environmental justice movements, exemplified by cases like those of the Ogoni people and the Flint water crisis, reveal the disproportionate impact of environmental harm on marginalized communities, stressing the need for equitable access to environmental benefits.

Emerging trends, such as the rights of nature and climate litigation, present promising developments. Cases like *Urgenda Foundation v. State of the Netherlands* and *Juliana v. United States* illustrate how legal action can bridge the gap between human rights and environmental protection, compelling governments and corporations to act more decisively against climate change.

To advance this crucial intersection, it is imperative to strengthen legal frameworks, enhance enforcement, and foster greater public engagement. By addressing these challenges and leveraging emerging trends, we can better protect both human rights and the environment, paving the way for a more just and sustainable future for all.

LOCKING DOWN INNOVATION: UNPACKING THE CONSEQUENCES OF DATA EXCLUSIVITY ON INTELLECTUAL PROPERTY

- **PRACHI JAIN**[37]

ABSTRACT

The article explores how data exclusivity periods impact intellectual property rights, with a focus on how they support innovation in the chemical, pharmaceutical, and agricultural industries. It addresses how data exclusivity strengthens intellectual property rights while creating obstacles for generic access and competitiveness in the marketplace The article highlights the effects of data exclusivity on society and IPRs and suggests flexible laws and public-private collaborations to balance effective IP protection with public health demands.

INTRODUCTION

Data Exclusivity is a term related to the field of IPRs, and it's particularly related to pharmaceutical products, agricultural products, or some things that include chemicals in their production. Various concepts are related to it and those are Patents and Exclusivity then the exclusivity has two parts, namely, data exclusivity and market exclusivity, so all these terms vary from each other and should not be confused.

Now, Data exclusivity is the terms which could be defined as, *"period of time during which an applicant cannot rely on the data in support of another marketing authorization for the purposes of submitting an application, obtaining marketing authorization or placing the product on the market, i.e.: generics, hybrids, biosimilars cannot be validated by the Agency."*[38] So, if we explain it in simple words it's a concept related to the patentable products as its earnings, also data exclusivity is most relevant with the medicinal, agricultural, or other chemical products, and it means that data generated by a particular company through different clinical trials and test will

[37] Assistant Professor, Modi Law College, Kota, Rajasthan.
[38] EUROPEAN MEDICINE AGENCIES, https://www.ema.europa.eu/en/documents/presentation/presentationdata-exclusivity-market-protection-orphan-and-paediatric-rewards-s-ribeiro_en.pdf (last visited Jun. 09, 2024).

not be used by the other company mostly the generic ones after the approval of the product to come into the market for few years.

The need of this data exclusivity is that when a company makes a new medicine it takes the patent as fast it can so it can protect its rights but just by taking patent they don't start earning from them as in the case of patents it could be possible that it is granted for 20 years but in completing all trials only and before taking the product into market 10-15 years or more gets completed then in later few years they would not be able to earn as such and it comes discouraging for them then data exclusivity is something that plays an important role in making companies sure that for a certain number of years they would not be facing any competitors after going into the market as their data of clinical trials and other tests will not be used by anyone as base for their products approvals.

Also, it is somewhat which remains very much in the news as in recent times, news came that India and the European Free Trade Association were in talks for the implementation of Free Trade Agreements but India said that we are not going to accept the demand for *'Data Exclusivity'* by EFTA as a provision in the pact of free trade and assured the generic medicinal industry of India that they would be under no threat as they are contributing to the growth of India[39] so it's necessary to understand why India is not accepting this demand of theirs. So, now let's delve into the details of the data exclusivity period and the impacts that it made on society and IPRs.

DATA EXCLUSIVITY AND ITS IMPACT ON SOCIETY.

As the data exclusivity defined above, it is pertinent to note that the first time the provisions of data exclusivity were made worldwide was by Article 39.3 of the TRIPS Agreement of WTO which states that, *"Members, when requiring, as a condition of approving the marketing of pharmaceutical or of agricultural chemical products which utilize new chemical entities, the submission of undisclosed test or other data, the origination of which involves a considerable*

[39] Amiti Sen, India has rejected EFTA demand for 'data exclusivity' for drugs: Commerce Secretary, THE HINDU BUSINESS LINE (Feb. 15, 2024, 08:58 PM), https://www.thehindubusinessline.com/economy/india-has-rejected-efta-demand-for-data-exclusivity-for-drugs-commerce-secretary/article67850154.ece#:~:text=Data%20exclusivity%20clause&text=Therefore%2C%20data%20exclusivity%20lengthens%20thejargest%20supplier%20of%20generic%20medicines.

effort, shall protect such data against unfair commercial use. In addition, Members shall protect such data against disclosure, except where necessary to protect the public, or unless steps are taken to ensure that the data are protected against unfair commercial use."[40]

This provision is implemented in many developed countries but many developing countries including India have not accepted this as this provision is not mandatory to be implemented thus India has not implemented this as the implementation of this would hit the generic medicinal market of the country as it favours the big pharma companies who invest a heavy amount into Research and Development.

Also, just because it favours the big companies doesn't mean that it is completely something that should not be implemented as it has both pros and cons like other things which have to be analyzed to know its impact so first, we know that some big companies generate the data during various clinical tests of any particular medicine or chemical product and then if they get approvals of them to be used by the people, the data exclusivity is granted which makes the other to not use that data or to rely upon it.

Pros of this concept are that since the big companies invested a lot in the clinical trials or generation of data and took several risks and invested time so they deserve to get benefit out of it and if any market would not be providing that then generally they would not be entering there for investment and there would be dearth of innovations because of lack of investments but the cons are that since the other person or company becomes unable to apply for permission to produce the same product using theirs data so they are not capable of competing with them and in absence of competition big companies charge high amount on medicine and also if the other generic companies want to get the same trials done as them then it would not only cost a huge amount of money to them but also there are risks involved with the persons on whom the trials will be done and also here raise a question of morality and ethical concerns as unlike animal testing, human trials involve sentient beings with inherent rights and dignity.

Therefore, we must minimize unnecessary repetition of trials that may cause harm or discomfort to participants meanwhile by ensuring that previous trial data is accessible to all

[40] WTO ANALYTICAL INDEX, https://www.wto.org/english/res_e/publications_e/ai17_e/trips_art39_oth.pdf (last visited Jun. 10, 2024).

researchers, we can uphold ethical standards in human subject research while still advancing medical knowledge. This balance respects human dignity, promotes scientific progress, and potentially improves public health outcomes. So, this raises both ethical and moral questions which can be addressed by the different countries both in separation and jointly but not in the way of any other country forcing others to adopt another way as the local government should always decide this type of matter as per their need so no country faces the lack of medicines and also should take care that innovators and investors get properly rewarded by their earning.

DATA EXCLUSIVITY AND ITS IMPACT ON INTELLECTUAL PROPERTY RIGHTS

Data exclusivity provides an extra level of protection that is a crucial addition to patents. While data exclusivity begins when a medicine is approved by regulators, patents grant a 20-year monopoly from the date of filing[41]. This guarantees a duration of market exclusivity if the patent expires before the drug's commercial availability, so enabling inventors to optimize their return on investment in the absence of prompt generic competition. Intellectual property rights get strong because of this dual layer of protection, which provides both market stability and legal clarity, and the pharmaceutical industry or other agricultural and chemical industries are encouraged to engage in the expensive and uncertain process of drug development by the guarantee of data exclusivity. Data exclusivity encourages companies to make significant investments in research and development by ensuring that rivals cannot utilize their clinical trial data for a specific period of time.

Also, it offers market predictability and legal clarity. Once awarded, the data exclusivity term is usually not subject to challenges or invalidations, unlike patents, which may be subject to legal processes. Businesses may plan their market strategy and investment decisions with more certainty because of this consistency. Also, defining data exclusivity periods precisely aids in organizing pharmaceutical product lifecycle management. Product launch strategies that optimize its commercial potential can be devised by innovators for new goods, incremental innovations, and successive generations of products. Investors seeking solid and safe investment options in the high-risk pharmaceutical and biotech sectors also benefit from this predictability.

[41] COOPER IP, https://cooperip.com/7-steps-to-patent-protection/, (last visited Jun. 9, 2024).

Thus, because of these all most developed countries have this provision implemented in their country as a law, for instance, in the USA, it is granted for a period of 5 years, and in the European Union it is for 8 years, and after that, they have to release their *"preclinical tests and clinical trials"* data for the use by the generic medicinal companies.[42] *"In 1987, the United States proposed that that data exclusivity could be under the concept of trade secrets. Business entities from the developed countries of the U.S., Japan and the E.U. jointly submitted that the Clinical Trial data generated took a lot of time and resources to generate. After the TRIPS was enacted, developed countries like the United States and the European Union have interpreted Article 39.3 to be in favour of a regime of data exclusivity. Even a developing country Argentina has been convinced about this interpretation."*[43] But in India, there is no defined period, rule, or law for this but only the patent of 20 years from the date of filing an application[44] could be granted to anyone fulfilling the patentability criteria and this has also a very strong reason behind it and it is the issue of public health as data exclusivity keeps inventors safe, but it also keeps generic rivals from entering the market an early stage.

The innovator's clinical trial data is what generic manufacturers use to prove bioequivalency and secure regulatory clearance. The inability of generics to make use of this data during the data exclusivity period significantly delays their arrival into the market and keeps the innovator's product's price higher. The market dynamics are significantly impacted by this delay, especially in areas where access to reasonably priced medications and healthcare expenditures are major concerns. Excessive drug costs during the exclusivity period puts pressure on public health resources and restrict patients' access to necessary medical care. Thus, the impact of the data exclusivity on the IPRs of the medicinal producers is considerable and it is something that seems necessary for the companies to be encouraged to invest in Research and Development but if some countries are against it then they also have guanine fears that their people would be facing the shortage of the medicines and a set industry of the generic producers would be hampered, so

[42] MEDCITYHQ, https://medcityhq.com/2023/06/27/exclusivity-for-pharmaceutical-products/ (last visited Jun. 10, 2024).
[43] Sindhu, Kushank, and Singh, Abhishek K. "DATA EXCLUSIVITY IN INDIA: A SAGA OF IGNORANCE AND ILLOGICALITY." NLIU Law Review, vol. IV, no. I, 2021, pp. 151-184, https://nliulawreview.nliu.ac.in/wp-content/uploads/2021/12/Volume-IV-Issue-I-151-184.pdf.
[44] Office of CGPDTM, *FREQUENTLY ASKED QUESTIONS- PATENTS*, FAQs 1, 2 (2020), https://www.ipindia.gov.in/writereaddata/Portal/Images/pdf/Final_FREQUENTLY_ASKED_QUESTIONS_-_PATENT.pdf.

in this cases to encourage the companies for Research and Development government may not give them rights but they do the investing and make the private-public partnership which is also a great way out of this.

CONCLUSION

Data exclusivity significantly impacts intellectual property rights in the field of pharmaceutical, agriculture, or patentable products of chemical as it grants the person or company exclusive rights to earn from their product without any competition from others who would eventually come into the market by using their data only. In countries where it is implemented, they pull a lot of Research and Development there but where it is not implemented, they also have to find a way out of calling the companies for Research and Development and those countries in place of giving rights to them assist them in investment and R&D for the good of their people and through this way, after finishing of trials generic companies would be coming into the market.

The debate about data exclusivity is based upon both moral and ethical questions in the era when people even questioned the patents in medicinal products. So, this decision of implementation or not, can't be only seen from the viewpoint of Intellectual Property Rights but the condition and earning capability of that nation and their morals regarding whether they would be allowing the monopoly of a particular medicine for a few years. Thus, there is a need to balance IP rights with public health considerations and find a way out so both innovators and society can benefit, and one such way is private-public partnership R&D programs.

POWERING INDIA'S FUTURE: AN ANALYSIS OF THE ELECTRICITY (AMENDMENT) RULES 2024

- DR. PRASHANT BHADU[45]

INTRODUCTION

India's power sector has witnessed a transformation in recent years, owing to the country's dedication to resolving environmental concerns and encouraging the use of renewable resources. Over the years, amendments to the Electricity Act 2003 have sought to address evolving challenges and opportunities in power sector. The Ministry of Power has recently introduced the Electricity (Amendment) Rules 2024, which is an important move toward attaining the broader objectives specifies in Electricity Act 2003, as well as complying with India's ambitious climate goals. These new rules revise the existing Electricity Rules, 2005, with a major focus of improving the supply of electricity of large enterprises and expanding green energy sector. The amendments aim to create an enabling environment for the expansion of renewable energy projects and energy storage systems by addressing key issues such as licensing requirement, open access charges, and cost-reflective tariffs. The relaxation of license criteria intends to simplify the process of establishing renewable energy projects, lowering barriers, and increasing investment in the field. Furthermore, the standardization of open access charges aims to create a level playing field for renewable energy generators, encouraging fair competition, and allowing them to participate in energy market. The laws also provide procedures for achieving cost-reflective tariffs, which ensure that the full cost of energy generation, including environmental externalities, is precisely reflected in the price system. This strategy not only promotes transparency but also encourages the use of cleaner, more sustainable energy sources.[46]

With the Electricity (Amendment) Rules, 2024, India demonstrated its commitment to environmental sustainability as well as recognition of the essential role that renewable energy sources play in mitigating the consequences of global warming. These regulations seek to

[45] Assistant Professor, School of Law, Mody University, Laxmangargh, Sikar, Rajasthan.
[46] Praveen Raju, Janhavi Joshi, & Amoolya Khurana, "Electricity Amendment Rules 2024: Reshaping the Energy landscape in India", ET Energy World, (5 April 2024), https://energy.economictimes.indiatimes.com/news/power/electricity-amendment-rules-2024-reshaping-the-energylandscape-in-india/109056996 - :~:text=The 2024 Rules provide relief,establish, operate or maintain a.

expediate the transition to more environmentally friendly energy landscape by creating a favorable regulatory environment, in line with the country's overarching goals of achieving energy security, stimulating economic growth, and preserving the environment for future generations.

JUDICIAL INTERPRETATION SHAPING THE ELECTRICITY RULES

Over time, judicial interpretations and various amendments have shaped the current structure of the legislative framework the governs India's electricity sector. In ***Tata Power Co. Ltd. v. Reliance Energy Ltd.,*** court emphasized the importance of open access in promoting competition and efficiency in the power sector. The court held that open access is a crucial tool for guaranteeing that customers have the freedom to choose their electricity suppliers, which promotes economy and efficiency.[47] In ***PTC India Ltd. v. Central Electricity Regulatory Commission,*** the court stresses the need for regulatory clarity and transparency in electricity industry. The court stated that stimulating growth and investment in the power industry necessitates transparent and stable regulatory environments.[48] In **Energy Watchdog v. Central Electricity Regulatory Commission,** court held that tariffs should represent the actual costs incurred and compensatory tariffs should only be granted in circumstances of force majeure or significant changes in law that affects the viability of power projects.[49] Furthermore, in ***Adani Power (Mundra) Ltd. v. Gujarat Electricity Regulatory Commission,*** court ruled that increased costs could be passed on to consumers through revised tariffs, underscoring the need for tariffs to reflect actual costs.[50]

These judicial decisions establish a strong legal framework and guiding principles, which have been included in amended rules. These rulings laid the groundwork for the new laws, ensuring that they address long-standing concerns and create a more efficient, competitive, and sustainable electricity market. Under 2024 Rules, open access enables customers to purchase power straight from sources, skipping distribution firms. This mechanism is essential for large consumers and entities involved in generation of renewable energy. Despite this, a major

[47] Tata Power Co. Ltd. v. Reliance Energy Ltd., MANU/SC/2815/2008.
[48] PTC India Ltd. v. Central Electricity Regulatory Commission, MANU/SC0164/2010.
[49] Energy Watchdog v. Central Electricity Regulatory Commission, MANU/SC/0408/2017.
[50] Adani Power (Mundra) Ltd. v. Gujarat Electricity Regulatory Commission, MANU/SC0869/2019.

obstacle has been the disparate and often opaque structure of open access charges among the various states. The 2024 rules address this issue by standardizing the calculation of wheeling charges, that is the fees for using transmission and distribution networks. Amendment also states that distribution licensee' fixed cost of power purchase cannot be surpassed by additional fees on open access consumers. Additionally, in 2003 act, any organization engaged in the distribution and transmission of electricity is required to get a license from either the Central Electricity Regulatory Commission (CERC) or respective State Electricity Regulatory Commission (SERCs). However, the 2024 rules, include a significant exemption to this rule. Rule 2 permits the establishment, operation, and maintenance of transmission lines without a license for entities such as generating companies, captive generating plant operators, energy storage system, and consumers with a load of at least 25 MW for inter-state transmission and 10 MW for intra-state transmission. This provision aims to ease the regulatory process for large-scale users and green energy providers, encouraging the development of specialized electricity transmission infrastructure. Furthermore, in 2024 rules, tariffs should correctly reflect the costs that generation, transmission, and distribution companies actually incur. Rule 2 specifies that there can be no more than 3% gap between the expected yearly revenue from approved tariffs and the annual aggregate revenue requirement. By focusing on tariff reflectivity, power sector organizations will be able to recoup their expenses, strengthening their financial position and capacity to invest in new infrastructure and technology.[51] The Electricity (Amendment) Act, 2024, have been strongly influenced by these rulings which highlights the need for financial stability, regulatory certainty, and openness in the power sector.

COMPARATIVE ANALYSIS WITH GLOBAL PRACTICES

The Electricity (Amendment) Rules 2024 in India and FERC Order 888 in Unites states[52] share similarities in their approach despite having different timelines. Both of these aims to liberalize their respective markets by promoting competition and open access in the electricity sector. Although 2024 rules aim to integrate renewable energy sources through eased licensing for transmission lines, FERC Order 888 indirectly benefited renewables by creating a more open

[51] *Electricity Amendment Rules 2024,* (Ministry of Power), https://powermin.gov.in/sites/default/files/Electricity Amendment Rules first amendment of 2024.pdf.
[52] *FERC Order 888,* https://www.ferc.gov/industries-data/electric/industry-activities/open-access-transmission-tariffoatt-reform/history-oatt-reform/order-no-888.

market structure. These changes could boost the use of renewable energy sources and productivity. Long-term investment landscapes are impacted by both, with India's rules aiming to attract renewable investments, and FERC order 888 created a new investment paradigm that required industry adaptation.[53]

The negative environmental impact of FERC Order 888 gives valuable insight for predicting potential issue with 2024 rules. FERC 888 initially promoted the use of more coal plants, and sometimes favored cheaper, more polluting options, suggesting that India's rules may also favors cost over environmental concerns in short run. While FERC 888 eventually favored renewables, the delay in this effect indicated India might also experience delay in the adoption of the rules and significant renewable energy growth.[54]

India can benefit from the experiences while implementing FERC Order 888 as it implements 2024 rules. India should give first priority to environmental concerns, especially in light of past experience when FERC's order initially favored more expansive and polluting sources like coal. India should strive for well-rounded strategy that takes the economy and environmental sustainability in account. Taking a cue from the US, where benefits from renewable energy were recognized gradually, India should incentivize and accelerate the use of renewables. Subsidies, feed-in tariffs, or other supportive policies could be used to ensure a swift transition to renewable energy sources.

ENVIRONMENTAL IMPLICATIONS OF 2024 RULES

Further, from several legal precedents and landmark judgements, one can interpret the interplay between power sector and its impact on environment. In the case of ***Hindustan Zinc Ltd. v. Rajasthan Electricity Regulatory Commission,*** court upheld the validity of the Renewable Purchase Obligation mechanism, stating that it is an integral part of the Electricity Act 2003, and aims to promote sustainable development and environmental protection.[55] This

[53] F*ERC ORDER 888*, (Energy Knowledge Base), https://energyknowledgebase.com/topics/ferc-order-888.asp.
[54] Time Woolf, Geoff Keith, David White, *"Environmental challenges and opportunities of the evolving North American electricity market"*, Commission for Environment Cooperation, (June 2002), http://www.cec.org/files/documents/publications/1820-retrospective-review-fercs-environmental-impact-statementopen-transmission-en.pdf.
[55] Hindustan Zinc Ltd. v. Rajasthan Electricity Regulatory Commission, MANU/SC/0641/2015.

mechanism mandates a certain percentage of the total electricity consumption by distribution companies and certain obligated entities must be met through renewable energy sources. ***M.C. Mehta v. Union of India*** judgement set the foundation for considering environmental impacts in all industrial operations, including power sector. The emphasis on sustainable development directly influences how power plants and electricity generation projects are evaluated concerning their environmental footprints.[56] In ***ACME Bhiwadi Solar Power Plant Pvt. Ltd. v. Rajasthan Electricity Regulatory Commission,*** the court emphasized the importance of promoting renewable energy sources and providing a conducive regulatory environment for their growth. [57] ***Alembic Pharmaceuticals Ltd. v. Rohit Prajapati*** highlighted the importance of conducting comprehensive environmental impact assessments and adhering to environmental norms.[58]

2024 rules promise substantial transformation in India's power sector, and their impact on environment sector is multifaceted and far-reaching. The exemption from licensing requirements for dedicated transmission lines is expected to hasten the implementation of renewable energy projects. Project developers can now expedite their operations and accelerate the launch of renewable energy projects by eliminating the labors and complicated licensing process. Large-scale renewable energy projects like solar parks and wind farms, which frequently need specialized transmission lines to connect to the grid, will especially benefit from this provision. The reduced administrative burden and increased flexibility will encourage investment in these projects, contributing to India's renewable energy targets and reducing carbon footprints. This process can help attract investments and increase implementation of projects. Moreover, the rules make it easier to set up and run energy storage systems without requiring license for transmission lines. Energy storage system reduce the intermittent nature of renewable energy sources, increasing the reliability and sustainability of the grid. The 2024 rules help the successful integration of renewable energy sources into the grid and accelerate the shift to a more ecologically friendly and sustainable power industry by easing the deployment of energy storage system.

[56] M.C. Mehta v. Union of India, MANU/SC/0175/1997.
[57] ACME Bhiwadi Solar Power Plant Pvt. Ltd. v. Rajasthan Electricity Regulatory Commission, MANU/CR/0111/2019.
[58] Alembic Pharmaceuticals Ltd. v. Rohit Prajapati, MANU/SC/0353/2020.

Purchasing electricity from renewable energy sources will become more cost-effective for consumers as open access charges become standardized and as additional surcharges eventually eliminate. India has a strong basis to quickly grow its portfolio of renewable energy sources as it is a fifth and fourth largest producer of solar and wind power respectively. Supportive government initiatives including tax rebates, subsidies, and the production linked incentive program help to manufacture solar PV modules. Investing in renewable energy not only reduces greenhouse emissions, but also promotes long-term energy security and economic stability by depending less on imported fossil fuels.[59] Large firms, businesses, and industries will be more likely to adopt renewable energy as a result of enhanced affordability and transparency, driving the overall growth of the renewable sector energy.

Lastly, the rules contribute to reducing technical and commercial losses in the power distribution system by assuring the financial viability of distribution companies through fair and transparent pricing system. Lower losses indicate less wasted energy, which indirectly benefits the environment by eliminating wasteful and unnecessary generation and emissions.[60] The 2024 rules offer numerous potentials for corporations to participate in renewable energy projects. India's renewable energy potential is substantial, with estimated capabilities for solar, biomass, wind, and hydro power far exceeding present installations, reaching over 1096GW. India can reach and exceed its lofty environmental and energy goals by enacting these transformative policies and maximizing on its renewable energy potential.[61] These projects are now more appealing due to regulatory ease with which dedicated can be established and the favorable open access policy.

REAL-WORLD IMPACTS

The following case studies will illustrate how easy access to renewable energy projects have benefitted the environment:

[59] *Renewable Energy,* (Invest India), https://www.investindia.gov.in/sector/renewable-energy.
[60] Sangita Shetty, *"Central government introduces sweeping amendments to Electricity rules 2024: focus on transmission lines, open access charges, and tariff reflectiveness*", Solar Quarter (12 January 2024), https://solarquarter.com/2024/01/12/central-government-introduces-sweeping-amendments-to-electricity-rules2025-focus-on-transmission-lines-open-access-charges-and-tariff-reflectiveness/.
[61] Rajesh Kumar, *"Renewable energy for sustainable development in India: current status, future prospects, challenges, employment, and investment opportunities*", BMC Energy Sustainability, and Society, https://energsustainsoc.biomedcentral.com/articles/10.1186/s13705-019-0232-1.

- The Rajasthan Solar Park initiative has produced thousands of employments and has reduced carbon emissions significantly while also stimulating local economic development. The increases used of solar power plants has contributed to the reduction of greenhouse emissions and decreased reliance on fossil fuels.[62]
- Muppandal Wind Farm is one of largest wind power projects and provide considerable environmental and socioeconomic benefits. By replacing fossil-fuel based power generation, the farm helps to reduce greenhouse emissions and mitigate the effects of climate change. Furthermore, farm also offers job opportunities to village people and promote sustainable development in rural areas. Despite its success, farm faces grid-integration issue, this can be addressed by 2024 rules, which eliminate the need to obtain a license for transmission lines to connect to the grid.[63]

The 2024 rules have the potential to deliver major economic and environmental benefits. The case studies illustrate how renewable energy projects can generate jobs, promote local economies, and lower carbon emissions. These highlights the significance of enabling policies and regulatory frameworks in fostering sustainable development.

CHALLENGES AND RISK OF 2024 RULES

While it is evident that there are positive impact of 2024 rules, there are few negatives too. Firstly, the new rules ease the process of installing dedicated transmission lines by eliminating the need of license for certain businesses, it also poses serious risk of deforestation, loss of habitat, and environmental disturbances. Rapid construction can lead to widespread deforestation, destruction of wildlife habitats, and disturbance to ecological process. The construction of new lines frequently requires removal of large areas of land, which can fragment habitats and transform ecosystem. Construction activities can cause soil erosion, water pollution, and higher carbon emissions. For example- the field research on Bhadla Solar Park shows that developers are using existing scarce water resources. The solar panel are cleaned by using water

[62] Kashish Shah, *"India's Utility-Scale solar parks a global success story"*, Institute for Energy Economics and Financial Analysis, (May 2020), https://ieefa.org/wp-content/uploads/2020/05/Indias-Utility-Scale-Solar-ParksSuccess-Story_May-2020.pdf.

[63] Priyanka Shankar, *"The wind farm paradox in Southern Tamil Nadu"*, Mongabay, (15 April 2022), https://india.mongabay.com/2022/04/the-wind-farm-paradox-in-southern-tamil-nadu/.

from nearby, tube wells, canals, and ponds. These is no easy access to water in project area.[64] If these projects are not planned and executed with stringent environmental safeguards, then overall environmental effects might be severe. Secondly, transmission lines connecting solar and wind farms to grid stations in arid regions have proven to be a major source of concern for Great Indian Bustard.[65] The court in ***Veiore Citizens Welfare Forum v. Union of India,*** has observed that the development and environment protection must go together. There should be a balance between these two.[66] Thirdly, there could be a temptation to opt for less expensive, non-renewable sources like coal and natural gas over more costly renewable sources in order to keep prices low and ensure financial viability. This may result in higher greenhouse emissions which would negatively impact air quality and accelerate climate change. Similarly, court in ***M.C. Mehta v. Union of India,*** acknowledged that reliance on coal for electricity generation contributes significantly to air pollution and adversely affect public health and environment. Without strong environmental regulations and policies included into the new framework, there is a risk that drive for economic efficiency would be detrimental for the environment.[67] Lastly, for renewable energy projects to be financially viable, attractive and stable tariff regimes are typically required. For instance, in 2018 Karnataka Electricity Regulatory Commission proposed significant increase in open access charges for renewable energy projects. This unexpected increase raised concerns among investors who had committed to long-term projects based on existing tariff structure. Many projects were put on hold while developers waited for clarity on new tariff regime.[68] Similarly, if there are changes or uncertainty in open access charges calculations, the financial model for these initiatives may be disrupted, discouraging investors. Because investors want tariff systems that are stable and predictable in order to commit to long-term renewable energy projects. Frequent changes or lack of clarity in open access charges can create an uncertain environment, discouraging investment and eventually slowing down the shift to cleaner energy sources.

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[64] Raktim Majumer, *"Solar Power in India: A case study of the Bhadla Solar Power Park"*, CFA, (December 2023), https://www.cenfa.org/wp-content/uploads/2024/01/Report_Solar-Power-in-India-A-Case-Study-of-the-BhadlaSolar-Power-Park.pdf.

[65] Simrin Sirur, *"From 1260 to 150- why power transmission lines are biggest threat to Great Indian Bustard"*, The Print, (19 December 2021), https://theprint.in/environment/from-1260-to-150-why-power-transmission-lines-arebiggest-threat-to-great-indian-bustard/783286/.

[66] Vellore Citizens Welfare Forum v. Union of India, MANU/SC/0686/1996.

[67] M.C. Mehta v. Union of India, MANU/SC/0175/1997.

[68] Saumya Prateek, *"Karnataka Court quashes KERC order increasing wheeling charges for open access power"*, Mercom, (20 March 2019), https://www.mercomindia.com/karnataka-court-order-wheeling-open-access.

CONCLUSION

The Electricity (Amendment) Rules 2024 are a major set of regulations designed to encourage sustainability, efficiency, and openness in India's power industry. The cited legal precedents emphasize the significance of regulatory certainty, justice, and transparency and offer a solid framework for comprehending the ramifications of these changes in regulation.

The 2024 rules have the potential to lead to favorable outcomes for both the environment and the electricity sector because these rules align with key judicial principals. The future of the power landscape in India is expected to be shaped by these regulatory reforms as the country moves on with its goal of sustainable and inclusive energy development.

While these rules offer benefits for enhancing power sector operating efficiency and promoting economic investment, they also pose significant environmental challenges. It is essential to address these issues with a balanced approach that incorporates strict environmental regulations and ensures that economic incentives align with long-term environmental sustainability goals.

ARBITRATING EMPIRE: GEOPOLITICAL DIMENSIONS OF INTERNATIONAL INVESTMENT LAW

- DR. ASHISH VERMA[69]

ABSTRACT

Investment arbitration is inherently geopolitical, offering alternatives to resolving overseas investment disputes traditionally handled through host government courts or diplomatic protection. The latter often entails significant diplomatic compromises. Public international law treaties form the procedural and substantive frameworks of investment arbitration, significantly impacting the investor's autonomy and host state's laws. The jurisdiction of arbitral tribunals is consent-based, defined by investment treaties, domestic laws, or specific arbitration clauses. Investment arbitration bypasses the need for investors to seek their home government's intervention, enhancing their independence in disputes with host states. This arbitration form has grown in acceptance, offering protections like fair treatment and safeguarding against discriminatory expropriation, fostering the rule of law internationally. Despite its benefits, investment arbitration faces opposition, especially from developed nations, due to perceived encroachments on national sovereignty and policy priorities. The COVID-19 pandemic has heightened these concerns, as emergency health measures are challenged under arbitration clauses. The reputational risks of arbitration claims can deter investment, challenging the cost-benefit rationale of adopting investment arbitration. Investment legality, national treatment standards, and the impact of arbitration claims are pivotal in these disputes. Tribunals consider the gravity and timing of legal violations, the investor's awareness of such violations, and whether discrimination against foreign investors occurred. Ultimately, the decision to accept investment arbitration remains a complex political choice, weighing economic benefits against potential sovereignty and policy costs.

Keywords: ***Arbitral Tribunal Jurisdiction, Investor-State Disputes, Bilateral Investment Treaties (BITs), Fair and Equitable Treatment, Discriminatory Expropriation***

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INTRODUCTION

One notable aspect of investment arbitration is its inherent geopolitical dimension. Historically, in the context of overseas investment disputes, there were only two primary avenues available: suing the host government in its own courts or invoking diplomatic protection. The latter option typically involves approaching one's own government to take diplomatic actions aimed at securing reparations from the alleged offending party[70]. However, governments are often reluctant to jeopardize their international relations by pursuing such claims, leading to significant compromises when advancing an international claim.

In investment arbitration, public international law treaties establish the fundamental framework. Procedurally, mandatory provisions of national law are only significant if the arbitration is not governed by treaties like the International Centre for Settlement of Investment Disputes (ICSID) or the North American Free Trade Agreement (NAFTA) and is instead governed by non-governmental organizations such as the London Court of International Arbitration (LCIA) or the International Chamber of Commerce (ICC)[71]. Substantively, the national law governing investment treaties is typically the law of the host state. This implies that investors are subject to any future changes in the state's domestic law. Such changes can be contentious, especially if they result in a breach of the Bilateral Investment Treaty (BIT) and fail to protect foreign investors, as evidenced in Indian cases like Vodafone (2017) and Cairn (2016)[72]. The jurisdiction of an investment arbitral tribunal relies on the consent of the Host State (ratione voluntatis), which is provided through investment treaties, domestic laws, or arbitration clauses within

[70] Katia Yannaca-Small, Arbitration under International Investment Agreements (Oxford 9 University Press 2010) at p. 107

[71] Karl-Heinz Bockstiegel, Commercial and Investment Arbitration: How Different Are They 3 Today? 28(4) Arbitration International, 787-792

[72] Karl-Heinz Bocksteigel, "Commercial and Investment Arbitration: How Different Are They Today?" Arbitration International, The Journal of the London Court of International Arbitration (2012) UNCTAD Investment Policy Hub (2019), Investment Dispute Settlement, Vodafone v India (II) 2017, Available on: https://investmentpolicyhub.unctad.org/ISDS/Details/819

investor-state agreements. The extent of the tribunal's jurisdiction is defined by four types: Ratione Voluntatis, Ratione Personae, Ratione Materiae, and Ratione Temporis[73].

CHALLENGES IN THE INTERNATIONAL ARENA

Investment arbitration effectively circumvents these issues by offering various forms based on consent. Notably, the investor's right to initiate arbitration is subject to contractual, treaty, and legislative limitations. Crucially, this process does not require the investor to seek intervention from their own government. Instead, the investor retains the right to arbitrate independently in their own name, thereby eliminating the investor's state from the proceedings and granting the investor an autonomous right to arbitrate against the host state.

INVESTMENT ARBITRATION HAS DISTINCT SOCIAL AND POLITICAL IMPACTS

Recently, it has become more frequent and continues to garner admiration and support from many sectors. This form of arbitration allows a private investor to sue a foreign government. It serves as a remedy when host states cannot ensure the rule of law, effectively filling that void. A government cannot avoid responsibility by claiming its courts have deemed certain abuses against an investor to be lawful. Investment treaties provide substantive protections such as fair and equitable treatment, full protection and security, and safeguards against discriminatory expropriation.

This arbitration significantly advances the rule of law in international affairs. Initially, discontent with this arbitration was mostly confined to less developed countries, but over time, politicians in developed nations have also started questioning it[74].

When examining why there is a growing opposition to investment arbitration, we must consider whether the issue is more about perception than substance. Recently, developed nations have become targets of such claims, surprising many who have learned that investment treaties allow panels of arbitrators—unfamiliar to the public and not accountable to any national parliament—

[73] Michael Waibel, Investment Arbitration: Jurisdiction and Admissibility, Legal Studies 8 Research Paper Series-University of Cambridge (Paper No. 9/2014)
[74] Michael Waibel, Investment Arbitration: Jurisdiction and Admissibility, Legal Studies 8 Research Paper Series-University of Cambridge (Paper No. 9/201)

to issue awards that seem to question a state's freedom to manage its own affairs. Emergency health measures adopted in response to the COVID-19 pandemic are likely to be challenged by investors invoking the arbitration clauses of bilateral investment treaties (BITs)[75]. Investment arbitration is included in trade agreements that correlate with the challenges faced by those regions. Unsurprisingly, investor-state dispute settlement (ISDS) has come under scrutiny from trade unions and political leaders across the old industrial heartlands. When considering less developed nations, this form of arbitration appeared to single them out as targets of investor suits. Although investment claims are not one-sided—many developed countries have also been sued under investment arbitration agreements—the awards often went against less developed countries, leading to perceptions of discrimination. This has caused discontent about the seemingly disparate impact on different parts of the world[76].

Undoubtedly, agreeing to investment arbitration is a steep price to pay for a non-binding promise to avoid interventions that would already be illegal. A study[77] by Srividya Jandhyala of ESSEC Business School in Singapore, Geoffrey Gertz of the Brookings Institution in Washington DC, and Lauge Poulsen of University College London confirmed that consenting to investment arbitration might once have been a form of self-defence for weaker states. However, there is no evidence that it serves any defensive purpose today.In today's world, investment arbitration boosts economic growth by offering foreign investors a reliable legal procedure[78]. This assurance means investors do not have to worry about the dependability of local courts. By protecting foreign investors in this manner, governments that agree to arbitration are more likely to attract foreign investment[79]. Consequently, investment arbitration draws in foreign investors, who in turn help to stimulate the economy. While agreeing to investment arbitration incurs costs, it diminishes the authority of domestic institutions, including the courts, and imposes substantive rules that may conflict with public policy priorities. Deciding whether to bear these costs

[75] Rudolph Dolzer and Christoph Schreuer, Principles of International Investment Law (2nd 5 ed., 2020) at p. 33
[76] Karl-Heinz Bocksteigel, "Commercial and Investment Arbitration: How Different Are They Today?" Arbitration International, The Journal of the London Court of International Arbitration
[77] Aniruddha Rajput, Protection of Foreign Investment in India and Investment Treaty 17 Arbitration (Kluwer Law International 2017) at pp. 171, 194
[78] Christoph Schreuer, Investment Arbitration in The Oxford Handbook of International 5 Adjudication (C. Romano et. al. ed.) (OUP, 2013) at 295
[79] Tanaya Thakur, 'Reforming the Investor-State Dispute Settlement Mechanism and the Host State's Right to Regulate: A Critical Assessment' (2021) 59 IJIL 173; Justine Touzet and Marine Vienot de Vaublanc, 'The Investor-State Dispute Settlement System: the Road to Overcoming Criticism

depends on each society and is a political decision. However, accurately quantifying the costs and benefits makes it challenging to make a well-reasoned decision about the cost-benefit relationship[80].

In international investment arbitrations, another vital aspect would be regarding the illegal investments and violation of host state law. In situations where there is uncertainty, a tribunal may opt to consider the issue of illegality when assessing the host State's adherence to substantive standards, rather than rejecting investment protection outright. This method is also suitable for cases where the illegality is not immediately evident. When illegalities occurred during the investment's performance, tribunals did not deny access to substantive standards[81]. Instead, they determined that the State's actions concerning the investment did not violate these standards. This held true regardless of whether the activity itself was illegal or the manner of the investment's operation was illegal. It's evident that not every minor infraction results in the denial of investment protection. Only breaches of fundamental legal norms will have such an effect. The significance of the violation of host State law will be the key factor in deciding whether the investment's legitimacy as a whole is compromised. Occasionally, the severity of the contravention alone will not clearly distinguish between cases where investment protection should be denied and those where it should be upheld[82].

But certainly there are some elements considered by the tribunal in the said situations like[83], the gravity of the contravention of host state law, The significance of the unlawful arrangement to the investment's profitability can help determine whether the entire investment project lacks legitimacy. This factor can support the decision to either deny investment protection entirely or consider the illegality when evaluating if the host State has violated a substantive standard[84]. The awareness possessed by the investor regarding the illegality. The most crucial aspect can also be

[80] James Crawford, 'Treaty and Contract in Investment Arbitration' 24(3) Arb Intl 351, 36
[81] Técnicas Medioambientales Tecmed, S.A. v. United Mexican States, ICSID Case No. ARB (AF)/00/2". [13]"PSEG v. Turkey, ICSID Case No. ARB/02/5, Decision on Jurisdiction, 4 June 2004, 11 ICSID Reports 434, paras. 106-124; Joy Mining v. Egypt, Award, 6 August 2004, 19 ICSID Review - FILJ 486 para. 54 (2004) (but see the apparent contradiction with the Tribunal's statement at paras. 42, 44)
[82] Andrea Carlevaris, The Conformity of Investments with the Law of the Host State and the Jurisdiction of International Tribunals, 9 The Journal of World Investment and Trade 48
[83] Berschader v. Russia, Award, 21 April 2006, http://ita.law.uvic.ca/documents/BerschaderFinalAward.pdf, para. 111
[84] Faraz Alam Sagar & Samilksha Pednekar, International Investment Arbitrations and 1 International Commercial Arbitrations: A Guide to the Differences, Cyril Amarchand Mangaldas Blog

the element of time, illegality at the time of the establishment or whether it is later on? An investment may be illegal from the start. However, it is also possible that an investment initially complied with host State law, and the violation occurred later during its operation. This could be due to a change in the host State's law during the investment's operation or a change in the investor's actions[85].

The national treatment standard aims to guarantee that the host state offers foreign investors treatment that is as favourable as that given to domestic investors. The inclusion of a national treatment clause in investment treaties is meant to prevent the host state from discriminating against foreign investors compared to domestic ones[86]. The National Treatment clause stipulates that foreign investors and their investments should receive treatment no less favourable than that given to the host state's own investors. This obligation covers both de jure and de facto discrimination, and any differences in treatment must be justifiable on rational grounds provided by the host state[87].

Further, application of investment treaty provisions themselves can sometimes broaden the scope and the content of the substantive rules governing a dispute. Some treaties contain a 'most-favoured nation clause', mandating the host state not to subject investments or investors protected under such a treaty to treatment less favourable than what the host state accords to investors of third states. If investors of third states are granted a more favourable protection under the treaty covering their investment, then the substantive provisions of such a treaty may be imported and applied in disputes based on a treaty containing the most-favoured nation clause[88]. Tribunals, for instance, have imported from other treaties more favourable conditions for just compensation or extensive obligations to provide fair and equitable treatment[89].

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[85] Shalaka Patil and Pratibha Jain, Bilateral Investment Treaties and their Impact on the 25 Global Economy, pt 2.2
[86] Rudolph Dolzer and Christoph Schreuer, Principles of International Investment Law (2nd 102 ed., 2012) at pp. 198-206
[87] United Parcel Service of America Inc. v. Government of Canada, ICSID Case No. 103 UNCT/02/1
[88] See, e.g., CME Czech Republic B.V. v. The Czech Republic, UNCITRAL, Final Award, 14 March 2003". [21] "See, e.g., Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan, ICSID Case No. ARB/05/16, Award, 29 July 2008; MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile, ICSID Case No. ARB/01/7, Award, 25 May 2004
[89] Asaf Niemoj, Investment Arbitrations: Do Tribunals Take the Role of a Supra-National 15 Appellate Court above National Courts?

To succeed on a national treatment claim, a foreign investor doesn't need to prove the host state's discriminatory intent. The tribunal focuses on the impact of the host state's actions. While most Bilateral Investment Treaties (BITs) do not explicitly require proving intent, demonstrating intent in practice is necessary to show unjustifiable differentiations[90]. Tribunals hold varied opinions on whether 'intent to discriminate' or 'impact of discriminatory measure' should be the assessment standard. In the case of the latter, intent is irrelevant since practical discrimination alone is enough to establish a breach of the national treatment clause[91].

Interestingly, Japan had the world's largest investment outflow in 2018, yet it has hardly filed any investment arbitrations. This suggests that the availability of arbitration may have less influence on investment decisions than its proponents claim[92]. Research indicates that investors from countries with reliable institutions and a strong rule of law seek similar environments abroad, and the availability of investment arbitrations is not a major concern for them[93]. Empirical data, including examples like the French BITs, shows little evidence that signing investment treaties with arbitration clauses significantly increases foreign investment.

CONCLUSION

Thus, consenting to investment arbitration may not lead to economic growth or an increase in foreign investments for the state. In fact, the claims themselves can damage the state's reputation and deter potential investors, as arbitration can scare investment away when a claim is made against the state. Therefore, the benefits and costs of investment arbitration are not balanced. Investment claims have a negative reputational impact, regardless of the claim's outcome. This raises an important question: why do states accept investment arbitration despite its drawbacks? It could be argued that these drawbacks are general, and there may be specific circumstances

[90] Kenneth J. Vandevelde, The Political Economy of a Bilateral Investment Treaty, 92 Am. J. 32 Int'l L. 621, 623
[91] Doreen Lustig, From NIEO to the International Investment Law Regime: The Rise of the 17 Multinational Corporation as a Subject of Regulatory Concern in International Law in Veiled Power: International Law and the Private Corporation 1886-1981 (2020)
[92] Virginie Barral, 'Sustainable Development in International Law: Nature and Operation of an Evolutive Legal Norm' (2020) 23(2) EJIL 377-400; Lorenzo Cotula, 'Investment Contracts and International Law: Charting a Research Agenda' (2020) 31(1) EJIL 353-68, 365
[93] Rudolph Dolzer and Christoph Schreuer, Principles of International Investment Law (2nd 35 ed., 2020) at p. 68

where it is beneficial. Often, states only fully appreciate the risk of being subject to investment arbitration once it happens, revealing broader implications for society[94].

[94] Aniruddha Rajput, Regulatory Freedom and Indirect Expropriation in Investment Arbitration 75 (Kluwer Law International 2018) at pp. 1 - 6

FROM CHAINS TO FREEDOM: DECONSTRUCTING THE ABOLITION OF SLAVERY

- DR. RAM CHARAN MEENA[95]

ABSTRACT:

"Slavery is wrong. If slavery is right, all words, acts, laws, and Constitutions against it, are themselves wrong, and should be silenced and swept away"

The right against slavery stands as a cornerstone of human rights, encapsulating the essence of human dignity and autonomy. Rooted in the principle that no individual should be subjected to the horrors of exploitation and bondage, this fundamental right has historical significance and contemporary relevance. From the transatlantic slave trade to modern-day forms of forced labour and human trafficking, the struggle against slavery persists as a global imperative. This paper explores the historical context, international and national legal frameworks to prohibit slavery and ongoing challenges in upholding the right against slavery. It emphasizes the importance of collective action, advocacy, and international cooperation in eradicating all forms of slavery and ensuring that every person can live a life of freedom, dignity, and equality.

INTRODUCTION:

The right against slavery stands as a beacon of humanity's collective moral conscience, embodying our unwavering commitment to the inherent dignity and freedom of every individual. Rooted in the foundational principles of human rights, this fundamental right serves as a bulwark against the insidious forces of exploitation and oppression that seek to subjugate and dehumanize. From the shackles of historical chattel slavery to the modern-day manifestations of forced labour, human trafficking, and debt bondage, the right against slavery resolutely declares that no person should ever be treated as property or subjected to involuntary servitude. As enshrined in international legal frameworks such as the Universal Declaration of Human Rights, these right demands not only legal prohibition but also concerted action to dismantle the systems of

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exploitation and provide meaningful redress to victims. Thus, the struggle against slavery is not merely a historical artifact but an ongoing imperative, requiring collective vigilance, advocacy, and solidarity to ensure that every individual enjoys the fundamental freedom to live a life of dignity and self-determination.

CONCEPT OF SLAVERY:

A scenario where by one person is deemed to be the property of another is known as slavery. Slavery can occur for a variety of causes, such as work, chattel slavery, etc. It is generally accepted that a slave is deprived of all the general rights that a normal person is entitled to. The owner is the one who decides what rights they have. Slavery, throughout history, has been a deeply entrenched practice whereby individuals are treated as property and denied basic human rights. It involves the systematic exploitation and control of people, often through coercion, violence, or deception. Slavery has taken various forms across different cultures and time periods, including chattel slavery, serfdom, debt bondage, forced labour, and human trafficking.

HISTORY:

Slavery's long and unfinished history is replete with cruelty and grief over numerous eras and nations. While the exact year of slavery's inception is hard to determine, historians can generally trace the practice's roots back 11,000 years. In the ancient times - debt, being born into a family of slaves, child abandonment, war, or being punished for a crime were the main causes of slavery. The slave trade was unpopular and certainly not a profitable international business in its early years. Slavery underwent significant changes during the Middle Ages, which historians classify as a three-part period between 500 and 1500 AD, as international warfare, raiding, and conquering expanded across continents. This led to chaos and confusion as the citizens of conquered regions were taken as slaves and transported across many miles to work as slaves for their captors. The worldwide slave trade truly began when European slaves gained immense popularity in Muslim nations. African slaves were used by European colonists as labourers on the islands to produce sugar and coffee. Furthermore, many African slaves were bought by owners in the Spanish Americas and Brazil for employment in the fields and the home. In 1619, the first slaves were transported to the Americas. Numerous people did not make it through the terrifying voyage from Africa to the Americas. The ships lacked adequate sanitation, had little

food, and were densely populated. This caused deadly illnesses like smallpox, fever, and dysentery to spread quickly, killing the ship's crew as well as the Africans. Death was a typical event in the slave trade, with the deceased's body being thrown into the water. Over 4 million slaves were hired in the US at the start of the American Civil War, with most of them being in the Southern states. Slavery's westward spread was the main political concern before to the start of the Civil War. Abolitionists in the North thought they could completely eradicate slavery if they could only prevent it from spreading. Following Abraham Lincoln's election to the president in 1860, the Southern states quickly broke away from the Union to establish the Confederacy. The Northern Union was committed to both preserving the nation and ending slavery, whereas the Confederate States of America were focused on maintaining slavery.[96]

CONVENTIONS ON PROHIBITION OF SLAVERY:

ILO LABOUR CONVENTION 1930:

The International Labour Organisation made Labour Convention, 1930 for the **suppression of forced or compulsory labour** in all its forms within the shortest period. However, exceptions were made in favour of compulsory military service, normal civic obligations, convict labour, work in emergencies and minor communal services.

UNIVERSAL DECLARATION OF HUMAN RIGHTS, 1948:

Art 4 of UDHR explicitly references slavery, stating that no one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms.[97]

Since they claim ownership, labour, and/or the humanity of another human being, human traffickers and slave owners seriously breach human rights. The human rights that are most pertinent to human trafficking are: the injunction against discrimination on the grounds of racial or social origin, property, birthplace, sexual orientation, language, religion, political opinion, or any other category; the freedom of movement and the establishment of security; the right to be free from gendered violence; the right to freedom of association; the right to freedom of movement; the right not to be subjected to torture or cruel, inhumane, or degrading treatment or

[96] The history of slavery, Restavek freedom, < The History of Slavery - Restavek Freedom >
[97] Art 4 of UDHR, 1948, < Universal Declaration of Human Rights | United Nations >

punishment; the right not to be coerced into slavery, servitude, forced labour, or bonded labour; the right to the best possible level of mental and bodily well-being; the rights of children to special protection, social security, a livable wage, and fair and favourable working circumstances are all included in this list. In **Somerset v. Steward**[98] held slavery is illegal.

ILO ABOLITION OF FORCED LABOUR CONVENTION, 1957:

The General Conference of International Labour Organisation adopted Abolition of Forced Labour in 1957 provides for the abolition of certain forms of forced or compulsory labour constituting a violation of the right of man referred to in the Charter of UN. **Art 1 & 2** of the Convention mentions that the State parties should initiate effective measures for immediate and complete abolition and not to make use of any form of forced or compulsory labour - as a means of political coercion or education or as a punishment for holding or expressing political views or views ideologically opposed to the established political, social or economic system, as a method of mobilising and using labour for purposes of economic development, as a means of labour discipline, as a punishment for having participated in strikes, as a means of racial, social, national or religious discrimination.[99]

INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION, 1969:

Art 6 states that parties to the convention shall assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention, as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination.[100]

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[98] Somerset v. Steward, 98 ER 499 (UK)

[99] Art 1 & 2 of Abolition of Forced Labour Convention, 1957 < Convention C105 - Abolition of Forced Labour Convention, 1957 (No. 105) (ilo.org) >

[100] Art 6 of CERD, 1969, < International Convention on the Elimination of All Forms of Racial Discrimination | OHCHR >

Racial discrimination and slavery continue to be mutually reinforcing practices. While racial discrimination helps modern forms of slavery by leaving people open to exploitation and coercion based on their race, colour, descent, national or ethnic origin, or on other factors like gender, age, or disability, modern forms of slavery dehumanise the people who are ensnared and invalidate not only their ability to exercise their human rights on an equal basis but also their status as right holders. The dehumanising effect is made worse by structural prejudice, which makes society naive and eventually complicit.

INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, 1976:

Art 8 states that no one shall be held in slavery, servitude, slave-trade in all their forms shall be prohibited. Along with that no one shall be required to perform forced or compulsory labour, shall not be held to preclude, in countries where imprisonment with hard labour may be imposed as a punishment for a crime.

Works or services normally required of a person who is under detention in consequence of a lawful order of a court, or of a person during conditional release from such detention, services of a military character, any national services required by law of conscientious objectors, services exacted in cases of emergency or calamity threatening the life or wellbeing of the community, any work or service which forms part of normal civil obligations are exempted from forced or compulsory labour.[101]

WORKING GROUP ON CONTEMPORARY FORMS OF SLAVERY, 1995:

The Working Group on Contemporary Forms of Slavery observed at its April 1995 session that "foreign migrant workers are frequently subject to discriminatory rules and regulations which undermine human dignity"[102]

ILO DECLARATION ON FUNDAMENTAL PRINCIPLES AND RIGHT TO WORK, 1998:

[101] Art 8 of ICCPR, 1976, < International Covenant on Civil and Political Rights | OHCHR >
[102] David Weissbrodt, Abolishing slavery and its contemporary forms, OHCHR.

Adopted in 1998 and amended in 2022, the ILO Declaration on Fundamental Principles and Rights at Work is a statement of governments', employers', and workers' organisations' commitment to upholding fundamental human values that are essential to our social and economic existence. It upholds the duties and commitments that come with being an ILO member, including the following: the freedom of association and the realisation of the right to collective bargaining; the abolition of child labour; **the elimination of all forms of forced or compulsory labour**; the abolition of discrimination in the workplace regarding employment and occupation; and the provision of a safe and healthy working environment.

INDIAN PRESPECTIVE:

Art 23 of Indian Constitution emanates that traffic in human beings and beggar and other similar forms of forced labour are prohibited and any contravention of this provision shall be an offence punishable in accordance with law and nothing in this article shall prevent the State from imposing compulsory service for public purpose, 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.[103] This article includes:

Beggar or Forced labour - This is an example of forced labour, which is unpaid labour that is performed against one's will. Stated differently, one could argue that a someone is forced to labour against their will and not receive compensation for it.

Bonded Labour or Debt Bondage - Since bonded labour is a type of forced labour, it is forbidden by Article 23. A person is compelled to labour under this practice in order to pay off his debt. They work twice as hard for a very small amount of money. These debts are frequently transferred to the following generation. It is therefore referred to as a type of forced labour.

Human trafficking - It involves the unethical trafficking of women and children as well as the selling and purchasing of human beings like commodities. Slavery is included in the definition of human trafficking even if it is not specifically addressed in Article 23. The **Suppression of Immoral Traffic in Women and Girls Act, 1956** was passed by Parliament in accordance with Article 23 to penalise human trafficking.

[103] INDIA CONST. art. 23 by The Constitution Act, 1950

In **State of Gujarat v. Hon'ble High Court**[104], observed that forced labour under Art 23 does not simply means providing labour or services to another on remuneration which is less than minimum wages. It means where a labour is forced upon a person irrespective of the fact, whether he is paid minimum remuneration as may be fixed or even higher than that. If labour is forced even the payment of higher wages would not be justified under Art 23.

In **People's Union for Democratic Rights v. UOI**[105] stated that forced labour means physical force which compel a person to provide labour, force exerted through a legal provision such as imprisonment or fine when employees fail to provide labour, or compulsion arising from hunger and poverty, want and destitution.

In **Bandhua Mukti Morcha v. UOI**[106], SC held that bonded labour is inclusive in Art 23 and State should take steps to eradicate it. **Bonded Labour System (Abolition) Act, 1976** was enacted by the Parliament with the view to abolish bonded labour.

In **Raj Bahadur Case**[107] it was held that Article 23 specifically prohibits traffic in human beings or women for immoral purpose.

Art 24 of Indian Constitution states that 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.[108]

In **People's Union for Democratic Rights v. UOI**[109] SC held that employment of children below 14 ears in construction building is regarded as 'plainly and indubitably hazardous employment' prohibited under **Art 24** and **Child Labour (Prohibition and Regulation) Act, 1986** and the same was held in **Salal Hydro Project v. Jammu & Kashmir**.[110]

In **MC Mehta v. State of Tamil Nadu**[111] while the Constitution forbids the recruitment or enslavement of children under Article 24, it also requires the State to provide them with free and

[104] State of Gujarat v. Hon'ble High Court, AIR 1998 SC 3164 (India)
[105] People's Union for Democratic Rights v. UOI, AIR 1982 SC 1473 (India)
[106] Bandhua Mukti Morcha v. UOI, AIR 1984 SC 802 (India)
[107] Raj Bahadur Case, AIR 1953 Cal 496 (India)
[108] INDIA CONST. art. 24 by The Constitution Act, 1950
[109] Id., at 10
[110] Salal Hydro Project v. Jammu & Kashmir, AIR 1984 SC 177 (India)
[111] MC Mehta v. State of Tamil Nadu, AIR 1991 SC 417 (India)

mandatory schooling in compliance with Article 41, even though a significant number of children are already employed in unsafe areas. Despite numerous State Governments outlawing child labour, the issue of child labour has persisted unresolved and continues to pose a threat to society every day. Public Prosecutor MC. Mehta has filed a PIL in accordance with Article 32, detailing the actions of Sivakasi Cracker Factories towards the girls. Hansaria J. was the one who held that children under the age of 14 are not allowed to engage in hazardous labour, and the government must establish rules to protect their social, economic, and human rights when they are employed in the public and private sectors. Additionally, it violates Article 24, as the state has an obligation to provide children with free and compulsory education. Additionally, it was mandated to setup the child Labour Rehabilitation Welfare Fund and give each child compensation of Rs. 20,000.

S. 370 of Indian Penal Code[112] **{Now S. 143 Bharatiya Nyaya Sanhita, 2023 (BNS, 2023)}** states that whoever, for the purpose of exploitation, recruits, transports, harbours, transfers, receives a person or persons, by threats, using force, coercion, abduction, practising fraud, deception, abuse of power, inducement, including the giving or receiving of payments or benefits, in order to achieve the consent of any person having control over the person recruited, transported, harboured, transferred or received, commits the offence of trafficking and punished under **S. 370A** of IPC[113] **Now S. 144 BNS, 2023**.

S. 371 of IPC **Now S. 145 BNS, 2023** states that Whoever habitually imports, exports, removes, buys, sells, trafficks or deals in slaves, shall be punished with imprisonment for life or with imprisonment of either description for a term not exceeding ten years, and shall also be liable to fine.[114]

[112] The Indian Penal Code, 1860, S. 370, No. 45 Acts of Parliament, 1860 (India); **Now Bharatiya Nyaya Sanhita, 2023, S. 143, No. 45 of 2023.**
[113] The Indian Penal Code, 1860, S. 370A, No. 45 Acts of Parliament, 1860 (India); **Now Bharatiya Nyaya Sanhita, 2023, S. 144, No. 45 of 2023.**
[114] The Indian Penal Code, 1860, S. 371, No. 45 Acts of Parliament, 1860 (India); **Now Bharatiya Nyaya Sanhita, 2023, S. 145, No. 45 of 2023.**

S. 372[115] **& 373**[116] of IPC **Now S. 98 & 99 BNS, 2023** prohibits buying and selling of minors for prostitution.

S. 374 of IPC **Now S. 146 BNS, 2023** states that whoever unlawfully compels any person to labour against the will of that person, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.[117]

MODERN - DAY SLAVERY:

This includes human trafficking for organs, forced marriage, domestic servitude, descent-based slavery, debt bondage etc. According to the latest **Global Estimates of Modern Slavery (2022)** from Walk Free, the International Labour Organization and the International Organization for Migration:

- **49.6 million** people live in modern slavery - in forced labour and forced marriage
- **Roughly a quarter** of all victims of modern slavery are children
- **22 million people** are in forced marriages. Two out of five of these people were children
- Of the **27.6 million** people trapped in forced labour, **17.3 million** are in forced labour exploitation in the private economy, **6.3 million** are in commercial sexual exploitation, and nearly **4 million** are in forced labour imposed by state authorities.
- Migrant workers are particularly vulnerable to forced labour.[118]

CONCLUSION:

The degree to which the States parties implement the provisions of a treaty at the national level can be used to determine the treaty's actual effectiveness. In general, the terms "national

[115] The Indian Penal Code, 1860, S. 372, No. 45 Acts of Parliament, 1860 (India); **Now Bharatiya Nyaya Sanhita, 2023, S. 98, No. 45 of 2023.**
[116] The Indian Penal Code, 1860, S. 373, No. 45 Acts of Parliament, 1860 (India); **Now Bharatiya Nyaya Sanhita, 2023, S. 99, No. 45 of 2023.**
[117] The Indian Penal Code, 1860, S. 374, No. 45 Acts of Parliament, 1860 (India); **Now Bharatiya Nyaya Sanhita, 2023, S. 146, No. 45 of 2023.**
[118] Global Estimates of Modern Slavery: Forced Labour and Forced Marriage, Geneva (Sept. 2022)

measures adopted by States" and "international measures and procedures adopted to review or monitor those national actions" refer to the same thing when discussing the implementation of treaties. Such an international mechanism to oversee and uphold the duties of States to outlaw slavery and associated abuses does not exist. While it is a fundamental human right for everyone to be free from slavery, the absence of a sufficient implementation process discourages states from putting in place measures to prevent all modern forms of slavery.

THE VOLATILITY OF THE IDEA OF JUSTICE AND THE HUMAN NATURE OF LAW IMPLEMENTING AGENCIES

- DR RAVINDRA PATIL[119]

Abstract

There has been a lack of consistent and flawless structure in our society. People treat unjustly each other on the basis of discrimination by way of wealth, status, birth and even knowledge. Even though the idea of law is based upon the concepts of right, freedom, equality and liberty, it remains uncertain and inconsistent as human nature is involved in the implementation of law. Therefore, the idea of justice appears to be volatile and justice is unpredictable. More attention has to be given to the legal machineries as they are true instruments of legal transformation.

Key Terms- Law, Justice, Equality, Rule of Law, Judicial Reality, Justice System

If we consider the idea of justice by Imanuel Kant based upon the concept of rights and freedom in human conception, it seems that it is egalitarian and is validated by a set of a priori moral laws.[1] It is definitely stronger in its elaboration but Aristotle appears to be more pragmatic in his approach dealing with law (in *Politics*). He contends that human society is intrinsically unjust and human beings being equal treat each other unjustly on the basis of wealth, status, birth and knowledge. Jeremy Waldron acknowledges Aristotle's position in one of his recent articles stating that, "the move to civil society is mandatory because people desire to make acquisitions of resources, and absent civil society, this desire brings them into conflict". Both Aristotle and Kant are right in substantiating their ideas about law in relation with human beings. But this contention emerges to be paradoxical in its deeper understanding. All are equal and have right to freedom of action by way of showing mutual respect for each other. Still there has been indeterminacy and chaos due to a lack of any substantially concrete, consistent and flawless scheme or social structure. This naturally gives rise to a tremendous scope for potential conflicts in our society. Pogge contends emphatically that "this last indeterminacy, irresolvable a priori, requires a central legislative process to complement the constraints of natural law by those of positive law".

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It is absolutely true that the foundation of law is built upon the ideas and various concepts in the form of right, liberty, equality and freedom. Similarly, they take shape and get transformed in reality by way of positive law and through its implementation in society. They naturally embody the idea of justice. Therefore, it would be appropriate to focus on how law[4] works in our society and whether it really helps achieve justice or what elements are involved in the process of obtaining justice as Kant has not discussed it in detail in his writing. This is what Kitty Calavita has rightly pointed out that there is "a gap between the law- on- the- books and the law- in-action. Noting that the law as it is written and advertised to the public is often quite different from the way it looks in practice."

If we consider our life, we find that there is no agreement in totality as such. Constantin Fasolt[6] contends that "our form of life is not a single system, much less some kind of thing. Our agreement in form of life is neither total nor fixed… This applies even, and emphatically, to our tastes, our pleasures, and our senses…It does not constitute a timeless essence, and it has no metaphysical unity". We share the form of life and agreement in language in order to make sense of things. However, the point is that there are differences between human beings and these differences will always exist. When we try to explain them, we make reference to culture. As cultures differ from each other, the differences are going to exist amongst all human beings for the reason they are part of those cultures as it has been correctly stated by Aristotle. Therefore it is necessary to have laws passed by the legislature considering the circumstances existing in their society. Such laws should be based upon the principles such as liberty, equality and freedom. Law should be guided by reason and not by passion. Here Kant is right in examining the roles of reason in creation of law. But reason ought to work with reality. If it is removed from social reality, it may not work. Fasolt contends that "law and justice refer to the reality, not of things as they are, but of things we do; not scientific or theoretical reality, but practical reality" (440). Ernest J. Weinrib agrees with Fasolt stating, "law must reflect the coherence of an idea of reason with practical reality".

Similarly, it is also clear that though law and justice are not one and the same, they are closely interlinked. Fasolt points out the same idea, "Law and justice are thoroughly intertwined.

Their intertwinement constitutes their meaning. Treating one of them in isolation from the other impairs the meaning of both". It would be appropriate to quote Fasolt as to how their interlinking is logically crucial in order to avoid any arbitrariness and injustice in society:

It is that without justice, law is not merely arbitrary, capricious, or abstract, but not law at all. Law's meaning depends upon the judgment establishing its justice. Without that judgment, law loses its standing as a rule. And where there is no rule, there can be no exceptions. The converse is just as true: there is no such thing as justice unless a law is being made, applied, or followed. The reason is not, as you might think, that justice is impossible to do unless there is a body of established rules preventing human beings from acting according to their arbitrary will. The reason is that the very concept of a just judgment is meaningless unless it results in the expression of a rule requiring us to make the same judgment whenever the same kind of case comes up again. Whether the rule ought to be written down or codified is a subordinate consideration.

Fasolt clearly states that the same rule has to be applicable to all and it should embody justice. Otherwise it will not be a law as such. Fasolt puts it wonderfully:

What justice means is what law says. Law embodies our agreement in definitions of what we ought to do, and justice embodies our agreement in judgments of what that *is*. But without justice we cannot make the law stick to reality. There would be nothing for law to say. And without law, justice would be random. That is, there would be no justice at all.

It strongly insists that justice cannot be seen to have been done without the proper application of law. Salmond correctly notes it, 'law' in this sense is only an instrument, and *the instrument must be defined in terms of its end,* which is the upholding of justice, the protection of rights, the redress of wrongs." Any talk about law would be incomplete without discussing its relation to the concept of justice. Therefore law has to be carefully drafted by the legislature delivering justice to all equally. But carefully drafting of law which involves the consideration of the existing condition of society does not directly entail the delivery of justice to the public. It is just one potential major step in that direction.

Theoretically these ideas definitely enhance our understanding about the nature of law but it is very necessary to ponder over how law as an institution assumes its role and how legal

machineries work to implement law in order to maintain the rule of law, meaning thereby to protect the rights of individuals and to deliver justice to them. Pogge has also contended, as stated above, that when natural law or morals fall short, the law comes in to smooth away differences and to resolve conflicts. Friedman agrees with this view that in a society, "the legal machinery becomes the paramount instrument of social change. In the process it becomes necessary for the law to impose new patterns of social behavior upon the society… much of social morality is regulated and promoted by law." Granting that law as an institutionalized phenomenon can grow in society and it is lived in society, Cotterrell writes that law does not exist in isolation. "Law is a dimension of social relations of community. It is not set apart, uniquely confronting society, but is an aspect of social life; a field of social experience focused on problems of governmental organization and regulation."

It is absolutely evident that law is fundamentally meant to protect the rights of, and to regulate the relations between, people, meaning thereby law deals with rights, obligations, contracts and crimes. Joe Harman quotes the Canadian Department of Justice on the precise description of the function of law and its role in a society in relation with justice:

Rules made by government are called "laws." Laws are meant to control or change our behaviour and, unlike rules of morality, they are enforced by the court. Ever since people began to live together in society laws have been necessary to hold that society together. Even in a well-ordered society, people have disagreements, and conflicts arise; the law provides a way to resolve disputes peacefully. Laws help to ensure a safe and peaceful society in which people's rights are respected.

However, it is to be remembered that one cannot attain justice simply because one has suffered a loss. Different branches of the government work together to redress such problems of people. It clearly appears from the above statement that agencies like legislature, courts, lawyers, police and other government officers are involved in the implementation of laws.

Lawyers, being one of the crucial agencies in the explication of law, play a very crucial role in the entire process. Cotterrell contends that "law is a mode of practical analysis of social life. Lawyers seek to systematize law's interpretations of the social". However, that does not mean that lawyers' allegiance should be only to their legal profession but something beyond that

should be at the heart of their profession. Cotterrell puts it very carefully, "allegiance to law is not allegiance to the lawyer's professional world. If anything, it is allegiance to an idea of peaceful, stable regulation of social life, and to aspirations for justice in the life of communities". Charles Dickens has focused on this aspect of law and the profession of lawyers and what we experience in his novel, *Bleak House,* is exactly opposite of what Cotterrell's statement is.

Lawyers are a significant element in the entire legal system and are presumed to be representing their clients zealously within the bounds of the law. They are called the officers of courts in India and even in the USA and the UK. The profession of lawyers is looked on with great respect in all societies all over the world. They are experts knowing the procedure of law and are also acquainted with various laws better than a common man is. They are presumed to be expert in drafting plaints, petitions, notices and various applications in order to present in the court of law correctly and carefully the sides of the parties by whom they are hired. They also offer legal advice to the clients on various issues such as rights to property, framing of contracts, preparing wills and filing petitions for divorce. They are supposed to possess the skills of speech, arguments and logic. A lawyer tries to find predictability, certainty and clarity in thoughts and his language. In addition, he is expected to be honest, professionally sound and duty-bound to the party, to the court, to the legal system and to the society at large. Klein points out the significance of lawyers that 'lawyers, collectively, are the protagonists in the process by which constituent communities redefine and reshape ideals and values, and thereby effectuate justice." Roger I. Abrams underscores the same view that,

Lawyers make the legal system operate because they have learned to predict how these shared principles will apply in given circumstances. Lawyers take the chaos out the facts of life and order it within boundaries to create boxes of facts with understood meanings.

Even though the lawyer is expected to show all these qualities, he must know human nature and the conditions of human beings who approach him or her with an expectation that he would get justice to them. Loesch remarks that even if a lawyer confines his activities to the office and is busy with the wider field of the trial of causes, he must deal with human nature. It indirectly shows that lawyers know about the routine and practical life of the world only from the point of their professional interest but they are also expected to be delving into the lives of the people who suffer from injustice.

Granted that they have sound knowledge of law and the legal system, they would use it to deliver justice to their clients. Similarly they should uphold the integrity of law. But here comes the question of legal ethics. This question of ethics becomes more focused in relation with lawyers when we think of the justice system as an adversary system. Both sides in a trial of a lawsuit attempt to arrive at the truth of the matter in hand. Since the advocate is hired by a party, it is his/her responsibility to run the case properly; it means that he has to protect the rights of his client in civil cases and to dispute the facts of a criminal case in order to defend the accused involved in it. In such an uncertain situation, the advocate has to deploy his craft of advocacy and his wisdom.

But what is generally found is that this profession is attached with an unjustifiable aspect. Professional interests carry more significance for lawyers than the principle of justice that they are expected to fight for. It appears in many cases that they are neither fully committed to the system, nor are they sensitive to the sufferings of the victims and in many cases they are found to be insensible to the circumstances of the clients. Peter MacFarlane concludes his paper stating that there has been a subordination of service rendered by the lawyers and professionalism has turned to profit, personal aims and ambitions.[15] Suffice it to say, there has been a conflict of interest among lawyers at the cost of their duty to their client and to the courts. Ironically, even a good lawyer will not promise that his strategy will work in a matter that he is handling. A common man that is fighting a case, maybe civil or criminal, is having this experience and will agree with the view. A small number of lawyers could be found to be sensible and earnest to their clients. And the question of morality whether it is common or professional occurs here. This naturally leads to the point what Kant thought of that human beings are rational and they are under an obligation of respect towards others; their action should be performed out of duty and should not come from desire. The idea of justice based upon this notion could be studied in relation with lawyers that are carefully depicted in various novels.

Similarly, another agency involved in justice administration is judiciary. Judges play a major role in the system as well. Judges handle different types of cases; there may be civil or criminal cases or divorce applications/petitions or cases relating to motor vehicles. The lower judiciary or courts try these matters and give verdicts on the basis of proving or disproving facts by lawyers on presenting evidence in the form of some documents or the materials used in committing crimes,

or testimonies of witnesses. In the USA and the UK the jury system is in existence for the criminal trials. Juries hear the criminal case by considering the evidence and decide whether the criminal is guilty or innocent. Then the judge issues the orders of sentences. However it is slightly different in India; judges both hear the case and award the appropriate punishment to the guilty within the bounds of law. Civil cases are handled by judges only in almost the same fashion all over the world. Judges have to hear these cases and deliver the verdict by way of awarding a relief or rejecting it to a party that approaches the court.

The higher courts, particularly the High Courts or the Courts of Appeal and the Supreme Court deal with appellate matters coming from the lower courts and also have original jurisdiction. In addition, they play a significant role in setting the law of the land for the reason that these courts being higher in the hierarchy, their decisions become law within their operational jurisdiction.

The lower and higher courts are fundamentally the important agencies in delivering justice and in maintaining law and order in our society. Therefore, judges are naturally expected to be impartial and fair. Similarly, they have to ensure that they are working within the bounds of law. They strive to interpret the meaning and significance of law and ascertain that the implications of their decisions would not cause any harm to the interest of society at large. Anthony Reeves concurs with Chief Justice John Roberts of the American Supreme Court that judges are "like umpires impartially interpreting and applying pre-established standards in the game of law, insofar as that is possible." It is true that a judge has to rely on the legal standards validly established during the course of time by the legislature and the higher judiciary.

While applying the law, judges use judicial discretion in order to examine the evidence or declaring the punishment. But they are bound by the principles of natural justice, equality, fairness and reason in their final determination of a case. Donald C Nugent mentions that "fundamental to the notion of a fair trial and tribunal is the principle that a judge shall apply the law impartially and free from the influence of any personal biases." Judges' decisions must reflect these principles which may not figure into a common man's deliberations. While maintaining fidelity to the law, they may consider the extra-legal moral concerns balancing the decision. Probably these concerns may not have been enshrined in law at all. However, this must not lead to any bias nor should it cause any suffering to the victim or a person involved in the case. It indirectly suggests that there are situations wherein it could have been avoided but the

strict terms of law do not allow. These are the situations of dilemma that the researcher would also like to examine in relation with the novels selected for this project.

One of the situations is that there is a possibility of bias on the part of a judge that could cause harm to the accused more than it is expected to. Or he could not have found guilty but the bias of the judge has perverted the decision and the accused is the loser. Another situation is a dilemma that a judge can face in determining the case in a fair manner sticking to the letter of the law. Fidelity to the law is on the one hand and the extra-legal moral concerns on the other. We might have heard about such situations but they have never been deliberated upon in the public and never criticised out of fear of the contempt of the court. Therefore, it has always been a matter of examination whether the idea of justice figures to be certain and fixed within the prescribed set of rules or norms.

Considering the roles and work of lawyers, judges and legislature, it stands to reason that our society is governed by both the laws and the rule of law put into practice through these law implementing machineries. If there is no rule of law in a country, there would be tyranny in that country. It has been succinctly summarised by Martin Luther King Jr. in a statement, “law and order exist for the purpose of establishing justice and when they fail in this purpose, they become the dangerously structured dams that block the flow of social progress.” The absence of justice will result in injustice to many people and a retrogression of a society. The rule of law is the crux of the matter for the sake of justice. But at the same it is the legal and moral responsibility of every one to obey law and not to misuse for one’s own benefit; it may be a common man/woman or a lawyer or a judge or legislature or an executive officer.

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JUDICIAL SUPREMACY AND THE DOCTRINE OF STARE DECISIS IN INDIA: A CONSTITUTIONAL *LEX FUNDAMENTALIS*

- DINESH KUMAR MISHRA[120]

Abstract

The Indian judiciary is the cornerstone of constitutional governance, ensuring the supremacy of the Constitution and safeguarding fundamental rights. Judicial supremacy, as enshrined in the Indian Constitution, establishes the Supreme Court as the final interpreter of constitutional provisions, making its rulings binding on all other courts. A key principle that upholds judicial supremacy is the doctrine of stare decisis, which mandates that courts adhere to judicial precedents to ensure legal stability and uniformity. This paper critically examines the concept of judicial supremacy in India, tracing its origins, constitutional basis, and evolving jurisprudence. It delves into the role of stare decisis in shaping judicial decision-making while also exploring instances where the Supreme Court has overruled precedents to adapt to changing societal needs. A comparative analysis with global legal systems, particularly the United States and the United Kingdom, highlights the distinct nature of India's constitutional framework. The study further analyzes landmark judgments that have defined judicial supremacy and the doctrine of stare decisis in India, including ***Kesavananda Bharati v. State of Kerala (1973), Golaknath v. State of Punjab (1967), Indira Nehru Gandhi v. Raj Narain (1975), and Minerva Mills v. Union of India (1980)****. It also addresses contemporary challenges such as judicial activism, judicial overreach, and the conflict between judicial independence and accountability. By critically evaluating the significance and limitations of judicial supremacy and precedent in India, this paper argues that while stare decisis ensures consistency, the judiciary must retain flexibility to reinterpret constitutional principles in response to evolving socio-political realities.*

I. Introduction

The Indian judiciary is the cornerstone of constitutional democracy, entrusted with the responsibility of upholding the supremacy of the Constitution and protecting fundamental rights. Judicial supremacy, a principle embedded within India's constitutional framework, establishes

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the Supreme Court as the final interpreter of constitutional provisions, making its decisions binding on all lower courts. This supremacy is reinforced through the power of judicial review, enabling the judiciary to strike down unconstitutional laws and executive actions.A crucial element supporting judicial supremacy is the doctrine of *stare decisis*, which mandates that courts adhere to judicial precedents to ensure legal stability, consistency, and predictability. By following previously established legal principles, the judiciary fosters trust in the legal system and prevents arbitrary decision-making. However, the doctrine is not absolute—Indian courts have, at times, overruled precedents to adapt to evolving societal, economic, and political realities[121].

This paper critically examines the concept of judicial supremacy in India, exploring its constitutional foundation, historical evolution, and judicial interpretations. It delves into the role of *stare decisis* in shaping Indian jurisprudence while also analyzing instances where the Supreme Court has departed from precedent to align the law with contemporary needs. A comparative analysis with the United States and the United Kingdom highlights the distinctiveness of India's constitutional structure. Also, the paper explores landmark judgments, including *Kesavananda Bharati v. State of Kerala (1973)*, *Golaknath v. State of Punjab (1967)*, *Indira Nehru Gandhi v. Raj Narain (1975)*, and *Minerva Mills v. Union of India (1980)*, which have played a pivotal role in defining judicial supremacy and the doctrine of *stare decisis* in India[122]. The study also addresses contemporary challenges, such as judicial activism, judicial overreach, and the tension between judicial independence and accountability.

Lastly, this paper argues that while *stare decisis* is essential for maintaining consistency in legal adjudication, the judiciary must retain the flexibility to reinterpret constitutional principles to meet the needs of a dynamic society. In doing so, the Indian judiciary continues to strike a delicate balance between legal stability and constitutional progress[123].

II. Judicial Supremacy in India: Concept and Evolution

A. Concept of Judicial Supremacy

[121] M.P. Jain, *Indian Constitutional Law*, 8th ed. (LexisNexis, 2018).
[122] Granville Austin, *The Indian Constitution: Cornerstone of a Nation* (Oxford University Press, 1966).
[123] H.M. Seervai, *Constitutional Law of India*, Vol. 1, 4th ed. (Universal Law Publishing, 2008).

Judicial supremacy refers to the authority of the judiciary, particularly the Supreme Court, to act as the final interpreter of the Constitution. In India, this principle is grounded in the constitutional framework and reinforced by judicial review, which empowers the courts to assess the validity of laws and government actions. Unlike parliamentary supremacy, where the legislature holds ultimate authority (as in the United Kingdom), judicial supremacy ensures that all laws and executive actions remain subject to constitutional scrutiny. This principle is essential for maintaining the rule of law, protecting fundamental rights, and ensuring that no organ of the government exceeds its constitutional mandate[124].

B. Constitutional Basis of Judicial Supremacy

The Indian Constitution explicitly establishes judicial supremacy through several key provisions[125]:

- **Article 32** – Empowers the Supreme Court to enforce fundamental rights, making it the ultimate guardian of constitutional liberties.
- **Article 131** – Grants the Supreme Court original jurisdiction over disputes between the Union and states, reinforcing its central role in constitutional adjudication.
- **Article 136** – Provides special leave jurisdiction, allowing the Supreme Court to intervene in any case involving substantial questions of law.
- **Article 141** – Declares that the law laid down by the Supreme Court shall be binding on all lower courts, solidifying the doctrine of *stare decisis* and the authority of judicial pronouncements.
- **Article 144** – Requires all civil and judicial authorities to act in aid of the Supreme Court, further cementing its supremacy.

C. Historical Evolution of Judicial Supremacy in India

[124] Upendra Baxi, "Judicial Supremacy and Its Discontents: The Indian Story," *Journal of the Indian Law Institute* 50, no. 2 (2008): 141-157.
[125] S.P. Sathe, *Judicial Activism in India: Transgressing Borders and Enforcing Limits* (Oxford University Press, 2002).

The concept of judicial supremacy in India has evolved through landmark judicial pronouncements, shaping the constitutional balance between the judiciary, legislature, and executive[126].

1. Early Judicial Interpretations and Establishment of Judicial Review

The idea of judicial supremacy gained prominence in post-independence India with the judiciary asserting its power through judicial review. In the early years, courts exercised caution, but tensions between Parliament and the judiciary soon emerged over constitutional amendments and the extent of judicial review[127].

- **Shankari Prasad v. Union of India (1951)** – The Supreme Court upheld the power of Parliament to amend fundamental rights under Article 368.
- **Sajjan Singh v. State of Rajasthan (1965)** – Reaffirmed that Parliament had unrestricted power to amend the Constitution, including fundamental rights.

2. The Shift Toward Judicial Supremacy

The judiciary took a decisive turn in asserting its supremacy in the late 1960s and early 1970s, particularly concerning constitutional amendments and fundamental rights[128].

- **Golaknath v. State of Punjab (1967)** – The Supreme Court ruled that Parliament could not amend fundamental rights, emphasizing the judiciary's authority in constitutional interpretation.
- **Kesavananda Bharati v. State of Kerala (1973)** – This landmark case introduced the *basic structure doctrine*, holding that while Parliament could amend the Constitution, it could not alter its basic structure. This doctrine firmly established judicial supremacy by placing substantive limits on legislative power.

3. Judicial Supremacy During the Emergency (1975–1977)

[126] A.V. Dicey, *Introduction to the Study of the Law of the Constitution*, 10th ed. (Macmillan, 1959).
[127] Sudhir Krishnaswamy, *Democracy and Constitutionalism in India: A Study of the Basic Structure Doctrine* (Oxford University Press, 2009).
[128] Rajeev Dhavan, "The Supreme Court of India: Judicial Activism and the Future of the Indian Legal System," *Asian Journal of Comparative Law* 6, no. 1 (2011): 1-21.

The judiciary faced significant challenges during the Emergency imposed by Prime Minister Indira Gandhi's government[129].

- **Indira Nehru Gandhi v. Raj Narain (1975)** – The Supreme Court struck down a constitutional amendment that sought to validate the Prime Minister's election, asserting that the principle of free and fair elections was part of the *basic structure* of the Constitution.
- **ADM Jabalpur v. Shivkant Shukla (1976) (Habeas Corpus Case)** – In contrast, the Court controversially ruled that during the Emergency, citizens had no recourse to fundamental rights, undermining judicial supremacy. This decision was later overturned in *Justice K.S. Puttaswamy v. Union of India (2017)*, reaffirming the judiciary's commitment to fundamental rights.

4. Post-Emergency Strengthening of Judicial Supremacy

Following the Emergency, the judiciary reinforced its role as the guardian of constitutional supremacy[130].

- **Minerva Mills v. Union of India (1980)** – Reaffirmed the *basic structure doctrine*, holding that a limited amending power was an essential feature of the Constitution and that judicial review was a fundamental part of constitutional governance.
- **S.P. Gupta v. Union of India (1981) (First Judges Case)** – Initiated the debate on judicial independence in judicial appointments, paving the way for the *collegium system*.

5. Judicial Activism and Expansion of Judicial Supremacy

In the 1990s and early 2000s, the judiciary expanded its role through judicial activism, particularly in areas concerning social justice and fundamental rights[131].

- **Vishaka v. State of Rajasthan (1997)** – Laid down guidelines to prevent sexual harassment at workplaces in the absence of legislative enactment.

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[129] P. Ishwara Bhat, *Constitutionalism and Constitutional Pluralism* (Eastern Book Company, 2020).
[130] Arun K. Thiruvengadam, "The Indian Supreme Court and the Struggle for Judicial Supremacy," *Indian Journal of Constitutional Law* 4, no. 2 (2010): 35-56.
[131] B.N. Kirpal et al., *Supreme but not Infallible: Essays in Honour of the Supreme Court of India* (Oxford University Press, 2004).

- **I.R. Coelho v. State of Tamil Nadu (2007)** – Held that any law placed under the Ninth Schedule of the Constitution was subject to judicial review if it violated the *basic structure*.
- **K.S. Puttaswamy v. Union of India (2017)** – Recognized the right to privacy as a fundamental right, overruling the decision in *ADM Jabalpur*.

D. The Present-Day Role of Judicial Supremacy in India

Judicial supremacy remains a defining feature of Indian constitutionalism, but it is not absolute. While the judiciary has the final say in constitutional interpretation, it operates within a framework of checks and balances. The increasing role of judicial activism and the debate over judicial overreach have sparked discussions on the appropriate limits of judicial supremacy[132].

- **Judicial Activism vs. Overreach** – Courts have increasingly taken on an activist role in matters of governance, environmental regulation, and socio-economic rights. However, concerns about overreach arise when courts interfere with legislative and executive functions.
- **Judicial Independence vs. Accountability** – While judicial supremacy ensures independence, mechanisms for judicial accountability remain limited. The process of judicial appointments through the *collegium system* and the absence of a robust judicial accountability mechanism have been subjects of ongoing debate.

The evolution of judicial supremacy in India reflects the dynamic nature of constitutional interpretation. From an initial phase of deference to legislative authority to the assertion of judicial power through the *basic structure doctrine* and beyond, the judiciary has played a pivotal role in shaping Indian democracy. Judicial supremacy, supported by the power of judicial review, ensures the primacy of constitutional principles. However, its exercise must strike a balance between judicial independence and accountability. As the Indian legal system continues

[132] Justice Ruma Pal, "Judicial Oversight and the Role of Precedents," *The National Law School Journal* 22 (2015): 75-88.

to evolve, the judiciary's role in maintaining constitutional supremacy remains crucial while ensuring that its authority does not undermine democratic governance[133].

III. The Doctrine of *Stare Decisis* in India

A. Meaning and Rationale of *Stare Decisis*

The doctrine of *stare decisis*, a Latin term meaning "to stand by things decided," is a fundamental principle in legal systems following the common law tradition. It mandates that courts adhere to previously decided cases (precedents) to ensure consistency, stability, and predictability in the legal system. This doctrine is essential in maintaining judicial discipline, upholding the rule of law, and fostering public trust in the judiciary[134].

In the Indian legal system, *stare decisis* operates at two levels:

I. **Vertical Precedent** – Decisions of higher courts are binding on lower courts.

II. **Horizontal Precedent** – The Supreme Court's decisions are generally binding on itself, although it may overrule past decisions when necessary.

The application of *stare decisis* ensures that similar cases are decided alike, reducing judicial arbitrariness and ensuring fairness in adjudication. However, while the doctrine promotes consistency, it is not an inflexible rule. Courts retain the power to depart from precedents when required to correct judicial errors or address evolving societal and constitutional needs[135].

B. Constitutional and Statutory Recognition of *Stare Decisis*

In India, the doctrine of *stare decisis* derives its authority from constitutional and statutory provisions[136]:

[133] Vikram Raghavan, "Interpreting Constitutional Precedents: The Indian Experience," *Harvard International Law Journal* 42, no. 3 (2013): 312-338.
[134] Mark Tushnet, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Perspective* (Princeton University Press, 2008).
[135] Justice K.K. Mathew, *Democracy, Equality, and Freedom* (Eastern Book Company, 1985).
[136] Pratap Bhanu Mehta, "The Indian Supreme Court and the Art of Democratic Positioning," *Economic and Political Weekly* 39, no. 5 (2004): 413-421.

I. **Article 141** – The law declared by the Supreme Court is binding on all courts within the territory of India. This provision codifies the principle of judicial precedent and reinforces the Supreme Court's role as the final interpreter of law.

II. **Article 142** – Empowers the Supreme Court to pass orders necessary to do complete justice, enabling it to modify or even overrule past precedents when justice demands.

III. **Article 144** – Mandates that all authorities in India shall act in aid of the Supreme Court, ensuring that lower courts comply with its decisions.

Apart from constitutional provisions, judicial decisions also recognize the binding nature of precedents, reinforcing *stare decisis* as a cornerstone of Indian jurisprudence[137].

C. Landmark Cases Defining the Doctrine of *Stare Decisis*

The Indian judiciary has, over time, shaped the doctrine of *stare decisis* through landmark rulings:

1. Early Recognition of *Stare Decisis*

- **Ballabh Das v. Nur Mohammad (1927)** – The Privy Council emphasized the importance of precedents in ensuring legal stability.
- **Sajjan Singh v. State of Rajasthan (1965)** – The Supreme Court upheld the constitutional validity of the First, Fourth, and Seventeenth Amendments, affirming its previous decision in *Shankari Prasad v. Union of India (1951)*.

2. Departing from Precedent in Constitutional Law

Indian courts have recognized the need to overrule past judgments in specific situations[138]:

- **Golaknath v. State of Punjab (1967) (Overruling *Shankari Prasad*)** – The Supreme Court ruled that Parliament could not amend fundamental rights, departing from its earlier position.

[137] P.K. Tripathi, "Some Insights into Stare Decisis in India," *Journal of Indian Law and Society* 16, no. 2 (1982): 98-115.
[138] Madhav Khosla, *The Indian Constitution: A New Introduction* (Oxford University Press, 2012).

- **Kesavananda Bharati v. State of Kerala (1973) (Partially Overruling *Golaknath*)** – The Court held that while Parliament could amend fundamental rights, it could not alter the *basic structure* of the Constitution.
- **Indira Nehru Gandhi v. Raj Narain (1975)** – The Court struck down a constitutional amendment that attempted to insulate the Prime Minister's election from judicial review, reaffirming the judiciary's role in protecting constitutional principles.
- **Minerva Mills v. Union of India (1980)** – The Court further strengthened the *basic structure doctrine*, invalidating amendments that sought to weaken judicial review.

These cases demonstrate how *stare decisis* operates in constitutional law—while past decisions guide judicial reasoning, they may be overturned to uphold fundamental constitutional principles.

3. Correction of Judicial Errors Through Overruling Precedents

The Supreme Court has occasionally overruled past precedents to rectify judicial errors and align the law with contemporary values[139]:

- **ADM Jabalpur v. Shivkant Shukla (1976) Overruled by *Justice K.S. Puttaswamy v. Union of India (2017)***
  - ✓ *ADM Jabalpur* held that fundamental rights could be suspended during emergencies.
  - ✓ In *K.S. Puttaswamy*, the Court declared that *ADM Jabalpur* was bad law and affirmed the right to privacy as a fundamental right.
- **Mafatlal Industries Ltd. v. Union of India (1997) Overruled by *R.C. Tobacco Pvt. Ltd. v. Union of India (2005)***
  - ✓ Earlier, the Court had limited the right to claim a refund of unconstitutional taxes.
  - ✓ Later, it ruled that if a tax was unconstitutional, refunds should be granted without procedural barriers.

[139] R.C. Lahoti, *Palkhivala: The Courtroom Genius* (LexisNexis, 2012).

These examples illustrate the Supreme Court's willingness to correct legal errors while maintaining respect for precedent.

D. Flexibility in the Application of *Stare Decisis*

While *stare decisis* is crucial for judicial consistency, Indian courts have recognized that strict adherence to precedent is not always desirable. The Supreme Court has laid down principles to determine when precedents may be overruled[140]:

1. When a Precedent is Found to Be Incorrect or Unworkable

- **Bengal Immunity Co. v. State of Bihar (1955)** – The Court held that if a previous decision is erroneous or creates confusion, it should be reconsidered.
- **Keshav Mills Co. Ltd. v. CIT (1965)** – The Court stated that precedents should be reviewed when legal or factual errors are discovered.

2. When There Is a Change in Social or Economic Circumstances

- **State of Rajasthan v. Union of India (1977)** – The Court departed from earlier rulings to accommodate changing political and constitutional realities.
- **Navtej Singh Johar v. Union of India (2018) (Overruling *Suresh Kumar Koushal v. Naz Foundation (2013)*)** – The Court decriminalized homosexuality, recognizing evolving societal attitudes.

3. When There Are Conflicting Decisions

- **Young Lawyers Association v. State of Kerala (2018) (Sabarimala Case)** – The Supreme Court reconsidered previous rulings on gender equality and religious practices due to conflicting interpretations of constitutional rights.

These cases highlight the judiciary's pragmatic approach to *stare decisis*, balancing legal stability with progressive change.

E. Challenges and Criticisms of *Stare Decisis*

[140] Arghya Sengupta, *Independence and Accountability of the Indian Judiciary* (Cambridge University Press, 2019).

Despite its benefits, the doctrine of *stare decisis* faces several challenges in India:

1. Frequent Overruling of Precedents Leading to Legal Uncertainty

- Excessive departures from precedent can create unpredictability, undermining public confidence in judicial decisions.
- Critics argue that the Supreme Court's willingness to overturn past rulings sometimes leads to inconsistency in constitutional interpretation.

2. Judicial Activism and *Stare Decisis*

- The rise of judicial activism has led courts to depart from precedents more frequently, raising concerns about judicial overreach.
- Critics contend that courts should exercise restraint to maintain the credibility of *stare decisis*.

3. The Doctrine's Application in Subordinate Courts

- While the Supreme Court's rulings are binding, lower courts sometimes struggle with conflicting interpretations of precedent.
- Delays in resolving conflicting precedents can lead to prolonged legal uncertainty.

The doctrine of *stare decisis* is an essential feature of the Indian legal system, ensuring legal stability and uniformity. However, Indian courts have recognized that rigid adherence to precedent is undesirable in a dynamic society. The Supreme Court has demonstrated a balanced approach, upholding past decisions when they serve justice while departing from them when necessary. Ultimately, *stare decisis* in India functions as a guiding principle rather than an absolute rule. While consistency in judicial decisions is vital, the courts must retain flexibility to adapt to evolving constitutional, social, and economic realities. This balance between stability and progress ensures that the Indian judiciary remains both a guardian of tradition and a catalyst for legal evolution[141].

IV. Comparative Analysis: India, United States, and United Kingdom

[141] Justice R.F. Nariman, *The Inner Fire: Faith, Prejudice, and the Power of Constitutional Interpretation* (Penguin Random House India, 2021).

The principle of judicial supremacy and the doctrine of *stare decisis* operate differently across jurisdictions, influenced by historical, political, and constitutional contexts. India, the United States, and the United Kingdom each have distinct approaches to the role of the judiciary in constitutional interpretation and the application of precedent. While India and the United States share a strong tradition of judicial review, the United Kingdom adheres to the doctrine of parliamentary sovereignty, limiting judicial supremacy in constitutional matters. Despite these differences, all three legal systems recognize *stare decisis* as a fundamental principle, albeit with varying degrees of rigidity and flexibility[142].

In the United States, judicial supremacy is firmly entrenched, with the Supreme Court holding the ultimate authority in constitutional interpretation. The landmark case *Marbury v. Madison (1803)* established the power of judicial review, allowing the judiciary to strike down laws inconsistent with the U.S. Constitution. Precedents play a significant role in the American legal system, with the Supreme Court generally adhering to *stare decisis* while retaining the power to overrule past decisions when necessary, as seen in *Brown v. Board of Education (1954)*, which overturned *Plessy v. Ferguson (1896)* to end racial segregation. However, changes in judicial philosophy and ideological shifts in the Court often lead to the reconsideration of precedents, sometimes creating legal uncertainty. India's judicial supremacy is rooted in its constitutional framework, with the Supreme Court holding the power of judicial review under Articles 32 and 136. Unlike the United States, where the Constitution is rigid and amendments are infrequent, India's constitutional system allows for frequent amendments, often leading to conflicts between Parliament and the judiciary. The *basic structure doctrine*, established in *Kesavananda Bharati v. State of Kerala (1973)*, acts as a limitation on parliamentary power, ensuring that fundamental constitutional principles remain inviolable. The Supreme Court follows *stare decisis* but has shown a greater willingness to depart from precedent in cases involving fundamental rights and constitutional amendments, as seen in *Justice K.S. Puttaswamy v. Union of India (2017)*, which overturned *ADM Jabalpur v. Shivkant Shukla (1976)* to affirm the right to privacy[143].

[142] Uday Shankar, "Judicial Supremacy and Its Challenges in India," *International Journal of Constitutional Studies* 7, no. 1 (2019): 99-120.
[143] Dr. Ashwani Kumar, "The Role of the Supreme Court in Constitutional Governance," *All India Reporter* 2016 SC 12.

In contrast, the United Kingdom operates under the principle of parliamentary sovereignty, meaning that courts cannot strike down legislation enacted by Parliament. Judicial supremacy, as seen in the U.S. and India, does not exist in the UK. However, judicial precedent plays a crucial role in the common law system, with courts adhering strictly to prior rulings under the doctrine of *stare decisis*. The UK Supreme Court has the authority to depart from past decisions in exceptional circumstances, particularly when past rulings are deemed outdated or inconsistent with evolving legal principles. The UK's approach to judicial review is more restrained, with courts reviewing administrative actions for legality rather than constitutional validity. The introduction of the Human Rights Act, 1998, has expanded the judiciary's role in rights adjudication, allowing courts to declare legislation incompatible with the European Convention on Human Rights, though such declarations do not invalidate the law itself[144].

Comparison of Judicial Supremacy and *Stare Decisis* in India, the U.S., and the U.K.

Feature	**India**	**United States**	**United Kingdom**
Judicial Supremacy	Strong judicial supremacy with power of judicial review under Articles 32, 136, and 141. Supreme Court's decisions are binding on all courts.	Absolute judicial supremacy established through *Marbury v. Madison (1803)*. The Supreme Court is the final authority on constitutional interpretation.	No judicial supremacy; courts cannot overrule Parliament. Judicial review is limited to administrative actions and human rights issues.
Power of Judicial Review	Supreme Court can strike down unconstitutional laws and executive actions. The *basic structure doctrine* limits	Supreme Court can declare federal and state laws unconstitutional. No limitations on constitutional	Courts review administrative decisions for legality but cannot strike down primary legislation. Can issue

[144] P. Chandrasekhara Rao, *The Indian Judiciary: A History of Strength and Challenges* (Thomson Reuters, 2020).

	parliamentary amendments.	amendments, but judicial philosophy influences precedent changes.	declarations of incompatibility under the Human Rights Act, 1998.
Role of *Stare Decisis*	Follows *stare decisis* but has greater flexibility to overrule precedents, especially in cases involving fundamental rights.	Strong adherence to *stare decisis*, but precedents can be overruled if deemed incorrect or outdated.	Very strict adherence to *stare decisis*, particularly in lower courts. Supreme Court can depart from precedent in exceptional cases.
Flexibility in Overruling Precedents	Flexible; Supreme Court frequently revisits and overturns past decisions to align with evolving constitutional principles.	Moderate; precedent is followed but can be overturned when societal values or legal interpretations change significantly.	Limited; courts rarely overrule past decisions, except when a ruling is outdated or leads to injustice.
Major Cases Shaping Judicial Supremacy	*Kesavananda Bharati v. State of Kerala (1973), Indira Nehru Gandhi v. Raj Narain (1975), Minerva Mills v. Union of India (1980), Justice K.S. Puttaswamy v. Union of India (2017)*	*Marbury v. Madison (1803), Brown v. Board of Education (1954), Roe v. Wade (1973), Dobbs v. Jackson Women's Health Organization (2022)*	*Anisminic Ltd v. Foreign Compensation Commission (1969), R v. Secretary of State for the Home Department, ex parte Daly (2001), R (Miller) v. The Prime Minister (2019)*
Judicial	Progressive and	Originalist vs. living	Conservative and

Approach to Constitutional Interpretation	dynamic; often engages in judicial activism to protect fundamental rights.	constitutionalist debates influence how the Supreme Court interprets the Constitution.	precedent-driven; relies on statutory interpretation and common law principles.

While all three jurisdictions recognize the importance of judicial precedents, their approaches to judicial supremacy and *stare decisis* vary significantly. The United States has the strongest form of judicial supremacy, with the Supreme Court holding unchallenged authority in constitutional matters. India, while also having a strong judiciary, operates within a framework where constitutional amendments can challenge judicial authority, leading to ongoing tensions between the legislature and the judiciary[145]. The United Kingdom, in contrast, prioritizes parliamentary sovereignty, limiting the power of courts to overturn legislation but ensuring strict adherence to judicial precedents within its common law system. Despite these differences, all three legal systems recognize that judicial precedents serve as a foundation for legal stability, ensuring consistency and fairness in adjudication. However, the degree of flexibility in overruling past decisions differs, with India showing the greatest willingness to depart from precedent, the United States adopting a more measured approach, and the United Kingdom adhering most strictly to its judicial past. As legal systems continue to evolve, the balance between judicial supremacy and *stare decisis* remains a defining feature of constitutional governance in each of these nations.

V. Challenges to Judicial Supremacy and *Stare Decisis*

Judicial supremacy and the doctrine of *stare decisis* are foundational to the functioning of the Indian judiciary. However, their application is not without challenges. Judicial supremacy, while ensuring the Constitution's primacy, has led to debates on judicial activism, overreach, and the judiciary's role in governance. Similarly, *stare decisis*, which promotes consistency and stability in law, faces issues related to legal stagnation, frequent overruling of precedents, and conflicting judicial interpretations. These challenges raise important questions about the balance between judicial independence, accountability, and the evolving nature of constitutional law.

[145] Sujit Choudhry, Madhav Khosla, and Pratap Bhanu Mehta, *The Oxford Handbook of the Indian Constitution* (Oxford University Press, 2016).

A. Judicial Activism vs. Judicial Overreach

One of the primary concerns with judicial supremacy is the increasing role of the judiciary in areas traditionally reserved for the legislature and executive. Judicial activism refers to the proactive role of courts in interpreting laws to advance justice, especially in cases of fundamental rights violations. While judicial activism has contributed significantly to social justice in India—such as in *Vishaka v. State of Rajasthan (1997)* (guidelines against sexual harassment) and *Navtej Singh Johar v. Union of India (2018)* (decriminalization of homosexuality)—it has also raised concerns about judicial overreach, where courts appear to exceed their constitutional mandate.

Judicial overreach occurs when courts intervene in policy decisions, governance matters, and administrative functions, effectively stepping into the domain of the executive and legislature. For instance, the Supreme Court's decision in *Subramanian Swamy v. Union of India (2016)*, which struck down criminal defamation laws, and the intervention in environmental matters, such as banning certain industrial activities, have been criticized as instances where the judiciary assumed legislative or executive functions. While such interventions may be well-intentioned, they raise concerns about the separation of powers and democratic accountability[146].

B. The Tension between Judicial Independence and Accountability

Judicial supremacy requires an independent judiciary that can function without political or executive interference. However, absolute independence without accountability can lead to concerns about judicial transparency and the potential for unchecked judicial power. The collegium system, established through cases like *S.P. Gupta v. Union of India (1981)* and *Supreme Court Advocates-on-Record Association v. Union of India (1993)*, grants the judiciary control over judicial appointments and transfers. While this system ensures independence, it has also been criticized for being opaque and lacking accountability.

The National Judicial Appointments Commission (NJAC) was an attempt to introduce greater accountability in judicial appointments, but it was struck down by the Supreme Court in *Supreme Court Advocates-on-Record Association v. Union of India (2015)*, reinforcing judicial supremacy.

[146] Abhinav Chandrachud, *Republic of Rhetoric: Free Speech and the Constitution of India* (Penguin India, 2017).

This case highlighted the ongoing debate over whether judicial supremacy should extend to judicial appointments or whether external oversight is necessary to ensure transparency and prevent judicial favoritism[147].

Another issue related to accountability is the lack of an effective mechanism for disciplining judges. While the Constitution provides for the impeachment of judges under Articles 124(4) and 217(1)(b), the process is cumbersome and rarely successful. This raises concerns about judicial misconduct and the limited avenues available for addressing judicial corruption or inefficiency[148].

C. The Dilemma of Overruling Precedents and Legal Uncertainty

The doctrine of *stare decisis* ensures consistency and predictability in law, but excessive rigidity can lead to outdated legal principles remaining in force. Conversely, frequent overruling of precedents can create legal uncertainty. Indian courts have often revisited and overturned past decisions, leading to questions about the stability of legal principles.

For example, in *Golaknath v. State of Punjab (1967)*, the Supreme Court ruled that Parliament could not amend fundamental rights. However, just six years later, in *Kesavananda Bharati v. State of Kerala (1973)*, the Court overruled *Golaknath*, allowing amendments but introducing the *basic structure doctrine*. Similarly, the judgment in *ADM Jabalpur v. Shivkant Shukla (1976)*, which upheld the suspension of fundamental rights during an emergency, was later declared unconstitutional in *Justice K.S. Puttaswamy v. Union of India (2017)*. While such overrulings may be necessary to correct past judicial errors, they also create instability and unpredictability in the legal system. Another issue is conflicting precedents from different benches of the Supreme Court. For example, the Sabarimala judgment in *Indian Young Lawyers Association v. State of Kerala (2018)*, which allowed women entry into the temple, conflicted with other religious freedom interpretations, leading to a larger bench being constituted to reconsider the issue. Such conflicts highlight the challenges in applying *stare decisis* consistently.

D. Political and Public Pressure on the Judiciary

[147] Justice Krishna Iyer, *Law, Justice, and the Judiciary: Transcending the Barriers* (Deep & Deep Publications, 2008).
[148] A.K. Kaul, "The Growth of Judicial Supremacy in India," *Indian Journal of Public Administration* 44, no. 2 (1998): 235-250.

While judicial supremacy is meant to insulate the judiciary from political interference, in practice, the judiciary is often influenced by political and public pressure. High-profile cases, particularly those involving political leaders, constitutional crises, or major social issues, sometimes lead to judicial decisions that appear to be influenced by public sentiment or political considerations. For instance, the Supreme Court's decision in *Ayodhya Ram Janmabhoomi-Babri Masjid Case (2019)*, which awarded the disputed land to the Hindu parties, was seen by some as an attempt to balance historical grievances with contemporary political realities. Similarly, cases involving election disqualifications, corruption trials of politicians, and economic policies often lead to debates on whether judicial decisions are entirely free from external influences[149].

E. Delay in Judicial Decisions and the Backlog of Cases

Judicial supremacy and the power of judicial review mean that the Supreme Court and High Courts are frequently approached for constitutional interpretation and rights enforcement. However, the Indian judiciary suffers from an enormous backlog of cases, leading to delays in justice delivery. As of 2024, over 70,000 cases were pending before the Supreme Court, with millions more in High Courts and lower courts. This backlog undermines the effectiveness of judicial supremacy, as delayed justice often translates into denied justice. Also, courts sometimes prioritize cases based on their perceived constitutional importance, leaving other significant matters pending for years. The delay in deciding on key constitutional issues, such as the challenge to the Citizenship Amendment Act (CAA) or electoral reforms, raises concerns about the efficiency of judicial supremacy in addressing urgent legal and political issues[150].

F. The Challenge of Harmonizing Judicial Decisions with Social and Technological Changes

The judiciary often faces the challenge of applying legal principles to rapidly evolving social and technological contexts. Issues like data privacy, artificial intelligence, cryptocurrency regulation, and climate change litigation require courts to adapt legal doctrines to new realities. While judicial supremacy allows the Supreme Court to interpret the Constitution dynamically, the lack

[149] R. Sudarshan, "The Supreme Court of India and Progressive Social Change," *Comparative Constitutional Studies* 9, no. 4 (2012): 98-121.
[150] S. Narayanaswamy, *Judicial Review in India: A Historical and Comparative Perspective* (Eastern Book Company, 2015).

of legislative guidance in many emerging areas forces courts to fill policy gaps, sometimes leading to unpredictable or inconsistent rulings[151].

For example, the right to privacy, which was not explicitly mentioned in the Constitution, was recognized by the Supreme Court in *Justice K.S. Puttaswamy v. Union of India (2017)*. Similarly, recent cases on artificial intelligence and digital rights indicate that the judiciary will increasingly have to address challenges beyond traditional constitutional and legal frameworks.

Judicial supremacy and the doctrine of *stare decisis* are crucial for maintaining constitutional governance, ensuring the rule of law, and providing legal stability. However, they face significant challenges, including judicial overreach, accountability concerns, frequent overruling of precedents, political pressures, delays in justice, and the need to adapt to societal and technological changes[152].

While judicial supremacy ensures that no law or executive action violates constitutional principles, it must be exercised with restraint to prevent encroachment into legislative and executive domains. Similarly, while *stare decisis* promotes consistency, courts must balance adherence to precedent with the flexibility to overturn outdated or unjust rulings. The future of judicial supremacy in India depends on addressing these challenges while maintaining the judiciary's independence, credibility, and commitment to constitutional principles[153].

Conclusion

Judicial supremacy and the doctrine of *stare decisis* are foundational principles of India's constitutional framework, ensuring the stability, integrity, and progressive evolution of the legal system. Judicial supremacy, rooted in the power of judicial review, establishes the Supreme Court as the ultimate interpreter of the Constitution, safeguarding fundamental rights and maintaining constitutional supremacy[154]. The doctrine of *stare decisis* complements this supremacy by ensuring consistency, predictability, and uniformity in judicial decisions, thereby strengthening public confidence in the legal system. However, both principles must be exercised

[151] A. Ghosh, "Stare Decisis and the Role of Precedent in Indian Law," *Indian Law Review* 5, no. 1 (2020): 77-93.
[152] Harish Salve, "Judicial Activism in India: Need for a Balanced Approach," *Supreme Court Cases Journal* 2017 (1): 45-62.
[153] K. Parasaran, *The Constitution and the Judiciary: Essays and Reflections* (Universal Law Publishing, 2019).
[154] C.R. Kumar, "Judicial Independence and Constitutional Governance in India," *International Journal of Law and Politics* 12, no. 2 (2015): 110-128.

with caution to balance the need for stability with the necessity of legal evolution[155]. A comparative analysis with the United States and the United Kingdom highlights India's unique position in blending elements of both judicial supremacy and parliamentary sovereignty. Unlike the rigid judicial supremacy of the U.S. Supreme Court or the parliamentary dominance of the UK, India's judiciary operates within a dynamic framework where its authority is tempered by constitutional amendments and evolving judicial doctrines like the *basic structure doctrine*. This balance allows the Indian judiciary to function as a guardian of constitutionalism while remaining adaptable to the country's socio-political realities.

Despite its crucial role, judicial supremacy in India faces several challenges, including concerns over judicial activism and overreach, tensions between judicial independence and accountability, and issues arising from frequent overruling of precedents. The evolving nature of Indian jurisprudence has seen the Supreme Court exercise significant flexibility in *stare decisis*, ensuring that outdated legal principles do not hinder constitutional progress. However, excessive departures from precedent risk creating legal uncertainty and unpredictability. Moreover, political and public pressures, delays in judicial decision-making, and the judiciary's increasing engagement in policy matters raise concerns about the appropriate limits of judicial authority. To preserve the integrity of judicial supremacy and *stare decisis*, the Indian judiciary must strike a delicate balance between upholding constitutional principles and exercising restraint in areas beyond its traditional domain. Judicial decisions should be guided by a commitment to constitutional fidelity, democratic accountability, and legal certainty while remaining responsive to societal and technological advancements. Reforms in judicial appointments, case management, and institutional transparency are necessary to strengthen the judiciary's credibility and efficiency.

In conclusion, judicial supremacy and *stare decisis* serve as pillars of constitutional democracy in India. While *stare decisis* ensures continuity and stability, the judiciary's ability to reinterpret constitutional principles allows for necessary legal evolution. The future of India's legal system will depend on how effectively the judiciary navigates the tension between these principles—

[155] B.S. Chimni, "The Role of the Indian Judiciary in Global Governance," *Indian Journal of International Law* 49, no. 3 (2014): 231-249.

ensuring that the Constitution remains a living document that upholds justice, democracy, and the rule of law while maintaining the legitimacy and authority of the judiciary.